



Basics of Water and Sewer Rate Setting

Guest article by Colin Mielke, Esq., LEED Green Associate

Colorado special districts have the authority pursuant to Colorado statutes to fix, increase, and decrease fees, rates, tolls, penalties and charges for services, programs, or facilities furnished by a district.¹ As a type of special district, water and sanitation districts may utilize this authority to establish rates for the purpose of furnishing water and sewer services and facilities. This article discusses some of the basic factors a water and sanitation board should consider when setting rates and fees. A board's considerations should include (1) what constitutes a reasonable rate; (2) how rates may differ between customers within the district; and (3) how rates may differ between the district's customers inside and outside of the district.

Reasonableness of Rates

The Colorado General Assembly is the ultimate authority over the power to set rates related to furnishing water and sewer services and facilities.² Through certain provisions of the Special District Act, the General Assembly has delegated the power to set water and sewer rates, fees, tolls, and charges to districts that provide water and sewer services and facilities.³ While such districts have the power to set their own water and sewer rates, there are restrictions on that power. Specifically, fees charged by a district must be reasonable in light of the services actually furnished by the district.⁴

Rate setting is considered a legislative function of the district's board of directors, and courts defer to the board's rate-making decisions because courts must be careful to not violate the separation of powers and substitute their rate-making judgment for that of a district's legislative body (i.e. the district's board).⁵ As such, the board is given broad discretion in determin-

ing what rates it will set. If a person challenges a district's rates or the methods used by a district to calculate its rates, a court will not set aside the district's rates unless the rates or rate-setting methods used by the district are "inherently unsound."⁶ However, the law does require that a district's rates and the methods used by a district to set its rates must have a rational relationship to a legitimate government purpose.⁷ This essentially means that the district's board merely needs a rational reason for collecting the rate, setting the amount of the rate, and for using the chosen rate-setting methods.⁸ Therefore, a challenger of a district's rates or rate-setting methods must prove that the district's rates or rate-setting methods do not have a rational relationship to a legitimate government purpose. This is an uphill battle for the challenger,⁹ and provides the district with a certain level of protection when adopting its rates and rate-setting methods.

Despite the difficulties faced by challengers of a district's rates or rate-setting methods, there are certain precautions a district should consider taking to help establish that its rates or rate-setting methods serve a rational relationship to a legitimate government purpose. First, a district can include a statement in its rules and regulations describing the purpose of its rates and rate-setting methods and describing how the rates and rate-setting methods are rationally related to the operations of the district. This provides the district with a quick and easy place to direct challengers or the court when such rates or methods are questioned. Second, at the public meeting at which such rates and methods are adopted, the board should clearly discuss its rationale for adopting its rates and rate-setting methods and explain how those rates and rate-setting methods are rationally related to the operations of the district. That discussion should then be included in the district's meeting minutes. Note that if a district already has adopted rules and regulations, but did not

1 § 32-1-1001(1)(j)(l), C.R.S.

2 *Krupp v. Breckenridge Sanitation Dist.*, 1 P.3d 178 (Colo. App. 1999); *aff'd*, 19 P.3d 687 (Colo.2001).

3 *E.g.*, § 32-1-1001(1)(j), (k), C.R.S.; § 32-1-1006(1)(b)(l); C.R.S.; § 31-35-402(1)(f), C.R.S.

4 *Krupp*, 1 P.3d at 183.

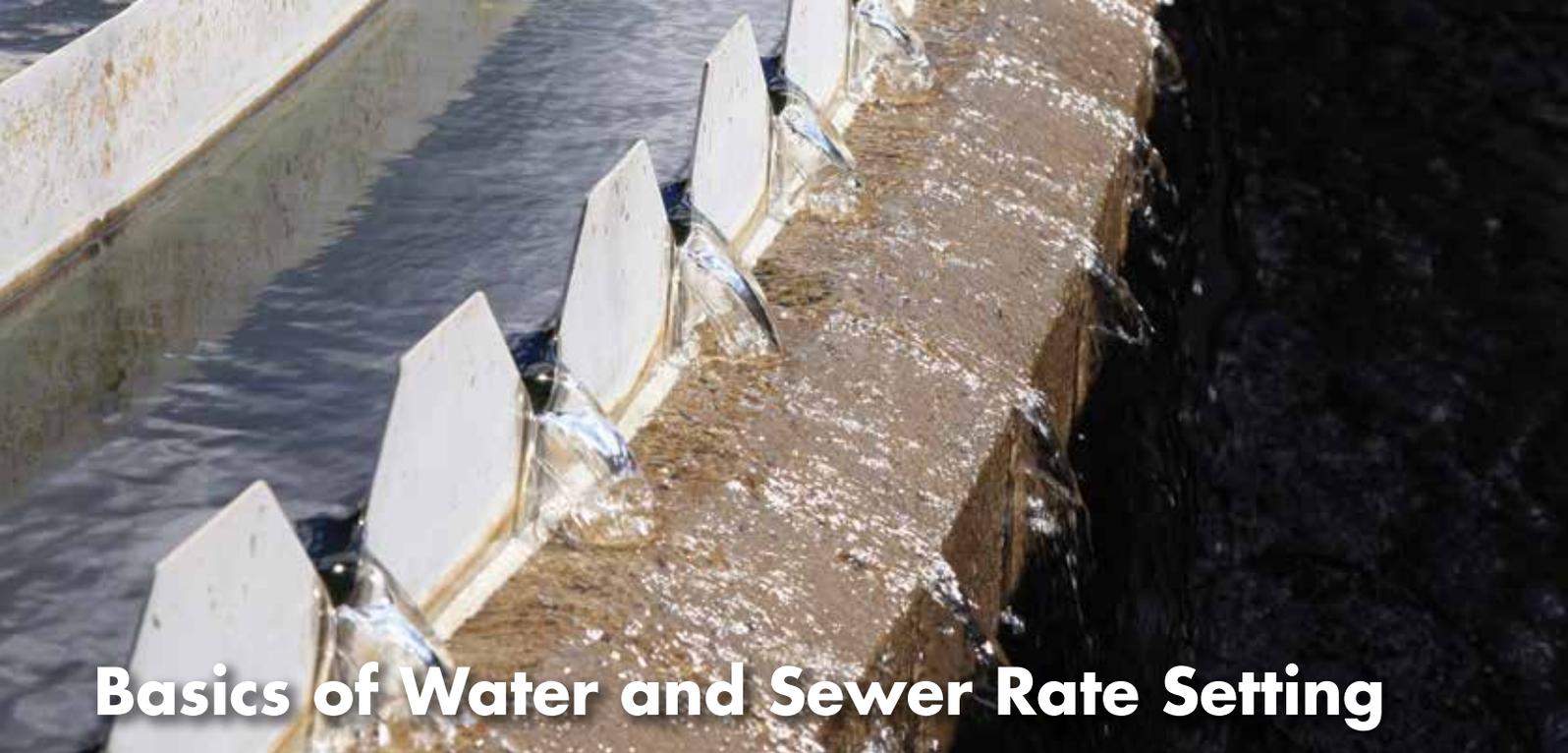
5 See *Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver*, 928 P.2d 1254, 1268-69 (Colo. 1996).

