FILED by order
of the Board of Directors of
The Metropolitan Water District
of Southern California
at its meeting held MAY 12 1992
Executive Secretary

39634

9-17

MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

April 13, 1992

To: Board of Directors (Water Problems Committee--Information)
(Finance and Insurance Committee--Information)

From: General Counsel

Subject: Standby Charge

Report

During the period between March 30 and April 7, 1992, the Board conducted hearings on the proposed standby charge of $5 per acre or $5 per parcel less than an acre in size. Transcripts of those hearings are currently in preparation and will be furnished to each member of the Board prior to any recommendation for action to implement the charge. The testimony offered at those hearings included significant comments pro and con on the proposed charge, together with many requests for exemptions. In addition, over 1,000 written communications have been received protesting the proposed charge for various reasons which must be considered by the Board.

One recurring theme in opposition is that MWD water is not available to certain land within the territory proposed to be subject to the charge. Another series of objections concern land dedicated to open space, as well as other land which is claimed to be essentially undevelopable. A third objection is that there is little if any present benefit, particularly with regard to the reservoir, and to elderly landowners who would not profit from future benefits. These issues as well as many more that are more easily disposed of will require consideration by the Board as to whether or not the standby charge should be applied to particular properties. Considering the large number of protests, it is our view that the Board could establish the criteria for excluding certain lands from the charge and delegate to the General Manager the ministerial duty of denying or approving specific protests.[1]

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[1] While not free from doubt, we believe that, especially considering the size of the Board of Directors, the number of protests, and the need for speedy resolution of protests, the function of reviewing the individual protests to determine whether they qualify for Board determined classes of exemptions can be delegated.

This office has done considerable research on the issues concerning the validity of the charge. Last October, a letter concerning the subject was sent to your Board. That letter commented upon a number of problem areas as well as citing certain options for proceeding with the charge. For your convenience, a copy of that letter is attached. It may be noted that the District is proceeding under the County Water District Act provisions referenced in Section 134.5 of the MWD Act rather than the Uniform Standby Charge Procedures Act.

Although the enabling statute does not expressly provide an exemption provision such as one for homeowners, senior citizens, etc. (the charge being on the land, not the owner in any event), Section 31032.3 of the County Water District Act empowers the Board to adopt, revise, change, reduce or modify assessments after hearing and considering objections and protests.[2] In any event, under general assessment law, if the landowner can affirmatively demonstrate

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[2] It may be noted that Section 134.5 does not expressly reference sections in the County Water District Law other than Section 31031. That section in turn does not expressly authorize collection of the standby charge on the tax rolls (or by any other particular means) or otherwise specify any procedure for implementing the charge, but merely provides that the standby charge may be imposed. Sections 31032.1 et seq. provide an alternative to Section 31031 but with additional terms providing for notice (31032.2), hearing (31032.3), filing with the County Auditor (31032.4), assessment as a lien (31032.5) and collection through the tax rolls (31032.6). It has been contended that the reference to only Section 31031 permits the District to impose the charge but only collect it by individually billing the land owners, not by use of the tax rolls. Our response is that Section 31031 by itself is incomplete, for example, it does not provide for minimal procedural due process requirements, and that in granting the District the express authority to impose the charge by reference to Section 31031, the Legislature also impliedly imposed the notice and the hearing requirements and granted authority for collecting the charge by use of the tax rolls, all as provided in Sections 31032.1 et seq. Clearly it would make no sense at all for the Legislature to grant a six-county wholesale entity with no direct connections to the ultimate consumers the power to impose a standby charge on land without requiring both reasonable procedural due process protection for land owners as well as an efficacious method of collection for the District.

that MWD and the projects to which the proceeds of the charge will be applied do not now and will not in the future provide a benefit for the particular parcel, that land must be excluded from the territory subject to the charge. Any exemptions must be strictly limited since the theory of any form of assessment is that unwarranted exemptions for certain classes threaten the validity of the entire charge since they tend to shift the cost from one beneficiary to another, increasing the burden of the latter. (Kalashian v. County of Fresno (1973) 35 Cal.App.3d 43, 50; Cogan v. City of Los Angeles (1973) 34 Cal.App.3d 516, 522; Larsen v. City of San Francisco (1920) 182 Cal. 1, 17.) The justification for any form of assessment is that the charge correlates with a definable benefit. The basic requirement for relief from a standby charge is that the land is not benefited by the project funded by the charge.[3]

