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July 8, 2020



VIA CSM DROPBOX

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Rebuttal Comments of the County of San Diego in re Test Claim 17-TC-05

Dear Heather Halsey:

In accordance with Section 1183.3 of Title 2 of the California Code of Regulations, the County of San Diego, as principal claimant and in coordination with the City of San Juan Capistrano, (“Claimants”) submit these rebuttal comments to the State Water Resources Control Board (“State Water Board”) and the San Diego Regional Water Quality Control Board’s (“Regional Water Board”) (collectively, “Water Boards”) joint comments in opposition to Test Claim 17-TC-05 (“Opposition Brief”). This Rebuttal also responds to the late-filed opposition comments presented by the Department of Finance in this same Test Claim.¹ Claimants’ Test Claim seeks reimbursement for the costs of implementing the requirements of Regional Water Board Order No. R9-2017-0077 (“Trash Order”).

¹ The Department of Finance’s comments address only the issue of whether Claimants have fee authority. On this issue, the Department of Finance’s comments are substantially similar to the Water Boards’ comments and are addressed under the treatment of the Opposition Brief, unless otherwise noted.



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REBUTTAL

Contrary to the Water Boards' Opposition Brief, the activities mandated by the Trash Order² require Claimants to implement a "program," the program is "new," and Claimants lack adequate fee authority to pay the costs of implementing the new program under Section 6 of Article XIII B of the California Constitution ("Section 6").³ As a result, subvention is required.

I. TRASH ORDER REQUIRES CLAIMANTS TO IMPLEMENT A "PROGRAM"

The Water Boards assert that the Trash Order does not require Claimants to implement a "program" because submitting a letter and description of plans to coordinate with Caltrans to the Water Board are not public services⁴ and all dischargers are subject to the same or more stringent requirements.⁵ All assertions are incorrect.

The activities mandated by the Trash Order constitute a state mandated "program" under Section 6. The California Supreme Court articulated the following standard for determining if a state mandated activity constitutes a "program" under Section 6:

² The Trash Order requires Claimants to undertake four activities at issue here: (1) to select one of two tracks for implementing the Trash Provisions (the "Track Selection Mandate"); (2) for the County, which selected Track 1, submit jurisdictional maps and a time schedule, including interim milestones, for full implementation of trash capture devices; (3) for the City, which selected Track 2, to create an implementation plan describing which controls would be used, how those controls would achieve Full Capture System Equivalency, and generally justifying its selection of Track 2 (tasks (2) and (3) are referred to collectively as the "Implementation Plan Mandates"); and (4) to coordinate with Caltrans to install, operate, and maintain full capture systems, multi-benefit projects, and other controls in significant trash generating areas and/or priority land uses ("Coordination with Caltrans Mandate"). Trash Order pp. 10-11, attached to Test Claim at Section, 7, pp. 89-101. See also, e.g., Administrative Record ("AR") at pp. RB9 002049-2061.

³ Cal. Const. art. XIII B, § 6; Gov. Code, § 17556, subd. (d).

⁴ Opposition Brief at pp. 3, 18-19, 22.

⁵ Opposition Brief at pp. 24-26. The Opposition Brief addresses "unique requirements" and "statewide law or policy," in part under the question of whether the activities mandated by the Trash Order carry out a governmental function of providing services to the public. This Rebuttal addresses the Water Boards' arguments under their appropriate tests.



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What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term - programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.⁶

Thus, a “program” for purposes of Section 6 exists when the mandated activity either: (1) carries out the governmental function of providing services to the public, or (2) imposes unique requirements on local governments pursuant to a statewide law or policy that do not apply generally to all residents and entities in the state.⁷

Although only one of the standards must be met, the activities mandated by the Trash Order constitute a “program” under both standards.⁸

A. TRASH ORDER REQUIRES CLAIMANTS TO PROVIDE SERVICES TO THE PUBLIC

Contrary to the Water Boards’ arguments, the Trash Order requires Claimants to do more than merely submit a letter.⁹ The Trash Order requires Claimants to carry out the governmental function of providing flood control and pollution control services to the public in

⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

⁷ *Carmel Valley Fire Prot. Dist. v. State of California* (1987) 190 Cal.App.3d 521, 538 (noting that the “second” prong is an “alternative”).

⁸ The Water Boards also argue that the Commission should not consider Claimants to have taken the position that the Trash Order imposes a program under both tests because Claimants did not express how the tests could be met. Opposition Brief at p. 19. This is incorrect. Claimants described the “program background,” Test Claim § 5, subsection II, identified the specific “new programs and activities imposed on permittees, including Claimants,” *id.* § 5, subsection IV, and argued that the activities mandated by the Trash Order impose unique requirements on local governments that do not generally apply to all residents and entities in the state and they are intended to implement a state policy in accordance with the precedential cases of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 and *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537, *id.* § 5, subsection VI. This Rebuttal responds to the arguments raised by the Water Board.

⁹ Opposition Brief at pp. 3, 18-19, 22.



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specific ways compelled by the Water Boards. The Trash Order effectively converts Claimants’ flood control program into a pollution prevention program. In doing so, the State shifts its own obligation to control pollution in water onto Claimants.

1. FLOOD CONTROL IS A PUBLIC SERVICE

The Water Boards issued the Trash Order to Claimants as “Permittees” under a “Phase I MS4 Permit.”¹⁰ Claimants’ operation of a municipal separate storm sewer system (“MS4”) provides essential public flood control services that protect lives and communities from flooding by conveying stormwater away from structures, people, and activities and into surface waters.¹¹ The Water Boards do not dispute that the provision of flood control services constitutes a public service. Instead, they argue that Regional Water Board “does not require Claimants to operate an MS4 or discharge to surface waters.”¹² This argument is inapposite and is more properly considered a challenge to whether the state has “mandated” the actions at issue.¹³ In any case, the Water Boards’ argument is unfounded for three reasons.

First, Claimants do not allege in this Test Claim that the Water Boards require operation of an MS4; nor do they seek reimbursement for the cost of operating an MS4 – only for those increased costs resulting from compliance with the Trash Order.

¹⁰ Trash Order p. 1. An MS4 is a municipal separate storm sewer system. 40 C.F.R. § 122.26(b).

¹¹ See *House v. Los Angeles County Flood Control District* (1944) 25 Cal.2d 384, 388–389 (describing flood control as an exercise of police power); see also *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337–338. See also Water Code, §§ 8000-8061 (flood control by cities), 8100-8129 (flood control in counties).

¹² Opposition Brief at p. 21, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58.

¹³ See, *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 742 (“*Kern High School Dist.*”) (“activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice”).



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Second, the provision of flood control services to the public is a core function of Claimants' MS4s.¹⁴ In *Coast Community College District v. Commission on State Mandates*, the Third District Court of Appeal determined that "minimum conditions" imposed by the Education Code for community college districts to receive financial aid affected "core functions" that the districts were legally compelled to provide.¹⁵ Because the districts could not voluntarily cease providing the core functions, the "minimum conditions" were properly considered programs under Section 6.¹⁶ Similar to the districts in *Coast Community College District*, Claimants cannot stop providing public flood control services. As a practical matter, "rain water will run downhill, and not even a law passed by the Congress of the United States can stop that."¹⁷ Further, Claimants cannot stop conveying and discharging stormwater as a constitutional matter.¹⁸ Without Claimants' flood control services, flooding will occur, resulting in the potential taking of private property.¹⁹ Indeed, constitutional takings claims are premised entirely on the *public purpose* behind flood control activities.²⁰ Unlike the school districts' voluntary participation in the underlying programs in *Kern High School District*, Claimants do not operate the MS4 as a result of a discretionary decision, but are legally compelled to do so.²¹ Very real penalties arise if Claimants fail to provide flood control services to the public.²² By adopting the Trash

¹⁴ See *Coast Community College District v. Commission on State Mandates* (2020) 47 Cal.App.5th 415, 433, as modified on denial of reh'g (May 1, 2020), review filed (June 10, 2020).

¹⁵ *Coast Community College District v. Commission on State Mandates* (2020) 47 Cal.App.5th 415, 433, as modified on denial of reh'g (May 1, 2020), review filed (June 10, 2020).

¹⁶ *Ibid.*

¹⁷ See *Hughey v. JMS Development Corp.* (11th Cir. 1996) 78 F.3d 1523, 1530.

¹⁸ See Cal. Const. art. I, § 19; see also *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337–338 ("a governmental entity may be liable under the principles of inverse condemnation for downstream damage").

¹⁹ See, e.g., *Locklin*, 7 Cal.4th at pp. 337–338.

²⁰ *Ibid.*

²¹ Cf. *Kern High School Dist.*, *supra*, 30 Cal.4th at 742 with Opposition Brief at p. 21.

²² See, e.g., *ibid.*; *Kern High School Dist.*, *supra*, 30 Cal.4th at p. 742.



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Provisions²³ and the Trash Order, the Water Boards directed Claimants to operate the “core functions” of their flood control programs in particular ways related to the control of trash.

Third, as will be set forth in Section I.B, below, the Water Boards’ reliance on *County of Los Angeles v. State of California*, 43 Cal.3d 46, 58 actually contradicts their position.

2. POLLUTION CONTROL IS A PUBLIC SERVICE

Nevertheless, the Water Boards argue that the mandates at issue do not force Claimants to carry out the governmental function of providing services to the public because the mandates are imposed as part of permittee’s authorization to discharge to surface waters.²⁴ Through the activities mandated by the Trash Order, however, the Water Boards require Claimants to provide the public service of flood control in specific, detailed ways that also control trash generated by society, which are activities unrelated to flood control.

The activities mandated by the Trash Order effectively convert Claimants’ *flood control* program into a *pollution control* program.²⁵ The Track Selection Mandate requires Claimants to plan for the use of the MS4s to control trash.²⁶ The Implementation Plan Mandates obligate those MS4s who selected Track 1 to submit jurisdictional maps and a time schedule for implementing full trash capture devices and those who selected Track 2 to create an

²³ As used herein, the term “Trash Provisions” refers to Amendments to the Water Quality Control Plan for Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California, adopted by the State Water Board pursuant to Resolution No. 2015-0019 to establish a statewide narrative water quality objective and implementation requirements to control trash with respect to the surface waters of the State. A copy of the Trash Provisions was provided in the Section 7 Documentation filed with the Test Claim at pages 7-2 – 7-88.

²⁴ Opposition Brief at p. 20-21, citing *County of Los Angeles v. Dep’t. of Ind. Relations* (1989) 214 Cal.App.3d 1538, 1540-1541.

²⁵ Trash Order pp. 10-11.

²⁶ *Ibid.*



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implementation plan for controlling trash generated by society.²⁷ The Coordination with Caltrans Mandate requires Claimants to work with Caltrans to implement multi-benefit projects and other controls in trash generating areas.²⁸ Unlike the operation of an elevator by public and private entities alike in *Dept. of Industrial Relations*, the provision of flood control and the control of society-generated trash are uniquely public services.

The Water Boards also argue that the Trash Order does not require the provision of a public service because Claimants were “merely providing information” by submitting a letter identifying Claimants’ selected method of compliance and plan for coordinating with Caltrans.²⁹ Even the Water Boards, however, recognize that each of the activities mandated by the Trash Order is intended to implement the “initial procedural steps” in providing the public service of reducing society’s discharge of pollutants to waters of the state.³⁰ Through the mechanism of the Trash Order, the Water Boards require Claimants to use their flood control systems (which are only designed to protect the public health and safety from flooding) to also provide the public service of cleaning up the pollution generated by society.

There is no real dispute that to comply with the Trash Order, Claimants must augment their flood control public services by planning for and controlling pollutants generated by society as a whole and these activities constitute a program that provides a public service.

²⁷ *Ibid.* The Water Boards note that the City provided estimated costs for performing trash collection services and assert that the Trash Order did not require Claimants to implement any substantive trash control requirements. Opposition Brief at p. 20. If, however, as noted below at Section I.B.3, the Water Boards assert that the general discharge prohibition in the Trash Provisions is directly applicable to dischargers, then costs associated with collecting trash as required by the Implementation Plan (itself an “Ongoing Implementation Mandate”) is properly before the Commission. This Rebuttal, therefore, also addresses the Water Boards’ arguments related to the “Ongoing Implementation Mandates.”

²⁸ *Ibid.*

²⁹ Opposition Brief at p. 19.

³⁰ Opposition Brief at p. 2, 4, 22.



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**3. THE TRASH ORDER SHIFTS THE WATER BOARDS’
POLLUTION CONTROL OBLIGATIONS ONTO CLAIMANTS**

Through the activities mandated by the Trash Order, the Water Boards also shift to Claimants the Water Boards’ own obligation to control pollution in waters of the state. The Water Boards, however, assert that the “Trash Orders do not shift any responsibility from the State on to the Claimants[.]”³¹ The Water Boards’ assertion is unsupported and incorrect.

The Water Boards are statutorily required to regulate pollutant discharges to waters of the state and United States.³² The Water Boards directly regulate thousands of dischargers through individual and general permits.³³ Rather than directly imposing the activities mandated by the Trash Order on the entities that generate pollutants, by requiring those who generate trash to actively collect and properly dispose of trash, the Water Boards have passed along that responsibility to Claimants by compelling Claimants to exercise their flood control police power and land use authority to regulate trash generating activities and to collect trash from those who fail to properly dispose of it.

For example, the Trash Order requires Claimants to take initial steps to retrofit existing flood control infrastructure with full capture devices or to implement equivalent

³¹ Opposition Brief at pp. 25, 28 (arguing that the activities mandated by the Trash Order do not shift responsibility from the Water Boards to Claimants), citing *County of Los Angeles v. Comm’n on State Mandates* (2003) 110 Cal.App.4th 1176.

³² Water Code, §§ 13160 (“state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act...”), 13263 (“The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge...”); see also *San Francisco Baykeeper v. Levin Enterprises, Inc.* (N.D. Cal. 2013) 12 F.Supp.3d 1208, 1211.)

³³ See, e.g., Opposition Brief at pp. 8, 20, 26 (noting issuance of Industrial General Permit and Construction General Permit).



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measures to capture trash generated by the public generally.³⁴ The public's improper disposal of trash may or may not be a direct violation of the Trash Provisions,³⁵ however, the Trash Order requires Claimants to clean up and prevent such improperly discarded trash from entering waters of the State via MS4s.³⁶ Claimants may also be liable for failing to implement such protective measures, even though Claimants do not generate the trash at issue.³⁷

Even though the Water Boards are obligated to control pollution in waters of the state, they used the Trash Order to require Claimants to modify their flood control programs to control trash created by the public. The activities mandated by the Trash Order thus require quintessential public services, which constitute a “program” for purposes of subvention under Section 6.

B. THE TRASH ORDER IMPOSES UNIQUE REQUIREMENTS ON LOCAL GOVERNMENTS

There is no need to address the second, independent test of what constitutes a “program” in *County of Los Angeles*, because the Trash Order requires Claimants to carry out the governmental function of providing services to the public.³⁸ Nevertheless, the Water Boards also argue the activities mandated by the Trash Order do not impose unique requirements on Claimants because: (1) all dischargers, including state and federal entities, and private discharges such as industrial and construction sites, must comply with the “outright prohibition” on trash

³⁴ See Trash Order at pp. 3, 10-11; see also, e.g., AR RB9 002051, 002058-002059 (requiring Claimants to “Install, operate, and maintain Full Capture Systems(FN) for all storm drains that capture runoff from the Priority Land Uses in their jurisdictions”).

³⁵ Cf. Opposition Brief at p. 8 (asserting the Trash Provisions may be directly enforced through discharge prohibition) with Opposition Brief at p. 25-26 (recognizing the Trash Provisions are “implemented in Phase I MS4 Permits issued to local governments”).

³⁶ See Trash Order at pp. 3, 10-11 (requiring installation of “Full Capture Systems” or their equivalent, designed to capture trash generated by society); see also, e.g., AR RB9 002051, 002058-002059.

³⁷ Trash Order at p. 12, AR RB9 002060 Test Claim p. 7-99.

³⁸ *County of Los Angeles, supra*, 43 Cal.3d at p. 56; see also, *Carmel Valley Fire Prot. Dist., supra*, 190 Cal.App.3d at p. 538 (noting that the “second” prong is an “alternative”).



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discharges in the Trash Provisions;³⁹ and (2) the Trash Order imposes a “less stringent implementation path[.]”⁴⁰ The Water Boards also assert that it is “not ripe” for Claimants to assert the Trash Order imposes unique requirements on Claimants, because no MS4 Permit requires implementation of the Trash Provisions.⁴¹

These arguments are incorrect and are addressed in turn.

1. THE TRASH ORDER DOES NOT APPLY TO THE PUBLIC GENERALLY.

The Trash Order is the executive order at issue in this Test Claim. Nevertheless, the Water Boards claim that Water Code section 13383 (“Section 13383”) orders can be sent to both public and private entities, and any entity “that received a Water Code section 13383 order would have the same obligation to submit information (albeit different information) to the Water Boards.”⁴² The Water Boards’ arguments lack merit for two reasons.

First, the Water Boards recognize that members of the public generally were not issued a Section 13383 order and that the Trash Order at issue here does not apply to the public generally.⁴³ This admission is dispositive of this alternative standard under *County of Los Angeles*.

Second, Section 13383 does not impose the activities mandated by the Trash Order and is not challenged in the present Test Claim. Section 13383 provides, in relevant part:

³⁹ Opposition Brief at pp. 18-25.

⁴⁰ Opposition Brief at pp. 20, 21-26, citing *City of Sacramento v. California* (1990) 50 Cal.3d 51, 57, 67-69; *City of Richmond v. Comm’n on State Mandates* (1998) 64 Cal.App.4th 1190, 1193, 1197-1199.

⁴¹ Opposition Brief at pp. 3, 20.

⁴² Opposition Brief at pp. 19, 22.

⁴³ See, e.g., Opposition Brief at p 20 (industrial dischargers “did not receive Water Code section 13383 orders requiring them to submit written notification of their selected track or to submit an implementation plan for Track 2.”)



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(a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements ... for any person who discharges, or proposes to discharge, to navigable waters ...⁴⁴

Nowhere in Section 13383 are Claimants required to select one of two tracks for implementing the Trash Provisions, to create an implementation plan, to coordinate with Caltrans, or to comply with the Trash Provisions. Section 13383 does not require the public generally to undertake the activities mandated by the Trash Order. Further, the Water Boards did not issue Section 13383 orders to “all residents and entities in the state” or otherwise require the general public to identify the means of complying with the Trash Provisions, to create an implementation plan for compliance, or to coordinate with Caltrans to control trash.⁴⁵ Section 13383 does not impose the activities mandated by the Trash Order on Claimants, is not at issue here, and provides no support for the Water Boards’ position.

2. GENERAL PROHIBITION APPLIES UNIQUELY TO LOCAL GOVERNMENTS THROUGH THE TRASH ORDER

The Water Boards next argue that the Trash Provisions and their “outright prohibition” apply “to all dischargers of trash to surface waters, whether public or private.”⁴⁶ The Water Boards’ reliance on the statewide “outright prohibition” argument is misplaced for five reasons.

⁴⁴ Water Code, § 13383, subd. (a).

⁴⁵ *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d at p. 56; see also *Carmel Valley Fire Protection Dist.*, *supra*, 190 Cal.App.3d at p. 537.

⁴⁶ Opposition Brief at p. 20, see also *id.* at pp. 20, 24 (recognizing the requirements of the Trash Orders are not unique to local government ... because industrial dischargers are required to comply with the outright prohibition “by eliminating all trash discharges when the Trash Provisions are implemented in their NPDES permits”).



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First, the Test Claim challenges specific activities mandated in the Trash Order, not the Trash Provisions. There is no dispute that the Trash Order imposes the activities mandated by the Trash Order.⁴⁷

Second, even if the outright prohibition in the Trash Provisions was properly at issue in this Test Claim, which it is not, the prohibition applies uniquely to Claimants when compared with its application to private dischargers.⁴⁸ In *County of Los Angeles*, 43 Cal.3d 46, the California Supreme Court determined that when a state mandate imposes requirements on local government that are “distinguishable” from those imposed on private entities, the mandate is unique to local government, but if they are “indistinguishable,” they are not unique to local government.⁴⁹ The Water Boards recognize that the Trash Provisions treat MS4s, including Claimants, in a manner that is distinguishable from the public generally, but characterize these different requirements as “more lenient” or “less stringent” and therefore, as not unique under *County of Los Angeles*.⁵⁰ There is, however, no dispute that the Trash Order (and Trash Provisions) distinguish Claimants from the public generally and do not require private entities to implement the activities mandated by the Trash Order. The Trash Order specifically recognizes that the Permittees, including Claimant, have “regulatory authority” over the Priority Land Uses where trash is to be controlled.⁵¹ Indeed, the only reason that the Trash Order could be imposed

⁴⁷ Cf. Test Claim, § 5, subsection VI with Opposition Brief at pp. 10-11 (“The first directive required San Diego Region MS4 owners and operators to submit a written notice stating selection of Track 1 or Track 2 to comply with the trash discharge prohibition.”).

⁴⁸ Cf. *County of Los Angeles*, *supra*, 43 Cal.3d 46 with Opposition Brief at p. 24-26; citing *City of Sacramento v. California* (1990) 50 Cal.3d 51, 57, 67-69; *City of Richmond*, *supra*, 64 Cal.App.4th at pp. 1193, 1197-1199.

⁴⁹ *County of Los Angeles*, 43 Cal.3d at p. 58 (concluding that Labor Code provisions imposed requirements that were “indistinguishable” as applied to public and private employers).

⁵⁰ Opposition Brief at p. 24-26; citing *City of Sacramento*, *supra*, 50 Cal.3d at pp. 57, 67-69; *City of Richmond*, *supra*, 64 Cal.App.4th at pp., 1193, 1197-1199; *State of California Dept. of Fin. V. Comm’n on State Mandates*, Los Angeles County Superior Court Case No. BS130730, Order Granting Petition for Writ of Mandate (Post-Remand) and Denying Cross-Petitions a Moot, Feb. 9, 2018, p. 14 (“*Los Angeles Mandates Case*”).

⁵¹ Trash Order p. 2, 5.



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by the Regional Board in the first place is because Claimant and the other Permittees have such “regulatory authority.”⁵²

Third, the cases relied on by the Water Boards actually support the conclusion that the Trash Order imposes unique requirements on local government. In *County of Los Angeles*, the court concluded that the Labor Code provisions at issue imposed requirements that were “indistinguishable” as applied to public and private employers.⁵³ In *City of Sacramento*, the court found that “[m]ost private employers in the state already were required to provide unemployment protection to their employees[.]”⁵⁴ In *City of Richmond*, the court noted that challenged Labor Code provisions made “workers’ compensation death benefit requirements as applicable to local governments as they are to private employers.”⁵⁵ None of these three cases presented facts as presented by this Test Claim, where an executive order imposes specific requirements on local government based on the attributes of that government, i.e., regulatory authority and the operation of *municipal* storm sewer systems. Further, the trial court’s decision in the *Los Angeles Mandates Case* has been appealed and is no longer citable as law.

Fourth, the activities mandated by the Trash Order are not “less stringent” or “more lenient” than the outright prohibition in the Trash Provisions. As applied to the public generally, either through direct enforcement or through separate NPDES permits, the outright prohibition would regulate only the trash-generating entity itself by preventing that entity from

⁵² The Water Boards also appear to argue that public agencies constitute the public for purposes of the second prong of the analysis. Opposition Brief at pp. 22-23 (referring to United States Marine Corps (USMC) Recruit Depot, USMC Base Camp Pendleton (MCBCP), the Veterans Affairs San Diego Healthcare System, California State University San Marcos (CSUSM), and R.J. Donovan Correctional Facility at Rock Mountain). This is incorrect. Public agencies do not constitute “all residents and entities in the state” as set forth in *County of Los Angeles*. 43 Cal.3d at pp. 49-50 (“the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities”).

⁵³ *County of Los Angeles, supra*, 43 Cal.3d at p. 58.

⁵⁴ *City of Sacramento, supra*, 50 Cal.3d at p. 67.

