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Commission on
State Mandates

VIA CSM DROPBOX

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

Re: *Lead Sampling in Schools, Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017*, 17-TC-03, Response to Comments from DOF and SWRCB

Dear Ms. Halsey:

Please accept these comments on behalf of Claimant City of San Diego (City) in response to comments submitted by the Department of Finance (DOF) and the State Water Resources Control Board (SWRCB). These comments address DOF's and SWRCB's legal arguments as to why they believe the City is ineligible to seek reimbursement: that the Permit Amendment does not impose a new program or a higher level of service on the City, and that the City can raise water rates on all its customers to pay for free lead testing at schools.

I. Introduction

On January 11, 2018, the City submitted a test claim for costs associated with lead testing performed at public and private school campuses as required by the above referenced Permit Amendment. The Permit Amendment requires the City to perform lead testing at the request of any Kindergarten through 12th Grade school in the City's service area at no charge to the school.[1]

DOF and SWRCB both argue in their comments that the City is ineligible for subvention because providing water service is not a governmental function, and therefore lead testing conducted by a water agency is not a new program or higher level of service under state mandates law. They also argue the City is ineligible for subvention because the City has the authority to raise fees on all water ratepayers to pay for lead testing at schools under Proposition 218.

[1] Permit Amendment No. 2017PA-SCHOOLS at p. 4, § 5 (Exhibit 1 at p. 6).

At the outset, we recognize that the two arguments raised by DOF and SWRCB were also raised in consolidated test claims 10-TC-12 and 12-TC-01, regarding certain water conservation measures. While the City was preparing these comments, the Commission's decision to deny those consolidated test claims was first affirmed by the Third District Court of Appeal, and then a rehearing was granted.[2] The Court's pending decision, however, does not impact this test claim for two reasons. First, this test claim is distinguishable because the City is not alleging the majority protest provision in Proposition 218 is a barrier to raising fees, as was argued in the consolidated test claims.[3] Instead, the City is deprived of its fee authority because the Permit Amendment directs the new service be provided at no charge to the schools. Second, because the Commission determined the claimants had sufficient fee authority, the Commission did not decide whether providing water service is a governmental function under state mandates law.[4]

II. Free Lead Testing for Schools is a New Program or a Higher Level of Service

The California Constitution provides that "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service."[5]

The program created by the Permit Amendment is free lead testing for schools. The program is new in that the City was not previously required to conduct lead testing at schools.[6] Soon after SWRCB issued the Permit Amendment, the State Superintendent of Public Instruction issued a press release entitled:

State Schools Chief Tom Torlakson Announces Free Testing for Lead in Drinking Water at California Public Schools[7]

The press release indicated it was a new state program: "State Superintendent of Public Instruction Tom Torlakson announced that public schools can receive free testing for lead in drinking water under a new state program."[8] SWRCB issued a similar press release announcing the new initiative: "K-12 schools in the state can receive free testing for lead under a new initiative announced today by the State Water Resources Control Board."[9]

The program is also a higher level of service in that it mandates more lead testing than required by the federal Lead and Copper Rule. As SWRCB explains, testing performed under the Lead

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[2] *Paradise Irrigation District, et al. v. Commission on State Mandates,* (2018) 27 Cal. App. 5th 1056 (rehearing granted Oct. 31, 2018).
[3] Decision on Consolidated Test Claims 10-TC-12 and 12-TC-1, at p. 19 (Dec. 5, 2014) (Exhibit 4).
[4] *Id*. at p. 29.
[5] Cal. Const. art. XIII B, §6.
[6] Declaration of Doug Campbell ¶ 11 (Exhibit 5).
[7] California Department of Education News Release #17-8 (Jan. 30, 2017) (Exhibit 2).
[8] *Id*.
[9] Media Release, *California Water Systems to Provide Lead Testing For Schools*, (Jan. 17, 2017) (Exhibit 3).

and Copper Rule is primarily done at private residences.[10] Residences are not selected randomly, but are targeted for testing based on the age and characteristics of plumbing in the area.[11] For large agencies like the City, lead testing is performed at 100 locations, which may be reduced to 50 locations if prior testing shows lead and copper are below certain levels.[12] Testing frequency can likewise be reduced from every six months to every three years.[13] The City is currently on a three year schedule.[14] Under the first year of the Permit Amendment, however, the City received requests for lead testing from 255 schools.[15] The Permit Amendment prohibits counting any of the lead testing performed at schools towards satisfying the Lead and Copper Rule.[16] The Permit Amendment mandates a higher level of service in that it requires lead testing be done at schools in addition to targeted private residences, and in numbers in excess of what is required by the Lead and Copper Rule.

As SWRCB explains, however, a new program may not be eligible for reimbursement under state mandates law if it is required by a law of general application.[17] The California Supreme Court identified the programs subject to subvention as being "[1] programs that carry out the governmental function of providing services to the public, or [2] 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."[18] These are alternative tests; satisfaction of either test will establish a program subject to reimbursement under state mandates law.[19] Both tests are satisfied in this case.

Under the first test, the service being provided under the Permit Amendment is free lead testing. Lead testing furthers two governmental functions of providing services to the public. The first government function is providing water service, in that the Permit Amendment was issued to the City as a local water agency, and water agencies conduct targeted residential lead testing pursuant to the Lead and Copper Rule. The second governmental function is schooling of children, because schools are obligated to provide a safe environment for students and the Permit Amendment requires lead testing only on school property.

Under the second test, lead testing implements a State policy of providing safe drinking water to school students. Lead testing under the Permit Amendment does not apply to all residents and entities in the state; it applies uniquely to the City as a local water agency. The fact that identical permit amendments were issued to local water agencies that are privately-owned does not preclude the Permit Amendment from being a new program under the second test.

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[10] SWRCB Comments at p. 6.
[11] 40 C.F.R. § 141.86(a).
[12] 40 C.F.R. § 141.86(c).
[13] 40 C.F.R. § 141.86(d).
[14] Declaration of Doug Campbell ¶ 13.
[15] *Id*. at ¶ 7f.
[16] Permit Amendment at p. 5, § 6 (Exhibit 1 at p. 7) ["The water system may not use any lead samples collected as part of these special school samples to satisfy federal or state Lead and Copper Rule requirements."]
[17] SWRCB Comments at p. 8.
[18] *County of Los Angeles v. State of California*, (1987) 43 Cal. 3d 46, 56.
[19] *Carmel Valley Fire Protection District v. State of California*, (1987) 190 Cal. App. 3d 521, 537.

A. Water service is a governmental function that provides services to the public.

The City of San Diego is a charter city. The City Charter imposes a legal obligation and responsibility on the City to provide water service.[20] The City is empowered to adopted rules and regulations necessary for the regulation, use, and government of the water system.[21] The City has approximately 281,000 retail water connections.[22] The City Council must approve rates and charges for water service.[23] Providing water service is a function of City government.

SWRCB argues that the City is ineligible for reimbursement because water service is not a function "peculiar" to government, and therefore not a governmental function.[24] But the first test established by the California Supreme Court does not require that the function be "peculiar" to government, only that the program "carry out the governmental function of providing services to the public."[25] The word "peculiar" is not in the test. The Supreme Court used the term "peculiar" only to distinguish programs that are forced on local government from laws that apply generally to all state residents and entities.[26] The opinion of *Carmel Valley Fire Protection District v. State of California* cited by SWRCB, certainly found that "fire protection is a peculiarly governmental function" in satisfying the first test, despite the fact that private sector fire fighters provide the same service.[27] The opinion does not say, however, that the first test can only be satisfied if the governmental function is peculiar to government, as SWRCB suggests.

The first test only requires that the governmental function be that "of providing services to the public." SWRCB does not cite a published opinion where the government was providing a public service, but subvention was denied because the government function was not peculiar to government. Instead, instances where the first test was not satisfied involved situations where the new requirements did not increase the level of service provided to the public, such as requirements to provide employees with unemployment insurance coverage[28], worker's compensation benefits,[29] or to upgrade public buildings to comply with statewide elevator safety regulations.[30] These requirements only increased the government's incidental cost of providing existing public services rather than requiring new services or programs.

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[20] San Diego Charter § 26.1.
[21] San Diego Charter § 3.
[22] Declaration of Lee Ann Jones-Santos ¶ 5 (Exhibit 6). In its comments, the SWRCB indicates the City has "over 3,000,000 customers to fund the school testing." SWRCB Comments at p.2. The City does not understand how SWRCB arrived at this figure, seeing as the population of the City of San Diego is only 1.4 million.
[23] *See* Cal. Const. art. XIII D, § 6(a)(2).
[24] *See* SWRCB Comments at p. 8 ["The California Supreme Court has established that only those programs which involve a function peculiar to government, or which impose unique requirements on local government, are eligible for subvention."] *See also Id*. at p. 9 ["The Permit Amendment Does Not Involve a Function Peculiar to Government"].
[25] *County of Los Angeles*, *supra*, 43 Cal. 3d at 56.
[26] *County of Los Angeles*, *supra*, 43 Cal. 3d at 56-57.
[27] *Carmel Valley Fire Protection District*, *supra*, 190 Cal. App. 3d at 537.
[28] *City of Sacramento v. State of California*, (1990) 50 Cal. 3d 51.
[29] *County of Los Angeles v. State of California*, (1987) 43 Cal. 3d 46.
[30] *County of Los Angeles v. Department of Industrial Relations*, (1989) 214 Cal. App. 3d 1538.

SWRCB also relies on a 100-year-old line of cases on sovereign immunity, to argue that cities operating a water utility are performing a "proprietary function" and not a "governmental function." Since then, however, Courts have determined "[t]he labels 'governmental function' and 'proprietary function' are of dubious value in terms of legal analysis in any context."[31] "Whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur."[32] Water service provided by public agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218 (discussed below), which eliminates profit from water service charges.

SWRCB's reliance on the Service Duplication Law is confusing.[33] The Legislature recognized that private water utilities may be reluctant to invest in facilities "to meet the present and prospective needs" of its customers when there is a possibility that local government could exercise its authority to provide water service in the same area.[34] State law was adopted in 1965 to provide compensation to private water utilities in the event that happens.[35] But this law does not amount to a legislative determination that water service is not a governmental function. If anything, the Service Duplication Law recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business. Now, over 50 years later, that transition is substantially complete.

The data provided by SWRCB demonstrates that water service is predominantly provided by public agencies. SWRCB and DOF argue that water service is mostly a private enterprise, in that 75% of drinking water systems, or 5,314 of 6,970 water systems, in the State are privately owned.[36] These figures were pulled directly from tables provided by SWRCB.[37] However, the same tables show that 81% of the population served by drinking water systems statewide, or 33.8 million of 41.6 million people, receive their water service from public entities.[38] Similarly, 81% of the water service connections, or 7.7 million of the 9.5 million connections, are connections to public entities.[39] The City has no means to verify the accuracy of this data, but assuming that SWRCB and DOF are correct that 75% of drinking water systems are privately owned, then the same data tables demonstrate that public agencies serve 81% of people in the State who have drinking water service. Such a large percentage of the State population receiving water service from public entities is strong evidence that water service is a governmental function, more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems.

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[31] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, (1977) 75 Cal. App. 3d 957, 968.
[32] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, (1966) 247 Cal. App. 2d 317, 325, quoting *Washington Township v. Village of Ridgewood*, (1958) 26 N.J. 578, 584, 141 A.2d 308, 311.
[33] SWRCB Comments at p. 13.
[34] Cal. Pub. Util. Code § 1501.
[35] *Id*. at § 1503; Stats. 1965, c. 1752, p. 3925, Sec. 1.
[36] SWRCB Comments at p. 2; DOF Comments at p. 2.
[37] SWRCB Comments, Attachment 101, pp. 406-409 (Exhibit 7).
[38] *Id*. (using third column totals).
[39] *Id*. (using fourth column totals).

Nevertheless, the fact that private utilities also provide water service does not preclude water service from being a governmental function. In *Carmel Valley Fire Protection District*, the Court determined fire protection is a governmental function even though fire protection is also provided by private firefighters:

> This classification is not weakened by the State's assertion that there are private sector fire fighters who are also subject to the executive orders. Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function.[40]

If a service had to be exclusively provided by government to be eligible for subvention, then presumably many of this Commission's decisions involving public schools should have been denied because of the prevalence of private schools. Such a rationale would create a loophole for the State to perpetually avoid subvention by including a handful of private entities within the scope of any new programs it imposes on local government.

The California Supreme Court explained the concern the voters had when the Constitution was amended to address state mandates:

> The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.[41]

This is precisely what the Permit Amendment is doing: creating a new lead testing program for schools and transferring the cost and administration of the program to the City. Water service is a governmental function because it is predominately provided by public agencies. Lead testing of drinking water at schools is a service to the public. Therefore, the Permit Amendment is a new program eligible for reimbursement under the first test established by the Supreme Court.

B. Public schooling is a governmental function that provides services to the public.

The lead testing program in the Permit Amendment carries out a second governmental function of ensuring safe schools. "Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public."[42] Schools are obligated to provide free drinking water to students, or to adopt a resolution explaining why fiscal constraints or health and safety concerns prevent it.[43] The City

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[40] *Carmel Valley Fire Protection District*, *supra*, 190 Cal. App. 3d at 537.
[41] *County of Los Angeles*, *supra*, 43 Cal. 3d at 56.
[42] *San Diego Unified School District v. Commission on State Mandates*, (2004) 33 Cal. 4th 859, 879.
[43] Cal. Educ. Code § 38086.

is enhancing the safety of students by performing lead testing of drinking water on school campuses for free.

The history of the Permit Amendment demonstrates its purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies. In September 2015, the Legislature passed Senate Bill 334 (SB 334), a proposal to amend the California Education Code to ensure that drinking water provided by schools does not contain lead.[44] Inherent in such a requirement is an obligation to test the water for lead. The bill indicated it was imposing a state-mandated local program on school districts.[45] The Governor vetoed SB 334, expressing his concern over the cost to the State:

> **"I agree that all California students should have access to safe drinking water but this bill creates a state mandate of uncertain but possibly very large magnitude."**[46]

Instead of signing the bill, the Governor directed SWRCB to implement lead testing at schools through local water agencies as part of the Lead and Copper Rule.[47] The Governor's intent was clearly to avoid spending State funds, and to shift the costs of school lead testing to local water agencies. SWRCB followed the Governor's direction by issuing the Permit Amendment to the City to perform lead testing on school campuses at no charge.

Had SB 334 become law and schools had to test water for lead to confirm their students had safe, clean drinking water, the schools would have been performing a governmental function subject to reimbursement from the State. Lead testing at schools does not lose its characterization as a "governmental function of providing services to the public" under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies.[48] The City is performing a governmental function, albeit a function associated with schooling, when the City tests for lead on school property pursuant to the Permit Amendment.

C. The Permit Amendment imposes a unique requirement on the City that does not apply generally to all residents and entities in the state.

The Supreme Court's second test to identify programs subject to subvention is "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."[49] This includes orders issued by State agencies.[50] The State policy being implemented by the Permit Amendment is providing safe drinking water to school students.

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[44] Senate Bill 334, 2015-2016 Sess. (Sen. Leyva).
[45] *Id*.
[46] Governor's Veto Message on SB 334 (Oct. 9, 2015).
[47] *Id*.
[48] *See Lucia Mar Unified School District v. Honig*, (1988) 44 Cal. 3d 830, 835 [Shifting funding of an existing program for disabled students from the State to a local entity is a new program under state mandates law.]
[49] *County of Los Angeles*, *supra*, 43 Cal. 3d at 56.
[50] *See Carmel Valley Fire Protection District*, *supra*, 190 Cal. App. 3d at 537; Cal. Const. art. XIII B, §6.

SWRCB argues that the Permit Amendment does not impose unique requirements on the City because identical permit amendments were issued to over 1,100 water agencies.[51] SWRCB insists the Permit Amendment "simply effectuates" the Safe Drinking Water Act, a law SWRCB characterizes as law of general application that precludes the Permit Amendment from being a program subject to reimbursement under the second test.[52] However, in characterizing the Act as a law of general application, SWRCB relies only on the legislative findings which broadly declare that every resident has the right to safe drinking water, and water systems must deliver pure, wholesome, potable water.[53] SWRCB does not cite any substantive provisions in the Safe Drinking Water Act that "apply generally to all residents and entities in the state" within the meaning of the second test, or explain how such a provision is implemented by the Permit Amendment.

The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies.[54] The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.[55]

Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage[56], worker's compensation benefits,[57] or to upgrade public buildings to comply with statewide elevator safety regulations.[58] Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.

The Permit Amendment satisfies all the elements of the second test. The Permit Amendment is implementing a State policy of providing safe drinking water to school students. The policy is implemented by obligating local water agencies to test for lead on school property. The obligation to test for lead does not apply generally to all residents and entities in the State, but

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[51] SWRCB Comments at p. 14.
[52] *Id*. at p. 15.
[53] *Id*.
[54] *Carmel Valley Fire Protection District*, *supra*, 190 Cal. App. 3d at 538.
[55] *See County of Los Angeles v. Commission on State Mandates*, (2007) 150 Cal. App. 4th 898, 919 ["In any event, the applicability of permits to public and private discharges does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6."]
[56] *City of Sacramento v. State of California*, (1990) 50 Cal. 3d 51.
[57] *County of Los Angeles v. State of California*, (1987) 43 Cal. 3d 46.
[58] *County of Los Angeles v. Department of Industrial Relations*, (1989) 214 Cal. App. 3d 1538.

uniquely to local water agencies. Therefore, the Permit Amendment is a new program eligible for reimbursement under the second test established by the Supreme Court.

III. The Permit Amendment Deprives the City of its Fee Authority to Charge for Lead Testing.

This test claim would not have been necessary if the Permit Amendment had allowed the City to charge the schools for lead testing performed at their request. By mandating that the City perform lead testing for free, the Permit Amendment has ensnared the City in constitutional web of fees and charges, where the only ways out are to spend local tax revenue or to seek reimbursement through this Commission.

A. Proposition 218 prohibits the City from charging all water ratepayers for lead testing done at the request of schools.

Proposition 218 amended the California Constitution in 1996 by adding articles XIII C and XIII D. Section 6 of article XIII D added procedural and substantive requirements for new and existing property related fees and charges. Charges for water delivered to property owners and residents are property-related fees subject to these restrictions.[59]

The procedural requirements imposed by Proposition 218 include prior notice, a public hearing, and an opportunity to protest new or increased fees or charges.[60] An agency is prohibited from adopting a proposed fee or charge if a majority of the property owners submit written protests against it.[61] The Court of Appeal in *Paradise Irrigation District* recently granted a rehearing, where it will decide whether the majority protest provision divests the claimants of their authority to levy fees.[62] The City has not alleged the majority protest provision is a barrier to its fee authority in this test claim.

Instead, the Permit Amendment divests the City of its authority to levy fees by ordering the City to provide a new service at no charge.[63] Without the ability to charge the schools for a new service provided exclusively to them, the cost of the new service is being absorbed by all City ratepayers. This places the City's water utility in violation of substantive (as opposed to procedural) requirements of Proposition 218, which must be cured.

Proposition 218 introduced five substantive requirements to extend, impose, or increase property-related fees and charges:[64]

> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

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[59] *Bighorn Desert View Water Agency v. Verjil*, (2006) 39 Cal. 4th 205, 217.
[60] Cal. Const. art XIII D, § 6(a).
[61] Cal. Const. art XIII D, § 6(a)(2).
[62] *Paradise Irrigation District, supra,* (2018) 27 Cal. App. 5th 1056 (rehearing granted Oct. 31, 2018).
[63] Permit Amendment at p.4, § 5 (Exhibit 1 at p. 6).
[64] Cal. Const. art XIII D, § 6(b).

> (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.
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> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
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> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
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> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.

The first and second listed requirements restrict the City from collectively charging its customers more than it costs to provide water service.[65] The City cannot operate its water system at a profit. The third requirement tasks the City with apportioning the total cost of operating its water system among its customers based on the cost of providing water service to each customer.[66] The purpose of this requirement is to protect customers from having to pay rates that are higher than the cost of providing service to them.[67] This prevents the City from using revenue from certain water customers to subsidize the cost of providing services to other customers.

The SWRCB contends there are no barriers to the City raising water rates to cover the costs associated with the Permit Amendment.[68] The SWRCB believes that the Permit Amendment confers a direct benefit on all water ratepayers, not just the schools, in the form of increased property values and ensuring the City's water does not contain lead.[69] The SWRCB therefore reasons that because all water ratepayers directly benefit, all water ratepayers can pay for lead testing at schools. It is not that simple.

First, raising water rates to cover the cost of the Permit Amendment would ultimately violate the Permit Amendment itself. The City is legally obligated by Proposition 218 to apportion the cost of service based on the relative benefits received by its customers.[70] Proposition 218 further prohibits the City from charging customers for services that are not immediately available to

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[65] *Howard Jarvis Taxpayers Association v. City of Roseville*, (2002) 97 Cal. App. 4th 637, 647-648.
[66] *City of Palmdale v. Palmdale Water District*, (2011) 198 Cal. App. 4th 926, 936-937.
[67] *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*, (2015) 235 Cal. App. 4th 1493, 1503.
[68] SWRCB Comments at p. 15.
[69] *Id*. at pp. 15-16.
[70] *Capistrano Taxpayers Association*, *supra*, 235 Cal. App. 4th at 1503 [Low water users cannot pay for water recycling facilities that would not be necessary but for higher water consumers.]

them.[71] The schools, as the exclusive and direct recipients of lead testing under the Permit Amendment, benefit the most in that the testing assesses school pipes and fixtures for sources of lead. Lead testing is not available to the rest of the City's water ratepayers under the Permit Amendment, so they do not receive the benefit of having their own properties evaluated. The benefits of higher property values and testing of City water that SWRCB says are direct benefits to all ratepayers, are really collateral or incidental benefits. Any water rate increase apportioning the cost of lead testing among City ratepayers would fall primarily on schools, the direct and primary beneficiary of the lead testing. The Permit Amendment, however, prohibits charging a school for lead testing. A school is being charged for lead testing whether the City sends the school an invoice when the testing is done, or passes on the cost of lead testing to a school through a water rate increase.

Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters.[72] While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.

Third, lead testing done at the request of a school is not a property-related service that the City can bundle within water rates under Proposition 218. In *Richmond v. Shasta Community Services District*, the California Supreme Court addressed the question whether a water connection fee (also known as a capacity fee) for new service was subject to Proposition 218.[73] The Court distinguished fees for ongoing water service from one-time fees to connect to a water system:

> A fee for ongoing water service though an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.[74]

The Court concluded that water connection fees are not governed by Proposition 218 because the fees are triggered by the voluntary decision of property owners to obtain water service.[75]

Richmond demonstrates that not all fees and charges related to water service are governed by Proposition 218. Fees or charges imposed because of a voluntary decision of a property owner are not imposed "as an incident of property ownership" and fall outside of Proposition 218.[76] Under the Permit Amendment, the City's obligation to conduct lead testing is similarly triggered

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[71] Cal. Const. art XIII D, § 6(b)(4).
[72] Declaration of Lee Ann Jones-Santos ¶ 4.
[73] *Richmond v. Shasta Community Services Dist.*, (2004) 32 Cal. 4th 409 [A water connection fee is neither an assessment nor a property-related fee under Proposition 218].
[74] *Id.* at 427.
[75] *Id.* at 427-428.
[76] *Id.*; *See also Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, (2001) 24 Cal. 4th 830, 840 [Fee imposed to inspect rental property is not a fee imposed as an incident of property ownership under Proposition 218].

by a voluntary decision of a school to request the service. Lead testing on private property is not an activity associated with ongoing water service, so a fee for lead testing cannot be imposed "as an incident of property ownership" under Proposition 218. Rather, the City has separate fee authority under Proposition 26 that it could exercise, but for the language in the Permit Amendment that prohibits the City from charging the schools for the service.

B. The Permit Amendment prohibits the City from exercising its fee authority under Proposition 26.

The City's authority to levy fees or charges for lead testing mandated by the Permit Amendment is governed by Proposition 26, a constitutional amendment adopted by the voters in 2010. Proposition 26 further tightened the restrictions on local government revenue imposed by Propositions 13 and 218 by defining a tax as "any levy, charge, or exaction of any kind imposed by a local government, except the following:"[77]

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
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> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

[77] Cal. Const. art. XIII C, § 1(e).

A fee or charge is a tax that must be approved by the voters unless the fee or charge meets one of these seven exceptions.[78] The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.

This leaves only the second exception, which would ordinarily give the City sufficient fee authority in situations like this: "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."[79] The City is providing lead testing services on school property at the request of each school, for which the City could ordinarily charge each school an amount equivalent to the cost of providing the service. The problem is the Permit Amendment prohibits the City from charging the schools, even though the schools are receiving the government service. The school is not the "payor," so the second exception does not apply. Therefore, by default, the City's water ratepayers become the "payor" even though they are not requesting or receiving the service. Without any applicable exceptions, charging water ratepayers for lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.

IV. The Permit Amendment Requires the City to Expends Funds Subject to the Taxing and Spending Limitations of Articles XIII A and XIII B to avoid a violation of Proposition 218.

The City of San Diego is a charter city providing a full range of services for its residents. The City provides police and fire protection, lifeguards, water service, wastewater service, trash collection, libraries, park and recreation facilities, street and storm drain maintenance, development services, and many other services. The City is a local government, subject to the taxing and spending limitations of Articles XIII A and XIII B of the California Constitution.[80]

There are instances in the City where different City departments work together to provide public services, including general fund departments, and utility departments funded through fees and charges. Several general fund departments support the Public Utilities Department's efforts to

[78] Cal. Const. art. XIII C, § 2.
[79] Cal. Const. art. XIII C, § 1(e)(2).
[80] Cal. Const. art. XIII A, § 4; Cal. Const. art. XIII B, § 8(d).

provide water service.[81] Water ratepayer funds are used to reimburse the City's general fund for this support, consistent with Proposition 218.[82]

Likewise, the Public Utilities Department helps the City provide other public services. For example, the City's water utility owns surface reservoirs and open space land that is popular for boating, fishing, hiking and picnicking.[83] These recreational activities are available to the general public, whether or not they are City water ratepayers.[84] Proposition 218 prohibits using water ratepayer funds for services available to the general public:

> No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.[85]

The City's water utility charges the City's general fund about $2.5 million each year for providing park and recreation activities.[86] This fund transfer ensures that water ratepayers are not paying for unrelated activities or programs, consistent with Proposition 218.

By mandating free service, the Permit Amendment similarly makes the City's general fund responsible for the cost of lead testing unless reimbursement is received from the State. The City's water utility has paid for the lead testing at schools to date, pending reimbursement from another source.[87] The City cannot increase water rates, or use existing water ratepayer funds, to pay for lead testing because lead testing pursuant to the Permit Amendment is not a property-related service. The Permit Amendment also prohibits the City from charging the schools for the service they receive. The liability of tax revenue in the City's general fund to pay for lead testing makes the City eligible to pursue subvention from the State.

V. Conclusion

The Permit Amendment imposes a state-mandated local program under both legal tests established by the California Supreme Court. Lead testing performed at schools carries out the governmental functions of providing water service and safe schooling of children. The Permit Amendment also imposes requirements on the City that do not apply generally to all residents and entities in the State, to implement a State policy of providing safe drinking water to school students. The City could ordinarily charge the schools a fee to cover the cost of lead testing, but by mandating that the service be provided at no charge, the Permit Amendment requires the City

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[81] For example, water service is supported by the City Attorney's Office for legal services, the Public Works Department for capital improvement projects, and the Real Estate Assets Department for property management.
[82] *See Moore v. City of Lemon Grove*, (2015) 237 Cal. App. 4th 363.
[83] Declaration of Lee Ann Jones-Santos ¶ 8.
[84] *Id*.
[85] Cal. Const. art XIII D, § 6(b)(5).
[86] Declaration of Lee Ann Jones-Santos ¶ 9.
[87] *Id*. at ¶ 10.

to spend tax revenue to avoid violating Constitutional restrictions on the use of water ratepayer funds. Therefore, the City respectfully requests this test claim be approved.

Pursuant to Cal. Code Regs. tit. 2, § 1181.3(a), I certify and declare under penalty of perjury that the foregoing facts are true and correct to the best of my personal knowledge, information, or belief. I further declare that all exhibits are true and correct copies of such documents as they exist in the City's files, or as they were obtained from publicly available sources.

Sincerely,

MARA W. ELLIOTT, City Attorney

By
Thomas C. Zeleny
Sr. Chief Deputy City Attorney

cc: Service List via CSM Dropbox
Doc. No: 1826175

EXHIBIT LIST

Cases[1]

[1] Pursuant to Cal. Code Regs. tit. 2, § 1183.3(b)(2), published court opinions arising from state mandate determinations are not attached as exhibits.

CALIFORNIA
Water Boards

EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIQUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board
Division of Drinking Water

CC: Peter Vroom
CC: Isam Hireish

January 18, 2017

Halla Razak
Public Utilities Director
City of San Diego, System No. 3710020
9192 Topaz Way
San Diego, CA 92123

Dear Halla Razak:

ISSUANCE OF PERMIT AMENDMENT 2017PA_SCHOOLS

REQUIREMENTS FOR LEAD SAMPLING AT K-12 SCHOOLS

The State Water Resource Control Board, Division of Drinking Water (Division) has issued a permit amendment to the City of San Diego water supply permit. The enclosed permit amendment establishes requirements for lead monitoring and lead sample result interpretation at Kindergarten to 12th grade (K-12) schools served by your water system that have submitted a written request for lead sampling related assistance. Full details of the new requirements for K-12 school lead sampling and lead sample result interpretation are included in the enclosed permit amendment.

If your water system does not serve potable water to at least one K-12 school, this permit amendment does not apply to your water system.

The Water System to whom a permit amendment is issued may file a petition with the State Water Resources Control Board (State Water Board) for reconsideration of the decision to issue the permit amendment. Petitions must be received by the State Water Board within 30 calendar days of the issuance of the permit amendment. The date of issuance is the earlier of the date when the permit amendment is mailed or served. If the 30th day falls on a Saturday, Sunday or state holiday, the petition is due the following business day. Petitions must be received by 5 p.m. Information regarding filing petitions may be found at:

http://www.waterboards.ca.gov/drinking_water/programs/petitions/index.shtml

Please visit the Division's school lead sampling webpage at:
http://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.shtml
for additional information including frequently asked questions and other important guidance.

If you have any questions, please contact the Lead Sampling for Schools Specialist at (916) 449-5577 or email your question to DDW-PLU@waterboards.ca.gov

Sincerely,

Sean Sterchi, P.E.
District Engineer

Enclosure: 2017PA_Schools

cc: Keith Kezer, Program Coordinator, Land and Water Quality Division, County of San Diego, Department of Environmental Health (via email)

bcc: ECM – Permitting and Technical Review – Permits, Amendments, Decisions – Permit Amendments

STATE OF *CALIFORNIA*

AMENDMENT TO THE

DOMESTIC WATER SUPPLY PERMIT ISSUED TO

City of San Diego
(Public Water System No. *3710020*)

By The

State Water Resources Control Board

Division of Drinking Water

PERMIT AMENDMENT NO. **2017PA-SCHOOLS** EFFECTIVE DATE: **January 18, 2017**

WHEREAS:

1. The State Water Resources Control Board (SWRCB) "may renew, reissue, revise, or amend any domestic water supply permit whenever the ... [SWRCB] deems it to be necessary for the protection of public health whether or not an application has been filed." (California Health and Safety Code (CHSC), Section 116525 (c))

2. "Every resident of California has the right to pure and safe drinking water." (CHSC, Section 116270 (a))

3. "It is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that, when present in drinking water, may cause cancer, birth defects, and other chronic diseases." (CHSC, Section 116270 (d))

4. The Safe Drinking Water Act is "intended to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable." (CHSC, Section 116270 (e))

5. Protecting children from exposure to lead is important to lifelong good health. Children who are exposed to lead could experience long-term problems with physical and mental growth and development. Effects of lead exposure can be managed, but they cannot be remedied.

6. Recent events in the United States have shown that lead in drinking water remains an ongoing public health challenge and important concern for children's health. The SWRCB is encouraging schools that serve one or more of grades Kindergarten through 12th grade to test for lead in water from taps regularly used for drinking or cooking. The school can request assistance from their public water system.

7. Lead exposure in children typically results from a combination of environmental and man-made lead from sources such as paint, air, soil, industry, consumer products, food, and drinking water.

   Normally, the exposure from drinking water would be a very low component of this exposure. Children consume drinking water at home, at school and at various other locations. High levels of lead in drinking water are a concern at any of these locations. Lead in drinking water is typically found at the highest levels on "first draw" samples after the water has stagnated in the water pipes for several hours (such as overnight). If the lead levels are found to be below the action level after stagnation, that is a strong indication that there is an insignificant exposure to lead at that particular sampling location. Individual plumbing fixtures can contribute to high levels in these "first draw" samples.

8. In California, the SWRCB oversees public water systems to ensure the water they provide is tested and safe per the requirements of the State and Federal Safe Drinking Water Acts, and regulations adopted pursuant to those Acts, which includes the Lead and Copper Rule (LCR), a regulation adopted by the United States Environmental Protection Agency (USEPA) and the SWRCB to control lead and copper in drinking water.

   Under the LCR, public water systems are required to test water for lead at a set number of service connections (depending on the number of customers served by the system) that are at a higher risk for lead in the tap water due to their plumbing characteristics. Water suppliers are not required to test every customer's tap. Schools that are served by community water systems are generally not included in the LCR testing; only residential connections are included.

THEREFORE: The State Water Resources Control Board hereby determines that it is necessary for the protection of public health for this amendment to be issued, and hereby issues this permit amendment subject to the following provisions:

1. This permit amendment applies to each public water system that serves drinking water to at least one or more of grades Kindergarten through 12th grade school for which a request for lead sampling has been made prior to **November 1, 2019**, as provided for in Provision 3.

2. Each water system shall submit to the SWRCB's Division of Drinking Water (DDW) a comprehensive list of the names and addresses of all Kindergarten through 12th grade schools that are served water through a utility meter by **July 1, 2017**. The list shall be in the format and method posted on the DDW Lead Sampling in California Schools website.

3. If an authorized school representative, (the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a

private school) of a school served by the water system requests one-time assistance with lead sampling in writing, the water system shall:

a. Respond in writing within 60 days of receiving the school's lead sampling request and schedule a meeting with school officials, including at least one staff member familiar with the school's water infrastructure, to develop a sampling plan. An example school lead sampling plan is located on the DDW Lead Sampling in California Schools website. The sampling plan may use the USEPAs "*3Ts for Reducing Lead in Drinking Water in Schools*" as general guidance. The 3T document can be found online at:

https://www.epa.gov/sites/production/files/2015-09/documents/toolkit_leadschools_guide_3ts_leadschools.pdf

b. Finalize a sampling plan and complete the initial sampling within 90 days of receiving the lead sampling request, except that if the water system cannot complete the sampling plan and the lead sampling in that time period, the water system shall develop and comply with a time schedule to complete the sampling plan and initial lead sampling that has been approved by DDW.

c. Collect from one to five samples at each school from regularly used drinking fountains, cafeteria/food preparation areas, or reusable bottle water filling stations selected according to the lead sampling plan described in Provision 3 (b) using the sampling guidance located in **Appendix A (Sampling Guidance)** which is attached. Sample sites may be either treated or untreated.

d. Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday or Friday during a day school is in session and has been in session for at least one school day prior to the date of sampling.

e. Ensure that samples are collected by a water system representative that is adequately trained to collect lead and copper samples.

f. Submit the samples to an ELAP certified laboratory for analysis of lead.

g. Require the laboratory to submit the data electronically to DDW in accordance with the electronic submittal guidance which is located on the DDW Lead Sampling in California Schools website.

h. Provide a copy of the results to the requesting authorized school representative.

i. Within two school business days of receipt of a laboratory result that shows an exceedance of 15 parts per billion (ppb) at a sample site, notify the school of the sample result.

j. If an initial lead sample result shows an exceedance of 15 parts per billion (ppb) at a sample site,

   i. Collect an additional sample (resample) within 10 business days of receipt of the laboratory result above 15 ppb if the sample site remains in service.

   ii. Collect a third sample within 10 business days after notification that a resample result described above is less than or equal to 15 ppb.

iii. If the sample site is removed from service by the school, do not collect the repeat samples unless the school has completed corrective actions.

iv. Collect at least one more lead sample at a sample site where the school has completed some corrective action following an initial lead sample result over 15 ppb (examples of corrective action are replacing interior piping, replacing faucet, installing filters, etc.)

k. Ensure that it receives the results of the repeat lead samples required in Provision 3 (j) from the laboratory no more than 10 business days after the date of sample collection.

l. Not release the lead sampling data to the public for 60 days following the receipt of the initial lead sampling results unless the water system releases the data in compliance with a Public Records Act (PRA) request for the specific results.

m. Discuss the lead sample results with the school prior to releasing the sample results to the public. The water system shall discuss all lead sampling results with the school within 10 business days of receiving the results from the laboratory.

4. The water system may stop lead sampling at a school if:

a. All initial samples are less than or equal to 15 ppb; or

b. Repeat sampling has been analyzed for each sample location with an initial lead sample greater than 15 ppb in accordance with Provision 3, and either:

i. If lead is confirmed over 15 ppb and the sample location has subsequently been physically removed from service, or

ii. If the sample location remains in service, and

a. If lead is confirmed over 15 ppb and the school has taken some corrective actions at the sample location and the water system has collected at least one additional lead sample after the corrective actions and the result is less than or equal to 15 ppb, or

b. If lead is less than or equal to 15 ppb in both the first repeat sample and second repeat sample described in Provision 3(j).

c. A written request from the water system to terminate lead sampling assistance has been approved by DDW.

d. If requested in writing by the school's authorized school representative.

5. The water system is responsible for the following costs:

a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.

b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.

6. The water system may not use any lead samples collected as part of these special school samples to satisfy federal or state Lead and Copper Rule requirements.

7. The water system shall communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if a school has confirmed lead levels above 15 ppb. The water system is not responsible to pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water. The water system is not responsible for determining any corrective actions needed at the school.

8. The water system shall keep records of all written requests from a school for lead related assistance and provide the records to DDW, upon request. Records shall include, at a minimum, the following information:

   a. The name of the school. If a school district makes a request, the school district's name shall be recorded along with each individual school served by the water system that is requesting sampling;

   b. The date of the request;

   c. The date of the initial meeting;

   d. The date of the sampling plan along with a copy of each sampling plan; and

   e. The date of initial lead sampling and all repeat samples.

9. The water system's annual Consumer Confidence Report shall include a statement summarizing the number of schools requesting lead sampling.

This permit amendment shall be appended to and shall be considered to be an integral part of the existing Domestic Water Supply Permit previously issued to the water system.

This permit amendment shall be effective as of the date shown below.

FOR THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Dated: January 18, 2017

Sean Sterchi, P.E.
District Engineer
San Diego District
SWRCB-DDW

APPENDIX A
SAMPLING GUIDANCE
Collecting Drinking Water Samples
for Lead Testing At K-12 Schools

This Sampling Guidance is provided by the State Water Resources Control Board (SWRCB) Division of Drinking Water for use by schools and water system staff who will be participating in the collection of samples for the determination of lead in drinking water at K-12 schools. Sampling and testing will be used to help reduce students and staff exposure to lead in the drinking water provided at the school.

This guidance and the instructions for sampling are taken from the US Environmental Protection Agency's 3Ts (Testing, Training, and Telling) for Reducing Lead in Drinking Water in Schools program for measuring and reducing lead at school drinking water locations; however, there are differences between the EPA and SWRCB sampling procedures. The SWRCB procedures used for this testing includes initial sampling to determine the combined lead concentration from the outlet device (bubbler, sink faucet, fountain, etc.) and from the internal plumbing, and repeat sampling to confirm initial sampling test results or to determine the lead concertation after routine, interim, and permanent corrective actions to reduce lead from an outlet device have been completed.

To ensure accurate test results the samples should be collected by following the instructions below for preparation, initial sampling, and repeat sampling.

Preparation

1. At least one school employee should be designated to assist the water system trained sampler during the collection of initial, repeat, confirmation, and check samples and to provide any additional help as necessary to complete the sampling.
2. Select up to five of the busiest locations used for drinking and cooking to be sampled and tested. These locations can be selected by observing students and staff during the morning, break, and lunch periods over as many days as needed until the busiest locations have been identified.
3. All faucets, fountains, coolers, bubblers, bottle filling stations, and filtered water dispensers located on the exterior and interior of buildings, including those located in hallways, playgrounds, classrooms, and cafeterias, should be evaluated to assure that all locations have been considered for selection. Large industrial sinks designed for washing and not intended to be used as a source of water for drinking and cooking should not be included.
4. Do not omit from the evaluation and selection process drinking water locations that are served by a point of use filter (a filter attached to the faucet or under the sink) or drinking water locations in buildings or school ground areas that are served by a water softening, conditioning, or filtration treatment system.
5. Each location selected for testing should be assigned a Sample ID. Each Sample ID should use the following format: <Water System No.>-<School ID>-<Sample ID> i.e. 1710001-005-001.
6. A Lead Sampling Plan should be prepared that includes the five sample locations and Sample IDs identified on a map of the school grounds. Only water system staff trained in sampling should be collecting the samples.
7. All samples should be collected on a Tuesday, Wednesday, Thursday or Friday morning during periods of normal school operations (school is in session) and not during summer school, summer or winter breaks, or other extended breaks. Do not collect the samples on the first day back to school following a vacation, holidays, or weekends.

8. Record the location description, date and time last used, and date and time collected in the Lead Sampling Plan.
9. All samples must be "first draw samples" meaning that at the time of sampling the drinking water locations must not have been used during the previous 6 hours. To ensure this period of inactivity it may be necessary to protect the sample locations overnight prior to collecting the samples early in the morning before students and staff arrive.
10. Do not flush a sample site for any length of time prior to the 6 hour period of inactivity and do not flush a sample site at the outlet before collection of the sample.
11. Leave all angle stops, shutoff valves, and similar devices on the sample line providing water to the drinking water location in a normal state of operation prior to sampling. Do not modify, open, or close any devices located on the sample line in preparation for collecting a sample. Doing so may cause sample results that are not representative of normal operating conditions.
12. Do not remove any filters, aerators, or screens at any sample outlet prior to collecting the samples.
13. All sample bottles must be labeled with the Sample IDs for each sample location. All samples must be collected in 1 liter wide mouth plastic bottles and all bottles must be completely filled. Make sure your laboratory provides 1 liter (not 250 mL) wide mouth sample bottles.
14. If a bottle does not fit at the sample site and cannot be completely filled, a spare 1 liter laboratory bottle may be used to partially fill and transfer the drinking water until the sample bottle is full.
15. It should be requested to the laboratory to provide unpreserved sample bottles. All samples must be delivered to the testing laboratory within 14 days of collection for preservation.
16. Cold water must be collected for all samples. If sampling from a drinking water outlet that provides cold and hot water, the cold water handle must be used for sample collection.

Initial Sampling

Initial sampling is used to determine if a drinking water outlet has a lead level that is above or below the Action Level of 15 ppb. Drinking water outlets with a test result of equal to or less than 15 ppb do not need additional testing and a water system is not required to collect additional samples when the initial sample results is less than or equal to 15 ppb.. Drinking water outlets with an initial sampling test result of greater than 15 ppb exceed the Action Level and should undergo repeat sampling. Water system staff should provide the initial test results to the school contact person and meet with the school to discuss the results within 10 days of receipt from the laboratory. In the case of an Action Level exceedance water system staff should provide the results to the school within two school business days. Following a review of the initial test results the school should document how it will proceed with each individual drinking water outlet.

1. After completing the preparation steps above, the trained sampler collects initial samples using the Initial Sampling Instructions as guidance.
2. Upon delivery of the samples to the laboratory, the standard laboratory turn-around-time for receiving results is acceptable.
3. All initial sample locations with a test result of less than or equal to 15 ppb have lead levels less than the Action Level, the location is suitable for consumption, and no further testing is needed.
4. All initial sample locations with a test result of greater than 15 ppb have a lead level that exceeds the Action Level and should be tested again by collecting a repeat sample.

5. Drinking water locations with an initial Action Level exceedance should remain in service and repeat samples collected within 10 days of receiving the initial sample results from the water system and by using the Repeat Sampling Instructions as guidance.
6. Alternatively, drinking water locations with an initial Action Level exceedance can be removed from service permanently or until addressed using the EPA 3Ts recommendations for routine, interim, and permanent corrective actions.
7. The water system cannot release the initial lead sampling data to the public for 60 days following the receipt of the initial sampling results in accordance with the permit amendment.

Repeat and Confirmation Sampling

Repeat sampling is used to confirm an initial sampling result indicating that a drinking water outlet has a lead level that is greater than 15 ppb and exceeds the lead Action Level. Confirmation sampling is used to confirm the lead concentration at a drinking water location following an initial sampling lead result greater than 15 ppb and a repeat sampling lead result less than or equal to 15 ppb. Repeat sampling should be performed within 10 days of receiving the initial sample results and, if necessary, confirmation repeat sampling should be performed within 10 days of receiving the repeat sample results. Drinking water outlets with a repeat Action Level exceedance that confirms an initial sample result should be removed from service until corrective actions and check sampling have been performed with test results that indicate the water outlet has a lead level of less than 15 ppb. Water system staff should provide the repeat test results to the school contact person and meet with the school to discuss the results within 10 days of receipt from the laboratory and in the case of an Action Level exceedance provide the results to the school within two school business days. Following a review of the repeat test results the school should document how it will proceed with each individual drinking water outlet.

1. After completing the preparation steps above, the trained sampler collects repeat samples using the Repeat Sampling Instructions as guidance.
2. Upon delivery of the samples to the laboratory it shall be requested that results are reported by the laboratory within 10 business days.
3. All repeat sample locations with a test result of greater than 15 ppb have a lead level that exceeds the Action Level and should be removed from service permanently or addressed using the EPA 3Ts recommendations for routine, interim, and permanent corrective actions to minimize students and staff exposure to lead in drinking water.
4. All repeat sample locations with a test result of less than or equal to 15 ppb should be tested again by collecting a confirmation repeat sample to confirm the lead concentration at the drinking water outlet.
5. If the confirmation repeat sample has a test result of greater than 15 ppb the outlet has a lead level that exceeds the Action Level and should be removed from service permanently or addressed using the EPA 3Ts recommendations for routine, interim, and permanent corrective actions and check sampling.
5. If the confirmation repeat sample has a test result of less than or equal to 15 ppb the lead level is less than the Action Level, the location is suitable for consumption, and no further testing is needed.
6. The water system is not required to collect any additional samples when the repeat result and confirmation repeat result are less than or equal to 15 ppb.
7. All repeat sample locations with an Action Level exceedance should remain out of service until the school has completed the corrective actions and the water system has completed check sampling identified in the Corrective Action Plan described below in the Laboratory Results section of this guidance document.

