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November 6, 2015

Via Facsimile and U.S. Mail
Frank W. Robinson
Town Manager
Town of Apple Valley
14955 Dale Evans Parkway
Apple Valley, CA 92307

Re: Proposition 218 Violations

Dear Mr. Robinson:

I write on behalf of an individual who pays wastewater user fees to the Town of Apple Valley. We believe that these fees do not comply with and were not adopted in accordance with Proposition 218 (which added article XIII D to the California Constitution). We demand that the Town address these violations immediately.

Although I assume you are familiar with Prop. 218's mandates, I provide a brief summary. In November 1996, voters approved Prop. 218, the *Right to Vote on Taxes Act*. In adopting Prop. 218, the People declared that "Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."

With respect to property-related fees, such as the wastewater fees at issue, Prop. 218 imposes a number of restrictions on local governments. It states that:

> "[r]evenues derived from the fee or charge shall not exceed the funds required to provide the property-related services"
>
> "the amount of the fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of service attributable to the parcel"

> "[no] fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question."
>
> and
>
> "[n]o fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners."

(See article XIII D, § 6, subd. (b)(1)(3)(4) and (5).)

In addition to these substantive requirements, Prop. 218 sets forth critical procedural requirements. The public agency proposing to impose a new or increased fee must conduct a public hearing not less than 45 days after it mails written notice to record owners of the affected properties setting forth the amount of the fee or charge proposed to be imposed, the basis upon which the amount of the proposed fee or charge was calculated, and the reason for the fee or charge, together with the date, time, and location of the public hearing on the proposed fee or charge.

(See article XIII D, § 6, subd. (a)(1).)

As explained below, the Town has violated Prop. 218's procedural and substantive requirements with regard to its wastewater user fees.

Failure to Provide Notice of Future Rate Increases

On June 10, 2014, the Town adopted Resolution 2014-18, which increased wastewater user charges as follows: FY15 – 11.5%, FY16 – 11.5%, FY17- 9%, FY18 – 9%, and FY19 -7%. The Town mailed and published a Prop. 218 Notice prior to the June 10, 2014 hearing, but the Notice was deficient. Specifically, while Resolution 2014-18 adopted increases totaling 48% over a five-year period, the Notice only referenced a single 11.5% increase in FY15. The Resolution also increased the "per fixture" amounts, but the Notice made no reference to those increases. In other words, ratepayers were deprived of constitutionally-required information. Accordingly, any fee increases beyond the first 11.5% increase (effective June 11, 2014) have been imposed in violation of section 6(a)(1) because the Town failed to include in the Notice, the amount of the fee or charge proposed to be imposed, the basis upon which the amount of the proposed fee or charge was calculated, and the reason for the fee or charge. We believe these omissions were intentional.

Fees Not Proportional to Costs

Section 6(b)(3) requires fees and charges to be proportional as between ratepayers. Yet single family residents, multi-family residents, and commercial customers with "an individual restroom" are charged the same amount per month ($35.04.) Other commercial customers with

"centralized sewer use facilities" are charged $35.04 plus a separate amount "per fixture" in excess of twenty units. The decision to impose fees in this arbitrary manner does not comply with Section 6(b)(3). Specifically, most commercial customers impose a far greater load on a wastewater system than residential customers. The standard practice in the wastewater industry is to account for Total Suspended Solids ("TSS") and Biological Oxygen Demand ("BOD") to ensure that costs are fairly allocated. In other words, a restaurant, an industrial operation, and a single family residence should not be charged the same because the cost of providing service to a restaurant or industrial operation is far greater than the cost of providing service to a residence. We note that the Victor Valley Wastewater Reclamation Authority ("VVWRA") accounts for the treatment of BOD, TSS, and NH3 (ammonia) when calculating its unit costs. The Town could easily utilize the work undertaken by the VVWRA to apportion costs amongst its customers, but has declined to do so.

The Town does not properly account for another critical cost factor - flow. As you are aware, the VVWRA charges the Town based purely on flow ($2,756 / MG as of July 1, 2014). Yet the Town treats each SFG, MFR, and commercial customer with individual restrooms the same amount irrespective of each user's flow.