⁵⁵ *City of Richmond, supra*, 64 Cal.App.4th at p. 1199.



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discharging its own trash into waters of the State.⁵⁶ The activities mandated by the Trash Order, however, require Claimants to plan for and ultimately prevent trash *generated by third parties*, which is improperly discarded in violation of the Trash Provisions, to collect that trash and prevent it from discharging to waters of the State.⁵⁷ While non-municipal dischargers are required to control their own trash, Claimants are required to control trash generated by the general public and third-party dischargers. Private dischargers, however, are not required to control trash generated at locations and by activities unrelated to that private entity. The activities mandated by the Trash Order, therefore, constitute a “distinguishable” and more stringent, not a less stringent, requirement than is imposed on the public generally.

Fifth, the Water Boards also cite to trash control requirements in NPDES permits issued to industrial dischargers and construction site operators as evidence that the “public generally” is subject to more stringent requirements.⁵⁸ This is incorrect. Industrial and construction dischargers are a small portion of the “public generally.” Further, they are not required to undertake the activities mandated by the Trash Order or to create and implement a plan to capture trash generated by third parties.⁵⁹ Indeed, the Trash Provisions require Claimants to capture trash generated from priority land uses, which include *industrial* properties.⁶⁰ Finally, Claimants are, at times, subject to the requirements of the Industrial General Permit and/or Construction General Permit based on their own activities. This Test Claim does not seek a subvention of funds for the costs of complying with the trash control requirements imposed

⁵⁶ AR 6198, 6212.

⁵⁷ AR 6200, 6212 (requiring MS4s to capture runoff and trash).

⁵⁸ See Opposition Brief at pp. 22, 24, 26.

⁵⁹ See Opposition Brief at pp. 1-2, 7-9, 20-26.

⁶⁰ AR 6208, 6221 (Trash Provisions define “Priority Land Uses” to include, in part, “industrial: land uses where the primary activities on the developed parcels involve product manufacture, storage, or distribution (e.g., manufacturing businesses, warehouses, equipment storage lots, junkyards, wholesale businesses, distribution centers, or building material sales yards)).



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through those permits. This Test Claim only addresses the activities mandated by the Water Boards through the Trash Order.⁶¹

The activities mandated by the Trash Order obligate Claimants to provide quintessential flood control and pollution control services to the public and impose requirements unique to Claimants and distinguishable from the requirements applicable to the public generally.

3. THE WATER BOARDS' RIPENESS ARGUMENT IS UNFOUNDED

Finally, the Water Boards' ripeness argument is unfounded.⁶² If, as the Water Boards assert, the general discharge prohibition in the Trash Provisions is directly applicable to dischargers, then the Ongoing Implementation Mandate in the Trash Order is properly before this Commission. If, as the Water Boards also assert, the Ongoing Implementation Mandate is unripe because no MS4 Permit yet requires implementation of the Trash Provisions, then the Water Boards' arguments regarding the applicability of the discharge prohibition to the public generally are unfounded and there is no remaining basis to claim the prohibition applies to the public generally.

⁶¹ Claimants do not miss the Water Boards' thinly-veiled threat to require MS4 operators to comply with a zero discharge requirement – in effect an “end of pipe” numeric effluent limitation. Opposition Brief at p. 26 (“the state and regional water boards [may be encouraged] to issue orders imposing the same standards on MS4 operators as on other storm water discharges, potentially at greater cost to local governments”). However, by requiring Claimants to implement specific activities that exceed federal law (either as strict compliance with numeric limitations or as strict compliance with specific mandated activities), the State would remove flexibility reserved to MS4s to create their own programs, and thus directly mandate particular programs and activities for purposes of Section 6. See, *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167 (noting that inclusion of numeric limitations in an MS4 permit is discretionary). See also *Department of Finance, supra*, 1 Cal.5th at 767 (the Regional Board “was not required by federal law to impose any specific permit conditions.”).

⁶² Opposition Brief at pp. 20, 26.



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II. TRASH ORDER REQUIRES A “NEW” PROGRAM OR HIGHER LEVELS OF SERVICE

The activities mandated by the Trash Order are “new” programs or higher levels of service pursuant to Section 6 because the legal requirements in effect prior to adoption of the Trash Order – and indeed before adoption of the Trash Provisions – did not require Claimants to undertake any of the activities mandated by the Trash Order.⁶³ Under *San Diego Unified School District*, the California Supreme Court confirmed that a program or services are “new” or “higher” for purposes of Section 6 if “they did not exist prior to the enactment of [the challenged state action].”⁶⁴

The Water Boards, however, argue that the activities mandated by the Trash Order do not require “new” programs or higher levels of service for three incorrect reasons.

First, the Water Boards argue that every MS4 permit issued to either Claimant since 1990 required Claimants to implement and report on control measures “to reduce the discharge of pollutants, including trash from covered MS4s ... to the maximum extent practicable.”⁶⁵ The Water Boards, however, do not identify any pre-existing requirement to select one of two tracks for implementing the Trash Provisions, to create an implementation plan, to capture all trash from priority land uses before it entered the MS4, or to coordinate with Caltrans. To the contrary, the Water Boards recognize that the Trash Order requirements “build

⁶³ See Test Claim, §5, subsection IV; see also *San Diego Unified School Dist. v. Comm’n on State Mandates* (2004) 33 Cal.4th 859, 878.

⁶⁴ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at p. 878.

⁶⁵ Opposition Brief at pp. 25-27, citing *Environmental Defense Center v. U.S. EPA* (9th Cir. 2003) 344 F.3d 832, 840-41. Mandates imposed on Claimants in MS4 permit(s) are subject to separate test claims. This Rebuttal does not make any admissions or waive any arguments or defenses in those test claims.



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on” the requirements in existing permits.⁶⁶ Further, the case of *Environmental Defense Center*, cited by the Water Boards, does not impose the activities mandated by the Trash Order.⁶⁷ It simply discusses how stormwater picks up pollutants generated by others. Thus, there is no real dispute that the activities mandated by the Trash Order are new.

Second, the Water Boards implicitly argue that there is not, and can never be, any new program or higher level of service because the maximum extent practicable (“MEP”) standard has always been the applicable standard.⁶⁸ The California Supreme Court and Third District have both rejected this argument.⁶⁹

Third, the Water Boards argue that the “Trash Order does not shift any responsibility from the State[.]”⁷⁰ As set forth in Section I.A.3, above, the Water Boards *are* shifting their obligation to protect water quality onto Claimants to control trash generated by third parties through specific uses of Claimants’ land use authority and police power.⁷¹

Not only do the activities mandated by the Trash Order shift the Water Boards’ responsibilities to Claimants, the Water Boards’ reliance on *County of Los Angeles v. Commission on State Mandates* is misplaced. In that case, the Second District Court of Appeal

⁶⁶ Opposition Brief at p. 27, citing 55 Fed. Reg. 47990, 48052 (Nov. 16, 1990). There is also no argument here that the activities mandated by the Trash Order are required by federal law. The federal register reference does not require the activities mandated by the Trash Order.

⁶⁷ *Environmental Defense Center*, 344 F.3d at 840-841. The Water Boards’ reference to *Environmental Defense Center*, however, demonstrates the public service nature of the activities mandated by the Trash Order: the Trash Order requires Claimants to clean up trash created by society generally and carried through the storm drain system.

⁶⁸ Opposition Brief at pp. 25-27.

⁶⁹ *Dept. of Finance v. Comm’n on State Mandates* (2016) 1 Cal.5th 749, 768 (“the Regional Board had discretion to fashion requirements which it determined would meet the CWA’s maximum extent practicable standard”); *San Diego Mandates*, 18 Cal.App.5th at pp. 681 (“The ‘maximum extent practicable’ standard by its nature is discretionary and does not by itself impose a federal mandate for purposes of section 6.”).

⁷⁰ Opposition Brief at pp. 25, 28, citing *County of Los Angeles, supra*, 110 Cal.App.4th at p. 1194.

⁷¹ Cf. Opposition Brief at pp. 25, 28 (arguing that the activities mandated by the Trash Order do not shift responsibility from the Water Boards to Claimants) citing *County of Los Angeles*, 110 Cal.App.4th at pp. 1191, 1194).



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surveyed cases addressing when a shift of responsibilities from the state to the local government creates a “new” program for purposes of Section 6, and concluded no shift in obligations occurs when the state provides funding to implement certain programs and also requires a portion of the funding to be allocated to a particular activity.⁷² Here, the Water Boards shifted their responsibility to Claimants, imposed new programs or higher levels of service, and failed to provide any funding to implement the activities mandated by the Trash Order, much less dictate how that funding must be allocated.

III. SUBVENTION IS REQUIRED BECAUSE CLAIMANTS LACK FEE AUTHORITY

The Water Boards do not dispute that any charge, fee, or assessment levied to pay the costs of the activities mandated by the Trash Order must “be no more than necessary to cover the reasonable costs of the government activity”⁷³ and that “the manner in which those costs are allocated to a payer must bear a fair or reasonable relationship to the payer’s burdens on, or benefits received from, the activity funded by the fee.”⁷⁴ There also appears to be no dispute that the benefits provided by Claimants’ implementation of the activities mandated by the Trash Order are designed “to address the impacts trash has on the beneficial uses of surface waters” which means the benefits of Claimants’ activities under the Trash Order are conferred on *all* persons within Claimants’ jurisdictions.⁷⁵ There is also no dispute that property-related fees are subject to voter-approval and justify a subvention under Section 6.⁷⁶

⁷² 110 Cal.App.4th at pp. 1191-1194.

⁷³ Cf Test Claim, § 5, subsection X, (citing *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874) with Opposition Brief at pp. 28-32.

⁷⁴ Cf Test Claim, § 5, subsection X.A.1 (citing Cal. Const. art. XIII C §§ 1(e)(1), (2)) with Opposition Brief at pp. 28-32.

⁷⁵ Cf. Test Claim, § 5, subsection X.A.1 (citing Trash Provisions at p. 1, AR 00744 (“The State Water Board’s project objective for the proposed Trash Amendments is to address the impacts of trash to the surface waters in



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Instead, the Water Boards merely identify six general sources of authority without ever addressing Claimants’ inability to structure a levy under these authorities to meet the substantive requirements that would exempt these levies from the definition of tax or from the voter-approval requirements of property-related fees: “inspection fees,”⁷⁷ “regulatory fees,”⁷⁸ “fees from developers,”⁷⁹ “Health and Safety Code section 5471 and Public Resources Code section 40059, subdivision (a)(1)”⁸⁰ and the California Watershed Improvement Act of 2009.⁸¹ The Water Boards also assert Assembly Bill 2403 (2014)⁸² (“AB 2403”) and Senate Bill 231 (2017)⁸³ (“SB 231”) “confirm that Claimants have authority to raise fees, without voter approval”⁸⁴ and that “[e]ven if a voter-approval requirement did apply, the requirement does not obviate Claimants’ fee authority.”⁸⁵

Each assertion is wrong.

California”), 00946 (same), 01117 (same), 01319 (same), 05910 (same), 06127 (same), 06627 (same)) with Opposition Brief at pp. 28-32.

⁷⁶ Cf. Test Claim, § 5, subsection X.A.2 with Opening Brief at pp. 28-32.

⁷⁷ Opposition Brief at p. 28, citing *Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842, 844.

⁷⁸ Opposition Brief at p. 28, citing *Sinclair Paint Co., supra*, 15 Cal.4th at pp. 876-877; *Cal. Farm Bur. Federation v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437-438; *Cal. Ass’n of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 945; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1319, 1326.

⁷⁹ Opposition Brief at pp. 28-29, citing *Sinclair Paint, supra*, 15 Cal.4th at p. 877.

⁸⁰ Opposition Brief at p. 30.

⁸¹ Wat. Code, §§ 16100 to 16104; Opposition Brief at p. 30.

⁸² Opposition Brief at p. 29, citing Cal. Stats. 2014, ch. 78, § 2. The Opposition Brief refers to “AB 2043” but this brief refers to the correct bill number: “AB 2403.”

⁸³ *Id.*, citing Stats, 2017, ch. 536, § 2.

⁸⁴ Opposition Brief at pp. 29.

⁸⁵ Opposition Brief at pp. 29-32, citing *Paradise Irrigation Dist. v. Comm’n on State Mandates* (2019) 33 Cal.App.5th 174, 180-182, 187-189, 194-197; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401; and taxes imposed by “the cities of Culver City, Alameda, Palo Alto, San Clemente, San Jose, and Santa Cruz” as well as “the County of Los Angeles[.]”).



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A. CONSTITUTIONAL LIMITATIONS ON REVENUE GENERATION

A tax is “*any* levy, charge, or exaction *of any kind* imposed by a local government” unless one of seven specific exceptions from the definition of “tax” applies.⁸⁶ Two exemptions are relevant to the Water Boards’ arguments here:

(a) charges for benefits or privileges, or for a government service or product;⁸⁷ and

(b) property-related fees imposed pursuant to California Constitution Article XIII D (“Article XIII D”).⁸⁸

To avoid characterization as a “tax,” a fee must meet the requirements of an exception.

1. EXCEPTION FOR CHARGES FOR BENEFITS, PRIVILEGES, SERVICES, OR PRODUCTS

The Water Boards do not dispute that charges for benefits, privileges, services, or products must be “...provided directly to the payor ...[and] not provided to those not charged,” (the “exclusive allocation” requirement), and must “not exceed the reasonable costs [of the government activity]” (a “proportionality” requirement).⁸⁹ A charge does not meet the “exclusive allocation” requirement when a payor bears a disproportionate share of the fiscal burden of the benefit, privilege, service or product provided, or when the fee funds a governmental activity benefitting the public at large or those not paying the fee.⁹⁰

⁸⁶ Cal. Const. art. XIII C, § 1, subd. (e) (emphasis added).

⁸⁷ Cal. Const. art. XIII C, § 1, subds. (e)(1), (2).

⁸⁸ Cal. Const. art. XIII C, § 1, subd. (e)(7).

⁸⁹ Cal. Const. art. XIII C, § 1, subds. (e)(1), (2).

⁹⁰ Cal. Const. art. XIII C, § 1, subd. (e); *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 (determining, “it is clear from the text itself that voters intended to adopt two separate requirements: To qualify as a nontax ‘fee’ under article XIII C, as amended, a charge must satisfy both the



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Any charges for benefits, privileges, services, or products will fail to meet either the exclusive allocation or proportionality requirement is a tax, regardless of the source of authority for the “fee.”

2. EXCEPTION FOR PROPERTY-RELATED FEES

Property-related fees have similar proportionality and exclusive allocation requirements, including, as relevant here, the following:

- (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
- (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
- (3) The amount of a fee or charge ... shall not exceed the proportional cost of the service attributable to the parcel.
- ...
- (5) No fee or charge may be imposed for general governmental services.⁹¹

Unless an exception applies, a property-related fee that meets the proportionality and exclusive allocation requirements is then subject to two layers of voter approval. The first layer of approval authorizes a majority of affected owners to submit written protests at a noticed

requirement that it be fixed in an amount that is ‘no more than necessary to cover the reasonable costs of the governmental activity,’ and the requirement that ‘the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.’”).

⁹¹ Cal. Const. art. XIII D, § 6, subd. (c) (“Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.”).



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public hearing called for this purpose, prohibiting the agency from adopting the fees.⁹² The second layer of approval provides that new or increased property-related fees may not be imposed “unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.”⁹³

Sewer, water, and refuse collection services are excepted from the second layer of approval and fees for these services are only required to comply with the first layer – the majority protest process. The “[majority] protest procedure implemented by Proposition 218 is not properly construed as a deprivation of fee authority” for purposes of Section 6.⁹⁴ *Paradise Irrigation District v. Commission on State Mandates* nevertheless recognized that all other property-related fees, which are subject to voter approval, are taxes for purposes of Section 6, stating, “[majority] *protest* procedures for fees ... [are] in contrast to the voter-approval requirement imposed by Proposition 218 before new taxes may be imposed.”⁹⁵

For purposes of Section 6, it is insufficient for a fee to merely meet an exception. Section 6 requires subvention, unless, in part, the local government has “authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.”⁹⁶ When voter-approval is required before a local government can impose a fee, such as with a tax, the local government’s costs are not “recoverable” because it lacks authority to impose the fee.⁹⁷ Thus, even when a fee qualifies for an exemption from the definition of “tax,”

⁹² Cal. Const. art. XIII D, § 6 subd. (a)(2).

⁹³ Cal. Const. art. XIII D, § 6 subd. (c); see also *City of Salinas*, 98 Cal.App.4th at pp. 1356-1358.

⁹⁴ *Paradise Irrigation Dist.*, *supra*, 33 Cal.App.5th at p. 194.

⁹⁵ *Id.* at p. 192 (emphasis in original).

⁹⁶ Gov. Code, § 17556, subd. (d).

⁹⁷ See, *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Legislature effectively – and properly – construed ‘costs’ as excluding expenses that are *recoverable* from sources other than taxes”) (emphasis added); see also *Paradise Irrigation Dist. v. Comm’n on State Mandates*, 33 Cal.App.5th at p. 192 (“new taxes require voter consent”).



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if that fee still requires approval by voters, Section 6 should still require subvention. Given these constitutional requirements, the Water Boards are incorrect when they assert that Claimants have six sources of authority to levy non-tax and non- property-related fees.⁹⁸ As set forth in the following section, any fee adopted pursuant to these six authorities will either fail to satisfy either the substantive “exclusive allocation” or “proportionality” requirements that exempt a fee from the definition of “tax” or will qualify as a property-related fee subject to voter approval.⁹⁹

B. EVERY SOURCE OF AUTHORITY IDENTIFIED BY THE WATER BOARDS IS A TAX IF IMPOSED TO PAY FOR THE TRASH ORDER MANDATED ACTIVITIES

Claimants’ Test Claim describes how any levy, charge, or assessment to fund the activities mandated by the Trash Order would provide a benefit to more than those who pay the fee contrary to the exclusive allocation and proportionality requirements.¹⁰⁰ The Water Boards do not dispute this.¹⁰¹ As a result, none of the general sources of authority identified by the Water Boards provide Claimants with non-tax authority to levy charges, fees, or assessments, and the Water Board does not dispute that none of the general sources of authority can be implemented in a manner that meets the requirements for an exemption from a “tax.”¹⁰² Further, any property-related fee authority identified by the Water Boards would be subject to both layers of voter approval. As such, every funding source identified by the Water Boards would be subject to voter approval and subject to subvention under Section 6 if imposed to fund the activities mandated by the Trash Order.

⁹⁸ Opposition Brief at pp. 28-32.

⁹⁹ Cal. Const. art. XIII C, § 1, subs. (e)(1), (2), (7).

¹⁰⁰ Test Claim, § 5, subsection X.A.

¹⁰¹ Cf. Test Claim § 5, subsection X.A.1 with Opposition Brief at pp. 28-32.

¹⁰² Gov. Code, § 17556, subd. (d).



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1. INSPECTION FEES DO NOT MEET REQUIREMENTS FOR AN EXEMPTION FROM TAXES

Claimants cannot impose “inspection” fees for the costs of any activities mandated by the Trash Order.¹⁰³ The Water Boards do not specify who or what would be subject to an inspection fee to fund such activities, but state only that “inspection fees have been held not to be subject to Proposition 218.”¹⁰⁴ The costs of implementing the activities mandated by the Trash Order do not include costs for conducting inspections. It would be contrary to the exclusive allocation and proportionality requirements to charge persons for the costs of inspections that were never conducted.

Even if the Test Claim sought a subvention of funds for inspection costs, which it does not, *Apartment Ass’n of Los Angeles County* does not provide any authority to impose inspection fees on all residential properties as the Water Boards suggest. Indeed, this case stands for the opposite. *Apartment Ass’n* addressed an inspection fee imposed on owners of residential *rental* properties “by virtue of their ownership of a business.”¹⁰⁵ The court rightly notes that an inspection fee imposed on residential properties absent a business would be a property-related fee subject to voter approval.¹⁰⁶

It is undisputed that an inspection fee must meet both the substantive exclusive allocation and proportionality requirements. An inspection fee on residential properties as suggested by the Water Boards would violate the exclusive allocation and proportionality requirements because it would be charged to individuals who would not receive an inspection.

¹⁰³ Opposition Brief at p. 28.

¹⁰⁴ *Ibid.*, citing *Apartment Ass’n of Los Angeles County*, *supra*, 24 Cal.4th at pp. 842, 844-845. The fee at issue in *Apartment Ass’n of Los Angeles* was a regulatory fee. *Id.* at p. 838 (the “levy is regulatory (as this inspection fee clearly is)”).

¹⁰⁵ *Apartment Ass’n of Los Angeles County*, *supra*, 24 Cal.4th at p. 842.

¹⁰⁶ *Id.* at p. 838.



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Further, as set forth in *Apartment Ass'n of Los Angeles*, such a charge would constitute a property-related fee subject to voter approval, qualifying it for subvention under Section 6.

2. FEES ON UNDEVELOPED PROPERTY AND REGULATORY FEES DO NOT MEET REQUIREMENTS FOR AN EXEMPTION FROM TAXES

Claimants also cannot impose “regulatory” or “development” fees to fund the costs of the activities mandated by the Trash Order. The Water Boards do not specify who or what would be subject to a regulatory fee, but claim only that “[t]he California Supreme Court has also validated the adoption of regulatory fees, providing they are not levied for unrelated revenue purposes.”¹⁰⁷ The Water Boards do not specify who or what would be subject to a “development” fee, but claim that it “is reasonable to collect fees from developers for the costs associated with implementing certain provisions to control trash, particularly where trash from land development has been identified as high trash generating.”¹⁰⁸ Based on the cases cited, it appears the Water Boards believe a regulatory fee or development fee may be charged to any *undeveloped* property as a regulation of the development of land.¹⁰⁹ These assertions fail for two reasons.

First, a fee imposed on undeveloped property cannot satisfy the exclusive allocation requirement. Importantly, the Water Boards do not dispute that the activities mandated

¹⁰⁷ Opposition Brief at p. 28, citing *Sinclair Paint Co.*, *supra*, 15 Cal.4th at pp. 876-77, *Cal. Farm Bur. Federation*, *supra*, 51 Cal.4th at pp. 437-438; *California Association of Professional Scientists*, *supra*, 79 Cal.App.4th at p. 945; *Schmeer*, *supra*, 213 Cal.App.4th at p. 1326.

¹⁰⁸ Opposition Brief at pp. 28-29, citing *Sinclair Paint Co.*, *supra*, 15 Cal.4th at p. 877.

¹⁰⁹ Opposition Brief at pp. 28-32 (asserting it is reasonable to collect fees from developers for the costs associated with implementing certain provisions to control trash), citing *Sinclair Paint*, *supra*, 15 Cal.4th at pp. 876-877; *Cal. Farm Bur. Fed.*, *supra*, 51 Cal. at pp. 437-438; *Cal. Ass'n of Prof. Scientists*, *supra*, 79 Cal.App.4th at p. 945; *Schmeer*, *supra*, 213 Cal.App.4th at p. 1326.) To the extent the Water Boards may be arguing that regulatory fees could be imposed on activities or properties other than land development, the analysis in Section III.C, below would subject such a levy to voter approval requiring subvention under Section 6.



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by the Trash Order are intended to address trash generated as a result of already-developed property.¹¹⁰ As apparently conceived by the Water Boards, however, a regulatory fee would be levied against *undeveloped* property for the costs of addressing issues purportedly created by *developed* property. Such a fee would benefit the owners of developed properties without charging those owners, contrary to the exclusive allocation requirement.¹¹¹

Second, whether imposed pursuant to Claimants' general police power or pursuant to statutory authority, such as the Mitigation Fee Act, fees imposed on development projects may only be prospective in nature.¹¹² In *City of Lemoore*, the court determined that a fire impact fee imposed in an area already served by fire protection facilities had "no nexus [to] ... the burden posed by new housing" and was improper because the new development created "no need for additional fire protection facilities."¹¹³ Here, however, the costs of the activities mandated by the Trash Order cannot be recovered in a prospective manner consistent with *City of Lemoore*. Claimants necessarily incurred the cost of the Track Selection Mandate and the Implementation Plan Mandate to address demands created primarily by already-developed "Priority Land Uses" or "Equivalent Alternative Land Uses."¹¹⁴ The costs imposed by the activities mandated by the Trash Order do not include costs associated with future development. Claimants recognize that costs of public improvements associated with future development can be recouped through the development entitlement process. The costs at issue in the Test Claim

¹¹⁰ See AR6221 (defining "Priority Land Uses" in part as "Those *developed* sites, facilities and land uses ...") (emphasis added); see also AR 6208 (same).