It should be noted that the concept of "no benefit" does not include an absence of benefit resulting from the voluntary choice of use of the land by the landowner, but rather a situation where it is not legally or physically possible to benefit the land. Consistent with that, the California courts have upheld water standby charges on property which is unimproved and not connected to a water main on the rationale that the financed projects are expected to benefit the property by making water available to it even though the water might not actually be used at the present time. As to the voluntary aspect of unavailability, in a 1953 case, Howard Park Co. v. City of Los Angeles, 119 Cal.App.2d 515, an assessment for the purpose of financing a sewer system was

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[3] As noted earlier, two of the major points raised in opposition to the charge were (1) that MWD water was not available to the land because of no service by the member agency and (2) that the land was dedicated to open space or otherwise essentially undevelopable. The basic complaint and assumption in each situation is that such land derives no benefit from Metropolitan. However, before reaching such a conclusion, consideration must be given to such facts as that in certain areas the recharge of groundwater basins remote from the particular land may permit operation of wells on that land. Also, regarding open space, it would appear that Metropolitan furnished water could directly or indirectly be a resource for fire protection of that land and adjoining territory as well as used to protect and enhance natural habitat values of lands. Certainly if the land is to be used for recreational purposes, water would be used to maintain vegetation, picnic and rest areas, ball fields, restroom facilities, etc.

imposed on property which was owned for and being used for oil production. The court rejected the property owner's contention that there was no benefit to his lots, holding that the amount of benefit to be measured is that which the property would receive if devoted to any reasonable use. The court determined that it would be unfair to exempt property voluntarily devoted to a special use since the owner could, at any time, change the use so as to reap the benefits of the improvement. Although we have not found any California case which addresses the situation where a special assessment is exacted against property which is permanently limited to uses which will not benefit from the improvement being financed by the assessment it would appear to be permissible to exclude such properties.

Generally, benefits which will sustain an assessment should be immediate and of such character that they can be seen and traced. However, courts have upheld assessments when the benefits can be realized within a reasonable time in the future, the rationale being that the benefit is presumed to inure not to the present use but rather to the property itself.[4]

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[4] In Dawson v. Town of Los Altos Hills (1976) 16 Cal.3d 676, property owners challenged the town's formation of a sewer assessment district on the grounds that no new benefits would accrue since no specific plans were made for the development of collection facilities which would allow the assessed properties to take advantage of the capacity rights which they would acquire. The court rejected the claims on the basis that the value and desirability of the property would depend, to a great extent, on contemplated acquisitions for the future needs of the area. Each parcel of property would receive a special benefit by the assurance of capacity rights and rights of service.

> "[T]he properties assessed had acquired a valuable right: the right to capacity in and use of a contemplated sewage treatment and disposal system. The fact that collectors are not presently in existence and in fact have not yet reached the planning state does not detract from the legislative judgment that such facilities will be necessary in the foreseeable future and that a necessary prerequisite to their installation is the acquisition of capacity rights the Palo Alto system." (Id., at p. 689.)

As to the Board's determination of whether there is a benefit to a parcel, the courts generally have held that the legislative body's determination on the question of benefit received by the property owners is conclusive in the absence of fraud or an abuse of discretion which is deemed to be equivalent to fraud. (Larsen v. San Francisco (1920) 182 Cal. 1, 15; Dawson v. Town of Los Altos Hills (1976) 16 Cal.3d 676, 684.)

The land owner contesting the imposition of an assessment bears the burden of proof to show the absence of benefit, and whether a particular property is benefitted is a factual determination. One measure of benefit articulated by the California courts is the enhancement of the property's market value in relation to reasonably potential uses as well as present uses. As a result, the increase in market value is often taken as a measure of the benefits.

Board Committee Assignments

This letter is referred for information to:

The Water Problems Committee because of its jurisdiction to study, advise and make recommendations with regard to water standby or availability of service charges within the District, pursuant to Administrative Code Section 2481, subdivision (f); and

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Future benefits were found in J.W. Jones Companies v. City of San Diego (1984) 157 Cal.App.3d 745. In Jones, the City of San Diego enacted an ordinance that imposed a present lien on undeveloped property to pay in the future an apportioned share of the costs of public facilities required to accommodate the needs of future residents of the properties on their development. Jones, a developer, claimed that the assessment did not confer a benefit because some of the facilities were remote and thus the benefits were indirect. In imposing the charge on undeveloped land, the city concluded that a piecemeal approach to dealing with large development projects in planned urbanizing areas would inevitably lead to a haphazard, random growth putting heavy burdens on those seeking early development of their land and lighter loads upon those coming into development at later times. (Id., at p. 757.) The court held that the assessment on the undeveloped property was reasonable and acknowledged that city's determination on the benefit as conclusive.

The Finance and Insurance Committee because of its jurisdiction to study, advise and make recommendations with regard to the determination of revenues to be obtained through water standby or availability of service charges, pursuant to Administrative Code Section 2441, subdivision (e).