In sum, a widow residing in a one-bedroom apartment is charged the same amount as a Starbucks, a drycleaner, or a car wash, despite the fact the cost of providing wastewater service to each is vastly different. She is also charged the same amount as a single family residence with seven people, despite the fact her volume of sewer flow is substantially less.

Increases Not Based on Actual Increased Treatment Costs as Claimed

Section 6(b)(1) prohibits the Town from charging ratepayers more than it costs to provide wastewater service. The Town has not complied with this constitutional mandate. For example, the 11.5% increase (effective June 11, 2014) was characterized (in both the Notice and in the 2014-18 Resolution) as a pass-through of the VVWRA rate increase. But an increase in the treatment costs should not translate to a proportional increase in user fees because treatment costs represent only about 1/4 of the total wastewater costs. In other words, a 12% increase in treatment costs only requires a 3% increase in user fees. The Town has improperly adopted resolutions in the past based on this same faulty calculation.

We also note that the user fee increases exceed the VVWRA rate increase in the first two years (11.5% v. 9%). The Town claims that this was done to "recapture . . .a portion but not all of the previous increased treatment costs." This is problematic not only because the Town had previously adopted an increase based on supposed increased treatment costs in 2013, but also because Section 6(b)(4) prohibits such. The Town may only impose fees necessary to provide services actually used by or immediately available to users. Treatment costs previously incurred have nothing to do with the costs of providing current service to current ratepayers. Current ratepayers should not suffer the consequence of the Town's prior failure to responsibly manage its costs.

No Evidence that Fees Do Not Exceed Cost of Providing Service

More generally, the Town does not have any rate studies, cost of service studies, or internal analyses that reflect the Town's efforts to calculate its wastewater fees and charges in compliance with Section 6(b)(1). Instead, the Town has periodically imposed increases on the "original sewer rate" ($8/EDU per month) that went into effect in the 1980s. The Town has no documentation that this "original sewer rate" was intended to recover only the costs of providing wastewater service. Indeed, the original rate was adopted years before Prop. 218 was passed. Furthermore, even if the "original sewer rate" was Prop. 218 compliant, it is unlikely that the assumptions and costs underlying the original rate would be meaningful today. In sum, the Town cannot demonstrate that its rates comply with Prop. 218. (See article XIII D, § 6, subd. (b)(5) (stating that the burden of compliance is on local agency).)

The Fees Support General Governmental Services

Section 6(b)(5) states that no fee or charge may be imposed for general governmental services. Each year, the Town transfers funds from its Wastewater Fund to its General Fund according to a "Cost Allocation Plan" described in its budget. Presumably, the Town contends the transfers represent reimbursements of costs incurred in the General Fund on behalf of the Wastewater Fund. We disagree.

Page 257 of the Town's FY15-16 Proposed Budget identifies the costs that underlie the transfers. The Town allocated 21% of the "General Govt." expenditures ($637,308) to the Wastewater Fund. But the expenditures identified in the General Government budget (p. 173) include expenditures that are plainly not related to providing wastewater service. For example, the budget includes a transfer of $1,072,660 to the Parks & Recreation Fund and a $349,968 transfer to the Golf Course Fund. Although we do not understand the purpose of these transfers at this time, we cannot fathom why they would be necessary to provide wastewater service. We are particularly concerned in light of the fact the Town previously engaged in highly-questionable transfers. In 2011, the Town transferred $633,423 from the Wastewater Fund to the Golf Course Fund to reimburse the Golf Course Fund legal fees it had incurred in connection with a water and reversionary rights settlement. Wastewater customers received no benefit from this litigation or settlement.

In sum, the Town has engaged in the very practice Prop. 218 was designed to curb: disguising taxes as user fees in order to bolster its general fund revenues. We demand that the Town advise within ten (10) days as to whether it intends to take formal action to remedy its substantive and procedural violations and to restore to its wastewater ratepayers all illegally-adopted fees during the past three years.

Thank you for your attention to these matters. We look forward to hearing from you.

Sincerely,

Eric J. Benink