6 *Krupp*, 1 P.3d at 184.

7 *Bennett Bear*, 928 P.2d at 1268.

8 *Id.*

9 *Bennett Bear*, 928 P.2d at 1269.



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discuss the rational basis for the rates and methods (or include them in meeting minutes), a board may want to review its rates and methods at an upcoming meeting, at which time it can discuss the rationality of such rates and methods, and subsequently include that discussion within the district's meeting minutes and rules and regulations.

Creating Different Classes of Customers

The Special District Act authorizes water and sanitation districts, if they desire, to determine different classes of customers and set different rates, fees, tolls, or charges for services and facilities provided to those separate classes of customers.¹⁰ Obvious examples of different classes include differentiating rates for residential, commercial and industrial customers. However, classifications of customers can be differentiated even further. For example, the Colorado Court of Appeals has ruled that a district may charge a different amount for a plant improvement fee to triplex dwelling units than single-family or duplex dwelling units.¹¹ The difference in the amount was allowable in that specific instance because the district had a rational reason for the different charges; namely, there was evidence that triplex units within the district were more commonly rented out than single-family or duplex units, and that rentals resulted in higher peak occupancy and higher peak sewage flow.¹² The classification of buildings based on the nature, use, and size of the buildings is also considered rationally related to a legitimate government purpose.¹³

Just like when a district sets a rate or utilizes a particular rate-setting method for the district as a whole, the district must have a rational reason for fixing different rates for different classes of customers. If the district does not have a rational reason for the differentiation, the rate or rate-setting method may be set aside based on a violation of the Equal Protection Clause of the United States Constitution.¹⁴

¹⁰ § 32-1-1006(1)(b)(I), C.R.S.

¹¹ *Krupp*, 1 P.3d at 178.

¹² *Id.* at 182.

¹³ *Id.* at 184.

¹⁴ *Krupp*, 1 P.3d at 178; U.S. CONST. amend. XIV, § 1.

Different Rates for Services Inside and Outside of District

Under the Special District Act, a district may furnish services and facilities outside of its boundaries and establish "fees, rates, tolls, penalties, or charges for such services or facilities."¹⁵ Districts may fix different rates for customers outside the district's boundaries than the rates fixed for the district's in-boundary customers, so long as the district has a rational reason for doing so.¹⁶ One of the rationales for such rate differentiation is that oftentimes in-boundary customers pay taxes related to the district's facilities and out-of-boundary customers do not pay those taxes.¹⁷ Also, in-boundary customers are often the first to invest in the district's facilities and therefore bear a disproportionate share of the initial facilities' costs.¹⁸

Conclusion

It is the responsibility of the district's board to ensure that the rates and the methods used to set those rates are rationally related to a legitimate purpose of the district. In addition, district boards should take precautions to ensure that the rationality and reasonableness for such rates and rate-setting methods is clearly established in the governing documents and/or meeting minutes of the district. In doing so, the board will have helped insulate the district from challenges and potential litigation, and provided customers with a clear picture of the district's purposes for implementing such rates and rate-setting policies. Legal counsel should be consulted prior to adopting or changing a district's rates or rate-setting methods. 📌

¹⁵ § 32-1-1001(1)(k), C.R.S.

¹⁶ *Bennett Bear*, 928 P.2d at 1261.

¹⁷ Utility Fees, Rates and Collections, Colorado Dept. of Local Affairs, Handout p. 4 (June 16, 2010), <http://www.colorado.gov/cs/Satellite/DOLA-Main/CBON/1251594654279>. This is a helpful resource for district personnel to review when considering revisions to a district's rates or methods for setting rates.

¹⁸ *Id.*