Recommendation

For information only.

Fred Vendig

JWM:gm
bdltr\stndby.jo

Encl.

MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-7

October 31, 1991
(Special Budget Committee--Information)
(Engineering & Operations Committee--Information)
(Water Problems Committee--Information)
(Finance & Insurance Committee--Information)

To: Board of Directors

From: General Counsel

Subject: Firm Revenue Sources

Report

Introduction

As part of its deliberations, the Special Budget Committee has considered means of generating a firm source of fixed revenue. This memorandum examines various means whereby that objective could be achieved, either in whole or in part.

Definitions and Distinctions

In order to have a common understanding of the terms to be used below, we begin with definitions:

1. Tax

A tax is a pecuniary burden imposed generally upon individuals or property for governmental purposes without reference to specific benefits to particular individuals or property and enforced by legislative authority.

2. Assessments

Assessments are charges which are sometimes understood to be a form of taxation, since the right to impose assessments has its foundation in the taxing power of government, but in practice, the term has reference to impositions upon property owners for facilities or improvements which are beneficial to particular individuals or property, and are justified on the basis of the improvements conferring benefits. Typically, payment of the amount assessed is secured by a lien on the property. Proceeds of assessments are generally used either directly to pay the costs of the facilities or improvements or, if paid over time, to repay bonds used to finance such costs. "Special assessment" financing proceeds are typically used for improvements directly relating to the property, such as sidewalks, streets, gutters, sewer and water hookups. "Benefit

assessment" financing proceeds relate to items with a less tangible relationship to the assessment such as parking facilities or flood control projects and are based on a determined benefit to the property owners.

3. Charges

Charges are forms of assessments. Standby charges and availability of service charges typically are imposed to recover some portion of the costs of improvements which benefit property and which are not otherwise being recovered either through taxes or, for example, water sales.

Background

As fixed costs such as revenue bond debt service continue to grow while the ratio of fixed income from taxes continues to diminish in relation to variable income from water sales (which inevitably is subject to the vagaries of dry and wet years and other weather influences), the Board has been concerned that there be an adequate level of guaranteed revenue to support fixed costs. In 1984, when legislation was adopted fixing an upper limit in amount and a finite limit in time on Metropolitan's authority to raise revenue through ad valorem property taxes (MWD Act, § 124.5), Metropolitan was provided in the same legislation with what was intended to be a substitute authority to generate firm revenue through water standby or availability of service charges (MWD Act, § 134.5) as well as benefit assessments (MWD Act, § 134.6-134.9). Through the intervening period, greater than anticipated water sales (until the fifth year of the current drought) have provided ample revenue without resort to implementation of a standby charge, service charges, or benefit assessments. The situation has changed dramatically this year and the prospects for raising adequate levels of revenue principally from water sales during the next several years have diminished to the point that the Special Budget Committee has sought firm sources of revenue to supplement revenues to be recovered from water sales.

A few years ago, the Subcommittee on Financial Policy determined that Metropolitan should be prepared to impose a standby charge and this office concluded that certain revisions to the 1984 legislation should be adopted if Metropolitan intended to rely on that authority. At the instruction of the Board, amendments were drafted by staff and were subsequently introduced in 1989 at Metropolitan's request by Senator Presley in the form of SB 1037. That bill became controversial even though the basic authority to impose such charges already had been enacted. SB 1037 was not pursued, in part because of this

controversy but more significantly because of the enactment of the Uniform Standby Charge Procedures Act (Gov. Code, § 54984-54984.9) in 1988 which provides authority independent of the MWD Act for the implementation and collection of standby charges which are otherwise authorized.

Current and Potentially Available Statutory Authorities

1. Additional Taxes

Taxes upon property, such as those imposed by Metropolitan, are allocated based upon the assessed value of the property (ad valorem). Article XIIIA of the California Constitution placed substantial restrictions on property taxes and local government generally, but has not affected Metropolitan's property tax revenues. This is due to the specific exception from the one percent of assessed value limitation for taxes levied for the payment of pre-1978 voter-approved debt. In Goodman v. County of Riverside (1983) 140 Cal.App.3d 900, it was established that Metropolitan's payment obligations under the State Water Contract were properly categorized as pre-1978 voter-approved debt. Metropolitan, as a matter of policy, has taxed for only a portion of its state contract payment obligations. The other substantial qualifying debt for which unlimited property taxes may be levied consists of the general obligation bonds authorized in 1966 and currently outstanding. Thus, it would be legally possible for Metropolitan to significantly increase property tax levies without constitutional restriction. There are, however, statutory restrictions, one being Revenue and Taxation Code section 97.65(b), which mandates that no property tax rate increase in excess of the rate imposed in the 1984-85 fiscal year shall be imposed if the purpose of the rate increase is to fund a reduction in the rates charged for water at the time of the property tax rate increase. This office has previously concluded that this constraint would not prevent the mitigation by a tax rate increase of a water rate increase otherwise required, that it would only apply in the event of an actual water rate reduction directly related to a contemporaneous tax rate increase that would result in a tax rate in excess of .0156, the 1984-85 rate. By comparison, the current rate is .0089; to reach .0156 would require an increase of 75 percent. Application of .0156 to current assessed value would result in taxes of about $128 million.