¹¹¹ Cal. Const. art. XIII C, § 1(e); see also e.g., *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1080–1085 (varying amounts assessed on parcels for the costs of undergrounding utility lines improper because the amounts individually assessed were not based on the special benefits the undergrounding project would confer on each assessed parcel).

¹¹² See Gov. Code, §§ 66000, subd. (a), 66001, subds. (a)(3), (4); see also *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 571, as modified on denial of reh'g (July 8, 2010); see also *Tahoe Keys*, 23 Cal.App.4th at pp. 1483-1484 ("land use regulation must be prospective in nature because the state is constitutionally limited in the extent to which it may, through land use regulation, affect prior existing uses").

¹¹³ *City of Lemoore*, 185 Cal.App.4th at 571.

¹¹⁴ Test Claim p. 7-93, Trash Order p. 5.



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are associated with *existing* development, however, such as retrofitting existing infrastructure with Full Capture Devices.¹¹⁵ In accordance with *City of Lemoore*, fees cannot be imposed on *undeveloped* property to pay costs of the activities mandated by the Trash Order, which were necessitated by *developed* property.

The cases cited by the Water Boards provide no support for their position. *Sinclair Paint* did not address a fee imposed on *undeveloped property*. Instead, it allowed the State to impose fees on manufacturers of lead based paint for the cost of environmental damages caused by those paints, which provided a benefit to the victims and not the payers. The fee in *Sinclair Paint* related to implementing measures to “clean up,” in a health or environmental sense, the harm caused by the regulated industry. *Undeveloped* properties did not cause the harms at issue here: trash generated from developed property. As noted above, if a property will be developed, it can be expected to bear the cost of mitigating its future trash contributions. *Sinclair Paint*, however, does not authorize a fee on undeveloped property to mitigate the environmental issues created by already-developed properties.

Further, the *Sinclair Paint* decision was largely superseded in 2010 by Proposition 26. Proposition 26 prohibits fees that do not provide benefits directly to the entity paying the fee in a way that is separate and distinct from benefits to those not charged.¹¹⁶ Indeed, now fees and charges that directly benefit a payor may still violate Proposition 26 if the service provided in exchange for those fees also benefits those not charged a fee.¹¹⁷ Because the fee in *Sinclair Paint* benefitted victims rather than payers, it would be a tax under Proposition 26.

¹¹⁵ See Test Claim, § 6, Declaration of Snyder ¶ 10, Declaration of Siegel ¶ 11.

¹¹⁶ Cal. Const. art. XIII C, § 1, subd. (e)(1), (2) & (3).

¹¹⁷ *Ibid.*



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In *California Farm Bureau*, the State Water Resources Control Board imposed a fee on water appropriation permit and license holders pursuant to Water Code section 1525.¹¹⁸ The fee was intended to fund “the Division[of Water Rights]’s operations[.]”¹¹⁹ Water Code section 1525 does not authorize Claimants to impose fees. Further, it is undisputed that any fee imposed by Claimants must meet the exclusive allocation and proportionality requirements. The Water Boards make no claim here that a permit or licensing program exists for the use of the MS4s through which a fee may be imposed.¹²⁰

In *Professional Scientists*, the state Department of Fish and Game imposed a fee on applications for development projects pursuant to Fish and Game Code section 711.4.¹²¹ The fee funded costs incurred by the department to conduct environmental reviews of the proposed development.¹²² Fish and Game section 711.4 does not authorize Claimants to impose fees. Further, it is undisputed that any fee imposed by Claimants must meet the exclusive allocation and proportionality requirements. For all the reasons set forth above, *Professional Scientists* does not authorize Claimants to charge a fee to *undeveloped* property in order to offset the costs of addressing issues originating from *developed* property.

Finally, in *Schmeer*, the County of Los Angeles adopted an ordinance prohibiting plastic carryout bags and requiring stores to charge customers 10 cents for each paper carryout bag.¹²³ The 10-cent charge was determined not to be a tax because it was “payable to and retained by the retail store and [wa]s not remitted to the county.”¹²⁴ This case provides no support for the Water Boards’ position. Any charge levied to pay for the costs of the activities

¹¹⁸ See Opposition Brief at p. 28; *Cal. Farm Bureau*, *supra*, 51 Cal.4th at pp. 434-435.

¹¹⁹ *Id.* at p. 432.

¹²⁰ Cf. Opposition Brief at pp. 28-29. As set forth in Section III.C, below, such a program would create a property-related fee subject to voter approval.

¹²¹ See Opposition Brief at p. 28; *Cal. Assn. of Prof. Scientists*, *supra*, 79 Cal.App.4th at p. 939.

¹²² *Cal. Assn. of Prof. Scientists*, *supra*, 79 Cal.App.4th at p. 940.

¹²³ *Schmeer*, *supra*, 213 Cal.App.4th at p. 1326.

¹²⁴ *Ibid.*



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mandated by the Trash Order would be paid to Claimants and would not be retained by a private party. Under the rationale in *Schmeer*, such a fee would be a tax.¹²⁵

The facts in this Test Claim would not support a fee imposed post-Proposition 26. The Water Boards have not disputed that “the benefits of Claimants’ activities under the Trash Order are conferred on all persons within Claimant’s jurisdictions”¹²⁶ The Water Boards also have not disputed that “the costs associated with implementing the mandates in the Trash Order cannot be tied to a direct benefit or service experienced by any individual businesses, property owners, or residents.”¹²⁷ In light of the undisputed requirements of Proposition 26 and the undisputed benefits provided by the activities mandated by the Trash Order, it follows that Claimants cannot charge any particular activity or any undeveloped properties for the costs of the activities mandated by the Trash Order because these costs provide a benefit to all of society (all residents, all businesses, all visitors, and all property owners) who rely on the MS4, not just future developers.¹²⁸

¹²⁵ See *id.* at p. 1327 (“... the language ‘any levy, charge, or exaction of any kind imposed by a local government’ in the first paragraph of article XIII C, section 1, subdivision (e) is limited to charges payable to a local government”).

¹²⁶ Test Claim, § 5, subsection X.A.1.

¹²⁷ *Ibid.*

¹²⁸ Trash Provisions at p. 1, AR 00744, (“The State Water Board’s project objective for the proposed Trash Amendments is to address the impacts of trash to the surface waters in California”), 00946 (same), 01117 (same), 01319 (same), 05910 (same), 06127 (same), 06627 (same); Test Claim, § 5, subsection X.A.1.



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3. HEALTH & SAFETY CODE § 5471 AND PUBLIC RESOURCES CODE § 40059 DO NOT MEET REQUIREMENTS FOR A PROPERTY-RELATED FEE-EXEMPTION FROM TAXES

Claimants cannot impose fees under Health & Safety Code section 5471 or Public Resources Code section 40059 to fund the costs of the activities mandated by the Trash Order for purposes of Section 6, as the Water Boards assert.¹²⁹

Public Resources Code section 40059 provides, in relevant part:

a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:

(1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

“Solid waste” is defined in Public Resources Code section 40191 as:

... all putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes, and other discarded solid and semisolid wastes.

“Solid waste handling” is defined in Public Resources Code section 40195 as “the collection, transportation, storage, transfer, or processing of solid wastes.”

¹²⁹ Opposition Brief at p. 30.



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Health & Safety Code section 5471, subdivision (a) provides:

a) In addition to the powers granted in the principal act, any entity shall have power, by an ordinance or resolution approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.

The activities mandated by the Trash Order include, in part, undertaking assessments of Claimants' authority and feasibility to install Full Capture Systems in Priority Land Use areas, conducting a cost estimate trash study to identify Priority Land Use mapping, and preparing a plan to implement the selected Track.¹³⁰ These activities are not "solid waste handling" for purposes of Public Resources Code section 40059.¹³¹ Similarly, these activities do not qualify as storm drainage operation or maintenance for purposes of Health & Safety Code section 5471.¹³²

Even if some portion of the costs of implementing the activities mandated by the Trash Order may qualify as solid waste handling or as storm drainage operation or maintenance under these statutes, any fee adopted pursuant to either statutory provision would require voter approval under *City of Salinas* because they would be imposed on the basis of property ownership.¹³³ As set forth in the Test Claim, under *City of Salinas*, a fee to fund a general stormwater program is a property-related fee subject to voter approval.¹³⁴ Further, as set forth in

¹³⁰ Test Claim § 6, Declaration of Snyder at ¶ 13; Declaration of Siegel at ¶ 13.

¹³¹ See Commission on State Mandates, Statement of Decision, *Discharge of Stormwater Runoff – Order No. R9-2007-0001* (March 26, 2010), at pp. 114-119.

¹³² *Id.* at pp. 114-119.

¹³³ See *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1356-1358; see also Cal. Const. art. XIII C, § 1, subd. (e), § 2; see also *Discharge of Stormwater Runoff – Order No. R9-2007-0001*, at pp. 114-119.

¹³⁴ Cf. Test Claim § 5, subsection X.A with Opposition Brief at pp. 28-32.



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the Test Claim and in Section III.C, AB 2403 and SB 231 do not provide the Commission with any authority to conclude otherwise.¹³⁵

4. CALIFORNIA WATERSHED IMPROVEMENT ACT

The California Watershed Improvement Act (“Watershed Act”) authorizes a local government to “impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution, to pay the costs of the preparation of a watershed improvement plan, and the implementation of a watershed improvement plan if all of the following requirements are met:”¹³⁶

- (1) the Regional Board approved the watershed improvement plan and, in the case of fees for implementing the watershed improvement plan, has incorporated that plan into the Regional Permit;¹³⁷
- (2) the Permittees make a finding, supported by substantial evidence, that the fee is reasonably related to the cost of mitigating the actual or anticipated past, present, or future adverse effects of the activities of the fee payer; and¹³⁸
- (3) the fee is not imposed solely as an incident of property ownership.¹³⁹

A levy to fund the activities mandated by the Trash Order cannot meet these requirements.

¹³⁵ See Test Claim, § 5, subsection X.A.

¹³⁶ Wat. Code, § 16103.

¹³⁷ Water Code §§ 16103, subd. (a)(1), 16102, subd. (e).

¹³⁸ Water Code § 16103, subd. (a)(2).

¹³⁹ Water Code §§ 16103, subd. (a)(3).



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**a) WATER QUALITY IMPROVEMENT PLANS DO NOT
INCLUDE TRASH ORDER MANDATED ACTIVITIES**

Claimants cannot meet the first requirement of the Watershed Act for three reasons. First, the activities mandated by the Trash Order are not “watershed improvement plans” as required by the Watershed Act.¹⁴⁰ A watershed improvement plan must address the following:

major sources of pollutants in receiving water, stormwater, urban runoff, or other surface runoff pollution within the watershed or subwatershed[,] ... implement existing and future water quality requirements and regulations by, among other things, where appropriate, identifying opportunities for stormwater detention, infiltration, use of natural treatment systems, water recycling, reuse, and supply augmentation; and providing programs and measures designed to promote, maintain, or achieve compliance with water quality laws and regulations, including water quality standards and other requirements of statewide plans, regional water quality control plans, total maximum daily loads, and NPDES permits.¹⁴¹

The activities mandated by the Trash Order apply only to “Priority Land Uses” or “Equivalent Alternative Land Uses” and do not constitute a watershed based approach to addressing issues such as water recycling, reuse, supply augmentation, or compliance with total maximum daily loads.

Second, the Regional Board has not approved a watershed improvement plan that incorporates the activities mandated by the Trash Order. Despite claiming that the Water Quality Improvement Plans are “largely consistent” with watershed improvement plans in the

¹⁴⁰ Water Code, § 16101, subd. (a).

¹⁴¹ *Ibid.*



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Watershed Act, the Water Boards recognize that the activities mandated by the Trash Order “build on” existing pollution control requirements imposed in the existing MS4 Permit.¹⁴² The Regional Water Board has not approved any watershed improvement plan that includes the activities mandated by the Trash Order. It is notable that the Water Boards do not go so far as to argue this, either.

Third, because the Trash Order did not exist when the current MS4 Permit was adopted or when the Water Quality Improvement Plans were submitted, Claimants had no authority to request that the activities mandated by the Trash Order be incorporated into the Water Quality Improvement Plans. Claimants thus incurred costs to comply with the Trash Order as written. As a result, the first requirement of the Watershed Act is not met and Claimants cannot impose a fee under the Watershed Act to fund the activities mandated by the Trash Order.

**b) WATERSHED ACT FEES CANNOT REASONABLY
RELATE TO THE COST OF MITIGATING ADVERSE EFFECTS
OF THE FEE PAYER’S ACTIVITIES**

For all the reasons discussed in Section III.A, relating to development fees and regulatory fees, costs associated with implementing the activities mandated by the Trash Order cannot reasonably relate to the cost of mitigating effects of activities of those who pay the fee. Claimants who select Track 1 must retrofit infrastructure within Priority Land Use areas.¹⁴³ Track 1 does not allow for a fee based on activities of a fee payor because the requirements are based on property owners via “Priority Land Use” designation. Track 2 provides more

¹⁴² Opposition Brief at p. 27.

¹⁴³ The following section further discusses fees based on property ownership.



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flexibility in identifying where activities by allowing for identification of “Equivalent Alternative Land Uses,” however these identifications are still property based. Further, any such property-based fee would benefit all users of the storm drain system contrary to the exclusive allocation requirement.¹⁴⁴

c) FEES MUST BE AN INCIDENT OF PROPERTY OWNERSHIP

A levy to pay for the activities mandated by the Trash Order cannot meet the third requirement of the Watershed Act because such a levy must be an incident of property ownership. As described immediately above, Track 1 does not allow for a fee based on the “activities of the fee payer” because the Trash Order requirements themselves are based on “Priority Land Uses”.¹⁴⁵ Track 2 requirements are more flexible, but also impose mandates based on “locations or land uses” rather than on activities.¹⁴⁶

Further, the only reported decision on the issue of user fees (activity-based fees) for stormwater programs is in conflict with the Watershed Act and has specifically found that a stormwater user fee **is imposed as an incident of property ownership** under Article XIII D of the California Constitution.¹⁴⁷ The fee in *City of Salinas* was to be imposed on “users of the storm drainage system[.]”¹⁴⁸ The court concluded that the storm drainage fee “burden[s]

¹⁴⁴ Cal. Const. art. XIII C, § 1, subds. (e)(1), (2).

¹⁴⁵ Water Code § 16103, subd. (a)(2); AR 6208, 6221.

¹⁴⁶ Trash Order p. 3 (“The MS4 permittee may determine the locations or land uses within its jurisdiction to implement any combination of controls.”).

¹⁴⁷ *Howard Jarvis Taxpayer Assoc. v. City of Salinas*, 98 Cal.App.4th at 1354-1356.

¹⁴⁸ *Howard Jarvis Taxpayer Assoc. v. City of Salinas*, 98 Cal.App.4th at 1353.



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landowners *as landowners*,” and thus it was in reality a property-related fee subject to the requirements of Article XIII D and not a user fee.

As noted above, subsection (2) of Article 1(e), the Constitution prohibits charging a fee for a service that is also of benefit to others who are not charged. The activities mandated by the Trash Order are intended to benefit all residents and property owners in a watershed.¹⁴⁹ To comply with the “exclusive allocation” requirement, a user fee under the Watershed Act must be charged to all users in the watershed who drain into the MS4. If all users are charged, it will be, under current law, a charge based on an incident of property ownership and violate the “incident of property ownership” restrictions in the Watershed Act.¹⁵⁰ If a fee is charged to a smaller class of users than all who benefit from the stormwater program, it will run afoul of the exclusive allocation requirement for charging certain users for a service that benefits everyone.¹⁵¹

A fee to fund the activities mandated by the Trash Order cannot meet the requirements of the Watershed Act or California’s constitutional limitations on fees under current precedent.¹⁵² For this reason, the Watershed Act does not provide Claimants any authority to impose fees to fund the cost of implementing the activities mandated by the Trash Order.

¹⁴⁹ See, Trash Provisions at p. 1, AR 00744, (“The State Water Board’s project objective for the proposed Trash Amendments is to address the impacts of trash to the surface waters in California”), 00946 (same), 01117 (same), 01319 (same), 05910 (same), 06127 (same), 06627 (same).

¹⁵⁰ *Howard Jarvis Taxpayer Assoc. v. City of Salinas*, 98 Cal.App.4th at 1353.

¹⁵¹ Cal. Const. art. XIII C, § 1, subd. (e)(2).

¹⁵² Cal. Const. art. XIII D; *Howard Jarvis Taxpayer Assoc. v. City of Salinas*, 98 Cal.App.4th at 1354-1356. The impact of AB 2403 and SB 231 on current precedent is discussed in the following section.



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C. AB 2403 AND SB 231 DO NOT AUTHORIZE ADOPTION OF A FEE TO FUND TRASH ORDER MANDATED ACTIVITIES

The Water Boards assert that AB 2403 and SB 231 overrule *City of Salinas* and “confirm that Claimants have authority to raise fees, without voter approval, for costs related to their storm sewer systems.”¹⁵³ This is incorrect for at least three reasons.

First, SB 231 did not become effective until after all costs for the Track Selection Mandate were already incurred. Legislative provisions are presumed to “operate prospectively, and ... should be so interpreted ‘unless express language or clear and unavoidable implication negates the presumption.’”¹⁵⁴ Here, SB 231 contains no express language and no clear or unavoidable implication to negate its prospective operation. As a result, the Commission is not authorized to apply SB 231 retroactively.

Second, AB 2403 merely modified the definition of “water” to mean water from any source. AB 2403 was intended to codify *Griffith v. Pajaro Valley Water Management Agency* in order to support local government authority to adopt fees for water *supply* purposes.¹⁵⁵ AB 2403 does not address a situation, such as here, where the mandated activities do not capture stormwater for water supply uses. As a result, this bill did not affect Claimants’ authority to levy charges to pay the costs of conducting the studies required by the Track Selection Mandate, to prepare the planning documents required by the Implementation Plan Mandate, to coordinate with Caltrans, or to fund the capital and operational costs imposed by the Ongoing Implementation Mandate. The Water Boards provide no basis for concluding otherwise.

¹⁵³ Opposition Brief at pp. 29. See also Department of Finance Opposition Brief at p 2.

¹⁵⁴ *In re E.J.* (2010) 47 Cal.4th 1258, 1272; see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208.

¹⁵⁵ *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586; see also Attachment 4, Assem. Floor Analysis, Concurrence in Senate Amendments, Assem. Bill. No. 2403 (2013-2014 Reg. Sess.) June 16, 2014 (“This bill would put the new *Griffith* ... decision into statute and allow public agencies to apply the simpler protest process to their approval of stormwater management fees, where the management programs address both *water supply* and water quality.”) (emphasis added).



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Third, the Commission is bound to follow judicial pronouncements regarding the meaning of constitutional provisions, not legislative pronouncements.¹⁵⁶ The Legislature has no authority to interpret or change the Constitution.¹⁵⁷ Only courts have authority to interpret voter intent in initiative constitutional amendments.¹⁵⁸ The Legislature previously attempted to exempt permits issued by the Water Boards from the definition of an “executive order” subject to Section 6.¹⁵⁹ Then, as now, the Water Boards argued that the exemption was appropriate “because the Water Boards regulate water pollution with an even hand[,] [w]hether the pollution originates from a local public agency or a private industrial source[.]”¹⁶⁰ The Second District Court of Appeal, however, found this argument was contravened by “the clear, unequivocal intent of ... [S]ection 6 that subvention of funds is required ‘[w]henever...any state agency mandates a new program or higher level of service on any local government.’”¹⁶¹ Now, as then, the Legislature’s action in adopting SB 231 must be weighed against the judicial interpretation of the constitution in *City of Salinas*.¹⁶² The Commission is thus bound to follow the judicial interpretation of storm drain fees set out in *City of Salinas*.¹⁶³

As the Water Boards note, AB 2403 and SB 231 purport to interpret Proposition 218 and Section 6 contrary to *City of Salinas*.¹⁶⁴ The Commission, however, has no authority to interpret or apply AB 2403 or SB 231 in a manner that contradicts the judicial interpretation of constitutional voter approval requirements in *City of Salinas*.¹⁶⁵ As such, these bills provide no

¹⁵⁶ *San Buenaventura*, 3 Cal.5th at p. 1209 fn. 6 (“the ultimate constitutional interpretation must rest, of course, with the judiciary”); see also *County of Los Angeles v. Comm’n on State Mandates* (2007) 150 Cal.App.4th 898, 921 (“A statute cannot trump the constitution”).

¹⁵⁷ See *San Buenaventura*, 3 Cal.5th at p. 1209 fn. 6; see also *County of Los Angeles*, 150 Cal.App.4th at p. 921.

¹⁵⁸ *County of Los Angeles*, 43 Cal.3d at p. 56.

¹⁵⁹ *County of Los Angeles*, 150 Cal.App.4th at p. 904.

¹⁶⁰ *Id.* at p. 919.

¹⁶¹ *Id.* at p. 920.

¹⁶² *Id.* at p. 921.

¹⁶³ *City of Salinas*, *supra*, 98 Cal.App.4th at pp. 1356-1359.

¹⁶⁴ See Opposition Brief at pp. 29-32.

¹⁶⁵ *San Buenaventura*, 3 Cal.5th at p. 1209 fn 6; *County of Los Angeles*, 150 Cal.App.4th at p. 921.



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non-tax authority for Claimants to impose fees to fund the activities mandated by the Trash Order.

Paradise Irrigation District does not change this conclusion.¹⁶⁶ In *Paradise Irrigation District*, the Third Appellate District Court determined that the majority protest requirements applicable to fees for “sewer, water and refuse collection services” did not divest the water and irrigation districts of their fee authority.¹⁶⁷ Instead, the court reasoned “the majority protest procedures are properly construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority.”¹⁶⁸ *Paradise Irrigation District* did not consider whether the voter approval requirements of Proposition 218 divest local agencies of their fee authority for purposes of Section 6.¹⁶⁹

Here, the facts are distinguishable from those presented in *Paradise Irrigation District*. As set forth above, any fees imposed to pay the costs of the activities mandated by the Trash Order would not qualify as fees for “sewer, water, and refuse collection service” subject only to the majority-protest procedures. As a result, such fees would require voter approval. Because *Paradise Irrigation District* did not consider such fees, that decision does not support the Water Boards’ position.¹⁷⁰

¹⁶⁶ See Opposition Brief at pp. 30-32, citing *Paradise Irrigation Dist.*, *supra*, 33 Cal.App.5th at p. 194-195.

¹⁶⁷ *Paradise Irrigation Dist.*, 33 Cal.App.5th at p. 193.

¹⁶⁸ *Id.* at p. 182.

¹⁶⁹ *Id.* at p. 192 (“This voter-approval requirement, however, does not apply ...”); *see also Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343 (“A decision, of course, does not stand for a proposition not considered by the court.”).

¹⁷⁰ *See City of Anaheim, supra*, 33 Cal.4th at p. 343.



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D. THE WATER BOARDS' EXAMPLES OF "FEES" ARE ALL VOTER-APPROVED LEVIES

The Water Boards also improperly claim that various funding schemes adopted by other local governments in California provide evidence of Claimants' fee authority.¹⁷¹ The Department of Finance appears to agree with this argument by relying on the same case and making similar arguments.¹⁷² The Water Boards and Department of Finance are patently incorrect. Each funding scheme is a tax or voter-approved property-related fee.