Corrective Action Check Sampling

Following the implementation of any corrective action at a drinking water outlet, check sampling should be performed to determine if the corrective action was successful in reducing the lead level to less than 15 ppb. Corrective actions are performed to reduce the lead concentration at a specific outlet; however, it is possible for a corrective action to have no effect or to increase the lead concentration at an outlet. If any check sample has a lead result of greater than the Action Level, additional corrective actions should be performed until the check sample indicates that the drinking water outlet has a lead level of less than 15 ppb. Water system staff should provide the corrective action test results to the school contact person and meet with the school to discuss the results within 10 days of receipt from the laboratory and in the case of an Action Level exceedance provide the results to the school within two school business days. The drinking water outlet should remain out of service during check sampling and until a lead level of less than 15 ppb is obtained for the test result. The water system is not required to collect additional samples when the corrective action sample result is less than or equal to 15 ppb. If successive corrective actions indicate that the lead level at a drinking water outlet cannot be reduced to equal to or less than the Action Level, the school may choose to permanently remove the outlet from service. Water system staff should provide all laboratory test results to the school contact person upon receipt and in the case of an Action Level exceedance should provide the results within two school business days. Following a review of the check sampling test results the school should document how it will proceed with each individual drinking water outlet.

1. After completing the preparation steps above, the trained sampler collects check samples using the Corrective Action Check Sampling Instructions as guidance.
2. Upon delivery of the samples to the laboratory it shall be requested that results are reported by the laboratory within 10 business days.
3. All check samples with a test result of less than or equal to 15 ppb have lead levels less than the Action Level, no further testing at the drinking water outlet is needed, and the drinking water outlet can be placed back into service.
4. The water system is not required to collect additional samples when the corrective action sample result is less than or equal to 15 ppb.
5. All check samples with a test result of greater than 15 ppb have lead levels greater than the Action Level and additional corrective actions should be implemented at the drinking water outlet.
6. Following each corrective action, collect a check sample for testing to determine if the corrective action was successful in reducing the lead level at the drinking water outlet to less than 15 ppb.
7. Complete the necessary corrective actions and check sampling until a lead level of less than 15 ppb is obtained at which time the drinking water outlet can be placed back into service.

Laboratory Concentrations

The testing laboratory may report the results of the initial and repeat samples in several different formats or units. If the report includes the units of ppb (parts per billion) or ug/L (micrograms per liter) these two are essentially the same and the values in the report can be directly compared to the lead Action Level. If the report includes the units of ppm (parts per million) or mg/L (milligrams per liter) the values in the report must be converted to ppb or ug/L before comparison to the lead Action Level. To convert between units use the following conversion factors:

Convert from ppm to ppb: 1 ppm = 1,000 ppb
Convert from mg/L to ug/L: 1 mg/L = 1,000 ug/L

For example, if the laboratory reports an initial sample result of 0.007 ppm, the conversion would be 0.007 ppm X 1,000 = 7 ppb. The drinking water outlet has a lead concentration below the Action Level of 15 ppb and no further testing is needed.

If the laboratory reports an initial sample result of 0.021 mg/L, the conversion would be 0.021 mg/L X 1,000 = 21 ug/L. Since the units of ug/L and ppb are essentially the same, the drinking water outlet has a lead concentration above the Action Level of 15 ppb and needs testing again using the Repeat Sampling Instructions.

Laboratory Results

Test results should be reviewed by both the water system and the school prior to making any decisions on Action Level exceedances, repeat, confirmation, and check sampling, corrective actions, and release of the results and testing information to the students, staff, and water system customers.

Under most conditions laboratory results are very accurate and considered final; however, under rare circumstances errors can occur during sampling or in the laboratory and test results may not reflect the true concentration of the drinking water outlet. If you feel this has happened, contact the water system staff who performed the sampling and let them know. Water system staff should contact the local SWRCB DDW office for instructions on how to proceed.

Following the review of initial test results by both the water system and the school, both parties should document which drinking water locations are below the Action Level and need no additional testing, and which drinking water locations are above the Action Level and need repeat testing.

Following review of repeat test results by both the water system and the school, both parties should document which drinking water locations have Action Level exceedances and require corrective actions.

Corrective Action Plan

It is recommended that the school prepare a Corrective Action Plan if initial sample test results exceed the Action Level. The water system may be able to assist. The Corrective Action Plan identifies all drinking water outlets that need corrective actions to bring lead levels to less than or equal to 15 ppb and check sampling to return the drinking water outlets to service. The Corrective Action Plan lists all corrective actions found to be appropriate for each individual drinking water location with an Action Level exceedance. Corrective actions such as an aerator/screen cleaning and maintenance program may be suitable for one drinking outlet while the complete replacement of the outlet may be suitable for another location. Schools should refer to the EPA 3Ts references for detailed information on corrective actions. The Corrective Action Plan should be completed before releasing the results and testing information to the students, staff, and water system customers as it will help answer questions about Action Level Exceedances and what plans the school has to address the lead contamination issues. The Corrective Action Plan should be updated with the dates that corrective actions are made, the dates check sampling is performed, and the dates each drinking water outlet is returned to service, so that a record is maintained of each drinking water outlet initially having an Action Level exceedance.

Differences Between SWRCB and EPA Sample Collection

Schools are encouraged to read the EPA 3Ts references listed in the SWRCB *Frequently Asked Questions about Lead Sampling of Drinking Water in California Schools* document. SWRCB has prepared the lead testing at schools program using the EPA 3Ts documents, however, there are differences between the two sampling procedures. The table below lists the major differences and highlights the SWRCB procedures that should be followed.

Differences Between SWRCB and EPA Sample Collection				
Sampling Step	SWRCB Sampling Use These Procedures		EPA 3Ts Sampling (Not Used)	
Lead Action Level	15 ppb	If Initial Sample greater than 15 ppb should do repeat sample	20 ppb	If Initial Sample greater than 20 ppb should do follow-up sample
Initial Sample	1 liter	Tests for lead in the sample outlet and internal plumbing	250 mL	Tests for lead in the sample outlet
Repeat Sample	1 liter	Confirms Initial Sample Result	Not used	
Confirmation Repeat Sample	1 liter	Confirms Repeat Sample Result	Not used	
Corrective Action Check Sample	1 liter	Test lead level after implementation of corrective actions	Not used	
Follow-up Sample with 30-second flush	Not used		250 mL	Test for lead in the internal plumbing
Two-step sampling process	Not used		Determines if source of lead is from sample outlet or internal plumbing	
Lead Sampling Plan and Corrective Action Plan	Record water system and school information; record sample collection information noting any important observations during sampling; complete sample location map for all samples; document all routine, interim, and permanent corrective actions implemented		Not used	
Plumbing Profile and Sampling Plan	Not used		Prepare building and plumbing details; Select sites to be tested	
Drinking Outlet Inactivity	6 hours	Sample outlet unused for at least 6 hrs prior to sampling	8-18 hours	Sample outlet unused for at least 6 hrs but no more than 18 hrs prior to sampling

California DEPARTMENT OF EDUCATION

CALIFORNIA DEPARTMENT OF EDUCATION

NEWS RELEASE

TOM TORLAKSON
State Superintendent
of Public Instruction

Release: #17-8
January 30, 2017

Contact: Robert Oakes
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Phone: 916-319-0818

State Schools Chief Tom Torlakson Announces Free Testing for Lead in Drinking Water at California Public Schools

SACRAMENTO— State Superintendent of Public Instruction Tom Torlakson announced that public schools can receive free testing for lead in drinking water under a new state program.

The State Water Resources Control Board, in cooperation with the California Department of Education (CDE), recently required all community water systems to test school drinking water upon request by school officials.

"Students should have access to clean drinking water at all times," Torlakson said. "Students need fresh water, nutritious meals, and appropriate physical activity to be ready to learn in class."

California's water agencies regularly test for lead and other contaminants in their systems to comply with both state and federal laws. Water agencies also use corrosion control measures to prevent any lead that might be present from leaching into tap water.

The State Water Resources Control Board initiative makes testing mandatory if a public school served by a community water system requests testing.

Lead problems are infrequent in California, which has newer water infrastructure and less corrosive water than other parts of the nation. Governor Edmund G. Brown Jr. directed the State Water Resources Control Board to incorporate schools into the regular water quality testing that community water systems conduct at customer's taps.

If school officials make a written request, the community water systems must collect the samples within three months and report results back within two business days. Sampling locations can include drinking fountains, cafeteria and food preparation areas, and reusable water bottle filling stations. The program extends until November 1, 2019.

The community water systems are responsible for the costs associated with collecting drinking water samples, analyzing them, and reporting results.

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Tom Torlakson — State Superintendent of Public Instruction
Communications Division, Room 5602, 916-319-0818, Fax 916-319-0100

Last Reviewed: Thursday, August 2, 2018

Media Release

California Water Systems to Provide Lead Testing For Schools

FOR IMMEDIATE RELEASE
Jan. 17, 2017

Contact: Andrew DiLuccia
Phone: (916) 324-4775
andrew.diluccia@waterboards.ca.gov

SACRAMENTO – In an effort to further safeguard California's water quality, K-12 schools in the state can receive free testing for lead under a new initiative announced today by the State Water Resources Control Board.

The Board is requiring all community water systems to test school drinking water upon request by the school's officials.

There are approximately 9,000 K-12 schools in California, most of which are served by more than 3,000 community water systems in the state. While these community water systems extensively and regularly test their drinking water for lead, lead could get into clean water at a school campus if there were corroded pipes or old fixtures at the school.

Because California has newer infrastructure and less corrosive water than other parts of the country, lead problems at the tap are uncommon. However, national events have highlighted the importance of ongoing water quality monitoring and in 2015 Governor Edmund G. Brown Jr. directed the State Water Board to incorporate schools into the regular water quality testing that community water systems conduct at customer's taps.

"While the presence of lead in California's water infrastructure is minimal compared to other parts of the country, additional testing can help ensure we are continuing to protect our most vulnerable populations," said Darrin Polhemus, deputy director of the State Water Board's Division of Drinking Water.

Under the new requirement, testing is voluntary for schools, but if the schools make a written request, the community water systems must collect the samples within three months and report the results back to the school within 10 business days after receiving the results from the laboratory, or two business days if a result exceeds 15 parts per billion. Sampling locations can include drinking fountains, cafeteria and food preparation areas, and reusable water bottle filling stations. The one-time program extends until Nov. 1, 2019.

The community water systems are responsible for the costs associated with collecting drinking water samples, analyzing them and reporting results through this new program. In addition, the State Water Board's Division of Financial Assistance will have some funding available to assist with addressing lead found in tests, with a particular focus on schools in disadvantaged communities.

Under the federal Lead and Copper Rule, the U.S. Environmental Protection Agency already requires public water systems to test for lead at customers' taps, targeting the highest risk homes based on the age of their plumbing. California's compliance rate with the Lead and Copper Rule is among the highest in the country, but the rule does not require testing for schools and businesses. The Board's new requirement ensures schools that want lead testing can receive it for free. The Board consulted with water systems and schools in developing the requirement.

Existing federal and state programs provide guidance to help schools determine if a lead problem exists and how to remedy the contamination. And many school districts have already implemented testing programs.

Protecting children from lead exposure is important for their development and lifelong good health.

For more information on the lead sampling for schools program, see our frequently asked questions section of the lead sampling website.

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: 10-TC-12 Water Code Division 6, Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4; Filed on June 30, 2011; By, South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, Biggs-West Gridley Water District, Claimants; *Consolidated with* 12-TC-01 Filed on February 28, 2013; California Code of Regulations, title 23, sections 597, 597.1 597.2, 597.3, and 597.4, Register 2012, No. 28; By, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, Glenn-Colusa Irrigation District, Claimants.	Case Nos.: 10-TC-12 and 12-TC-01 *Water Conservation* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2014*) (*Served December 12, 2014*)

DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 5, 2014. Dustin Cooper, Peter Harman, and Alexis Stevens appeared on behalf of the claimants. Donna Ferebee and Lee Scott appeared on behalf of the Department of Finance. Spencer Kenner appeared on behalf of the Department of Water Resources. Dorothy Holzem of the California Special Districts Association and Geoffrey Neill of the California State Association of Counties also appeared on behalf of interested persons and parties.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed decision to deny the test claim by a vote of six to zero.

Summary of the Findings

The Commission finds that the two original agricultural water supplier claimants named in each test claim, Richvale Irrigation District and Biggs-West Gridley Water District, are not eligible to claim reimbursement under article XIII B, section 6, because they do not collect or expend tax revenue, and are therefore not subject to the limitations of articles XIII A and XIII B. However, two substitute agricultural water supplier claimants, Oakdale Irrigation District and Glenn-Colusa Irrigation District, are subject to articles XIII A and XIII B and are therefore claimants eligible to seek reimbursement under article XIII B, section 6. As a result, the Commission has jurisdiction to hear and determine test claims 10-TC-12 and 12-TC-01.

The Commission finds that the Water Conservation Act of 2009 (Act), and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources (DWR) to implement the Act, impose some new required activities on urban water suppliers and agricultural water suppliers, including measurement requirements, conservation and efficient water management requirements, notice and hearing requirements, and documentation requirements, with specified exceptions and limitations.

However, the Commission finds that several agricultural water suppliers are either exempted from the requirements of the test claim statutes and regulations or are subject to alternative and less expensive compliance alternatives because the activities were already required by a regime of federal statutes and regulations, which apply to most agricultural water suppliers within the state.[1]

Additionally, to the extent that the test claim statute and regulations impose any new state-mandated activities, they do not impose costs mandated by the state because the Commission finds that urban water suppliers and agricultural water suppliers possess fee authority, sufficient as a matter of law to cover the costs of any new required activities. Therefore, the test claim statute and regulations do not impose costs mandated by the state pursuant to Government Code section 17556(d), and are not reimbursable under article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

I. Chronology

06/30/2011	Co-claimants, South Feather Water and Power Agency (South Feather), Paradise Irrigation District (Paradise), Biggs-West Gridley Water District (Biggs), and Richvale Irrigation District (Richvale) filed test claim 10-TC-12 with the Commission.[2]
10/07/2011	Department of Finance (Finance) requested an extension of time to file comments, which was approved.

[1] See Public Law 102-565 and the Reclamation Reform Act of 1982 and the specific exceptions and alternate compliance provisions in the test claim statutes for those subject to these federal requirements, as discussed in greater detail in the analysis below.

[2] Exhibit A, *Water Conservation Act* Test Claim, 10-TC-12.

12/06/2011	Department of Water Resources (DWR) requested an extension of time to file comments, which was approved.
02/01/2012	DWR requested an extension of time to file comments, which was approved.
03/30/2012	DWR requested an extension of time to file comments, which was approved.
05/30/2012	DWR requested an extension of time to file comments, which was approved.
08/02/2012	DWR requested an extension of time to file comments, which was approved.
10/02/2012	DWR requested an extension of time to file comments, which was approved.
12/03/2012	DWR requested an extension of time to file comments, which was approved.
12/07/2012	Finance requested an extension of time to file comments, which was approved.
02/04/2013	DWR requested an extension of time to file comments, which was approved.
02/06/2013	Finance requested an extension of time to file comments, which was approved.
02/28/2013	Richvale and Biggs filed test claim 12-TC-01 with the Commission.[3]
03/06/2013	The executive director consolidated the test claims for analysis and hearing, and renamed them *Water Conservation*.
03/29/2013	DWR requested an extension of time to file comments, which was approved.
06/07/2013	Finance submitted written comments on the consolidated test claims.[4]
06/07/2013	DWR submitted written comments on the consolidated test claims.[5]
07/09/2013	Claimants requested an extension of time to file rebuttal comments, which was approved.
08/07/2013	Claimants filed rebuttal comments.[6]
08/22/2013	Commission staff issued a request for additional information regarding the eligibility status of the claimants.[7]
09/19/2013	Finance submitted comments in response to staff's request.[8]
09/20/2013	The State Controller's Office (SCO) submitted a request for extension of time to comments, which was approved for good cause.
09/23/2013	DWR submitted comments in response to staff's request.[9]

[3] Exhibit B, *Agricultural Water Measurement* Test Claim, 12-TC-01.

[4] Exhibit C, Finance Comments on Consolidated Test Claims.

[5] Exhibit D, DWR Comments on Consolidated Test Claims.

[6] Exhibit E, Claimant Rebuttal Comments.

[7] Exhibit F, Request for Additional Information.

[8] Exhibit G, Finance Response to Commission Request for Comments.

09/23/2013	The claimants submitted comments in response to staff's request.[10]
10/07/2013	SCO submitted comments in response to staff's request.[11]
11/12/2013	Commission staff issued a Notice of Pending Dismissal of 12-TC-01, and a Notice of Opportunity for a Local Agency, Subject to the Tax and Spend Limitations of Articles XIII A and B of the California Constitution and Subject to the Requirements of the Alleged Mandate to Take Over the Test Claim by a Substitution of Parties.[12]
11/22/2013	Co-claimants Richvale and Biggs filed an appeal of the executive director's decision to dismiss test claim 12-TC-01.[13]
11/25/2013	The executive director issued notice that the appeal would be heard on March 28, 2014.[14]
01/13/2014	Oakdale Irrigation District (Oakdale) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Dustin C. Cooper, of Minasian, Meith, Soares, Sexton & Cooper, LLP, as its representative.[15]
01/13/2014	Glenn-Colusa Irrigation District (Glenn-Colusa) requested to be substituted in as a party to 10-TC-12 and 12-TC-01, and designated Andrew M. Hitchings and Alexis K. Stevens of Somach, Simmons & Dunn as its representative.[16]
01/15/2014	Commission staff issued a Notice of Substitution of Parties and Notice of Hearing which mooted the appeal.[17]
07/31/2014	Commission staff issued a draft proposed statement of decision.[18]
08/13/2014	South Feather Water and Power Agency, Paradise Irrigation District, Richvale Irrigation District, and Biggs West Gridley Water District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.

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[9] Exhibit H, DWR Response to Commission Request for Comments.

[10] Exhibit I, Claimant Response to Commission Request for Comments.

[11] Exhibit J, SCO Response to Commission Request for Comments.

[12] Exhibit K, Notice of Pending Dismissal.

[13] Exhibit L, Appeal of Executive Director's Decision.

[14] Exhibit M, Appeal of Executive Director Decision and Notice of Hearing.

[15] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District.

[16] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[17] Exhibit P, Notice of Substitution of Parties and Notice of Hearing. Note that matters are only tentatively set for hearing until the draft staff analysis is issued which actually sets the matter for hearing pursuant to section 1187(b) of the Commission's regulations. Staff inadvertently omitted the word "tentative" in this notice.

[18] Exhibit Q, Draft Proposed Decision.

08/14/2014	Glenn Colusa Irrigation District filed a request for an extension of time to comment and postponement of hearing to December 5, 2014, which was granted for good cause shown.
10/16/2014	Claimant filed comments on the draft proposed decision.[19]
10/17/2014	California Special Districts Association (CSDA) filed comments on the draft proposed decision.[20]
10/17/2014	Environmental Law Foundation (ELF)filed comments on the draft proposed decision.[21]
10/17/2014	DWR filed comments on the draft proposed decision.[22]
10/22/2014	Northern California Water Association (NCWA) filed late comments on the draft proposed decision.[23]
11/07/2014	Claimants filed late comments.[24]

II. Background

These consolidated test claims allege that Water Code Part 2.55 [Sections 10608 through 10608.64] and Part 2.8 [Sections 10800 through 10853] enacted by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) (10-TC-12) impose reimbursable state-mandated increased costs resulting from activities required of urban water suppliers and agricultural water suppliers. The claimants also allege that the Agricultural Water Measurement regulations issued by DWR (12-TC-01), codified at California Code of Regulations, title 23, sections 597-597.4, impose additional reimbursable state-mandated increased costs on agricultural water suppliers only.

The Water Conservation Act of 2009, pled in test claim 10-TC-12, calls for a 20 percent reduction in urban per capita water use on or before December 31, 2020, and an interim reduction of at least 10 percent on or before December 31, 2015.[25] In order to achieve these reductions, the Act requires urban retail water suppliers, both publicly and privately owned, to develop urban water use targets and interim targets that cumulatively result in the desired 20 percent reduction by December 31, 2020.[26] Prior to adopting its urban water use targets, each supplier is required to conduct at least one public hearing to allow community input regarding the supplier's implementation plan to meet the desired reductions, and to consider the economic

[19] Exhibit R, Claimant Comments on Draft Proposed Decision.

[20] Exhibit S, CSDA Comments on Draft Proposed Decision.

[21] Exhibit T, Environmental Law Foundation Comments on Draft Proposed Decision.

[22] Exhibit U, DWR Comments on Draft Proposed Decision.

[23] Exhibit V, NCWA Comments on Draft Proposed Decision.

[24] Exhibit W, Claimants Late Rebuttal Comments.

[25] Water Code section 10608.16 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[26] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

impacts of the implementation plan.[27] This hearing may be combined with the hearing required under prior law (Water Code 10631) for adoption of the urban water management plan (UWMP).[28] An urban retail water supplier is also required to include in its UWMP, which is required to be updated every five years in accordance with pre-existing Water Code section 10621, information describing the baseline per capita water use; interim and final urban water use targets;[29] and a report on the supplier's progress in meeting urban water use targets.[30]

With respect to agricultural water suppliers, the Act requires implementation of specified critical efficient water management practices, including measuring the volume of water delivered to customers and adopting a volume-based pricing structure; and additional efficient water management practices that are locally cost effective and technically feasible.[31] In addition, the Act requires agricultural water suppliers (with specified exceptions)[32] to prepare and adopt, and every five years update, an agricultural water management plan (AWMP),[33] describing the service area, water sources and supplies, water uses within the service area, previous water management activities; and including a report on which efficient water management practices have been implemented or are planned to be implemented, and information documenting any determination that a specified efficient water management practice was not locally cost effective or technically feasible.[34]

Prior to preparing and adopting or updating an AWMP, the Act requires an agricultural water supplier to notify the city or county within which the supplier provides water that it will be preparing or considering changes to the AWMP;[35] and to make the proposed plan available for

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[27] Water Code section 10608.26 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[28] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[29] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[30] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[31] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[32] See Water Code sections 10608.8(d) (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [agricultural water suppliers that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617 are exempt from the requirements of Part 2.55 (Water Code sections 10608-10608.64)]; 10608.48(f); 10828 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [an agricultural water supplier may meet requirements of AWMPs by submitting its water conservation plan approved by United States Bureau of Reclamation]; 10827 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [members of Agricultural Water Management Council and submit water management plans to council pursuant to the Memorandum of Understanding may rely on those plans to satisfy AWMP requirements]; 10829 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)) [adoption of an urban water management plan or participation in an areawide, regional, watershed, or basinwide water management plan will satisfy the AWMP requirements].

[33] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[34] Water Code sections 10608.48; 10820 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[35] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

public inspection and hold a noticed public hearing.[36] An agricultural water supplier is then required to implement the AWMP in accordance with the schedule set forth in the AWMP;[37] and to submit a copy of the AWMP to DWR and a number of specified local entities, and make the plan available on the internet, within 30 days of adoption.[38]

Finally, to aid agricultural water suppliers in complying with their measurement requirements and developing a volume-based pricing structure as required by section 10608.48, DWR adopted in 2012 the Agricultural Water Measurement Regulations,[39] which are the subject of test claim 12-TC-01. These regulations provide a range of options for agricultural water suppliers to implement accurate measurement of the volume of water delivered to customers. The regulations provide for measurement at the delivery point or farm gate of an individual customer, or at a point upstream of the delivery point where necessary, and provide for specified accuracy standards for measurement devices employed by the supplier, whether existing or new, as well as field testing protocols and recordkeeping requirements, to ensure ongoing accuracy of volume measurements.

To provide some context for how the the test claim statute and implementing regulations fit into the state's water conservation planning efforts, a brief discussion of the history of water conservation law in California follows.

A. Prior California Conservation and Water Supply Planning Requirements.

1. Constitutional and Statutory Framework of Water Conservation.

Article X, section 2 of the California Constitution prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. It also declares that the conditions in the state require "that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Moreover, article X, section 2 provides that "[t]he right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*"[40] Although article X, section 2 provides that it is self-executing; it also provides that the Legislature may enact statutes to advance its policy.

The Legislature has implemented these constitutional provisions in a number of enactments over the course of many years, which authorize water conservation programs by water suppliers, including metered pricing. For example:

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[36] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[37] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[38] Water Code sections 10843; 10844 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[39] Code of Regulations, title 23, sections 597-597.4 (Register 2012, No. 28).

[40] Adopted June 8, 1976. Derivation, former article 14, section 3, added November 6, 1928 and amended November 5, 1974 [emphasis added].

- Water Code section 1009 provides that water conservation programs are an authorized water supply function for all municipal water providers in the state.[41]
- Water Code section 1011 furthers the water conservation policies of the state by providing that a water appropriator does not lose an appropriative water right because of water conservation programs. [42]
- Water Code sections 520 -529.7 require water meters and recognize that metered water rates are an important conservation tool.[43]
- Water Code section 375(b) provides that public water suppliers may encourage conservation through "rate structure design." The bill amending the Water Code to add this authority was adopted during the height of a statewide drought. In an uncodified portion of the bill, the Legislature specifically acknowledged that conservation is an important part of the state's water policy and that water conservation pricing is a best management practice.[44]
- Water Code sections 370-374 provide additional, alternate authority (in addition to a water supplier's general authority to set rates) for public entities to encourage conservation rate structure design consistent with the proportionality requirements of Proposition 218.[45]
- Water Code section 10631(f)(1)(K) establishes water conservation pricing as a recognized water demand management measure for purposes of UWMPs, and other conservation measures including metering, leak detection and retrofits for pipes and plumbing fixtures.[46]

In addition, the Legislature has long vested water districts with broad authority to manage water to furnish a sustained, reliable supply. For example:

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[41] Statutes 1976, chapter 709, p. 1725, section 1.

[42] Added by statutes 1979, chapter 1112, p. 4047, section 2, amended by Statutes, 1982, chapter 876, p. 3223, section 4, Statutes 1996, chapter 408, section 1, and Statutes 1999, chapter 938, section 2.

[43] Added by Statutes 1991, chapter 407 and amended by Statutes 2004, chapter 884, section 3 and Statutes 2005, chapter 22. See especially, Water Code section 521 (b) and (c)).

[44] Statutes 1993, chapter 313, section 1.

[45] Statutes 2008, chapter 610 (AB 2882). See Exhibit X, Senate Floor Analysis AB 2882; Assembly Floor Analysis AB 2882.

[46] Water Code section 10631(f)(1)(K) (Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 712 (SB 553); Stats. 2001, ch. 643 (SB 610); Stats. 2001, ch. 644 (AB 901); Stats. 2002, ch. 664 (AB 3034); Stats. 2002, ch. 969 (SB 1384); Stats. 2004, ch. 688 (SB 318); Stats. 2006, ch. 538 (SB 1852)).

- Irrigation Districts have the power to take any act necessary to furnish sufficient water for beneficial uses and to control water.[47] They have general authority to fix and collect charges for any service of the district.[48]
- County Water Districts have similar power to take any act necessary to furnish sufficient water and express authority to conserve.[49]
- Municipal Water Districts also have broad power to control water for beneficial uses and express power to conserve.[50]

2. Existing Requirements to Prepare, Adopt, and Update Urban Water Management Plans.

The Urban Water Management Act of 1983 required urban water suppliers to prepare and update an UWMP every five years.[51] This Act has been amended numerous times between its original enactment in 1983 and the enactment of the test claim statute in 2009.[52] The law pertaining to UWMPs in effect immediately prior to the enactment of the test claim statute consisted of sections 10610 through 10657 of the California Water Code, which detail the information that must be included in UWMPs, as well as who must file them.

According to the Act, as amended prior to the test claim statute, "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level."[53] The Legislature declared as state policy that:

> (a) The management of urban water demands and efficient use of water shall be actively pursued to protect both the people of the state and their water resources.
>
> (b) The management of urban water demands and efficient use of urban water supplies shall be a guiding criterion in public decisions.

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[47] Water Code section 22075 added by Statutes 1943, chapter 372 and section 22078 added by Statutes 1953, chapter 719, p. 187, section 1.

[48] Water Code section 22280, as amended by statutes 2007, chapter 27, section 19.

[49] Water Code sections 31020 and 31021 added by Statutes 1949, chapter 274, p. 509, section 1.

[50] Water Code sections 71610 as amended by Statutes 1995, chapter 28 and 71610.5 as added by Statutes 1975, chapter 893, p. 1976, section 1.

[51] Statutes 1983, chapter 1009 added Part 2.6 to Division 6 of the Water Code, commencing at section 10610.

[52] Enacted, Statutes 1983, chapter 1009; Amended, Statutes 1990, chapter 355 (AB 2661); Statutes 1991-92, 1st Extraordinary Session, chapter 13 (AB 11); Statutes 1991, chapter 938 (AB 1869) Statutes 1993, chapter 589 (AB 2211); Statutes 1993, chapter 720 (AB 892); Statutes 1994, chapter 366 (AB 2853); Statutes 1995, chapter 28 (AB 1247); Statutes 1995, chapter 854 (SB 1011); Statutes 2000, chapter 712 (SB 553); Statutes 2001, chapter 643 (SB 610); Statutes 2001, chapter 644 (AB 901); Statutes 2002, chapter 664 (AB 3034); Statutes 2002, chapter 969 (SB 1384); Statutes 2004, chapter 688 (SB 318); Statutes 2006, chapter 538 (SB 1852); Statutes 2009, chapter 534 (AB 1465).

[53] Water Code section 10610.2 (Stats. 2002, ch. 664 (AB 3034)).

(c) Urban water suppliers shall be required to develop water management plans to actively pursue the efficient use of available supplies.[54]

The Act specified that each urban water supplier that provides water for municipal purposes either directly or indirectly to more than 3,000 customers or supplies more than 3,000 acre feet of water annually shall prepare, update, and adopt its urban water management plan at least once every five years on or before December 31, in years ending in five and zero.[55]

a. Contents of Plans

The required contents of an UWMP are provided in sections 10631 through 10635. These statutes are prior law and have not been pled in this test claim. As last amended by Statutes 2009, chapter 534 (AB 1465), section 10631 requires that an adopted UWMP contain information describing the service area of the supplier, reliability of supply, water uses over five year increments, water demand management measures currently being implemented or being considered or scheduled for implementation, and opportunities for development of desalinated water.[56] Section 10631 further provides that urban water suppliers that are members of the California Urban Water Conservation Council and submit annual reports in accordance with the "Memorandum of Understanding Regarding Urban Water Conservation in California," may submit those annual reports to satisfy the requirements of section 10631(f) and (g), pertaining to current, proposed, and future demand management measures.[57]

Section 10632 requires that an UWMP provide an urban water shortage contingency analysis, which includes actions to be taken in response to a supply shortage; an estimate of minimum supply available during the next three years; actions to be taken in the event of a "catastrophic interruption of water supplies," such as a natural disaster; additional prohibitions employed during water shortages; penalties or charges for excessive use; an analysis of impacts on revenues and expenditures; a draft water shortage contingency resolution or ordinance; and a mechanism for determining actual reductions in water use.[58]

Section 10633, as amended by Statutes 2002, chapter 261, specifies that the plan shall provide, to the extent available, information on recycled water and its potential for use as a water source in the service area of the urban water supplier. The preparation of the plan shall be coordinated with local water, wastewater, groundwater, and planning agencies that operate within the supplier's service area, and shall include: a description of wastewater collection and treatment systems; a description of the quantity of treated wastewater that meets recycled water standards; a description of recycled water currently used in the supplier's service area; a description and quantification of the potential uses of recycled water; projected use of recycled water over five year increments for the next 20 years; a description of actions that may be taken to encourage the

[54] Water Code section 10610.4 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[55] Water Code sections 10617 (Stats. 1996, ch. 1023(SB 1497)); 10621(a) (Stats. 2007, ch. 64 (AB 1376)).

[56] Water Code section 10631 (Statutes 2009, chapter 534 (AB 1465)).

[57] Water Code section 10631(i) (Statutes 2009, chapter 534 (AB 1465)).

[58] Water Code section 10632 (Stats. 1995, ch. 854 (SB 1011)).

use of recycled water; and a plan for optimizing the use of recycled water in the supplier's service area.[59]

As added by Statutes 2001, chapter 644, and continuously in law up to the adoption of the test claim statute, section 10634 requires the UWMP to include, to the extent practicable, information relating to the quality of existing sources of water available to the supplier over the same five-year increments as described in Section 10631(a); and to describe the manner in which water quality affects water management strategies and supply reliability.[60]

And finally, section 10635, added by Statutes 1995, chapter 330, requires an urban water supplier to include in its UWMP an assessment of the reliability of its water service to customers during normal and dry years, projected over the next 20 years, in five year increments.[61]

b. Adoption and Implementation of Plans

Sections 10640 through 10645, as added by Statutes 1983, chapter 1009 and Statutes 1990, chapter 355, provide the requirements for adoption and implementation of UWMPs, including public notice and recordkeeping requirements associated with the adoption of each update of the UWMP.

Section 10640 provides that every urban water supplier required to prepare an UWMP pursuant to this part shall prepare its UWMP pursuant to Article 2 (commencing with Section 10630), and shall "periodically review the plan … and any amendments or changes required as a result of that review shall be adopted pursuant to this article."[62] Section 10641 provides that an urban water supplier required to prepare an UWMP may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water demand management methods and techniques.[63]

Section 10642 provides that each urban water supplier shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the service area prior to and during the preparation of its UWMP. Prior to adopting an UWMP, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to section 6066 of the Government Code. A privately owned water supplier is required to provide a similar degree of notice, and the plan shall be adopted after the hearing either "as prepared or as modified…"[64]

Section 10643 provides that an UWMP shall be implemented "in accordance with the schedule set forth in [the] plan."[65] As amended by Statutes 2007, chapter 628, section 10644 requires an

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[59] Water Code section 10633 (Stats. 2002, ch. 261 (SB 1518)).

[60] Water Code section 10634 (Stats. 2001, ch. 644 (AB 901)).

[61] Water Code section 10635 (Stats. 1995, ch. 330 (AB 1845)).

[62] Water Code section 10640 (Stats. 1983, ch. 1009).

[63] Water Code section 10640 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)).

[64] Water Code section 10642 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552)).

[65] Water Code section 10643 (Stats. 1983, ch. 1009).

urban water supplier to submit to DWR, the State Library, and any city or county within which the supplier provides water supplies, a copy of its plan and copies of any changes or amendments to the plans no later than 30 days after adoption. Section 10644 also requires DWR to prepare and submit to the Legislature, on or before December 31, in the years ending in six and one, a report summarizing the status of the UWMPs adopted pursuant to this part. The report is required to identify the outstanding elements of the individual UWMPs. DWR is also required to provide a copy of the report to each urban water supplier that has submitted its UWMP to DWR.[66] And lastly, in accordance with section 10645, not later than 30 days after filing a copy of its UWMP with DWR, the urban water supplier and DWR shall make the plan available for public review during normal business hours.[67]

c. Miscellaneous Provisions Pertaining to the UWMP Requirement

While sections 10631 through 10635 provide for the lengthy and technical content requirements of UWMPs, and sections 10640 through 10645 provide the requirements of a valid adoption of a UWMP, several remaining provisions of the Urban Water Management Planning Act provide for the satisfaction of the UWMP requirements by other means, and provide for the easing of certain other regulatory requirements and the recovery of costs.

- Section 10631, as amended by Statutes 2009, chapter 534 (AB 1465), provides that urban water suppliers that are members of the California Urban Water Conservation Council shall be deemed in compliance with the demand management provisions of the UWMP "by complying with all the provisions of the 'Memorandum of Understanding Regarding Urban Water Conservation in California'…and by submitting the annual reports required by Section 6.2 of that memorandum."[68] These suppliers, then, are not separately required to comply with sections 10631(f) and (g), which require a description and evaluation of the supplier's "demand management measures" that are currently or could be implemented.[69]
- Section 10652 streamlines the adoption of UWMPs by exempting plans from the California Environmental Quality Act (CEQA). However, section 10652 does not exempt any project (that might be contained in the plan) that would significantly affect water supplies for fish and wildlife.[70]
- Section 10653 provides that the adoption of a plan shall satisfy any requirements of state law, regulation, or order, including those of the State Water Resources Control Board and the Public Utilities Commission, for the preparation of water

[66] Water Code section 10644 (Stats. 1983, ch. 1009; Stats. 1990, ch. 355 (AB 2661); Stats. 1992, ch. 711 (AB 2874); Stats. 1995, ch. 854 (SB 1011); Stats. 2000, ch. 297 (AB 2552); Stats. 2004, ch. 497 (AB 105); Stats. 2007, ch. 628 (AB 1420)).

[67] Water Code section 10645 (Stats. 1990, ch. 355 (AB 2661)).

[68] Water Code section 10631 (as amended, Stats. 2009, ch. 534 (AB 1465)).

[69] Water Code section 10631(f-g) (as amended, Stats. 2009, ch. 534 (AB 1465)).

[70] Water Code section 10652 (Stats. 1983, ch. 1009; Stats. 1991-1992, 1st Ex. Sess., ch. 13 (AB 11); Stats. 1995, ch. 854 (SB 1011)).

management plans or conservation plans; provided, that if the State Water Resources Control Board or the Public Utilities Commission requires additional information concerning water conservation to implement its existing authority, nothing in this part shall be deemed to limit the board or the commission in obtaining that information. In addition, section 10653 provides that "[t]he requirements of this part *shall be satisfied by any urban water demand management plan prepared to meet federal laws or regulations after the effective date of this part*, and which substantially meets the requirements of this part, or by any existing urban water management plan which includes the contents of a plan required under this part."[71] The plain language of section 10653 therefore exempts an urban retail water supplier that is already required to prepare a water demand management plan from any requirements of an UWMP added by the test claim statutes.

- Section 10654 provides expressly that an urban water supplier "may recover in its rates the costs incurred in preparing its plan and implementing the reasonable water conservation measures included in the plan." Any best water management practice that is included in the plan that is identified in the "Memorandum of Understanding Regarding Urban Water Conservation in California" (discussed below) is deemed to be reasonable for the purposes of this section.[72] Therefore, suppliers are expressly authorized to recover the costs of implementing "reasonable water conservation measures" or any "best water management practice…identified in [the MOU for Urban Water Conservation]."

3. Prior Requirements to Prepare, Adopt, and Update Agricultural Water Management Plans, Which Became Inoperative by their own Terms in 1993.

The Agricultural Water Management Planning Act was enacted in 1986 and became inoperative, by its own terms, in 1993.[73] The 1986 Act stated in its legislative findings and declarations that "[t]he Constitution requires that water in the state be used in a reasonable and beneficial way…" and that "[t]he conservation of agricultural water supplies are of great concern." The findings and declarations further stated that "[a]gricultural water suppliers that receive water from the federal Central Valley Water Project are required by federal law to develop and implement water conservation plans," as are "[a]gricultural water suppliers applying for a permit to appropriate water from the State Water Resources Control Board…" Therefore, the act stated that "it is the policy of the state as follows:"

(a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources.

(b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.

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[71] Water Code section 10653 (Stats. 1983, ch. 1009; Stats. 1995, ch. 854 (SB 1011)) [emphasis added].

[72] Water Code section 10654 (Stats. 1983, ch. 1009; Stats. 1994, ch. 609 (SB 1017)).

[73] Statutes 1986, chapter 954 (AB1658). See Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

(c) Agricultural water suppliers, who determine that a significant opportunity exists to conserve water or reduce the quantity of highly saline or toxic drainage water, shall be required to develop water management plans to achieve conservation of water.[74]

Specifically, the 1986 Act provided that every agricultural water supplier serving water directly to customers "shall prepare an informational report based on information from the last three irrigation seasons on its water management and conservation practices…" That report "shall include a determination of whether the supplier has a significant opportunity to conserve water or reduce the quantity of highly saline or toxic drainage water through improved irrigation water management…" If a "significant opportunity exists" to conserve water or improve the quality of drainage water, the supplier "shall prepare and adopt an agricultural water management plan…" (AWMP).[75] The Act provided, however, that an agricultural water supplier "may satisfy the requirements of this part by participation in areawide, regional, watershed, or basinwide agricultural water management planning where those plans will reduce preparation costs and contribute to the achievement of conservation and efficient water use and where those plans satisfy the requirements of this part." The requirements of an AWMP or an informational report, where required, included quantity and sources of water delivered to and by the supplier; other sources of water used within the service area, including groundwater; a general description of the delivery system and service area; total irrigated acreage within the service area; acreage of trees and vines within the service area; an identification of current water conservation practices being used, plans for implementation of water conservation practices, and conservation educational practices being used; and a determination of whether the supplier has a significant opportunity to save water by means of reduced evapotranspiration, evaporation, or reduction of flows to unusable water bodies, or to reduce the quantity of highly saline or toxic drainage water.[76] In addition, an AWMP "shall address all of the following:" quantity and source of surface and groundwater delivered to and by the supplier; a description of the water delivery system, the beneficial uses of the water supplied, conjunctive use programs, incidental and planned groundwater recharge, and the amounts of delivered water that are lost to evapotranspiration, evaporation, or surface flow or percolation; an identification of cost-effective and economically feasible measures for water conservation; an evaluation of other significant impacts; and a schedule to implement those water management practices that the supplier determines to be cost-effective and economically feasible.[77]

The Act further provided that an agricultural water supplier required to prepare an AWMP "may consult with, and obtain comments from, any public agency or state agency or any person who has special expertise with respect to water conservation and management methods and techniques."[78] And, "[p]rior to adopting a plan, the agricultural water supplier shall make the plan available for public inspection and shall hold a public hearing thereon." This requirement

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[74] Former Water Code section 10802 (Stats. 1986, ch. 954 (AB 1658)).

[75] Former Water Code section 10821 (as added, Stats. 1986, ch. 954 (AB 1658)).

[76] Former Water Code section 10825 (as added, Stats. 1986, ch. 954 (AB 1658)).

[77] Former Water Code section 10826 (as added, Stats. 1986, ch. 954 (AB 1658)).

[78] Former Water Code section 10841(as added, Stats. 1986, ch. 954 (AB 1658)).

applies also to privately owned water suppliers.[79] In addition, the Act states that an agricultural water supplier shall implement its AWMP in accordance with the schedule set forth in the plan, and "shall file with [DWR] a copy of its plan no later than 30 days after adoption."[80] Finally, the 1986 Act provided for funds to be appropriated to prepare the informational reports and agricultural water management plans, as required, and provided that "[t]his part shall remain operative only until January 1, 1993, except that, if an agricultural water supplier fails to submit its information report or agricultural water management plan prior to January 1, 1993, this part shall remain operative with respect to that supplier until it has submitted its report or plan, or both."[81]

As noted above, the AWMP requirements provided by the Agricultural Water Management Planning Act became inoperative as of January 1, 1993,[82] and therefore do not constitute the law in effect immediately prior to the test claim statute, even though, as shown below, the test claim statute reenacted substantially similar plan requirements. However, the federal requirement to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the federal Central Valley Project Improvement Act (Public Law 102-565) or the federal Reclamation Reform Act of 1982, remained the law throughout and does constitute the law in effect immediately prior to the test claim statute, with respect to those suppliers subject to one or both federal requirements.[83]

4. The Water Measurement Law, Statutes 1991, chapter 407, applicable to Urban and Agricultural Water Suppliers.

The Water Measurement Law (Water Code sections 510-535) requires standardized water management practices and water measurement, and is applicable to Urban and Agricultural Water Suppliers, as follows:[84]

- Every water purveyor that provides potable water to 15 or more service connections or 25 or more yearlong residents must require meters as a condition of *new* water service.[85]
- Urban water suppliers, except those that receive water from the federal Central Valley Project, must install meters on all municipal (i.e., residential and governmental) and industrial (i.e., commercial) service connections on or before January 1, 2025 and shall charge each customer that has a service connection for which a meter has been installed based on the actual volume of deliveries beginning on or before January 1, 2010 service. A water purveyor, including an

[79] Former Water Code section 10842(as added, Stats. 1986, ch. 954 (AB 1658)).

[80] Former Water Code sections 10843 and 10844 (as added, Stats. 1986, ch. 954 (AB 1658)).

[81] Former Water Code sections 10853; 10854; 10855 (as added, Stats. 1986, ch. 954 (AB 1658)).

[82] Former Water Code section 10855 (Stats. 1986, ch. 954 (AB 1658)).

[83] See Water Code section 10828 (added, Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[84] The Water Measurement Law was added by Statutes 1991, chapter 407.

[85] Section 525 as amended by statutes 2005, chapter 22.

urban water supplier, may recover the cost of the purchase, installation, and operation of a water meter from rates, fees, or charges.[86]

- Urban water suppliers receiving water from the federal Central Valley Project (CVP) shall install water meters on all residential and non-agricultural commercial service connections constructed prior to 1992 on or before January 1, 2013 and charge customers for water based on the actual volume of deliveries, as measured by a water meter, beginning March 1, 2013, or according to the CVP water contract. Urban water suppliers that receive water from the CVP are also specifically authorized to "recover the cost of providing services related to the purchase, installation, and operation and maintenance of water meters from rates, fees or charges.[87]
- Agricultural water providers shall report annually to DWR summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis. However, the Water Measurement Law does not require implementation of water measurement programs or practices that are not locally cost effective.[88]

The test claim statute, as noted above, requires agricultural water suppliers to measure the volume of water delivered to customers and to adopt a volume-based pricing structure. However, the test claim statute also contemplates a water supplier that is both an agricultural and an urban water supplier, by definition: section 10829 provides that an agricultural water supplier may satisfy the AWMP requirements by adopting an UWMP pursuant to Part 2.6 of Division 6 of the Water Code; and the definitions of "agricultural" and "urban retail" water suppliers in section 10608.12 are not, based on their plain language, mutually exclusive. The record on this test claim is not sufficient to determine how many, if any, agricultural water suppliers are also urban retail water suppliers,[89] and consequently would be required to install water meters on new and existing service connections in accordance with Water Code sections 525-527, and to charge customers based on the volume of water delivered. In addition, the record is not sufficient to determine whether and to what extent some agricultural water suppliers may already have implemented water measurement programs which were locally cost effective, in accordance with section 531.10. However, to the extent that an agricultural water supplier is also an urban water supplier, sections 525-527 may constitute a prior law requirement to accurately measure water delivered and charge customers based on volume, and the test claim statute may not impose new requirements or costs on some entities. And, to the extent that water measurement programs or practices were previously implemented pursuant to section 531.10, some of the activities required by the test claim statute and regulations may not be newly required, with respect to certain agricultural suppliers. These caveats and limitations are noted where relevant in the analysis below.

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[86] Section 527 as amended by statutes 2005, chapter 22.

[87] Section 526 as amended by Statutes 2004, chapter 884.

[88] Section 531.10 as added by Statutes 2007, chapter 675.

[89] See Water Code section 10608.12, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) for definitions of "agricultural water supplier" and "urban retail water supplier."

III. Positions of the Parties

A. Claimants' Positions:

The four original claimants together alleged a total of $72,194.48 in mandated costs for fiscal year 2009-2010 (although Paradise maintains a different fiscal year than the remaining claimants). In addition, claimants project that program costs for fiscal year 2010-2011, and for 2011-2012, will be "higher," but claimants allege that they are unable to reasonably estimate the amount.