The more significant statutory limit is found in MWD Act section 124.5, which for practical purposes establishes a current limit of about $98.5 million, the equivalent of Metropolitan's general obligation debt service together with

the proportionate share of the state's Burns-Porter bond debt service. To exceed this amount, it would require your Board to make a finding, following a hearing, that a greater tax is essential to Metropolitan's fiscal integrity, and to provide written notice of the hearing preceding such action to the Speaker of the Assembly and the President Pro Tempore of the Senate at least 10 days before the hearing.

The proportionate use formula, as stated in Administrative Code sections 4300-4304, established the method for determining the amount of revenue to be raised by water sales and by taxes. Application of that formula, as most recently amended in February 1991, provides that amounts raised by taxes shall not exceed the Section 124.5 limits, and, subject to those limits (which reduce over the next several years), shall not be less than the amounts levied for fiscal year 1990-91, which approximates $77 million.

2. MWD Act Section 134.5

Section 134.5 expressly provides that Metropolitan may impose either standby charges or service charges. "Service charges" appear to be intended to be collected from member public agencies which in turn recover the charge from their customers in the manner they deem most appropriate. "Standby charges" on the other hand would bypass the member public agencies and be directly imposed upon parcels of property by Metropolitan. Presently, Metropolitan has no authority to collect assessments in the form of capacity or connection charges. See, however, the discussion below under AB 1875. Statutorily, both the amount of revenue to be raised and the method of allocation among member agencies permitted are essentially unlimited. Section 134.5 enumerates the following among the factors that may be taken into consideration in allocating the charge among member agencies: "historical water deliveries by a district; projected water service demands by member public agencies of a district; contracted water service demands by member public agencies of a district; service connection capacity; acreage; property parcels; population, and assessed valuation, or a combination thereof." Note, however, the methods refer to allocation among member agencies. The only reference to allocation methods relative to parcels is the provision that, after taking into account the factors applicable to allocation among member agencies, the Board may, in implementing a standby charge against individual parcels, fix different standby charge rates for parcels situated within different member public agencies. Thus, it is clear that

charges per parcel may differ from one member agency to another, but it is not clear that such charges may vary within any particular agency under this authority.

Other than requiring a 45-day notice to each member agency prior to final adoption of the charge there are no express requirements or procedures for mechanical implementation of the imposition or collection of such charge. The section states that a district "may exercise the powers of a county water district" under section 31031 of the Water Code, which defines the power of a county water district in imposing a standby charge. The reference to section 31031 is qualified, however, by providing that the $10 per year parcel charge limit of section 31031 can be increased by Metropolitan by a majority vote of the Board.

The County Water District Law includes specific provisions not expressed in section 134.5 that are necessary to meet reasonable standards of procedural due process, such as requirements for notice (§ 31032.2) and opportunity to be heard (§ 31032.3) for those persons who would be affected by the imposition of a charge. It does not, however, incorporate a disqualification by protest procedure or require an election in the event of substantial protests. It also includes provisions authorizing collection of the charges by way of the county tax collection rolls. It is not at all clear that these other provisions of the County Water District Act pertaining to the manner or collection of standby charges are incorporated in the Metropolitan Water District Act. Consequently, Attachment 1 provides draft amendatory language to Section 31031 that would assure that such provisions apply to Metropolitan.

Another possible means of rectifying perceived shortcomings in section 134.5 is the aforementioned SB 1037, a copy of which is attached as Attachment 2. In addition to certain technical clarifications, e.g., specifying that both a service charge and a standby charge could be implemented at the same time, SB 1037 would delete the reference to and reliance upon the County Water District Law and would add in its place a new section 134.5.1 to the MWD Act which would (1) specify the timing of adoption of such a charge to be consistent with the timing of the adoption of the property tax resolution (adoption each year by August 20, notification to county auditors by September 1); (2) require a two-thirds vote rather than the simple majority called for in the reference to the County Water District Law for imposition of a charge greater than $10 per parcel; (3) establish notice and hearing requirements; and (4) provide for collection of the charges with regular property tax collections. On balance, this office continues to support the

concept of including all material revenue raising authority within the MWD Act and the substance of this proposed legislation in particular since it was intended only to make more efficient the exercise of an existing power.

