Assessing Fee-for-Service Charges
And the Meaning of “Not-for-Profit Entities” in the RCD Law

California Association of Resource Conservation Districts
Ontario, CA
November 16-19, 2016

PRESENTED BY

Steven M. Anderson
Partner
Framework

• **Issue:** How much can RCDs charge in fee-for-service agreements?

• **Two basic legal parameters:**
  
  (A) Fees for services may not exceed the “cost reasonably borne” by an RCD (Pub. Res. Code § 9403.5) but (B) may not be so low as to constitute a gift of public funds (Cal. Const., art. XVI, § 6)
• “Cost reasonably borne” by the RCD
  - No definitive legislative or judicial interpretation of the RCD law’s reasonable cost provision

• Fundamental Point #1: RCD’s provide services on a voluntary contractual basis
  - Public agencies are generally permitted to contract on a “what the market will bear” basis under general state law principles
  - RCD’s do not impose fees
  - Strict standards of Proposition 218 and Proposition 26 do not apply.
  - RCD’s have greater flexibility and discretion in how much to charge than do cities and water districts with fees
Interpreting “costs reasonably borne”

• Fundamental Point #2: Even public agency (utility) that are highly regulated are authorized to recover the following costs in their fees:

  • All **required** costs of providing the utility service.
  • **Short-term** and **long-term** costs (*Howard Jarvis Taxpayers Assn v. City of Roseville*)
  • **Operation, maintenance, financial, and capital expenditures** (*Howard Jarvis Taxpayers Assn v. City of Roseville*)
  • **Overhead** and **fully-loaded** costs of employee time (*Moore v. City of Lemon Grove* )

■ Standard of Review of challenges to such fees: cost recovery fees just have to be **“reasonably determined”** (*Howard Jarvis Taxpayers Assn v. City of Fresno*)
Ex: Moore v. City of Lemon Grove

- City calculated reimbursable costs using an accounting practice for:
  1) Direct costs (operations) and 2) Indirect costs (overhead):
    - Examples of proper reimbursed costs:
      - Capital cost of telephone (direct cost);
      - Percentage of telephone use for project in relation to total phone use (indirect cost)
      - Apportioned costs as a percentage of total revenues generated is ok
    - Court concluded city’s methods were informal but reasonable given the circumstances (i.e. expenditure-based allocation could fluctuate too much to be reasonably related to costs of services to the district)
    - “Cost allocation methods used by governments present a subject beyond the trial court’s and our common experience and knowledge,” so court will generally defer to an expert (e.g. city’s finance director). Moore at 375.
Takeaways

• Some form of (documented) cost accounting that allocates overhead, loaded employee costs, and any other costs incurred by an RCD may help ensure fees reasonably reflect the costs of providing a service

• Adopting a board policy to justify accounting methodology may be warranted

• Hiring a cost accountant to develop a system of cost allocation for the services an RCD provides could reduce exposure to an “unreasonable” cost finding
California Constitution: Do Not Undercharge without RCD Board Authorization

• The California Constitution prohibits gifting public monies. Cal. Const., art. XVI § 6. This requirement generally creates a floor for what RCDs can charge for their services. (No subsidies with public monies allowed.)
  ▪ Thus, a fee reflecting a discount to a contracting party (particularly if a private developer) would probably constitute a gift of public funds unless the discount could be justified as serving a “primarily public purpose”
Justifying Your Costs: Sample Fee Policy

L. POLICY: FEE CHARGE FOR SERVICES PROVIDED

Purpose

To establish and charge fees for services provided by the district to, and upon the request of, persons or government entities.

Policy and Procedure

The Board of Directors has established the following fee structure to recover all costs borne in providing services to persons or government entities:

1. The District Manager will calculate each individual's hourly rate of pay and add 40% to the hourly rate to cover employer related costs such as social security, unemployment insurance, health insurance, dental insurance, life insurance, annual leave, sick leave, jury duty leave, bereavement leave, holiday pay and 457 retirement. The 40% will be added to the hourly rate.

2. The District Manager will add a 20% administrative cost fee to the total in item 1 above, to cover the following costs: rent, utilities, general liability insurance, public officials liability insurance, automobile insurance, property insurance, public employees and/or official dishonesty blanket coverage, worker's compensation insurance, depreciation on equipment, purchase of equipment to provide service, meetings to discuss projects and reports, monitoring of subcontractors, and monthly or monthly or quarterly billing. The 20% administrative fee will not be added to legal or contractor fees.