South Feather Water and Power Agency and Paradise Irrigation District

South Feather and Paradise allege that they are urban retail water suppliers, as defined in Water Code section 10608.12. As such, they allege that they are required to establish urban water use targets "by July 1, 2011 by selecting one of four methods to achieve the mandated water conservation." South Feather and Paradise further allege that they are "mandated to adopt expanded and more detailed urban water management plans in 2010 that include the baseline daily per capita water use, urban water use target, interim urban water use target, compliance daily per capita water use, along with the bases for determining estimates, including supporting data."[90] South Feather and Paradise allege that thereafter, UWMPs are to be updated "in every year ending in 5 and 0," and the 2015 plan "must describe the urban retail water supplier's progress towards [*sic*] achieving the 20% reduction by 2020."[91] Finally, South Feather and Paradise allege that they are required to conduct at least one noticed public hearing to allow community input, consider economic impacts, and adopt a method for determining a water use baseline "from which to measure the 20% reduction."[92]

Prior to the Act, South Feather and Paradise allege that there was no requirement to achieve a 20 percent per capita reduction in water use by 2020. They allege that they were required to adopt UWMPs prior to the Act, but not to include 'the baseline per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with bases for determining those estimates, including supporting data."[93] And they allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts…or to adopt a method for determining an urban water use target."[94]

Biggs-West Gridley Water District and Richvale Irrigation District

Richvale and Biggs allege that they are required to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate," in accordance with regulations adopted by DWR pursuant to the Act.[95] They further allege that they are required to adopt a pricing structure for water customers

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[90] Exhibit A, 10-TC-12, page 3.

[91] *Ibid.*

[92] Exhibit A, 10-TC-12, page 4.

[93] Exhibit A, 10-TC-12, pages 7-8.

[94] Exhibit A, 10-TC-12, page 8.

[95] Exhibit A, 10-TC-12, page 4.

based on the quantity of water delivered, and that "[b]ecause Richvale and Biggs are local public agencies, the change in pricing structure would have to be authorized and approved by its [*sic*] customers through the Proposition 218 process."[96]

In addition, Richvale and Biggs allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices," as specified. They additionally allege that on or before December 31, 2012, they are required to prepare AWMPs that include a report on the implementation and planned implementation of efficient water management practices, and documentation supporting any determination made that certain conservation measures were held to be not locally cost effective or technically feasible.[97] Finally, Richvale and Biggs allege that prior to adoption of an AWMP, they are required to notice and hold a public hearing; and that after adoption the plan must be distributed to "various entities" and posted on the internet for public review.[98]

Prior to the Act, Richvale and Biggs assert, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered." In addition, prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible." And, Richvale and Biggs allege that prior to the Act the number of agricultural water suppliers subject to the requirement to develop an AWMP was significantly fewer, and now the "contents of the plans" are "more encompassing than plans required under the former law."[99] Richvale and Biggs allege that "[f]inally, prior to the Act, there was no requirement to conduct at least one public hearing prior to adopting the plan, make copies of it available for public inspection, or to publish the time and place of the hearing once per week for two successive weeks in a newspaper of general circulation."[100]

As discussed below, in the early stages of Commission staff's review and analysis of these consolidated test claims, it became apparent that Richvale and Biggs, the two claimants representing agricultural water suppliers, are not subject to the revenue limits of article XIII B, and do not collect or expend "proceeds of taxes," within the meaning of articles XIII A and XIII B.[101] After additional briefing and further review, it was concluded that Richvale and Biggs are indeed not eligible for reimbursement under article XIII B, section 6. The Commission's executive director therefore issued a notice of pending dismissal and offered an opportunity for another eligible local claimant, subject to the tax and spend limitations of articles XIII A and XIII B, to take over the test claim.[102] Richvale and Biggs filed an appeal of that decision, and maintain that they are eligible local government claimants pursuant to Government Code section 17518, and that the fees or assessments that the districts would be required to establish or increase to comply with the requirements of the test claim statute and regulations would be

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[96] *Ibid.*

[97] Exhibit A, 10-TC-12, pages 4-6.

[98] Exhibit A, 10-TC-12, page 6.

[99] Exhibit A, 10-TC-12, page 8.

[100] Exhibit A, 10-TC-12, page 9.

[101] Exhibit F, Commission Request for Additional Information, page 1.

[102] Exhibit K, Notice of Pending Dismissal.

characterized as taxes under article XIII B, section 8, because such fees or assessments would exceed the reasonable costs of providing water services.[103] This decision addresses these issues.

Glenn-Colusa Irrigation District and Oakdale Irrigation District

Glenn-Colusa and Oakdale requested to be substituted in as parties to these consolidated test claims, in place of Richvale and Biggs.[104] Both Glenn-Colusa and Oakdale submitted declarations asserting that they receive an annual share of property tax revenue, and therefore are subject to articles XIII A and XIII B of the California Constitution. Both additionally allege that they incur at least $1000 in increased costs as a result of the test claim statute and regulations, and that they are subject to the requirements of the test claim statutes and regulations as described in the test claim narrative.[105]

Claimants' Collective Response to the Draft Proposed Decision

In comments on the draft proposed decision, the claimants focus primarily on the findings regarding the ineligibility of Richvale and Biggs to claim reimbursement based on the evidence in the record indicating that neither agency collects or expends tax revenues subject to the limitations of articles XIII A and XIII B. The claimants also address the related findings that all claimants have sufficient fee authority under law to cover the costs of the mandate, and thus the Commission cannot find costs mandated by the state, pursuant to section 17556(d).

Specifically, the claimants argue that "[f]ees and charges for sewer, water, or refuse collection services are excused from the formal election process, but not from the majority protest process."[106] Therefore, claimants conclude that "[a]gencies that provide water, sewer, or refuse collection services, including Claimants, lack sufficient authority to unilaterally impose new or increased fees or charges in light of Proposition 218's majority protest procedure."[107]

In addition, claimants note the Commission's analysis in 07-TC-09, *Discharge of Stormwater Runoff*, and argue that the Commission should not "ignore a prior Commission decision that is directly on point…" The claimants assert that "as this Commission has already recognized…" Proposition 218 "created a legal barrier to establishing or increasing fees or charges…" and as a result claimants "can do no more than merely propose new or increased fees for customer approval and the customers have the authority to then accept or reject…" a fee increase.[108]

The claimants assert that the reasoning of the draft proposed decision "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218..."[109] and "would create a class of local agencies that are per se ineligible for reimbursement under this test

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[103] Exhibit L, Appeal of Executive Director's Decision.

[104] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

[105] *Ibid.*

[106] Exhibit R, Claimant Comments on Draft Proposed Decision, page 10.

[107] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[108] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[109] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[110] The claimant calls this a "sea change in Constitutional interpretation…"[111]

The claimants argue, based on this interpretation of the effect of Proposition 218, that the draft proposed decision inappropriately excluded Richvale and Biggs from subvention, "because they do not currently collect or expend tax revenues."[112] The claimants argue that "this additional 'requirement' [is] based on an outdated case that predates Proposition 218 and on an inapplicable line of cases that apply only to redevelopment agencies, while ignoring the strong policy underlying the voters' approval of the subvention requirement."[113] The claimants argue that after articles XIII C and XIII D, "assessments and property-related fees and charges have joined tax revenues as among local entities' 'increasingly limited revenue sources…'"[114]

The claimants further argue that: "Agencies like Richvale and Biggs that need additional revenue to pay for new mandates but are subject to the limitations of Proposition 218 are faced with three problematic options: (a) do not implement the mandates in light of revenue limitations; (b) implement the mandates with existing revenue; or (c) propose a new or increased fee or charge, assessment, or special tax to implement the mandates."[115] The claimants argue for the Commission to take action to expand the scope of reimbursement: "the subvention provision should be read in harmony with later Constitutional enactments and protect not just tax revenue, but assessment and fee revenue as well."[116]

Finally, in late comments, the claimants challenge DWR's reasoning, including the figures cited by the department, that due to the existence of a substantial number of private water suppliers, the test claim statutes do not impose a "program" within the meaning of article XIII B, section 6.[117]

B. State Agency Positions:

Department of Finance

Finance maintains that "the Act and Regulations do not impose a reimbursable mandate on local agencies within the meaning of Article XIII B, section 6."[118] Finance asserts that each of the claimants is a special district authorized to charge a fee for delivery of water to its users, and therefore has the ability to cover the costs of any new required activities.[119] Finance further

[110] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[111] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[112] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[113] Exhibit R, Claimant Comments on Draft Proposed Decision, page 16.

[114] Exhibit R, Claimant Comments on Draft Proposed Decision, page 17.

[115] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[116] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21.

[117] Exhibit W, Claimant Late Comments, pages 1-4.

[118] Exhibit C, Finance Comments, page 1.

[119] Exhibit C, Finance Comments, page 1.

asserts that the conservation efforts required by the test claim statute and regulations will result in surplus water accruing to the claimant districts, which are authorized to sell water. Finance concludes that "each district will likely have the opportunity to cover all or a portion of costs related to implementation of the Act or Regulations with revenue from surplus water sales."[120] Moreover, Finance argues that "special districts are only entitled to reimbursement if they are subject to the tax and spend limitations under articles XIII A and XIII B…*and only when the mandated costs in question can be recovered solely from the proceeds of taxes.*"[121] Finance argues that the claimants "should be directed to provide information that will enable the Commission on State Mandates to determine if they are subject to tax and spending limitations."[122] Finance did not submit comments on the draft proposed decision.

State Controller's Office

In response to Commission staff's request for additional information regarding the uncertain eligibility of the test claimants, the SCO submitted written comments confirming that the "Butte County Auditor-Controller has confirmed for fiscal years 2010-2011, 2011-2012, and 2012-2013," that South Feather and Paradise both received proceeds of taxes, but Richvale and Biggs did not.[123] However, the SCO also noted that none of the four claimants reported an appropriations limit for fiscal years 2010-2011, 2011-2012, and 2012-2013. The SCO stated that "Government Code section 7910 requires each local government entity to annually establish its appropriations limit by resolution of its governing board," and that "Government Code section 12463 requires the annual appropriations limit to be reported in the financial transactions report submitted to the SCO." However, the SCO noted that it "has the responsibility to review each report for reasonableness, yet we are not required to audit any of the data reported." The SCO concluded, therefore, that "we are unable to determine which special district is subject to report an annual appropriations limit." The SCO did not comment on the draft proposed decision.

Department of Water Resources

DWR argues, in comments on the consolidated test claims, first, that the Water Conservation Act of 2009 applies to public and private entities alike, and is therefore not a "program" within the meaning of article XIII B, section 6. In addition, DWR argues that the Act is not a "new program," because it is "a refinement of urban and agricultural water conservation requirements that have been part of the law for years." DWR further asserts that even if the Act "were an unfunded state mandate, it would not be reimbursable since the water suppliers have sufficient non-tax sources to offset any implementation costs." And, DWR asserts that the test claim regulations on agricultural water measurement do not impose any requirements on water suppliers because "they are free to choose alternative measurement methods." And finally, DWR argues that the Act does not impose any new programs or higher levels of service "because what is required is compliance with general and evolving water conservation standards based on

[120] Exhibit C, Finance Comments, page 2.

[121] Exhibit C, Finance Comments, page 2 [emphasis in original].

[122] Exhibit C, Finance Comments, page 2.

[123] Exhibit J, SCO Comments, pages 1-2.

the foundational reasonable and beneficial water use principle dating from before the 1928 amendment – Article X, section 2 – to California's Constitution revising water use standards."[124]

In comments on the draft proposed decision, DWR "concurs with and fully supports the ultimate conclusion reached…", but reiterates and expands upon its earlier comments with respect to whether the alleged test claim requirements constitute a new program or higher level of service that is uniquely imposed upon local government.[125] DWR argues that "a law that governs private and public entities alike is not a 'program' for purposes of article XIII B…"[126] DWR continues:

> Claimants, in their Rebuttal Comments, ignore DWR's reference to the language of the Water Conservation Act, which by its plain terms is made applicable to both public and private entities. Instead, Claimants seek to shift attention away from the nature of the activity and focus instead on the number of entities engaged in that activity. Claimants concede that the law and regulations adopted pursuant to that law do in fact apply to both private and public entities, but argue that because (according to their calculation) "only 7.67%" of urban retail water suppliers are private, the requirements of the Water Conservation Act ought to be treated as reimbursable "programs" because those requirements "fall overwhelmingly on local governmental agencies."[127]

DWR maintains that "there are, in fact, 72 private wholesale and retail suppliers out of a total of 369…so the proportion of private water suppliers is actually 16.3 percent." And, "based on data submitted in the 2010 urban water management plans, it turns out that private retail water suppliers serve 19.7 percent of the population and account for 17.3 percent of water delivered."[128]

DWR acknowledges that there are more public than private water suppliers, but asserts that "[u]nder the Supreme Court's test in *County of Los Angeles v. State of California* the question is not whether an activity is more likely to be undertaken by a governmental entity, but whether the activity implements a state policy and imposes unique requirements on local governments, but is one that does not apply generally to all residents and entities in the state."[129] DWR explains that "generally," in this context, is not synonymous with "commonly," and therefore the prevalence of public water suppliers as to private is not relevant to the issue; rather, "generally" refers to

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[124] Exhibit D, DWR Comments, page 2.

[125] Exhibit U, DWR Comments on Draft Proposed Decision, page 1.

[126] Exhibit U, DWR Comments on Draft Proposed Decision, page 2 [citing Exhibit D, DWR Comments, filed June 7, 2013; *Carmel Valley Fire Protection District v. State* (1987) 190 Cal.App.3d 521, 537].

[127] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [quoting Exhibit E, Claimant's Rebuttal Comments, pages 3-4].

[128] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[129] Exhibit U, DWR Comments on Draft Proposed Decision, page 3. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

laws of general application, meaning "those that apply to all persons or entities of a particular class."[130] The Water Conservation Act, DWR maintains, "does just that."[131]

In addition, DWR disputes that the provision of water services is a "classic governmental function," as asserted by the claimants.[132] The California Supreme Court has held that reimbursement should be limited to new "programs" that carry out the governmental function of providing services to the public.[133] DWR maintains that there is an important distinction between public purposes, and private or corporate purposes, and that that distinction should control in the analysis of a new program or higher level of service. In particular, DWR identifies the provision of utilities to municipal customers as a corporate activity, rather than a governmental purpose:

> Of the myriad services provided by government, although some may be difficult to categorize, at either end of the spectrum the categories are fairly clear. At one end, such things as police and fire protection have long been recognized as true governmental functions, those that implicate the notion of the "government as sovereign." At the other end, however, are public utilities such as power generation, and, of particular significance to this claim, municipal water districts.[134]

DWR argues that "California law thus draws a distinction between the many utilitarian services that could as easily be (and often are) undertaken by the private sector, and those that implicate the unique authority vested in the state and its political subdivisions." DWR continues: "Maintaining a police force, for instance, is easily understood as something fundamental to the government *as government*." "On the other hand," DWR reasons, "there is nothing intrinsically governmental about a government entity operating a utility and providing services such as electricity, natural gas, sewer, garbage collection, or water delivery."[135]

DWR thus "urges the Commission to give full consideration to the fact that the Water Conservation Act is a law of general application that applies to private as well as public water

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[130] Exhibit U, DWR Comments on Draft Proposed Decision, page 3 [citing *McDonald v. Conniff* (1893) 99 Cal.386, 391.

[131] Exhibit U, DWR Comments on Draft Proposed Decision, page 3.

[132] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing Exhibit E, Claimant Rebuttal Comments, page 4].

[133] Exhibit U, DWR Comments on Draft Proposed Decision, page 4 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 50].

[134] Exhibit U, DWR Comments on Draft Proposed Decision, page 5 [citing *Chappelle v. City of Concord* (1956) 144 Cal.App.2d 822, 825; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Davoust v. City of Alameda* (1906) 149 Cal. 69, 72; *City of South Pasadena v. Pasadena Land & Water Co.* (1908) 152 Cal. 579, 593; *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385; *Mann Water & Power Co. v. Town of Sausalito* (1920) 49 Cal.App. 78, 79; *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 58; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[135] Exhibit U, DWR Comments on Draft Proposed Decision, page 6.

suppliers alike." And, DWR reiterates: "contrary to Claimants' suggestion, water delivery, while clearly an important service, is not a classic "governmental function" in the constitutional sense."[136]

C. Interested Person Positions:[137]

California Special Districts Association

CSDA asserts that "the Proposed Decision fails to appropriately analyze the provisions of Article XIII B Section 6…as amended by Proposition 1A in 2004…"[138] CSDA argues that the draft proposed decision "rather analyzes the original language of Article XIII B Section 6 adopted as Proposition 4 in 1978, before the adoption of Proposition 218 adding articles XIII C and XIII D to the Constitution and before the adoption of Proposition 1A amending Article XIII B Section 6."[139]

CSDA argues that the plain language of article XIII B, section 6, as amended by Proposition 1A, "indicates that the mandate provisions are applicable to all cities, counties, cities and counties, and special districts without restriction."[140] CSDA further asserts that "[t]he plain language also mandates the state to appropriate the 'full payment amount' of costs incurred by local government in complying with state mandated programs, without any qualification as to the types of revenues utilized by local governments in paying the costs of such compliance."[141] CSDA reasons that "there are no words of limitation indicating that suspension of mandates is only applicable to those local government agencies which receive proceeds of taxes and expend those proceeds of taxes in complying with state mandated programs." Therefore, absent "such limiting language, the holding of the Proposed Decision which limits eligibility for claiming reimbursement…to those local agencies receiving proceeds of taxes is contradicted by the mandate provisions of Proposition 1A, and is therefore incorrect as a matter of law."[142]

CSDA also argues that the voters' intent and understanding in adopting Proposition 1A is controlling, and can be determined by examining the LAO analysis in the ballot pamphlet.[143] CSDA argues that "[t]he LAO analysis of Proposition 1A in the ballot pamphlet fails to mention any restriction or limitation on state mandates to be reimbursed or suspended, and such analysis is totally silent as to any requirement that reimbursable mandates be limited to those mandates imposed on local governments which receive and expend proceeds of taxes…" In fact, CSDA argues, the LAO analysis indicates that Proposition 1A "expand(s) the circumstances under

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[136] Exhibit U, DWR Comments on Draft Proposed Decision, page 7.

[137] "Interested person" is defined in the Commission's regulations to mean "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (Cal. Code Regs., tit. 2, § 1181.2(j).)

[138] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[139] Exhibit S, CSDA Comments on Draft Proposed Decision, page 6.

[140] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[141] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[142] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

[143] Exhibit S, CSDA Comments on Draft Proposed Decision, page 8.

which the state is responsible for reimbursing cities, counties and special districts for complying with state mandated programs by including all programs for which the state even had partial financial responsibility before such transfer."[144] CSDA maintains that "[t]herefore the voters who approved Proposition 1A by 82% of the popular vote had no understanding of this limitation on reimbursement of state mandates to local governments which is the basic holding of the Proposed Decision."[145] CSDA relies on the language of the ballot pamphlet, which states: "if the state does not fund a mandate within any year, the state must eliminate local government's duty to implement it for that same time period."[146] CSDA concludes that "[t]he plain words of Proposition 1A support this voter intent to require the state to fully reimburse the costs incurred by all cities, counties, cities and counties and special districts in implementing any state program in which the complete or partial financial responsibility for that program has been transferred from the state to local government, not just those cities, counties, cities and counties, and special districts which receive proceeds of taxes."[147]

In addition, CSDA argues that the Commission's analysis must read together and harmonize articles XIII A, XIII B, XIII C, and XIII D.[148] Specifically, CSDA argues that pursuant to article XIII C, added by Proposition 218, property-related fees are subject to "majority protest procedures" and "may not be expended for general governmental services…which are available to the public at large in substantially the same manner as they are to property owners..."[149] And, revenues from property-related fees "may not be used for any purpose other than that for which the fee was imposed;" and "may not exceed the costs required to provide the property related service."[150] In addition, CSDA asserts that the amount of a property-related fee must not exceed the proportional cost of providing the service to each individual parcel subject to the fee.[151] CSDA also notes that "Article XIII D includes similar provisions restricting the ability of local governments to raise and expend assessment revenue."[152] CSDA argues that "[a]nalyzed together, all of these restrictions on the raising and expenditure of property related fees and charges by local government agencies specified in Articles XIII C and D of the Constitution severely limit the ability of local government agencies to utilize revenue for property related fees and charges to fund the costs of state mandated programs."[153] CSDA goes on to argue that "[t]hose restrictions are more onerous and stringent than the restrictions imposed on local government agencies in expending proceeds of taxes by virtue of the appropriations limit in

[144] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[145] Exhibit S, CSDA Comments on Draft Proposed Decision, page 9.

[146] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[147] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[148] Exhibit S, CSDA Comments on Draft Proposed Decision, page 10.

[149] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[150] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[151] Exhibit S, CSDA Comments on Draft Proposed Decision, page 11.

[152] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[153] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

Article XIII B."[154] CSDA concludes that "[t]he Proposed Decision should be modified to recognize these restrictions imposed by Articles XIII C and D."[155]

Environmental Law Foundation Position

ELF states, in its comments, that it agrees with the draft proposed decision, however, "[t]o aid the Commission in developing its final decision, we would like to present an additional ground upon which the Commission could rely in denying the test claim…"[156] ELF asserts that "the Commission should find that charges for irrigation water are not 'property-related fees' for the purposes of Article XIII D of the California Constitution."[157] Specifically, ELF agrees that the test claim statutes are exempt from the voter-approval requirements of article XIII D, section 6(c);[158] however, ELF also argues that "charges for irrigation water are not 'property-related fees' at all." ELF reasons: "As a result, raising them does not trigger the substantive or procedural requirements contained in Article XIII D, and the claimant districts may increase them free of any constitutional obstacle."[159]

ELF continues: "Article XIII D, § 3 restricts local governments' ability to levy a new "assessment, fee, or charge" without complying with the substantive and procedural requirements of section 4 (assessments) and section 6 (property-related fees)." However, ELF asserts that "Section 2 of Article XIII D makes Proposition 218's relatively limited reach abundantly clear."[160] ELF notes that section 2 defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[161] ELF therefore reasons that "[f]ees that are not 'imposed upon a parcel' or that are not imposed upon a 'person as an incident of property ownership' or that are not a 'user fee or charge for a property related service' are not subject to Article XIII D."[162] ELF notes that in *Apartment Association of Los Angeles County v. City of Los Angeles*[163] the court held that an inspection fee imposed upon landlords was not imposed upon them as property owners, but as business owners and, therefore the fee was not subject to article XIII D.[164] The court, ELF

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[154] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[155] Exhibit S, CSDA Comments on Draft Proposed Decision, page 12.

[156] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[157] Exhibit T, ELF Comments on Draft Proposed Decision, page 1.

[158] Exhibit T, ELF Comments on Draft Proposed Decision, page 3 [citing Exhibit Q, Draft Proposed Decision, page 80].

[159] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[160] Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[161] California Constitution, article XIII D, section 2; Exhibit T, ELF Comments on Draft Proposed Decision, page 3.

[162] Exhibit T, ELF Comments on Draft Proposed Decision, pages 3-4.

[163] (2001) 24 Cal.4th 830.

[164] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

explains, found that this type of fee was "not 'property related' because it was dependent on the property's use – it was not imposed on the property simply as an incident of ownership."[165]

ELF goes on to note that "no case has squarely addressed the issue…" but the courts have recognized that not all water service charges are necessarily subject to article XIII D. In *Pajaro Valley Water Management Agency v. Amrheim*,[166] the court held that a groundwater augmentation charge was a property-related fee, but "it rested that conclusion on the fact that the majority of users were residential users, not large-scale irrigators."[167] And, ELF notes, other cases have found that domestic water use is "necessary for 'normal ownership and use of property.'"[168] ELF concludes that these cases, and others, "present no obstacle to the conclusion that irrigation water is not a property-related service."[169] ELF concludes that fees for irrigation water are not "property-related" but a business-related fee, and that therefore the Commission should deny this test claim.[170]

Northern California Water Association Position

In late comments on the draft proposed decision, NCWA seeks to "highlight and emphasize how onerous and expensive these new state mandates are in the Sacramento Valley."[171] NCWA argues that "[t]hese statewide benefits, achieved through implementation of incredibly expensive mandates, ought to be funded by the state and not borne exclusively by the impacted local agencies' landowners."[172] NCWA continues: "The draft proposed decision, in an effort to circumvent the clear requirements to reimburse for these types of state mandates, has attempted to avoid reimbursement by exerting exclusions that are not appropriate for the facts before the Commission."[173] NCWA denies that any "exemptions" apply to the test claim statutes, and "urge[s] the Commission to modify the draft proposed decision to reimburse these and other similarly affected water suppliers."[174]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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[165] Exhibit T, ELF Comments on Draft Proposed Decision, page 4.

[166] (2007) 150 Cal.App.4th 1364.

[167] Exhibit T, ELF Comments on Draft Proposed Decision, pages 4-5.

[168] Exhibit T, ELF Comments on Draft Proposed Decision, page 5 [citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427; *Bighorn Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205].

[169] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[170] Exhibit T, ELF Comments on Draft Proposed Decision, page 5.

[171] Exhibit V, NCWA Comments on Draft Proposed Decision, page 1.

[172] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[173] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

[174] Exhibit V, NCWA Comments on Draft Proposed Decision, page 2.

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[175] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[176]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[177]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[178]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[179]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

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[175] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[176] *County of Los Angeles v. State of California* (*County of Los Angeles I*) (1987) 43 Cal.3d 46, 56.

[177] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist.*) (2004) 33 Cal.4th 859, 874.

[178] *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56).

[179] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.[180]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[181] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[182] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[183]

The parties raise the following issues in their comments:

- The test claim statute and executive order do not impose a new program or higher level of service that is subject to article XIII B, section 6 because the Water Conservation Law and implementing regulations apply to both public and private water suppliers alike, and do not impose requirements uniquely upon local government.
- The test claim statute and executive order do not impose a new program or higher level of service because the provision of water and other utilities is an activity that could be, and often is, undertaken by private enterprise, and is therefore not a quintessentially governmental service in the manner that police and fire protection are generally accepted to be.
- The test claim does not result in costs mandated by the state for agricultural water suppliers because fees or charges for the provision of irrigation water are not "property-related" fees or charges subject to the limitations of articles XIII C and XIII D.

As described below, the Commission denies this claim on the grounds that most of the code sections and regulations pled do not impose new mandated activities, and all affected claimants have sufficient fee authority as a matter of law to cover the costs of any new requirements. Therefore, this decision does not make findings on the additional potential grounds for denial raised in comments on the draft proposed decision summarized above.

A. South Feather Water and Power Agency, Paradise Irrigation District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District are Subject to the Revenue Limitations of Article XIII B, and are Therefore Eligible for Reimbursement Pursuant to Article XIII B, Section 6.

1. To be eligible for reimbursement, a local agency must be subject to the taxing and spending limitations of articles XIII A and XIII B.

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[180] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[181] *County of San Diego, supra*, 15 Cal.4th 68, 109.

[182] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332.

[183] *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

An interpretation of article XIII B, section 6 requires an understanding of articles XIII A and XIII B. "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend taxes for public purposes."[184]

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A drastically reduced property tax revenue previously enjoyed by local governments by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[185] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[186]

Article XIII B was adopted by the voters as Proposition 4 less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[187] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, Article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[188]

Article XIII B established an "appropriations limit," or spending limit for each "entity of local government" beginning in fiscal year 1980-1981.[189] Specifically, the appropriations limit provides as follows:

> The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.[190]

No "appropriations subject to limitation" may be made in excess of the appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years.[191] Article XIII B does not limit the ability to expend government funds collected from *all sources*; the appropriations limit is based on "appropriations subject to limitation," which means, pursuant to article XIII B, section 8, "any authorization to

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[184] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 (*County of Fresno*).

[185] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[186] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[187] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 (*County of Placer*).

[188] *Ibid.*

[189] California Constitution, article XIII B, section 8(h) (added, Nov. 7, 1979).

[190] California Constitution, article XIII B, section 1 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[191] California Constitution, article XIII B, section 2 (added, Nov. 7, 1979).

expend during a fiscal year the *proceeds of taxes* levied by or for that entity."[192] Appropriations subject to limitation do not include "local agency loan funds or indebtedness funds"; "investment (or authorizations to invest) funds…of an entity of local government in accounts at banks…or in liquid securities";[193] "[a]ppropriations for debt service"; "[a]ppropriations required to comply with mandates of the courts or the federal government"; and "[a]ppropriations of any special district which existed on January 1, 1978 and which did not as of the 1977-78 fiscal year levy an ad valorem tax on property in excess of 12 [and one half] cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."[194]

Proposition 4 also added article XIII B, section 6 to require the state to reimburse local governments for any additional expenditures that might be mandated by the state, and which would rely solely on revenues subject to the appropriations limit. The California Supreme Court, in *County of Fresno v. State of California*,[195] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[196]

Not every local agency is subject to the restrictions of article XIII B, and therefore not every local agency is entitled to reimbursement. Redevelopment agencies, for example, have been identified by the courts as being exempt from the restrictions of article XIII B. In *Bell Community Redevelopment Agency v. Woolsey*, the Second District Court of Appeal concluded that a redevelopment agency's power to issue bonds, and to repay those bonds with its tax increment, was not subject to the spending limit of article XIII B. The court reasoned that to construe tax increment payments as appropriations subject to limitation "would be directly contrary to the mandate of section 7," which provides that "[n]othing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with

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[192] California Constitution, article XIII B, section 8 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) [emphasis added].

[193] California Constitution, article XIII B, section 8.

[194] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[195] *County of Fresno, supra,* (1991) 53 Cal.3d 482.

[196] *Id*, at p. 487. Emphasis in original.

respect to existing or future bonded indebtedness."[197] In addition, the court found that article XVI, section 16, addressing the funding of redevelopment agencies, was inconsistent with the limitations of article XIII B:

> Article XVI, section 16, provides that tax increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit [*sic*], it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds.[198]

The court therefore concluded that redevelopment agencies could not reasonably be subject to article XIII B, and therefore upheld Health and Safety Code section 33678, and ordered that the writ issue to compel Woolsey to publish the notice.

Accordingly, in *Redevelopment Agency of San Marcos v. Commission on State Mandates*,[199] the court held that redevelopment agencies were not eligible to claim reimbursement because Health and Safety Code section 33678 exempted tax increment financing, their primary source of revenue, from the limitations of article XIII B.

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity." The purpose for which state subvention of funds was created, to protect local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play when redevelopment agencies are required to allocate their tax increment financing in a particular manner...
>
> For all these reasons, we conclude the same policies which support exempting tax increment revenues from article XIII B appropriations limits also support denying reimbursement under section 6… [The] costs of depositing tax increment revenues in the Housing Fund are attributable not directly to tax revenues, but to the benefit received by the Agency from the tax increment financing scheme, which is one step removed from other local agencies' collection of tax revenues.[200]

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[197] (1985) 169 Cal.App.3d 24, at p. 31 [quoting article XIII B, section 7].

[198] *Id*, at p. 31.

[199] (1997) 55 Cal.App.4th 976.

[200] *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at pp. 986-987 [internal citations omitted].

In 2000, the Third District Court of Appeal, in *City of El Monte v. Commission on State Mandates,* affirmed the reasoning of the *San Marcos* decision, holding that a redevelopment agency cannot accept the benefits of an exemption from article XIII B's spending limit while asserting an entitlement to reimbursement under article XIII B, section 6.[201]

Therefore, pursuant to the plain language of article XIII B, section 9 and the decisions in *County of Fresno*, *supra*, *Redevelopment Agency of San Marcos*, *supra*, and *City of El Monte*, *supra*, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

Nevertheless, claimants argue that *County of Fresno* and the redevelopment agency cases do not apply in this case. Specifically, claimants argue that *County of Fresno*, *supra*, predates Proposition 218, which added articles XIII C and XIII D to the California Constitution, and is factually distinguishable from this test claim because the test claim statute at issue in *County of Fresno* specifically authorized user fees to pay for the mandated activities. With respect to the redevelopment cases (*Bell Community Redevelopment Agency*, *Redevelopment Agency of San Marcos*, and *City of El Monte*), the claimants argue that the courts' findings rely on Health and Safety Code section 33678, which specifically excepts the revenues of redevelopment agencies from the scope of revenue-limited appropriations under article XIII B.[202] In addition, the claimants argue that the above reasoning "would prohibit state subvention for every enterprise district in the state that is subject to Proposition 218…" and "would create a class of local agencies that are per se ineligible for reimbursement under this test claim, all potential future test claims, and all previous test claims dating back to Proposition 218's passage in 1996."[203] In addition, both the claimants and CSDA suggest that the Commission broaden the scope of reimbursement eligibility under article XIII B, section 6, beyond that articulated by the courts, and beyond the plain language of articles XIII A and XIII B.[204] The claimants and CSDA urge the Commission to consider the restrictions placed on special districts' authority to impose assessments, fees, or charges by articles XIII C and XIII D to be part of the "increasingly limited revenues sources" that subvention under section 6 was intended to protect. The claimants and CSDA would have the Commission broadly interpret and extend the subvention requirement and treat fee authority subject to proposition 218 as proceeds of taxes, "to advance the goal of 'preclud[ing] the state from shifting financial responsibility for carrying out governmental functions onto local entities that [are] ill equipped to handle the task."[205]

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[201] (2000) 83 Cal.App.4th 266, 281-282 (*El Monte*).

[202] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18.

[203] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 14-15.

[204] See Exhibit R, Claimant Comments on Draft Proposed Decision, page 21; Exhibit S, CSDA Comments on Draft Proposed Decision, pages 10-12 [Arguing that the restrictions of articles XIII C and XIII D are more onerous than the revenue limits of article XIII B, and the Commission should "recognize these restrictions…" and "Articles XIII A, B, C, and D should be read together and harmonized…"].

[205] Exhibit R, Claimant Comments on Draft Proposed Decision, page 21 [quoting *County of Fresno*, *supra* 53 Cal.3d, at p. 487.].

The claimant's comments do not alter the above analysis. The factual distinction that claimants allege between this test claim and *County of Fresno* is not dispositive.[206] Specific fee authority provided by the test claim statute is not necessary: so long as a local government's statutory fee authority can be legally applied to alleged activities mandated by the test claim statute, there are no *costs mandated by the state* within the meaning of Government Code section 17514 and article XIII B, section 6, to the extent of that fee authority.[207] If the local entity is not compelled to rely on *appropriations subject to limitation* to comply with the alleged mandate, no reimbursement is required.[208]

The claimant's comments addressing the redevelopment cases are similarly unpersuasive. Those cases are discussed above not as analogues for the types of special districts represented in this test claim, but only to demonstrate that *not all local government entities* are subject to articles XIII A and XIII B, and that an agency that is not bound by article XIII B cannot assert an entitlement to reimbursement under section 6.[209]

Moreover, enterprise districts, and indeed any local government entity funded exclusively through user fees, charges, or assessments, *are* per se ineligible for mandate reimbursement. This is so because only a mandate to expend revenues that are subject to the appropriations limit, as defined and expounded upon by the courts,[210] can entitle a local government entity to mandate reimbursement. In other words, a local agency that is funded solely by user fees or charges, (or tax increment revenues, as discussed above), or appropriations for debt service, or any combination of revenues "other than the proceeds of taxes" is an agency that is not subject to the appropriations limit, and therefore not entitled to subvention.[211]

This interpretation is supported by decades of mandates precedent and is consistent with the purpose of article XIII B. As discussed above, "Section 6 was included in article XIII B in recognition that article XIII A…severely restricted the *taxing* powers of local governments."[212] Article XIII B "was not intended to reach beyond taxation…" and "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue…"[213] The issue, then, is

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[206] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 17-18. *County of Fresno*, *supra*, 53 Cal.3d at p. 485.

[207] See also, *Clovis Unified School District v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["Claimants can choose not to required these fees, but not at the state's expense."

[208] See *Redevelopment Agency of San Marcos*, *supra*, 55 Cal.App.4th at p. 987 ["No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes."].

[209] *City of El Monte*, *supra*, (2000) 83 Cal.App.4th 266, 281-282 [citing *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976].

[210] See *Placer v. Corin* (1980) 113 Cal.App.3d 443; *Bell Community Redevelopment Agency*, *supra* (1985) 169 Cal.App.3d 24; *County of Fresno*, *supra* (1991) 53 Cal.3d 482; *Redevelopment Agency of San Marcos*, *supra*, (1997) 55 Cal.App.4th 976.

[211] California Constitution, article XIII B, section 9 (Adopted Nov. 6, 1979; Amended June 5, 1990).

[212] See *County of Fresno*, *supra*, 53 Cal.3d at p. 487 [emphasis added].

[213] *Ibid.*

not *how many* different sources of revenue a local entity has at its disposal, as suggested by claimants;[214] it is whether and to what extent those sources of revenue (and the appropriations to be made) are *limited* by articles XIII A and XIII B. Based on the foregoing, nothing in claimants' comments alters the above analysis.

The Commission also disagrees with the interpretation offered by CSDA. CSDA argues in its comments that Proposition 1A, adopted in 2004, made changes to article XIII B, section 6, which must be considered by the Commission, and that the voters' intent and understanding when adopting Proposition 1A should weigh heavily on the Commission's interpretation of the amended text.[215] However, the amendments made by Proposition 1A require the Legislature to either pay or suspend a mandate for local agencies, and expand the definition of a new program or higher level of service. The plain language of Proposition 1A does not address which entities are eligible to claim reimbursement, and does not require reimbursement for all special districts, including those that do not receive property tax revenue and are not subject to the appropriations limitation of article XIII B.[216] CSDA's comments do not alter the above analysis.

Based on the foregoing, a local agency that does not collect and expend "proceeds of taxes" is not subject to the tax and spend limitations of articles XIII A and B, and therefore is not entitled to claim reimbursement pursuant to article XIII B, section 6.

2. Biggs-West Gridley Water District and Richvale Irrigation District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible for reimbursement under article XIII B, section 6 of the California Constitution. However, Oakdale Irrigation District and Glenn-Colusa Irrigation District are subject to the taxing and spending limitations, have been substituted in as claimants for both of the consolidated test claims, and are eligible for reimbursement under article XIII B, section 6 of the California Constitution.

10-TC-12 was originally filed by four co-claimants: South Feather, Paradise, Biggs, and Richvale.[217] 12-TC-01 was filed by Richvale and Biggs only,[218] and the two test claims were consolidated for analysis and hearing and renamed *Water Conservation.* Based on the analysis herein, the Commission finds that Richvale and Biggs are ineligible to claim reimbursement under article XIII B, section 6, and test claim 12-TC-01 would have to be dismissed for want of an eligible claimant.[219] However, Oakdale and Glenn-Colusa have requested to be substituted in on both test claims in the place of the ineligible claimants.[220] The analysis below will therefore address the eligibility of each of the six co-claimants, and will show that South Feather, Paradise,

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[214] Exhibit R, Claimant Comments on Draft Proposed Decision, pages 20-21.

[215] See, e.g., Exhibit S, CSDA Comments on Draft Proposed Decision, page 7.

[216] See California Constitution, article XIII B, section 6 (b-c).

[217] Exhibit A, Test Claim 10-TC-12.

[218] Exhibit B, Test Claim 12-TC-01.

[219] See Exhibit K, Notice of Pending Dismissal.

[220] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District; Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District.

Oakdale, and Glenn-Colusa are all eligible to claim reimbursement under article XIII B, section 6, and therefore the Commission maintains jurisdiction over both of the consolidated test claims.

a. Biggs-West Gridley Water District and Richvale Irrigation District are not eligible to claim reimbursement under article XIII B, section 6.

The Districts have acknowledged that "Richvale and Biggs do not receive property tax revenue."[221] With respect to Richvale, that statement is consistent with the original test claim filing, in which Richvale stated that it "does not receive an annual share of property tax revenue."[222] However, Biggs had earlier stated in a declaration by Karen Peters, the District's Executive Administrator, that "Biggs receives an annual share of property tax revenue," and for "Fiscal Year 2011 the amount of property tax revenue is expected to be approximately $64,000."[223] Biggs has since determined that the Peters declaration was in error, and a more recent declaration from Eugene Massa, the District's General Manager, states that "[t]hat revenue estimate actually reflects Biggs' *assessment*, equating to $2 per acre within Biggs' boundaries." Mr. Massa goes on to state that "Biggs does not currently receive any share of ad valorem *property tax* revenue."[224,225]

Even though Richvale and Biggs acknowledge that they receive no property tax revenue, they argue that they and "other similarly situated public agencies should not be deemed ineligible for subvention due to a historical quirk that resulted in those agencies not receiving a share of ad valorem property taxes."[226] The "historical quirk" to which Richvale and Biggs refer, it is assumed, is the fact that Richvale and Biggs either did not exist or did not share in ad valorem property tax revenue as of the 1977-78 fiscal year, which would render at least some portion of

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[221] Exhibit I, Claimant Response to Request for Additional Information, page 1.

[222] Exhibit A, South Feather Water and Power Test Claim, page 22.

[223] Exhibit A, 10-TC-12, page 30.

[224] Exhibit I, Claimant Response to Request for Additional Information, page 393 [emphasis added].

[225] See also Exhibit X, Special Districts Annual Report 2010-2011, pages 184; 389; 1051 [The Special Districts Annual Report for 2010-2011 is consistent with Richvale's statement that it does not receive property tax revenue. Table 8 indicates no property tax receipts, and Table 1 does not indicate an appropriations limit. Biggs did not submit the necessary information to the SCO, and therefore does not appear in Tables 1 or 8 of the 2010-2011 Special Districts Annual Report. Based on that report, and the admissions of the Districts, a notice of dismissal was issued on November 12, 2013 for test claim 12-TC-01, for which Richvale and Biggs were the only named claimants. In response to the Notice of Pending Dismissal, the Districts submitted an Appeal of Dismissal, in which they argue that Proposition 218 undermines a local agency's fee authority, and that the Districts are eligible for reimbursement "for the reasons already explained in the Districts' 'Claimants' Response to Request for Additional Information 10-TC-12 and 12-TC-01.'" (Exhibit K, Notice of Pending Dismissal; Exhibit L, Appeal of Executive Director's Decision)].

[226] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

their revenues subject to the appropriations limit, in accordance with article XIII B, section 9.[227] They argue that all public agencies are ill-equipped to cover the costs of new mandates, whether they are subject to the tax and spend limits of articles XIII A and XIII B, or the fee and assessment restrictions of articles XIII C and XIII D.[228] In addition, Richvale and Biggs assert that to the extent they do have authority to raise revenues other than taxes, any increased fees or assessments necessary to cover the costs of the required activities would, by definition, be classified as proceeds of taxes under article XIII B, section 8.[229]

The Districts' reasoning is both circular and fundamentally unsound. Article XIII B, section 8 provides that "proceeds of taxes" includes "all tax revenues and the proceeds to an entity of government from (1) regulatory licenses, user charges, and user fees *to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service*, and (2) the investment of tax revenues."[230] The districts argue, therefore, that "proceeds of taxes" includes not only revenues directly derived from taxes, "but also revenues exceeding the costs to fund the services provided by the agency." The Districts argue that Richvale and Biggs are unable, under Proposition 218, to impose new fees as a matter of law, and must reallocate existing fees, which constitute "proceeds of taxes" under article XIII B, section 8. But Proposition 218 added article XIII D to expressly provide that fees or charges "*shall not be extended, imposed, or increased*" if revenues derived from the fee or charge exceed the funds needed to provide the property-related service; and "shall not be used for any purpose other than that for which the fee or charge was imposed."[231] Therefore, Proposition 218 imposes an absolute bar to raising fees beyond those necessary to provide the property-related service, or "reallocating" fees for a purpose other than that for which the fee or charge was imposed.

Moreover, Richvale and Biggs' reasoning that such fees *would automatically and by definition* constitute proceeds of taxes under article XIII B, section 8, rests on the initial presumption that such fees or charges would "exceed" those necessary to provide the service. In other words, the Districts presume that the costs of the mandate are unrelated to, or exceed, the costs of providing water service to the districts' users.[232] On the contrary, any fees or charges, whether *new or existing*, imposed by Richvale and Biggs are imposed for the purpose of providing irrigation water. The alleged mandated activities imposed upon irrigation districts by the test claim statute and regulations are required for those districts to *continue* providing irrigation water. Therefore, utilizing revenues from fees or charges to comply with the alleged new requirements is not

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[227] Section 9 states that appropriations subject to limitation do not include: "Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes."

[228] Exhibit R, Claimant Comments on Draft Proposed Decision, page 20.

[229] Exhibit I, Claimant Response to Request for Additional Information, page 3.

[230] Exhibit I, Claimant Response to Request for Additional Information, page 3 [citing California Constitution, article XIII B, section 8 (emphasis added)].

[231] Article XIII D, section 6(b) (added November 5, 1996, by Proposition 218).

[232] Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

"divert[ing] existing revenues from their authorized purposes…"[233] Rather, the increased or reallocated fees are merely being used to ensure that claimants can continue to provide water service consistently with all applicable legal requirements. Claimants' assertion that an increase or reallocation of fees alters the legal significance of such fees pursuant to article XIII B, section 8 is not supported by the law or the record.

Simply put, Richvale and Biggs do not impose or collect taxes[234] and the Commission cannot say, as a matter of law, that fees increased or imposed to comply with the alleged mandate would constitute proceeds of taxes, within the meaning of article XIII B, section 8. Unless or until a court determines that article XIII B, section 8 can be applied in this manner, the Commission must presume that only those local government entities that collect and expend proceeds of taxes, within the meaning of article XIII A, are subject to the spending limits of article XIII B, including section 6.

Based on the foregoing, the Commission finds that Richvale Irrigation District and Biggs-West Gridley Water District are not subject to the taxing and spending limitations of articles XIII A and XIII B, and are therefore not eligible to claim reimbursement under article XIII B, section 6.

b. South Feather Water and Power Agency and Paradise Irrigation District are eligible to claim reimbursement under article XIII B, section 6.

Claimants state that "South Feather and Paradise receive property tax revenue," and "are in the process of establishing their appropriations limits for their current fiscal years."[235]

Declarations attached to claimants' response state that both South Feather and Paradise are in the process of determining and adopting an appropriations limit. Kevin Phillips, Finance Manager of Paradise, stated that during his tenure, "I have not calculated or otherwise established Paradise's appropriation limit as set forth in Proposition 4." Mr. Phillips further states that "[a]t the request of Paradise's legal counsel, I have begun working to establish Paradise's appropriation limit and intend…to ask Paradise's Board of Directors to adopt a resolution…for its current fiscal year."[236] Similarly, Steve Wong, Finance Division Manager of South Feather, states that he has not "calculated or otherwise established South Feather's appropriation limit" during his employment with South Feather. Mr. Wong further states that "[a]t the request of South Feather's legal counsel, I have begun working to establish South Feather's appropriation limit and intend, after the requisite public review period, to ask South Feather's Board of Directors to adopt a resolution establishing South Feather's appropriation limit for its current fiscal year."[237]

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[233] See Exhibit I, Claimant Response to Request for Additional Information, pages 4-5.

[234] Note that special districts generally have statutory authorization to impose special taxes, but only with two-thirds voter approval (See article XIII A, section 4). However, there is no evidence in the record indicating that Richvale or Biggs currently collects or expends special taxes.

[235] Exhibit I, Claimant Response to Request for Additional Information, pages 1-2.

[236] See Exhibit I, Claimant Response to Request for Additional Information, page 394.

[237] See Exhibit I, Claimant Response to Request for Additional Information, page 427.

Based on the foregoing, the Commission finds that both South Feather and Paradise are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

3. Oakdale Irrigation District and Glenn-Colusa Irrigation District are eligible to claim reimbursement under article XIII B, section 6 and are thus substituted in as claimants in the consolidated test claims in place of Biggs-West Gridley Water District and Richvale Irrigation District.