In the event that no amendatory legislation was enacted, and it was determined to implement the standby charge authority of section 134.5 without reference to the County Water District Law or the Uniform Standby Charge Procedures Act, it is our opinion that it would be necessary to put in practice an adequate procedure for notice and opportunity to be heard in order to comply with minimum standards of procedural due process. Implementation of actions at least as comprehensive as those called for by the provisions of the Uniform Standby Charge Procedures Act should be adequate for that purpose, and such action should overcome a challenge arising from the absence of an expression of such procedures in the MWD Act. It would also be expedient to enter into contracts with the various county tax collectors whereby they would agree to collect the charges. The alternative of imposition upon and collection of a service charge from member public agencies would not present substantial procedural problems, but when this was originally considered several years ago, the agency managers of that period urged a standby charge as an alternative to a service charge.

3. MWD Act Sections 134.6-134.9

These sections provide authority for benefit assessments. As a practical matter, however, the specific prerequisite of voter approval for any such assessment makes enforcement both speculative regarding approval and, without question, very expensive to implement. Further, the objective of raising revenue for general purposes is inconsistent with the character of traditional benefit assessments, which contemplate a direct, identifiable local benefit to the assessed property. Staff considers this authority academic but not particularly useful as a significant revenue source.

4. Uniform Standby Charge Procedures Act

A practical alternative to either the composite provisions of the MWD Act and the County Water District Law, or to amendatory legislation, is available under the Uniform Standby Charge Procedures Act (USCPA). That act provides in pertinent part that the procedures set forth in USCPA are available to any local agency authorized to provide water service and to fix any related standby or availability charge or assessment. It does require fixing the charge by August 10

each year which would require adoption of the charge in advance of the date that the property tax levy is made, which is about August 20 each year.

This act permits varying the charge according to land uses, benefit derived or to be derived from the use or availability of water facilities, or the degree of availability or quantity of the use of the water. It also provides that the charge may be restricted to one or more improvement districts or zones of benefit within the agency, and that the charge may be imposed on an area, frontage, or parcel basis, or a combination thereof, which would provide sufficient flexibility for a reasonably fair distribution of such charges. It further provides a specific methodology for development and implementation of the charges, including individually mailed notices to each owner of land as well as publication at least twice in a newspaper of general circulation, printed and published within the jurisdiction of the area of the notice of hearing, and a requirement that the governing body conduct the hearing and hear and consider all objections and protests, if any. The inability to delegate the conduct of the hearing to staff or hearing officers would be an inconvenience for the Board, particularly if it was concluded that adequate due process would require conducting hearings in several different geographical areas throughout Metropolitan's six-county service area.

Receipt of written protests representing 40 percent of the parcels subject to the charges would preclude the imposition of any charge for that year. Receipt of written protests representing 15 percent of the parcels would permit the Board to continue the procedure for that year, but the charges proposed would be ineffective until collectively approved by a majority vote in an election within the affected territory. In the election, landowners would have one vote for each parcel owned within the affected territory. This would be burdensome for Metropolitan, given the substantial cost of a special election throughout the partial six-county service area without boundaries common to other local entities. Further, the uncertainty of attaining a favorable vote could make revenue planning for that period virtually infeasible.

After the charge was established for a year, the Board could continue the charge in successive years at the same rate and in the same manner without the requirement for mailed individual notice, but still subject to the requirement for publication of notice. The hearing requirement would still apply, but after considering all objections or protests, the Board could make a final determination without further review.

This authority, however, would not be available if the amount of the assessment was increased or any changes were made in the area subject to the assessment compared to the prior year.

Once the charge is validly established, USCPA somewhat ambiguously provides that ". . . the local agency shall cause the charge to be collected at the same time and in the same manner as is available to it under applicable law." Since another provision of USCPA sets the August 10 deadline for local agencies whose taxes are collected for the local agency by the county and a different deadline for agencies who collect their own taxes, and since MWD Act section 311 provides for collection of taxes by the counties, we conclude that, read together, this contemplates the collection of the charges for Metropolitan by county tax collectors.

Finally, USCPA provides that in the event charges become delinquent, those charges, together with interest and penalties, may become a lien on the property.

