

Drought policies, price of water lands in court: Hillsborough residents sue town over charging penalties for excessive water use

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The statewide question of whether it's legal to charge more for water during a drought has landed in San Mateo County Superior Court with a group of Hillsborough residents suing the town.

A class action lawsuit was filed last week and seeks to test the legalities of certain drought-related policies many water providers handed down when faced with state mandates Californians had to conserve.

The suit alleges Hillsborough's nearly 30-year-old tiered-water-rate structure and its recent policy of charging penalties for excessive use conflicts with the state's Constitution and Proposition 218. That proposition passed in 1996 and limits the ability of local governments to raise taxes without approval of those paying. The tiered structure involves increasing rates based on usage as a way to promote conservation. On the other hand, Proposition 218 requires the price of utilities be tied to the actual cost of providing service.

"No one disagrees that the drought is serious and measures need to be taken," said Beau Burbidge, an attorney representing the residents. "But the drought doesn't create a reason to circumvent the law."

Hillsborough, known for its large landscaped properties with average home prices close to \$4 million, was faced with one of the steepest requirements when Gov. Jerry Brown issues his landmark drought conservation mandates in June 2015.

The town was ordered to reduce consumption by 36 percent, just one of two areas in the county that faced the highest conservation standard. The average Hillsborough resident was using 324 gallons of water a day in June 2014, and the town faced a significant challenge to reduce or potentially face state fines of \$10,000 a day, according to the town.

"I think agencies are trying to do the best they can to recoup their costs of service while complying with Prop. 218 and also trying to deal with an unprecedented period of drought," said Kimberly Hood, an attorney representing Hillsborough.

Before the state ultimately lifted mandates this past May, Hillsborough significantly exceeded its target by conserving a cumulative 42.7 percent with the average resident using about 156 gallons per day by April 2016. Those savings have tapered off to a cumulative 26.3 percent since many local agencies reverted to voluntary cutbacks, according to data with the State Water Resources Control Board.

Cost of service

The suit alleges the town was a conservation success story, but the city opted to institute penalties for excessive use anyway. Now, residents and their attorney allege the town's tiered-water rate structure isn't tied to the cost of service and that Hillsborough officials unfairly attempted to levy an estimated \$600,000 in penalties against those who went above their water allotments.

The crux of the arguments is that Proposition 218, which regulates how customers can be charged for utilities such as water and power, and requires rates be tied to the actual cost of providing service. Since Hillsborough buys all of its water from the San Francisco Public Utilities Commission at a fixed rate, Burbidge said his clients were unfairly charged higher rates that arbitrarily increased based on consumption. He noted there isn't anything inherently wrong with using a tiered structure, but Hillsborough hasn't proved its prices actually correlate to costs. He also points to a 2015 court ruling whereby the city of San Juan Capistrano's tiered water rates were found to be flawed as they didn't reflect the true cost of providing service.

It's a balance water providers are facing throughout the state — how to cover the costs of doing business when consumption is down, while also trying to promote conservation, said Nicole Sandkulla, CEO of the Bay Area Water Supply and Conservation Agency.

"Agencies are struggling with this. And as a water customer, the other expectation you have is that your water agency stays in business, that it actually can continue to provide water, which means they have to have a revenue stream that can support that. So it's an issue that the water providers are trying to figure out right now," Sandkulla said.

While not able to comment specifically on the Hillsborough lawsuit, Sandkulla pointed to the five-year drought ending around 1992. Around that time, conservation best practices were adopted and included the tiered rate structure, she said.

"The idea at the time was a rate structure that incentivized people to use less water by putting a premium on the next tier. That's the genesis of these tiered structures that environmental organizations and conservation organizations have supported for years, and they're wisely adopted by water agencies," Sandkulla said.

Charging to conserve

Hillsborough is not alone in using a tiered rate structure, most in San Mateo County do. However, average water bills in Hillsborough are more than double the cost of most other cities — although some of that could be due to the larger landscaped homes in the hillside town. The residents' attorney also noted Hillsborough buys solely from the SFPUC, which has fixed rates, while other towns may have multiple sources.

Many jurisdictions, including Hillsborough, are also now in the process of undergoing a cost of service study, which will seek to tie rates to the price of doing business, according to Sandkulla and Hood, who will help defend the town in the lawsuit.

"The goal is just to make sure that you're covering your cost of service and it's always been clear since Prop. 218, that you can't be making a profit," Hood said. "But the courts have allowed some flexibility in how they [cover costs]," Hood said.

Hillsborough, like many others throughout the state, responded to state mandates by setting up allotments for customers and issuing penalties for those who went over — also known as excessive use charges. For each 748 gallons a customer went above their allotment, they were issued a \$30 penalty, according to the city.

The concept stems from the State Water Resources Control Board and local state Sen. Jerry Hill, D-San Mateo, recently had

legislation signed by the governor that affirms providers can set up excessive use charges.

However, Burbidge notes these provisions cannot usurp the state Constitution and questions their legality as well as whether they should be considered a tax, which would require voter approval.

Most, if not all of his clients, have been paying the town's highest water rate and received penalties for excessive consumption. His clients are Brad and Kathy Baruh, Charles Bolton, Eldridge Gray, John Lockton, David Marquardt, Paul Rochester, Arthur Stromberg and Charles Syers.

Burbidge said his firm filed a similar lawsuit in Marin County and emphasized legal challenges such as this will ideally help clarify and define how water providers are able to impose drought-related regulations.

"The resolution of this lawsuit and its determination of, we think, that these excessive use penalties are illegal, is going to be helpful in defining the bounds of constitutional requirements and what municipalities can and cannot do to reduce water consumption," Burbidge said, adding "I think other municipalities need to be mindful as well."

samantha@smdailyjournal.com

(650) 344-5200 ext. 106