First, the cases cited by the Water Boards recognize that Section 6 is expressly intended to protect Claimants' voter-approved revenues from the limitations on local government authority imposed by voter approval requirements.¹⁷³

Second, the Water Boards' and Department of Finance's reliance on the "politically impracticable" line of cases reflected in *Clovis* and *Connell* is misplaced. In *Clovis*, the Court of Appeal rightly found that a reimbursement claim should be reduced by the fees that college districts were directly authorized to impose on students, even when districts decided that it was not practical to charge those fees. Similarly, in *Connell*, the Court of Appeal correctly concluded, at least at that time, that Water Code section 35470 gave water districts a direct right to impose a fee. Thus, even though the water districts might have found it politically

¹⁷¹ Cf Opposition Brief at p. 31, citing *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812 and *Connell, supra*, 59 Cal.App.4th at p. 398 with *Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 192 ("[majority] protest procedures for fees ... [are] in contrast to the voter-approval requirement imposed by Proposition 218 before new taxes may be imposed"); *Connell, supra*, 59 Cal.App.4th at p. 398 (recognizing intent to protect taxes); and documentation from City of Alameda, Palo Alto, Culver City, San Clemente, San Jose, and Santa Cruz. See also, Department of Finance Opposition Brief at p. 2, citing *Clovis, supra*, 188 Cal.App.4th at p. 812.

¹⁷² See Opposition Brief at p. 31, citing *Clovis, supra*, 188 Cal.App.4th at p. 812 and *Connell, supra*, 59 Cal.App.4th at p. 398; see also Department of Finance Opposition Brief at p. 2, citing *Clovis, supra*, 188 Cal.App.4th at p. 398.

¹⁷³ *Kern High School Dist.* 30 Cal.4th at p. 735 (referring to Section 6 as a "safety valve" protecting local tax revenues); *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 (recognizing Section 6 prevents the state from requiring local governments to assume financial responsibility for governmental functions without a subvention of funds from the state.).



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impracticable to impose the fee, they had, at that time, the unilateral authority under the law to impose it. As set forth above, SB 231 and AB 2403 provide no non-tax authority for Claimants to impose fees for activities mandated by the Trash Order, making the political impracticality of imposing a fee in *Clovis* and *Connell* irrelevant to the voter-approval requirement for levying a voter-approved funding mechanism.

Assuming, without admitting, that the materials attached to the Opposition Brief constitute proper evidence, these materials all demonstrate that local voter-approved levies are currently being used to fund state mandated stormwater programs.

The materials regarding San Clemente’s funding mechanism indicates the charge at issue was subject to voter approval.¹⁷⁴

The materials regarding “Measure E” do not themselves indicate which city proposed the funding source at issue or provide any evidence of a funding mechanism.¹⁷⁵ However, Chapter 3.14 of the City of Santa Cruz Municipal Code sets out the “Clean River, Beaches and Ocean Tax Ordinance” which was approved as a Measure E parcel tax in the November 2008 election.¹⁷⁶ If true, Measure E was a tax measure, not a fee.

The materials associated with Palo Alto indicate a funding mechanism approved by way of the two step process required by Proposition 218, stating: “If there is no majority

¹⁷⁴ Opposition Brief at p. F-15 – F-17 (“Why are property owners voting on this fee?” “How and when will the vote occur?”).

¹⁷⁵ Opposition Brief at pp. F-18 – F-53.

¹⁷⁶ See Attachment 1: Santa Cruz Municipal Code, § 3.14.030, subd. (b) (“The ordinance codified in this chapter was approved by the voters of the city at the consolidated state general election held on November 4, 2008, by the following vote: Yes: 76.25% No: 23.75%”).



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opposition, then the city will conduct a mail ballot election[.]” a property-related, voter-approved levy.¹⁷⁷

The materials regarding San Jose reference Resolution 75857, June 14, 2011.¹⁷⁸ Although not included in the materials attached to the Opposition Brief, Resolution No. 75857 appears to continue fees in place since 1960 and 1991, both pre-dating Proposition 218, and therefore not subject to the voter approval requirements imposed by Proposition 218.¹⁷⁹

The materials for Alameda appear to be dated February 6, 2017.¹⁸⁰ These materials do not indicate how the funding mechanism was approved. Materials available online, however, indicate that Alameda’s current “fee” was actually approved by voters in 2019.¹⁸¹

The materials regarding Culver City reference a special election requiring voter approval of the funding measure.¹⁸² Finally, the Los Angeles County materials reference a “ballot measure” requiring two-thirds voter approval prior to imposing the funding measure.¹⁸³

The Water Boards have not cited any example of storm water funding mechanisms that constituted *fees* for purposes of Section 6. Similarly, Claimants lack authority to impose a fee to fund the activities mandated by the Trash Order. Any “fee” cannot meet the substantive requirements for exclusion from the definition of tax, which the Water Boards do not

¹⁷⁷ Opposition Brief at p. F-54 – F-55.

¹⁷⁸ Opposition Brief at p. F-56.

¹⁷⁹ Attachment 2: Draft City of San Jose Resolution No. 75857, June 14, 2011, last accessed July 2, 2020 at http://www3.sanjoseca.gov/clerk/Agenda/20110802/20110802_0304res.pdf; Minutes of June 14, 2011 meeting available <http://www3.sanjoseca.gov/clerk/Agenda/20110614/20110614min.pdf>, last accessed July 2, 2020.

¹⁸⁰ Opposition Brief at p. F-57 – F-58.

¹⁸¹ See Attachment 3: City of Alameda Official Ballot Information Guide: <https://www.alamedaca.gov/files/sharedassets/public/alameda/city-manager/stormwater-ballot-guide.pdf> (last accessed July 2, 2020).

¹⁸² Opposition Brief at p. F-59 (“During the November 8, 2016 Special Municipal election, Culver City residents voted on Measure CW, the Clean Water, Clean Beach Parcel Tax.”).

¹⁸³ Opposition Brief at p. F-65 (“The tax, which will appear on the Nov. 6 ballot, will need approval from two-thirds of voters.”)



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dispute, or from the voter-approval requirements for property-related fee. As a result, subvention is required under Section 6.

CONCLUSION

Although only one of the standards for “program” under Section 6 must be met, the activities mandated by the Trash Order constitute a “program” under both standards. The activities mandated by the Trash Order are “new” programs or higher levels of service pursuant to Section 6. Finally, Claimants lack non-tax authority to levy charges, fees or assessments sufficient to pay for the mandated program or increased level of service. For all these reasons, and the reasons set forth in the Test Claim, Claimant has established that the costs of complying with the activities mandated by the Trash Order are state mandated costs subject to subvention under Section 6.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct to the best of my personal knowledge, information, or belief. I further declare that all documents attached to this filing are true and correct copies of documents as they exist on the websites of public agencies or on the California Legislative Information public website.

A handwritten signature in cursive script that reads 'Rebecca Andrews'.

Rebecca Andrews
for BEST BEST & KRIEGER LLP

ATTACHMENT 1
Santa Cruz Municipal Code Chapter 3.14
Available:

<https://www.codepublishing.com/CA/SantaCruz/#!/SantaCruz03/SantaCruz0314.html#3.14>

Chapter 3.14
CLEAN RIVER, BEACHES AND OCEAN TAX ORDINANCE

Sections:

[3.14.010 Title and purpose.](#)

[3.14.020 Definitions.](#)

[3.14.030 Necessity, authority, and purpose.](#)

[3.14.040 Tax levy.](#)

[3.14.050 Purposes and uses of tax.](#)

[3.14.060 Exemptions.](#)

[3.14.070 Computation and collection of tax – Interest and penalties.](#)

[3.14.080 Accountability – Citizen’s oversight committee.](#)

[3.14.090 Examination of books and records and annual audit.](#)

[3.14.100 Property tax.](#)

[3.14.110 Refund of tax, penalty, or interest paid more than once, or erroneously or illegally collected.](#)

[3.14.120 Savings clause.](#)

[3.14.130 Regulations.](#)

[3.14.140 Increase appropriations limit.](#)

3.14.010 TITLE AND PURPOSE.

This chapter may be cited as the “Clean River, Beaches and Ocean Tax Ordinance.”

(Ord. 2008-21 § 1 (part), 2008).

3.14.020 DEFINITIONS.

The following words and phrases whenever used in this chapter shall be construed and defined in this section as follows:

- (a) “Director” shall mean the director of public works, or his/her designee.

- (b) "Owner" shall mean the legal owner of any parcel of real property, except when the legal owner of the real property is such due to the holding of a mortgage, note or other security, in which case the "owner" shall be deemed to be the beneficial owner of said parcel of real property.
- (c) "Parcel" shall mean the smallest, separately segregated lot, unit or plot of land having an identified owner, boundaries and surface area which is documented for property tax purposes and given an assessor's identification number by the county of Santa Cruz tax assessor.
- (d) "Parcel size" shall mean the size of the parcel measured in acres.
- (e) "Possessory interest" shall mean possession of, claim to, or right to the possession of land or improvements and shall include any exclusive right to the use of such land or improvements.
- (f) "Single-family dwelling" shall mean a developed tax parcel with one single-family housing unit, and not more than one additional permitted accessory dwelling unit.

(Ord. 2008-21 § 1 (part), 2008).

3.14.030 NECESSITY, AUTHORITY, AND PURPOSE.

- (a) The city council of the city of Santa Cruz hereby finds:
 - (1) That the reduction of pollution, trash, toxics and dangerous bacteria in our streams, river, bay, ocean and on our beaches is necessary to protect public health and safety, to protect fish and wildlife habitat, to protect the environment, and to protect the quality of life and economic vitality of the city;
 - (2) That the city is mandated, under federal and state law, to protect water quality and reduce water pollution associated with runoff from streets and properties in the city;
 - (3) That the cost for programs and projects necessary to reduce and prevent water pollution at the level required exceeds the amount of revenues available from other sources;
 - (4) That additional revenues are needed to fund improved management practices for protection of watersheds and water quality; maintenance, capital improvements, environmental restoration, and upgrades to stormwater collection, conveyance, management and treatment systems; implementation of stormwater best management practices; and public education and outreach activities to prevent and reduce pollution;
 - (5) That the levy of a city-wide special tax as hereinafter provided is necessary to fund the foregoing municipal improvements and services.
- (b) The ordinance codified in this chapter was approved by the voters of the city at the consolidated state general election held on November 4, 2008, by the following vote:

Yes: 76.25% No: 23.75%

Accordingly, the city of Santa Cruz clean river, beaches and ocean ordinance (the “tax”) is levied under this chapter pursuant to the city’s charter, Government Code Section 50075 et seq., and other applicable laws.

(Ord. 2008-21 § 1 (part), 2008).

3.14.040 TAX LEVY.

The tax as set forth in this section is hereby levied as follows, commencing the fiscal year 2008-2009, on all parcels, improved or unimproved, within the boundaries of the city.

- (a) For each parcel which is a single-family dwelling, the annual tax rate shall be twenty-eight dollars.
- (b) For each developed parcel that is not a single-family dwelling, the annual tax rate shall be ninety-four dollars.
- (c) For each undeveloped or park parcel that is not a single-family dwelling, the annual tax rate shall be ten dollars.
- (d) The tax imposed by this chapter shall be assessed to the owner unless the owner is by law exempt from taxation, in which case the tax imposed shall be assessed to the holder of the possessory interest in such parcel, unless such holder is also by law exempt from taxation.
- (e) For the purposes specified in Section [3.14.050](#), the tax shall be levied so long as it is necessary to pay for any financing of capital improvements, and so long as necessary for services as specified in Section [3.14.050](#).
- (f) The tax is levied pursuant to California Government Code Section 50075 et seq. and is a tax upon each parcel of property.
- (g) The amount of the tax is not measured by the value of the parcel.

(Ord. 2008-21 § 1 (part), 2008).

3.14.050 PURPOSES AND USES OF TAX.

- (a) There is hereby established a special segregated fund entitled “Clean River, Beaches and Ocean Parcel Tax Fund” to be maintained and administered by the city.
- (b) Proceeds of the tax, together with any interest and penalties thereon (collectively, the “tax proceeds”), shall be collected each fiscal year and deposited in said special fund, and shall be used exclusively for the purpose of reducing and preventing water pollution and managing stormwater runoff, including but not limited to improved management practices for protection of watersheds and water quality; maintenance, capital

improvements, environmental restoration, and upgrades to stormwater collection, conveyance, management and treatment systems; implementation of stormwater best management practices; and public education and outreach activities to prevent and reduce water pollution; as well as complying with local, state, and federal stormwater regulations and paying for, or securing the payment of, any indebtedness incurred for these purposes, and any and all other purposes as more fully discussed therein.

(c) The tax proceeds may also be used to enforce and administer the tax, including costs for submission of any measure to the voters for the establishment or alteration of the tax, and any costs that may be assessed by the County of Santa Cruz in connection with the collection of the tax.

(Ord. 2008-21 § 1 (part), 2008).

3.14.060 EXEMPTIONS.

The tax imposed by this chapter shall not be construed as imposing a tax upon any person when the imposition of such tax upon that person would be in violation of either the Constitution of the United States or the Constitution of the State of California.

(Ord. 2008-21 § 1 (part), 2008).

3.14.070 COMPUTATION AND COLLECTION OF TAX – INTEREST AND PENALTIES.

(a) The director or his/her designee or employee is hereby authorized and directed each fiscal year, commencing with the fiscal year 2008-2009, to determine the tax amount to be levied for the next ensuing fiscal year for each taxable parcel of real property within the city, in the manner and as provided in Section [3.14.040](#). The city finance director is hereby authorized and directed to provide all necessary information to the auditor-controller of the county of Santa Cruz to affect proper billing and collection of the tax, so that the installments of the tax shall be included on the secured property tax roll of the county of Santa Cruz. Unless otherwise required by the council, no council action shall be required to authorize the annual collection of the tax as herein provided.

(b) The tax shall be collected in the same manner as ordinary ad valorem taxes are collected and shall have the same lien priority, and be subject to the same penalties and the same procedure and sale in cases of delinquency as provided for ad valorem taxes collected by the county of Santa Cruz; provided, however, that the council may provide for other appropriate methods of collection of the tax.

(c) The tax shall constitute a lien upon the parcel upon which it is levied until it has been paid. Any unpaid tax due under this chapter shall be subject to all remedies provided under the city's municipal code and as provided by law.

(Ord. 2008-21 § 1 (part), 2008).

3.14.080 ACCOUNTABILITY – CITIZEN'S OVERSIGHT COMMITTEE.

(a) Pursuant to Sections 50075.1 and 50075.3 of the California Government Code, the specific purposes of the tax and the requirement that the tax proceeds be applied to such purposes and the establishment of a special fund for the tax proceeds are as set forth in Section [3.14.050](#). So long as the tax is collected hereunder, commencing no later than July 1, 2010, the finance director is hereby authorized and directed to cause to be prepared and filed with the council a report that shows the amount of tax collected and expended and the status of any projects funded with the tax proceeds. For purposes of this section, the finance director is authorized to retain such consultants, accountants or agents as may be necessary or convenient to accomplish the foregoing.

(b) The council shall designate a citizen's oversight committee to review the use of the tax proceeds. The membership, scope and responsibilities of the citizen's oversight committee shall be determined by the council in its exercise of discretion.

(Ord. 2008-21 § 1 (part), 2008).

3.14.090 EXAMINATION OF BOOKS AND RECORDS AND ANNUAL AUDIT.

(a) The finance director or director of public works or their designee is hereby authorized and directed to examine assessment rolls, property tax records, records of the Santa Cruz County recorder and any other records of the county of Santa Cruz deemed necessary in order to determine ownership of parcels and computation of the tax.

(b) A certified public accounting firm retained by the city will perform an annual audit to assure accountability of the proper disbursement of these tax proceeds in accordance with the objectives stated herein.

(Ord. 2008-21 § 1 (part), 2008).

3.14.100 PROPERTY TAX.

This special parcel tax is a property tax and qualified property owners and renters shall be entitled to the benefits of the Gonsalves-Deukmejian-Petris Senior Citizen's Property Tax Assistance Law (California Revenue and Taxation Code Section 20501 et seq.) and the Senior Citizens and Disabled Property Tax Postponement Law (California Revenue and Taxation Code Section 20581 et seq.).

(Ord. 2008-21 § 1 (part), 2008).

3.14.110 REFUND OF TAX, PENALTY, OR INTEREST PAID MORE THAN ONCE, OR ERRONEOUSLY OR ILLEGALLY COLLECTED.

When the amount of the tax, any penalty, or any interest has been paid more than once, or has been erroneously or illegally collected or received by the city under this chapter, it may be refunded provided a verified claim in writing therefor, stating the specific grounds upon which the claim is founded, is filed with the finance director within one year from the date of payment. If the claim is approved by the finance director, the excess amount collected or paid may be refunded or may be credited against any amounts then due and payable from the

person from whom it is collected or by whom paid, and the balance may be refunded to such person, his/her administrators or executors.

(Ord. 2008-21 § 1 (part), 2008).

3.14.120 SAVINGS CLAUSE.

The provisions of this chapter shall not apply to any person, or to any property as to whom or which it is beyond the power of the city to impose the tax herein provided. If any provision, sentence, clause, section or part of this chapter is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall affect only such provision, sentence, clause, section or part of this chapter and shall not affect or impair any remaining provisions, sentences, clauses, sections or parts of this chapter. It is hereby declared to be the intention of the city that this chapter would have been adopted had such unconstitutional, illegal or invalid provision, sentence, clause, section or part thereof not been included herein.

(Ord. 2008-21 § 1 (part), 2008).

3.14.130 REGULATIONS.

The finance director is hereby authorized to promulgate such regulations as she or he shall deem necessary in order to implement the provisions of this chapter.

(Ord. 2008-21 § 1 (part), 2008).

3.14.140 INCREASE APPROPRIATIONS LIMIT.

Pursuant to California Constitution Article XIII B, the appropriations limit for the city of Santa Cruz is hereby increased by the aggregate sum authorized to be levied by this tax for the fiscal year 2008-2009 and each year thereafter.

(Ord. 2008-21 § 1 (part), 2008).

ATTACHMENT 2
Draft City of San Jose Resolution No. 75857, June 14, 2011
and
Minutes of June 14, 2011

Available at http://www3.sanjoseca.gov/clerk/Agenda/20110802/20110802_0304res.pdf;
and
<http://www3.sanjoseca.gov/clerk/Agenda/20110614/20110614min.pdf>

RESOLUTION NO.

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING THE ANNUAL REPORT FOR FISCAL YEAR 2011-2012 OF THE DIRECTOR OF FINANCE ON SANITARY SEWER SERVICE AND USE CHARGES AND STORM SEWER SERVICE CHARGES AND APPROVING THE PLACEMENT OF CHARGES AS SET FORTH THEREIN ON THE 2010-2011 TAX ROLL

WHEREAS, since 1960 and 1991 respectively, the collection of the majority of the City of San José Sanitary Sewer Service and Use charges and Storm Sewer Service charges has been accomplished by placing the charges (with certain exceptions) on the County of Santa Clara property tax rolls; and

WHEREAS, on June 14, 2011, the City Council of the City of San José (“City Council”) adopted Resolution No. 75857 establishing Sanitary Sewer Service and Use charges and Storm Sewer Service charges, effective July 1, 2011; and

WHEREAS, pursuant to San José Municipal Code Sections 15.12.550 and 15.16.1410, and Resolution No. 75885, approved by the City Council on June 21, 2011 and which extended the due date of the written report to July 15 2011, the Director of Finance submitted a written report to the City Clerk on July 13, 2010, containing a description of the tax roll properties receiving sanitary sewer service and storm sewer service and the amount of the Sanitary Sewer Service and Use charges and Storm Sewer Service charges for each parcel for the forthcoming fiscal year; and

WHEREAS, the Finance Director’s report identified approximately 230,000 parcels and recommended placement of the charges for the sanitary sewer service and storm sewer service on the tax rolls; and

WHEREAS, pursuant to San José Municipal Code Sections 15.12.550 and 15.16.1430 and the adoption of Resolution No. 75885 by the City Council, the City Clerk set the public hearing on the Report of the Finance Director for August 2, 2011 at 1:30 p.m., or as soon thereafter as the matter may be heard, in the Council Chambers at City Hall, located at 200 East Santa Clara Street, San José, California, and published notices of said hearing in accordance with the San José Municipal Code; and

WHEREAS, Sanitary Sewer Service and Use charges and Storm Sewer Service charge collections will be approximately \$151.4 million for fiscal year 2011-2012, as a result of the public hearing, and have been allocated by the City Council to various allowable sewer related functions as part of the adoption of the 2011-2012 budget;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

1. The 2011-2012 annual Sanitary Sewer Service and Use Charge and Storm Sewer Service Charge Report of the Director of Finance is hereby approved.
2. Placement of the Sanitary Sewer Service and Use charges and Storm Sewer Service charges as set forth in the July 13, 2011 Report of the Director of Finance on the 2011-2012 tax rolls is hereby approved.

RD:MD1
7/21/2011

ADOPTED this _____ day of _____, 2011, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED
Mayor

ATTEST:

DENNIS HAWKINS, CMC
City Clerk

MINUTES OF THE CITY COUNCIL

SAN JOSE, CALIFORNIA

TUESDAY, JUNE 14, 2011

The Council of the City of San José convened in Regular Session at 9:02 a.m. in the Council Chambers at City Hall.

Present: Council Members - Campos, Chu, Constant, Nguyen, Pyle, Rocha; Reed.

Absent: Council Members - Herrera, Kalra, Liccardo, Oliverio. (Excused)

STRATEGIC SUPPORT SERVICES

3.2 (a) Accept Labor Negotiations Update.

Director of Employee Relations Alex Gurza presented a brief Update on Labor Negotiations.

Public Comments: Brian Doyle, Association of Legal Professionals, indicated that there has not been good faith bargaining with the Unions. Vera Todorov, Association of Legal Professionals, suggested a cooling off period to obtain the facts and to look at actuarial studies that the bargaining units and the City can both agree to.

CLOSED SESSION

Upon motion unanimously adopted, Council recessed at 9:08 a.m. to a Closed Session in Room W133 (A) to confer with Legal Counsel pursuant to Government Code Section 54956.9 subsection (a) with respect to existing litigation: (1) Redevelopment Agency/City vs. Bank of America, N.A., et al; Names of Parties Involved: City of San José, Redevelopment Agency, Bank of America, N.A., Merrill Lynch & Co.; Inc., UBS AG, UBS Financial Services, Inc., UBS Securities, LLC, MBIA, Inc., Citibank, N.A., Citigroup Financial Products Inc., Citigroup Global Markets Holdings Inc., Morgan Stanley, Rabobank Group, Bayerische, Landesbank Gironzentrale, Piper Jaffray & Co., Societe Generale SA, Financial Security Assurance, Inc., Assured Guaranty US Holdings Inc., Dexia S.A., National Westminster Bank, PLC, Natixis Funding Corp., Natixis S.A.,

CLOSED SESSION (Cont'd.)