Pursuant to the Notice of Pending Dismissal, Oakdale submitted a request to be substituted in as a party on 10-TC-12 and 12-TC-01 on January 13, 2014. Oakdale states that it is subject to the tax and spend limitations of articles XIII A and XIII B, and that it is an agricultural water supplier "subject to the mandates imposed by the Agricultural Water Measurement Regulations…and the Water Conservation Act of 2009."[238] The declaration of Steve Knell, Oakdale's General Manager, attached to the Request for Substitution, states that Oakdale "receives an annual share of ad valorem property tax revenue from Stanislaus and San Joaquin counties." The declaration further states that the District "received $5,701,730 in property taxes for 2011-2013 and expects to receive approximately $1.9 million in 2014."

The Special Districts Annual Reports for 2010-2011 and 2011-2012 do not indicate an appropriations limit for Oakdale in Table 1,[239] but they do indicate that Oakdale received property tax revenue in Table 8 for 2010-2011 and 2011-2012.[240]

Similarly, Glenn-Colusa submitted a request to be substituted in as a party on both test claims. Glenn-Colusa asserted in its request that it "is subject to the tax and spend limitations of Articles XIII A and XIII B of the California Constitution," and is an agricultural water supplier, subject to "the mandates imposed by the Water Conservation Act of 2009…and the Agricultural Water Measurement Regulations."[241] In declarations attached to the Request for Substitution, Thaddeus Bettner, General Manager of Glenn-Colusa, asserts that the District "received $520,420 in property taxes in 2013 and expects to receive $528,300 in 2014."[242]

Table 8 of the Special Districts Annual Report indicates that Glenn-Colusa collected property taxes in 2010-2011 and 2011-2012,[243] but Table 1 does not indicate an appropriations limit for the district.[244]

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[238] Exhibit N, Request for Substitution of Parties by Oakdale Irrigation District, page 2.

[239] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 159 and 157, respectively.

[240] Exhibit X, Special Districts Annual Reports for 2010-2011 and 2011-2012, pages 381 and 379, respectively.

[241] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, pages 1-2.

[242] Exhibit O, Request for Substitution of Parties by Glenn-Colusa Irrigation District, page 7.

[243] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 357 and 355, respectively.

[244] Exhibit X, Special Districts Annual Report, 2010-2011 and 2011-2012, pages 104 and 101, respectively.

Based on the evidence in the record, including the declarations of the General Managers of Oakdale and Glenn-Colusa, as well as the information reported to the SCO in the Special Districts Annual Reports for fiscal years 2010-2011 and 2011-2012, both the substitute claimants collect some amount of property tax revenue. In turn, because property tax revenue is subject to the appropriations limit, both claimants also expend revenues subject to the appropriations limit, in accordance with article XIII B. A local government entity that is subject to both articles XIII A and XIII B is eligible for subvention under article XIII B, section 6, and is an eligible claimant before the Commission.

The Commission concludes that both Oakdale and Glenn-Colusa are subject to article XIII B as a matter of law, because they have authority to collect and expend property tax revenue.

Based on the foregoing, the Commission finds that Oakdale and Glenn-Colusa are subject to the tax and spend limitations of articles XIII A and XIII B, and are therefore eligible to claim reimbursement under article XIII B, section 6.

B. Some of the Test Claim Statutes and Regulations Impose New Requirements on Urban Retail Water Suppliers.

Test claim 10-TC-12 alleged all of Part 2.55 of Division 6 of the Water Code, which consists of sections 10608 through 10608.64. The following analysis addresses only those sections of Part 2.55 containing mandatory language, and those sections specifically alleged in the test claim narrative. Sections 10608.22, 10608.28, 10608.36, 10608.43, 10608.44, 10608.50, 10608.56, 10608.60, and 10608.64 are not analyzed below, because those sections were not specifically alleged to impose increased costs mandated by the state, and because they do not impose new requirements on local government.

1. Water Code sections 10608, 10608.4(d), 10608.12(a; p), and 10608.16(a), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Water Code section 10608 states the Legislature's findings and declarations, including: "Water is a public resource that the California Constitution protects against waste and unreasonable use..." and "Reduced water use through conservation provides significant energy and environmental benefits, and can help protect water quality, improve streamflows, and reduce greenhouse gas emissions." Subdivision (g), specifically invoked by the claimants,[245] states that "[t]he Governor has called for a 20 percent per capita reduction in urban water use statewide by 2020."[246] The plain language of this section establishes a goal, but does not, itself, impose any new requirements on local government.

Water Code section 10608.4 as added, states the "intent of the legislature," including, as highlighted by the claimants,[247] to "[e]stablish a method or methods for urban retail water suppliers to determine targets for achieving increased water use efficiency by the year 2020, in

[245] Exhibit A, Test Claim 10-TC-12, page 3.

[246] Water Code section 10608(a; d; g) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[247] Exhibit A, Test Claim 10-TC-12, page 3.

accordance with the Governor's goal of a 20 percent reduction."[248] The plain language of this section expresses legislative intent, and does not impose any new activities on local government

Water Code section 10608.16(a), as added, states that "[t]he state shall achieve a 20 percent reduction in urban per capita water use in California on or before December 31, 2020." In addition, section 10608.16(b) provides that the state "shall make incremental progress towards the state target specified in subdivision (a) by reducing urban per capita water use by at least 10 percent on or before December 31, 2015."[249] The plain language of this section is directed to the State generally, and does not impose any new mandated activities on local government.

Water Code section 10608.12 provides that "the following definitions govern the construction of this part:" An "urban retail water supplier " is defined as "a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes."[250] The claimants allege that the Water Conservation Act imposes unfunded state mandates on urban retail water suppliers, and that South Feather and Paradise "are 'urban retail water suppliers,' as defined."[251] Likewise, under section 10608.12, an "agricultural water supplier" is defined as "a water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water."[252] The claimants allege that this definition "expanded the definition of what constitutes an agricultural water supplier," and thus required a greater number of entities to adopt AWMPs and perform other activities under the Water Code.[253] However, whatever new activities may be required by the test claim statutes, the plain language of amended section 10608.12 does not impose any new requirements on urban retail water suppliers or agricultural water suppliers; section 10608.12 merely prescribes the applicability and scope of the other requirements of the test claim statutes.

Based on the foregoing, the Commission finds that sections 10608, 10608.4 10608.12, and 10608.16, pled as added, do not impose any new requirements on local government, and are therefore denied.

2. Water Code sections 10608.20(a; b; e; and j), 10608.24, and 10608.40, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7) impose new required activities on urban water suppliers.

Prior law required the preparation of an urban water management plan, and required urban water suppliers to update the plan every five years. The test claim statutes add additional information related to conservation goals to that required to be included in a supplier's UWMP, and authorize an extension of time from December 31, 2010 to July 1, 2011 for the adoption of the next UWMP. As added by the test claim statute, section 10608.20 provides, in pertinent part:

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[248] Water Code section 10608.4 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[249] Water Code section 10608.16(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[250] Water Code section 10608.12(p) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[251] Exhibit A, 10-TC-12, page 2.

[252] Water Code section 10608.12(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[253] Exhibit A, 10-TC-12, page 8.

(a)(1) Each urban retail water supplier shall develop urban water use targets and an interim urban water use target by July 1, 2011. Urban retail water suppliers may elect to determine and report progress toward achieving these targets on an individual or regional basis, as provided in subdivision (a) of Section 10608.28, and may determine the targets on a fiscal year or calendar year basis.

(2) It is the intent of the Legislature that the urban water use targets described in subdivision (a) cumulatively result in a 20-percent reduction from the baseline daily per capita water use by December 31, 2020.

(b) An urban retail water supplier shall adopt one of the following methods for determining its urban water use target pursuant to subdivision (a):

(1) Eighty percent of the urban retail water supplier's baseline per capita daily water use.

(2) The per capita daily water use that is estimated using the sum of the following performance standards:

(A) For indoor residential water use, 55 gallons per capita daily water use as a provisional standard. Upon completion of the department's 2016 report to the Legislature pursuant to Section 10608.42, this standard may be adjusted by the Legislature by statute.

(B) For landscape irrigated through dedicated or residential meters or connections, water efficiency equivalent to the standards of the Model Water Efficient Landscape Ordinance set forth in Chapter 2.7 (commencing with Section 490) of Division 2 of Title 23 of the California Code of Regulations, as in effect the later of the year of the landscape's installation or 1992. An urban retail water supplier using the approach specified in this subparagraph shall use satellite imagery, site visits, or other best available technology to develop an accurate estimate of landscaped areas.

(C) For commercial, industrial, and institutional uses, a 10-percent reduction in water use from the baseline commercial, industrial, and institutional water use by 2020.

(3) Ninety-five percent of the applicable state hydrologic region target, as set forth in the state's draft 20x2020 Water Conservation Plan (dated April 30, 2009). If the service area of an urban water supplier includes more than one hydrologic region, the supplier shall apportion its service area to each region based on population or area.

(4) A method that shall be identified and developed by the department, through a public process, and reported to the Legislature no later than December 31, 2010…[254]

In addition, section 10608.20(e) provides that an urban retail water supplier "shall include in its urban water management plan due in 2010…the baseline daily per capita water use, urban water

[254] Water Code section 10608.20 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining estimates, including references to supporting data."[255]

And, section 10608.20(j) provides that an urban retail water supplier "shall be granted an extension to July 1, 2011…" to adopt a complying water management plan, and that an urban retail water supplier that adopts an urban water management plan due in 2010 "that does not use the methodologies developed by the department pursuant to subdivision (h) shall amend the plan by July 1, 2011 to comply with this part."[256]

Section 10608.40 provides that an urban retail water supplier shall also "report to [DWR] on their progress in meeting their urban water use targets as part of their [UWMPs] submitted pursuant to Section 10631."[257]

Section 10608.24 provides that each urban retail water supplier "shall meet its interim urban water use target by December 31, 2015," and "shall meet its [final] urban water use target by December 31, 2020."[258]

As discussed above, prior law required the adoption of an UWMP, which, pursuant to section 10631, included a detailed description and analysis of water supplies within the service area, including reliability of supply in normal, dry, and multiple dry years, and a description and evaluation of water demand management measures currently being implemented and scheduled for implementation.[259] Pursuant to existing section 10621, that plan was required to be updated "once every five years…in years ending in five and zero."[260] And, existing section 10631(e) also required identification and quantification of past, current and projected water use over a five-year period including, but not necessarily limited to, all of the following uses:

> (A) Single-family residential.
>
> (B) Multifamily.
>
> (C) Commercial.
>
> (D) Industrial.
>
> (E) Institutional and governmental.
>
> (F) Landscape.
>
> (G) Sales to other agencies.
>
> (H) Saline water intrusion barriers, groundwater recharge, or conjunctive use, or any combination thereof.

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[255] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[256] Water Code section 10608.20(j) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[257] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[258] Water Code section 10608.24(a; b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[259] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[260] Water Code section 10621 (Stats. 2007, ch. 64 (AB 1376)).

(I) Agricultural.[261]

However, nothing in prior law required the adoption of urban water use targets, baseline information on a per capita basis (as opposed to on a type of use basis), interim and final water use targets, assessment of present and proposed measures to achieve the targeted reductions, or a report on the supplier's progress toward meeting the reductions.

Based on the foregoing, the Commission finds that Water Code sections 10608.20, 10608.24, and 10608.40, as added by the test claim statute, impose new requirements on urban retail water suppliers, as follows:

- Develop urban water use targets and an interim urban water use targets by July 1, 2011.[262]
- Adopt one of the methods specified in section 10608.20(b) for determining an urban water use target.[263]
- Include in its urban water management plan due in 2010 the baseline daily per capita water use, urban water use target, interim urban water use target, and compliance daily per capita water use, along with the bases for determining those estimates, including references to supporting data.[264]
- Report to DWR on their progress in meeting urban water use targets as part of their UWMPs.[265]
- Amend its urban water management plan, by July 1, 2011, to allow use of technical methodologies developed by the department pursuant to subdivisions (b) and (h) of section 10608.20.[266]
- Meet interim urban water use target by December 31, 2015.[267]
- Meet final urban water use target by December 31, 2020.[268]

The activities required to meet the interim and final urban water use targets are intended to vary significantly among local governments based upon differences in climate, population density, levels of per capita water use according to plant water needs, levels of commercial, industrial, and institutional water use, and the amount of hardening that has occurred as a result of prior conservation measures implemented in different regions

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[261] Water Code section 10631 (Stats. 2009, ch. 534 (AB 1465)).

[262] Water Code section 10608.20(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[263] Water Code section 10608.20(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[264] Water Code section 10608.20(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[265] Water Code section 10608.40 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[266] Water Code section 10608.20(i) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[267] Water Code section 10608.24(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[268] Water Code section 10608.24(b) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

throughout the state. Local variations, therefore, are not expressly stated in the test claim statutes.

3. Water Code section 10608.26, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), requires urban water suppliers to conduct at least one public hearing to allow community input regarding an urban retail water supplier's implementation plan.

Section 10608.26 provides that "[i]n complying with this part," an urban retail water supplier shall conduct at least one public hearing "to accomplish all of the following:" (1) allow community input regarding the urban retail water supplier's implementation plan; (2) consider the economic impacts of the urban retail water supplier's implementation plan; and (3) adopt one of the four methods provided in section 10608.20(b) for determining its urban water use target.[269]

The claimants assert that "prior to the Act, there was no requirement to conduct at least one public hearing to allow for community input regarding conservation, consider economic impacts of the implementing the 20% reduction [*sic*], or to adopt a method for determining an urban water use target."[270]

Section 10642, added by Statutes 1983, chapter 1009, required a public hearing prior to *adopting an UWMP*, as follows:

> Prior to adopting a plan, the urban water supplier shall make the plan available for public inspection and shall hold a public hearing thereon. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned water supplier pursuant to Section 6066 of the Government Code…[271]

However, section 10608.26 requires a public hearing for purposes of allowing public input regarding an implementation plan, considering the economic impacts of an implementation plan, or adopting a method for determining the urban water supplier's water use targets, as required by section 10608.20(b). DWR, the agency with responsibility for implementing the Water Conservation Act, has interpreted these two requirements as only requiring one hearing.[272] As the implementing agency, DWRs interpretation of the Act is entitled to great weight.[273]

Based on the foregoing, the Commission finds that section 10608.26 imposes a new and additional requirement on urban retail water suppliers, as follows:

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[269] Water Code section 10608.26(a) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[270] Exhibit A, 10-TC-12, page 8 [citing Water Code section 10608.26(a)(1-3)].

[271] Water Code section 10642 (Stats. 1983, ch. 1009) [citing Government Code section 6066 (Stats. 1959, ch. 954), which provides for publication once per week for two successive weeks in a newspaper of general circulation].

[272] Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[273] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

Include in the public hearing on the adoption of the UWMP an opportunity for community input regarding the urban retail water supplier's implementation plan; consideration of the economic impacts of the implementation plan; and the adoption of a method, pursuant to section 10608.20(b), for determining urban water use targets.[274]

4. Water Code section 10608.42, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new requirements on local government.

Section 10608.42 provides:

> The department shall review the 2015 urban water management plans and report to the Legislature by December 31, 2016, on progress towards achieving a 20-percent reduction in urban water use by December 31, 2020. The report shall include recommendations on changes to water efficiency standards or urban water use targets in order to achieve the 20-percent reduction and to reflect updated efficiency information and technology changes.[275]

The claimants allege that section 10608.42 requires an UWMP, adopted by an urban retail water supplier, to "describe the urban retail water supplier's progress toward achieving the 20% reduction by 2020."[276] However, the plain language of this section is directed to DWR, and does not, itself, impose any new activities or requirements on local government.

Based on the foregoing, the Commission finds that section 10608.42 does not impose any new requirements on local government, and is therefore denied.

5. Water Code sections 10608.56 and 10608.8, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), do not impose any new requirements on local government.

Section 10806.56 provides that "[o]n and after July 1, 2016, an urban retail water supplier is not eligible for a water grant or loan awarded or administered by the state unless the supplier complies with this part."[277] The plain language of this section does not impose any new requirements on local government; the section only states the consequence of failing to comply with all other requirements of the Act.

Section 10608.8 provides that "[b]ecause an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of Section 10608.24, an urban retail water supplier's failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021."[278] The plain language of

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[274] Water Code section 10608.26 ((Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)). See also Exhibit X, Department of Water Resources, *Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan*, pp. A-2 and 3-4.

[275] Water Code section 10608.42 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[276] Exhibit A, 10-TC-12, page 3.

[277] Water Code section 10608.56 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[278] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

this section does not impose any new requirements on local government; rather, the section states that no violation of law shall occur until after the date that urban water use targets are supposed to be met.

The claimants allege that Water Code section 10608.56 imposes reimbursable state-mandated costs, alleging that "[f]ailure to comply with the aforementioned mandates by South Feather and Paradise will result, on and after July 1, 2016, in ineligibility for water grants or loans awarded or administered by the State of California." In addition, the claimants allege that "a failure to meet the 20% target shall be a violation of law on and after January 1, 2021," citing Water Code section 10608.8.[279] The plain language of sections 10608.8 and 10608.56, as described above, do not impose any new activities or tasks on local government; the provisions that the claimants allege only state the consequences of failing to comply with all other requirements of the Act.

Based on the foregoing, the Commission finds that sections 10806.56 and 10806.8 do not impose any new requirements on local government, and are therefore denied.

C. Some of the Test Claim Statutes and Regulations Impose New Requirements on Non-exempt Agricultural Water Suppliers.

Chapter 4 of Part 2.55 of Division 6 of the Water Code consists of a single code section that addresses water conservation requirements for agricultural water suppliers: section 10608.48. The remaining provisions of the test claim statute addressing agricultural water suppliers were added in Part 2.8 of Division 6 of the Water Code, consisting of sections 10800-10853, and address agricultural water management planning requirements. Sections 10608.8 and 10828 provide for exemptions from the requirements of Part 2.55 and Part 2.8, respectively, under certain circumstances, which are addressed where relevant below.

1. Water Code section 10608.48(a-c), as amended by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), imposes new requirements on some agricultural water suppliers to implement efficient water management practices, including measurement and a pricing structure based in part on quantity of water delivered; and to implement up to fourteen other efficient water management practices, if locally cost effective and technically feasible.

Section 10608.48 provides for the implementation by agricultural water suppliers of specified critical efficient water management practices, including measurement and volume-based pricing; and *additional* efficient water management practices, where locally cost effective and technically feasible, as follows:

> (a) On or before July 31, 2012, an agricultural water supplier shall implement efficient water management practices pursuant to subdivisions (b) and (c).
>
> (b) Agricultural water suppliers shall implement *all of the following critical efficient management practices*:
>
> (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).

[279] Exhibit A, 10-TC-12, page 4.

(2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

(c) Agricultural water suppliers shall implement *additional efficient management practices*, including, but not limited to, practices to accomplish all of the following, *if the measures are locally cost effective and technically feasible*:

(1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

(2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

(3) Facilitate the financing of capital improvements for on-farm irrigation systems.

(4) Implement an incentive pricing structure that promotes one or more of the following goals:

(A) More efficient water use at the farm level.

(B) Conjunctive use of groundwater.

(C) Appropriate increase of groundwater recharge.

(D) Reduction in problem drainage.

(E) Improved management of environmental resources.

(F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

(5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

(6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[280]

The claimants allege that section 10608.48 requires agricultural water suppliers (Oakdale and Glenn-Colusa) to "measure the volume of water delivered to their customers using best professional practices to achieve a minimum level of measurement accuracy at the farm-gate." In addition, they allege, agricultural water suppliers are required to "adopt a pricing structure for water customers based on the quantity of water delivered." The claimants further allege that "[i]f 'locally cost effective' and technically feasible, agricultural water suppliers are required to implement fourteen additional efficient management practices" specified in section 10608.48(c).[281]

The claimants argue that prior to the test claim statute, agricultural water suppliers "were not required to have a pricing structure based, at least in part, on the quantity of water delivered," and were not required to measure the volume of water delivered if it was not locally cost effective to do so. The claimants assert that "[w]hile subdivision (a) of Water Code section 531.10 was a preexisting obligation, subdivision (b) of that same section gave an exception to the farm-gate measurement requirement if the measurement devices were not locally cost effective." The claimants conclude that now "[t]he Act requires compliance with subdivision (a) regardless of whether it is locally cost effective."[282] In addition, the claimants assert that prior to the Act, "there was no requirement to implement up to 14 additional conservation measures if locally cost effective and technically feasible."[283]

Section 531.10 of the Water Measurement Law, as added by Statutes 2007, chapter 675 provides, in its entirety:

(a) An agricultural water supplier shall submit an annual report to the department that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices.

(b) Nothing in this article shall be construed to require the implementation of water measurement programs or practices that are not locally cost effective.

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[280] Water Code section 10608.48(a-c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)) [emphasis added].

[281] Exhibit A, Test Claim 10-TC-12, page 4.

[282] Exhibit A, 10-TC-12, page 8.

[283] Exhibit A, 10-TC-12, page 8.

(c) It is the intent of the Legislature that the requirements of this section shall complement and not affect the scope of authority granted to the department or the board by provisions of law other than this article.

The plain language of section 531.10 required agricultural water suppliers to submit an annual report to DWR summarizing aggregated data on water delivered to individual agricultural customers using best professional practices, but only if water measurement programs or practices were locally cost effective.[284] Therefore, to the extent that water measurement programs or practices *were* locally cost effective, such activities were required to comply with prior law. Section 10608.48(b), in turn, does not impose a *new* requirement to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with [section 531.10(a),]" if such water measurement activities were already performed. However, section 10608.48(b) also requires an agricultural water supplier, *regardless of local cost-effectiveness*, to "[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 *and to implement paragraph (2)*," which requires suppliers to implement a pricing structure based at least in part on volume of water delivered. Therefore, section 10608.48(b) imposes a new requirement to the extent that prior law activities were not sufficient to also implement a pricing structure based at least in part on quantity of water delivered.

Moreover, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1, for as long as the QSA remains in effect.[285] The local agency parties to the QSA include the San Diego County Water Authority, Coachella Valley Water District, Imperial Irrigation District, and Metropolitan Water District of Southern California.[286] As a result, by the plain language of Water Code section 10608.8 those entities are exempt and are not mandated by the state to comply with the requirements of Part 2.55 of Division 6 of the Water Code, including section 10608.48.

Based on the foregoing, the Commission finds that section 10608.48 imposes new requirements on agricultural water suppliers, except those that are parties to the Quantification Settlement Agreement, as defined in Statutes 2002, chapter 617, section 1, for as long as QSA remains in effect, as follows:

- Measure the volume of water delivered to customers with sufficient accuracy to (1) comply with subdivision (a) of Water Code section 531.10, which previously imposed the requirement, with specified exceptions, for agricultural water suppliers to submit an annual report summarizing aggregated farm-gate delivery data, on a monthly or bi-monthly basis, using best professional practices; and (2) implement a pricing structure for water customers based at least in part on quantity of water delivered.[287]

[284] Water Code section 531.10 (Stats. 2007, Ch. 675 (AB 1404)).

[285] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[286] Exhibit X, Quantification Settlement Agreement, dated October 10, 2003.

[287] Water Code section 10608.48(b)(1) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

This activity is only newly required if measurement of farm-gate delivery data was not previously performed by the agricultural water supplier pursuant to a determination under section 531.10(b) that such measurement programs or practices were not locally cost effective, or if measurement data was not sufficient to implement a pricing structure based at least in part on quantity of water delivered.[288]

- Implement a pricing structure for water customers based at least in part on quantity of water delivered.[289]
- *If the measures are locally cost effective and technically feasible,* implement additional efficient management practices, including, but not limited to, practices to accomplish all of the following:

  (1) Facilitate alternative land use for lands with exceptionally high water duties or whose irrigation contributes to significant problems, including drainage.

  (2) Facilitate use of available recycled water that otherwise would not be used beneficially, meets all health and safety criteria, and does not harm crops or soils.

  (3) Facilitate the financing of capital improvements for on-farm irrigation systems.

  (4) Implement an incentive pricing structure that promotes one or more of the following goals:

  (A) More efficient water use at the farm level.

  (B) Conjunctive use of groundwater.

  (C) Appropriate increase of groundwater recharge.

  (D) Reduction in problem drainage.

  (E) Improved management of environmental resources.

  (F) Effective management of all water sources throughout the year by adjusting seasonal pricing structures based on current conditions.

  (5) Expand line or pipe distribution systems, and construct regulatory reservoirs to increase distribution system flexibility and capacity, decrease maintenance, and reduce seepage.

  (6) Increase flexibility in water ordering by, and delivery to, water customers within operational limits.

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[288] Water Code section 531.10(a-b) previously required reporting annually to the Department of Water Resources aggregated farm-gate delivery data, summarized on a monthly or bi-monthly basis, unless such measurement programs or practices were not locally cost effective. If an agricultural water supplier had not determined that such practices were not locally cost effective, then the prior law, Section 531.10(a) would have required measurement, and the activity is not therefore new.

[289] Water Code section 10608.48(b)(2) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(7) Construct and operate supplier spill and tailwater recovery systems.

(8) Increase planned conjunctive use of surface water and groundwater within the supplier service area.

(9) Automate canal control structures.

(10) Facilitate or promote customer pump testing and evaluation.

(11) Designate a water conservation coordinator who will develop and implement the water management plan and prepare progress reports.

(12) Provide for the availability of water management services to water users. These services may include, but are not limited to, all of the following:

(A) On-farm irrigation and drainage system evaluations.

(B) Normal year and real-time irrigation scheduling and crop evapotranspiration information.

(C) Surface water, groundwater, and drainage water quantity and quality data.

(D) Agricultural water management educational programs and materials for farmers, staff, and the public.

(13) Evaluate the policies of agencies that provide the supplier with water to identify the potential for institutional changes to allow more flexible water deliveries and storage.

(14) Evaluate and improve the efficiencies of the supplier's pumps.[290]

2. Water Code sections 10608.48(d-f) and 10820-10829, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers, as defined pursuant to section 10608.12, to prepare and adopt on or before December 31, 2012, and to update on or before December 31, 2015, and every five years thereafter, an agricultural water management plan, as specified. However, many agricultural water suppliers, including all participants in the Central Valley Project and United States Bureau of Reclamation water contracts, are exempt from the requirement to *prepare and adopt* an agricultural water management plan pursuant to 10826, because they were already required by existing federal law to prepare a water conservation plan, which they may submit to satisfy this requirement.

As noted above, the test claim statute repealed and added Part 2.8 of Division 6 of the Water Code, commencing with section 10800. While a number of the activities alleged in these consolidated test claims were required by the prior provisions of the Water Code that were repealed and replaced by the test claim statute, those provisions were by their own terms no longer operative immediately prior to the effective date of the test claim statute. Former Water Code section 10855, as added by Statutes 1986, chapter 954, provided that "[t]his part shall

[290] Water Code section 10608.48(c) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

remain operative only until January 1, 1993..." Therefore, the provisions added by the test claim statute, which became effective on February 3, 2010, impose new requirements or activities.[291]

Section 10820, as added, provides that all agricultural water suppliers *shall prepare and adopt* an AWMP on or before December 31, 2012, and shall update that plan on December 31, 2015, and on or before December 31 every five years thereafter.[292]

Section 10826, as added, provides that the plan "shall do all of the following:"

> (a) Describe the agricultural water supplier and the service area, including all of the following:
>
> (1) Size of the service area.
>
> (2) Location of the service area and its water management facilities.
>
> (3) Terrain and soils.
>
> (4) Climate.
>
> (5) Operating rules and regulations.
>
> (6) Water delivery measurements or calculations.
>
> (7) Water rate schedules and billing.
>
> (8) Water shortage allocation policies.
>
> (b) Describe the quantity and quality of water resources of the agricultural water supplier, including all of the following:
>
> (1) Surface water supply.
>
> (2) Groundwater supply.
>
> (3) Other water supplies.
>
> (4) Source water quality monitoring practices.
>
> (5) Water uses within the agricultural water supplier's service area, including all of the following:
>
> (A) Agricultural.
>
> (B) Environmental.
>
> (C) Recreational.
>
> (D) Municipal and industrial.
>
> (E) Groundwater recharge.
>
> (F) Transfers and exchanges.

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[291] Bills introduced in an extraordinary session take effect 91 days after the final adjournment of that extraordinary session. (Cal. Const. Art. IV, Sec. 8(c)(1).) The 7th Extraordinary Session concluded on November 4, 2009. Thus, the effective date of SB X7 7 is February 3, 2010.

[292] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(G) Other water uses.

(6) Drainage from the water supplier's service area.

(7) Water accounting, including all of the following:

(A) Quantifying the water supplier's water supplies.

(B) Tabulating water uses.

(C) Overall water budget.

(8) Water supply reliability.

(c) Include an analysis, based on available information, of the effect of climate change on future water supplies.

(d) Describe previous water management activities.

(e) Include in the plan the water use efficiency information required pursuant to Section 10608.48.[293]

Meanwhile, section 10608.48(d) provides that agricultural water suppliers "shall include in the agricultural water management plans required pursuant to [section 10820] a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report, and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future."[294]

Furthermore, section 10608.48 provides that if a supplier "determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination."[295] And, the section further provides that "[t]he data shall be reported using a standardized form developed pursuant to Section 10608.52."[296]

In addition, section 10828 provides that:

> (a) Agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, *may submit those water conservation plans to satisfy the requirements of Section 10826, if both of the following apply*:
>
> (1) The agricultural water supplier has adopted and submitted the water conservation plan to the United States Bureau of Reclamation within the previous four years.
>
> (2) The United States Bureau of Reclamation has accepted the water conservation plan as adequate.

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[293] Water Code section 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[294] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[295] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[296] *Ibid.*

> (b) This part does not require agricultural water suppliers that are required to submit water conservation plans to the United States Bureau of Reclamation pursuant to either the Central Valley Project Improvement Act (Public Law 102-575) or the Reclamation Reform Act of 1982, or both, to prepare and adopt water conservation plans according to a schedule that is different from that required by the United States Bureau of Reclamation.[297]

And, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[298]

Based on the plain language of section 10828, those local agencies who are CVP or USBR contractors may submit a copy of their water conservation plan already submitted to USBR in satisfaction of the requirements of section 10826 (which provides for the contents of an AWMP). In addition, section 10828(b) provides that CVP or USBR contractors are not required to adhere to the "schedule" for preparing and adopting AWMPs, as provided in section 10820, above. Therefore, the requirements of section 10820, to prepare and adopt an AWMP on or before December 31, 2012, and to update the AWMP on or before December 31, 2015 and every five years thereafter, do not apply to CVP or USBR contractors, who may instead rely on the schedule for updating and readopting their water conservation plans.

Both Glenn-Colusa and Oakdale are contractors with the United States Bureau of Reclamation (USBR) and as a result are required by federal law to prepare water conservation plans. Glenn-Colusa and Oakdale are also CVP contractors, as are dozens of other local agencies.[299]

As noted above, Water Code section 10608.8 provides that "[t]he requirements of this part do not apply to an agricultural water supplier that is a party to the Quantification Settlement Agreement" (QSA), as defined in Statutes 2002, chapter 617, section 1 for as long as QSA remains in effect.[300] Therefore, a supplier that is a party to the QSA is not mandated by the state to include the water use efficiency reporting requirements in the plan pursuant to section 10680.48.

Additionally, section 10608.48(f) provides that an agricultural water supplier "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to the United States Bureau of Reclamation that meets the requirements described in Section 10828."[301] Therefore, the requirements to include in a supplier's AWMP a report on efficient water management practices and documentation on those practices determined not to be cost effective or technically feasible, pursuant to section 10608.48(d-e), do not apply to CVP or

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[297] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[298] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[299] Exhibit X, Bureau of Reclamation, Mid-Pacific Region, Central Valley Project (CVP) Water Contractors, dated March 4, 2014.

[300] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[301] Water Code section 10608.48(e; f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

USBR contractors that prepare and submit water conservation plans to USBR.[302] The *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, issued by DWR, "encourages" suppliers to file certain "documentation as an attachment with the USBR-accepted water management/conservation plan."[303] However, the plain language of section 10608.48(f) states that a supplier may satisfy the requirements of section 10608.48(d) and (e) by submitting to DWR its water conservation plan prepared for USBR. And, section 10828, as shown above, exempts CVP and USBR contractors from the requirement to prepare an AWMP in the first instance. Finally, pursuant to section 10829, the requirement to adopt an AWMP in the first instance does not apply if the supplier adopts a UWMP, or participates in regional water management planning.

Based on the foregoing, the Commission finds that newly added sections 10820 and 10826, and 10608.48(d-f), impose the following new requirements on agricultural water suppliers, except for suppliers that adopt a UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and CVP and USBR contractors:

- On or before December 31, 2012, prepare and adopt an agricultural water management plan in accordance with section 10826.[304]
- On or before December 31, 2015, and every five years thereafter, update the agricultural water management plan, in accordance with section 10820 et seq.[305]
- If a supplier becomes an agricultural water supplier, as defined, after December 31, 2012, that agricultural water supplier shall prepare and adopt an agricultural water management plan within one year after the date that it has become an agricultural water supplier.[306]
- Include in the agricultural water management plans required pursuant to Water Code section 10800 et seq. a report on which efficient water management practices have been implemented and are planned to be implemented, an estimate of the water use efficiency improvements that have occurred since the last report,

[302] Water Code section 10608.48(f) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[303] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 11, "The agricultural water suppliers that submit a plan to USBR may meet the requirements of section 10608.48 (d) and (e) [report of EWMPs implemented, planned for implementation, and estimate of efficiency improvements, as well as documentation for not locally cost effective EWMPs] by submitting the USBR-accepted plan to DWR. "DWR *encourages* CVPIA/RRA water suppliers to also provide a report on water use efficiency information (required by section 10608.48(d);see Section 3.7 of this Guidebook)." Emphasis added.

[304] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[305] Water Code sections 10820; 10826 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[306] Water Code section 10820 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

and an estimate of the water use efficiency improvements estimated to occur five and 10 years in the future.[307]

In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[308]

- If an agricultural water supplier determines that an efficient water management practice is not locally cost effective or technically feasible, the supplier shall submit information documenting that determination.[309]

  In addition, an agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[310]

- Report the data using a standardized form developed pursuant to Water Code section 10608.52.[311]

  An agricultural water supplier that is a party to the Quantification Settlement Agreement (QSA), as defined in Statutes 2002, chapter 617, section 1 is not subject to this requirement for as long as the QSA remains in effect.[312]

3. Section 10608.48(g-i), as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), does not impose any new activities on local government.

Section 10608.48(g) provides that on or before December 31, 2013, DWR shall submit to the Legislature a report on agricultural efficient water management practices that have been implemented or are planned to be implemented, and an assessment of those practices and their effects on agricultural operations. Section 10608.48(h) states that DWR "may update the efficient water management practices required pursuant to [section 10608.48(c)]," but only after conducting public hearings. Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement" of section 10608.48(b).

The plain language of these sections section 10608.48(g-i) is directed to DWR, and does not impose any activities or requirements on local government.

4. Sections 10821, 10841, 10842, 10843, and 10844, as added by Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), impose new requirements on agricultural water suppliers.

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[307] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[308] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[309] Water Code section 10608.48(d) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[310] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[311] Water Code section 10608.48(e) (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[312] Water Code section 10608.8 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

Water Code section 10821, as added, provides that an agricultural water supplier required to prepare an AWMP pursuant to this part, "shall notify each city or county within which the supplier provides water supplies that the agricultural water supplier will be preparing the plan or reviewing the plan and considering amendments or changes to the plan."[313]

In addition, newly added section 10841 requires that the plan be made available for public inspection and that a public hearing shall be held as follows:

> Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan. Prior to the hearing, notice of the time and place of hearing shall be published within the jurisdiction of the publicly owned agricultural water supplier pursuant to Section 6066 of the Government Code. A privately owned agricultural water supplier shall provide an equivalent notice within its service area and shall provide a reasonably equivalent opportunity that would otherwise be afforded through a public hearing process for interested parties to provide input on the plan...[314]

Section 10842 provides that an agricultural water supplier shall implement its AWMP "in accordance with the schedule set forth in its plan."[315]

Following adoption of an AWMP, section 10843 requires an agricultural water supplier to submit a copy of its AWMP, no later than 30 days after adoption, to DWR and to the following affected or interested entities:

> (2) Any city, county, or city and county within which the agricultural water supplier provides water supplies.
>
> (3) Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.
>
> (4) Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
>
> (5) Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
>
> (6) The California State Library.
>
> (7) Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[316]

Finally, newly added section 10844 requires an agricultural water supplier to make its water management plan available for public review via the internet, as follows:

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[313] Water Code section 10821 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[314] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[315] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[316] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

(a) Not later than 30 days after the date of adopting its plan, the agricultural water supplier shall make the plan available for public review on the agricultural water supplier's Internet Web site.

(b) An agricultural water supplier that does not have an Internet Web site shall submit to [DWR], not later than 30 days after the date of adopting its plan, a copy of the adopted plan in an electronic format. [DWR] shall make the plan available for public review on [its] Internet Web site.[317]

The prior provisions of the Water Code pertaining to the adoption and implementation of AWMPs, as explained above, were inoperative by their own terms as of January 1, 1993.[318] Therefore, the requirements to hold a public hearing, to implement the plan in accordance with the schedule, to submit copies to DWR and other specified local entities, and to make the plan available by either posting the plan on the supplier's web site, or by sending an electronic copy to DWR for posting on its web site, are new activities with respect to prior law.

However, section 10828, as discussed above, provides that USBR or CVP contractors may satisfy the requirements of section 10826 by submitting their water conservation plans adopted within the previous four years pursuant to the Central Valley Improvement Act or the Reclamation Reform Act of 1982.[319] This section does not expressly exempt CVP or USBR contractors from all requirements of Part 2.8, but only from the content requirements of the plan itself, and the requirement to adopt according to the "schedule" set forth in section 10820, as discussed above. Accordingly, DWR's *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 [AWMP]* provides:

> All agricultural water suppliers required to prepare new agricultural water management/conservation plans must prepare and complete their plan in accordance with Water Code Part 2.8, Article 1 and Article 3 requirements for notification, public participation, adoption, and submittal (refer to Section 3.1 for details). *The federal review process may incorporate many requirements specified in Part 2.8, Articles 1 and 3; as such the federal process may meet the requirements of Part 2.8, otherwise, the agricultural water supplier would have to complete those requirements in Part 2.8, Articles 1 and 3 that are not already a part of the federal review pro*cess.[320]

Article 1 of Part 2.8 includes section 10821, which requires an agricultural water supplier to notify the city or county that it will be preparing an AWMP. Therefore, to the extent that the "federal process" of adopting a water conservation plan for USBR or CVP also requires notice to the city or county, this activity is not newly required. Article 3 of Part 2.8 includes sections 10840-10845, pertaining to the adoption and implementation of AWMPs. Those requirements include, as discussed above, noticing and holding a public hearing; implementing the plan in

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[317] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[318] See former Water Code sections 10840-10845; 10855 (Stats. 1986, ch. 954).

[319] Water Code section 10828 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[320] Exhibit X, *Guidebook to Assist Agricultural Water Suppliers to Prepare a 2012 Agricultural Water Management Plan*, page 94 [emphasis added].

accordance with the schedule set forth in the plan; submitting a copy of the AWMP to specified state and local entities within 30 days after adoption; and making the AWMP available on the supplier's website, or submitting the AWMP for posting on DWR's website. To the extent that the "federal process" satisfies those requirements, they are not newly required by the test claim statutes.

In addition, as noted above, section 10829 provides that an agricultural water supplier may satisfy the requirements "of this part" by adopting an UWMP pursuant to Part 2.6 or by participating in areawide, regional, watershed, or basinwide water management planning, so long as those plans meet or exceed the requirements of this part.[321] That exception would include all of the notice and hearing requirements identified below.

Based on the foregoing, the Commission finds that Water Code sections 10821, 10841, 10842, 10843, and 10844 impose new requirements on agricultural water suppliers, except those that adopt an UWMP or participate in areawide, regional, watershed, or basinwide water management planning, and except to the extent that suppliers that are USBR or CVP contractors have water conservation plans that satisfy the AWMP adoption requirements, as follows:

- Notify the city or county within which the agricultural supplier provides water supplies that it will be preparing the AWMP or reviewing the AWMP and considering amendments or changes.[322]
- Prior to adopting a plan, the agricultural water supplier shall make the proposed plan available for public inspection, and shall hold a public hearing on the plan.[323]
- Prior to the hearing, notice of the time and place of hearing shall be published in a newspaper within the jurisdiction of the publicly owned agricultural water supplier once a week for two successive weeks, as specified in Government Code 6066.[324]
- Implement the AWMP in accordance with the schedule set forth in the AWMP.[325]
- An agricultural water supplier shall submit to the following entities a copy of its plan no later than 30 days after the adoption of the plan. Copies of amendments or changes to the plans shall be submitted to the entities identified within 30 days after the adoption of the amendments or changes.
    - DWR.
    - Any city, county, or city and county within which the agricultural water supplier provides water supplies.
    - Any groundwater management entity within which jurisdiction the agricultural water supplier extracts or provides water supplies.

[321] Water Code section 10829 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[322] Water Code section 10821(Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[323] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[324] Water Code section 10841 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[325] Water Code section 10842 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

- Any urban water supplier within which jurisdiction the agricultural water supplier provides water supplies.
- Any city or county library within which jurisdiction the agricultural water supplier provides water supplies.
- The California State Library.
- Any local agency formation commission serving a county within which the agricultural water supplier provides water supplies.[326]

- An agricultural water supplier shall make its agricultural water management plan available for public review on its web site not later than 30 days after adopting the plan, or for an agricultural water supplier that does not have a web site, submit an electronic copy to the Department of Water Resources not later than 30 days after adoption, and the Department shall make the plan available for public review on its web site.[327]

5. Agricultural Water Measurement Regulations, California Code of Regulations, Title 23, Division 6, sections 597 through 597.4, Register 2012, Number 28.

California Code of Regulations, title 23, section 597 provides that under authority included in Water Code section 10608.48(i), DWR is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of section 10609.48(b).[328] The plain language of this section does not impose any new activities or requirements on local government.

Section 597.1 provides that an agricultural water supplier providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article, and a supplier providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, is not subject to this article unless sufficient funding is provided pursuant to Water Code section 10853. A supplier providing water to 25,000 irrigated acres or more, excluding acres that receive only recycled water, is subject to this article. A supplier providing water to wildlife refuges or habitat lands, as specified, is subject to this article. A *wholesale* agricultural water supplier is subject to this article at the location at which control of the water is transferred to the receiving water supplier, but the wholesale supplier is not required to measure the ultimate deliveries to customers. A canal authority or other entity that conveys water through facilities owned by a federal agency is not subject to this article. An agricultural water supplier that is a party to the QSA, as defined in Statutes 2002, chapter 617, section 1, is not subject to this article. And finally, DWR is not subject to this article.[329] None of the above-described provisions of section 597.1 impose any new requirements or activities on local government.

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[326] Water Code section 10843 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[327] Water Code section 10844 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[328] Code of Regulations, title 23, section 597 (Register 2012, No. 28).

[329] Code of Regulations, title 23, section 597.1 (Register 2012, No. 28).

Section 597.2 provides definitions of "accuracy," "agricultural water supplier," "approved by an engineer," "best professional practices," "customer," "delivery point," "existing measurement device," "farm-gate," "irrigated acres," "manufactured device," "measurement device," "new or replacement measurement device," "recycled water," and "type of device."[330] Based on the plain language of 597.2, the definitions provided in section 597.2 do not impose any new requirements or activities on local government.

Section 597.3 requires an agricultural water supplier to measure surface water and groundwater that it delivers to its customers and provides a range of options to comply with section 10608.48(i), as follows:

> An agricultural water supplier subject to this article shall measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section. The supplier may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section. Measurement device accuracy and operation shall be certified, tested, inspected and/or analyzed as described in §597.4 of this article.
>
> **(a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer**
>
> An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).
>
> (1) An existing measurement device shall be certified to be accurate to within +12% by volume,
>
> and,
>
> (2) A new or replacement measurement device shall be certified to be accurate to within:
>
> (A) ±5% by volume in the laboratory if using a laboratory certification;
>
> (B) ±10% by volume in the field if using a non-laboratory certification.
>
> **(b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers**
>
> (1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

[330] Code of Regulations, title 23, section 597.2 (Register 2012, No. 28).

(A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device.

(B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of measurement options in §597.3(a) cannot be met by installing a measurement device or devices (manufactured or on-site built or in-house built devices with or without additional components such as gauging rod, water level control structure at the farm-gate, etc.). If conditions change such that the accuracy standards of measurement options in §597.3(a) at the farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, a schedule, budget and finance plan to demonstrate progress to measure water at the farm-gate in compliance with §597.3(a) of this article.

(2) An agricultural water supplier choosing an option under paragraph (b)(l) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those points.

(B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the water level or flow conditions described in §597.3(b)(l)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(C) The agricultural water supplier shall document all of the following criteria about the methodology it uses to apportion the volume of water delivered to the individual downstream customers:

(i) How it accounts for differences in water use among the individual customers based on but not limited to the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system, and;

(ii) That it is sufficient for establishing a pricing structure based at least in part on the volume delivered, and;

(iii) That it was approved by the agricultural water supplier's governing board or body.[331]

Thus, one option under these regulations, in order to measure the volume of water delivered, as required by section 10608.48, is measurement "at the delivery point or farm-gate of a single customer" using an existing measurement device certified to be accurate to within 12 percent by volume, or a new measurement device certified to be accurate within 5 percent if certified in a laboratory or within 10 percent if certified in the field. Another option is to measure upstream of a delivery point or farm gate if the supplier does not have legal access to the delivery point for an individual customer, or if the standards of measurement cannot be met due to large fluctuations in flow rate or velocity during the delivery season. If this option is chosen, appropriate documentation explaining the option must be provided, as described above.

The claimants allege that section 597.3 requires agricultural water suppliers to measure at a delivery point or farm gate "by either (1) using an existing measurement device, certified to be accurate within ±12% by volume or (2) a new or replacement measurement device, certified to be accurate within ±5% by volume in the laboratory if using a laboratory certification or ±10% by volume in the field if using a non-laboratory certification." In addition, the claimants allege that the regulations provide for "limited exceptions" if the supplier is unable to measure at the farm-gate, which allow, in certain circumstances, for upstream measurement.[332] The claimants assert that prior to these regulations, "there was no requirement to measure water delivered to the farm-gate of *each* single customer, with limited exception."[333]

DWR argues that these regulations merely provide options, and are not therefore a mandate. Specifically, DWR asserts that "[n]o local government is required to comply with those regulations." DWR asserts that "the regulations exist as a resource for agricultural water suppliers who wish to comply with certain requirements…described in the 2009 Water Law." DWR concludes that "[the regulations] are optional, and the suppliers are free to comply with the law in other ways."[334]

Section 10608.48(i) provides that DWR "shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement" to comply with the measurement requirements of subdivision (b).[335] The phrase "may use or implement" suggests that the regulations provide a choice for agricultural water suppliers, rather than a mandate.

However, Section 10608.48(b) states that agricultural water suppliers "shall implement all of the following critical efficient management practices…(1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to [adopt a pricing structure based in part on quantity of water delivered]."[336] Moreover, the plain language of section 597.3 of the regulations, as cited above, states that an agricultural water

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[331] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[332] Exhibit B, 12-TC-01, page 4.

