

LAW OFFICES OF DAVID M. O'HARA

October 30, 2007



Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

**RE: Appeal from Notice of Dismissal of Test Claim Filing
Ethics Training Requirements
Government Code sections 53234 and 53235.2
Statutes 205, Chapter 700 (AB 1234)
Union Sanitary District, Claimant**

Dear Honorable Commissioners:

Union Sanitary District respectfully appeals from the Notice of Dismissal of Test Claim Filing included in the letter dated October 18, 2007, over the signature of Paula Higashi, Executive Director, which was placed in the United States Mail on October 19, 2007 (a Friday) and was received in the undersigned's office on Tuesday, October 23, 2007.

Background

On September 17, 2007, an original and seven copies of the claim was filed with the Commission on State Mandates, which consists of a test claim filing on Government Code §§ 53234 and 53235.2 (Statutes 2005, Chapter 700 - AB 1234), *Ethics Training Requirements* by Union Sanitary District. The test claim was initially returned as being untimely. Upon re-submission, it was conceded that the test claim was timely filed.

The Executive Director of the Commission on State Mandates provided a Notice of Dismissal of the Test Claim Filing, a copy of which is enclosed, which was received by the undersigned and within ten days this appeal was noticed.

There has been no ruling on the merits. The test claim itself, in its original form along with seven copies, sits in the undersigned's office.

Basis of Dismissal

According to the letter of the Executive Director of the Commission, the Commission does not have jurisdiction to hear Union Sanitary District's claim. Hence, it was dismissed.

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This seems curious in that lack of jurisdiction means that the Commission does not have the power and right to interpret the law or apply it in this instance; or, the authority to control proceedings. In other words, the Commission on State Mandates is alleged to lack the authority to award or deny reimbursement of a State Mandated activity.

The authorities cited by the Executive Director were said to provide that a claimant can only recover unfunded state mandates when the costs which were sustained come solely from tax revenues. As can be seen by the Notice of Dismissal, the position of the Executive Director is that there can be no reimbursement for state mandated expenses when the costs are recoverable from revenue other than tax revenue. Of the authorities cited, for this proposition, one case was decided in 1980 and the latter case in 1991. Proposition 218 was passed in 1996.

The gist of the dismissal argument appears to be that there is no way service charges, fees or assessments of a public agency can ever be imposed as taxes; or, that Constitution Article XIII B places no limit on the ability of a government entity from spending funds from any source.

On both rationales, the Executive Director is incorrect.

Basis of Appeal

Union Sanitary District is a public agency, a public sanitary district formed under the Sanitary District Act of 1923, Health & Safety Code §§ 6400-6805, and as such is a subdivision of the State of California. Union Sanitary District has the authority to impose taxes, and does impose taxes, pursuant to Health & Safety Code § 5473.

Proposition 218, entitled "Right to Vote on Taxes Act" was passed by the voters of the State of California on November 5, 1996, and was retroactive to July 1, 1995. Proposition 218 established two Constitutional Amendments, Article XIII C and XIII D. Union Sanitary District is subject to Proposition 218, both Division C and Division D, since it provides a sewer service to the inhabitants of the Cities of Fremont, Newark and Union City, California.

The sources of revenues for Union Sanitary District are essentially two-fold:

- Sewer Service Charges, annual fees imposed upon real property for the purpose of maintaining the sewer collection system, sewage treatment system and the disposal system. Sewer Service Charges are obviously

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real property taxes, since they are always imposed, at least in the case of Union Sanitary District, on the real property tax bill under Health & Safety Code § 5473.

- Capacity charges which are capital facility fees, sometimes referred in older instances as connection fees, used for capital improvements.

In accordance with the recent Supreme Court Decision in *Bighorn-Desert View Water Agency v. Verjil et al.* (2006) 39 Cal.4th 205, California Constitution Article XIII C § 3, applies to assessments, fees and charges of agencies such as Union Sanitary District, and is therefore a special tax. At Pg. 213.

Proposition 218, and the Constitutional Amendments it enacted, require that all fees and charges collected as sewer service charges must be justified as the cost of doing business and therefore dedicated to the purpose for which the tax revenue is collected.

The second form of revenue raised by Union Sanitary District is a capacity fee, which is a capital facilities charge. Capital facilities charges such as capacity fees are governed by Government Code § 66013. This provides as follows:

Subdivision (a). The amount of fee charged cannot be in excess of the estimated reasonable cost of providing the services or materials; and

Subdivision (c). All revenue obtained through capacity charges (sewer connection fees) must be deposited in a special fund, all interest must be kept in that fund, and all monies, revenue and interest, can only be used for capital facility fees.

Like many public agencies, Union Sanitary District receives fee for plan checking, inspection of connections and the like, which are solely imposed to recover the expense entailed in providing that service. Interest on sewer service charges continue as a part of tax revenues, since they are expended within the fiscal year in which they are imposed.

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Virtually all of the revenues obtained by Union Sanitary District come from either tax revenues (sewer service charges imposed as part of real property taxes) or from capital facilities fees, which must be held separately and expended solely for capital improvements, including the interest on the deposits.

The Commission on State Mandates certainly has the jurisdiction to hear the test claim of Union Sanitary District, which claim has been dismissed at the fiat of the Executive Director, without any hearing on the merits or the opportunity to explore legal arguments concerning the propriety of Union Sanitary District receiving reimbursement.

Since the test claim was incorrectly dismissed on the basis of lack of jurisdiction, the Commission is compelled to direct that the Executive Director accept the claim which was lodged on September 17, 2007, and schedule processing and hearing on the merits of the claim.

We reserve the right to supplement this appeal with points and authorities, given the limited time permitted for appeal, and to avail claimant of the options provided by AB 1222 (2007 Session).

Respectfully submitted,



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Attorney for
UNION SANITARY DISTRICT

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