The Goldman Sachs Group, Inc., Goldman Sachs Mitsui Marine Derivative Products, L.P., Goldman Sachs Bank USA, CDR Financial Products, Winters & Co., Advisors, LLC, George K. Baum & Co., Sound Capital Management, Inc., Investment Management Advisory Group, Inc., First Southwest Company, PFM Investment, LLC PFM Asset Management LLC; Court: U.S. District Court, Northern District of California; Case No: CV 102199; Amount of Money or Other Relief Sought: Damages according to proof; (2) County of Alameda, et al. v. AMBAC Financial, et al; Names of Parties Involved: County of Alameda, City and County of San Francisco, City of Los Angeles, Los Angeles Department of Water and Power, Los Angeles World Airports, City of Oakland, City of Richmond, Redwood City, East Bay Municipal Utility District; City of Sacramento, Sacramento Suburban Water District, Sacramento Municipal Utility District, City of San José, City of Stockton, Redevelopment Agency of the City of Stockton, the Public Financing Authority of the City of Stockton, County of Tulare, The Regents of the University of California, Redevelopment Agency of the City of San José, AMBAC Financial Group, Inc., AMBAC Assurance Corporation, MBIA, Inc., MBIA Insurance Corporation, MBIA Insurance Corp. of Illinois, AKA National Public Finance Guarantee Corporation, Syncora Guarantee, Inc., FKA XL Capital Assurance, Inc., Financial Guaranty Insurance Company, Financial Security Assurance Inc., CIFG Assurance of North America, Inc., Assured Guaranty Corp., Jason Kissane, Does 1 through 50; Court: Superior Court of California, In and For the City and County of San Francisco; Case No: CJC-08-004555; Amount of Money or Other Relief Sought: Damages according to proof; (3) Murrel v. City; Names of Parties Involved: Dawn Murrel, City of San José, Does 1 through 100; Court: Superior Court of California, County of Santa Clara; Case No: 1-10-CV172575; Amount of Money or Other Relief Sought: Damages according to proof. (B) to confer with Legal Counsel pursuant to Government Code subsection (c) of Section 54956.9 with respect to anticipated litigation in two (2) matters. (C) to confer with Labor Negotiator pursuant to Government Code Section 54957.6: City Negotiator: City Manager Designee Alex Gurza; Employee Organizations: (1) Association of Building, Mechanical and Electrical Inspectors (ABMEI); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and ABMEI. (2) Association of Engineers & Architects (AEA); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and AEA. (3) Association of Maintenance Supervisory Personnel (AMSP); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and AMSP. (4) City Association of Management Personnel Agreement (CAMP); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and CAMP. (5) Confidential Employees' Organization, AFSCME Local 101 (CEO); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and CEO. (6) International Association of Firefighters, Local 230 (IAFF); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and International Association of

CLOSED SESSION (Cont'd.)

Firefighters. (7) International Brotherhood of Electrical Workers (IBEW); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and IBEW. (8) Municipal Employees' Federation, AFSCME Local 101, AFL-CIO (MEF); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and MEF; (9) International Union of Operating Engineers, Local No. 3 (OE#3); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and International Union of Operating Engineers, Local No. 3. (10) San José Police Officers' Association (SJPOA); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc; Name of Existing Contract or MOA: Memorandum of Agreement between City of San José and San José Police Officers' Association. (11) Association of Legal Professionals of San José (ALP); Nature of Negotiations: Wages/Salaries, Hours, Working Conditions, etc. Web: <http://www.sanjoseca.gov/employeerelations/moa.asp>; Telephone for Employee Relations: 408-535-8150.

By unanimous consent, Council recessed from the Closed Session at 11:01 a.m. and reconvened to Regular Session at 11:16 a.m. in the Council Chambers.

Present: Council Members - Campos, Chu, Constant, Herrera, Kalra, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.

Absent: Council Members - All Present.

ORDERS OF THE DAY

Upon motion by Council Member Pyle, seconded by Council Member Herrera and carried unanimously, the Orders of the Day and the Amended Agenda were approved, and Items 2.3(a)-(e) and Item 3.7(c) were deferred to June 21, 2011. (11-0.)

CLOSED SESSION REPORT

City Attorney Doyle disclosed the following Closed Session actions of June 14, 2011:

A. Authority to Initiate Litigation:

Authority to initiate litigation was given in one (1) matter. The names of the action(s) and the defendant(s), as well as the substance of the litigation shall be disclosed to any person upon inquiry once the action(s) are formally commenced.

CLOSED SESSION REPORT (Cont'd.)

Council Vote: Ayes: Chu, Constant, Herrera, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.

Noes: Campos, Kalra.

Abstention: None.

Absent: None.

STRATEGIC SUPPORT SERVICES

3.3 Adopt a resolution increasing the Library Parcel Tax rates for Fiscal Year 2011-2012 by 1.69% over the Fiscal Year 2010-2011 rates and approving the placement of the Library Parcel Tax on the Fiscal Year 2011-2012 Santa Clara County Property Tax Roll. CEQA: Not a Project, File No. PP10-067 (a), specific funding mechanism – adjustment to rates. (Finance)

Documents Filed: Memorandum from Director of Finance Scott P. Johnson, dated May 23, 2011, recommending adoption of a resolution.

Action: Upon motion by Council Member Liccardo, seconded by Council Member Herrera and carried unanimously, Resolution No. 75825, entitled: “A Resolution of the Council of the City of San José Approving the Increased Library Parcel Tax Rates for FY 2011-2012 and Approving the Placement of the Library Parcel Tax on the FY 2011-2012 Santa Clara County Property Tax Roll”, was adopted. (11-0.)

CONSENT CALENDAR

Upon motion by Vice Mayor Nguyen, seconded by Council Member Herrera and carried unanimously, the Consent Calendar was approved and the below listed actions were taken as indicated. (11-0.)

2.1 Approval of Minutes.

Action: There were none.

2.2 Final adoption of ordinances.

(a) **ORD. NO. 28908** – Amending Title 6 of the San José Municipal Code to add a new Chapter 6.88 to establish regulations pertaining to medical marijuana collectives and to the individual cultivation, and use of medical marijuana.

Action: Deferred to August 9, 2011 per Administration.

2.3 Approval of Council Committee Reports.

- (a) Rules and Open Government Committee Report of May 18, 2011.**
- (b) Rules and Open Government Committee Report of May 25, 2011.**
- (c) Rules and Open Government Committee Report of May 11, 2011.**
- (d) Rules and Open Government Committee Report of May 4, 2011.**
- (e) Rules and Open Government Committee Report of April 27, 2011.**

Action: Deferred to June 21, 2011 per Orders of the Day.

- (f) Rules and Open Government Committee Report of April 20, 2011.**
 - (g) Rules and Open Government Committee Report of April 13, 2011.**
 - (h) Rules and Open Government Committee Report of March 23, 2011.**
 - (i) Rules and Open Government Committee Report of March 16, 2011.**
 - (j) Rules and Open Government Committee Report of March 9, 2011.**
- (Mayor)**

Documents Filed: The Rules and Open Government Committee Reports dated March 9, 2011, March 16, 2011, March 23, 2011, April 13, 2011 and April 20, 2011.

Action: The Rules and Open Government Committee Reports were approved. (11-0.)

2.4 Mayor and Council Excused Absence Requests.

Action: There were none.

2.5 City Council Travel Reports.

Action: There were none.

2.6 Report from the Council Liaison to the Retirement Boards.

Action: There were none.

2.7 Approve the Third Amendment to the agreement with Jefferson Wells International for continuation of on-call audit consultant services for the Terminal Area Improvement Program (TAIP) at the Norman Y. Mineta San Jose International Airport, increasing the total compensation by \$100,000 from \$500,000 to a total not to exceed fee of \$600,000, and extending the term of the agreement to December 31, 2011. CEQA: Not a Project, File No. PP10-066(d), Consultant Services for Design/Study/Research/Inspection. (Airport)

Documents Filed: Memorandum from Director of Aviation William F. Sherry, dated May 23, 2011, recommending approval of the third amendment to the agreement.

2.7 (Cont'd.)

Action: The Third Amendment to the agreement with Jefferson Wells International for continuation of on-call audit consultant services for the Terminal Area Improvement Program (TAIP) at the Norman Y. Mineta San Jose International Airport, increasing the total compensation by \$100,000 from \$500,000 to a total not to exceed fee of \$600,000, and extending the term of the agreement to December 31, 2011 was approved. (11-0.)

2.8 Approve settlement in the case of Alvis v. Olmos, City of San José, et. al., and authorize the City Attorney to execute a Settlement Agreement and Release with Jennifer and Derek Alvis in the amount of \$225,000.00. CEQA: Not a Project, File No. PP10-066(h), Settlement Agreement. (City Attorney's Office)

Documents Filed: Memorandum from City Attorney Richard Doyle, dated May 31, 2011, recommending approval of the settlement.

Action: The settlement in the case of Alvis v. Olmos, City of San José, et. al. was approved and the City Attorney was authorized to execute a Settlement Agreement and Release with Jennifer and Derek Alvis in the amount of \$225,000.00. (11-0.)

2.9 Adopt a resolution to:

- (a) **Authorize the City Manager to submit an application to the U.S. Foreign-Trade Zones Board to establish a Foreign Trade Subzone at Tesla Motors, Inc. facilities in Palo Alto and Fremont.**
- (b) **Authorize the City Manager to negotiate and execute an agreement with Tesla Motors, Inc. for management and operation of the Subzone upon the U.S. Foreign-Trade Zones Board's approval of the application.**

CEQA: Not a Project, File No. PP10-068 3(a), Federal Application. (Economic Development)

Documents Filed: Memorandum from Director of Economic Development/Chief Strategist Kim Welsh, dated May 23, 2011, recommending adoption of a resolution.

Mayor Reed presented comments about Tesla Motors, Inc.

Action: Upon motion by Council Member Constant, seconded by Council Member Kalra and carried unanimously, Resolution No. 75826, entitled: "A Resolution of the Council of the City of San José Authorizing the City Manager to File an Application for Foreign Trade Zone Subzone Authority for Tesla Motors, Inc.", was adopted. (11-0.)

2.10 Approve a master agreement with GHD Inc., for Asset Management Consultant Services in an amount not to exceed \$300,000, for a term of July 1, 2011 date to June 30, 2014. CEQA: Not a Project, File No. PP10-066(a), new contract for professional services with no change to the physical environment. (Environmental Services)

Action: Deferred to June 21, 2011 per Administration.

- 2.11 Approve a Continuation Agreement with Westin Engineering, Inc., for Implementation of a Computerized Maintenance Management System at the San Jose/ Santa Clara Water Pollution Control Plant for ten additional months to expire on June 30, 2012, at no additional cost. CEQA: Not a Project, File No. PP10-066(a), Contract amendment for software installation and support. (Environmental Services)**

Action: Deferred to June 21, 2011 per Administration.

- 2.12 (a) Accept Report on Request for Proposal for the purchase and deployment of an Adaptive Traffic Control System.**
- (b) Adopt a resolution authorizing the Director of Finance to negotiate and execute:**
- (1) An agreement with TransCore ITS, LLC (Pleasanton, CA) for the design, purchase, implementation and deployment of an Adaptive Traffic Control System including all hardware, software (including third party licenses), related professional services, one year of extended maintenance and support, shipping and applicable sales tax for an amount not to exceed \$905,720.**
 - (2) Change orders not to exceed a contingency amount of \$90,000 to cover any unanticipated design or implementation changes.**
 - (3) Four one-year options for ongoing maintenance and support subject to annual appropriation of funds.**
 - (4) An amendment or change order to purchase additional hardware and software to expand the adaptive control system to cover additional intersections for four years, subject to the appropriation of funds.**

CEQA: EIR, File No. PP08-154, September 18, 2008. (Finance)

Documents Filed: Memorandum from Director of Finance Scott P. Johnson, dated May 23, 2011, recommending adoption of a resolution.

Action: Report on Request for Proposal for the purchase and deployment of an Adaptive Traffic Control System was accepted and Resolution No. 75827, entitled: "A Resolution of the Council of the City of San José Authorizing the Director of Finance to Negotiate and Execute an Agreement with Transcore ITS, LLC for an Adaptive Traffic Control System", was adopted. (11-0.)

- 2.13 (a) Adopt a resolution authorizing the City Manager to execute the Joint Powers Agreement to Establish the Bay Area Regional Interoperable Communications System (BayRICS) Authority on behalf of the City of San Jose, upon appropriation of funding.**
- (b) Authorize the Mayor to appoint a representative from the City of San Jose to the BayRICS JPA Board of Directors and an alternate.**

CEQA: Not a Project, File No. PP10-066(e), services that involve no physical changes to the environment. (Mayor/City Manager's Office)

2.13 (Cont'd.)

Documents Filed: (1) Memorandum from Deputy City Manager Deanna Santana and Senior Policy Advisor Michelle McGurk, dated May 19, 2011, recommending adoption of a resolution and appointment of a representative to BayRICS. (2) Memorandum from Mayor Reed, dated June 9, 2011, recommending approval of the Staff recommendation.

Mayor Reed and Council Members Pyle, Herrera and Constant presented comments and congratulated Staff for their work.

Action: Upon motion by Council Member Pyle, seconded by Council Member Herrera and carried unanimously, Resolution No. 75828, entitled: "A Resolution of the Council of the City of San José Authorizing the City Manager to Execute an Agreement to Establish the Bay Area Regional Interoperable Communications System (BayRICS) Authority", was adopted. Senior Policy Advisor Michelle McGurk was appointed as Director to BayRICS and Deputy City Manager Deanna Santana was appointed as Alternate to BayRICS. (11-0.)

2.14 **Adopt a resolution authorizing the City Manager to execute a second Amendment to extend the term of the Joint Memorandum of Understanding with the City and County of San Francisco, City of Oakland, Alameda County, and Santa Clara County as partners in the San Francisco Bay Urban Area Security Initiative grant program from July 1, 2011 to December 31, 2011. CEQA: Not a Project, File No. PP10-066 (a), 2010 UASI Grant MOU. (Fire/City Manager's Office)**

Documents Filed: Memorandum from Deputy City Manager Deanna Santana and Assistant Fire Chief Teresa Reed, dated May 27, 2011, recommending adoption of a resolution.

Action: Resolution No. 75829, entitled: "A Resolution of the Council of the City of San José Authorizing the City Manager to Execute a Second Amendment to the Urban Area Security Initiative Memorandum of Understanding", was adopted. (11-0.)

2.15 **Adopt a resolution that authorizes the City Manager or designee to negotiate and execute a Memorandum of Understanding between the City of San José and the San José Unified School District which describes the parties' vision for the shared planning, development and operation of an artificial turf soccer field at Allen at Steinbeck School. CEQA: Not a Project, File No. PP10-066(g), Memorandum of Understanding. (Parks, Recreation and Neighborhood Services)**

Documents Filed: Memorandum from Deputy City Manager/Acting Director of Parks, Recreation and Neighborhood Services Norberto Dueñas, dated May 23, 2011, recommending adoption of a resolution.

Council Member Pyle expressed comments about the Memorandum of Understanding for the field at Steinbeck. Council Member Kalra offered his congratulations to the City Staff and San José Unified School District.

2.15 (Cont'd.)

Action: Upon motion by Council Member Pyle, seconded by Council Member Kalra and carried unanimously, Resolution No. 75830, entitled: “A Resolution of the Council of the City of San José Authorizing the City Manager to Negotiate and Execute a Memorandum of Understanding Between the City of San José and the San José Unified School District for a Soccer Field at Allen at Steinbeck School”, was adopted. (11-0.)

2.16 Adopt a resolution authorizing the City Manager to negotiate and execute a cost-sharing agreement with the Santa Clara Valley Water District to compensate the District for design and construction associated with the repair of a City outfall and an eroded bank along Thompson Creek, and sediment removal and repair of an eroded bank along Guadalupe River in a total amount not to exceed \$553,000. CEQA: “Final Environmental Impact Report for the Multi-Year Stream Maintenance Program” dated August 2001. Resolution No. 2001-56 adopted August 21, 2001, by the Santa Clara Valley Water District Board of Directors. Council Districts 6, 8 and 9. (Public Works)

Documents Filed: Memorandum from Acting Director of Public Works David Sykes, dated May 23, 2011, recommending adoption of a resolution.

Action: Upon motion by Council Member Herrera, seconded by Council Member Pyle and carried unanimously, Resolution No. 75831, entitled: “A Resolution of the Council of the City of San José Authorizing the City Manager to Negotiate and Execute a Cost-Sharing Agreement with the Santa Clara Valley Water District for Thompson Creek and Guadalupe River Bank Erosion and Outfall Repair Projects In An Amount Not To Exceed \$553,000”, was adopted. (11-0.)

2.17 Approve a Master Agreement with Schaaf & Wheeler for consultant services for Storm Drainage Master Planning and General Engineering Services from the date of execution to December 31, 2014, in an amount not to exceed \$500,000, subject to appropriation of funds. CEQA: Exempt, File No. PP10-066. (Public Works)

Documents Filed: Memorandum from Acting Director of Public Works David Sykes, dated May 23, 2011, recommending approval of a master agreement and authority for the Director of Public Works to approve service orders up to the not to exceed amount.

Action: A Master Agreement with Schaaf & Wheeler for consultant services for Storm Drainage Master Planning and General Engineering Services from the date of execution to December 31, 2014, in an amount not to exceed \$500,000, subject to appropriation of funds was approved and authority for the Director of Public Works to approve service orders up to the not to exceed amount, was authorized. (11-0.)

- 2.18 Approve a Master Agreement with AECOM Technical Services, Inc. for consultant services for various projects from the date of execution to June 30, 2014, in an amount not to exceed \$500,000, subject to appropriation of funds. CEQA: Not a Project, File No. PP10-066(d), consultant services that will have no effect on the environment. (Public Works)**

Documents Filed: Memorandum from Acting Director of Public Works David Sykes, dated May 23, 2011, recommending approval of a master agreement.

Action: A Master Agreement with AECOM Technical Services, Inc. for consultant services for various projects from the date of execution to June 30, 2014, in an amount not to exceed \$500,000, subject to appropriation of funds, was approved. (11-0.)

- 2.19 Adopt resolutions approving, confirming and adopting the Annual Budget Reports for Fiscal Year 2011-2012 for City of San José Maintenance Districts 1, 2, 5, 8, 9, 11, 13, 15, 18, 19, 20, 21 and 22 and levying the assessments therein. CEQA: Not a Project, File No. PP10-069 (a), annual reports. Council Districts 2, 3, 4 and 8. (Public Works)**

Documents Filed: Memorandum from Acting Director of Public Works David Sykes, dated May 23, 2011, recommending adoption of resolutions and transmitting the annual budget reports.

Action: Resolution No. 75832, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 1 (Los Paseos) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75833, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 2 (Trade Zone Boulevard – Lundy Avenue) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75834, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 5 (Orchard Parkway – Plumeria Drive) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75835, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 8 (Zanker – Montague) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75836, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 9 (Santa Teresa – Great Oaks) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75837, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 11 (Brokaw Road from Junction Avenue to Old Oakland Road) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75838, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 13 (Karina – O’Nel) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75839, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 15 (Silver Creek Valley) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75840, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 18 (The Meadowland) for Fiscal Year

2.19 (Cont'd.)

2011-2012 and Levying Assessments”; Resolution No. 75841, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 19 (River Oaks Area Landscaping) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75842, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 20 (Renaissance – North First Landscaping) for Fiscal Year 2011-2012 and Levying Assessments”; Resolution No. 75843, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 21 (Gateway Place – Airport Parkway) for Fiscal Year 2011-2012 and Levying Assessments” and Resolution No. 75844, entitled: “A Resolution of the Council of the City of San José Approving the Annual Budget Report for Maintenance District 22 (Hellyer Avenue – Silver Creek Valley Road) for Fiscal Year 2011-2012 and Levying Assessments”, were adopted. (11-0.)

2.20 Adopt a resolution to:

- (a) **Approve the Downtown San Jose Property-Based Business Improvement District Annual Report for Fiscal Year 2011-2012 as filed or modified by Council.**
- (b) **Confirm the individual assessments as proposed or modified by Council, including the assessment on City-owned property of approximately \$354,773 and the assessment on Redevelopment Agency property of approximately \$47,503.**
- (c) **Direct the City baseline services contribution in the amount of \$364,255, and assessment payments as described above be made.**
- (d) **Direct the Director of Finance to deliver the assessment roll to the County for collection with the property taxes.**

CEQA: Not a Project, File No. PP10-069(a), annual reports. Council District 3. (Public Works/Transportation)

Documents Filed: Memorandum from Acting Director of Public Works David Sykes and Director of Transportation Hans F. Larsen, dated May 23, 2011, recommending adoption of a resolution.

Mayor Reed thanked the Downtown property owners.

Action: Upon motion by Council Member Liccardo, seconded by Council Member Herrera and carried unanimously, Resolution No. 75845, entitled: “A Resolution of the Council of the City of San José Approving The Downtown San Jose Property-Based Business Improvement District Annual Report for Fiscal Year 2011-2012 as Filed or Modified by the City Council; Confirming the Individual Assessments as Proposed or Modified by the City Council, Including the Assessment on City Owned Property of Approximately \$328,133 and the Assessment on Redevelopment Agency Property of Approximately \$74,142; Directing That the City Baseline Services Contribution in the Amount of \$364,255 and Assessment Payment Be Made; and Directing the Director of Finance to Deliver the Assessment Roll to the County of Santa Clara for Collection with the Property Taxes”, was adopted. (11-0.)

- 2.21 As recommended by the Rules and Open Government Committee on June 1, 2011:**
- (a) Approve the Jewish American Heritage Month Event as a City Council sponsored Special Event.**
 - (b) Approve and accept donations from various individuals, businesses or community groups to support the event.**
- (City Clerk)**

Documents Filed: Memorandum from City Clerk Dennis D. Hawkins, dated June 1, 2011, transmitting the recommendations of the Rules and Open Government Committee.

Action: The Jewish American Heritage Month Event as a City Council sponsored Special Event was approved and acceptance of donations from various individuals, businesses or community groups to support the event was authorized. (11-0.)

- 2.22 As recommended by the Rules and Open Government Committee on June 1, 2011:**
- (a) Approve the Canadian Flag Raising Event as a City Council sponsored Special Event.**
 - (b) Approve and accept donations from various individuals, businesses or community groups to support the event.**
- (City Clerk)**

Documents Filed: Memorandum from City Clerk Dennis D. Hawkins, dated June 1, 2011, transmitting the recommendations of the Rules and Open Government Committee.

Action: The Canadian Flag Raising Event as a City Council sponsored Special Event was approved and acceptance of donations from various individuals, businesses or community groups to support the event was authorized. (11-0.)

- 2.23 Approve travel by Council Member Chu to Sacramento, CA on June 17, 2011 to attend the regularly scheduled League of California Cities Transportation, Communication and Public Works Policy Committee meeting as the City's designated representative. Source of Funds: Mayor/Council Travel Fund if necessary. (Chu)**

Documents Filed: Memorandum from Council Member Chu, dated June 2, 2011, requesting approval of travel.

Action: The travel request for Council Member Chu was approved. (11-0.)

- 2.24 Approve travel by Council Member Herrera to Sacramento, CA on June 16-17, 2011 to attend the regularly scheduled League of California Cities Policy Committee. Source of Funds: Mayor/Council Travel Fund. (Herrera)**

Documents Filed: Memorandum from Council Member Herrera, dated June 7, 2011, requesting approval of travel.

Action: The travel request for Council Member Herrera was approved. (11-0.)

- 2.25 Approve travel by Vice Mayor Nguyen to Sacramento, CA on June 27-29, 2011 to participate in the “Capitol Academy 120 – State Leadership: An Insider’s View” leadership program sponsored by the California Asian Pacific Islander Legislative Caucus Institute. Source of Funds: California Asian Pacific Islander Legislative Caucus Institute. No City Funds will be used for travel. (Nguyen)**

Documents Filed: Memorandum from Vice Mayor Nguyen, dated June 6, 2011, requesting approval of travel.

Action: The travel request for Vice Mayor Nguyen was approved. (11-0.)

- 2.26 As recommended by the Rules and Open Government Committee on June 8, 2011, appoint Corinne Winter as an At-Large representative and Steve Borkenhagen as the Downtown Association Representative to the Downtown Parking Board. (Liccardo)**

Documents Filed: Memorandum from City Clerk Dennis D. Hawkins, dated June 8, 2011, transmitting the recommendations of the Rules and Open Government Committee.

Action: Corinne Winter was appointed as an At-Large representative and Steve Borkenhagen as the Downtown Association Representative to the Downtown Parking Board. (11-0.)

END OF CONSENT CALENDAR

STRATEGIC SUPPORT SERVICES

- 3.10 Adopt a resolution to approve the terms of a collective bargaining agreement between the City and the San José Police Officers’ Association (SJPOA) for the term of July 1, 2011 to June 30, 2012 or June 30, 2013, and authorizing the City Manager to execute an agreement, pending ratification by the SJPOA membership. CEQA: Not a Project, File No. PP10-069(b), Personnel Related Decisions. (City Manager’s Office)**

Documents Filed: (1) Memorandum from Director of Employee Relations Alex Gurza, dated June 3, 2011, recommending adoption of a resolution. (2) Supplemental memorandum from Director of Employee Relations Alex Gurza, dated June 9, 2011, transmitting the tentative agreements reached with the SJPOA on June 3, 2011 and June 6, 2011 and which were to be ratified by the membership and approved by City Council.

