Filed 7/20/04 – Opinion on remand from Supreme Court

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., et al.,

Defendant and Cross-defendant;

E. W. KELLEY,

Real Party in Interest, Cross-complainant and Appellant

E033515

(Super.Ct.No. SCV 097005)

OPINION

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

Sweeney, Davidian, Greene & Grant, Eric Grant, and James F. Sweeney for Real Party in Interest and Appellant.

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

1. Introduction

The Bighorn-Desert View Water Agency supplies water to its customers in Landers in San Bernardino County. The real party in interest, E.W. Kelley, seeks to reduce Bighorn's water rates and charges by voter initiative. After granting review of our previous opinion, the California Supreme Court issued its decision in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409 and transferred the matter back to us with directions to vacate our decision and reconsider it in light of *Richmond*. Having done so, we again affirm judgment in favor of Bighorn. In summary, we hold that the initiative process of Proposition 218, adopted by the voters in November 1996, does not apply to the water rates and charges fixed by Bighorn for water services.

2. Factual and Procedural Background

The facts in this case are not disputed.

In 1969, the Bighorn Mountains Water Agency Law (Wat. Code Appen, § 112-1 et seq.) established Bighorn as a special act agency. Bighorn supplies domestic water

service to some consumers in Landers. Others obtain their water by different means, such as private wells or trucked water.

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." (Wat. Code Appen., § 112-25.)

Kelley succeeding in qualifying for the ballot an initiative petition seeking to reduce Bighorn's water rates and charges by about one-half and requiring two-thirds voter approval for any subsequent increases by Bighorn.

Bighorn filed a declaratory relief action against the registrar of voters and the real parties in interest, seeking a judicial declaration that the Kelley initiative was invalid.

In response, Kelley filed a "cross-petition for alternative writ of mandate" and a motion for judgment on the pleadings. In the cross-petition, real parties identify themselves as "citizens, residents, taxpayers, and registered voters." They do not allege they are all property owners or water users in the area served by Bighorn. The cross-petition acknowledges the authority of Bighorn "to impose water rates, fees, and charges on residents and other customers" although it challenges the exercise of that authority.

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 original briefs and the parties' supplemental briefs, filed at our direction after the issuance of *Richmond*, this court has considered amici curiae briefs filed in support of Bighorn by the Association of California Water Agencies -- a 400-plus member organization -- and filed in support of the real parties by the Howard Jarvis Taxpayers Association.

3. Discussion

In this case, we confront several apparently conflicting cases that are not easily reconciled. (*Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842; *Richmond v. Shasta Community Services Dist., supra,* 32 Cal.4th 409.) All involve the ongoing judicial struggle to interpret and apply Proposition 218, the "Right to Vote on Taxes Act," approved by California voters in November 1996.

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

Proposition 218 added two amendments to the California Constitution: Article XIII C, requiring voter approval for local tax levies, and Article XIII D, affecting assessment and property-related fee reform. Article XIII C, section 3, includes the power of initiative: "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 . . . ." Kelley contends the initiative power can be used to challenge Bighorn's water rates and related charges. Based on the following analysis, we disagree. We conclude that the cost of water services provided by Bighorn is not subject to Proposition 218, whether or not it may be properly characterized as property-related or as an incident of property ownership.

Article XIII C governs special and general taxes, which are not at issue here. Article XIII D law governs certain types of fees and charges: "*Notwithstanding any other*

provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. [Emphasis added.]" (Art. XIII D, § 1.) Article XIII D, section 2, defines "fee" and "charge":

"(e) 'Fee' or 'charge' means 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. [¶] . . . [¶]

"(g) 'Property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

"(h) 'Property-related service' means a public service having a direct relationship to property ownership."

The parties disagree strenuously about whether the cost of water service provided by Bighorn is a "property-related service" or a "levy . . . imposed by an agency upon a parcel or upon a person as an incident of property ownership."

In discussing whether Proposition 218 applies to water rates, the Second Appellate District said usage-based water services are not a property-related service or imposed as an incident of property ownership: "'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.]' [¶] . . . [¶]

"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.' . . . 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." (*Howard Jarvis Taxpayers Assn. v. City of Los Angeles, supra,* 85 Cal.App.4th at pp. 82-83, fns. omitted.)