5. AB 1875

Currently, Metropolitan has no authority to impose either capacity charges or connection charges. Legislation would be required to accomplish this. AB 1875 (Cannella), which has been amended seven times since its introduction, most recently August 30, 1991, is presently pending further consideration in the State Senate. AB 1875 would add a new chapter to the Water Code which, subject to specified limitations, would in pertinent part authorize water districts, in addition to the powers granted in the principal act, to prescribe and collect water capacity and connection charges. "Capacity charges" are defined as charges for water facilities in existence at the time the charge is imposed or charges for new facilities to be constructed in the future that are of benefit to the person or property being charged. "Connection" is defined as the connection of a building to a public water system. Revenues raised under this legislation could be used only for the acquisition, construction, reconstruction, maintenance and operation of water systems or facilities; to repay principal and interest on bonds issued for the construction or reconstruction of those public water systems and facilities, and to repay federal or state loans made to the local agency for such purposes.

The bill seems to contemplate that wholesale providers may use these provisions where collection is made on the retail level with the consent of the retailer, but this portion of the bill needs legislative clarification.

To implement such charges would require an ordinance passed by a two-thirds vote of the legislative body to be followed by notice and hearing by the legislative body of all objections and protests. No election would be required. The post-hearing determination of the legislative body would be final.

Specific limitations subject these provisions to Government Code section 66013 and a proviso that this proposed section 20300 shall not be construed to modify or repeal chapter 13.7 (commencing with § 54999) of the Government Code. The latter provisions relate to the limitations on the liability of school districts, the California State University, the University of California and state agencies, for public utility capital facility fees levied by local agencies which were adopted in 1988, as legislative revisions to the holding in San Marcos Water District v. San Marcos Unified School District. The more restrictive limitation is section 66013 which in substance provides that when a local agency imposes fees for water connections or capacity charges "those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed" without a two-thirds favorable vote in an election. This section legislatively confirms in effect a court decision in Beaumont Investors v. Beaumont-Cherry Valley Water District (1985) 154 Cal.App.3d 227 that connection fees that do not meet that standard, with the burden of proof on the local agency, are in substance "special taxes" which can be imposed only with a two-thirds vote pursuant to article XIIIA, section 4 of the California Constitution. Clearly, the "estimated reasonable cost" of providing the service for which such a fee or charge would be imposed would be a factual question and since the burden of proof in the court decision was placed upon the agency, this could serve as a significant, practical limitation upon the ability of a local agency, particularly a wholesaler, to collect substantial charges.

Other Legal Considerations to Be Observed

1. CEQA Compliance

The Legislature has exempted from CEQA the establishment, modification, structuring, restructuring, or approval of rates or other charges by public agencies which the public agency finds are for the purpose of: (1) meeting operating expenses, including employee-wage rates and fringe benefits; (2) purchasing or leasing supplies, equipment, or materials; (3) meeting financial reserve needs and

requirements, or (4) obtaining funds for capital projects necessary to maintain service within existing service areas.

The public agency is required to incorporate written findings in the record of any proceeding in which an exemption from CEQA is claimed setting forth with specificity the basis for the claim of exemption. (Public Resources Code Section 21080 (b)(8).)

The Secretary for Resources has recognized by regulation that rate increases to fund capital projects for the expansion of a system remain subject to CEQA. The agency granting the rate increase shall act either as the lead agency if no other agency has prepared environmental documents for the capital project or as a responsible agency if another agency has already complied with CEQA as the lead agency. (Cal. Code Regs., tit. 14, § 15273.)

Your Board should be able to reasonably rely on the exemption available under Public Resources Code Section 21080 (b)(8) since the revenue source would be for at least some of the specified purposes. Only if the revenue source were to be used solely used to fund expansion of the system, as distinct from maintaining service reliability within the existing area served by Metropolitan, would this exemption be unavailable. In that event, the environmental documents supporting the proposed capital project could, in all probability, be relied upon by your Board in approving the charge.

2. Notice

Assuming Metropolitan were to use the Uniform Standby Charge Procedures Act it would cause a notice of time and place of the hearing on the charge to be published pursuant to Government Code section 6066 prior to the date set for the hearing in a newspaper of general circulation printed and published within the jurisdiction of Metropolitan. Also, Metropolitan would cause a notice in writing to be mailed at least 14 days prior to the date set for hearing to each owner of land affected by the charge. Section 6066 specifies publication once a week for two successive weeks.

3. Hearings

Existing statutory provisions relating to hearings do not require multiple events; however, none of these provisions contemplate multi-county agencies. If Metropolitan's Board were to restrict the hearing location to Headquarters, it would cause a burden upon landowners in the more distant reaches of

our service area if they wish to personally present protests at the hearing, particularly if the numbers would cause the hearings to be continued beyond the initial date. Whether such a burden would constitute a legally unreasonable restriction on the opportunity to be heard by affected landowners is unclear, but it would seem that if these charges are to be implemented, the safest procedure would call for hearings conducted within each of the six counties within our service area.