City Manager Debra Figone presented introductory comments about the San José Police Officers’ Association agreement.

Director of Employee Relations Alex Gurza provided the report.

Motion: Council Member Constant moved approval of the Staff recommendations. Council Member Kalra seconded the motion.

3.10 (Cont'd.)

Council discussion and comments followed.

Public Comments: George Beattie, San José Police Officers' Association, presented comments and requested that Council look at alternative proposals to save all the remaining Police Officers in Tier 1.

Action: On a call for the question, the motion carried unanimously, Resolution No. 74846, entitled: "A Resolution of the Council of the City of San José Approving an Agreement Between the City of San José and the San José Police Officers' Association with a Term of July 1, 2011 to June 30, 2012, or June 30, 2013", was adopted. (11-0.)

3.1 Report of the City Manager, Debra Figone (Verbal Report)

City Manager Debra Figone presented highlights about the conference being held at City Hall, June 23, 2011, for entrepreneurs and small businesses featuring business development through social media.

COMMUNITY AND ECONOMIC DEVELOPMENT

4.4 Approve an ordinance authorizing an Animal License Amnesty Program from September 1, 2011 through October 31, 2011, suspending all animal license citation activity, and waiving late fees. CEQA: Not a Project, File No. PP10-066(e), Services that involve no physical changes to the environment. (Public Works)

Documents Filed: Memorandum from Acting Director of Public Works David Sykes, dated May 23, 2011, recommending approval of an ordinance.

Action: Upon motion by Vice Mayor Nguyen, seconded by Council Member Herrera and carried unanimously, Ordinance No. 28925, entitled: "An Ordinance of the City of San José Adopting a Limited Amnesty Program Under Which the City Will Forgive All Late Licensing Fees and Suspend Issuance of Citations for Violations of Section 7.20.520 of Chapter 720 of the San José Municipal Code", was passed for publication. (11-0.)

4.5 Consent to the request of Applegate Johnston, Inc., the general contractor on the new Fire Station No. 36 Project, to substitute itself and Butte Steel for Sciarini Steel. CEQA: Exempt, File Nos. PPO6-009 and PPO9-150. (Public Works)

Documents Filed: Memorandum from Acting Director of Public Works David Sykes, dated May 23, 2011, recommending that Council consent to the request of Applegate Johnston, Inc.

Motion: Council Member Constant moved approval of the Staff recommendations. Council Member Herrera seconded the motion.

4.5 (Cont'd.)

Acting Director of Public Works David Sykes responded to the questions and concerns from Council Member Campos.

Action: On a call for the question, the motion carried unanimously, the request of Applegate Johnston, Inc., the general contractor on the new Fire Station No. 36 Project, to substitute itself and Butte Steel for Sciarini Steel, was approved. (11-0.)

4.6 As recommended by the Rules and Open Government Committee on June 1, 2011, discuss and provide direction on:

(a) **The approval of an ordinance amending the Cisco Systems June 2000 Development Agreement.**

(b) **Modifications to the City's Development Agreement Ordinance.**

(Mayor)

Documents Filed: (1) Memorandum from Mayor Reed, Council Members Chu and Liccardo, dated June 3, 2011, recommending direction as described in "Action". (2) Memorandum from City Clerk Dennis D. Hawkins, dated June 1, 2011, transmitting the recommendations of the Rules and Open Government Committee.

Mayor Reed presented introductory remarks and commented on the memorandum he cosigned with Council Members Chu and Liccardo.

Motion: Council Member Chu moved approval of the recommendations of the Rules and Open Government Committee and the memorandum he cosigned with Mayor Reed and Council Member Liccardo. Council Member Liccardo seconded the motion.

Mayor Reed and Council Member Chu provided meeting disclosures.

Action: On a call for the question, the motion carried unanimously, the memorandum from Mayor Reed and Council Members Chu and Liccardo, dated June 3, 2011 was approved. The Administration was directed to: (1) Negotiate and prepare for City Council consideration in September 2011, amendments to the Development Agreement with Cisco Systems to: (a) Allow Cisco Systems to retain approved entitlements for Site 6 in Alviso. (b) Remove the second condition of the current agreement requiring half of the Phase 1 square footage to be built within 12 years. (c) Retain the effectiveness of the 2000 agreement through 2020. (2) Prepare for City Council consideration in the August Priority Setting Session, a work load assessment to develop modifications to the Development Agreement Ordinance to streamline and strengthen the ordinance to support and advance the City's Economic Strategy goals. (11-0.)

NEIGHBORHOOD SERVICES

5.1 (a) Adopt a resolution that authorizes the City Manager or designee to:

- (1) **Submit grant applications for the following four projects: 1) Roberto Antonio Balermino Park, 2) Tamien Park, 3) St. James Park, and 4) Del Monte Park Phase I, in a total amount not to exceed \$20,000,000 under the Statewide Park Development and Community Revitalization Program of 2008 (Statewide Park Program) administered by the Office of Grants and Local Services (OGALS) within the California State Department of Parks and Recreation (DPR).**
- (2) **For all projects with appropriate CEQA clearance, accept any grant funds awarded to the City and negotiate and execute all necessary documents to implement the grant awards and agree to the commitments required by the grant program as described in the memorandum.**
- (3) **For the Tamien Park project, accept any grant funds awarded to the City for the limited purpose of completing CEQA, and negotiate and execute all necessary documents to implement the grant award for CEQA clearance and to return to City Council after appropriate CEQA clearance, for authorization to negotiate and execute all necessary documents including acceptance of any grant funds awarded to the City.**

- (b) **Exempt the Roberto Balermino Park, Tamien Park, and Del Monte Park Phase I projects from the City Council policy set forth in Resolution No. 75638 adopted on November 16, 2010 requiring staff to identify long-term non-General Fund funding for maintenance prior to the commitment for development of any new park, trail or recreational facility.**

CEQA: Roberto Antonio Balermino Park, Negative Declaration, File No. PDC98-089; St. James Park, Categorically Exempt, File No. PP02-108; Del Monte Park Phase I, EIR Resolution No. 72625, File No. PDC03-071; Tamien Park, Not a Project, File No. PP10-068, grant applications. (Parks, Recreation and Neighborhood Services)

Documents Filed: Memorandum from Deputy City Manager/Acting Director of Parks, Recreation and Neighborhood Services Norberto Dueñas, dated May 23, 2011, recommending adoption of a resolution and exempt the Roberto Balermino Park, Tamien Park, and Del Monte Park Phase I projects from the City Council policy set forth in Resolution No. 75638 adopted on November 16, 2010.

5.1 (Cont'd.)

Action: Upon motion by Council Member Oliverio, seconded by Council Member Herrera and carried unanimously, Resolution No. 75847, entitled: "A Resolution of the Council of the City of San José Authorizing the City Manager, or Designee, To Submit Grant Applications to the Statewide Park Development and Community Revitalization Program of 2008 Administered by the Office of Grants and Local Services Within the California State Department of Parks and Recreation for Four Projects Identified in the Attachment of this Resolution, in An Amount Not To Exceed \$20 Million, To Accept the Grant if Awarded and To Negotiate and Execute All Related Documents", was adopted and the Roberto Balermينو Park, Tamien Park, and Del Monte Park Phase I projects were exempted from the City Council Policy set forth in Resolution No. 75638 which was adopted on November 16, 2010. (11-0.)

5.2 **Adopt a resolution to amend and restate the policy and pilot program approved by the City Council on November 16, 2010, that authorized City staff to proceed with the development of any new park or recreational facility if long-term non-general funding for maintenance is identified to:**

- (a) **Remove any reference to "trail" from the policy.**
- (b) **Expand the policy to allow more residential development projects to take advantage of the policy and pilot program by receiving credit against their parkland fees in exchange for providing long-term maintenance of a new park or new recreational facility.**

CEQA: Statutorily Exempt, File No. PP10-067(a), CEQA Guidelines Section 15273, Rates, Tolls, Fares, and Charges. (Parks, Recreation and Neighborhood Services)

Documents Filed: Memorandum from Deputy City Manager/Acting Director of Parks, Recreation and Neighborhood Services Norberto Dueñas, dated May 27, 2011, recommending adoption of a resolution.

Mayor Reed provided meeting disclosures.

Council Member Liccardo thanked the Staff for their willingness to engage in creative solutions.

Action: Upon motion by Council Member Constant, seconded by Vice Mayor Nguyen and carried unanimously, Resolution No. 75848, entitled: "A Resolution of the Council of the City of San José to Repeal Resolution No. 75638 and Amend and Restate the Policy Adopted by the City Council on November 16, 2010 To: (1) Implement a Pilot Program, Through December 31, 2012, To Authorize Staff To Proceed with Development of Any New Park or Recreational Facility (Excluding Trail) That Meets Certain Funding Criteria, and (2) Modify the Park Maintenance Exemption to the City's Prevailing Wage Requirements", was adopted. (10-1. Noes: Oliverio.)

TRANSPORTATION & AVIATION SERVICES

- 6.2 Adopt a resolution authorizing the City Manager to negotiate and execute a Public-Private Partnership Agreement between City of San José, City and County of San Francisco through San Francisco Municipal Transportation Authority (SFMTA) and Better Place Inc., relating to the development of battery switch stations and the operation of a network of zero-emission “battery switchable” electric taxi vehicles in San José and San Francisco as part of the Bay Area Electric Vehicle Taxi Corridor Program partially funded by a grant administered by the Federal Highway Administration of the U.S. Department of Transportation. CEQA: Exempt. (Transportation)**

Documents Filed: Memorandum from Director of Transportation Hans F. Larsen, dated May 27, 2011, recommending adoption of a resolution.

Action: Upon motion by Council Member Liccardo, seconded by Vice Mayor Nguyen and carried unanimously, Resolution No. 75849, entitled: “A Resolution of the Council of the City of San José Authorizing the City Manager to Negotiate and Execute a Public Private Partnership Agreement Between the City of San José, City and County of San Francisco through the San Francisco Municipal Transportation Authority and Better Place, Inc. Relating to the Development of Battery Switch Stations and the Operation of a Network of Zero-Emission Battery Switchable Electric Taxi Vehicles”, was adopted. (11-0.)

ENVIRONMENTAL & UTILITY SERVICES

- 7.1 (a) Accept the Plant’s odor assessment status report and direct staff to continue with the development of a regional odor assessment study:**
- (1) Develop a stakeholder process including the other possible odor generating facilities and the Plant’s tributary agencies.**
 - (2) Develop a funding plan to include a portion of the funding from sources other than the Sewer Service and Use Charges.**
 - (3) Complete development of a scope and engage consultant services.**
 - (4) Provide a status report in the fall of 2011 on progress made.**
- (b) Accept the analysis of the feasibility of implementing odor control projects in three to seven years and direct staff to continue to explore the possibility of accelerating biosolids projects and deliver a status report in fall 2011.**

CEQA: Not a Project, File No. PP10-069 (a) Staff Reports. (Environmental Services/Public Works)

Action: Deferred to June 21, 2011 per Administration.

- 7.2 (a) Conduct a Public Hearing to allow community input regarding the implementation plan for complying with the requirements of Senate Bill X7-7 (SB 7), Water Conservation Bill of 2009.**
- (b) Conduct a Public Hearing to allow community input regarding the draft Urban Water Management Plan prior to its adoption.**

- 7.2 (c) **Adopt a resolution approving the San Jose Municipal Water System 2010 Urban Water Management Plan update and directing staff to file the Plan with the California Department of Water Resources.**

CEQA: The preparation and adoption of an UWMP is exempt from the CEQA process per California Water Code section 10652. Council Districts 2, 4, 7 and 8. (ESD)

Documents Filed: (1) Memorandum from City Clerk Dennis D. Hawkins, dated June 6, 2011, transmitting the recommendations of Transportation and Environment Committee. (2) Proof of Publications of Notices of Public Hearings, executed on May 13, 2010, and May 20, 2011, submitted by the City Clerk.

Mayor Reed opened the public hearings on the San José Municipal Water System Implementation Plan for the Water Conservation Bill of 2009, including the establishment of Urban Per Capita Water Use Targets and the 2010 Urban Water Management Plan Update for the San José Municipal Water System.

Public Comments: There was no testimony from the floor. Mayor Reed closed the public hearings.

Assistant City Manager Edward K. Shikada responded to Council questions.

Action: Upon motion by Council Member Herrera, seconded by Council Member Pyle and carried unanimously, Resolution No. 75850, entitled: “A Resolution of the Council of the City of San José Approving the San José Municipal Water System 2010 Urban Water Management Plan Update and Directing staff to File the Plan with the California Department of Water Resources”, was adopted. (11-0.)

ADJOURNMENT

The Council of the City of San José adjourned the morning session at 12:13 p.m.

RECESS/RECONVENE

The City Council recessed at 12:13 p.m. from the morning Council Session and reconvened at 1:31 p.m. in the Council Chambers, City Hall.

Present: Council Members - Campos, Chu, Constant, Herrera, Kalra, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.

Absent: Council Members - All Present.

INVOCATION

Father Mark Gazzingan, St. Christopher Church presented the Invocation. (District 6)

PLEDGE OF ALLEGIANCE

Mayor Reed, accompanied by District 8 Girl Scout Troop, led the Pledge of Allegiance.

JOINT COUNCIL/REDEVELOPMENT AGENCY

The Redevelopment Agency Board was convened at 1:41 p.m. to Consider Item 9.1 in a Joint Session.

- 9.1 (a) Review, discuss and approve the Mayor's 2011 June Budget Message.**
(b) Adopt resolutions authorizing the City Manager and Redevelopment Agency Executive Director to negotiate and execute agreements for projects for which funding has been approved in the Mayor's Budget Message when amounts exceed the City Manager's or Executive Director's contract authority and environmental review has been completed.
(Mayor)

Documents Filed: (1) Memorandum from Mayor Reed, dated June 3, 2011, transmitting the Mayor's June Budget Message for Fiscal Year 2011-2012. (2) Memorandum from Mayor Reed, dated June 13, 2011, transmitting the Mayor's June Budget Adjustments for Fiscal Year 2011-2012. (3) Memorandum from Council Member Constant, dated June 13, 2011, recommending approval of the Mayor's June Budget Message with an amendment to restore 25 Police Officer Positions utilizing the funding sources as outlined in his memorandum. (4) Memoranda from Council Member Campos, both dated June 14, 2011, recommending amendments to the Mayor's June Budget Message. (5) Memorandum from Council Member Kalra, dated June 10, 2011, recommending amendments to the Mayor's June Budget Message. (6) Memorandum from Council Members Chu, Pyle and Rocha, dated June 10, 2011, recommending consideration of budget recommendations from the Youth Commission for integration in the Mayor's

9.1 Documents Filed: (Cont'd.)

June Budget Message. (7) Memorandum from Council Member Chu, dated June 8, 2011, recommending approval of the Mayor's Budget Message with revisions to the rebudget amounts for Council Offices to reduce the amounts for each office by \$50,000. (8) Memorandum from Council Members Chu and Rocha, dated June 10, 2011, recommending allocating savings from the Mayor and Council Office rebudgets to restore the Youth Outreach Specialist position. (9) Letter from the San José Trailer Park, dated June 14, 2011, submitting their strong objection to any further increases to the Storm Sewer Services or the Sewer Service and Use Charges. (10) Letter from the California Catholic Conference, dated June 14, 2011, providing a Moral Framework for Addressing California's Budget Crisis.

Mayor Reed presented introductory comments.

Mayor Reed clarified the adjustments to the Mayor's June 3, 2011 Budget Message for Fiscal Year 2011-2012 in his memorandum dated June 13, 2011, as formally described in "Action" on Page 23.

Public Comments: The following speakers presented comments, complaints, suggestions and support to the Proposed Operating and Capital Budgets for Fiscal Year 2011-2012, the Proposed Five-Year Capital Improvement Program for Fiscal Year 2012-2016, the Proposed Fees and Charges Report for the Fiscal Year 2011-2012, the Mayor's June Budget Message for Fiscal Year 2011-2012 and the Proposed San José Redevelopment Agency Operating and Capital Budgets for Fiscal Year 2011-2012.

Phil Henderson, Roger Lasson, Robert Sapien, San José Firefighters, David Wall, Imam Mubasher Ahmad, Stan Taylor, Reverend Chuck Rawlings, Presbyterian Church, John Freesemann, Holy Redeemer Lutheran Church, Bob Brownstein, Chuck Andrew, Teamsters Automotive Union Local 665, Michael Thompson, Doug Block, Teamsters Joint Council, Reverend Rebecca Kuiken, Interfaith Council, Reverend Ben Chun, Good Shepard Lutheran, Emilie Gatfield, Tony Sanseverino, Augustin Viyan, Alma Center, Jose Orta, Sacred Heart Community Service, Megan Fluke, Habitat Conservation Now, George Beattie, San José Police Officers' Association, Martha O'Connell, HOME, Patricia Ventimiglia, Joseph Ossa, Carlo America, Gina America, Bob Leininger, Elena Backman, David Oki, Charie Chan, Roz Dean, Ben Field, South Bay Labor Union, Judy, Richard McCoy, Melvina Augustine, Scott Knies, San José Downtown Association, Ted Scarlett, Kylee Cooley, Jonathan Lustig, Johnny Khamis and Karen Stephenson.

Motion: Vice Mayor Nguyen moved approval of the Mayor's June Budget Message for Fiscal Year 2011-2012, dated June 3, 2011 and the Mayor's June Budget Message Adjustments for Fiscal Year 2011-2012, dated June 13, 2012, as described in "Action" on Page 23. Council Member Liccardo seconded the motion.

Council Member Herrera expressed her support to the motion on the floor.

9.1 (Cont'd.)

Council Member Constant moved approval to amend the motion on the floor to include his memorandum to restore 25 Police Officer positions. The motion failed for lack of a second.

Council Member Kalra requested to amend the motion to include his memorandum, dated June 10, 2011, to allocate 25% of any funding deemed available for the Future Deficit Reserve Fund to restore Police Officer positions. Vice Mayor Nguyen and Council Member Liccardo declined to accept the amendment.

Council Member Kalra moved approval to amend the motion to include his memorandum dated June 10, 2011, as described previously. Council Member Chu seconded the motion. On a call for the question, the motion failed. (3-8. Noes: Constant, Herrera, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.)

Council Member Chu moved approval to amend the motion to include his memorandum dated June 8, 2011, revising the Mayor's recommended rebudget amounts for Council Offices to reduce the amounts for each office by \$50,000. Council Member Campos seconded the motion. On a call for the question, the motion failed. (3-8. Noes: Constant, Herrera, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.)

Council Member Campos moved approval to amend the motion to add 10 Police Officers from Redevelopment Agency reserves, keep the libraries open 4-1/2 days a week and to add funding to San José Best and the Healthy Neighborhood Venture Fund transition, as referred to in his memorandum. Council Member Kalra seconded the motion. On a call for the question, the motion failed. (3-8. Noes: Constant, Herrera, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.)

Extensive Council discussion ensued.

Amendment to the Motion: Council Member Herrera requested to amend the motion to add her memorandum dated June 14, 2011, recommending acceptance of the Neighborhoods Commission as outlined in their May 27, 2011 letter to Mayor Reed and the City Council. The amendment was accepted by Vice Mayor Nguyen and Council Member Liccardo.

Council Member Kalra expressed his disappointment with a few of the priorities that the Council has agreed to set forth, including not making choices to help the Police Department keep the citizens of San José safe.

9.1 (Cont'd.)

Action: On a call for the question, the motion carried, the following items were approved: (a) The Mayor's 2011 June Budget Message for Fiscal Year 2011-2012, dated June 3, 2011. (b) The memorandum from Mayor Reed, dated June 13, 2011, June Budget Message Adjustments for Fiscal Year 2011-2012. (c) The Mayor's additions at the June 14, 2011 City Council Meeting, including: (1) Keep the San José branch libraries open 4 days per week; (2) Restore 49 firefighter positions through the SAFER grant; (3) Rehire additional police officers from any increase in sales tax receipts or COPS grants, and maximize the number of officers on patrol; (4) Preserve the Safe School Campus Initiative at middle and high schools; (5) Restore 2 Park Ranger positions bringing the total to 6 full-time FTE and 2.5 PT positions; (6) Crossing guards: Added \$75,000 to fund additional priority intersections; (7) Code Enforcement Officers: Reinstate 2.0 Code Enforcement officers to retain ability to respond to neighborhood quality complaints; (8) Senior Wellness Programs: \$400,000 allocated to continue wellness programs at City and Community Based Organization sites. (d) The memorandum from Council Member Herrera, dated June 14, 2011, accepting the recommendations of the Neighborhoods Commission as outlined in their May 27, 2011 letter to the Mayor and Council; Resolution No. 75851, entitled: "A Resolution of the Council of the City of San José Authorizing the City Manager to Negotiate and Execute Certain Agreements Addressed in the Mayor's 2011 Budget Message and Approved Amendments in Amounts That Exceed the City Manager's Contract Authority" and Redevelopment Agency Resolution No. 6017, entitled: "A Resolution of the Board of Directors of the Redevelopment Agency of the City of San José Authorizing the Executive Director to Negotiate and Execute Certain Agreements Addressed in the Mayor's 2011 Budget Message and Approved Amendments in Amounts that Exceed the Executive Director's Contract Authority", were adopted. (7-4. Noes: Campos, Chu, Constant, Kalra.)

COMMUNITY & ECONOMIC DEVELOPMENT

4.1 Adopt a resolution to:

- (a) **Approve a request to allow the assignment and assumption of an outstanding loan in the original amount of \$4,851,000 ("Townhomes Loan"), made to San Carlos Town Homes, LLC for the San Carlos Townhomes Project ("Townhomes Project") to San Carlos Willard Associates, L.P., or its designated affiliate, in the form of new construction/permanent loan documents, to fund the development costs for the 95-unit San Carlos Senior Apartments project ("Senior Project") located at 1523-1533 West San Carlos Street.**
- (b) *Approve a waiver of the requirement that Agency supplemental housing funds be used solely to fund extremely low income units to allow a change in affordability mix for the senior project from 99 affordable unit serving households earning up to 30% Area Median Income ("AMI") to 94 affordable units with 29 units serving households earning up to 30% AMI, 31 units serving households earning up to 40% AMI and, 34 units serving households earning up to 50% AMI, and one unrestricted manager's unit.*

- 4.1 (c) **Extending the term of the existing loans on the Townhomes Project/Senior Project loans.**
- (d) **Authorize the Director of Housing to negotiate and execute all documents to effectuate these transactions and to extend the term of the loans as appropriate.**

CEQA: Exempt, File No. PD04-103. Council District 6. SNI: Burbank/DelMonte. (Housing)

Documents Filed: (1) Memorandum from Director of Housing Leslye Corsiglia, dated May 24, 2011, recommending adoption of a resolution. (2) Supplemental memorandum from Director of Housing Leslye Corsiglia, dated June 13, 2011, regarding questions received from an interested citizen about this project, with the questions and answers included as an attachment.

Motion: Council Member Constant moved approval of the Staff recommendations. Council Member Herrera seconded the motion.

Amendment to the Motion: City Attorney Richard Doyle requested to amend the motion to change the recommendation on (b) to: Approve a waiver of the requirement that Agency supplemental housing funds be used solely to fund extremely low income units to allow a change in affordability mix for the senior project from 99 affordable unit serving households. Council Members Constant and Herrera accepted the amendment.

Director of Housing Leslye Corsiglia responded to Council questions.

Public Comments: Terri Balandra, Fiesta Lanes Action Group, expressed concerns about a disturbing lack of clarity and an opportunity for serious future negative consequences and offered her insight.

Council Member Oliverio expressed opposition to the motion on the floor.

Action: On a call for the question, the motion carried, Resolution No. 75842, entitled: “A Resolution of the Council of the City of San José Allowing the Assignment and Assumption of the Outstanding Loan Balance from the San Carlos Townhomes Project to the San Carlos Senior Apartments Project”, was adopted, as amended, and revised the recommendation on Item 4.1(b) above: *Approve a waiver of the requirement that Agency supplemental housing funds be used solely to fund extremely low income units to allow a change in affordability mix for the senior project from 99 affordable unit serving households.* (10-1. Noes: Oliverio.)

