

ORIGINAL FILED

JAN 18 2002

**LOS ANGELES
SUPERIOR COURT**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

JOHN DONALDSON, et al,

Plaintiffs,

v.

CITY OF LONG BEACH, et al,

Defendants.

Case No: BC 251505

STATEMENT OF DECISION RE:

DEMURRER AND MOTION TO STRIKE
OF DEFENDANTS

I.

BACKGROUND

Plaintiffs, Long Beach City tax payers and customers of the Long Beach Gas Department, seek class certification of this action to challenge the alleged unlawful Long Beach Gas Department policy and practice of charging local customers more for gas than is being charged by other Southern California Utilities in contravention of Long Beach City Charter. Plaintiffs' complaint alleges: violation of Long Beach City Charter (Charter) § 1502 (failure to charge in accordance with similarly situated Gas utilities), violation of Charter § 1501 (failure to establish adequate cash reserves), violation of Long Beach Municipal Code (Code) § 15.36.100, and public waste in violation of California Code of Civil Procedure § 526a. They request injunctive, preliminary and permanent, prohibiting a change in pricing, and declaratory relief, declaring the challenged prices violate both Charter and Code. Plaintiffs seek disgorgement and or payment of all overcharges amounting to \$38 million to date; reasonable attorney's fees; jury trial on all triable issues.

Plaintiffs claim the past practice of Long Beach was to base the gas rates on that of Southern California Gas Co. alone, and that the legislative history behind Code § 1501 supports their position that only California Gas Co. rates are comparable. Plaintiffs contend Long Beach Gas Department's General Manager failed in his responsibility to apply Code § 1501 and, thus, is liable in his official capacity for violation of Code § 15.36.100 and violation of California Code of Civil Procedure § 526a.

Code § 1502(c) requires Long Beach to set aside a portion of the reserve fund to provide for contingencies. Plaintiffs believe defendants have violated the plain meaning of the Code in transferring an excessive amount of reserve to the City's General Fund, leaving a remainder insufficient to provide for contingencies, such as the radically changing gas rates in a volatile gas market. Further, plaintiffs allege this transfer of funds resulted in illegal expenditure of, waste of, or injury to, the estate, funds, or other property of Long Beach.

Defendants demur to each of plaintiffs' four causes of action under CCP § 430.10(e) and § 430.10 (f). First, defendants contend they are in compliance with Charter § 1502, and contrary to the express language of the statute, plaintiffs exclude consideration of all other like utilities operating in Southern California, with the exception of Southern California Gas Co. In addition, plaintiffs allegedly have not plead facts sufficient to show Long Beach rates were unreasonable or unfair. Second, defendants claim there is no violation of Charter § 1501 because the utility reserve fund is maintained at a level the amount of which is subject to the sole discretion of the City. Third, defendants contend plaintiffs can state no facts upon which to claim Long Beach officers committed any waste or illegal activity in violation of Code of Civil Procedure 526a. Finally, defendants demur on the grounds that CCP § 1085 (writ of mandate) is plaintiffs' sole remedy.

Defendants move to strike plaintiffs' claim for money damages because plaintiffs do not distinguish between the damages occurring as a result of the transfer of Gas Funds to the General Fund within the one-year statutory period (Govt Code § 905) and those damages accumulating since 1980.

II

DISCUSSION

Defendants' contention that plaintiffs sole remedy is a writ of mandate under CCP § 1085 is unpersuasive. Generally, the extraordinary remedy of mandate is not available when other remedies at law are adequate. *Tevis v San Francisco* (1954) 43 Cal 2d 190, 198.

Charter § 1502 requires the Long Beach gas rate be based upon the "prevailing rates for similar services and commodities supplied or sold by other like utilities whether public or private, operating in the Southern California area." Plaintiffs primary position is that Southern California Gas Co., alone, is the only "like" utility. In the alternative, plaintiffs argue the prices set by Long Beach were above those, or above the averages of those, charged by any of the gas companies included by defendants; therefore, the rates were not comparable. Defendants maintain, while during certain months their gas rates were higher, their overall gas rates were comparable when viewed over a period of time. This difference of opinion cannot be resolved by review of the pleadings or of matters which are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318.

Charter § 1501 lists the priorities for use of revenue funds received by the Gas Department, i.e., (a) payment of the principal or interest of any bond coming due, (b) payment of annual operating or maintenance expenses, acquisitions, improvements, extensions of the utility system, (c) set aside the remainder of the fund to be used for contingencies of the utility operation, and (d) transfer to the General Fund of the remainder of those funds unnecessary to meet the obligations of the utility.

It is unclear from the pleadings and matters from which judicial notice can be taken what reserves were maintained in the Gas Fund for contingencies in the operation. Nonetheless, plaintiffs contention that "contingencies" include a buffer for any dramatic pass through of cost to residents is unsupported by the language of the statute. "Our first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." *People v. Valladoli* (1996) 13 Cal. 4th 590, 597, citing *Mercer v. Department of Motor Vehicles* (1991) 53 Cal. 3d 753, 763; *Lungren v.*

Deukmejian (1988) 45 Cal. 3d 727, 735. Subsection (d) of 1501, allows for the City Council to transfer funds to the General Fund as approved in the annual budget.

California Code of Civil Procedure § 526a permits actions against officers to restrain and prevent any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of the City. Plaintiffs allegations are that the funds should not have been transferred to the General Fund and that such transfer constituted waste. They make no allegation the monies were improperly or illegally used by the General Fund.

III

CONCLUSION

Plaintiffs' first and third causes of action are properly plead. They raise a question as to whether the prices charged were comparable to the other like utilities and whether or not the General Manager of Long Beach's Gas Department and or the City Manager acted in accordance with their duties under 15.36.100; therefore, defendants' demurrer to plaintiffs first and third causes of action are Overruled.

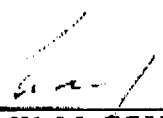
The clear language of Code § 1501(c) and (d) permits legislative discretion in the amount of transfers to the General Fund and provides no specific amount that must be kept in reserves. Defendants demurrer to plaintiffs' second cause of action is Sustained with leave to amend within 30 days from this Notice of Decision.

Plaintiffs' fourth cause of action provides no allegation the monies transferred by the City Council were improperly or illegally used by the General Fund. Defendants demurrer to the fourth cause of action is Sustained with leave to amend within 30 days from this Notice of Decision.

Defendants motion to strike is Overruled; it is apparent the plaintiffs distinguish between the 20-year *transfer* of funds and the damages plaintiffs now claim.

Dated:

1 / 17 / 02



CHARLES W. McCOY, JR
Judge of the Superior Court