[333] Exhibit B, 12-TC-01, page 6.

[334] Exhibit D, DWR Comments, page 11.

[335] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess., ch. 4 (SBX7 7)).

[336] *Ibid.*

supplier "shall measure surface water and groundwater that it delivers to customers pursuant to the accuracy standards in this section." The language states that the supplier "may choose any applicable single measurement option or combination of options listed in paragraphs (a) or (b) of this section."[337] There is no express provision for choosing a measurement option or combination of options not listed in section 597.3. Although an agricultural water supplier may pick which one of the regulatory options to comply with, it "shall" pick one of them based on the plain language of section 597.3. As a result, most agricultural water suppliers are required to implement one of the measurement options provided by 597.3. As discussed above though, there are several water suppliers exempt from this requirement, including parties to the QSA, suppliers providing water to less than 10,000 irrigated acres, excluding acres that receive only recycled water, and suppliers providing water to more than 10,000 irrigated acres but less than 25,000 irrigated acres, excluding acres that receive only recycled water, unless sufficient funding is provided pursuant to Water Code section 10853. Thus, section 597.3 requires the following for those agencies which are not exempt:

- Measure water delivered at the delivery point or farm-gate of a single customer using one of the following options.
    - An existing measurement device certified to be accurate to within ±12% by volume.
    - A new or replacement measurement device certified to be accurate to within:
        - ±5% by volume in the laboratory if using a laboratory certification;
        - ±10% by volume in the field if using a non-laboratory certification.

      If a device measures a value other than volume (e.g., flow rate, velocity or water elevation) the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume.[338]
- Measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers if:
    - The supplier does not have legal access to the delivery points of individual customers or group of customers needed to install, measure, maintain, operate, and monitor a measurement device; or
    - An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season, accuracy standards of measurement cannot be met by installing a measurement device or devices.[339]
- And, when a supplier chooses to measure water delivered at an upstream location:

[337] Code of Regulations, title 23, section 597.3 (Register 2012, No. 28).

[338] Code of Regulations, title 23, section 597.3(a) (Register 2012, No. 28).

[339] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

- Provide, where applicable, documentation to demonstrate the lack of legal access at delivery points of individual or groups of customers downstream of the point of measurement; or documentation of the water measurement device unavailability and that water level or flow conditions exist that prohibit meeting accuracy standards, as approved by an engineer.
- Document the following about its apportionment of water delivered to individual customers:
  - How the supplier accounts for differences in water use among individual customers based on the duration of water delivery to the individual customers, annual customer water use patterns, irrigated acreage, crops planted, and on-farm irrigation system;
  - That it is sufficient for establishing a pricing structure based at least in part on the volume of water delivered; and
  - That it was approved by the agricultural water supplier's governing board or body.[340]

Section 597.4, also alleged in this consolidated test claim, requires that measurement devices be certified and documented as follows:

(a) Initial Certification of Device Accuracy

The accuracy of an existing, new or replacement measurement device or type of device, as required in §597.3, shall be initially certified and documented as follows:

(1) For existing measurement devices, the device accuracy required in section 597.3(a) shall be initially certified and documented by either:

(A) Field-testing that is completed on a random and statistically representative sample of the existing measurement devices as described in §597.4(b)(1) and §597.4(b)(2). Field-testing shall be performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer.

Or,

(B) Field-inspections and analysis completed for every existing measurement device as described in §597.4(b)(3). Field-inspections and analysis shall be performed by trained individuals in the use of field inspection and analysis, and documented in a report approved by an engineer.

(2) For new or replacement measurement devices, the device accuracy required in sections 597.3 (a)(2) shall be initially certified and documented by either:

[340] Code of Regulations, title 23, section 597.3(b) (Register 2012, No. 28).

(A) Laboratory Certification prior to installation of a measurement device as documented by the manufacturer or an entity, institution or individual that tested the device following industry-established protocols such as the National Institute for Standards and Testing (NIST) traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device.

Or,

(B) Non-Laboratory Certification after the installation of a measurement device in the field, as documented by either:

(i) An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devices for each type of device installed at specified locations.

Or,

(ii) A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.

(b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

(1) Field-testing shall be performed for a sample of existing measurement devices according to manufacturer's recommendations or design specifications and following best professional practices. It is recommended that the sample size be no less than 10% of existing devices, with a minimum of 5, and not to exceed 100 individual devices for any particular device type. Alternatively, the supplier may develop its own sampling plan using an accepted statistical methodology.

(2) If during the field-testing of existing measurement devices, more than one quarter of the samples for any particular device type do not meet the criteria pursuant to §597.3(a), the agricultural water supplier shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed an additional 100 individual devices for the particular device type. This second round of field-testing and corrective actions shall be completed within three years of the initial field-testing.

(3) Field-inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards

of §597.3(a) and operation and maintenance protocols meet best professional practices.

(c) Records Retention

Records documenting compliance with the requirements in §597.3 and §597.4 shall be maintained by the agricultural water supplier for ten years or two Agricultural Water Management Plan cycles.

(d) Performance Requirements

(1) All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.

(2) If an installed measurement device no longer meets the accuracy requirements of §597.3(a) based on either field-testing or field-inspections and analysis as defined in sections 597.4 (a) and (b) for either the initial accuracy certification or during operations and maintenance, then the agricultural water supplier shall take appropriate corrective action, including but not limited to, repair or replacement to achieve the requirements of this article.

(e) Reporting in Agricultural Water Management Plans

Agricultural water suppliers shall report the following information in their Agricultural Water Management Plan(s):

(1) Documentation as required to demonstrate compliance with §597.3 (b), as outlined in section §597.3(b)(2), and §597.4(b)(2).

(2) A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.

(3) If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:

(A) For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.

(B) For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is

derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.

(C) For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).

(4) If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

Thus, the plain language of section 597.4 requires agricultural water suppliers to certify and document the initial accuracy of "existing, new or replacement measurement device[s]," as specified.[341] In addition, section 597.4 provides that field-testing "shall be performed" following "best professional practices," and either sampling "no less than 10% of existing devices," as recommended by the department, or developing a "sampling plan using an accepted statistical methodology." Then, if field testing results in more than a quarter of any particular devices failing the accuracy criteria described in section 597.3(a), above, the supplier "shall provide in its Agricultural Water Management Plan, a plan to test an additional 10% of its existing devices…"[342] In addition, section 597.4 provides that records documenting compliance "shall be maintained…for ten years or two Agricultural Water Management Plan cycles."[343] Section 597.4 further provides that "all measurement devices shall be correctly installed, maintained, operated, inspected, and monitored," and if a device no longer meets the accuracy requirements of section 597.3, the supplier "shall take appropriate corrective action," including repair or replacement, if necessary.[344] And finally, section 597.4 requires agricultural water suppliers to report additional information regarding their compliance and "best professional practices" for water measurement in their agricultural water measurement plan.[345]

As noted above, some agricultural water suppliers may have been required pursuant to section 531.10 to measure farm-gate water deliveries.[346] To the extent that those measurement programs or practices satisfy the requirements of these regulations, the regulations do not impose new activities.[347] In addition, for any agricultural water supplier that is also an urban water supplier,

[341] Code of Regulations, title 23, section 597.4(a) (Register 2012, No. 28).

[342] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[343] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[344] Code of Regulations, title 23, section 597.4(d) (Register 2012, No. 28).

[345] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

[346] Water Code section 531.10 (Stats. 2007, ch. 675 (AB 1404)).

[347] See discussion above addressing section 10608.48(a-c).

existing sections 525 through 527 required those entities to install water meters on new and existing service connections, as specified.[348] To the extent that any such water meter on an agricultural service connection satisfies the measurement requirements of these regulations, the regulations do not impose any new activities or requirements.

Based on the foregoing, the Commission finds that section 597.4 imposes new requirements on agricultural water suppliers not exempt from the water measurement requirements, and not already required by existing law to take part in the programs or practices of water measurement, discussed above, that would satisfy the accuracy standards of these regulations, as follows:

- Certify the initial accuracy of existing measurement devices by either:
    - Field-testing that is completed on a random and statistically representative sample of the existing measurement devices, performed by individuals trained in the use of field-testing equipment, and documented in a report approved by an engineer; or
    - Field inspections and analysis for every existing measurement device, performed by individuals trained in the use of field inspection and analysis, and documented in a report approved by an engineer.[349]
- Certify the initial accuracy of new or replacement measurement devices by either:
    - Laboratory certification prior to installation of the device as documented by the manufacturer or an entity, institution, or individual that tested the device following industry-established protocols such as the National Institute of Standards and Testing traceability standards. Documentation shall include the manufacturer's literature or the results of laboratory testing of an individual device or type of device; or
    - Non-laboratory certification after installation of a measurement device in the field, documented by either:
        - An affidavit approved by an engineer submitted to the agricultural water supplier of either (1) the design and installation of an individual device at a specified location, or (2) the standardized design and installation for a group of measurement devises for each type of device installed at specified locations; or
        - A report submitted to the agricultural water supplier and approved by an engineer documenting the field-testing performed on the installed measurement device or type of device, by individuals trained in the use of field testing equipment.[350]
- Ensure that field-testing is performed as follows:

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[348] Section 525 as amended by statutes 2005, chapter 22; Section 527 as amended by statutes 2005, chapter 22; Section 526 as amended by Statutes 2004, chapter 884.

[349] Code of Regulations, title 23, section 597.4(a)(1) (Register 2012, No. 28).

[350] Code of Regulations, title 23, section 597.4(a)(2) (Register 2012, No. 28).

- Field-testing shall be performed for a sample of existing measurement devices according to the manufacturer's recommendations or design specifications and following best professional practices.
- If more than one quarter of the samples for any particular device type do not meet the accuracy criteria specified in section 597.3(a), the supplier shall provide in its Agricultural Water Management Plan a plan to test an additional 10% of its existing devices, with a minimum of 5, but not to exceed 100 additional devices for the particular device type, and shall complete the second round of field-testing and corrective actions within three years of the initial field-testing.
- Field inspections and analysis protocols shall be performed and the results shall be approved by an engineer for every existing measurement device to demonstrate that the design and installation standards used for the installation of existing measurement devices meet the accuracy standards specified in section 597.3(a) and that operation and maintenance protocols meet best professional practices.[351]

- Maintain records documenting compliance with the requirements of sections 597.3 and 597.4 for ten years or two Agricultural Water Management Plan cycles.[352]
- Ensure that all measurement devices are correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices.[353]
- If an installed measurement device no longer meets the accuracy requirements of section 597.3(a) based on either field-testing or field-inspections and analysis for either the initial accuracy certification or during operations and maintenance, take appropriate corrective action, including but not limited to, repair or replacement of the device.[354]
- Report the information listed below in its Agricultural Water Management Plan(s). :
  - Documentation, as required, to demonstrate that an agricultural water supplier that chooses to measure upstream of a delivery point or farm-gate for a customer or group of customers has complied justified the reason to do so, and has taken appropriate steps to ensure that measurements can be allocated to the customer or group of customers sufficiently to support a pricing structure based at least in part on quantity of water delivered.

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[351] Code of Regulations, title 23, section 597.4(b) (Register 2012, No. 28).

[352] Code of Regulations, title 23, section 597.4(c) (Register 2012, No. 28).

[353] Code of Regulations, title 23, section 597.4(d)(1) (Register 2012, No. 28).

[354] Code of Regulations, title 23, section 597.4(d)(2) (Register 2012, No. 28).

- A description of best professional practices about, but not limited to, the (1) collection of water measurement data, (2) frequency of measurements, (3) method for determining irrigated acres, and (4) quality control and quality assurance procedures.
- If a water measurement device measures flow rate, velocity or water elevation, and does not report the total volume of water delivered, the agricultural water supplier must document in its Agricultural Water Management Plan how it converted the measured value to volume. The protocols must follow best professional practices and include the following methods for determining volumetric deliveries:
    - For devices that measure flow-rate, documentation shall describe protocols used to measure the duration of water delivery where volume is derived by the following formula: Volume = flow rate x duration of delivery.
    - For devices that measure velocity only, the documentation shall describe protocols associated with the measurement of the cross-sectional area of flow and duration of water delivery, where volume is derived by the following formula: Volume = velocity x cross-section flow area x duration of delivery.
    - For devices that measure water elevation at the device (e.g. flow over a weir or differential elevation on either side of a device), the documentation shall describe protocols associated with the measurement of elevation that was used to derive flow rate at the device. The documentation will also describe the method or formula used to derive volume from the measured elevation value(s).
- If an existing water measurement device is determined to be out of compliance with §597.3, and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.[355]

D. The Test Claim Statutes and Regulations do not Result in Increased Costs Mandated by the State, Because the Claimants Possess Fee Authority Sufficient as a Matter of Law to Cover the Costs of any New Mandated Activities.

As the preceding analysis indicates, many of the requirements of the test claim statutes are not new, at least with respect to *some* urban or agricultural water suppliers, because suppliers were previously required to perform substantially the same activities under prior law. Additionally, many of the alleged test claim statutes do not impose any requirements at all, based on the plain language. However, even if the new requirements identified above could be argued to mandate a new program or higher level of service, the Commission finds that the costs incurred to comply

[355] Code of Regulations, title 23, section 597.4(e) (Register 2012, No. 28).

with those requirements are not costs mandated by the state, within the meaning of article XIII B, section 6 and Government Code section 17514, because all affected entities have fee authority, sufficient as a matter of law to cover the costs of any mandated activities.

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, as defined in section 17514, if the local government claimant "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court upheld the constitutionality of Government Code section 17556, subdivision (d), in *County of Fresno v. State of California.*[356] The Court, in holding that the term "costs" in article XIII B, section 6 excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[357]

Accordingly, in *Connell v. Superior Court of Sacramento County*,[358] the Santa Margarita Water District, among others, was denied reimbursement based on its authority to impose fees on water users. The water districts submitted evidence that funding the mandated costs with fees was not practical: "rates necessary to cover the increased costs [of pollution control regulations] would render the reclaimed water unmarketable and would encourage users to switch to potable water."[359] The court concluded that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs." Water Code section 35470 authorized the levy of fees to "correspond to the cost and value of the service," and "to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose."[360] The court held that the Districts had not demonstrated "that anything in Water Code section 35470 limits the authority of the Districts to levy fees 'sufficient' to cover their costs,"

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[356] *County of Fresno v. State of California, supra,* 53 Cal.3d 482.

[357] *Id*, at p. 487 [emphasis added].

[358] (Cal. Ct. App. 3d Dist. 1997) 59 Cal.App.4th 382.

[359] *Id*, at p. 399.

[360] *Ibid.*

and that therefore "the economic evidence presented by SMWD to the Board [of Control] was irrelevant and injected improper factual questions into the inquiry."[361]

Likewise, in *Clovis Unified School District v. Chiang*, the court found that the SCO was not acting in excess of its authority in reducing reimbursement claims to the full extent of the districts' authority to impose fees, even if there existed practical impediments to collecting the fees. In making its decision the court noted that the concept underlying Government Code sections 17514 and 17556(d) is that "[t]o the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost."[362] The court further noted that, "this basic principle flows from common sense as well." The court reasoned: "As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'"[363]

1. The claimants have statutory authority to levy fees or charges for the provision of water.

Both Finance and DWR asserted, in comments on the test claim, that the test claim statutes are not reimbursable pursuant to section 17556(d). Finance argued that the claimants are "statutorily authorized to charge a fee for the delivery of water," and thus "each of these water agencies has the ability to cover any potential initial and ongoing costs related to the Act and Regulations with fee revenue."[364] DWR asserted that "Senate Bill 1017, which amended the [Urban Water Management Act] in 1994," provides authority for an urban water supplier "to recover the costs of preparing its [urban water management plan] and implementing the reasonable water conservation measures included in the plan in its water rates."[365]

For the following reasons, the Commission finds that the claimants have statutory authority to establish and increase fees or assessments for the provision of water services.

Water Code section 35470 provides generally that "[a]ny [water] district formed on or after July 30, 1917, may, in lieu in whole or in part of raising money for district purposes by assessment, make water available to the holders of title to land or the occupants thereon, and may fix and collect charges therefor." Section 35470 further provides that "[t]he charges may vary in different months and in different localities of the district to correspond to the cost and value of the service, and the district *may use so much of the proceeds of the charges as may be necessary to defray the ordinary operation or maintenance expenses of the district and for any other lawful purpose.*"[366] In addition, section 50911 provides that an irrigation district may "[a]dopt a schedule of rates to be charged by the district for furnishing water for the irrigation of district lands."[367]

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[361] *Connell, supra*, (1997) 59 Cal.App.4th at p. 401.

[362] *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, at p. 812.

[363] *Ibid.*

[364] Exhibit C, Finance Comments on Test Claim, page 1.

[365] Exhibit D, DWR Comments on Test Claim, pages 8-9 [citing Water Code section 10654].

[366] Water Code section 35470 (Stats. 2007, ch. 27 (SB 444)) [emphasis added].

[367] Water Code section 50911 (Stats. 2007, ch. 27 (SB 444)).

More specifically, and pertaining to the requirements of the test claim statutes, Water Code section 10654 permits an urban water supplier to "recover in its rates" for the costs incurred in preparing and implementing water conservation measures.[368] And, section 10608.48 expressly requires agricultural water suppliers to "[a]dopt a pricing structure for water customers based at least in part on quantity delivered."[369] This provision indicates that the Legislature intended user fees to be an essential component of the water conservation practices called for by the Act. And finally, Water Code section 10608.32, as added *within the test claim statute*, provides that all costs incurred pursuant to this part may be recoverable in rates subject to review and approval by the Public Utilities Commission.[370]

Based on the foregoing, the Commission finds that both agricultural and urban water suppliers have statutory authority to impose or increase fees to cover the costs of new state-mandated activities.

2. Nothing in Proposition 218, case law, or any prior Commission Decision, alters the analysis of the claimants' statutory fee authority.

The claimants argue that both Finance and DWR cite *Connell v. Superior Court* and "ignore the most recent rulings on the subject of Proposition 218 where their exact arguments were considered and overruled by the Commission in *Discharge of Stormwater Runoff*, 07-TC-09." The claimants argue that "under Proposition 218, Claimants' customers could reject the Board's action to establish or increase fees or assessments, yet Claimants would still be obligated to implement the mandates."[371] In comments on the draft proposed decision, the claimants reiterate, more urgently:

> The Commission should not accept its staff's invitation to ignore a prior Commission decision that is directly on point, and which was based on a plain reading of the California Constitution, all in order to reject the test claim here. To do so would undermine the Commission' s credibility, eviscerate the Commission's Constitutional duty to reimburse agencies for new state mandates, and have far-reaching negative effects.[372]

For the following reasons, the claimant's argument is unsound. In *Connell v. Superior Court*, *supra* the court held that "[t]he question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs," and that the economic viability of the necessary rate increases "was irrelevant and injected improper factual questions into the inquiry."[373] *Connell* did not address the possible impact of Proposition 218 on the districts' fee authority, because the districts did not "contend that the services at issue…are among the 'many services'

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[368] Water Code section 10654 (Stats. 1994, ch. 609 (SB 1017)).

[369] Water Code section 10608.48 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[370] Water Code section 10608.32 (Stats. 2009-2010, 7th Ex. Sess. ch. 4 (SBX7 7)).

[371] Exhibit E, Claimant Rebuttal Comments, pages 11-12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[372] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[373] *Connell*, *supra*, (1997) 59 Cal.App.4th at p. 401.

impacted by Proposition 218."[374] The claimants here argue that *Connell* is no longer good authority, because Proposition 218 has changed the landscape of special districts' legal authority to impose fees or charges.

Proposition 218, adopted by the voters in 1996, also known as the "Right to Vote on Taxes Act," declared its purpose to protect taxpayers "by limiting the methods by which local governments exact revenue from taxpayers without their consent." Proposition 218 added articles XIII C and XIII D to the Constitution;[375] article XIII C addresses assessments, while article XIII D addresses user fees and charges. The claimants allege that article XIII D, section 6, specifically, imposes a legal or constitutional hurdle to imposing or increasing fees, which undermines any analysis of statutory fee authority under Government Code section 17556(d).

The requirements of article XIII D, section 6 to which claimants refer provide as follows:

> Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. *If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*
>
> [¶…¶]
>
> (c) Voter Approval for New or Increased Fees and Charges. *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 shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures

[374] 59 Cal.App.4th at p. 403.

[375] Exhibit X, Text of Proposition 218.

similar to those for increases in assessments in the conduct of elections under this subdivision.[376]

The claimants have acknowledged that they have fee authority, absent the restrictions of articles XIII C and XIII D: "Claimants do not deny that, before the passage Proposition 218, the Water Code would have provided Claimants sufficient authority, pursuant to their governing bodies' discretion, to unilaterally establish or increase fees or charges for the provision of water services."[377] After Proposition 218, the claimants argue they are now "authorized to do no more than *propose* a fee increase that can be rejected" by majority protest.[378] Furthermore, the claimants maintain that the Commission's decision in *Discharge of Stormwater Runoff* recognized the limitations imposed by article XIII D, section 6, and the effect on local governments' fee authority: "[f]inding *Connell* inapposite, the Commission observed that 'The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one.'"[379]

However, claimants' reliance on the Commission's prior action is misplaced, and claimants' assertions about the effect of Proposition 218 on the law of *Connell* are overstated. Commission decisions are not precedential, and in any event the current test claim is distinguishable from the analysis in *Discharge of Stormwater Runoff*. The Commission, in *Discharge of Stormwater Runoff*, deviated from the rule of *Connell*, and found that Proposition 218, as *applied to the claimants* and *the mandated activities in that test claim*, constituted a legal and constitutional barrier to increasing fees. The test claim was brought by the County of San Diego and a number of cities, and alleged various mandated activities and costs related to reducing stormwater pollution.[380] The Commission found that although the County and the Cities had a generalized fee authority based on regulatory and police powers,[381] "[w]ith some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996."[382] The Commission reasoned that "it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate,"[383] and that "[a]bsent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d)."[384] Thus, the

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[376] California Constitution, article XIII D, section 6 (added, November 5, 1996, by Proposition 218) [emphasis added].

[377] Exhibit R, Claimant Comments on Draft Proposed Decision, page 11.

[378] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[379] Exhibit E, Claimant Rebuttal Comments, page 12 [citing *Discharge of Stormwater Runoff*, 07-TC-09, page 107].

[380] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 1.

[381] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 103.

[382] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 105.

[383] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 106.

[384] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107.

Commission concluded that "[t]he voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one."[385]

Here, Proposition 218 does not impose a legal and constitutional hurdle, because fees for the provision of water services are expressly exempt from the voter approval requirements of Proposition 218.[386] The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."[387] Thus, an urban or agricultural water supplier that undertakes measures to ensure the conservation of water, to produce more water, and enhance the quality and reliability of its supply, is providing water service, within the meaning of the Omnibus Act. The statutory and regulatory metering and other conservation practices required of the claimants therefore describe "water service." Unlike the test claimants in *Discharge of Stormwater Runoff* (cities and counties), the services for which fees or charges would be increased are expressly exempt from the voter approval requirements in article XIII D, section 6(c), and the decision and reasoning of the Commission in *Discharge of Stormwater Runoff* is not relevant. Therefore, the Commission's earlier decision is distinguishable on the very same ground that renders *Connell* significantly poignant. The claimants cannot rely on the unwillingness of voters to raise fees, because the fees in question fall, based on the plain language of the Constitution, outside voter-approval requirement of article XIII D, section 6(c).

Claimants acknowledge that fees for water service "are excused from the formal election requirement under article XIII D section 6(c), [but] the majority protest provision in subdivision (a)(2) still applies and constitutes a legal barrier to Claimants' fee authority."[388] Claimants therefore argue that they "find themselves required to implement and pay for the newly mandated activities, yet are authorized to do no more than *propose* a fee increase that can be rejected by a simple majority of affected customers."[389]

However, the so-called "majority protest provision," which claimants allege constitutes a legal barrier to claimants' fee authority, presents either a mixed question of fact and law, which has not been demonstrated based on the evidence in the record, or a legal issue that is incumbent on the courts first to resolve. In order for the Commission to make findings that the claimants' fee authority has been diminished, or negated, pursuant to article XIII D, section 6(a), the claimants would have to provide evidence that they tried and failed to impose or increase the necessary fees,[390] or provide evidence that a court determined that Proposition 218 represents a

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[385] Exhibit X, Statement of Decision, *Discharge of Stormwater Runoff*, 07-TC-09, page 107 [citing *Connell v. Superior Court*, *supra*, 59 Cal.App.4th 382, at p. 401].

[386] See California Constitution, article XIII D, section 6(c).

[387] Government Code section 53750(m) (Stats. 2002, ch. 395).

[388] Exhibit R, Claimant Comments on Draft Proposed Decision, page 14.

[389] Exhibit R, Claimant Comments on Draft Proposed Decision, page 15.

[390] If a claimant were to provide evidence that it had tried and failed to impose or increase fees, that evidence could constitute costs "first incurred," within the meaning of Government Code section 17551, and a claimant otherwise barred from reimbursement under section 17556(d) could thus potentially demonstrate that it had incurred costs mandated by the state, as defined in

constitutional hurdle to fee authority as a matter of law. The Commission cannot now say, as a matter of law, that the claimants' fee authority is insufficient based on the speculative and uncertain threat of a "written protests against the proposed fee or charge [being] presented by a majority of owners of the identified parcels…"[391]

Based on the foregoing analysis, the Commission cannot find costs mandated by the state, within the meaning of Government Code section 17514, because the claimants have sufficient fee authority, as a matter of law, to establish or increase fees or charges to cover the costs of any new required activities.

V. Conclusion

Based on the foregoing analysis, the Commission finds that the Water Conservation Act of 2009, enacted as Statutes 2009-2010, 7th Extraordinary Session, chapter 4 (SBX7 7), and the Agricultural Water Measurement Regulations issued by the Department of Water Resources, found at Code of Regulations, title 23, section 597 et seq., do not impose a reimbursable state-mandated program on urban retail water suppliers or agricultural water suppliers within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The Commission therefore denies this test claim.

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section 17514. The Commission does not make findings on this issue, but merely observes the potentiality.

[391] See article XIII D, section 6(a)(2).

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
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RE: **Decision**

Water Conservation, 10-TC-12 and 12-TC-01
Water Conservation Act of 2009 et al.
South Feather Water and Power Agency, Paradise Irrigation District,
Oakdale Irrigation District, and Glenn-Colusa Irrigation District, Claimants

On December 5, 2014, the foregoing decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: December 12, 2014

Heather Halsey, Executive Director

SECTION 6. DECLARATIONS

Test Claim Title: SWRCB Water Supply Permit Amendment (2017PA-SCHOOLS) for PWS No. 3710020

Claimant: City of San Diego

DECLARATION OF DOUG CAMPBELL IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO

I, Doug Campbell, declare as follows:

1. I am a Senior Chemist of the Public Utilities Department (PUD) that oversees the Department's Environmental Monitoring and Technical Services Division for the City of San Diego (City). In that capacity, I have direct oversight of the City's implementation of monitoring requirements contained in the City's Domestic Water Supply Permit (the Permit) and in the Permit Amendment No. 2017PA-SCHOOLS (Permit Amendment), as adopted by the California State Water Resources Control Board (SWRCB).

2. I instructed and supervised each of the staff members who were required to perform this work as stated in the Test Claim Documents and this Declaration, and have personal knowledge of the work that was required by each of them at my direction.

3. I have reviewed sections of the Test Claim filing as set forth herein and am familiar with those provisions. I am also familiar with the pertinent sections of Permit Amendment No. 2017PA-SCHOOLS, which was issued by the SWRCB on January 17, 2017.

5. I have personal knowledge of the City's sources of funding for programs and activities required to comply with the Permit and the Permit Amendment.

6. I have personal knowledge of the facts contained in this declaration, and if called upon as a witness, I could and would competently testify to the truthfulness of these facts as set forth in this declaration.

7. Based on my knowledge of the Permit Amendment and its requirements, the Permit Amendment requires the City to undertake the following new activities not required by the City's Domestic Water Supply Permit and which are unique to local government entities:

SECTION 6. DECLARATIONS

Test Claim Title: SWRCB Water Supply Permit Amendment (2017PA-SCHOOLS) for PWS No. 3710020

Claimant: City of San Diego

DECLARATION OF DOUG CAMPBELL
IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO

a. The Lead and Copper Rule (LCR) is a United States federal regulation that requires San Diego Public Utilities to test for corrosivity of the City's water supply by analyzing samples from residential plumbing systems that contain copper and may contain lead. The LCR studies occur regularly every three years and are funded through rates charged by the Department. Since analyses required by the LCR are a normal part of the Public Utilities Department's scheduled responsibilities, and provide water quality information on a system-wide basis, no specific budget is earmarked for this activity. Instead, costs associated with LCR sampling and analyses have been included as part of the City's Public Utilities annual laboratory budget since the implementation of the regulation in the early 1990's. This service benefits all PUD customers for water, thus it is properly charged to all ratepayers.

b. The LCR differs markedly from the California state-mandated Lead in Schools amendment to the City's Water Supply Permit. Unlike the LCR that is examining corrosivity system-wide, the Lead in Schools amendment determines whether plumbing at a specific school site may be contaminating that facility's drinking water supply. This service directly benefits only the individual school tested and cannot be charged to all ratepayers.

c. The City's PUD was afforded very little time to develop this program. Schools were eligible to send sampling requests on the same day full details of the program became available to PUD. This required a significant investment of time on the part of management and staff to develop a thorough understanding of the program requirements, to seek answers to questions, and to become experts in all facets of the requirement such that proper information can be relayed to school officials.

d. This included review and understanding of DDW DRINC database, used to login schools requesting sampling, and to assign sample IDs to each school sampling location.

e. As a result of media attention and public pressure, the San Diego Unified School District (SDUSD) requested in March 2017 that all 198 of its schools be tested before the end of the 2016-2017 school year. This required a substantial investment of resources to quickly develop templates, training materials, webpages, database routines and naming conventions, sampling kits, and the like.

f. The volume of requests for school sampling for PUD as of January 1, 2018, was 255 schools, which is greater than any other county in the State, and represents nearly 12% of the 2,160 requests in the State to date. An investment was required into additional sample bottles and coolers for sampling kits totaling $3,730.40. (Exhibit 19). No other Public Water System was as impacted by this Permit Amendment as the City's PUD.

g. The Permit Amendment increases the service obligations imposed on the City, creating a number of new program requirements not present in the LCR or other state or federal regulations. These activities are not mandated by federal law, were not required as part of the City's initial permit or any previous permit amendment, and constitute a new program or higher level of service for which the City has and will continue to incur significant costs.

h. The Permit Amendment required the City to submit to the State Board's Division of Drinking Water (DDW) a comprehensive list of the names and addresses of all K-12 schools that the City serves water through a utility meter by July 1, 2017.

DECLARATION OF DOUG CAMPBELL
IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO

8. All of the work necessary to fulfill the required mandates of the Permit Amendment was either performed by me or at my direction, and I have personal knowledge of the staff time and expense needed to fulfill these mandates. (See, Exhibits 5-15, 17-35.)

9. The City is required to keep records of all written requests from a school for lead related assistance and provide the records to DDW, upon request. The City's annual Consumer Confidence Report must include a statement summarizing the number of schools requesting lead sampling. (See, Exhibit 1 - Permit Amendment No. 2017PA-Schools to COSD, ¶ 8.)

10. According to the Permit Amendment, PUD is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at up to five locations at each school, and is required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The Permit Amendments do *not* require the community water system to pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but the water system is required to conduct repeat sampling at the school to confirm elevated lead levels and the effectiveness of any corrective action taken by the school. (See, Exhibits 5-15, 17-35.)

11. The City's existing Permit and its prior amendments do not require PUD to perform lead testing at K-12 schools. Nor is the City required to perform such testing under the Federal Lead and Copper Rule (LCR). In 1991, the EPA adopted the LCR, which established "action levels" for lead. The LCR requires *schools* that have their own non-transient, non-

community water system supply to test water at the tap for a sample of their customers served (students) for lead levels. The LCR requires lead samples to be collected every six months.

12. There are approximately 500 schools in California that are permitted as a public water system because they have their own water supply, such as a well. Those schools are already required to test their taps for lead (and copper), and have been performing this testing for many years. No permit amendments were issued to schools that are already regulated as public water systems. However, most schools in California are served by community water systems which have not been required to test their water for lead under the current Lead and Copper Rule.

13. Under state regulations (virtually identical to the federal LCR), lead and copper testing is conducted on a regular basis. Public water systems conduct water sampling once every six months for lead. Testing frequency relaxes if test results consistently show no lead exceedances. According to the California Department of Public Health, the City's PUD is on a schedule to test for lead once every three years under Title 22's Reduced Monitoring program (Cal. Code Regs. Title 22, § 64675.5).

14. The City may not use any of the lead samples collected from schools as part of the Permit Amendment to satisfy federal or state LCR requirements. The City is required to communicate with the school after the lead sampling is complete and assist the school with interpreting the laboratory results as well as provide information regarding potential corrective actions if a school has lead levels above 15 ppb. (See, Exhibit 1.)

15. The Permit Amendment required extensive modifications to PUD's existing monitoring activities. Program Management elements include the general administration of the

program by management, supervisory, and support staff. This includes written and verbal communication with schools staff, the public, media, management, and concerned citizens and parents. As the scope of labor that this effort would require became apparent, management expended labor to communicate with City leadership, to discuss and seek agreement on the identification and solicitation of additional labor resources, to meet and confer with resources and their leadership, and to communicate program expectations and requirements. Labor was invested to track program documents and information – sampling requests, emails, phone calls, and requests for information.

16. For each sampling request that was received, staff were required to: prepare and send a response to the sampling request; submit a copy of the sampling request to the State; communicate with the school to schedule training meetings, and communicate school request status to PUD management; create and maintain a daily tracking spreadsheet that includes school request status, contact information, and other relevant information, and upgrading, updating, and maintenance of tracking spreadsheets. (See, Exhibits 5-15, 17-35.)

17. In addition, the Permit Amendment's Site Specific Planning Elements include tasks that are specific to sampling at a school site. Sampling plans were created by school staff using the template and guidelines provided by PUD. Staff review of these plans ensures that sites fall within permit amendment guidelines, are clearly identified and marked in the sampling plan, and are signed by appropriate and qualified school personnel. Correspondence was frequently required with school staff to clarify or request revision of sampling plans. Once deemed acceptable, information on the individual sample sites was required to be entered into the DDW

DRINC database to obtain State Sample IDs. These data also had to be entered into the PUD LIMS database, along with all identifying information, including the full description of each site and DRINC sample IDs. When all this information had been finalized and entered, sampling plans were signed by PUD staff and finalized as a pdf document. (See, Exhibits 5-15, 17-35.)

18. The large number of SDUSD requested schools, along with the short time period remaining before the end of the school year, required PUD to approve a minimum of 25 School Sample Plans per week to complete the project on time. For each school site, a sampling kit had to be prepared, including a printed copy of the sampling plan, chain of custody and associated paperwork; sample bottles and coolers had to be located, and sample bottles properly labeled. A trained PUD sampler had to be identified, briefed on the school, and given contact information for the school representative who would meet them at the school.

19. School sampling was conducted by a number of PUD staff, all of which had to be conducted on a Tuesday, Wednesday, Thursday, Friday, or for SDUSD Schools only by agreement with DDW, Saturday. According to the Permit Amendment, sampling was required to be conducted after water had been sitting stagnant in plumbing and fixtures for a minimum of six hours. This meant sampling had to be conducted prior to the start of the school day, as use of fixtures other than those identified and secured for sampling could disturb water in the plumbing system itself. This requirement limited the number of schools that could be sampled by an individual sampler on any given day. The large number of SDUSD requested schools, along with the short time period remaining before the end of the school year, required PUD to sample a minimum of 25 schools per week to complete the project on time.

DECLARATION OF DOUG CAMPBELL
IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO

20. Following sampling, school samplers deliver sampling kit and associated paperwork to WQCS QA/DM staff. Paperwork is reviewed, sample status is updated in LIMS database, paperwork is finalized, and samples are routed and stored in the proper location. One thousand, one hundred and fifteen field samples were analyzed in FY17 for the PUD Lead in Schools program. This does not include quality control and other samples required in each analytical batch.

21. A reporting template was developed for use in the Lead in Schools program. This report needed to contain sufficient information to track samples in DDW website, the PUD LIMS database, and for the schools and public to understand the source from which the sample was obtained. All reports were reviewed by supervisory or management staff. This review included the referencing of SDUSD or other school websites to ensure the report contained proper identifying information for the school and reports with schools of similar names were clarified. (See, Exhibits 8-17.)

22. Per Permit Amendment requirements, consultation was provided to schools in interpreting results obtained via this program. For school fixtures with lead results above 15 ppb, the parameters of the program were explained, including the option to resample, remediate, or remove the fixture from service. When remediation was complete, resamples were obtained by PUD and reports of these results were provided to the schools. Results for each school sample were required to be uploaded into the DDW EDT database.

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DECLARATION OF DOUG CAMPBELL
IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO

23. Utilizing the State-provided Write On software for this task, as PUD does for routine regulatory reporting, would have required the generation of a separate report for each of the 1,115 samples analyzed. Instead staff developed a method to convert reports into files that are compatible with the EDT system (called .res files) in order to upload results *en masse*. This required a significant amount of time for trial and error, and the upload of a test set of samples prior to the upload of the complete data set. (See, Exhibits 5-15, 17-36.)

24. I have personal knowledge that a search was done to find external funding for this new work and services, and there are no dedicated state, federal, or local funds that are or will be available to pay for any of the new programs set forth in this declaration. I am not aware of any fee, charge or tax which the City would have the discretion to impose under California law to recover any portion of these new activities.

25. I have personal knowledge of all of the staff time required to fulfill the new programs, services and mandates that are necessary to comply with the Permit Amendment. The monies spent by the City and PUD to comply with all of the work and services described in my declaration and the Written Narrative provided as part of this Test Claim are true and accurate, as also stated in the Declaration of Rex Ragucos and Exhibit 36, referenced therein, which I have confirmed.

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SECTION 6. DECLARATIONS

Test Claim Title: SWRCB Water Supply Permit Amendment (2017PA-SCHOOLS) for PWS No. 3710020

Claimant: City of San Diego

DECLARATION OF DOUG CAMPBELL
IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 29th day of March 2018 in San Diego, California.

Doug Campbell, Senior Chemist
Public Utilities Department

MARA W. ELLIOTT, City Attorney
SANNA R. SINGER, Assistant City Attorney
THOMAS C. ZELENY, Sr. Chief Deputy City Attorney
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San Diego, California 92101-4100
Telephone: (619) 533-5800
Facsimile: (619) 533-5856

Attorneys for Claimant City of San Diego

COMMISSION ON STATE MANDATES, STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Lead Sampling in Schools Permit Amendment No. 2017PA-SCHOOLS City of San Diego Public Water System No. 3710020	Test Claim No. 17-TC-03 **DECLARATION OF LEE ANN JONES-SANTOS IN SUPPORT OF TEST CLAIM FILED BY THE CITY OF SAN DIEGO**

I, Lee Ann Jones-Santos, declare:

1. I am the Assistant Director of the Public Utilities Department of the City of San Diego and have been in that role since May 2015. From April 2010 to May 2015, I was the Deputy Director of Finance and Information Technology for the Public Utilities Department. I have personal knowledge of the facts stated below, and if I were called as a witness I could competently testify about what I have written in this declaration.

2. My responsibilities include overseeing the finances of the Public Utilities Department. The Department is funded primarily by the Water Fund and the Sewer Fund, which consist of water ratepayer funds and sewer ratepayer funds, respectively.

3. My responsibilities also include overseeing the Customer Service Division of the Public Utilities Department, which is responsible for opening and closing customer accounts,

sending periodic billing statements to customers for water and sewer service, and answering questions from customers.

4. Water and sewer accounts may be opened by a property owner or a tenant of the property. Whoever opens the account is responsible for payment of the water and sewer bill.

5. There are approximately 281,000 retail connections for water service managed by the Public Utilities Department.

6. The Water Fund and the Sewer Fund are held and accounted for separately, to avoid commingling of ratepayer funds, consistent with my understanding of the restrictions imposed on the use of ratepayer funds under Proposition 218.

7. Similarly, the Water and Sewer Funds are held and accounted for separately from the City's General Fund, in part to avoid using ratepayer funds to pay for costs that are not associated with providing water and sewer service.

8. The Water Fund owns surface reservoirs and open space land that is popular for boating, fishing, hiking and picnicking. These recreational activities are available to the general public, whether or not they are City water ratepayers.

9. The Public Utilities Department charges the General Fund about $2.5 million each fiscal year to pay for the recreational activities on Water Fund property, to ensure water ratepayers funds are not used for programs available to the general public.

10. The Water Fund has incurred all the costs of lead testing performed by the City at the requests of schools to date, pending reimbursement from the City's General Fund or some other source.

I declare under the penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Dated: November 7, 2018

By _____
Lee Ann Jones-Santos
Assistant Director

Agency At-A-Glance

This report allows users to view key information for mulitiple Regulating Agencies on one screen. Clicking on the Regulating Agency name will generate a detailed report of the associated Water Systems. If you would like to see all Water Systems from your search criteria click on "See All" located at the bottom of the results table.

Regulating Agency	Total Water Systems	Total Population	Total Service Connections
DISTRICT 01 - KLAMATH	75	173,359	61,282
DISTRICT 02 - LASSEN	76	509,495	176,788
DISTRICT 03 - MENDOCINO	54	226,045	70,295
DISTRICT 04 - SAN FRANCISCO	50	3,836,477	987,724
DISTRICT 05 - MONTEREY	29	357,170	92,152
DISTRICT 06 - SANTA BARBARA	65	1,265,926	339,471
DISTRICT 07 - HOLLYWOOD	23	1,206,228	259,502
DISTRICT 08 - SANTA ANA	36	5,274,972	762,668
DISTRICT 09 - SACRAMENTO	43	1,644,292	499,470
DISTRICT 10 - STOCKTON	70	1,121,155	311,822
DISTRICT 11 - MERCED	74	868,460	224,842
DISTRICT 12 - VISALIA	38	637,536	166,675
DISTRICT 13 - SAN BERNARDINO	62	1,701,262	466,810
DISTRICT 14 - SAN DIEGO	34	3,053,812	676,902
DISTRICT 15 - METROPOLITAN	23	5,014,404	860,746
DISTRICT 16 - CENTRAL	31	1,070,998	234,350
DISTRICT 17 - SANTA CLARA	55	1,180,663	291,426
DISTRICT 18 - SONOMA	70	650,823	203,731
DISTRICT 19 - TEHACHAPI	32	121,999	31,637
DISTRICT 20 - RIVERSIDE	40	2,317,098	652,595
DISTRICT 21 - VALLEY	49	255,193	73,810
DISTRICT 22 - ANGELES	19	733,632	160,774
DISTRICT 23 - FRESNO	85	196,513	40,872
DISTRICT 24 - TULARE	60	237,658	57,569
LPA32 - ALPINE COUNTY	2	50	16
LPA33 - AMADOR COUNTY	2	260	98
LPA34 - BUTTE COUNTY	15	2,160	397
LPA37 - CONTRA COSTA COUNTY	17	3,155	365
LPA39 - EL DORADO COUNTY	13	3,612	86
LPA43 - IMPERIAL COUNTY	14	5,667	541
LPA44 - INYO COUNTY	18	2,446	126
LPA46 - KINGS COUNTY	9	2,808	59
LPA49 - LA COUNTY	11	12,628	121
LPA50 - MADERA COUNTY	40	10,780	1,159
LPA56 - MONO COUNTY	17	1,530	412
LPA57 - MONTEREY COUNTY	21	5,233	39
LPA58 - NAPA COUNTY	9	1,083	187
LPA59 - NEVADA COUNTY	9	1,315	119
LPA61 - PLACER COUNTY	4	450	140
LPA62 - PLUMAS COUNTY	19	1,204	503
LPA63 - RIVERSIDE COUNTY	15	3,935	890
LPA64 - SACRAMENTO COUNTY	23	23,835	877
LPA66 - SAN BERNARDINO COUNTY	25	19,333	921
LPA67 - SAN DIEGO COUNTY	28	6,955	630
LPA69 - SAN JOAQUIN COUNTY	51	9,518	1,267
LPA70 - SAN LUIS OBISPO COUNTY	10	2,742	23
LPA72 - SANTA BARBARA COUNTY	7	3,578	146
LPA74 - SANTA CRUZ COUNTY	8	9,057	24
LPA75 - SHASTA COUNTY	16	4,232	122
LPA80 - STANISLAUS COUNTY	30	7,984	683
LPA82 - TEHAMA COUNTY	19	3,024	110
LPA87 - YOLO COUNTY	9	3,562	293
LPA88 - YUBA COUNTY	2	300	156
See All	1656	33,807,606	7,714,423

Agency At-A-Glance

This report allows users to view key information for mulitiple Regulating Agencies on one screen. Clicking on the Regulating Agency name will generate a detailed report of the associated Water Systems. If you would like to see all Water Systems from your search criteria click on "See All" located at the bottom of the results table.

Regulating Agency	Total Water Systems	Total Population	Total Service Connections
DISTRICT 01 - KLAMATH	121	29,082	6,976
DISTRICT 02 - LASSEN	56	17,973	11,094
DISTRICT 03 - MENDOCINO	148	47,363	14,685
DISTRICT 04 - SAN FRANCISCO	52	99,444	26,915
DISTRICT 05 - MONTEREY	78	313,757	90,539
DISTRICT 06 - SANTA BARBARA	77	281,507	90,742
DISTRICT 07 - HOLLYWOOD	21	622,982	157,702
DISTRICT 08 - SANTA ANA	15	170,557	43,091
DISTRICT 09 - SACRAMENTO	21	534,426	100,291
DISTRICT 10 - STOCKTON	10	183,594	46,776
DISTRICT 11 - MERCED	215	80,768	22,302
DISTRICT 12 - VISALIA	140	593,914	154,974
DISTRICT 13 - SAN BERNARDINO	40	399,731	102,069
DISTRICT 14 - SAN DIEGO	14	148,697	32,781
DISTRICT 15 - METROPOLITAN	14	681,156	59,499
DISTRICT 16 - CENTRAL	13	371,345	74,336
DISTRICT 17 - SANTA CLARA	115	1,398,867	342,827
DISTRICT 18 - SONOMA	369	60,546	17,601
DISTRICT 19 - TEHACHAPI	143	52,335	17,853
DISTRICT 20 - RIVERSIDE	12	47,423	13,896
DISTRICT 21 - VALLEY	81	167,464	45,799
DISTRICT 22 - ANGELES	22	957,551	220,235
DISTRICT 23 - FRESNO	235	44,482	5,625
DISTRICT 24 - TULARE	194	31,665	4,645
LPA32 - ALPINE COUNTY	22	1,222	450
LPA33 - AMADOR COUNTY	49	4,076	722
LPA34 - BUTTE COUNTY	65	10,868	2,056
LPA35 - CALAVERAS COUNTY	35	3,733	555
LPA37 - CONTRA COSTA COUNTY	76	8,040	2,074
LPA39 - EL DORADO COUNTY	96	11,909	1,741
LPA43 - IMPERIAL COUNTY	44	6,510	1,130
LPA44 - INYO COUNTY	65	6,532	1,907
LPA46 - KINGS COUNTY	19	1,824	220
LPA49 - LA COUNTY	95	20,297	4,059
LPA50 - MADERA COUNTY	36	3,595	1,540
LPA54 - MERCED COUNTY	18	352	150
LPA56 - MONO COUNTY	47	7,418	1,002
LPA57 - MONTEREY COUNTY	292	25,172	6,310
LPA58 - NAPA COUNTY	176	12,960	890
LPA59 - NEVADA COUNTY	54	9,068	1,077
LPA61 - PLACER COUNTY	87	20,443	1,525
LPA62 - PLUMAS COUNTY	110	7,673	1,088
LPA63 - RIVERSIDE COUNTY	215	22,029	8,231
LPA64 - SACRAMENTO COUNTY	122	20,895	3,749
LPA66 - SAN BERNARDINO COUNTY	221	59,194	6,599
LPA67 - SAN DIEGO COUNTY	114	16,620	5,910
LPA69 - SAN JOAQUIN COUNTY	235	24,447	2,810
LPA70 - SAN LUIS OBISPO COUNTY	118	12,311	2,473
LPA72 - SANTA BARBARA COUNTY	112	16,516	1,984
LPA74 - SANTA CRUZ COUNTY	88	10,451	2,320
LPA75 - SHASTA COUNTY	117	14,029	3,624
LPA80 - STANISLAUS COUNTY	172	16,236	2,518
LPA82 - TEHAMA COUNTY	77	7,318	2,431
LPA87 - YOLO COUNTY	73	11,323	1,180
LPA88 - YUBA COUNTY	58	22,416	1,408
See All	5314	7,752,106	1,776,986

Senate Bill No. 334

Passed the Senate September 10, 2015

_____

Secretary of the Senate

Passed the Assembly September 8, 2015

_____

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day of _____, 2015, at _____ o'clock ____M.