- 4.2 (a) **Public hearing on and consideration of adoption of a resolution to designate the “Curtis House” located at 96 South 17th Street as a landmark of special historic, architectural, aesthetic or engineering interest, or value of a historic nature.**
- (b) **Public hearing on and consideration of adoption of a resolution to approve a Historic Property Contract (California Mills Act) between the City of San José and the property owner for the preservation of the Curtis House (City Landmark No. HL10-196), located at 96 South 17th Street.**

4.2 (Cont'd.)

The Historic Landmarks Commission (4-0-2, Commissioners Jackson and Colombe absent) recommends the City Council adopt the resolution designating the Curtis House located at 96 South 17th Street as Historic Landmark HL10-196 and recommends that the City Council approve a Historic Property Contract for the Curtis House (City Landmark No. HL10-196) with modifications to Exhibit C Preservation Plan of the Contract to remove or reduce the amount of landscaping work, remove the kitchen remodel, and add in work associated with façade improvements and replacing the roof with tile (Norwita & Preston Powell, Owners). SNI: University. CEQA: Exempt.

HL10-196/MA11-003 – District 3

Documents Filed: (1) Memorandum from Secretary of the Historic Landmarks Commission Joseph Horwedel, dated June 2, 2011, recommending approval of the proposed landmark designation and the contract. (2) Report of the Staff of the Department of Planning, Building and Code Enforcement on Project File No. HL10-196/MA11-003, dated May 25, 2011. (3) Proof of Publication of Notice of Public Hearing, executed on May 20, 2011, submitted by the City Clerk. (4) Affidavit of Routing, dated July 12, 2011, submitted by the City Clerk.

Mayor Reed opened the public hearing.

Public Comments: There was no testimony from the floor. Mayor Reed closed the public hearing.

Action: Upon motion by Council Member Liccardo, seconded by Council Member Herrera and carried unanimously, Resolution No. 75853, entitled: “A Resolution of the Council of the City of San José Approving a Historic Landmark Preservation Agreement with Preston and Norwita Powell for the Curtis House Located at 96 South 17th Street, San José” and Resolution No. 75854, entitled: “A Resolution of the Council of the City of San José Designating, Pursuant to the Provisions of Chapter 13.48 of Title 13 of the San José Municipal Code, The Curtis House Site/Structure Located at 96 South 17th Street as a City Landmark of Special Historical, Architectural, Cultural, Aesthetic or Engineering Interest or Value of a Historic Nature”, were adopted. (11-0.)

4.3 **Public hearing on and consideration of adoption of a resolution to approve a Historic Property Contract (California Mills Act) between the City of San José and the property owner for the preservation of the Ashworth-Remillard House, located at 755 Story Road for the property known as the Ashworth-Remillard House (Sue Cucuzza, owner). The Historic Landmarks Commission (4-0-2, Commissioners Jackson and Colombe absent) recommends that the City Council approve a historic property contract for the Ashworth-Remillard House – City Historic Landmark No. HS-92-62. CEQA: Exempt.**

MA11-001 – District 7

4.3 (Cont'd.)

Documents Filed: (1) Memorandum from Secretary of the Historic Landmarks Commission Joseph Horwedel, dated June 2, 2011, recommending approval of the proposed historic property contract. (2) Report of the Staff of the Department of Planning, Building and Code Enforcement on Project File No. MA11-001, dated May 25, 2011. (3) Proof of Publication of Notice of Public Hearing, executed on May 20, 2011, submitted by the City Clerk. (4) Affidavit of Routing, dated July 12, 2011, submitted by the City Clerk.

Public Comments: Mayor Reed opened the public hearing. There was no testimony from the floor. Mayor Reed closed the public hearing.

Action: Upon motion by Vice Mayor Nguyen, seconded by Council Member Herrera and carried unanimously, Resolution No. 75855, entitled: "A Resolution of the Council of the City of San José Approving a Historic Landmark Preservation Agreement with Sue Cucuzza for the Ashworth-Remillard House Located at 755 Story Road, San José", was adopted. (11-0.)

PUBLIC SAFETY SERVICES

8.1 **Adopt a resolution authorizing the City Manager to execute the "911 Emergency Medical Services Provider Agreement between the City of San Jose and the County of Santa Clara Emergency Medical Services Agency" for the period of July 1, 2011 – July 1, 2016. CEQA: Not a Project, File No. PP10-066, Agreements. (Fire/City Manager's Office)**

Documents Filed: Memorandum from Deputy City Manager Deanna J. Santana and Fire Chief William McDonald, dated May 31, 2011, recommending adoption of a resolution.

Fire Chief William McDonald responded to Council questions.

Action: Upon motion by Council Member Pyle, seconded by Council Member Herrera and carried unanimously, Resolution No. 75856, entitled: "A Resolution of the Council of the City of San José Authorizing the City Manager to Execute an Emergency Medical Services Provider Agreement with the County of Santa Clara", was adopted. (11-0.)

OPEN FORUM

Mark Trout presented his own observations on Child Protective Services.

ADJOURNMENT

The Council of the City of San José adjourned the afternoon session at 5:41 p.m.

RECESS/RECONVENE

The City Council recessed at 5:41 p.m. from the afternoon Council Session and reconvened at 7:02 p.m. in the Council Chambers, City Hall.

Present: Council Members - Campos, Chu, Constant (7:14 p.m.), Herrera, Kalra, Liccardo, Nguyen, Oliverio, Pyle, Rocha; Reed.

Absent: Council Members - All Present.

City Clerk Dennis D. Hawkins, CMC, read the requests for continuance of the applications. Upon motion by Council Member Liccardo, seconded by Council Member Herrera, and carried unanimously, the below noted continuances and actions were taken as indicated. (11-0.)

CEREMONIAL ITEMS

1.1 Presentation of commendations to HACE Scholarship recipients Jeanette Ramos, Athena Salinas, and Julian Perez. (Campos)

Mayor Reed and Council Member Campos recognized and commended HACE Scholarship recipients Jeanette Ramos, Athena Salinas, and Julian Perez.

1.2 Presentation of a commendation to the Jade Ribbon Youth Council for their hard work to mobilize and educate our community to become active leaders in the prevention and eradication of Hepatitis B and Liver Cancer. (Chu)

Mayor Reed and Council Member Chu recognized and commended the Jade Ribbon Youth Council for their efforts.

1.3 Presentation of a commendation to Jorge Zavala for his leadership as Director of TechBA, a Mexico-Silicon Valley Technology business accelerator located in San José that has supported hundreds of entrepreneurs and small business through its extensive services and his involvement as a Board Member of work2future. (Herrera/Economic Development)

Mayor Reed, Council Member Herrera and Director of Strategic Development Jeff Ruster recognized and commended Jorge Zavala for his leadership as Director of TechBA.

STRATEGIC SUPPORT SERVICES

- 3.4 (a) **Conduct a public hearing on proposed 2011-2012 Storm Sewer Service Charges and proposed maximums for rate increases in 2012-2013; and direct staff to return during the 2012-2013 budget cycle with recommendations regarding rate increases in 2012-2013 consistent with staff recommended maximum rate increases noticed for that year;**

- (b) **Adopt a resolution:**

- (1) **Setting the following Sewer Service and Use Charge rates for 2011-2012:**

<u>Category</u>	<u>2011-2012 Monthly Rates</u>
Single-Family Residential	\$33.83
Multi-Family Residential	\$19.35 per unit
Mobile Home	\$19.39 per unit
Non-Monitored Commercial and Industrial	See Attachment A
Monitored Industrial	See Attachment A

- (2) **Setting the following Storm Sewer Service Charge rates for 2011-2012:**

<u>Category</u>	<u>2011-2012 Monthly Rates</u>
Single Family Residential and Duplex	\$7.87
Mobile Home	\$3.94 per unit
Residential Condominium	\$4.30 per unit
Large Multi-Family Residential (5 or more units)	\$4.30
Small Multi-Family Residential (3-4 units)	\$14.95
Commercial, Institutional, and Industrial	See Attachment B

CEQA: Not a Project, File No. PP10-067 (a) Increases or Adjustments to Fees, Rates & Fares. (Environmental Services)

Documents Filed: (1) Memorandum from Director of Environmental Services John Stufflebean, dated May 23, 2011, recommending holding a public hearing and adopting a resolution. (2) Supplemental memorandum from Director of Environmental Services John Stufflebean, dated June 8, 2011, reporting on the written protests received through June 5, 2011 in response to Public Notices mailed to the property owners.

City Clerk Dennis D. Hawkins, CMC, reported that the Office of the City Clerk received 46 valid ballots representing 46 parcels and a total of 273 valid written protests for the Proposed Sewer Service and Use Charges and Storm Sewer Service Charges rate increases. City Clerk Hawkins stated that the total protests during the protest period, together with the six speakers that protested the rate changes today, represented approximately one tenth of one percent of all property owners impacted by the change in sewer service and use charges and storm sewer service charge increases; therefore the Council may consider the Staff recommendations for the rate increases.

3.4 (Cont'd.)

Mayor Reed opened the public hearing.

Public Comments: There was no testimony from the floor at this time. Six speakers were heard during the public hearing of Item 9.1. Mayor Reed closed the public hearing.

Action: Upon motion by Council Member Liccardo, seconded by Council Member Herrera and carried unanimously, Resolution No. 75857, entitled: "A Resolution of the Council of the City of San José Setting Schedules of Sanitary Sewer Service and Use Charges and Storm Sewer Service Charges for Fiscal Year 2011-2012", was adopted. (10-0-1. Absent: Kalra.)

- 3.5 (a) **Conduct a public hearing on proposed 2011-2012 San Jose Municipal Water System potable water rates and charges;**
(b) **Adopt a resolution increasing the San Jose Municipal Water System potable water rates and charges by 5.9% effective July 1, 2011.**

CEQA: Statutorily Exempt, File No. PP10-067(a), CEQA Guidelines Section 15273 - Rates, Tolls, Fares, and Charges. (Environmental Services)

Documents Filed: (1) Memorandum from Director of Environmental Services John Stufflean, dated May 23, 2011, recommending holding a public hearing and adoption of a resolution. (2) Supplemental memorandum from Director of Environmental Services John Stufflean, dated June 8, 2011, reporting on the written protests received through June 7, 2011 in response to the Public Notices mailed to the property owners.

City Clerk Dennis D. Hawkins, CMC, reported that the Office of the City Clerk received 62 valid ballots representing 62 parcels and a total of 62 valid written protests for the proposed Municipal Water System Water Rate Increase. City Clerk Hawkins stated that all written protests during the public protest period represented approximately one tenth of one percent of all property owners impacted by the increases; therefore the Council may consider the Staff recommendations for the rate increases.

Public Comments: Mayor Reed opened the public hearing. There was no testimony from the floor. Mayor Reed closed the public hearing.

Action: Upon motion by Vice Mayor Nguyen, seconded by Council Member Pyle and carried unanimously, Resolution No. 75858, entitled: "A Resolution of the Council of the City of San José To Establish New Quantity Charges for Potable Water Service Effective July 1, 2011", was adopted. (10-0-1. Absent: Kalra.)

- 3.6 (a) **Conduct a public hearing on proposed 2011-2012 Recycle Plus rates and proposed maximums for rate increases in 2012-2013 and 2013-2014; and direct staff to return during the 2012-2013 budget cycle with recommendations regarding rate increases in 2012-2013 consistent with staff recommended maximum rate increases noticed for that year.**

- 3.6 (b) **Adopt a resolution to amend the current Recycle Plus rate resolution, as follows:**
- (1) **Increase rates for multi-family households by 9%, effective July 1, 2011.**
 - (2) **Increase rates for single-family households by 9%, effective August 1, 2011.**
 - (3) **Effective August 1, 2011, cap enrollments in the single-family Low Income Rate Assistance program to ensure funding is available to cover costs of current program participants.**

CEQA: Negative Declaration for 2010 Solid Waste Service Agreements, File No. PP10-055, adopted June 18, 2010. (Environmental Services)

Documents Filed: (1) Memorandum from Director of Environmental Services John Stufflebean, dated June 2, 2011, recommending holding a public hearing and adoption of a resolution. (2) Supplemental memorandum from Director of Environmental Services John Stufflebean, dated June 8, 2011, reporting on the written protests received through June 5, 2011 in response to the Public Notices mailed to the property owners.

City Clerk Dennis D. Hawkins, CMC, reported that subsequent to the supplemental memorandum from the Environmental Services Department, the Office of the City Clerk received 84 valid ballots representing 84 parcels and a total of 481 valid written protests for the Proposed Recycle Plus Rate Increases. City Clerk Hawkins stated that all written protests during the public protest period, together with the two speakers protesting earlier today, represented less than approximately two tenths of one percent of all property owners impacted by the increases; therefore the Council may consider the Staff recommendations for the rate increases.

Public Comments: Mayor Reed opened the public hearing. There was no testimony from the floor. Mayor Reed closed the public hearing.

Action: Upon motion by Vice Mayor Nguyen, seconded by Council Member Pyle and carried, Resolution No. 75859, entitled: "A Resolution of the Council of the City of San José Adopting Service Rates for the Recycle Plus Program Effective July 1, 2011 and Superseding Resolution No. 74905", was adopted. (9-1-1. Noes: Oliverio. Absent: Kalra.)

- 3.7 (a) **Adopt a resolution approving the Operating Budget for 2011-2012 for the City of San José, the Capital Budget for 2011-2012 for the City of San José, and the Five Year Capital Improvement Program for 2012-2016 for the City of San José as revised by the Mayor's Budget Message and directing the City Manager to prepare final documents for adoption.**
- (b) **Adopt a resolution establishing the Schedule of Fees and Charges for 2011-2012.**
- (c) **Item 3.7(c) was deferred to June 21, 2011 per Orders of the Day.**
- (d) **Adopt a resolution declaring the 0.23 acres of City-owned real property and building (old Fire Station 25) located at 1590 Gold Street surplus to the needs of the City.**

- 3.7 (e) **Adopt a resolution to amend the Administrative Citation Schedule of Fines to establish fines for various violations related to Title 6, Business Licenses and Regulations, Chapter 6.88 (Medical Marijuana Collectives) and repeal Resolution No 75689, entitled Administrative Citation Schedule of Fines for Certain Violations of the San Jose Municipal Code.**

Documents Filed: (1) Supplemental memorandum from Director of Economic Development/Chief Strategist Kim Walesh, dated June 9, 2011, providing input from public outreach regarding the sale of the City owned property. (2) Proof of Publication dated May 6, 2011, submitted by the City Clerk.

Action: Upon motion by Vice Mayor Nguyen, seconded by Council Member Pyle and carried unanimously, Resolution No. 75860, entitled: “A Resolution of the Council of the City of San José Approving for Adoption the Operating Budget for Fiscal Year 2011 – 2012”; Resolution No.75861, entitled: “A Resolution of the Council of the City of San José Approving for Adoption the Capital Budget for Fiscal Year 2011 – 2012”; Resolution No. 75862, entitled: “A Resolution of the Council of the City of San José Approving for Adoption the Five Year Capital Improvement Program for Fiscal Years 2012 – 2016”; Resolution No. 75863, entitled: “A Resolution of the Council of the City of San José Amending Resolution No. 72737 To Amend and Establish Various Fees and Charges Effective July 1, 2011”; Resolution No. 75864, entitled: “A Resolution of the Council of the City of San José Declaring Certain City Owned Property Located at 1590 Gold Street as Surplus to the Needs of the City and Authorizing the City Manager to Proceed with the Sale of Such Surplus Property in Accordance with the Applicable Provisions of the Municipal Code and Any City Policies, Including Any Amendments Thereto and Applicable State Law” and Resolution No. 75865, entitled: “A Resolution of the Council of the City of San José Amending the Administrative Citation Schedule of Fines for Certain Violations of the San José Municipal Code In Order to Establish Administrative Fines for Violations Related to Medical Marijuana and Repealing Resolution No. 75689”, were adopted. (10-0-1. Absent: Kalra.)

- (c) **City Council adoption of a resolution to repeal Resolution No. 75686 and set forth the Master Parking Rate Schedule, with rates effective July 1, 2011, unless noted otherwise to:**
- (1) **Implement the following parking rate and validation program changes at the Fourth Street Garage, the Market/San Pedro Square Garage, the Second/San Carlos Garage, and the Third Street Garage:**
 - (a) **Increase the daytime incremental parking rate from \$0.75 to \$1 every 20 minutes.**
 - (b) **Increase the maximum incremental daily parking rate from \$15 to \$20.**
 - (c) **Increase the evening flat rate from \$4 to \$5 effective January 1, 2012.**
 - (d) **Establish a \$4 flat daily rate Saturdays, Sundays and major holidays, with an increase to \$5 effective January 1, 2012.**

- 3.7 (c) (1) (e) **Modify the Downtown Parking Validation Program to provide for unlimited parking between 6 p.m. to 6 a.m., Monday through Friday and all day on Saturday, Sunday and major holidays, with a two hour validation coupon.**
- (2) **Increase the daytime incremental parking rate from \$0.75 to \$1 every 20 minutes and increase the maximum incremental daily parking rate from \$15 to \$20 at the City Hall Garage.**
- (3) **Eliminate the one hour of free parking after 6:00 PM at the Fourth Street Garage.**
- (4) **Modify the Free and 50% Discounted Parking Incentive programs to allow a building owner or property manager to enter into a parking lease agreement with the City on behalf of their tenants, for up to two years of free or 50% discounted parking for eligible businesses and under the same terms and conditions of the existing programs.**
- (5) **Incorporate other changes as described in this memorandum to include the Japantown Lot and previously owned Redevelopment Agency parking facilities transferred to the City and other new facilities now owned, controlled, or operated by the City, improve operations of the parking facilities and associated programs, modify eligibility for the Clean Air Vehicle Program and Downtown Validation Program, and clarify the Director of Transportation's authority relative to establishing parking rates. (Transportation)**

Action: Deferred to June 21, 2011 per Orders of the Day.

- 3.8 (a) **Accept the Report on Request for Proposal for Graffiti Abatement Services.**
- (b) **Adopt a resolution authorizing the Director of Finance, subject to the appropriation of funds, to:**
- (1) **Negotiate and execute an agreement with Graffiti Protective Coatings, Inc. (Los Angeles, CA) to provide Citywide Graffiti Abatement Services for an initial five-year term of June 27, 2011 through June 30, 2016, with a maximum compensation amount not to exceed \$3,159,503 for the initial five year term of the agreement.**
- (2) **Execute two (2) two-year options to renew the agreement.**

CEQA: Exempt. (Finance/Parks, Recreation and Neighborhood Services)

Documents Filed: Memorandum from Director of Finance Scott Johnson and Assistant Director of Parks, Recreation and Neighborhood Services Julie Edmonds-Mares, dated May 31, 2011, recommending acceptance of the report and adoption of a resolution.

Deputy City Manager/Acting Director of Parks, Recreation and Neighborhood Services Norberto Dueñas provided introductory comments. Assistant Director of Parks, Recreation and Neighborhood Services Julie Edmonds-Mares presented the report.

Motion: Council Member Liccardo moved approval of the Staff recommendations. Vice Mayor Nguyen seconded the motion.

Council discussion ensued.

3.8 (Cont'd.)

Council Members Rocha, Campos and Kalra expressed concerns about contracting out and dismantling the current Graffiti Abatement team.

Deputy City Manager/Acting Director of Parks, Recreation and Neighborhood Services Norberto Dueñas pointed out that Staff will be reporting to the Neighborhood Services and Education Committee on the outsourcing services associated with Graffiti Protective Coatings, Inc. on a frequent basis.

Action: On a call for the question, the motion carried, the Report on Request for Proposal for Graffiti Abatement Services was accepted and Resolution No. 75866, entitled: “A Resolution of the Council of the City of San José Authorizing the Director of Finance to Negotiate and Execute an Agreement with Graffiti Protective Coatings, Inc. to Provide Citywide Graffiti Abatement Services”, was adopted (7-4. Noes: Campos, Chu, Kalra, Rocha.)

3.9 **Conduct a public hearing and consider an ordinance of the City of San José amending Title 1 of the San José Municipal Code by amending Section 1.13.050 of Chapter 1.13 to exempt a lawful Medical Marijuana Collective from the definition of a public nuisance and amending Title 20 of the San José Municipal Code by amending Section 20.10.040 of Chapter 20.10, amending Section 20.40.100 of Chapter 20.40, amending Section 20.50.100 of Chapter 20.50, amending Section 20.70.100 of Chapter 20.70, adding a new Part 9.5 to Chapter 20.80, adding a new Part 13 to Chapter 20.100, and amending Section 20.100.200 of Chapter 20.100, all to establish land use regulations pertaining to Medical Marijuana Collectives and to establish a related zoning verification certificate process. (Planning, Building and Code Enforcement/City Attorney’s Office)**

Action: Deferred to August 9, 2011 per Administration.

3.11 **Adopt a resolution implementing compensation and benefit changes for the City Council Appointees to make last year’s 10% reduction in compensation ongoing. (Mayor)**

Documents Filed: Memorandum from Mayor Reed, dated May 19, 2011, recommending adoption of a resolution.

Mayor Reed presented introductory remarks and referred to his memorandum dated May 19, 2011.

Council Member Constant pointed out that the Independent Police Auditor should participate in the wage reduction.

Motion: Council Member Constant moved approval of the memorandum from Mayor Reed, dated May 19, 2011, including a revision to the memorandum to include the Independent Police Auditor in the 10% reduction in compensation ongoing. Council Member Herrera seconded the motion.

3.11 (Cont'd.)

Action: On a call for the question, the motion carried, the memorandum from Mayor Reed, dated May 19, 2011, was approved and amended to include the Independent Police Auditor in the 10% reduction in compensation ongoing and Resolution No. 75867, entitled: "A Resolution of the Council of the City of San José Approving a 10% Ongoing Reduction in Total Compensation for Council Appointees, Effective June 26, 2011", was adopted, as amended. (9-2. Noes: Chu; Reed.)

TRANSPORTATION & AVIATION SERVICES

6.1 Adopt a resolution to repeal Resolution No. 75531 and set forth the speed limits in the City of San José in compliance with State law and provide the opportunity for radar speed enforcement by:

- (a) Establishing speed limits on nine roadways; including portions of Bailey Avenue, Bernal Road/Silicon Valley Blvd., Blossom Hill Road, Charcot Avenue, Farnsworth Drive, Junction Avenue, Skyport Drive, Tasman Drive, and Yerba Buena Road.
- (b) Re-establishing speed limits with changes to seven roadways; including portions of Almaden Road, Great Oaks Blvd., O'Toole Avenue, Race Street, Seventh Street, and Tenth Street.
- (c) Recognizing speed limits established by the State of California for a portion of State Route 82 on San Carlos Street, and re-establishing speed limits on portions of Almaden Expressway and Capitol Expressway.
- (d) Adopting the speed limit established by the City of Santa Clara for Winchester Blvd. between Newhall Street and Stevens Creek Blvd for the segment within the jurisdiction of San José.
- (e) Making administrative corrections to the speed limit resolution as described in this memorandum.

CEQA: Exempt, File No. PP10-113. (Transportation)

Documents Filed: Memorandum from Director of Transportation Hans F. Larsen, dated May 23, 2011, recommending adoption of a resolution.

Motion: Council Member Oliverio moved approval of the Staff recommendations. Council Member Constant seconded the motion.

Director of Transportation Hans Larsen presented brief comments and responded to Council questions.

6.1 (Cont'd.)

Action: On a call for the question, the motion carried unanimously, Resolution No. 75868, entitled: "A Resolution of the Council of the City of San José (1) Establishing Speed Limits with Changes on 9 Roadway Segments; (2) Reestablishing Speed Limits on 7 Roadway Segments; (3) Recognizing Speed Limits Established by the State of California; (4) Reestablishing Speed Limits on Portions of Alamen Expressway and Capital Expressway; (5) Adopting the Speed Limit Established by the City of Santa Clara for a Portion of Winchester Boulevard; (6) Making Administrative Corrections to the Previous Speed Limit Resolution; (7) Reestablishing, Without Change, Speed Limits on Other Streets Within the City of San José and (8) Repealing Resolution No. 75531", was adopted. (10-0-1. Absent: Rocha.)