The latter case is consistent with *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra,* 24 Cal.4th at page 842, in which the California Supreme court said: "[T]axes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners as *landowners*. . . . [Article XIII D] applies only to exactions levied solely by virtue of property ownership. We may not interpret article XIII D as if it had been rewritten."

Following these cases, Bighorn's rates and charges are not property related or incidents of property ownership because they are based on consumption and not on ownership or tenancy of land. Bighorn's rates and charges do not "burden landowners as

landowners." Nor are they levied "solely by virtue of property ownership." Instead, Bighorn's water rates and related charges are imposed on voluntary water users and the water rates are based on consumption, not the user's status as a landowner.

We recognize that, in *Richmond*, the California Supreme Court employed language that could be construed as bearing on the issues in this case. Particularly, the court commented in dicta: "[W]e agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.' (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property." (*Richmond v. Shasta Community Services Dist., supra,* 32 Cal.4th at page 427.)

Richmond, however, differs from the present case. In it, several property owners brought an action testing the amount of a connection charge for new water service. *Richmond* did not involve Proposition 218's initiative power or usage-based water rates. Ultimately, Richmond rejected the challenge to the connection charge as not being a property-related fee or charge when the charge was incurred because a property owner voluntarily applied for the service. (*Richmond v. Shasta Community Services Dist., supra,* 32 Cal.4th at page 426.)

Richmond is not dispositive of the issues presented in our case. Furthermore, to the extent *Richmond* is relevant, it is consistent with our conclusion that water services are not subject to the initiative process because the consumer incurs the expense of the services voluntarily not as a property owner or tenant.

But, even if we were to interpret *Richmond* to hold that water services like those provided by Bighorn are property related or incidents of property ownership, we would still decide that Proposition 218's power of initiative does not operate.

Article XIII D, section 6, provides detailed procedures for imposing new fees or charges or increasing existing ones. Article XIII D, section 6, subdivision (c), also requires there be voter approval "[e]xcept for fees or charges for sewer, water, and refuse collection services . . . ." Both *Richmond* and *Howard Jarvis Taxpayers Assn. v. City of Los Angeles, supra,* 85 Cal.App.4th 79, recognized the exception from voter approval requirements stated in Article XIII D, section 6. The latter case said, "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. . . .'" from the requirement for voter approval. (*Howard Jarvis Taxpayers Assn. v. City of Los Angeles, supra,* 85 Cal.App.4th at page 83, fn. 1.) *Richmond* made a similar acknowledgement. (*Richmond v. Shasta Community Services Dist., supra,* 32 Cal.4th at page 427.)

As Article XIII D plainly makes an exception for fees or charges for water services, Bighorn's rates and charges for water services can be imposed without voter approval and are not subject to Proposition 218's voter initiative power. We recognize

the Howard Jarvis Taxpayers Association asserts that Article XIII C affords an exception to the exception and permits the initiative power to be employed in spite of Article XIII D. If that were so, it would make the voter-approval exception for water services meaningless, since Article XIII C would always permit a voter-initiated challenge that would overcome the exception stated in Article XIII D, section 6. Such an interpretation would violate the rules of statutory construction, the goal being a harmonious, not an unreasonable, result. (*Fields v. Eu* (1976) 18 Cal.3d 322, 328.)

As a final matter, we agree 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 be allowed to 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." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.) The rate-setting function delegated by the Legislature to Bighorn's board of directors is an administrative duty not subject to initiative.

Bighorn must charge water users the amounts necessary to meet its operating costs and other 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 users 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. . . ."'" (*Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, 869, citing *Simpson v. Hite* (1950) 36 Cal.2d 125, 134.

4. Disposition

Bighorn's usage-based water rates, and the related charges, are not property related or imposed as an incident of property ownership. In the alternative, they are excluded from the voter approval and initiative provisions of Proposition 218 by Article XIII D, section 6, subdivision (c). 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.