_____

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 32242 and 38086 of, to add Sections 32241.5, 32246, and 32249 to, and to add Article 13 (commencing with Section 49580) to Chapter 9 of Part 27 of Division 4 of Title 2 of, the Education Code, relating to pupil health.

LEGISLATIVE COUNSEL'S DIGEST

SB 334, Leyva. Pupil health: drinking water.

(1) Existing law requires a school district to provide access to free, fresh drinking water during meal times in school food service areas, unless the governing board of a school district adopts a resolution stating that it is unable to comply with this requirement and demonstrating the reasons why it is unable to comply due to fiscal constraints or health and safety concerns. Existing law requires the resolution to be publicly noticed on at least 2 consecutive meeting agendas and approved by at least a majority of the governing board of the school district.

This bill would delete the provision authorizing a school district to adopt a resolution stating that it is unable to provide access to free, fresh drinking water during meal times. The bill would instead specify that a school district shall provide access to free, fresh, and clean drinking water during meal times through the use of drinking water access points, as defined. By imposing additional duties on school districts, this bill would impose a state-mandated local program.

This bill would require a school district that has drinking water sources with drinking water that does not meet the United States Environmental Protection Agency drinking water standards for lead or any other contaminant to close access to those drinking water sources, to provide alternative drinking water sources, as specified, and to notify specified persons if the school district is required to provide those alternative drinking water sources. By imposing additional duties on pupil schools and school districts, this bill would impose a state-mandated local program.

(2) Under existing law, known as the Lead-Safe Schools Protection Act, the State Department of Public Health is required to perform various activities related to reducing the risk of exposure

to lead hazards in public schools, including, among other activities, working with the State Department of Education to develop voluntary guidelines to ensure that lead hazards are minimized in the course of school repair and maintenance programs and abatement procedures.

This bill would repeal the requirement that the State Department of Public Health develop voluntary guidelines. The bill would instead require the State Department of Education to make information available to school districts about the United States Environmental Protection Agency's technical guidance for reducing lead in drinking water in schools. The bill would prohibit drinking water that does not meet the United States Environmental Protection Agency drinking water standards for lead from being provided at a school facility. The bill would require a public school that has lead-containing plumbing components to flush all drinking water sources at the beginning of each schoolday, except as provided. By imposing additional duties on public schools and school districts, this bill would impose a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 32241.5 is added to the Education Code, to read:

32241.5. The department shall make information available to school districts, by posting on its Internet Web site or through any other means for distributing information it deems effective, about the United States Environmental Protection Agency's technical guidance for reducing lead in drinking water in schools.

SEC. 2. Section 32242 of the Education Code is amended to read:

32242. The State Department of Public Health shall do all of the following:

(a) Design and implement a strategy for identifying the characteristics of high-risk schools and provide a basis for statewide estimates of the presence of lead in schools attended by young children.

(b) Conduct a sample survey, as described in Section 32241, to determine the likely extent and distribution of lead exposure to children from paint on the school, soil in play areas at the school, drinking water at the tap, and other potential sources identified by the State Department of Public Health for this purpose. To the maximum extent possible, limited sample testing shall be used to validate survey results. The State Department of Public Health shall compile and summarize the results of that survey and report those results to the Legislature and the department.

(c) Within 60 days of the completion of testing a schoolsite, the State Department of Public Health shall notify the principal of the school or director of the schoolsite of the survey results. Within 45 days of receiving the survey results, the principal or director, as the case may be, shall notify the teachers and other school personnel and parents of the survey results.

(d) Make recommendations to the Legislature and the department, based on the survey results and consideration of appropriate federal and state standards, on the feasibility and necessity of conducting statewide lead testing and any additional action needed relating to lead contamination in the schools.

(e) As deemed necessary and appropriate in view of the survey results, develop environmental lead testing methods and standards to ensure the scientific integrity of results, for use by schools and contractors designated by schools for that purpose.

(f) Evaluate the most current cost-effective lead abatement technologies.

SEC. 3. Section 32246 is added to the Education Code, to read:

32246. Drinking water that does not meet the United States Environmental Protection Agency drinking water standards for lead shall not be provided at a school facility.

SEC. 4. Section 32249 is added to the Education Code, to read:

32249. A school that has lead-containing plumbing components shall flush all drinking water sources at the beginning of each schoolday, consistent with protocols recommended by the United

States Environmental Protection Agency. A school is not required to flush drinking water sources that have been shut off or have been certified as meeting the United States Environmental Protection Agency's drinking water standards for lead.

SEC. 5. Section 38086 of the Education Code is amended to read:

38086. (a) A school district shall provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction, including, but not necessarily limited to, areas where reimbursable meals under the federal National School Lunch Program or the federal School Breakfast Program are served or consumed. A school district may comply with this section by, among other means, providing cups and containers of water or soliciting or receiving donated bottled water.

(b) A school district shall comply with this section through the use of drinking water access points.

(c) For purposes of this section, "drinking water access point" is defined as a station, plumbed or unplumbed, where pupils can access free, fresh, and clean drinking water. An unplumbed access point may include water bottles and portable water dispensers.

SEC. 6. Article 13 (commencing with Section 49580) is added to Chapter 9 of Part 27 of Division 4 of Title 2 of the Education Code, to read:

Article 13. Drinking Water

49580. (a) A school district that has drinking water sources with drinking water that does not meet the United States Environmental Protection Agency drinking water standards for lead or any other contaminant shall close access to those drinking water sources immediately upon receipt of test results or notification from the public water system.

(b) (1) If, as a result of closing access to a drinking water source pursuant to subdivision (a), a schoolsite within a school district no longer has the minimum number of drinking fountains required pursuant to Chapter 4 (commencing with Section 401.0) of the California Plumbing Code (Part 5 of Title 24 of the California Code of Regulations), the school district shall provide alternative drinking water sources at that schoolsite.

(2) An alternative drinking water source provided pursuant to this subdivision while the source of contamination is being mitigated may be from plumbed or unplumbed sources. Unplumbed sources may include, but are not limited to, portable water sources and bottled water.

(c) A school district shall notify parents or legal guardians, pupils, teachers, and other school personnel of drinking water test results, immediately upon receipt of those test results, if the school district is required to provide alternative drinking water sources.

SEC. 7. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Approved _____, 2015

_____

Governor

OFFICE OF THE GOVERNOR

OCT 9 2015

To the Members of the California State Senate:

I am returning Senate Bill 334 without my signature.

This bill requires a school district that has a drinking water source that does not meet the Environmental Protection Agency's drinking water standards to provide alternative drinking water to their students.

I agree that all California students should have access to safe drinking water but this bill creates a state mandate of uncertain but possibly very large magnitude.

As our first order of business, local schools should understand the nature of their water quality problem, if there is one. Accordingly, I am directing the State Water Resources Control Board to work with school districts and local public water systems to incorporate water quality testing in schools as part of their lead and copper rule. School districts should utilize this information to ensure all students are provided safe water.

Sincerely,

Edmund G. Brown Jr.

Up^ Add To My Favorites

*** CALIFORNIA CONSTITUTION - CONS**

ARTICLE XIII A [TAX LIMITATION] [SECTION 1 - SEC. 7] *(Article 13A added June 6, 1978, by Prop. 13. Initiative measure.)*

SECTION 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any of the following:

(1) Indebtedness approved by the voters prior to July 1, 1978.

(2) Bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition.

(3) Bonded indebtedness incurred by a school district, community college district, or county office of education for the construction, reconstruction, rehabilitation, or replacement of school facilities, including the furnishing and equipping of school facilities, or the acquisition or lease of real property for school facilities, approved by 55 percent of the voters of the district or county, as appropriate, voting on the proposition on or after the effective date of the measure adding this paragraph. This paragraph shall apply only if the proposition approved by the voters and resulting in the bonded indebtedness includes all of the following accountability requirements:

(A) A requirement that the proceeds from the sale of the bonds be used only for the purposes specified in Article XIII A, Section 1(b)(3), and not for any other purpose, including teacher and administrator salaries and other school operating expenses.

(B) A list of the specific school facilities projects to be funded and certification that the school district board, community college board, or county office of education has evaluated safety, class size reduction, and information technology needs in developing that list.

(C) A requirement that the school district board, community college board, or county office of education conduct an annual, independent performance audit to ensure that the funds have been expended only on the specific projects listed.

(D) A requirement that the school district board, community college board, or county office of education conduct an annual, independent financial audit of the proceeds from the sale of the bonds until all of those proceeds have been expended for the school facilities projects.

(c) Notwithstanding any other provisions of law or of this Constitution, school districts, community college districts, and county offices of education may levy a 55 percent vote ad valorem tax pursuant to subdivision (b).

(Sec. 1 amended Nov. 7, 2000, by Prop. 39. Initiative measure.)

SEC. 2. (a) The "full cash value" means the county assessor's valuation of real property as shown on the 1975–76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975–76 full cash value may be reassessed to reflect that valuation. For purposes of this section, "newly constructed" does not include real property that is reconstructed after a disaster, as declared by the Governor, where the fair market value of the real property, as reconstructed, is comparable to its fair market value prior to the disaster. For purposes of this section, the term "newly constructed" does not include that portion of an existing structure that consists of the construction or reconstruction of seismic retrofitting components, as defined by the Legislature.

However, the Legislature may provide that, under appropriate circumstances and pursuant to definitions and procedures established by the Legislature, any person over the age of 55 years who resides in property that is eligible for the homeowner's exemption under subdivision (k) of Section 3 of Article XIII and any implementing legislation may transfer the base year value of the property entitled to exemption, with the adjustments authorized by subdivision (b), to any replacement dwelling of equal or lesser value located within the same county and purchased or newly constructed by that person as his or her principal residence within two years of the sale of the original property. For purposes of this section, "any person over the age of 55 years" includes a married couple one member of which is over the age of 55 years. For purposes of this section, "replacement dwelling" means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, and any land on which it may be situated. For purposes of this section, a two-dwelling unit shall be considered as two separate single-family dwellings. This paragraph shall apply to any replacement dwelling that was purchased or newly constructed on or after November 5, 1986.

In addition, the Legislature may authorize each county board of supervisors, after consultation with the local affected agencies within the county's boundaries, to adopt an ordinance making the provisions of this subdivision relating to transfer of base year value also applicable to situations in which the replacement dwellings are located in that county and the original properties are located in another county within this State. For purposes of this paragraph, "local affected agency" means any city, special district, school district, or community college district that receives an annual property tax revenue allocation. This paragraph applies to any replacement dwelling that was purchased or newly constructed on or after the date the county adopted the provisions of this subdivision relating to transfer of base year value, but does not apply to any replacement dwelling that was purchased or newly constructed before November 9, 1988.

The Legislature may extend the provisions of this subdivision relating to the transfer of base year values from original properties to replacement dwellings of homeowners over the age of 55 years to severely disabled homeowners, but only with respect to those replacement dwellings purchased or newly constructed on or after the effective date of this paragraph.

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction, or other factors causing a decline in value.

(c) For purposes of subdivision (a), the Legislature may provide that the term "newly constructed" does not include any of the following:

(1) The construction or addition of any active solar energy system.

(2) The construction or installation of any fire sprinkler system, other fire extinguishing system, fire detection system, or fire-related egress improvement, as defined by the Legislature, that is constructed or installed after the effective date of this paragraph.

(3) The construction, installation, or modification on or after the effective date of this paragraph of any portion or structural component of a single- or multiple-family dwelling that is eligible for the homeowner's exemption if the construction, installation, or modification is for the purpose of making the dwelling more accessible to a severely disabled person.

(4) The construction, installation, removal, or modification on or after the effective date of this paragraph of any portion or structural component of an existing building or structure if the construction, installation, removal, or modification is for the purpose of making the building more accessible to, or more usable by, a disabled person.

(5) The construction or addition, completed on or after January 1, 2019, of a rain water capture system, as defined by the Legislature.

(d) For purposes of this section, the term "change in ownership" does not include the acquisition of real property as a replacement for comparable property if the person acquiring the real property has been displaced from the property replaced by eminent domain proceedings, by acquisition by a public entity, or governmental action that has resulted in a judgment of inverse condemnation. The real property acquired shall be deemed comparable to the property replaced if it is similar in size, utility, and function, or if it conforms to state regulations defined by the Legislature governing the relocation of persons displaced by governmental actions. This subdivision applies to any property acquired after March 1, 1975, but affects only those assessments of that property that occur after the provisions of this subdivision take effect.

(e) (1) Notwithstanding any other provision of this section, the Legislature shall provide that the base year value of property that is substantially damaged or destroyed by a disaster, as declared by the Governor, may be transferred to comparable property within the same county that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property.

(2) Except as provided in paragraph (3), this subdivision applies to any comparable replacement property acquired or newly constructed on or after July 1, 1985, and to the determination of base year values for the 1985–86 fiscal year and fiscal years thereafter.

(3) In addition to the transfer of base year value of property within the same county that is permitted by paragraph (1), the Legislature may authorize each county board of supervisors to adopt, after consultation with affected local agencies within the county, an ordinance allowing the transfer of the base year value of property that is located within another county in the State and is substantially damaged or destroyed by a disaster, as declared by the Governor, to comparable replacement property of equal or lesser value that is located within the adopting county and is acquired or newly constructed within three years of the substantial damage or destruction of the original property as a replacement for that property. The scope and amount of the benefit provided to a property owner by the transfer of base year value of property pursuant to this paragraph shall not exceed the scope and amount of the benefit provided to a property owner by the transfer of base year value of property pursuant to subdivision (a). For purposes of this paragraph, "affected local agency" means any city, special district, school district, or community college district that receives an annual allocation of ad valorem property tax revenues. This paragraph applies to any comparable replacement property that is acquired or newly constructed as a replacement for property substantially damaged or destroyed by a disaster, as declared by the Governor, occurring on or after October 20, 1991, and to the determination of base year values for the 1991–92 fiscal year and fiscal years thereafter.

(f) For the purposes of subdivision (e):

(1) Property is substantially damaged or destroyed if it sustains physical damage amounting to more than 50 percent of its value immediately before the disaster. Damage includes a diminution in the value of property as a result of restricted access caused by the disaster.

(2) Replacement property is comparable to the property substantially damaged or destroyed if it is similar in size, utility, and function to the property that it replaces, and if the fair market value of the acquired property is comparable to the fair market value of the replaced property prior to the disaster.

(g) For purposes of subdivision (a), the terms "purchased" and "change in ownership" do not include the purchase or transfer of real property between spouses since March 1, 1975, including, but not limited to, all of the following:

(1) Transfers to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor.

(2) Transfers to a spouse that take effect upon the death of a spouse.

(3) Transfers to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation.

(4) The creation, transfer, or termination, solely between spouses, of any coowner's interest.

(5) The distribution of a legal entity's property to a spouse or former spouse in exchange for the interest of the spouse in the legal entity in connection with a property settlement agreement or a decree of dissolution of a marriage or legal separation.

(h) (1) For purposes of subdivision (a), the terms "purchased" and "change in ownership" do not include the purchase or transfer of the principal residence of the transferor in the case of a purchase or transfer between parents and their children, as defined by the Legislature, and the purchase or transfer of the first one million dollars ($1,000,000) of the full cash value of all other real property between parents and their children, as defined by the Legislature. This subdivision applies to both voluntary transfers and transfers resulting from a court order or judicial decree.

(2) (A) Subject to subparagraph (B), commencing with purchases or transfers that occur on or after the date upon which the measure adding this paragraph becomes effective, the exclusion established by paragraph (1) also applies to a purchase or transfer of real property between grandparents and their grandchild or grandchildren, as defined by the Legislature, that otherwise qualifies under paragraph (1), if all of the parents of that grandchild or those grandchildren, who qualify as the children of the grandparents, are deceased as of the date of the purchase or transfer.

(B) A purchase or transfer of a principal residence shall not be excluded pursuant to subparagraph (A) if the transferee grandchild or grandchildren also received a principal residence, or interest therein, through another purchase or transfer that was excludable pursuant to paragraph (1). The full cash value of any real property, other than a principal residence, that was transferred to the grandchild or grandchildren pursuant to a purchase or transfer that was excludable pursuant to paragraph (1), and the full cash value of a principal residence that fails to qualify for exclusion as a result of the preceding sentence, shall be included in applying, for purposes of subparagraph (A), the one-million-dollar ($1,000,000) full cash value limit specified in paragraph (1).

(i) (1) Notwithstanding any other provision of this section, the Legislature shall provide with respect to a qualified contaminated property, as defined in paragraph (2), that either, but not both, of the following apply:

(A) (i) Subject to the limitation of clause (ii), the base year value of the qualified contaminated property, as adjusted as authorized by subdivision (b), may be transferred to a replacement property that is acquired or newly constructed as a replacement for the qualified contaminated property, if the replacement real property has a fair market value that is equal to or less than the fair market value of the qualified contaminated property if that property were not contaminated and, except as otherwise provided by this clause, is located within the same county. The base year value of the qualified contaminated property may be transferred to a replacement real property located within another county if the board of supervisors of that other county has, after consultation with the affected local agencies within that county, adopted a resolution authorizing an intercounty transfer of base year value as so described.

(ii) This subparagraph applies only to replacement property that is acquired or newly constructed within five years after ownership in the qualified contaminated property is sold or otherwise transferred.

(B) In the case in which the remediation of the environmental problems on the qualified contaminated property requires the destruction of, or results in substantial damage to, a structure located on that property, the term "new construction" does not include the repair of a substantially damaged structure, or the construction of a structure replacing a destroyed structure on the qualified contaminated property, performed after the remediation of the environmental problems on that property, provided that the repaired or replacement structure is similar in size, utility, and function to the original structure.

(2) For purposes of this subdivision, "qualified contaminated property" means residential or nonresidential real property that is all of the following:

(A) In the case of residential real property, rendered uninhabitable, and in the case of nonresidential real property, rendered unusable, as the result of either environmental problems, in the nature of and including, but not limited to, the presence of toxic or hazardous materials, or the remediation of those environmental problems, except where the existence of the environmental problems was known to the owner, or to a related individual or entity as described in paragraph (3), at the time the real property was acquired or constructed. For purposes of this subparagraph, residential real property is "uninhabitable" if that property, as a result of health hazards caused by or associated with the environmental problems, is unfit for human habitation, and nonresidential real property is "unusable" if that property, as a result of health hazards caused by or associated with the environmental problems, is unhealthy and unsuitable for occupancy.

(B) Located on a site that has been designated as a toxic or environmental hazard or as an environmental cleanup site by an agency of the State of California or the federal government.

(C) Real property that contains a structure or structures thereon prior to the completion of environmental cleanup activities, and that structure or structures are substantially damaged or destroyed as a result of those environmental cleanup activities.

(D) Stipulated by the lead governmental agency, with respect to the environmental problems or environmental cleanup of the real property, not to have been rendered uninhabitable or unusable, as applicable, as described in subparagraph (A), by any act or omission in which an owner of that real property participated or acquiesced.

(3) It shall be rebuttably presumed that an owner of the real property participated or acquiesced in any act or omission that rendered the real property uninhabitable or unusable, as applicable, if that owner is related to any individual or entity that committed that act or omission in any of the following ways:

(A) Is a spouse, parent, child, grandparent, grandchild, or sibling of that individual.

(B) Is a corporate parent, subsidiary, or affiliate of that entity.

(C) Is an owner of, or has control of, that entity.

(D) Is owned or controlled by that entity.

If this presumption is not overcome, the owner shall not receive the relief provided for in subparagraph (A) or (B) of paragraph (1). The presumption may be overcome by presentation of satisfactory evidence to the assessor, who shall not be bound by the findings of the lead governmental agency in determining whether the presumption has been overcome.

(4) This subdivision applies only to replacement property that is acquired or constructed on or after January 1, 1995, and to property repairs performed on or after that date.

(j) Unless specifically provided otherwise, amendments to this section adopted prior to November 1, 1988, are effective for changes in ownership that occur, and new construction that is completed, after the effective date of the amendment. Unless specifically provided otherwise, amendments to this section adopted after November 1,

1988, are effective for changes in ownership that occur, and new construction that is completed, on or after the effective date of the amendment.

(Subdivision (c) amended June 5, 2018, by Prop. 72; Res.Ch. 1, 2018. Entire Sec. 2 amended June 8, 2010, by Prop. 13. Res.Ch. 115, 2008.)

SEC. 3. (a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

(b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.

(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and 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.

(Sec. 3 amended Nov. 2, 2010, by Prop. 26. Initiative measure.)

Section 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

(Sec. 4 added June 6, 1978, by Prop. 13. Initiative measure.)

Section 5. This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

(Sec. 5 added June 6, 1978, by Prop. 13. Initiative measure.)

Section 6. If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

(Sec. 6 added June 6, 1978, by Prop. 13. Initiative measure.)

SEC. 7. Section 3 of this article does not apply to the California Children and Families First Act of 1998.

(Sec. 7 added Nov. 3, 1998, by Prop. 10. Initiative measure. Effective on date election results were certified.)

*** CALIFORNIA CONSTITUTION - CONS**

ARTICLE XIII B GOVERNMENT SPENDING LIMITATION [SEC. 1 - SEC. 15] *(Article 13B added Nov. 6, 1979, by Prop. 4. Initiative measure.)*

SEC. 1. The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.

(Sec. 1 amended June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990.)

SEC. 1.5. The annual calculation of the appropriations limit under this article for each entity of local government shall be reviewed as part of an annual financial audit.

(Sec. 1.5 added June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990.)

SEC. 2. (a) (1) Fifty percent of all revenues received by the State in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the State in compliance with this article during that fiscal year and the fiscal year immediately following it shall be transferred and allocated, from a fund established for that purpose, pursuant to Section 8.5 of Article XVI.

(2) Fifty percent of all revenues received by the State in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the State in compliance with this article during that fiscal year and the fiscal year immediately following it shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

(b) All revenues received by an entity of government, other than the State, in a fiscal year and in the fiscal year immediately following it in excess of the amount which may be appropriated by the entity in compliance with this article during that fiscal year and the fiscal year immediately following it shall be returned by a revision of tax rates or fee schedules within the next two subsequent fiscal years.

(Sec. 2 amended June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990.)

SEC. 3. The appropriations limit for any fiscal year pursuant to Sec. 1 shall be adjusted as follows:

(a) In the event that the financial responsibility of providing services is transferred, in whole or in part, whether by annexation, incorporation or otherwise, from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount.

(b) In the event that the financial responsibility of providing services is transferred, in whole or in part, from an entity of government to a private entity, or the financial source for the provision of services is transferred, in whole or in part, from other revenues of an entity of government, to regulatory licenses, user charges or user fees, then for the year of such transfer the appropriations limit of such entity of government shall be decreased accordingly.

(c) (1) In the event an emergency is declared by the legislative body of an entity of government, the appropriations limit of the affected entity of government may be exceeded provided that the appropriations limits in the following three years are reduced accordingly to prevent an aggregate increase in appropriations resulting from the emergency.

(2) In the event an emergency is declared by the Governor, appropriations approved by a two-thirds vote of the legislative body of an affected entity of government to an emergency account for expenditures relating to that emergency shall not constitute appropriations subject to limitation. As used in this paragraph, "emergency" means

the existence, as declared by the Governor, of conditions of disaster or of extreme peril to the safety of persons and property within the State, or parts thereof, caused by such conditions as attack or probable or imminent attack by an enemy of the United States, fire, flood, drought, storm, civil disorder, earthquake, or volcanic eruption.

(Subd. (c) amended June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990. Entire Sec. 3 was added Nov. 6, 1979, by Prop. 4; initiative measure.)

SEC. 4. The appropriations limit imposed on any new or existing entity of government by this Article may be established or changed by the electors of such entity, subject to and in conformity with constitutional and statutory voting requirements. The duration of any such change shall be as determined by said electors, but shall in no event exceed four years from the most recent vote of said electors creating or continuing such change.

(Sec. 4 added Nov. 6, 1979, by Prop. 4. Initiative measure.)

SEC. 5. Each entity of government may establish such contingency, emergency, unemployment, reserve, retirement, sinking fund, trust, or similar funds as it shall deem reasonable and proper. Contributions to any such fund, to the extent that such contributions are derived from the proceeds of taxes, shall for purposes of this Article constitute appropriations subject to limitation in the year of contribution. Neither withdrawals from any such fund, nor expenditures of (or authorizations to expend) such withdrawals, nor transfers between or among such funds, shall for purposes of this Article constitute appropriations subject to limitation.

(Sec. 5 added Nov. 6, 1979, by Prop. 4. Initiative measure.)

SECTION 5.5. Prudent State Reserve. The Legislature shall establish a prudent state reserve fund in such amount as it shall deem reasonable and necessary. Contributions to, and withdrawals from, the fund shall be subject to the provisions of Section 5 of this Article.

(Sec. 5.5 added Nov. 8, 1988, by Prop. 98. Initiative measure.)

SEC. 6. (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates:

(1) Legislative mandates requested by the local agency affected.

(2) Legislation defining a new crime or changing an existing definition of a crime.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

(4) Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I.

(b) (1) Except as provided in paragraph (2), for the 2005–06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.

(2) Payable claims for costs incurred prior to the 2004–05 fiscal year that have not been paid prior to the 2005–06 fiscal year may be paid over a term of years, as prescribed by law.

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service.

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section.

(c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

(Sec. 6 amended June 3, 2014, by Prop. 42. Res.Ch. 123, 2013.)

SEC. 7. Nothing in this Article shall be construed to impair the ability of the State or of any local government to meet its obligations with respect to existing or future bonded indebtedness.

(Sec. 7 added Nov. 6, 1979, by Prop. 4. Initiative measure.)

SEC. 8. As used in this article and except as otherwise expressly provided herein:

(a) "Appropriations subject to limitation" of the State means any authorization to expend during a fiscal year the proceeds of taxes levied by or for the State, exclusive of state subventions for the use and operation of local government (other than subventions made pursuant to Section 6) and further exclusive of refunds of taxes, benefit payments from retirement, unemployment insurance, and disability insurance funds.

(b) "Appropriations subject to limitation" of an entity of local government means any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes.

(c) "Proceeds of taxes" shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, "proceeds of taxes" shall include subventions received from the State, other than pursuant to Section 6, and, with respect to the State, proceeds of taxes shall exclude such subventions.

(d) "Local government" means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the State.

(e) (1) "Change in the cost of living" for the State, a school district, or a community college district means the percentage change in California per capita personal income from the preceding year.

(2) "Change in the cost of living" for an entity of local government, other than a school district or a community college district, shall be either (A) the percentage change in California per capita personal income from the preceding year, or (B) the percentage change in the local assessment roll from the preceding year for the jurisdiction due to the addition of local nonresidential new construction. Each entity of local government shall select its change in the cost of living pursuant to this paragraph annually by a recorded vote of the entity's governing body.

(f) "Change in population" of any entity of government, other than the State, a school district, or a community college district, shall be determined by a method prescribed by the Legislature.

"Change in population" of a school district or a community college district shall be the percentage change in the average daily attendance of the school district or community college district from the preceding fiscal year, as determined by a method prescribed by the Legislature.

"Change in population" of the State shall be determined by adding (1) the percentage change in the State's population multiplied by the percentage of the State's budget in the prior fiscal year that is expended for other than educational purposes for kindergarten and grades one to 12, inclusive, and the community colleges, and (2) the percentage change in the total statewide average daily attendance in kindergarten and grades one to 12, inclusive, and the community colleges, multiplied by the percentage of the State's budget in the prior fiscal year that is expended for educational purposes for kindergarten and grades one to 12, inclusive, and the community colleges.

Any determination of population pursuant to this subdivision, other than that measured by average daily attendance, shall be revised, as necessary, to reflect the periodic census conducted by the United States Department of Commerce, or successor department.

(g) "Debt service" means appropriations required to pay the cost of interest and redemption charges, including the funding of any reserve or sinking fund required in connection therewith, on indebtedness existing or legally authorized as of January 1, 1979, or on bonded indebtedness thereafter approved according to law by a vote of the electors of the issuing entity voting in an election for that purpose.

(h) The "appropriations limit" of each entity of government for each fiscal year is that amount which total annual appropriations subject to limitation may not exceed under Sections 1 and 3. However, the "appropriations limit" of each entity of government for fiscal year 1978–79 is the total of the appropriations subject to limitation of the entity for that fiscal year. For fiscal year 1978–79, state subventions to local governments, exclusive of federal grants, are deemed to have been derived from the proceeds of state taxes.

(i) Except as otherwise provided in Section 5, "appropriations subject to limitation" do not include local agency loan funds or indebtedness funds, investment (or authorizations to invest) funds of the State, or of an entity of local government in accounts at banks or savings and loan associations or in liquid securities.

(Sec. 8 amended June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990.)

SEC. 9. "Appropriations subject to limitation" for each entity of government do not include:

(a) Appropriations for debt service.

(b) Appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.

(c) Appropriations of any special district which existed on January 1, 1978, and which did not as of the 1977–78 fiscal year levy an ad valorem tax on property in excess of 12 1/2 cents per $100 of assessed value; or the appropriations of any special district then existing or thereafter created by a vote of the people, which is totally funded by other than the proceeds of taxes.

(d) Appropriations for all qualified capital outlay projects, as defined by the Legislature.

(e) Appropriations of revenue which are derived from any of the following:

(1) That portion of the taxes imposed on motor vehicle fuels for use in motor vehicles upon public streets and highways at a rate of more than nine cents ($0.09) per gallon.

(2) Sales and use taxes collected on that increment of the tax specified in paragraph (1).

(3) That portion of the weight fee imposed on commercial vehicles which exceeds the weight fee imposed on those vehicles on January 1, 1990.

(Sec. 9 amended June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990.)

SEC. 10. This Article shall be effective commencing with the first day of the fiscal year following its adoption.

(Sec. 10 added Nov. 6, 1979, by Prop. 4. Initiative measure.)

SEC. 10.5. For fiscal years beginning on or after July 1, 1990, the appropriations limit of each entity of government shall be the appropriations limit for the 1986–87 fiscal year adjusted for the changes made from that fiscal year pursuant to this article, as amended by the measure adding this section, adjusted for the changes required by Section 3.

(Sec. 10.5 added June 5, 1990, by Prop. 111. Res.Ch. 66, 1989. Effective July 1, 1990.)

SEC. 11. If any appropriation category shall be added to or removed from appropriations subject to limitation, pursuant to final judgment of any court of competent jurisdiction and any appeal therefrom, the appropriations limit shall be adjusted accordingly. If any section, part, clause or phrase in this Article is for any reason held invalid or unconstitutional, the remaining portions of this Article shall not be affected but shall remain in full force and effect.

(Sec. 11 added Nov. 6, 1979, by Prop. 4. Initiative measure.)

SEC. 12. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the Cigarette and Tobacco Products Surtax Fund created by the Tobacco Tax and Health Protection Act of 1988. No adjustment in the appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the Cigarette and Tobacco Products Surtax Fund created by the Tobacco Tax and Health Protection Act of 1988.

(Sec. 12 added Nov. 8, 1988, by Prop. 99. Initiative measure.)

SEC. 13. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the California Children and Families First Trust Fund created by the California Children and Families First Act of 1998. No adjustment in the appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the California Children and Families First Trust Fund. The surtax created by the California Children and Families First Act of 1998 shall not be considered General Fund revenues for the purposes of Section 8 of Article XVI.

(Sec. 13 added Nov. 3, 1998, by Prop. 10. Initiative measure. Effective on date election results were certified.)

SEC. 14. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenue from the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 Fund created by the California Healthcare, Research and Prevention Tobacco Tax Act of 2016. No adjustment in the appropriations limit

of any entity of government shall be required pursuant to Section 3 as a result of revenue being deposited in or appropriated from the California Healthcare, Research and Prevention Tobacco Tax Act of 2016 Fund.

(Sec. 14 added Nov. 8, 2016, by Prop. 56. Initiative measure.)

SEC. 15. "Appropriations subject to limitation" of each entity of government shall not include appropriations of revenues from the Road Maintenance and Rehabilitation Account created by the Road Repair and Accountability Act of 2017, or any other revenues deposited into any other funds pursuant to the act. No adjustment in the appropriations limit of any entity of government shall be required pursuant to Section 3 as a result of revenues being deposited in or appropriated from the Road Maintenance and Rehabilitation Account created by the Road Repair and Accountability Act of 2017 or any other account pursuant to the act.

(Sec. 15 added June 5, 2018, by Prop. 69. Res.Ch. 30, 2017.)

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*** CALIFORNIA CONSTITUTION - CONS**

ARTICLE XIII C [VOTER APPROVAL FOR LOCAL TAX LEVIES] [SECTION 1 - SEC. 3] *(Article 13C added Nov. 5, 1996, by Prop. 218. Initiative measure.)*

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and 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.

(Sec. 1 amended Nov. 2, 2010, by Prop. 26. Initiative measure.)

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is

imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

(Sec. 2 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

(Sec. 3 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

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*** CALIFORNIA CONSTITUTION - CONS**

ARTICLE XIII D [ASSESSMENT AND PROPERTY-RELATED FEE REFORM] [SECTION 1 - SEC. 6] *(Article 13D added Nov. 5, 1996, by Prop. 218. Initiative measure.)*

SECTION 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.

(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

(c) Affect existing laws relating to the imposition of timber yield taxes.

(Sec. 1 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 2. Definitions. As used in this artide:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

(Sec. 2 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Artide XIII A.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

(Sec. 3 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

(Sec. 4 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 5. Effective Date. Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

(Sec. 5 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

SEC. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(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 imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.
Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. 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 shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

(Sec. 6 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

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EDUCATION CODE - EDC

TITLE 2. ELEMENTARY AND SECONDARY EDUCATION [33000 - 64100] *(Title 2 enacted by Stats. 1976, Ch. 1010.)*

DIVISION 3. LOCAL ADMINISTRATION [35000 - 45460] *(Division 3 enacted by Stats. 1976, Ch. 1010.)*

PART 23. SUPPLEMENTAL SERVICES [38000 - 38139] *(Part 23 repealed (by Sec. 6) and added by Stats. 1996, Ch. 277, Sec. 5.)*

CHAPTER 3. Cafeterias [38080 - 38103] *(Chapter 3 added by Stats. 1996, Ch. 277, Sec. 5.)*

ARTICLE 1. Establishment and Use [38080 - 38086.1] *(Article 1 added by Stats. 1996, Ch. 277, Sec. 5.)*

38080. The term "cafeteria" as used in this code is considered synonymous with the term "food service."

(Added by Stats. 1996, Ch. 277, Sec. 5. Effective January 1, 1997. Operative January 1, 1998.)

38081. The governing board of any school district may establish cafeterias in the schools under its jurisdiction whenever in its judgment it is advisable to do so.

(Added by Stats. 1996, Ch. 277, Sec. 5. Effective January 1, 1997. Operative January 1, 1998.)

38082. Food shall not be sold at any cafeteria operated by a school district to anyone except pupils and employees of any school district, members of the governing board thereof, and members or employees of the fund or association maintaining the cafeteria; provided, however, that nothing herein contained shall prohibit the use of the cafeteria facilities by any work or harvest camp maintained by or within the district, and by persons entitled to use the school under the Civic Center Act; and provided further, that the governing board of any school district operating a cafeteria may exempt by formal resolution of the board other individuals and organizations from the operation of this section including senior citizens participating in any program conducted pursuant to Chapter 6 (commencing with Section 9500) of Division 8.5 of the Welfare and Institutions Code.

(Added by Stats. 1996, Ch. 277, Sec. 5. Effective January 1, 1997. Operative January 1, 1998.)

38083. Perishable foodstuffs and seasonal commodities needed in the operation of cafeterias may be purchased by the school district in accordance with rules and regulations for such purchase adopted by the governing board of said district notwithstanding any provisions of this code in conflict with such rules and regulations.

(Added by Stats. 1996, Ch. 277, Sec. 5. Effective January 1, 1997. Operative January 1, 1998.)

38084. The food served shall be sold to the patrons of the cafeterias at such a price as will pay the cost of maintaining the cafeterias, exclusive of the costs made a charge against the funds of the school district by this chapter, and items made a charge against the funds of the school district by resolution of the governing board under authority of this chapter.

(Added by Stats. 1996, Ch. 277, Sec. 5. Effective January 1, 1997. Operative January 1, 1998.)

38086. (a) Except as provided in subdivision (b), by July 1, 2011, a school district shall provide access to free, fresh drinking water during meal times in the food service areas of the schools under its jurisdiction, including, but not necessarily limited to, areas where reimbursable meals under the National School Lunch Program or the federal School Breakfast Program are served or consumed. A school district may comply with this section by, among other means, providing cups and containers of water or soliciting or receiving donated bottled water.

(b) The governing board of a school district may adopt a resolution stating that it is unable to comply with the requirements of this section and demonstrating the reasons why it is unable to comply due to fiscal constraints or health and safety concerns. The resolution shall be publicly noticed on at least two consecutive meeting agendas,

first as an information item and second as an action item, and approved by at least a majority of the governing board.

(Added by Stats. 2010, Ch. 558, Sec. 1. (SB 1413) Effective January 1, 2011.)

38086.1. (a) The department may receive funds transferred from any available state and federal source, to be allocated by the department to school districts for the purpose of complying with the requirements of Section 38086.

(b) Subject to all laws, guidelines, policies, and criteria applicable to the funds, school districts may use funds received pursuant to subdivision (a) for water quality projects, including, but not limited to, water treatment, water facilities restructuring, water filling stations, and maintenance of water facilities.

(c) The department shall do both of the following:

(1) Consult with the State Department of Public Health, the Department of Water Resources, and the State Water Resources Control Board to identify available sources of funding, including, but not limited to, funding from Proposition 1, approved by the voters at the November 4, 2014, statewide general election, funds for safe drinking water programs administered by the department, the State Department of Public Health, the Department of Water Resources, and the State Water Resources Control Board, other state funding, and federal funding available to fund school water quality and infrastructure.

(2) Post the information collected pursuant to paragraph (1) on the department's Internet Web site.

(d) Nothing in this section or Section 38086 affects criteria established by the State Water Resources Control Board for funds and funding programs administered by the State Water Resources Control Board.

(Added by Stats. 2015, Ch. 664, Sec. 2. (AB 496) Effective January 1, 2016.)

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PUBLIC UTILITIES CODE - PUC

DIVISION 1. REGULATION OF PUBLIC UTILITIES [201 - 3260] *(Division 1 enacted by Stats. 1951, Ch. 764.)*

PART 1. PUBLIC UTILITIES ACT [201 - 2120] *(Part 1 enacted by Stats. 1951, Ch. 764.)*

CHAPTER 8.5. Service Duplication [1501 - 1507] *(Chapter 8.5 added by Stats. 1965, Ch. 1752.)*

1501. The Legislature recognizes the substantial obligation undertaken by a privately owned public utility which is franchised under the Constitution or by a certificate of public convenience and necessity to provide water service in that the utility must provide facilities to meet the present and prospective needs of those in its service area who may request service. At the same time, the rates that may be charged for water service by a regulated utility are fixed by the Public Utilities Commission at levels which assume that the facilities so installed will remain used and useful in the operation of the utility for a period of time measured by the physical life of such facilities.

The Legislature finds and declares that the potential loss of value of such facilities which may result from the construction and operation by a political subdivision of similar or duplicating facilities in the service area of such a private utility often deters such private utility from obtaining a certificate or extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.

The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.

(Added by Stats. 1965, Ch. 1752.)

1502. (a) As used in this chapter, "political subdivision" means a county, city and county, city, municipal water district, county water district, irrigation district, public utility district, California water district, or any other public corporation.

(b) As used in this chapter, "service area" means an area served by a privately owned public utility in which the facilities have been dedicated to public use and in which territory the utility is required to render service to the public.

(c) As used in this chapter, "operating system" means an integrated water system for the supply of water to a service area of a privately owned public utility.

(d) As used in this chapter, "private utility" means a privately owned public utility providing a water service.

(e) As used in this chapter, "type of service" means, among other things, domestic, commercial, industrial, fire protection, wholesale, or irrigation service.

(f) As used in this chapter, "reclaimed water" means reclaimed water as defined in Section 13050 of the Water Code.

(g) As used in this chapter, "private use" means an entity's use of its own reclaimed water.

(Amended by Stats. 1994, Ch. 859, Sec. 1. Effective January 1, 1995.)

1503. The Legislature finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public purpose to the extent that the private utility is injured by reason of any of its property employed in providing the water service being made inoperative, reduced in value or rendered useless to the private utility for the purpose of providing water service to the service area.

(Amended by Stats. 1975, Ch. 1240.)

1504. Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court of competent jurisdiction pursuant to the laws of this state relating to eminent domain, including consideration of the useful value to the political subdivision of the property so taken.

Whenever the compensation by a political subdivision under this section is an amount equal to the just compensation value of all the property of the private utility in the operating system that the private utility employs in providing water service to the service area, the political subdivision may, by resolution, provide for the acquisition of all such property.

A political subdivision engaged in activities set forth in Section 1503 shall pay just compensation for the property so taken for public purposes.

(Added by Stats. 1965, Ch. 1752.)

1505. The provisions of Sections 1503 and 1504 will be applicable to any private utility which constructs facilities to provide or extend water service or provides or extends such service to any territory theretofore served by a political subdivision with the same type of service.

(Added by Stats. 1965, Ch. 1752.)

1505.5. The provisions of Sections 1503 and 1504 will be applicable to any political subdivision which constructs facilities to provide or extend water service or provides or extends such service to any territory theretofore actually being lawfully served by any other political subdivision with facilities designed and constructed to provide the same type of service. The provisions of this section shall not apply to any territory, or portion thereof, which is the subject of any final judgment or litigation pending on the effective date of this section involving any duplication of water service occurring prior to the effective date of this section.

(Added by Stats. 1973, Ch. 997.)

1506. (a) As used in this chapter, "private utility" includes a mutual water company. In its application to mutual water companies, this chapter affects and relates only to the property, or portion of any property, of a mutual water company that is employed by the company in providing water service in or for a territory that is actually being provided with water service by the company when a political subdivision constructs facilities to provide or extend water service or provides or extends the service to the territory, and that territory shall constitute the "service area" of a mutual water company as used in Section 1502.

(b) Subject to the preservation of rights of a mutual water company in subdivision (c), this section does not apply to a political subdivision that constructs facilities to provide or extend recycled water service to the territory of the mutual water company, if the political subdivision complies with the Water Recycling Act of 1991 (Chapter 7.5 (commencing with Section 13575) of Division 7 of the Water Code).

(c) The exception in subdivision (b), for a political subdivision that constructs facilities to provide or extend recycled water service to the territory of the mutual water company, does not apply to those customers and their properties to which the mutual water company was providing recycled water service, or for whom the mutual water company has identified and developed specific plans to provide recycled water service, as of December 31, 2014.

(Amended by Stats. 2014, Ch. 817, Sec. 1. (AB 2443) Effective January 1, 2015.)

1507. This chapter shall not be applicable if all of the following conditions are met:

(a) The use is limited to the private use of reclaimed water by an entity that owns a water reclamation plant.

(b) The use is limited to the premises of a water reclamation plant or landfill owned by the entity that owns or operates the water reclamation plant.

(c) The use is limited to dust suppression, and irrigation purposes, and other uses on the site for which reclaimed water has been approved by the State Department of Health Services.

(d) No existing reclaimed water facilities, whether owned or operated by a private utility or political subdivision, can reasonably and economically serve the intended use.

(e) If reclaimed water is used on the premises of a landfill, the entity provides appropriate compensation to the private utility or political subdivision for those facilities directly used for the water services being replaced by reclaimed water service. Appropriate compensation shall not include valuations based on revenues lost by the private utility or political subdivision due to replacement of water service with reclaimed water.

(f) This section shall apply only in Los Angeles County.

(Added by Stats. 1994, Ch. 859, Sec. 2. Effective January 1, 1995.)

Section 2.1: Prohibition on Construction, Operation or Maintenance of Facilities Related to Offshore Drilling

Neither the City Council nor any officer or employee of the City shall take any action, or permit any action to be taken, which directly or indirectly authorizes or permits the construction, operation or maintenance of any pipeline within the City for the transmission of any crude oil or natural gas taken or removed from any offshore crude oil or natural gas drilling or pumping operations within 100 nautical miles of the coastline of the County of San Diego; nor shall the City Council or any officer or employee of the City take any action, or permit any action to be taken, which directly or indirectly authorizes or permits the construction, operation or maintenance of any commercial or industrial facility within the City, including but not necessarily limited to crude oil or natural gas storage facilities, which operated directly or indirectly in support of any offshore crude oil or natural gas drilling or pumping operations within 100 nautical miles of the coastline of the County of San Diego.
(Addition voted 11-4-1986; effective 12-8-1986.)

Section 3: Extent of Municipal Jurisdiction

The municipal jurisdiction of The City of San Diego shall extend to the limits and boundaries of said City and over the tidelands and waters of the Bay of San Diego, and into the Pacific Ocean to the extent of one Marine League. In addition thereto The City of San Diego shall have the right and power to prepare and adopt such rules and regulations as it may deem necessary for the regulation, use, and government of the water system of The City of San Diego, both within and without the territorial limits of said City, and such rules and regulations having been adopted by Ordinance, shall have the force and effect of law.

ARTICLE V

(Effective 01-01-2006, all executive authority, power, and responsibilities conferred upon the City Manager in this Article were transferred to the Mayor. See section 260.)