Use of Proceeds of Standby Charges or Availability of Service Charges

Section 134.5 does not make reference to the purposes for which the proceeds of standby or service charges may be used. However, one interpretation is that permitted uses of such proceeds are as broad as those authorized for the proceeds of water sales, i.e., operating expenses, repairs and maintenance, payment for property, services or rights acquired by Metropolitan, and debt service. This interpretation is based upon incorporating the reference to Section 134.5 in Section 134, relating to water rates. On the other hand, if one views the existing provisions of Section 134.5 as the exclusive source of authority for standby charges, it would seem implicit that purposes funded would be limited to those which produce definable benefits for those landowners assessed.

With regard to a standby charge, which is a form of an assessment, an expansive use of proceeds has not been judicially approved. Generally, the cases require a showing of related benefits to justify a charge on property in the form of an assessment, as opposed to a tax. It would seem advisable that if this Section 134.5 authority is to be imposed as a form of assessment, the proceeds should be used for purposes that could be identified with maintaining and perhaps enhancing the reliability of the water supply within the existing service area and certainly for the properties from which the revenues are derived.

A more aggressive stance would treat Section 134, as amended, and Section 134.5, read together, as a novel revenue source which partakes of the characteristics of both assessment and tax that would be effective without the normally requisite showing of benefits. However, if it were considered a "special tax" (a tax for a "specific purpose") within the purview of Section 4 of Article XIIIA it would require a two-thirds voter approval. If it were considered a tax other than a "special tax", its validity would depend upon the eventual disposition by the California Supreme Court of the several cases currently on appeal challenging the validity of Proposition 62, the 1986

initiative which added Sections 53720 - 53730 to the Government Code and therein established an additional, majority voter approval requirement for all taxes other than "special taxes" imposed after August 1, 1985.

In the alternative, a service charge imposed upon member agencies would not require a showing of particular benefit, and would not be subject to the constrictions of various forms of taxation. It would require a rational method of allocating the total charge among the member agencies, which presumably would not be merely identical with current water sales revenues, and would require 45 days advance notice. While it may or may not be a revenue source deemed acceptable by the Board, it does have the advantages of relative administrative simplicity, if not for the member agencies, at least for Metropolitan, and it is not fraught with myriad legal obstacles.

Standby Charge Calendar

If the intent of the Board is to pursue a standby charge for fiscal year 1992-93, prompt action will be required. Attachment 3 is an initial outline of the schedule of events necessary. Additional input is anticipated from Mr. Reiter and will be furnished at the November 12 meeting of the committees.

Board Committee Assignments

This letter was referred for information to:

The Special Budget Committee because of its authority to review the proposed annual budget, pursuant to Administrative Code Section 2531;

The Engineering and Operations Committee because of its authority regarding the initiation, scheduling, contracting, and performance of construction programs and work, pursuant to Administrative Code Section 2431(b), and the operation and maintenance of plants and facilities, pursuant to Administrative Code Section 2431(c);

The Water Problems Committee because of its authority related to policies regarding allocation of water standby or availability of service revenue requirements among member public agencies, pursuant to Administrative Code Section 2481(e) and (f); and

The Finance and Insurance Committee because of its authority regarding the determination of revenues to be

obtained through sales of water, water standby or availability of service charges, and the levying of taxes, pursuant to Administrative Code Section 2441(e).

Recommendation

For information only.

for Fred Vendig

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ATTACHMENT 1

Water Code Section 31031. Fixing of water standby or availability charge by district.

A district may fix, on or before the first day of July in each calendar year, a water standby or availability charge of not to exceed ten dollars ($10) per acre per year for each acre of land, or ten dollars ($10) per year for each parcel of land less than an acre within the district to which water is made available for any purpose by the district, whether the water is actually used or not. The board of directors of a district which fixes such a charge may establish schedules varying such charge according to the land uses and the degree of availability or quantity of use of such water to the affected lands, and may restrict such charge to the lands lying within one or more improvement districts within such district.

A district may elect to have such water standby or availability charges for the fiscal year collected on the tax roll by the same persons and at the same time as any general taxes it may levy. In that event, it shall prepare and file with the secretary a report which shall contain a description of each parcel of real property and the amount of the water standby or availability charge for each parcel for the year. It shall then follow the procedure of and be subject to the provisions of sections 31032.2 through 31032.6.

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ATTACHMENT 2

An act to amend Section 134.5 and to add Section 134.5.1 to the Metropolitan Water District Act (Chapter 209 of the Statutes of 1969) relating to metropolitan water districts.