PUBLIC HEARINGS

- 11.2 Conduct an Administrative Hearing and consider an appeal of the Planning Commission's decision to deny a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol at a general retail/pharmacy store in an existing approximately 20,317 square-foot tenant space in a shopping center on an approximately 13.2 gross-acre site in the CG-Commercial General Zoning District located 100 feet westerly of the northwest corner of Morrill Avenue and Amberwood Lane (2105 Morrill Ave) (Chiu Gabriel H Trustee & Et Al, Owner; Walgreens, Applicant). CEQA: Exempt. Director of Planning, Building and Code Enforcement and Planning Commission recommend denial (5-0-2; Commissioners Kamkar and Platten Absent).
CP10-016/ABC10-003 – District 4**

Action: Continued to August 23, 2011 per Council District 4.

- 11.3 Consideration of an ordinance rezoning the real property located at/on the southeast corner of North First Street and East Rosemary Street (1290 North First Street) from the A(PD) Planned Development Zoning District to the A(PD) Planned Development Zoning District to modify a zoning provision related to a voluntary contribution for parkland for an approved project which allows up to 290 multi-family residential units (106 Senior Affordable and 184 Multifamily Affordable) on a 4.045 gross acre site (1st & Rosemary Senior, 1st and Rosemary Family Housing, L.P., Owner). CEQA: North San José Development Policy Update EIR, Resolution No. 72768, adopted June 2005. Director of Planning, Building and Code Enforcement recommends approval. No Planning Commission action required.
PDC11-011 – District 3**

Documents Filed: (1) Report of the Staff of the Department of Planning, Building and Code Enforcement on Project File No. PDC11-011, dated May 23, 2011. (2) Proof of Publication of Notice of Public Hearing, executed on May 13, 2011, submitted by the City Clerk.

11.3 (Cont'd.)

Mayor Reed opened the public hearing.

Director of Planning, Building and Code Enforcement Joseph Horwedel provided introductory comments.

Public Comments: Jonathan Emami, ROEM Development Corporation, provided additional comments about the project.

Mayor Reed closed the public hearing.

Motion: Council Member Liccardo moved approval of the Staff recommendations, including the addition of the following: to modify Page 13 of the Development Standards in paragraph (a) to read as follows: The developer shall pay an amount to the City to assist in the acquisition and/or improvement of parkland in an amount between \$400,000 and \$500,000, apportioned between the two (senior and family) projects. Council Member Herrera seconded the motion.

Deputy Director of Planning, Building and Code Enforcement Laurel Prevetti responded to questions from Council Member Liccardo.

Deputy Director Prevetti requested to amend the motion to add that the second reading for this rezoning be heard at the Council Meeting scheduled on June 21, 2011. The amendment was accepted by Council Members Liccardo and Herrera.

Action: On a call for the question, the motion carried, Ordinance No. 28926, entitled: "An Ordinance of the City of San José Rezoning Certain Real Property Situated at the Southeast Corner of North First Street and East Rosemary Street to the A(PD) Planned Development Zoning District", was passed for publication, as amended, with the modification on Page 13 of the Development Standards in paragraph (a) to read as follows: The developer shall pay an amount to the City to assist in the acquisition and/or improvement of parkland in an amount between \$400,000 and \$500,000, apportioned between the two (senior and family) projects, with the second reading for the rezoning to be heard on June 21, 2011. (10-1. Noes: Oliverio.)

OPEN FORUM

Chris Ortiz expressed concerns about the continued gang violence and urged the Council to reconsider cutting staffing and resources of the Mayor's Gang Prevention Task Force and other Youth Intervention Programs.

ADJOURNMENT

The Council of the City of San José was adjourned at 8:15 p.m. in memory of Lance Corporal Harry Lew, who passed away in April while defending our Country, for his approach to life with a creative expression that inspired those around him. (Chu)

Minutes Recorded, Prepared and Respectfully Submitted by,

City Clerk Dennis D. Hawkins, CMC

/smd 06-14-11 MIN

Access the video, the agenda and related reports for this meeting by visiting the City's website at <http://www.sanjoseca.gov/clerk/agenda.asp> or <http://www.sanjoseca.gov/clerk/MeetingArchive.asp>. For information on any ordinance that is not hyperlinked to this document, please contact the Office of the City Clerk at (408) 535-1266.

ATTACHMENT 3
City of Alameda Official Ballot Information Guide

Available at <https://www.alamedaca.gov/files/sharedassets/public/alameda/city-manager/stormwater-ballot-guide.pdf>

Please Complete Your Ballot And Mail It Back Promptly

Method Of Voting

To complete the enclosed ballot, mark the oval next to either "Yes" or "No." Then sign the ballot, place it in the provided postage-paid return envelope, and mail or hand deliver it to:

**City of Alameda
City Clerk's Office
2263 Santa Clara Ave #380
Alameda, CA 94501**

Only official ballots that are signed and marked with the property owner's support or opposition, and are received before 6:00 p.m. on Monday, November 25, 2019, will be counted. Postmarks will not be accepted.

The fee shall not be imposed if votes submitted in opposition to the fee exceed the votes submitted in favor of the fee. If a majority of votes returned are in support, the fee may be levied beginning in fiscal year 2020-21 and continuing in future years, as authorized by the City Council, to fund stormwater capital improvement projects, maintenance and operations, and clean water and pollution control services.

If you lose your ballot, require a replacement ballot, or want to change your vote, contact Sarah Henry at (510) 747-4714 or by email at shenry@alamedaca.gov for another ballot. See the enclosed ballot for additional instructions.



The City's Clean Water Program removes 823 dump truck loads of debris, including debris from the City's streets by sweeping 24,000 miles annually.

Public Accountability

The proposed 2019 Water Quality and Flood Protection Fee revenues will be collected and deposited into a separate account that can only be used for authorized storm drainage activities and will undergo annual independent audits. The City Council must approve the fee each year in a public meeting, and the fee can never exceed actual estimated costs.



The City cleans and inspects 250 trash capture devices quarterly, removing 40 cubic yards of debris annually.

Ballot Tabulation

Each parcel with a proposed fee greater than zero will count for a vote. Ballots will be tabulated under the direction of the City Clerk at a location accessible to the public. The tabulation will commence at 9:00 am on Tuesday, November 26, 2019, in City Hall at 2263 Santa Clara Avenue Room 380 and continue between the hours of 9:00 am and 4:00 p.m. until the tabulation is complete.



The City has conducted a series of engineering studies to determine the best ways to protect neighborhoods during big storms and sea level rise.

Additional Information

Please contact Sarah Henry at (510) 747-4714 or by email at shenry@alamedaca.gov or visit our website at www.alamedaca.gov/cleanwater.



City of Alameda Water Quality & Flood Protection Initiative Official Ballot Information Guide

Why Did You Receive This Ballot?

In the early 1990s, the City of Alameda established its Clean Water Program to manage all City-owned storm drainage infrastructure including 11 pump stations (some dating back to the 1940s), 126 miles of pipelines, 96 acres of drainage lagoons, 278 outfalls to the San Francisco Bay and numerous tide gates and seawalls. This infrastructure collects and conveys our stormwater runoff during rain events safely and reliably to the Bay, while protecting our waterways from trash and other pollutants.

The Program is currently funded only by an annual storm drainage utility fee. This fee has not been increased in 15 years, while costs have increased significantly. At the same time we face increasing challenges such as local flooding, deferred maintenance on our aging infrastructure, and the impacts of climate change. As a result, expenses exceed revenues and operating reserves are now depleted.

The Program currently provides approximately \$4.2 million annually for the operations and maintenance of our storm drainage system. Several recent engineering studies have determined that \$5.4 million per year is needed in Alameda to prevent further system degradation. The current revenue generated by the existing fee is only \$2.5 million, resulting in a significant annual structural deficit. In addition, the City faces:

- Enhanced operations and maintenance needs to ensure homes are not flooded and roads remain clear for the movement of people, goods and emergency vehicles;
- \$30 million in high-priority capital project needs due to aging infrastructure; and
- Increasingly rigorous water quality standards.

To continue to maintain our storm drainage infrastructure and avoid eliminations and/or significant cuts to existing programs, the Clean Water Program is proposing **The 2019 Water Quality and Protection Initiative**. This additional storm drainage fee is dedicated to our storm drainage system and funds cannot be used for any other purposes.



The City of Alameda's Clean Water Program maintains the storm drainage infrastructure which protects homes, property, and streets from flooding and protects the City's beaches and the Bay from trash and pollutants caused by urban runoff during rain events.

What Would This Fee Provide?

Capital Improvements To Prevent Flooding - High Priority Local Projects: The Water Quality and Flood Protection Initiative details \$30 million in high-priority capital improvements and replacements including pump station upgrades and replacements, installing trash capture devices, outfall upgrades, and enhancements to intersections to reduce flooding.

Ongoing Operations & Maintenance of this Aging Infrastructure: The Water Quality and Flood Protection Fee initiative specifies an annual program to perform repairs and replacements of aging infrastructure, system cleaning and inspections. This operation and maintenance program will ensure the storm drainage system provides a high level of protection against flooding, and keeps trash and pollutants out of the Bay.

State and Federal Clean Water Requirements: The City's stormwater system must comply with important state and federal clean water standards to ensure that water discharged from the system is safe, clean, and healthy enough to protect our beaches and the Bay.

Funding Protections: Revenues from the proposed fees cannot be taken by the Federal, State, or County governments. Even the City Council cannot allocate these funds to non-storm drainage uses.

All Ballots Must Be Received By 6:00 pm November 25, 2019 To Be Counted

**Please Complete Your Ballot And Mail It Back Promptly
All Ballots Must Be Received By 6:00 pm November 25, 2019 To Be Counted**



City of Alameda

Water Quality & Flood Protection Initiative

Official Ballot Information Guide

How Much Is The Proposed Fee?

If approved, the Water Quality and Flood Protection Fee will be collected on the annual property tax bill. The fee for a single-family home on a typical medium-sized parcel (i.e. 0.08-0.14 acre, or 3,267-6,316 square feet), which is the most common fee, is proposed to be an additional \$78.00 per year, or \$6.50 per month. The entire schedule of proposed fees is shown in the table below. Properties that drain directly to the Bay or meet the Low Impact Development standards will be given rate credits of 57% and 25%, respectively.

The amount of the proposed fee is in addition to the existing stormwater utility fees paid by each property. For example, the owner of a typical home will pay \$56.00 (current fee) plus \$78.00 (proposed new fee) for a total of \$134.00 per year, or \$11.17 per month. The total additional amount to be collected by the proposed 2019 Water Quality and Flood Protection Fee in Fiscal Year 2020-21 is \$2.89 million, bringing total Clean Water Program revenues to \$5.45 million.

Land Use Category	Proposed Annual Fee FY 2020-21
Residential *	
Small Under 0.08 ac**	\$ 47.73 per parcel
Medium 0.08 to 0.14 ac	\$ 78.00 per parcel
Large over 0.14 ac	\$ 85.07 per parcel
Condo - Med Density	\$ 47.73 per parcel
Condo - Hi Density	\$ 24.55 per parcel
<i>Multiple homes on single parcel pays 16% higher rate</i>	
Non-Residential ***	
Apartment	\$ 908.18 per acre
Commercial / Retail / Industrial	\$1,083.80 per acre
Office	\$ 765.06 per acre
Church / Institutional	\$ 866.58 per acre
Institutional w/Playfield	\$ 619.22 per acre
Park	\$ 59.76 per acre
Vacant (developed)	\$ 59.76 per acre
Open Space / Agricultural	exempt

* Residential category also includes du- tri- and four-plex units

** ac = acre; 1 acre = 43,560 square feet

*** Non-Residential parcel size is calculated to a hundredth of an acre

How Was The Fee Determined?

The proposed 2019 Water Quality and Flood Protection Fee is based on the quantity of stormwater runoff produced by each parcel or category of parcel. This runoff is based upon the proportional impervious area (e.g. roof tops and pavements) on each category of parcel. A copy of the full 2019 Water Quality and Flood Protection Fee Report can be found online at the Public Works Department's website at www.alamedaca.gov/cleanwater.

Properties Subject To The Fee

All properties are subject to the fee except for open space and agricultural land.

Will The Fee Increase In The Future?

In order to offset the effects of inflation on the cost of labor, materials, and utilities, the proposed fee is subject to an annual increase based on the change in the Consumer Price Index but capped at no more than 3% in any single year.

Don't My Property Taxes Already Pay for This?

No. The Clean Water Program started in 1992 with a fee charged to properties. This has been the only revenue source for the Program since its inception. This is similar to water and sewer rates where the activities to provide those services are supported solely by user rates. This ensures that the rates are fair and equitable, and funds cannot be used for other purposes.



With such flat terrain and topography in our neighborhoods, the City of Alameda experiences frequent flooding of streets that also flow onto nearby properties. As shown in the City's recently adopted Climate Action and Resiliency Plan, this flooding will only grow in frequency and severity with climate change and sea level rise.

Clean Water Program Elements

Operations & Maintenance (O&M):

Storm response, street sweeping, lagoon maintenance & monitoring, storm drain inspection & cleaning

Water Quality (WQ):

Trash reduction, green infrastructure planning, shoreline/beach clean-ups, pollution prevention, illegal discharge inspections, development oversight, public education

Drainage Improvements (DI):

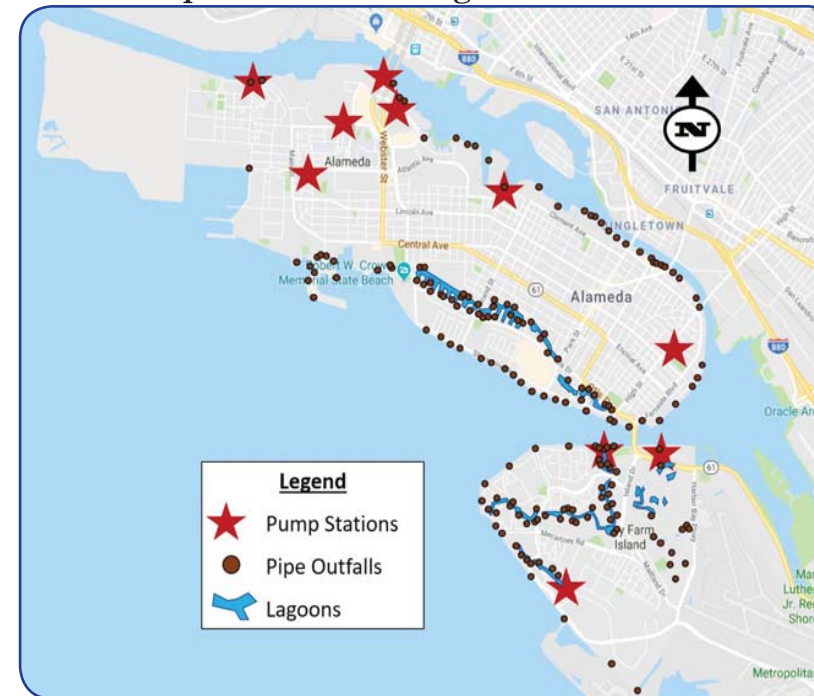
Retrofit or upsize pump stations, pipe, culvert and catch basin replacement, lagoon dredging, green infrastructure & trash capture devices

Coastal Flooding & Sea Level Rise Protection (CF&SLR):

Climate change planning, improved and increased capacity pump stations & pipes, perimeter levee infrastructure, shoreline improvements



Map of Storm Drainage Infrastructure



If The Initiative Fails ...

A Depleted Fund Means Cuts to Services:

- Clean Water Program would be more reactive (less proactive)
- Longer Response Times
- Reduced Storm Drain Maintenance
- Less Street Sweeping
- No Stormwater Capital Projects

Higher Risk of Catastrophic Failures

Inability to Adapt to Climate Change

High Priority Capital Improvement Projects

Category/ Project	Area
Flood Protection / Pipes / Lagoons	
Shoreline Culvert	South Shore
Bay Farm Island Gate Opener	Bay Farm Island
Bayview Weir Rehab	Bayview
Tidal Protection of Outfalls	Citywide
Veterans Court	Bay Farm Island
Lagoon Walls	South Shore
Seawall @ BFI Gate	Bay Farm Island
Dredge Lagoon	South Shore
Dredge Lagoon	Bay Farm Island
Pump Stations	
Arbor	North Central
Webster	Westside
Central/Eastshore	Eastside
Environmental	
Green Infrastructure	Citywide
Trash Capture	Citywide
Operational Enhancements	
Outfall Upgrades	Citywide
Intersection Culverts	Citywide
Ponding Improvements	Citywide
Line Clean & Video	Citywide
Lagoons	South Shore & Bay Farm Island

ATTACHMENT 4

Assem. Floor Analysis, Concurrence in Senate Amendments, Assem. Bill. No. 2403 (2013-2014
Reg. Sess.) June 16, 2014

CONCURRENCE IN SENATE AMENDMENTS

AB 2403 (Rendon and Mullin)

As Amended June 2, 2014

Majority vote

ASSEMBLY: 74-1 (May 19, 2014)

SENATE: 35-0 (June 16, 2014)

Original Committee Reference: L. GOV.

SUMMARY: Expands the definition of "water" in the Proposition 218 of 1996 Omnibus Implementation Act.

The Senate amendments remove references to specific court cases, *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 and *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351, from the findings and declarations.

EXISTING LAW:

- 1) Defines, for purposes of the California Constitution Article XIII C and Article XIII D and the Proposition 218 Omnibus Implementation Act, "water" to mean "any system of public improvement intended to provide for the production, storage, supply, treatment, or distribution of water".
- 2) "Recycled water" means, pursuant to the Water Code, "water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource."
- 3) Provides notice, protest, hearing, and election procedures for the levying of new or increased assessments or property-related fees or charges by local government agencies pursuant to Proposition 218 Omnibus Implementation Act.

AS PASSED BY THE ASSEMBLY, this bill:

- 1) Made changes to the Proposition 218 Omnibus Implementation Act to add "from any source" to the current definition of "water."
- 2) Found and declared that this act is declaratory of existing law, including the decision of the Sixth District Court of Appeal in *Griffith v. Pajaro Valley Water Management Agency* and *Howard Jarvis Taxpayers Association v. City of Salinas*.
- 3) Made other technical and conforming changes.
- 4) Found and declared that the provisions of the Proposition 218 Omnibus Implementation Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

FISCAL EFFECT: None

COMMENTS:

- 1) *Current law and purpose of this bill.* The Proposition 218 Omnibus Implementation Act, currently defines "water" to mean "any system of public improvement intended to provide for the production, storage, supply, treatment, or distribution of water." Under this bill the definition of water is "any system of public improvement intended to provide for the production, storage, supply, treatment or distribution of water from any source." This bill is author-sponsored.
- 2) *Author's statement.* According to the author, "This bill would put the new *Griffith [v. Pajaro Valley Water Management Agency]* decision into statute and allow public agencies to apply the simpler protest process to their approval of stormwater management fees, where the management programs address both water supply and water quality.

"In 2002, the [Sixth District] Court of Appeal interpreted this exception for water/sewer rates to exclude costs for stormwater drains. The service in the 2002 case emphasized flood control, moving water to the ocean as quickly as possible. That program had nothing to do with water supply. Those fees had developed to address the water quality challenges presented by stormwater. Stormwater management has changed since 2002. Since Proposition 218 passed in 1996, managing stormwater has become more about water supply, as agencies develop methods to 'capture' stormwater, clean it, and recharge groundwater aquifers for water supply. In 2013, the Court of Appeals again considered stormwater in a Proposition 218 context, for a program that charged fees for groundwater recharge, including stormwater capture.

"This bill offers one alternative to address the evolving nature of California's stormwater management programs, especially the growing development of 'stormwater recapture' programs for recharging groundwater aquifers."

- 3) *Proposition 218 Omnibus Implementation Act.* Proposition 218 Omnibus Implementation Act distinguishes among taxes, assessments and fees for property-related revenues, and requires certain actions before such revenues may be collected. Counties and other local agencies with police powers may impose any one of these options on property owners, after completing the Proposition 218 Omnibus Implementation Act process. Special districts created by statute, however, must have specific authority for each of these revenue sources.

The California Constitution defines a fee (or charge) as any levy other than an ad valorem tax, special tax, or assessment that is imposed by a local government on a parcel or on a person as an incident of property ownership, including a user fee for a property-related service. The fee imposed on any parcel or person cannot exceed the proportional cost of the service that is attributable to the parcel. Prior to imposing or increasing a property-related fee, the local government is required to identify the parcels, mail a written notice to all the property owners subject to the fee detailing the amount of the fee, the reason for the fee, and the date, time, and location of a public hearing on the proposed fee. No sooner than 45 days after mailing the notice to property owners, the agency must conduct a public hearing on the proposed fee. If a majority of owners of the identified parcels provide written protests against the fee, it cannot be imposed or increased by the agency.

Additionally, California Constitution Article XIII D, Section 6(c) provides election requirements, “*Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.*” The election for the fee is required to be conducted no less than 45 days following the public hearing.

The definition of "water" under the Proposition 218 Omnibus Implementation Act is significant because the election requirements are on fees for services other than water, sewer, and trash services.

- 4) *Griffith v. Pajaro Valley Water Management Agency*. Prior to the appellate decision in *Griffith v. Pajaro Valley Water Management Agency*, the issue of whether a charge for groundwater augmentation was considered a water service and therefore exempt from the election requirements was contested. Under *Griffith v. Pajaro Valley Water Management Agency* the court relied on the definition of "water" in Proposition 218 Omnibus Implementation Act narrowly construing an earlier decision in *Howard Jarvis Taxpayers Association v. City of Salinas*, which did not apply the Act's definitions to a storm water charge dispute. The *Griffith v. Pajaro Valley Water Management Agency* decision found that a groundwater augmentation charge is a fee for "water service".

According to the *Griffith v. Pajaro Valley Water Management Agency* decision, "Moreover, the Legislature has endorsed the view that water service means more than just supplying water. The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218 Omnibus Implementation Act, defines 'water' as 'any systems of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water'. Thus, the entity who produces, stores, supplies, treats, or distributes water necessarily provides water service. Defendant's statutory mandate to purchase, capture, store, and distribute supplemental water therefore describes water service." The Court made several other decisions regarding Proposition 218 Omnibus Implementation Act, however, the portions of the case that discuss "water service" are especially pertinent to this bill.

The Legislature may wish to consider following the appellate decision in *Griffith v. Pajaro Valley Water Management Agency* which has provided more guidance on several issues under Proposition 218 Omnibus Implementation Act's provisions regarding water, sewer, trash, and other property-related fees if it is helpful for the Legislature to amend the definition of "water." The Legislature may wish to consider if it is the best policy to let stakeholders continue to rely on the court's decision in light of the clarity provided by *Griffith v. Pajaro Valley Water Management Agency*.

- 5) *Arguments in support*. Supporters argue that while California's drought and efforts to provide a continued, safe, reliable supply of water presents many challenges, that the clarifying language in this bill provides an opportunity to remove any confusion that may exist and will enable all of our communities to get one step closer to attaining a sustainable water future.
- 6) *Arguments in opposition*. None on file.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

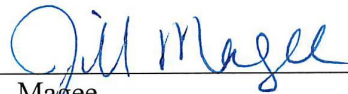
On July 8, 2020, I served the:

- **Claimants' Rebuttal Comments filed July 8, 2020**
- **Notice of Change of Representation (County of San Diego) filed July 8, 2020**

*California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2017-0077, Sections A.1, A.3, and A.5, 17-TC-05
City of San Juan Capistrano and County of San Diego, Claimants*

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 8, 2020 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/8/20

Claim Number: 17-TC-05

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2017-0077, Sections A.1, A.3, and A.5

Claimants: City of San Juan Capistrano
County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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