EXECUTIVE AND ADMINISTRATIVE SERVICE

Section 26: Administrative Code

The existing Departments, Divisions and Boards and existing Offices of the City Government are hereby continued unless changed by the provisions of this Charter or by ordinance of the Council. The Council shall by ordinance, by majority vote, adopt an administrative code providing for the detailed powers and duties of the administrative offices and departments of the City Government, based upon the provisions of this Charter. Thereafter, except as established by the provisions of this Charter, the Council may change, abolish, combine, and rearrange the departments, divisions and boards of the City Government provided for in said administrative code, but such ordinance creating, combining, abolishing or decreasing the powers of any department, division or board shall require a vote of two-thirds of the members elected to the Council. The Council may by ordinance, if authorized so to do by the general law of the State, provide that any function of the City may be performed by the County or that any function of the County may be performed by the City, provided the respective legislative bodies authorize and approve such transfer and assumption of function. There may also be established a combined City and County district for the performance of any function.
(Amendment voted 09-17-1963; effective 02-11-1964.)
(Amendment voted 11-08-1977; effective 01-20-1978.)
Prior Language

Section 26.1: Public Services Required

It shall be the obligation and responsibility of The City of San Diego to provide public works services, water services, building inspection services, public health services, park and recreation services, library services, and such other services and programs as may be desired, under such terms and conditions as may be authorized by the Council by ordinance.
(Addition voted 09-17-1963; effective 02-11-1964.)

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 5, 2018

Title 40: Protection of Environment
PART 141—NATIONAL PRIMARY DRINKING WATER REGULATIONS
Subpart I—Control of Lead and Copper

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§141.86 Monitoring requirements for lead and copper in tap water.

(a) *Sample site location.* (1) By the applicable date for commencement of monitoring under paragraph (d)(1) of this section, each water system shall complete a materials evaluation of its distribution system in order to identify a pool of targeted sampling sites that meets the requirements of this section, and which is sufficiently large to ensure that the water system can collect the number of lead and copper tap samples required in paragraph (c) of this section. All sites from which first draw samples are collected shall be selected from this pool of targeted sampling sites. Sampling sites may not include faucets that have point-of-use or point-of-entry treatment devices designed to remove inorganic contaminants.

(2) A water system shall use the information on lead, copper, and galvanized steel that it is required to collect under §141.42(d) of this part [special monitoring for corrosivity characteristics] when conducting a materials evaluation. When an evaluation of the information collected pursuant to §141.42(d) is insufficient to locate the requisite number of lead and copper sampling sites that meet the targeting criteria in paragraph (a) of this section, the water system shall review the sources of information listed below in order to identify a sufficient number of sampling sites. In addition, the system shall seek to collect such information where possible in the course of its normal operations (e.g., checking service line materials when reading water meters or performing maintenance activities):

(i) All plumbing codes, permits, and records in the files of the building department(s) which indicate the plumbing materials that are installed within publicly and privately owned structures connected to the distribution system;

(ii) All inspections and records of the distribution system that indicate the material composition of the service connections that connect a structure to the distribution system; and

(iii) All existing water quality information, which includes the results of all prior analyses of the system or individual structures connected to the system, indicating locations that may be particularly susceptible to high lead or copper concentrations.

(3) The sampling sites selected for a community water system's sampling pool (“tier I sampling sites”) shall consist of single family structures that:

(i) Contain copper pipes with lead solder installed after 1982 or contain lead pipes; and/or

(ii) Are served by a lead service line. When multiple-family residences comprise at least 20 percent of the structures served by a water system, the system may include these types of structures in its sampling pool.

(4) Any community water system with insufficient tier 1 sampling sites shall complete its sampling pool with “tier 2 sampling sites”, consisting of buildings, including multiple-family residences that:

(i) Contain copper pipes with lead solder installed after 1982 or contain lead pipes; and/or

(ii) Are served by a lead service line.

(5) Any community water system with insufficient tier 1 and tier 2 sampling sites shall complete its sampling pool with “tier 3 sampling sites”, consisting of single family structures that contain copper pipes with lead solder installed before 1983. A community water system with insufficient tier 1, tier 2, and tier 3 sampling sites shall complete its sampling pool with representative sites throughout the distribution system. For the purpose of this paragraph, a representative site is a site in which the plumbing materials used at that site would be commonly found at other sites served by the water system.

(6) The sampling sites selected for a non-transient noncommunity water system (“tier I sampling sites”) shall consist of buildings that:

(i) Contain copper pipes with lead solder installed after 1982 or contain lead pipes; and/or

(ii) Are served by a lead service line.

(7) A non-transient non-community water system with insufficient tier 1 sites that meet the targeting criteria in paragraph (a)(6) of this section shall complete its sampling pool with sampling sites that contain copper pipes with lead solder installed before 1983. If additional sites are needed to complete the sampling pool, the non-transient non-community water system shall use representative sites throughout the distribution system. For the purpose of this paragraph, a representative site is a site in which the plumbing materials used at that site would be commonly found at other sites served by the water system.

(8) Any water system whose distribution system contains lead service lines shall draw 50 percent of the samples it collects during each monitoring period from sites that contain lead pipes, or copper pipes with lead solder, and 50 percent of the samples from sites served by a lead service line. A water system that cannot identify a sufficient number of sampling sites served by a lead service line shall collect first-draw samples from all of the sites identified as being served by such lines.

(b) *Sample collection methods.* (1) All tap samples for lead and copper collected in accordance with this subpart, with the exception of lead service line samples collected under §141.84(c) and samples collected under paragraph (b)(5) of this section, shall be first-draw samples.

(2) Each first-draw tap sample for lead and copper shall be one liter in volume and have stood motionless in the plumbing system of each sampling site for at least six hours. First-draw samples from residential housing shall be collected from the cold water kitchen tap or bathroom sink tap. First-draw samples from a nonresidential building shall be one liter in volume and shall be collected at an interior tap from which water is typically drawn for consumption. Non-first-draw samples collected in lieu of first-draw samples pursuant to paragraph (b)(5) of this section shall be one liter in volume and shall be collected at an interior tap from which water is typically drawn for consumption. First-draw samples may be collected by the system or the system may allow residents to collect first-draw samples after instructing the residents of the sampling procedures specified in this paragraph. To avoid problems of residents handling nitric acid, acidification of first-draw samples may be done up to 14 days after the sample is collected. After acidification to resolubilize the metals, the sample must stand in the original container for the time specified in the approved EPA method before the sample can be analyzed. If a system allows residents to perform sampling, the system may not challenge, based on alleged errors in sample collection, the accuracy of sampling results.

(3) Each service line sample shall be one liter in volume and have stood motionless in the lead service line for at least six hours. Lead service line samples shall be collected in one of the following three ways:

(i) At the tap after flushing the volume of water between the tap and the lead service line. The volume of water shall be calculated based on the interior diameter and length of the pipe between the tap and the lead service line;

(ii) Tapping directly into the lead service line; or

(iii) If the sampling site is a building constructed as a single-family residence, allowing the water to run until there is a significant change in temperature which would be indicative of water that has been standing in the lead service line.

(4) A water system shall collect each first draw tap sample from the same sampling site from which it collected a previous sample. If, for any reason, the water system cannot gain entry to a sampling site in order to collect a follow-up tap sample, the system may collect the follow-up tap sample from another sampling site in its sampling pool as long as the new site meets the same targeting criteria, and is within reasonable proximity of the original site.

(5) A non-transient non-community water system, or a community water system that meets the criteria of §141.85(b)(7), that does not have enough taps that can supply first-draw samples, as defined in §141.2, may apply to the State in writing to substitute non-first-draw samples. Such systems must collect as many first-draw samples from appropriate taps as possible and identify sampling times and locations that would likely result in the longest standing time for the remaining sites. The State has the discretion to waive the requirement for prior State approval of non-first-draw sample sites selected by the system, either through State regulation or written notification to the system.

(c) *Number of samples.* Water systems shall collect at least one sample during each monitoring period specified in paragraph (d) of this section from the number of sites listed in the first column ("standard monitoring") of the table in this paragraph. A system conducting reduced monitoring under paragraph (d)(4) of this section shall collect at least one sample from the number of sites specified in the second column ("reduced monitoring") of the table in this paragraph during each monitoring period specified in paragraph (d)(4) of this section. Such reduced monitoring sites shall be representative of the sites required for standard monitoring. A public water system that has fewer than five drinking water taps, that can be used for human consumption meeting the sample site criteria of paragraph (a) of this section to reach the required number of sample sites listed in paragraph (c) of this section, must collect at least one sample from each tap and then must collect additional samples from those taps on different days during the monitoring period to meet the required number of sites. Alternatively the State may allow these public water systems to collect a number of samples less than the number of sites specified in paragraph

(c) of this section, provided that 100 percent of all taps that can be used for human consumption are sampled. The State must approve this reduction of the minimum number of samples in writing based on a request from the system or onsite verification by the State. States may specify sampling locations when a system is conducting reduced monitoring. The table is as follows:

System size (number of people served)	Number of sites (standard monitoring)	Number of sites (reduced monitoring)
>100,000	100	50
10,001 to 100,000	60	30
3,301 to 10,000	40	20
501 to 3,300	20	10
101 to 500	10	5
≤100	5	5

(d) *Timing of monitoring*—(1) *Initial tap sampling.* The first six-month monitoring period for small, medium-size and large systems shall begin on the following dates:

System size (No. people served)	First six-month monitoring period begins on
>50,000	January 1, 1992.
3,301 to 50,000	July 1, 1992.
≤3,300	July 1, 1993.

(i) All large systems shall monitor during two consecutive six-month periods.

(ii) All small and medium-size systems shall monitor during each six-month monitoring period until:

(A) The system exceeds the lead or copper action level and is therefore required to implement the corrosion control treatment requirements under §141.81, in which case the system shall continue monitoring in accordance with paragraph (d)(2) of this section, or

(B) The system meets the lead and copper action levels during two consecutive six-month monitoring periods, in which case the system may reduce monitoring in accordance with paragraph (d)(4) of this section.

(2) *Monitoring after installation of corrosion control and source water treatment.* (i) Any large system which installs optimal corrosion control treatment pursuant to §141.81(d)(4) shall monitor during two consecutive six-month monitoring periods by the date specified in §141.81(d)(5).

(ii) Any small or medium-size system which installs optimal corrosion control treatment pursuant to §141.81(e)(5) shall monitor during two consecutive six-month monitoring periods by the date specified in §141.81(e)(6).

(iii) Any system which installs source water treatment pursuant to §141.83(a)(3) shall monitor during two consecutive six-month monitoring periods by the date specified in §141.83(a)(4).

(3) *Monitoring after State specifies water quality parameter values for optimal corrosion control.* After the State specifies the values for water quality control parameters under §141.82(f), the system shall monitor during each subsequent six-month monitoring period, with the first monitoring period to begin on the date the State specifies the optimal values under §141.82(f).

(4) *Reduced monitoring.* (i) A small or medium-size water system that meets the lead and copper action levels during each of two consecutive six-month monitoring periods may reduce the number of samples in accordance with paragraph (c) of this section, and reduce the frequency of sampling to once per year. A small or medium water system collecting fewer than five samples as specified in paragraph (c) of this section, that meets the lead and copper action levels during each of two consecutive six-month monitoring periods may reduce the frequency of sampling to once per year. In no case can the system reduce the number of samples required below the minimum of one sample per available tap. This sampling shall begin during the calendar year immediately following the end of the second consecutive six-month monitoring period.

(ii) Any water system that meets the lead action level and maintains the range of values for the water quality control parameters reflecting optimal corrosion control treatment specified by the State under §141.82(f) during each of two consecutive six-month monitoring periods may reduce the frequency of monitoring to once per year and reduce the number of lead and copper samples in accordance with paragraph (c) of this section if it receives written approval from the State. This sampling shall begin during the calendar year immediately following the end of the second consecutive six-month monitoring period. The State shall review monitoring, treatment, and other relevant information submitted by the water system in accordance with §141.90, and shall notify the system in writing when it determines the system is eligible to commence reduced monitoring pursuant to this paragraph. The State shall review, and where appropriate, revise its determination when the system submits new monitoring or treatment data, or when other data relevant to the number and frequency of tap sampling becomes available.

(iii) A small or medium-size water system that meets the lead and copper action levels during three consecutive years of monitoring may reduce the frequency of monitoring for lead and copper from annually to once every three years. Any water system that meets the lead action level and maintains the range of values for the water quality control parameters reflecting optimal corrosion control treatment specified by the State under §141.82(f) during three consecutive years of monitoring may reduce the frequency of monitoring from annually to once every three years if it receives written approval from the State. Samples collected once every three years shall be collected no later than every third calendar year. The State shall review monitoring, treatment, and other relevant information submitted by the water system in accordance with §141.90, and shall notify the system in writing when it determines the system is eligible to reduce the frequency of monitoring to once every three years. The State shall review, and where appropriate, revise its determination when the system submits new monitoring or treatment data, or when other data relevant to the number and frequency of tap sampling becomes available.

(iv) A water system that reduces the number and frequency of sampling shall collect these samples from representative sites included in the pool of targeted sampling sites identified in paragraph (a) of this section. Systems sampling annually or less frequently shall conduct the lead and copper tap sampling during the months of June, July, August, or September unless the State has approved a different sampling period in accordance with paragraph (d)(4)(iv)(A) of this section.

(A) The State, at its discretion, may approve a different period for conducting the lead and copper tap sampling for systems collecting a reduced number of samples. Such a period shall be no longer than four consecutive months and must represent a time of normal operation where the highest levels of lead are most likely to occur. For a non-transient non-community water system that does not operate during the months of June through September, and for which the period of normal operation where the highest levels of lead are most likely to occur is not known, the State shall designate a period that represents a time of normal operation for the system. This sampling shall begin during the period approved or designated by the State in the calendar year immediately following the end of the second consecutive six-month monitoring period for systems initiating annual monitoring and during the three-year period following the end of the third consecutive calendar year of annual monitoring for systems initiating triennial monitoring.

(B) Systems monitoring annually, that have been collecting samples during the months of June through September and that receive State approval to alter their sample collection period under paragraph (d)(4)(iv)(A) of this section, must collect their next round of samples during a time period that ends no later than 21 months after the previous round of sampling. Systems monitoring triennially that have been collecting samples during the months of June through September, and receive State approval to alter the sampling collection period as per paragraph (d)(4)(iv)(A) of this section, must collect their next round of samples during a time period that ends no later than 45 months after the previous round of sampling. Subsequent rounds of sampling must be collected annually or triennially, as required by this section. Small systems with waivers, granted pursuant to paragraph (g) of this section, that have been collecting samples during the months of June through September and receive State approval to alter their sample collection period under paragraph (d)(4)(iv)(A) of this section must collect their next round of samples before the end of the 9-year period.

(v) Any water system that demonstrates for two consecutive 6-month monitoring periods that the tap water lead level computed under §141.80(c)(3) is less than or equal to 0.005 mg/L and the tap water copper level computed under §141.80(c)(3) is less than or equal to 0.65 mg/L may reduce the number of samples in accordance with paragraph (c) of this section and reduce the frequency of sampling to once every three calendar years.

(vi)(A) A small or medium-size water system subject to reduced monitoring that exceeds the lead or copper action level shall resume sampling in accordance with paragraph (d)(3) of this section and collect the number of samples specified for standard monitoring under paragraph (c) of this section. Such a system shall also conduct water quality parameter monitoring in accordance with §141.87(b), (c) or (d) (as appropriate) during the monitoring period in which it exceeded the action level. Any such system may resume annual monitoring for lead and copper at the tap at the reduced number of sites specified in paragraph (c) of this section after it has completed two subsequent consecutive six-month rounds of monitoring that meet the criteria of paragraph (d)(4)(i) of this section and/or may resume triennial monitoring for lead and copper at the reduced number of sites after it demonstrates through subsequent rounds of monitoring that it meets the criteria of either paragraph (d)(4)(iii) or (d)(4)(v) of this section.

(B) Any water system subject to the reduced monitoring frequency that fails to meet the lead action level during any four-month monitoring period or that fails to operate at or above the minimum value or within the range of values for the water quality parameters specified by the State under §141.82(f) for more than nine days in any six-month period specified in §141.87(d) shall conduct tap water sampling for lead and copper at the frequency specified in paragraph (d)(3) of this section, collect the number of samples specified for standard monitoring under paragraph (c) of this section, and shall resume monitoring for water quality parameters within the distribution system in accordance with §141.87(d). This standard tap water sampling shall begin no later than the six-month period beginning January 1 of the calendar year following the lead action level exceedance or water quality parameter excursion. Such a system may resume reduced monitoring for lead and copper at the tap and for water quality parameters within the distribution system under the following conditions:

(*1*) The system may resume annual monitoring for lead and copper at the tap at the reduced number of sites specified in paragraph (c) of this section after it has completed two subsequent six-month rounds of monitoring that meet the criteria of paragraph (d)(4)(ii) of this section and the system has received written approval from the State that it is appropriate to resume reduced monitoring on an annual frequency. This sampling shall begin during the calendar year immediately following the end of the second consecutive six-month monitoring period.

(*2*) The system may resume triennial monitoring for lead and copper at the tap at the reduced number of sites after it demonstrates through subsequent rounds of monitoring that it meets the criteria of either paragraph (d)(4)(iii) or (d)(4)(v) of this section and the system has received written approval from the State that it is appropriate to resume triennial monitoring.

(*3*) The system may reduce the number of water quality parameter tap water samples required in accordance with §141.87(e)(1) and the frequency with which it collects such samples in accordance with §141.87(e)(2). Such a system may not resume triennial monitoring for water quality parameters at the tap until it demonstrates, in accordance with the requirements of §141.87(e)(2), that it has re-qualified for triennial monitoring.

(vii) Any water system subject to a reduced monitoring frequency under paragraph (d)(4) of this section shall notify the State in writing in accordance with §141.90(a)(3) of any upcoming long-term change in treatment or addition of a new source as described in that section. The State must review and approve the addition of a new source or long-term change in water treatment before it is implemented by the water system. The State may require the system to resume sampling in accordance with paragraph (d)(3) of this section and collect the number of samples specified for standard monitoring under paragraph (c) of this section or take other appropriate steps such as increased water quality parameter monitoring or re-evaluation of its corrosion control treatment given the potentially different water quality considerations.

(e) *Additional monitoring by systems.* The results of any monitoring conducted in addition to the minimum requirements of this section shall be considered by the system and the State in making any determinations (*i.e.*, calculating the 90th percentile lead or copper level) under this subpart.

(f) *Invalidation of lead or copper tap water samples.* A sample invalidated under this paragraph does not count toward determining lead or copper 90th percentile levels under §141.80(c)(3) or toward meeting the minimum monitoring requirements of paragraph (c) of this section.

(1) The State may invalidate a lead or copper tap water sample at least if one of the following conditions is met.

(i) The laboratory establishes that improper sample analysis caused erroneous results.

(ii) The State determines that the sample was taken from a site that did not meet the site selection criteria of this section.

(iii) The sample container was damaged in transit.

(iv) There is substantial reason to believe that the sample was subject to tampering.

(2) The system must report the results of all samples to the State and all supporting documentation for samples the system believes should be invalidated.

(3) To invalidate a sample under paragraph (f)(1) of this section, the decision and the rationale for the decision must be documented in writing. States may not invalidate a sample solely on the grounds that a follow-up sample result is higher or lower than that of the original sample.

(4) The water system must collect replacement samples for any samples invalidated under this section if, after the invalidation of one or more samples, the system has too few samples to meet the minimum requirements of paragraph (c) of this section. Any such replacement samples must be taken as soon as possible, but no later than 20 days after the date the State invalidates the sample or by the end of the applicable monitoring period, whichever occurs later. Replacement samples taken after the end of the applicable monitoring period shall not also be used to meet the monitoring requirements of a subsequent monitoring period. The replacement samples shall be taken at the same locations as the invalidated samples or, if that is not possible, at locations other than those already used for sampling during the monitoring period.

(g) *Monitoring waivers for small systems.* Any small system that meets the criteria of this paragraph may apply to the State to reduce the frequency of monitoring for lead and copper under this section to once every nine years (*i.e.*, a “full waiver”) if it meets all of the materials criteria specified in paragraph (g)(1) of this section and all of the monitoring criteria specified in paragraph (g)(2) of this section. If State regulations permit, any small system that meets the criteria in paragraphs (g)(1) and (2) of this section only for lead, or only for copper, may apply to the State for a waiver to reduce the frequency of tap water monitoring to once every nine years for that contaminant only (*i.e.*, a “partial waiver”).

(1) *Materials criteria.* The system must demonstrate that its distribution system and service lines and all drinking water supply plumbing, including plumbing conveying drinking water within all residences and buildings connected to the system, are

free of lead-containing materials and/or copper-containing materials, as those terms are defined in this paragraph, as follows:

(i) *Lead.* To qualify for a full waiver, or a waiver of the tap water monitoring requirements for lead (*i.e.*, a "lead waiver"), the water system must provide certification and supporting documentation to the State that the system is free of all lead-containing materials, as follows:

(A) It contains no plastic pipes which contain lead plasticizers, or plastic service lines which contain lead plasticizers; and

(B) It is free of lead service lines, lead pipes, lead soldered pipe joints, and leaded brass or bronze alloy fittings and fixtures, unless such fittings and fixtures meet the specifications of any standard established pursuant to 42 U.S.C. 300g-6(e) (SDWA section 1417(e)).

(ii) *Copper.* To qualify for a full waiver, or a waiver of the tap water monitoring requirements for copper (*i.e.*, a "copper waiver"), the water system must provide certification and supporting documentation to the State that the system contains no copper pipes or copper service lines.

(2) *Monitoring criteria for waiver issuance.* The system must have completed at least one 6-month round of standard tap water monitoring for lead and copper at sites approved by the State and from the number of sites required by paragraph (c) of this section and demonstrate that the 90th percentile levels for any and all rounds of monitoring conducted since the system became free of all lead-containing and/or copper-containing materials, as appropriate, meet the following criteria.

(i) *Lead levels.* To qualify for a full waiver, or a lead waiver, the system must demonstrate that the 90th percentile lead level does not exceed 0.005 mg/L.

(ii) *Copper levels.* To qualify for a full waiver, or a copper waiver, the system must demonstrate that the 90th percentile copper level does not exceed 0.65 mg/L.

(3) *State approval of waiver application.* The State shall notify the system of its waiver determination, in writing, setting forth the basis of its decision and any condition of the waiver. As a condition of the waiver, the State may require the system to perform specific activities (e.g., limited monitoring, periodic outreach to customers to remind them to avoid installation of materials that might void the waiver) to avoid the risk of lead or copper concentration of concern in tap water. The small system must continue monitoring for lead and copper at the tap as required by paragraphs (d)(1) through (d)(4) of this section, as appropriate, until it receives written notification from the State that the waiver has been approved.

(4) *Monitoring frequency for systems with waivers.* (i) A system with a full waiver must conduct tap water monitoring for lead and copper in accordance with paragraph (d)(4)(iv) of this section at the reduced number of sampling sites identified in paragraph (c) of this section at least once every nine years and provide the materials certification specified in paragraph (g)(1) of this section for both lead and copper to the State along with the monitoring results. Samples collected every nine years shall be collected no later than every ninth calendar year.

(ii) A system with a partial waiver must conduct tap water monitoring for the waived contaminant in accordance with paragraph (d)(4)(iv) of this section at the reduced number of sampling sites specified in paragraph (c) of this section at least once every nine years and provide the materials certification specified in paragraph (g)(1) of this section pertaining to the waived contaminant along with the monitoring results. Such a system also must continue to monitor for the non-waived contaminant in accordance with requirements of paragraph (d)(1) through (d)(4) of this section, as appropriate.

(iii) Any water system with a full or partial waiver shall notify the State in writing in accordance with §141.90(a)(3) of any upcoming long-term change in treatment or addition of a new source, as described in that section. The State must review and approve the addition of a new source or long-term change in water treatment before it is implemented by the water system. The State has the authority to require the system to add or modify waiver conditions (e.g., require recertification that the system is free of lead-containing and/or copper-containing materials, require additional round(s) of monitoring), if it deems such modifications are necessary to address treatment or source water changes at the system.

(iv) If a system with a full or partial waiver becomes aware that it is no longer free of lead-containing or copper-containing materials, as appropriate, (e.g., as a result of new construction or repairs), the system shall notify the State in writing no later than 60 days after becoming aware of such a change.

(5) *Continued eligibility.* If the system continues to satisfy the requirements of paragraph (g)(4) of this section, the waiver will be renewed automatically, unless any of the conditions listed in paragraph (g)(5)(i) through (g)(5)(iii) of this section occurs. A system whose waiver has been revoked may re-apply for a waiver at such time as it again meets the appropriate materials and monitoring criteria of paragraphs (g)(1) and (g)(2) of this section.

(i) A system with a full waiver or a lead waiver no longer satisfies the materials criteria of paragraph (g)(1)(i) of this section or has a 90th percentile lead level greater than 0.005 mg/L.

(ii) A system with a full waiver or a copper waiver no longer satisfies the materials criteria of paragraph (g)(1)(ii) of this section or has a 90th percentile copper level greater than 0.65 mg/L.

(iii) The State notifies the system, in writing, that the waiver has been revoked, setting forth the basis of its decision.

(6) *Requirements following waiver revocation.* A system whose full or partial waiver has been revoked by the State is subject to the corrosion control treatment and lead and copper tap water monitoring requirements, as follows:

(i) If the system exceeds the lead and/or copper action level, the system must implement corrosion control treatment in accordance with the deadlines specified in §141.81(e), and any other applicable requirements of this subpart.

(ii) If the system meets both the lead and the copper action level, the system must monitor for lead and copper at the tap no less frequently than once every three years using the reduced number of sample sites specified in paragraph (c) of this section.

(7) *Pre-existing waivers.* Small system waivers approved by the State in writing prior to April 11, 2000 shall remain in effect under the following conditions:

(i) If the system has demonstrated that it is both free of lead-containing and copper-containing materials, as required by paragraph (g)(1) of this section and that its 90th percentile lead levels and 90th percentile copper levels meet the criteria of paragraph (g)(2) of this section, the waiver remains in effect so long as the system continues to meet the waiver eligibility criteria of paragraph (g)(5) of this section. The first round of tap water monitoring conducted pursuant to paragraph (g)(4) of this section shall be completed no later than nine years after the last time the system has monitored for lead and copper at the tap.

(ii) If the system has met the materials criteria of paragraph (g)(1) of this section but has not met the monitoring criteria of paragraph (g)(2) of this section, the system shall conduct a round of monitoring for lead and copper at the tap demonstrating that it meets the criteria of paragraph (g)(2) of this section no later than September 30, 2000. Thereafter, the waiver shall remain in effect as long as the system meets the continued eligibility criteria of paragraph (g)(5) of this section. The first round of tap water monitoring conducted pursuant to paragraph (g)(4) of this section shall be completed no later than nine years after the round of monitoring conducted pursuant to paragraph (g)(2) of this section.

[56 FR 26548, June 7, 1991; 56 FR 32113, July 15, 1991; 57 FR 28788, June 29, 1992, as amended at 65 FR 2007, Jan. 12, 2000; 72 FR 57817, Oct. 10, 2007]

CHAPTER 1751

An act to add Section 5060 to, and to repeal Sections 2945 and 3057 of, the Penal Code, relating to aid to persons discharged or paroled from institutions of Department of Corrections.

[Approved by Governor July 17, 1965. Filed with Secretary of State July 23, 1965.]

The people of the State of California do enact as follows:

SECTION 1. Section 5060 is added to the Penal Code, to read:

5060. The Director of Corrections may assist persons discharged, paroled, or otherwise released from confinement in an institution of the department and may secure employment for them, and for such purposes he may employ necessary officers and employees, may purchase tools, and give any other assistance that, in his judgment, he deems proper for the purpose of carrying out the objects and spirit of this section. Repayment of cash assistance received under this section from the current, or any prior appropriation, shall be credited to the appropriation current at time of such repayment.

SEC. 2. Section 2945 of said code is repealed.

SEC. 3. Section 3057 of said code is repealed.

CHAPTER 1752

An act to add Chapter 8.5 (commencing with Section 1501) to Part 1 of Division 1 of the Public Utilities Code, relating to water service duplication.

[Approved by Governor July 17, 1965. Filed with Secretary of State July 23, 1965.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 8.5 (commencing with Section 1501) is added to Part 1 of Division 1 of the Public Utilities Code, to read:

CHAPTER 8.5. SERVICE DUPLICATION

1501. The Legislature recognizes the substantial obligation undertaken by a privately owned public utility which is franchised under the Constitution or by a certificate of public convenience and necessity to provide water service in that the utility must provide facilities to meet the present and prospective needs of those in its service area who may request service. At the same time, the rates that may be charged for water service by a regulated utility are fixed by the Public Utilities Commission at levels which assume that the facilities so installed will remain used and useful in the operation of the

utility for a period of time measured by the physical life of such facilities.

The Legislature finds and declares that the potential loss of value of such facilities which may result from the construction and operation by a political subdivision of similar or duplicating facilities in the service area of such a private utility often deters such private utility from obtaining a certificate or extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.

The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.

1502. (a) As used in this chapter, "political subdivision" means a county, city and county, city, municipal water district, county water district, irrigation district, public utility district, or any other public corporation.

(b) As used in this chapter, "service area" means an area served by a privately owned public utility in which the facilities have been dedicated to public use and in which territory the utility is required to render service to the public.

(c) As used in this chapter, "operating system" means an integrated water system for the supply of water to a service area of a privately owned public utility.

(d) As used in this chapter, "private utility" means a privately owned public utility providing a water service.

(e) As used in this chapter, "type of service" means, among other things, domestic, commercial, industrial, fire protection, wholesale, or irrigation service.

1503. The Legislature finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public purpose to the extent that the private utility is injured by reason of any of its property employed in providing the water service being made inoperative, reduced in value or rendered useless to the private utility for the purpose of providing water service to the service area, and such taking shall be compensable under Section 14 of Article I of the Constitution of California.

1504. Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court of competent jurisdiction pursuant to the laws of this state relating to eminent domain, including consideration of the useful value to the political subdivision of the property so taken.

Whenever the compensation by a political subdivision under this section is an amount equal to the just compensation value

of all the property of the private utility in the operating system that the private utility employs in providing water service to the service area, the political subdivision may, by resolution, provide for the acquisition of all such property.

A political subdivision engaged in activities set forth in Section 1503 shall pay just compensation for the property so taken for public purposes.

1505. The provisions of Sections 1503 and 1504 will be applicable to any private utility which constructs facilities to provide or extend water service or provides or extends such service to any territory theretofore served by a political subdivision with the same type of service.

1506. As used in this chapter, "private utility" includes a mutual water company. In its application to mutual water companies, this chapter affects and relates only to the property, or portion of any property, of a mutual water company that is employed by the company in providing water service in or for a territory that is actually being provided with water service by the company when a political subdivision constructs facilities to provide or extend water service or provides or extends such service to the territory, and that territory shall constitute the "service area" of a mutual water company as used in Section 1502.

CHAPTER 1753

An act to amend Section 18500 of the Government Code, relating to the purpose of State Civil Service Act.

[Approved by Governor July 17, 1965. Filed with Secretary of State July 28, 1965.]

The people of the State of California do enact as follows:

SECTION 1. Section 18500 of the Government Code is amended to read:

18500. It is the purpose of this part:

(a) To facilitate the operation of Article XXIV of the Constitution.

(b) To promote and increase economy and efficiency in the state service.

(c) To provide a comprehensive personnel system for the state civil service, wherein:

(1) Positions involving comparable duties and responsibilities are similarly classified and compensated.

(2) Appointments are based upon merit and fitness ascertained through practical and competitive examination.

(3) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service insofar as consistent with the best interests of the state.

(4) The rights and interests of the state civil service employee are given consideration insofar as consistent with the best interests of the state.

(5) A high morale is developed among state civil service employees by providing adequately for leaves of absence, vacations, and other considerations for the general welfare of the employees.

(6) Tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds.

CHAPTER 1754

An act to add Section 6503.8 to the Welfare and Institutions Code, relating to state property.

[Approved by Governor July 17, 1965. Filed with Secretary of State July 23, 1965.]

The people of the State of California do enact as follows:

SECTION 1. Section 6503.8 is added to the Welfare and Institutions Code, to read:

6503.8. Notwithstanding the provisions of Section 6503 of this code, the Director of General Services, with the consent of the Director of Mental Hygiene, may grant a right-of-way for road purposes to the County of San Bernardino over and along a portion of the Patton State Hospital property adjacent to Arden Way and Pacific Street upon such terms and conditions and with such reservations and exceptions as in the opinion of the Director of General Services will be for the best interests of the state.

CHAPTER 1755

An act to amend Section 2290 of, to repeal Section 2291 of, and to add Sections 2291, 2291.1, 2291.2, 2291.3, and 2291.4 to the Health and Safety Code, relating to mosquito abatement districts.

[Approved by Governor July 17, 1965. Filed with Secretary of State July 23, 1965.]

The people of the State of California do enact as follows:

SECTION 1. Section 2290 of the Health and Safety Code is amended to read:

2290. Any mosquito abatement district organized on or after August 14, 1931, and any such district organized prior to that date that elects to do so by a vote taken at an election called and conducted as provided for an election for a tax to raise additional funds for the district, may provide for the

24 Cal.4th 830, 14 P.3d 930, 102 Cal.Rptr.2d 719, 01 Cal. Daily Op. Serv. 209, 2001 Daily Journal D.A.R. 237

APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC., et al., Plaintiffs and Appellants,
v.
CITY OF LOS ANGELES,
Defendant and Respondent.

No. S082645.
Supreme Court of California
Jan. 8, 2001.

SUMMARY

A city council, seeking to establish and fund a program to remedy substandard housing conditions, adopted an ordinance that required the owners of all residential rental properties subject to inspection under the program to pay a fee. An apartment association and other groups with similar interests brought an action for declaratory and injunctive relief against the city, alleging that the fee ordinance was unconstitutional and therefore void as a charge upon real property under Prop. 218 (Cal. Const., art. XIII D). The trial court sustained the city's demurrer without leave to amend, finding that the fee was not subject to the constitutional requirements, and entered judgment for the city. (Superior Court of Los Angeles County, No. BC195216, Charles W. McCoy, Jr., Judge.) The Court of Appeal, Second Dist., Div. One, No. B130243, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that this ordinance did not fall within the scope of Cal. Const., art. XIII D, which only restricts fees imposed directly on property owners in their capacity as such. The inspection fee was not imposed on landlords in their capacity as property owners, but rather in their capacity as business owners. This constitutional provision does not refer to fees imposed on an incident of property ownership, but rather to fees imposed on a parcel or a person as an incident of property ownership; this distinction was crucial to this case. According to its plain meaning, Cal. Const., art. XIII D applies only to exactions levied solely by virtue of property ownership. This inspection fee was imposed because the property was being rented; it ceased along with the business operation, whether or not ownership remained in the same hands. (Opinion by Mosk, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Dissenting opinion by Brown, J., with Baxter, J., concurring (see p. 845).)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Appellate Review § 145--Scope of Review--Questions of Law and Fact-- Interpretation of Constitutional Provision.
The interpretation of a constitutional provision, passed by voter initiative, is a question of law for the appellate courts to decide on independent review of the facts.

(2a, 2b, 2c)
Property Taxes § 7.6--Real Property Tax Limitation-- Proposition 218--Construction--In Context of Proposition 13.
Prop. 218, which added Cal. Const., art. XIII C and art. XIII D, can best be understood against its historical background, which began in 1978 with the adoption of Prop. 13, the purpose of which was to cut local property taxes. Prop. 218 buttressed the limitations in Prop. 13 on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges. Prop. 218 must be construed in the context of Prop. 13. Prop. 218 focuses on exactions, whether they be called taxes, fees, or charges, that are directly associated with property ownership.

(3a, 3b, 3c, 3d, 3e)
Property Taxes § 7.6--Real Property Tax Limitation--Proposition 218:Municipalities § 54--Ordinances--Fee Imposed on Owners of Residential Rental Properties--Validity.
A city ordinance that required payment of a fee by the owners of all residential rental properties subject to inspection under a program designed to remedy substandard housing conditions did not fall within the scope of Prop. 218 (Cal. Const., art. XIII D), which only restricts fees imposed directly on property owners in their capacity as such. The inspection fee was not imposed on

landlords in their capacity as property owners, but rather in their capacity as business owners. This constitutional provision does not refer to fees imposed on an incident of property ownership, but rather to fees imposed on a parcel or a person as an incident of property ownership. That distinction was crucial to this case. According to its plain meaning, Cal. Const., art. XIII D applies only to exactions levied solely by virtue of property ownership. This inspection fee was imposed because the property was being rented; it ceased along with the business operation, whether or not ownership remained in the same hands.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, §§ 110A, 110B.]

(4)
Real Property § 4--Incidents of Ownership--Right of Alienation.
Ownership of property in fee simple absolute is the greatest possible estate. Among the panoply of lesser estates are such nonfreehold chattels real as leases for a specific term and periodic tenancies-in common parlance, rentals or leases of limited duration. Among the incidents of estates in land are the so-called bundle of rights that flow from such tenure. Among them is the fundamental right to alienate one's property held in fee simple. That incident, or right, has been called inseparable, indispensable, and necessary. The power to alienate property or a property right is not limited to the right to sell or assign it. It means generally the power to transfer or convey it to another. The conveyance need not be of the whole fee. The right of alienation applies when fee holders seek to convey lesser estates. The power or right of alienation incident to the ownership of an estate in fee simple includes the power or right to dispose of property held in fee by lease, mortgage, or other mode of conveyance.

(5)
Taxation § 3--Construction--Distinguished from Regulatory Fees.
Regulatory fees are those charged in connection with regulatory activities, which do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged, and which are not levied for unrelated revenue purposes.

(6)
Statutes § 27--Construction--Liberality:Constitutional Law § 11-- Construction--Liberality.
As a rule, a command that a constitutional provision or a statute be liberally construed does not license either enlargement or restriction of the evident meaning of the provision.

COUNSEL
California Apartment Law Information Foundation, Trevor Grimm and Craig Mordoh for Plaintiffs and Appellants.
Sharon L. Browne and Stephen R. McCutcheon, Jr., for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiffs and Appellants.
James K. Hahn, City Attorney, Pedro B. Echeverria, Chief Assistant City Attorney, Ronald Tuller, Assistant City Attorney, and Miguel A. Dager, Deputy City Attorney, for Defendant and Respondent.
Hart, King & Coldren, Robert S. Coldren and C. William Dahlin for Western Manufactured Housing Communities Association as Amicus Curiae on behalf of Defendant and Respondent. ***833**
Gibson, Dunn & Crutcher, James P. Clark, Joel M. Tantalo; Western Center on Law & Poverty, Richard Rothschild; Bet Tzedek Legal Services and Lauren Saunders for the Los Angeles Blue Ribbon Citizens' Committee on Slum Housing, Bet Tzedek Legal Services, the Inner City Law Center, Los Angeles Center for Law and Justice, Legal Aid Foundation of Los Angeles, Legal Services of Northern California, Los Angeles Housing Law Project, Public Counsel, San Fernando Valley Neighborhood Legal Services, Western Center on Law and Poverty, Esperanza Community Housing Corporation, Southern California Association of Non-Profit Housing, Southern California Mutual Housing Association, the Coalition for Economic Survival, Inquilinos Unidos, the St. Francis Center, the Fair Housing Congress of Southern California and SEIU Local 347 as Amici Curiae on behalf of Defendant and Respondent.
Richard Doyle, City Attorney (San Jose), George Rios, Assistant City Attorney, and Robert Fabela, Deputy City Attorney, for the City of San Jose, 89 Additional California Cities, the California State Association of Counties and the California Association of Sanitation Agencies as Amici Curiae on behalf of Defendant and Respondent.

MOSK, J.

We granted review to decide whether a city ordinance imposing an inspection fee on private landlords violates article XIII D of the California Constitution (article XIII D), added by initiative measure, Proposition 218, in 1996. We conclude that it does not.

In July 1998, the City of Los Angeles put into effect the Los Angeles Housing Code. It is codified as article 1 of chapter XVI of the Los Angeles Municipal Code (§ 161.101 et seq.). Later that month, plaintiffs sued the city for declaratory and injunctive relief, alleging that Los Angeles Municipal Code section 161.352, imposing an inspection fee on private landlords, is unenforceable because it was enacted without complying with section 6 of article XIII D. The city demurred. The trial court sustained the demurrer without leave to amend, finding that the fee was not subject to the constitutional requirements. It entered judgment for the city.

In its statement of decision, the trial court recognized that the inspection fee "appears arguably to fall within the wide range of assessments which Proposition 218 was apparently written to encompass." But it added, "In *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [***834** 228 Cal.Rptr. 726, 721 P.2d 1111], the California Supreme Court held that a fee charged to cover the costs of operating San Jose's rent control ordinances, and not used to raise general revenue, is not subject to Article XIII A of the California Constitution. The City's ordinance here fits squarely within both the reason and rule of *Pennell*. The ordinance levies only property used for residential apartment rentals, and the money is used only to pay for regulat[ing such] rentals to insure, among other things, that they do not degenerate into what is commonly called 'slum conditions.' The assessment is not imposed on all property owners-only a subset of owners who rent apartments."

The Court of Appeal reversed, holding that the state constitutional provision invalidated the city ordinance. The court wrote: "There is nothing in Proposition 218 that exempts regulatory fees imposed on residential rental properties. It thus adds nothing to say, as does the City, that the fees are not 'imposed upon property owners in general, but only those who voluntarily engage in the business of renting, generate the risks of slum housing, and specially benefit from regular inspections as they contribute to the overall reputability and safety of the housing provided.' Quite plainly, Proposition 218 applies to any 'fee' or 'charge,' both of which are defined to mean 'any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service.' (Art. XIII D, § 2, subd. (e) ....) However well intentioned the City's program to abolish slum housing may be, we find it impossible to say that a fee imposed upon the owners of rental units so the City can locate and eradicate substandard housing is anything other than a user fee or charge for a property-related service." (Italics and fn. omitted.)

I.

A.

Section 161.102 of the Los Angeles Municipal Code states the reason for enacting the Los Angeles Housing Code: "It is found and declared that there exist in the City of Los Angeles substandard and unsanitary residential buildings and dwelling units the physical conditions and characteristics of which render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety and welfare of their occupants and of the public.

"It is further found and declared that the existence of such substandard buildings as dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting ***835** neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole."

Los Angeles Municipal Code section 161.301, entitled Scope, declares that the Los Angeles Housing Code applies to "all residential rental properties with two or more dwelling units on the same lot, the land, buildings and structures appurtenant thereto," but not to owner-occupied units, on-campus dormitory housing, hotels, motels, or certain other types of housing also specifically exempted.

Division 3.5 of the Los Angeles Housing Code (§ 161.351 et seq.) is entitled Housing Inspection Fees. Section

161.351 limits the scope of division 3.5 to "residential rental properties with two or more dwellings subject to the provisions of this Code." Those properties "will be subject to regular inspection by the General Manager or an authorized representative. Inspections may also be complaint-based." (*Ibid.*)

Section 161.352 of the Los Angeles Municipal Code, at issue here, sets forth the inspection fee schedule. It provides, in its entirety: "Owners of all buildings subject to inspection shall pay a service fee of $12.00 per unit per year. The fee will be used to finance the cost of inspection and enforcement by the Housing Department. Should the owner fail to pay the required fee, the City of Los Angeles will recover it, plus accrued interest, utilizing any remedies provided by law including nuisance abatement or municipal tax lien procedures established by ordinance or state law. This fee shall be known as the 'Systematic Code Enforcement Program Fee.' " (*Ibid.*, boldface omitted.)

B.

In November 1996 the voters approved Proposition 218, the Right to Vote on Taxes Act. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 1, p. 108; reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2001 supp.) foll. art. XIII C, § 1, p. 33.) The proposition amended the California Constitution, adding article XIII D. Section 3, subdivision (a)(3) of article XIII D provides that, with certain exceptions not relevant here, "No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except: [¶] ... [¶] ... as provided by this article." An agency is a local or regional governmental entity. (*Id.*, § 2, subd. (a); Cal. Const., art. XIII C, § 1, subd. (b).) ***836**

Section 1 of article XIII D provides that it applies to "all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority." Fees and charges are defined in subdivision (e) of section 2 thereof. " 'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (*Ibid.*)

"Property-related service" is further defined. It "means a public service having a direct relationship to property ownership." (Art. XIII D, § 2, subd. (h).)

Thus, and in summary, article XIII D applies, with certain exceptions not relevant here, to "any levy ... upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Art. XIII D, § 2, subd. (e).) As will appear, the outcome of this case turns on the meaning of this language.

C.

() Before us is "a question of law for the appellate courts to decide on independent review of the facts." (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874 [64 Cal.Rptr.2d 447, 937 P.2d 1350].) Though our reasoning turns on the language of the constitutional stricture, it may be helpful to explain, as did the Court of Appeal in *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679 [86 Cal.Rptr.2d 592] (*Howard Jarvis*), the reasons that led to placing Proposition 218 on the ballot.

() "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. 'The purpose of Proposition 13 was to cut local property taxes. [Citation.]' [Citation.] Its principal provisions limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands. (Cal. Const., art. XIII A, §§ 1, 2.)

"To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4; *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 6-7 [2 Cal.Rptr.2d 490, 820 P.2d 1000].) It has been held, however, that a special assessment is not a special tax within the meaning of Proposition 13. (*Knox v. City of* ***837** *Orland* (1992) 4 Cal.4th 132, 141 [14 Cal.Rptr.2d 159, 841 P.2d 144], and cases cited.) Accordingly, a special assessment could be imposed without a two-thirds vote.

"In November 1996, in part to change this rule, the electorate adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution. Proposition 218 allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. (Cal. Const., art.

XIII D, § 3, subd. (a)(1)-(4); see also [*id.*], § 2, subd. (a).) It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (*Howard Jarvis*, *supra*, 73 Cal.App.4th 679, 681-682.)

D.

() The Court of Appeal explained the parties' differing views of the effect of article XIII D on the city ordinance. "As viewed by [plaintiffs], the fee is imposed 'upon a parcel or upon a person as an incident of property ownership' and is, therefore, subject to the procedural requirements of Proposition 218. As viewed by the City, the fee is imposed upon a business activity (the rental of residential dwellings), separate and apart from property ownership, and purely for regulatory purposes, and it is therefore not subject to Proposition 218." (Italics omitted.)

Adhering before us to their point of view, plaintiffs contend that "nothing in Proposition 218 ... support[s] the contention that [it] was not meant to affect the ability of local governments to impose and collect business 'regulatory fees.' " The city also adheres to its position, devoting much of its briefing to an argument that because its inspection fee is a regulatory fee on business operations, it falls outside the purview of article XIII D. Examining the ballot arguments for and against Proposition 218 and the Legislative Analyst's analysis of the measure, the city also contends that article XIII D was intended only to restrict fees imposed directly on property owners in their capacity as such. A regulatory fee imposed on residential rental businesses, the city argues, necessarily falls outside article XIII D's ambit, even if the fee bears some relation to ownership of real property. [1]

As will appear, neither party is entirely correct. The relevant language of article XIII D does not compel a conclusion in plaintiffs' favor; rather, it ***838** compels the opposite. The city also misses the mark when it contends (or at least implies) that a regulatory fee or a levy on the operation of a business necessarily falls outside the scope of article XIII D.