3. The total of items 1 and 2 will be added and this amount will be used as the District's fee for reimbursable work.

• “The Legislature hereby finds and declares that resource conservation districts are legal subdivisions of the state and, as such, are not-for-profit entities.”

Pub. Res. Code § 9003

• Elements:
  1. RCDs are “legal subdivisions of the state”
  2. “and, as such, are not-for-profit entities”

▪ What do these terms mean?
- An RCD is first and foremost a “legal subdivision of the state”
  - Thus, an RCD is a public agency
  - RCD’s operate to provide a public good rather than private benefits. Senate Analysis SB 1268 (1996)
- However, the “not for profit” language is vague.
Legislative History—Why was “not for profit” added into RCD law?

- Senate Bill 1268 (1996)
  - RCDs sought the “not-for-profit” language to better compete with non-profit organizations for grant, gift, and other funding:

    “Facing their third year of property tax shifts to schools, RCDs have adopted an entrepreneurial approach to governance by applying to foundations for grants, gifts, and support. But when districts' applications compete with more well-known and better understood non-profit organizations, RCDs often lose out. To help RCDs increase their grant success rate, they want the Legislature to clarify that they're not profit-making agencies.” Senate Local Government Comm. (Feb. 24, 1995)
Legislative history

“If a change in state law is required, then it might be more prudent to state that the agencies are not profit-making entities rather than calling them nonprofit organizations. Instead of SB 1268's approach the Committee may wish to consider stating that RCDs are not profit-making bodies --- a true clarification of existing law --- rather than saying that they're nonprofit organizations, a confusing title for a government agency.” Senate Committee Analysis, SB 1268 (1996)
Legislative Confirmation

• By stating RCD’s are “legal subdivisions of the state” and through the legislative history, the Legislature reconfirmed that RCD’s are government agencies, not non-profit organizations
Are RCD’s public agencies?

• What other evidence is there that RCD’s are public agencies?
  • RCD Law is replete with references to RCD’s as public agencies
  • History of RCD’s is to establish a local gov’t agency partnership with Soil Conservation Service
  • RCD Directors are appointed by County BOS or elected
  • Some RCD’s receive property tax revenue
  • RCD’s comply with Brown Act, PRA, other state laws
  • RCD’s do not file tax returns; NPO’s do
Can RCD’s be both a public agency and a non-profit organization?

• Only in very limited circumstances can a special district also be a non-profit corporation

  ▪ Government Code §12463 defines “special districts” to include non-profit corporations only in the following circumstances:

  1. A non-profit formed in accordance with a joint powers agreement to carry out specific functions
  2. For purposes of issuing federally tax-exempt bonds to purchase land as a site for purchasing or constructing a building, stadium, or other facility subject to a lease or agreement with a local public entity
  3. The non-profit is wholly owned by a public agency
CA Secretary of State Status

• Non-profit corporations must register with the California Secretary of State
  - CA Secretary of State’s website shows only the following non-profits with the terms “resource conservation district” or “resource conservation districts”:

<table>
<thead>
<tr>
<th>Entity Number</th>
<th>Date Filed</th>
<th>Status</th>
<th>Entity Name</th>
<th>Agent for Service of Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>C0486276</td>
<td>02/23/1986</td>
<td>DISSOLVED</td>
<td>CALIFORNIA ASSOCIATION OF RESOURCE CONSERVATION DISTRICTS</td>
<td>KAREN BUHR</td>
</tr>
<tr>
<td>C1590278</td>
<td>06/17/1987</td>
<td>ACTIVE</td>
<td>CALIFORNIA ASSOCIATION OF RESOURCE CONSERVATION DISTRICTS</td>
<td>KAREN BUHR</td>
</tr>
</tbody>
</table>
What are the advantages of being a public agency rather than an NPO?

- Government Code Immunities
- Right to participate in State investment schemes, CALPERS, bonding, assessment, insurance pools, etc.
- Contracting rights with state and federal agencies that NPO’s do not have
- Access to surplus and real property tax sales in advance
- No need to file tax returns
- The list goes on
Conclusion

1. RCD’s can charge fees for services and they have discretion in the amounts charged, provided those fees reasonably reflect the cost of providing the services.

2. RCD’s are public agencies that are eligible for grant, gift, and other funding sources, as well as the right to accept tax deductible donations.

3. RCD’s are not NPO’s, except in very limited circs.
Thank you for attending.

Steven M. Anderson
Partner
Best Best & Krieger LLP
Office (Riverside)
Phone: (951) 826-8279
Email: steve.anderson@bbklaw.com
www.bbklaw.com