Section 1. Section 134.5 of the Metropolitan Water District Act (Chapter 209 of the Statutes of 1969) is amended to read:

Sec. 134.5. (a) The board may, from time to time, impose a water standby or availability service charge within a district.

The amount of revenue to be raised by the service charge shall be as determined by the board.

(b) Allocation of the service charge among member public agencies shall be in accordance with a method established by ordinance or resolution of the board. Factors that may be considered include, but are not limited to, historical water deliveries by a district; projected water service demands by member public agencies of a district; contracted water service demands by member public agencies of a district; service connection capacity; acreage; property parcels; population, and assessed valuation, or a combination thereof.

(c) The service charge may be collected from the member public agencies of a district. As an alternative, a district may impose a specified portion or the entire amount of a service charge as a standby charge against individual parcels within some or all member public agencies of the district.

~~In implementing this alternative, a district may exercise the powers of a county water district under Section 31031 of the Water Code, except that, notwithstanding Section 31031 of the Water Code, a district may (1) raise the standby charge rate above ten dollars ($10) per year by a majority vote of the board, and (2) after taking into account the factors specified in subdivision (b), fix different standby charge rates for parcels situated within different member public agencies.~~

(d) Before imposing or changing any water standby or availability service charge pursuant to this section, a district shall give written notice of intent to do so to each member public agency not less than 45 days prior to final adoption of the imposition or change.

(e) As an alternative to the two methods set forth in subdivision (c), a district, at the option of its board, may convert the charge to a benefit assessment to be levied pursuant to Sections 134.6 to 134.9, inclusive.

Section 2. Section 134.5.1 is added to the Metropolitan Water District Act (Chapter 209 of the Statutes of 1969) to read:

Sec. 134.5.1. (a) The board of directors of any district may fix and impose, by ordinance or resolution, on or before the 20th day of August of any fiscal year, a water standby charge on land within the boundaries of the district to which water is made available by the district, whether the water is actually used or not.

(b) The standby charge shall not exceed ten dollars ($10) per acre per year for each acre of land within the district or ten dollars ($10) per year for a parcel less than one acre, unless a higher charge is approved by a two-thirds vote of the board.

(c) The board of directors of a district which imposes a standby charge may establish schedules varying the charge according to the land uses or zoning, or the extent of availability or quantity of use of water furnished directly or indirectly by the district to the affected lands, or any combination of the above, and may restrict the charge to lands lying within all or a portion of one or more member public agencies of the district.

(d) The standby charge shall be adopted by the board of directors only after adoption of a resolution setting forth the particular schedule or schedules of charges proposed to be established and after a public hearing on the resolution. The secretary of the board shall cause notice of a time and place of the hearing to be published pursuant to Section 6066 of the Government Code, prior to the date set for hearing, in one or more newspapers of general circulation printed and published within the district. At the time stated in the notice, the board of directors shall hear and consider all objections or protests, if any, to the resolution referred to in the notice and may continue the hearing from time to time. Upon the conclusion of the hearing, the board of directors may adopt,

revise, change, reduce, modify, or withdraw any proposed charge or overrule any or all objections. The board of directors shall make its determination upon each charge as described in the resolution, which determination shall be final.

(e) On or before the first day of September, the district shall furnish in writing to the auditor of each affected county a description of any parcel of land within the district upon which a standby charge is to be collected for the current fiscal year, together with the amount of the standby charge fixed and imposed by the district on each parcel of land which is to be added to the assessment roll.

(f) All county officers charged with the duties of collecting taxes shall collect the district's standby charges with the regular tax payments to the county. The standby charges shall be collected in the same form and manner as county taxes are collected, and shall be subject to the procedures applicable to county taxes in the event of delinquency. Upon collection of the standby charges by the tax collector, the collections shall be paid to the district. The county may deduct the reasonable administrative costs incurred in collecting the water standby charges.

Section 3. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the local agency has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.

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ATTACHMENT 3

TENTATIVE PRELIMINARY STANDBY CHARGE CALENDAR

November 1	Review required CEQA compliance, if any.
November 1	Select engineer to prepare report required by USCPA.
November 1	Initial contacts with county tax collectors to verify mechanism that will assure collection of the charge.
February 1	Completion of engineer's report required by USCPA.
February 11 Board meeting	Standby charge letter and resolution to be considered.
March 10 Board meeting	Board sets standby charge.
May 1	Mail notice of standby charge to parcel owners.
June - July	Board hearings in six counties.
August 10	Special Board meeting to affirm standby charge.
August 10	Communication to county tax collectors.

standby.sch