But both parties are partly correct. Plaintiffs accurately state that the constitutional provision does not speak of regulatory fees or levies on business operations. Hence, the mere fact that a levy is regulatory (as this inspection fee clearly is) or touches on business activities (as it clearly does) is not enough, by itself, to remove it from article XIII D's scope. But the city is correct that article XIII D only restricts fees imposed directly on property owners in their capacity as such. The inspection fee is not imposed solely because a person owns property. Rather, it is imposed because the property is being rented. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the city must prevail.

II.

Section 2 of Proposition 218 stated the measure's purpose. "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., Gen. Elec., *supra*, text of Prop. 218, § 2, p. 108; reprinted as Historical Notes, 2A West's Ann. Cal. Const., *supra*, foll. art. XIII C, § 1, p. 33.)

The repeated references to taxes and taxpayers suggest an intent to prohibit unratified exactions imposed on property owners as such, rather than on the business of renting or leasing apartments-i.e., "residential rental properties with two or more dwellings" (L.A. Mun. Code, § 161.351).

() As explained in *Howard Jarvis*, *supra*, 73 Cal.App.4th 679, Proposition 218 is Proposition 13's progeny. Accordingly, it must be construed in that context. (***839** *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301 [58 Cal.Rptr.2d 855, 926 P.2d 1042].) Specifically, because Proposition 218 was designed to close government-devised loopholes in Proposition 13, the intent and purpose of the latter informs our interpretation of the former. Proposition 13 was directed at taxes imposed on property owners, in particular homeowners. The text of Proposition 218, the ballot arguments (both in favor and against), the Legislative Analyst's analysis, and the annotations of the Howard Jarvis Taxpayers Association, which drafted Proposition 218, all focus on exactions, whether they are called taxes, fees, or charges, that are directly associated with property ownership.

() The Legislative Analyst's analysis, printed in the November 1996 ballot pamphlet, is illustrative. It explained that Proposition 218 "would constrain local governments' ability to impose fees, assessments, and taxes," meaning "property-related" fees, including fees for water, sewer and refuse collection, but excluding gas and electricity charges (see Cal. Const., art. XIII D, § 3, subd. (b)) and development fees (see *id.*, § 1, subd. (b)). (Ballot Pamp., Gen. Elec., *supra*, Legis. Analyst's analysis, p. 73.) It did not refer to levies linked more indirectly to property ownership.

() The ballot arguments for Proposition 218 are also illustrative. "Proposition 218 guarantees your right to vote on local tax increases-even when they are called something else, like 'assessments' or 'fees' and imposed on homeowners." (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 218, p. 76.) "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.' " (*Ibid.*) "There are now over 5,000 local districts which can impose fees and assessments without the consent of local voters. Special districts have increased assessments by over 2400% over 15 years. Likewise, cities have increased utility taxes 415% and raised benefit assessments 976%, a ten-fold increase." (*Ibid.*) "To confirm the impact of fees and assessments on you, look at your property tax bill. You will see a growing list of assessments imposed without voter approval. The list will grow even longer unless Proposition 218 passes." (*Ibid.*)

() The ballot arguments identify what was perhaps the drafter's main concern: tax increases disguised via euphemistic relabeling as "fees," "charges," or "assessments." But in fairness to plaintiffs, it cannot be denied that the text of article XIII D does not limit its scope to taxes and taxpayers. We turn to the definitive language: restrictions on *any* levy imposed "upon a parcel or upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).)

The foregoing language means that a levy may not be imposed on a property owner as such-i.e., in its capacity as property owner-unless it ***840** meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.

The contrary reasoning of the Court of Appeal, and of plaintiffs, stems from a reliance on the word "incident," leaving aside that the constitutional provision does not refer to fees imposed *on* an incident of property ownership, but on a parcel or a person *as* an incident of property ownership. As amicus curiae for the city persuasively argue, the distinction is crucial.

Were the principal words *parcel* and *person* missing, and were *as* replaced with *on*, so that article XIII D restricted the city's ability to impose fees "on an incident of property ownership," plaintiffs' argument might have merit. () For among the incidents [2] of estates in land are the so-called bundle of rights that flow from such tenure. (31 C.J.S. (1996) Estates § 12, pp. 28-30; *id.*, § 14, pp. 32, 34; *id.*, § 31, p. 58.) Among them is the fundamental right to alienate one's property held in fee simple. (E.g., *id.*, § 12, p. 30; *Holien v. Trydahl* (N.D. 1965) 134 N.W.2d 851, 856; *Davis v. Geyer* (1942) 151 Fla. 362, 369 [9 So.2d 727, 728]; ***841** *Hardy v. Galloway* (1892) 111 N.C. 519, 523 [15 S.E. 890]; see also *Yee v. City of Escondido* (1992) 503 U.S. 519, 528 [112 S.Ct. 1522, 1528-1529, 118 L.Ed.2d 153].) That incident, or right, has been called "inseparable" (*Holien, supra*, 134 N.W.2d at p. 856; *Hardy, supra*, 15 S.E. at p. 890), "indispensable" (*Dukes v. Crumpton* (1958) 233 Miss. 611, 620 [103 So.2d 385, 388]), and "necessary" (*Re Collier* (Nfld. 1966) 60 D.L.R.2d 70, 75 [52 M.P.R. 211, 216] (per Puddester, J.)).

The power to alienate property or a property right is not limited to the right to sell or assign it. It means generally the power "to transfer or convey [it] to another." (Black's Law Dict., *supra*, p. 73, col. 1.) The conveyance need not be the whole fee. The right of alienation applies when fee holders seek to convey lesser estates. [3] " '[T]he power or right of alienation' " " 'incident to the ownership of an estate in fee-simple' " " 'include[s] the power or right to dispose of property held in fee ... by *lease*, mortgage, or other mode of conveyance ....' " (*Porter v. Barrett* (1925) 233 Mich. 373, 379-380 [206 N.W. 532, 535], quoting *Manierre v. Welling* (1911) 32 R.I. 104, 140 [78 A. 507, 522], italics added here.)

() Accordingly, *if* article XIII D restricted the city's ability to impose a "tax, assessment, fee, or charge on an incident of property ownership" (cf. *id.*, §§ 2, subd. (e), 3), plaintiffs' argument might be persuasive. The business of renting apartments is an incident of owning them, an activity necessarily dependent on that ownership but not vice versa. One can own apartments without renting them, but no one can rent them without owning them. (See fn. 2, *ante*, at p. 840.) [4]

But the language of article XIII D is materially dissimilar. As stated, article XIII D, section 3 provides that "[n]o tax, assessment, fee, or charge ***842** shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except ... [¶] ... [¶] ... as provided by this article." (See also *id.*, § 2, subd. (e).) In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords. [5] What plaintiffs ask us to do is to alter the foregoing language-changing "as an incident of property ownership" to "on an incident of property ownership." But to do so would be to ignore its plain meaning-namely, that it applies only to exactions levied solely by virtue of property ownership. We may not interpret article XIII D as if it had been rewritten. (Accord, *People ex rel. Lungren v. Superior Court*, *supra*, 14 Cal.4th 294, 301.)

The language of article XIII D, sections 2, subdivision (e), and 3, shows that it applies to levies imposed on a person or on property strictly as an incident of property ownership. Had the law included levies imposed on incidents of the ownership or use of residential real property (as relevant ***843** here, the exercise of the right to rent one's property), its text would have said so. But it did not. And although the plain language of the relevant constitutional provisions requires us not to consider extrinsic evidence of the voters' intent, we reiterate, purely as an aside, that neither the ballot arguments nor the Legislative Analyst's analysis suggested that article XIII D was intended to encompass fees of the type at issue here.

The subordinate clause in section 2, subdivision (e), of article XIII D, as clarified in section 2, subdivision (h), supports our conclusion. It may be recalled that among the fees or charges covered by article XIII D, section 2, subdivision (e), is "a user fee or charge for a property-related service." Such a service "means a public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).) In this case, the relationship between the city's inspection fee and property ownership is indirect-it is overlain by the requirement that the landowner be a landlord.

As stated, the foregoing clause is subordinate. It does not include all possible fees and charges that fall within the ambit of article XIII D. ()**(See fn. 6.)** But it does provide additional evidence of the scope of the constitutional provision. [6]

() At oral argument, plaintiffs emphasized article XIII D's exemptions for existing development fees and all charges to provide gas and electrical ***844** service. (Art. XIII D, §§ 1, subd. (b), 3, subd. (b).) They assert that a developer fee is a fee on an incident of property-the right to improve it-and that there would have been no need to exempt such fees if other fees imposed on incidents of property did not fall within article XIII D's scope. Similarly, they argue that one can own property without having utility service, and that if article XIII D applied strictly to levies that are imposed solely on the basis of property ownership, there would have been no need to exempt such utility charges in the constitutional provision.

We note, however, that the provision regarding development fees refers only to those existing at the time of article XIII D's enactment. Moreover, it is unclear to us whether a fee to provide gas or electricity service is the same as a fee imposed on the consumption of electricity or gas. In any event, we believe that the aforementioned exemptions may have been included in an abundance of caution in case court interpretations of article XIII D similar to the Court of Appeal's should prevail. Finally, we do not believe that any incongruity can trump the plain language we have discussed herein. In short, we are unpersuaded.

Similarly unpersuasive is plaintiffs' contention, also emphasized at oral argument, that the city's ability to enforce payment of the inspection fee by imposing a lien on the property shows that the fee is property-related, not business-related. The fact is that the city is simply availing itself of all possible means to collect the fee. Property liens may be precipitated by at least one cause unconnected to land ownership (except ownership of the land on which the lien is imposed): the cost of removing graffiti. (Gov. Code,

§ 38772.) A lien may be imposed on parents' land to defray the cost of removing graffiti their child has scrawled on that belonging to another. (*Id.*, subd. (b).)

Plaintiffs also advert to section 5 of Proposition 218, which requires that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., Gen. Elec., *supra*, text of Prop. 218, § 5, p. 109; reprinted as Historical Notes, 2A West's Ann. Cal. Const., *supra*, foll. art. XIII C, p. 33.) But "[l]iberal construction cannot overcome the plain language of Proposition 218 limiting [its] scope ... to [levies] based on real property." (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 237-238 [84 Cal.Rptr.2d 804].) () As a rule, a command that a constitutional provision or a statute be liberally construed "does not license either enlargement or restriction of its evident meaning" (*People v. Cruz* (1974) 12 Cal.3d 562, 566 [116 Cal.Rptr. 242, 526 P.2d 250]). Thus, ***845** given that article XIII D's scope is, as we have explained, unambiguously limited to burdens on landowners as such, " 'no resort to this command [of liberal construction] is required' " (*Howard Jarvis*, *supra*, 73 Cal.App.4th 679, 687, quoting *Buhlert Trucking v. Workers' Comp. Appeals Bd.* (1988) 199 Cal.App.3d 1530, 1533, fn. 4 [247 Cal.Rptr. 190]) or even permitted.

III.

The Court of Appeal's judgment is reversed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred.

BROWN, J.

I respectfully dissent.

Under the provisions of Proposition 218, affected property owners must approve the imposition of any new or increased fee, which is "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (Cal. Const., art. XIII D, § 2, subd. (e) (article XIII D).) The dispositive determination in this case is whether a rental inspection fee is imposed "upon a person as an incident of property ownership." (*Ibid.*) To find that it is not, the majority concludes the Court of Appeal erroneously substituted "on" for "as." It is the majority that errs, however, in assuming "incident" denotes "the so-called bundle of rights that flow from [estates in land]." (Maj. opn., *ante*, at p. 840; see maj. opn., *ante*, at pp. 840-841.) In my view, the voters did not intend the courts to look any further than a standard dictionary in applying the terms of article XIII D.

"A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words. [Citation.]" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 302 [58 Cal.Rptr.2d 855, 926 P.2d 1042].) Nothing in the ballot arguments in favor of or against Proposition 218 or in the Legislative Analyst's analysis implies that a different rule should obtain with respect to "incident," or that the voters intended it to have other than a plain meaning. The dictionary defines an "incident" as "something incident to something else," that is, "dependent upon or involved in something else." (Webster's New World Dict. (3d college ed. 1988) p. 682; see also Black's Law Dict. (4th ed. 1968) p. 904, col. 2 ["Used as a noun, [incident] denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing .... Also, less strictly, it denotes anything which is usually ***846** connected with another, or connected for some purposes, though not inseparably"].) In other words, if the imposition of a fee depends upon one's ownership of property, it comes within the purview of article XIII D unless otherwise excepted.

The fee at issue here plainly meets this definition. Pursuant to its police powers, the City of Los Angeles (City) enacted a Housing Code (L.A. Mun. Code, § 161.101 et seq.), which provides that residential rental properties are subject to regular inspection for substandard and unsanitary conditions. Under the Housing Code, funding for these inspections devolves to a particular class of property owners, the landlords of the rental units, who must pay a $12 fee for every unit owned. (*Id.*, § 161.352.)[1] As the majority acknowledges, "no one can rent [apartments] without owning them." (Maj. opn., *ante*, at p. 841; see also *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 105 [207 Cal.Rptr. 285, 688 P.2d 894].) And no one is subject to the rental inspection fee without owning

them. This exaction is thus imposed "as an incident of property ownership" (art. XIII D, § 2, subd. (e)); that is, it is dependent upon such ownership. (Cf. Off. of Legis. Analyst, Understanding Proposition 218 (Dec. 1996) p. 30 ["Generally, we think these fees would be considered property-related if there were no practical way that the owner could avoid the fee, short of selling the property or fundamentally changing its use"].) Moreover, "[s]hould the owner fail to pay the required fee, the City of Los Angeles will recover it, plus accrued interest, utilizing any remedies provided by law including nuisance abatement or municipal tax lien procedures established by ordinance or state law." (L.A. Mun. Code, § 161.352.) The use of tax lien procedures is a typical enforcement mechanism for delinquent levies imposed against property.

The majority avoids this result in part by finding the City "imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords." (Maj. opn., *ante*, at p. 842.) The last portion of this statement proves too much: Landlords are property owners. Imposition of the fee is an incident of, i.e., depends upon, that status and thereby runs afoul of article XIII D. As for the first portion of the statement, it ignores or disregards what the majority elsewhere concedes, that the business at issue is inseparable from property ownership. No amount of parsing can change that ineluctable fact. ***847**

The majority also concludes "neither the ballot arguments nor the Legislative Analyst's analysis suggested that article XIII D was intended to encompass fees of the type at issue here." (Maj. opn., *ante*, at p. 843.) Ultimately, the terms of the measure as enacted control our interpretation (see *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 673 [47 Cal.Rptr.2d 108, 905 P.2d 1248] (conc. opn. of Mosk, J.)); and their plain meaning does not support the majority's reasoning. But the ballot materials also belie the majority's conclusion. While those materials do not specifically mention rental inspection fees, such an intention is readily discernable from any fair reading. The Legislative Analyst warned generally that "[t]his measure would constrain local governments' ability to impose fees" and "[r]educe the amount of fees ... businesses pay." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by the Legis. Analyst, p. 73 (Ballot Pamphlet).) More particularly, the Legislative Analyst's list of "most likely fees and assessments affected by these provisions" (*id.* at p. 74) easily encompasses this type of exaction: "park and recreation programs, fire protection, lighting, ambulance, business improvement programs, library, and water service." (*Ibid.*) The argument in favor of Proposition 218 reminded the electorate that "[a]fter voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.' " (Ballot Pamp., *supra*, argument in favor of Prop. 218, p. 76.) "Proposition 218 guarantees your right to vote on local tax increases-even when they are called something else, like 'assessments' or 'fees' ...." (*Ibid.*) The argument did not limit the type of "fee" that would be subject to a vote under article XIII D but instead promised, "Proposition 218 ... stops politicians' end-runs around Proposition 13." (Ballot Pamp., *supra*, rebuttal to argument against Prop. 218, p. 77.) Particularly in light of its timing, the City's rental inspection fee appears to be just the kind of evasive maneuver at which proponents aimed Proposition 218. (See generally *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 105 [211 Cal.Rptr. 133, 695 P.2d 220] [purpose, in part, of Prop. 13 was "to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes"].)

In this regard, the majority also fails to accord any significance to two important provisions of Proposition 218. In any action challenging imposition of a new or increased fee or charge, the initiative assigns to the agency "the burden ... to demonstrate compliance with this article" (art. XIII D, § 6, subd. (b)(5)), thereby reversing the usual deference accorded governmental action in such matters and making it more difficult to defend its legitimacy. (See Ballot Pamp., *supra*, analysis of Prop. 218 by the Legis. ***848** Analyst, p. 74; see also art. XIII D, § 4, subd. (f) [imposing same burden for assessments].) The voters also expressly provided that Proposition 218 "shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (Ballot Pamp., *supra*, text of Prop. 218, § 5, p. 109, also reprinted as Historical Notes, 2A West's Ann. Cal. Const. (2000 supp.) foll. art. XIII C, § 1, p. 25.) The majority's construction frustrates both these goals.

The City argues that conditioning imposition of its rental inspection fee on compliance with the procedures set forth in article XIII D would allow landlords to defeat regulation of their businesses. This argument misses two critical points: First and generally, since the City has decided its rental inspections are necessary to eradicate

"substandard and unsanitary residential buildings and dwelling units the physical conditions and characteristics of which ... are such as to be detrimental to or jeopardize the health, safety and welfare of their occupants and of the public" (L.A. Mun. Code, § 161.102), it can reasonably expect the public to pay for the program.

Second and specifically, the Los Angeles Municipal Code already provides substantial enforcement authority to prosecute landlords who violate the City's Housing Code. If a property owner fails to correct violations, the City may recover its administrative as well as abatement costs (L.A. Mun. Code, § 161.206.2), may seek criminal penalties including fines and imprisonment (*id.*, § 161.206.3), and may pursue civil remedies as provided in the Health and Safety Code (L.A. Mun. Code, § 161.206.4).

When the voters passed Proposition 13 in 1978, they sought to restrict the ability of government to impose taxes and other charges on property owners without their approval. For almost two decades, however, they witnessed politicians evade this constitutional limitation. The message of Proposition 218 is that they meant what they said. With the majority turning a deaf ear to that message, we may well expect a future effort to "stop[] politicians' end-runs around Proposition 13." (Ballot Pamp., *supra*, rebuttal to argument against Prop. 218, p. 77.)

Baxter, J., concurred. ***849**

Footnotes

1 We have also received several amicus curiae briefs. Along with one of them is a request to judicially notice three purported local mobilehome park rent control ordinances and two other documents regarding that topic. The request is denied. The five documents have no bearing on the question before us.
Amici curiae also include a printed discussion issued by the Legislative Analyst in December 1996 and entitled Understanding Proposition 218. This document contains material relevant to the question at bench, and we grant the request for judicial notice regarding it. (Evid. Code, §§ 452, subd. (c), 459, subd. (a).)

2 Over time, "incident" has meant many things. As a noun, the meanings include the burden of the risk of a diminution of the value of real property during condemnation proceedings (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 263, fn. 9 [100 S.Ct. 2138, 2143, 65 L.Ed.2d 106]), the " 'burdens and disabilities' " of slavery prohibited by the Thirteenth Amendment to the United States Constitution (*Jones v. Mayer Co*. (1968) 392 U.S. 409, 441 [88 S.Ct. 2186, 2204, 20 L.Ed.2d 1189]), or, in earlier times, the monetary obligations imposed by the king or a mesne lord (McPherson, *Revisiting the Manor of East Greenwich* (1998) 42 Am. J. Legal Hist. 35, 39; see also 2 Coke (1641) Institutes of the Lawes of England (Butler & Hargrave's Notes ed.) 69a, § 95, fn. 7). And, in a more general sense, the meanings of "incident" include benefits or duties that appertain to some greater right or interest, i.e., the principal. (Civ. Code, §§ 662, 1084, 3540; *Owsley v. Hamner* (1951) 36 Cal.2d 710, 716-717 [227 P.2d 263, 24 A.L.R.2d 112]; *Fender v. Waller* (1941) 139 Neb. 612, 616 [298 N.W. 349, 351]; *Harris v. Elliott* (1836) 35 U.S. (10 Pet.) 25, 54 [9 L.Ed. 333].) In its fourth edition (1897), Bouvier's Law Dictionary defined "incident" as a term "used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy. For example, ... the right of alienation is necessarily incident to a fee-simple at common law ...." (*Id.* at p. 1006, col. 1.) Many cases have followed the Bouvier's Law Dictionary definition, or ones similar to it. (E.g., *Watts v. Copeland* (1933) 170 S.C. 449, 452 [170 S.E. 780]; *Moccasin State Bank v. Waldron* (1928) 81 Mont. 579, 586 [264 P. 940].) "Thus, timber trees are incident to the freehold, and so is a right of way." (*In re Estate of Bellesheim* (N.Y. Surr. 1888) 1 N.Y.S. 276, 278 [dictum]; accord, *Harris v. Elliott*, *supra*, 35 U.S. (10 Pet.) at p. 54 [9 L.Ed. at p. 344] [easements]; Black's Law Dict. (7th ed. 1999) p. 765, col. 1 ["the utility easement is incident to the ownership of the tract"].)

3 It is, of course, axiomatic in Anglo-American law that ownership of real property in fee simple absolute is the greatest possible estate (1 Coke (1628) Institutes of the Lawes of England (Butler & Hargrave's Notes ed.) 18a, § 11), and among the panoply of lesser estates are such nonfreehold chattels real as leases for a specific term and periodic tenancies (*Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 162 [2 Cal.Rptr.2d 536, 820 P.2d 1046])-in common parlance, rentals or leases of limited duration. (1 Tiffany, The Law of Real Property (3d ed. 1939) § 76, pp. 112-113; *Wilgus v. Commonwealth* (1873) 72 Ky. (9 Bush.) 556, 557 [1873 WL 6660], citing 2 Blackstone, Commentaries 143 [" 'An estate for years in land is regarded in law as inferior to an estate for life or an inheritance' "]; *Brydges v. Millionair Club* (1942) 15 Wash.2d 714, 719 [132 P.2d 188, 190]; see also *Williams v. R. R.* (1921) 182 N.C. 267, 272 [108 S.E. 915, 918].)

4 In *Acme Freight Lines v. City of Vidalia* (1942) 193 Ga. 334 [18 S.E.2d 540] (*Acme Freight*), similar statutory language favored an analogous argument-that a tax on an incident of the trucking business was a tax on a trucking company's ancillary delivery business.

In *Acme Freight*, a trucking company sought an injunction against a city's practice of imposing a business tax on those ancillary operations. The firm relied on this law: " 'No subdivision of this State ... shall levy any excise, license, or occupation tax of any nature *on* ... *any incidents* of said motor carrier business, or on a motor common carrier.' " (*Acme Freight, supra*, 193 Ga. 334, 335 [18 S.E.2d 540, 541], italics added.)

The city, Vidalia, acknowledged "its lack of authority to levy any tax against the plaintiff in reference to its transportation of freight as a motor common carrier .... Justification for the tax is founded upon the fact that, in addition to the operation of trucks for the transportation of freight ..., the plaintiff carries on ... a 'pick-up and delivery service' in and around the city. The trial judge ruled that this 'is not a *necessary* incident to the operation of a common carrier,' and that as to it 'the plaintiff is not a motor common carrier, but is engaged in a special and distinct business in the City of Vidalia, and is taxable as such.' This formula interpolates before the word 'incidents,' used in the statute, the word 'necessary' so as to require, as a condition of tax immunity, that the operation be a necessary incident of the business of a motor common carrier. This appears to us to be erroneous. [Rather,] ... an incident of the business of a motor common carrier of freight would be something naturally associated as pertinent to such transportation and necessarily dependent upon it, but without which the business of transportation might nevertheless be carried on. In other words, the incidental operation would be necessarily dependent upon the transportation, but the business of transportation would not be necessarily dependent upon the incidental operation.... As we understand the evidence adduced in this case, the plaintiff's operations against which the tax is said to be levied is of the above-described character; and accordingly we conclude that the tax is illegal, and should have been enjoined." (*Acme Freight*, *supra*, 193 Ga. 334, 335-336 [18 S.E.2d 540, 541].)

5 We acknowledge that landlords may rent because they wish to keep the property occupied in their absence, for philanthropic reasons, or to a family member for a nominal charge. Such arrangements are not rare, and may lie within the province of the ordinance, which refers to "residential rental properties." But even nonprofit or charitable purposes are business purposes under broad constructions of the term, and we believe that as long as the property is being rented for consideration, it is being conveyed for a business purpose. (Cf. *Marin Municipal Water Dist. v. Chenu* (1922) 188 Cal. 734, 738 [207 P. 251] [" 'business' " has "a narrower meaning applicable to occupation or employment for livelihood or gain, and to mercantile or commercial enterprises or transactions"].)

6 We turn to discuss briefly the authorities on which the city chiefly relies. They consist of two cases: *Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th 866; and *Pennell v. City of San Jose* (1986) 42 Cal.3d 365 [228 Cal.Rptr. 726, 721 P.2d 1111] (affd. *sub nom*. *Pennell v. San Jose* (1988) 485 U.S. 1 [108 S.Ct. 849, 99 L.Ed.2d 1]). They are inapposite. In *Sinclair* we held that an exaction on sources of lead contamination to remediate the effects of lead poisoning was a fee, not a tax. In *Pennell*, we held that a $3.75 charge on each residential rental unit, imposed by a rent control ordinance to fund its hearing process, also was a fee, not a tax. In *Sinclair* and *Pennell*, we defined such fees, which are similar to the city's inspection charge, as regulatory in nature. Regulatory fees are those " ' "charged in connection with regulatory activities[,] which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes." ' " (*Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th 866, 876, quoting *Pennell v. City of San Jose*, *supra*, 42 Cal.3d 365, 375, in turn quoting *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660 [166 Cal.Rptr. 674], bracketed material added here.)

We have stated that the city's inspection fee is a regulatory fee. And we have concluded that it does not fall within article XIII D's ambit. But *Sinclair* and *Pennell* do not concern themselves with the issue we confront here. Indeed, in *Sinclair* we cautioned that "We are not here concerned with issues arising under constitutional amendments effected by a recent initiative measure (Proposition 218) adopted at the November 5, 1996, General Election. That measure contains new restrictions on local agencies' power to impose fees and assessments." (*Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th 866, 873, fn. 2.) In *Pennell v. City of San Jose, supra*, 42 Cal.3d 365, we could not have written a similar caveat, for article XIII D did not exist at the time. But it applies just as well.

1 Los Angeles Municipal Code section 161.352 provides: "*Owners* of all buildings subject to inspection shall pay a service fee of $12.00 per unit per year. The fee will be used to finance the cost of inspection and enforcement by the Housing Department. Should the *owner* fail to pay the required fee, the City of Los Angeles will recover it, plus accrued interest, utilizing any remedies provided by law including nuisance abatement or municipal tax lien procedures established by ordinance or state law. This fee shall be known as the 'Systematic Code Enforcement Program Fee.' " (Italics added.)

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KeyCite Yellow Flag - Negative Treatment
Distinguished by City of San Buenaventura v. United Water Conservation Dist., Cal., December 4, 2017

39 Cal.4th 205
Supreme Court of California

BIGHORN–DESERT VIEW WATER AGENCY,
Plaintiff, Cross-defendant and Respondent,
v.
Kari VERJIL, as Registrar of Voters,
etc., Defendant and Cross-defendant;
E.W. Kelley, Real Party in Interest,
Cross-complainant and Appellant.

No. S127535.
|
July 24, 2006.

Synopsis

Background: Local public water district sought declaratory judgment invalidating proposed county initiative measure that would reduce domestic water rates and require voter preapproval of any subsequent rate increases. The Superior Court, San Bernardino County, No. SCV97005, Tara Reilly, J., entered judgment for district. Proponent of voter initiative appealed. The Court of Appeal affirmed. The Supreme Court granted review and transferred the case for reconsideration back to the Court of Appeal, which again affirmed. The Supreme Court again granted review, superseding the opinions of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:

[1] portion of measure that would reduce district's charges for delivering domestic water to existing customers was not subject to state constitutional restrictions, disapproving *Howard Jarvis Taxpayers Assn. v. City of Los Angeles,* 85 Cal.App.4th 79, 101 Cal.Rptr.2d 905; but

[2] portion of measure that would require voter preapproval for future increases was constitutionally prohibited; and

[3] due to invalidity of latter portion, initiative was properly withheld from county ballot.

Affirmed.

Opinions, 8 Cal.Rptr.3d 485, 15 Cal.Rptr.3d 911, superseded.

West Headnotes (9)

[1] Water Law
Water Rates, Rents, Connection Fees, and Other Charges

County initiative measure that would reduce a local public water district's charges for delivering domestic water to existing customers was protected by state constitutional guarantee against prohibition of initiative proposing reduction of local "fee or charge"; disapproving *Howard Jarvis Taxpayers Assn. v. City of Los Angeles,* 85 Cal.App.4th 79, 101 Cal.Rptr.2d 905. West's Ann.Cal. Const. Art. 13C, § 3.

See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 159; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 131 et seq.

20 Cases that cite this headnote

[2] Constitutional Law
Intent in general

When interpreting a provision of the state Constitution, the Supreme Court's aim is to determine and effectuate the intent of those who enacted the constitutional provision at issue.

7 Cases that cite this headnote

[3] Constitutional Law
Intent in general

When the voters enacted a state constitutional provision, their intent governs the Supreme Court's construction of the provision.

2 Cases that cite this headnote

[4] **Constitutional Law**
Meaning of Language in General
Constitutional Law
Plain, ordinary, or common meaning

To determine the voters' intent in enacting a state constitutional provision, the Supreme Court begins by examining the constitutional text, giving the words their ordinary meanings.

7 Cases that cite this headnote

[5] **Constitutional Law**
Giving effect to every word
Constitutional Law
Giving effect to entire instrument

In construing a constitutional provision, if possible, significance should be given to every word, phrase, sentence, and part of the provision in pursuance of the legislative purpose.

1 Cases that cite this headnote

[6] **Constitutional Law**
Intrinsic Aids to Construction

When a word has been used in different parts of a single state constitutional enactment, courts normally infer that the word was intended to have the same meaning throughout.

4 Cases that cite this headnote

[7] **Water Law**
Water Rates, Rents, Connection Fees, and Other Charges

Proposed county initiative measure that would impose a requirement of voter preapproval for any future increase in local public water district's charges for delivering domestic water to existing customers, or new charge, was prohibited under state constitution. West's Ann.Cal. Const. Art. 13C, § 3, Art. 13D, § 6(c).

19 Cases that cite this headnote

[8] **Constitutional Law**
Giving effect to entire instrument
Constitutional Law
Harmonizing provisions

Related constitutional provisions should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others.

4 Cases that cite this headnote

[9] **Municipal Corporations**
Initiative procedure

When a significant part of a proposed initiative measure is invalid, the measure may not be submitted to the voters.

2 Cases that cite this headnote

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Opinion

KENNARD, J.

***208** ****221** In November 1996, California voters adopted Proposition 218, which added articles XIII C and XIII D to the California Constitution. In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518 (*Richmond*), we construed article XIII D as it applies to fees that a local public water district charged for making new service connections to its domestic water delivery system. We concluded that those connection charges were not "assessments" or "property-related fees or ***209** charges" within the meaning of article XIII D. (*Richmond, supra,* at pp. 425, 428, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

Here, we consider a related issue, one that involves section 3 of article XIII C, which provides that "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." Does this provision grant local voters authority to adopt an initiative ****222** measure that would reduce a local public water district's charges for delivering domestic water to existing customers and that also would require voter preapproval for any future increase in those charges or for the imposition of any new charge?

As explained below, we conclude that section 3 of article XIII C grants local voters a right to use the initiative power to reduce the rate that a public water district charges for domestic water. We also conclude, however, that this new constitutional provision does not grant local voters a right to impose a voter-approval requirement on all future adjustments of water delivery charges, and that the proposed initiative at issue here was properly withheld from the ballot because it included a provision to impose such a requirement.

I

In 1969, the California Legislature formed the Bighorn–Desert View Water Agency (Agency) as a special district under the Bighorn Mountains Water Agency Law.[1] (Stats.1969, ch. 1175, p. 2273 et seq.) The Agency provides domestic water service to residents in a roughly 42–square–mile area north of Yucca Valley in San Bernardino County.

E.W. Kelley is a resident of San Bernardino County and the proponent of a local initiative measure to reduce the Agency's *****76** water rate and other charges. Kelley's initiative proposed to reduce the Agency's water rate from $4.00 to $2.00 per 100–cubic–foot billing unit,[2] to reduce the "non-cap recovery charge" from $4.65 to $2.50 per month, and to reduce the "MWA ***210** pipeline charge" from $13.62 to $11.50 per month. The initiative also would have required the Agency to obtain voter approval before increasing any existing water rate, fee, or charge, or imposing any new water rate, fee, or charge.

Kelley succeeded in qualifying the initiative for the ballot. On October 24, 2002, Sharon Beringson, as the Interim Registrar of Voters for San Bernardino County, certified the initiative, and the next day by letter she informed the Agency of its duty under Elections Code section 9310 to either adopt the initiative or submit it to the voters at a special election. The Agency did neither, however. Instead, on November 20, 2002, it filed a complaint for declaratory relief in the superior court, naming Beringson as the defendant and Kelley as the real party in interest.

In the complaint, the Agency asked the court to declare the initiative impermissible under California law, and beyond the power of the Agency's electorate to enact, because it would interfere with the statutory responsibility of the Agency's board of directors to set the water rate high enough to cover its costs. (See Stats.1969, ch. 1175, § 25, pp. 2285–2286, 72 B. West's Ann. Wat.-Appen., *supra,* ch. 112, p. 203 ["The board of directors, so far as practicable, shall fix such rate or rates for water in the agency ... as will result in revenues which will pay the operating expenses of the agency, ... provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the

payment of the principal of such debt as it may become due."].)

Kelley answered the complaint and filed a motion for judgment on the pleadings and a cross-petition for writ of mandate seeking to compel the Agency to either adopt the initiative as an ordinance or submit it to the voters at a special election. Asserting that the Agency was challenging the legality of the proposed initiative both on its face (insofar as it asserted that its board of directors had the exclusive power to set the agency's **223 water rates and charges) and as applied (insofar as it asserted that the particular rates and charges that the initiative would set would leave the Agency with insufficient net revenues), Kelly argued that the as-applied challenge could not be raised before the election and that the facial challenge failed because the initiative was authorized and protected by section 3 of article XIII C of the California Constitution. In its opposition to Kelley's motion for judgment on the pleadings, the Agency argued, essentially, that it was raising only a facial challenge to the proposed initiative.

*211 At the hearing on the motion for judgment on the pleadings, the parties agreed that the only issue was the validity of the initiative on its face, that the facts relevant to that issue were undisputed, and that the issue could be decided as a matter of law. The trial court, declaring that voters in the area served by the Agency lacked power to affect its water rates and fees and charges, denied Kelley's motion ***77 and cross-petition and entered a judgment of declaratory relief for the Agency.

Kelley appealed the judgment to the Court of Appeal, arguing that his initiative was authorized by article XIII C, section 3 of the California Constitution. The Court of Appeal affirmed the superior court's ruling, and Kelley petitioned this court for review. We granted review and then transferred the case back to the Court of Appeal with directions to vacate its decision and to reconsider the issues in light of *Richmond, supra,* 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518.

The Court of Appeal again found in favor of the Agency, holding that article XIII C did not authorize Kelley's initiative because the initiative did not deal with special or general taxes, which the Court of Appeal held to be the only subject matter article XIII C covers. The court held that the Agency's rate, fees, and charges were not subject to Proposition 218, and thus could not be reduced by voter initiative. Kelley again petitioned this court for review, which we again granted.

II

Article XIII C of the California Constitution is entitled Voter Approval for Local Tax Levies. Section 1 of article XIII C defines the terms " '[g]eneral tax,' " " '[s]pecial tax,' " " '[l]ocal government,' " and " '[s]pecial district.' " Section 2 of article XIII C provides, in subdivision (b), that "[n]o local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote," and it provides, in subdivision (d), that "[n]o local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." Section 3, the provision at issue here, states: "Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing *any local tax, assessment, fee or charge.* The power of initiative to affect *local taxes, assessments, fees and charges* shall be applicable to all local governments *212 and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives." [3] (Italics added.)

[1] With a single sentence, the Court of Appeal rejected Kelley's reliance on article XIII C as authority for the proposed initiative. The Court of Appeal stated: "Article XIII C governs special and general taxes, which are not at issue here." Kelley argues that this statement is erroneous because section 3 of article XIII C is not limited to special and general taxes, but applies by it terms to "any local tax, assessment, fee or charge."

[2] [3] [4] When interpreting a provision of our state Constitution, our aim is "to determine **224 and effectuate the intent of those who enacted the constitutional provision at issue." (*Richmond, supra,* 32 Cal.4th at p. 418, 9 Cal.Rptr.3d 121, 83 P.3d 518.) When, as here, the voters enacted the provision, their intent governs. (*Delaney* ***78 *v. Superior Court* (1990) 50 Cal.3d 785, 798, 268 Cal.Rptr. 753, 789 P.2d 934.) To

determine the voters' intent, "we begin by examining the constitutional text, giving the words their ordinary meanings." (*Richmond, supra,* at p. 418, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

[5] Article XIII C, section 3 of the California Constitution expressly states that the initiative power cannot be limited or prohibited when an initiative proposes to reduce or repeal "any local tax, assessment, fee or charge." In construing a constitutional or statutory provision, " ' "[i]f possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." ' " (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388, 20 Cal.Rptr.2d 523, 853 P.2d 978.) If possible, therefore, we must give significance to the words "assessment, fee or charge" in article XIII C, section 3, as meaning something other than "local tax." Accordingly, it would appear that article XIII C, section 3, is not limited to local special and general taxes but applies also to assessments, fees, and charges.

In the ballot pamphlet for the election at which Proposition 218 (which included both article XIII C and article XIII D) was adopted, the Legislative Analyst gave this description of how Proposition 218 would affect initiative powers: "The measure states that Californians have the power to repeal or ***213** reduce any local tax, assessment, or fee through the initiative process." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 74.) Thus, the Legislative Analyst appears to have also read section 3 of article XIII C as applying to fees as well as to special and general taxes and so described it to the voters who enacted it. (See *People v. Birkett* (1999) 21 Cal.4th 226, 243–244, 87 Cal.Rptr.2d 205, 980 P.2d 912 [argument and analyses in official ballot pamphlet may be consulted to determine voters' understanding and intent].)

Because the Agency offers no argument in support of the Court of Appeal's assertion that article XIII C applies only to special and general taxes, and not to fees, we will not belabor the point. We conclude that article XIII, section 3, applies to assessments, fees, and charges and not just to special and general taxes.

Are the amounts that the Agency bills its customers for the delivery of domestic water properly characterized as fees or charges within the meaning of those words in article XIII C, section 3? Although article XIII C contains definitions of the terms "general tax" and "special tax" (Cal. Const., art. XIII C, § 1, subds. (a), (d)), it does not define the terms "fee" or "charge." Article XIII D, which was enacted together with article XIII C as part of Proposition 218, does contain a definition of those terms. According to that definition, " '[f]ee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e).) It is unclear, however, whether that definition governs the meaning of the terms "fee" and "charge" in article XIII C, section 3.

[6] Section 2 of article XIII D of the state Constitution, which contains definitions for various terms, including "fee" and "charge," begins with the words, "As used *in this article.*" (Italics added.) Therefore, although the definitions in section 2 of article XIII D govern the meaning of the defined terms in article XIII D (see *People v. Canty* (2004) 32 Cal.4th 1266, 1277, 14 Cal.Rptr.3d 1, 90 P.3d 1168; *****79** *Richmond, supra,* 32 Cal.4th at p. 423, 9 Cal.Rptr.3d 121, 83 P.3d 518), those definitions do not *necessarily* apply outside of article XIII D and, in particular, in article XIII C. On the other hand, when a word has been used in different parts of a single enactment, courts normally infer that the word was intended to have the same meaning throughout. (*People v. Roberge* (2003) 29 Cal.4th 979, 987, 129 Cal.Rptr.2d 861, 62 P.3d 97.) Because article XIII C and article XIII D were enacted together by Proposition 218, it seems ***214** unlikely that the ****225** terms "fee" and "charge" were meant to carry *entirely* different meanings in those two articles, although some variation in meaning is possible. [4]

We considered a related question in *Richmond, supra,* 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518. At issue there was whether a water service connection fee was a fee or charge within the meaning of article XIII D's definition of the terms "fee" and "charge" as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, *including a user fee or charge for a property related service.*" (Cal. Const., art. XIII D, 2, subd. (e), italics added; see *Richmond, supra,* at p. 415, 9 Cal.Rptr.3d 121, 83 P.3d 518.) Of relevance here, we stated:

"In the ballot pamphlet for the election at which article XIII D was adopted, the Legislative Analyst stated that '[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of property-related fee.' (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges (see Gov.Code, §§ 61621, 61621.3)....

"Several provisions of article XIII D tend to confirm the Legislative Analyst's conclusion that charges for utility services such as electricity and water should be understood as charges imposed 'as an incident of property ownership.' For example, subdivision (b) of section 3 provides that 'fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership' under article XIII D. Under the rule of construction that the expression of some things in a statute implies the exclusion of other things not expressed (*In re Bryce C.* (1995) 12 Cal.4th 226, 231, 48 Cal.Rptr.2d 120, 906 P.2d 1275), the expression that electrical and gas service charges are not within the category of property-related fees implies that similar charges for other utility services, such as water and sewer, are property-related fees subject to the restrictions of article XIII D.

***215** "This implication is reinforced by subdivision (c) of article XIII D, section 6, which expressly excludes 'fees or charges for sewer, water, and refuse collection services' from the voter approval requirements *****80** that article XIII D imposes on property-related fees and charges. Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee[s] and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements. (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 645, 119 Cal.Rptr.2d 91 [reaching the same conclusion].)

"Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.' (Art. XIII D, § 2, subd. (e).)" (*Richmond, supra,* 32 Cal.4th at pp. 426–427, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

For purposes of identifying fees and charges under California Constitution article XIII D, we drew a distinction between water service connection charges and charges for ****226** ongoing water delivery. We explained: "A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection." (*Richmond, supra,* 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

Comparing the provisions of article XIII C and article XIII D, it appears to us that the words "fee" and "charge," which appear in both articles, may well have been intended to have a narrower, more restrictive meaning in article XIII D. The title of article XIII D is Assessment and *Property–Related* Fee Reform (italics added) and section 6 of article XIII D, which imposes restrictions on fees, is titled *Property Related* Fees and Charges (italics added). Consistent with these references to "property-related" fees, article XIII D's definition of "fee" requires that it be imposed "upon a parcel or upon a person as an incident of property ownership." (Cal. Const., art. XIII D, § 2, subd. (e).) By comparison, the words "property related" do not appear anywhere in article XIII C, nor does anything in the text of article XIII C suggest that it is limited to levies imposed on real property or on persons as an incident of property ownership. Thus, the terms "fee" and "charge" in section 3 of article XIII C may not be subject to the "property-related" qualification that was at issue in *Richmond, supra,* 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518. At the same time, any levy that ***216** qualifies as a property-related fee or charge under article XIII D must also qualify as a "fee" or "charge" under article XIII

C, section 3. Nothing in the text of article XIII C, or in the ballot pamphlet for the November 1996 general election at which it was adopted, suggests an intent to *exclude* property-related fees and charges from the reach of section 3 of article XIII C, or to impose any separate or additional restriction on the meaning of "fee" or "charge" as used in article XIII C.

Thus, it is possible that California Constitution article XIII C's grant of initiative power extends to some fees that, because they are not property related, are not fees within the meaning of article XIII D. But we perceive no basis for excluding from article XIII C's authorization any of the ***81** fees subject to article XIII D. The absence of a restrictive definition of "fee" or "charge" in article XIII C suggests that those terms include all levies that are ordinarily understood to be fees or charges, including all of the property-related fees and charges subject to article XIII D.

For present purposes, it is unnecessary to arrive at an exact definition of the terms "fee" and "charge" as used in article XIII C. It is sufficient to conclude that a public water agency's charges for ongoing water delivery, which are fees and charges within the meaning of article XIII D (*Richmond, supra,* 32 Cal.4th at pp. 426–427, 9 Cal.Rptr.3d 121, 83 P.3d 518), are also fees within the meaning of section 3 of article XIII C. Therefore, section 3 of article XIII C establishes that the initiative power "shall not be prohibited or otherwise limited in matters of reducing or repealing" a public agency's water delivery charges. In other words, this constitutional provision expressly authorizes initiative measures like Kelley's insofar as they seek to reduce or repeal a public agency's water rates and other water delivery charges.

The Agency urges us to draw a distinction between water delivery charges that are "consumption based" (calculated according to the quantity of water delivered) and charges that are imposed regardless of water usage. Under this proposed distinction, the Agency's water rate, which is a charge per 100 cubic feet of water, is a consumption-based charge, while its "non-cap recovery charge" and "MWA Pipeline charge" (both of which the Agency imposes in a fixed amount per month per customer) are not. The Agency argues that consumption-based water charges are not fees or charges within the meaning of article XIII D because they are not imposed "as an incident of property ownership" (Cal. Const., art. XIII D, § 2, subd. (e)), but instead as a result of the voluntary decisions of each water customer as to how much water to use. We are not persuaded.

227 Article XIII D defines "fee" or "charge" as "*including* a user fee or charge for a property related service." (Cal. Const., art. XIII D, § 2, subd. (e), *217 italics added.) The word "including" is " 'ordinarily a term of enlargement.' " (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717, 3 Cal.Rptr.3d 623, 74 P.3d 726.) As we explained in *Richmond, supra,* 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, domestic water delivery through a pipeline is a property-related service within the meaning of this definition. (*Id.* at pp. 426–427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) Accordingly, once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee.[5] Consumption-based water delivery charges also fall within the definition of user fees, which are "amounts charged to a person using a service where the amount of the charge is generally related to the value of the services provided." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 957, 5 Cal.Rptr.3d 520.) Because it is imposed for the property-related service of water delivery, the Agency's water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D, and thus, for the reasons we have explained, they are also fees or charges within the ***82 meaning of section 3 of article XIII C. Under the constitutional grant of power in section 3 of article XIII C, the initiative may be used to reduce each of those water delivery charges.

The Agency also argues that even if its water rate and other water delivery charges are fees or charges within the meaning of section 3 of article XIII C of the California Constitution, Kelley's initiative is nonetheless invalid because the Legislature has granted the Agency's governing board exclusive authority to set the Agency's rate and other charges. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775–777, 38 Cal.Rptr.2d 699, 889 P.2d 1019 [discussing exclusive delegation]; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511, 247 Cal.Rptr. 362, 754 P.2d 708 [same].) The Legislature is bound by the state Constitution, however, and the evident purpose of article XIII C is to extend

the local initiative power to fees and charges imposed by local public agencies. We need not determine whether the Legislature intended to preclude the use of the initiative to reduce the Agency's fees because even if it did so intend, the Legislature's authority in enacting the statutes under which the Agency operates must in this instance yield to constitutional command.

[7] To this point we have considered only the portions of Kelley's initiative that would reduce the Agency's water delivery charges. Kelley's initiative measure would do more than roll back the Agency's water rate and other charges, however. It would also require the Agency's board of directors to ***218** obtain voter approval before increasing any existing rate or charge or imposing any new rate or charge. Nothing in section 3 of California Constitution article XIII C authorizes initiative measures that impose voter-approval requirements for future increases in fees or charges.

Arguing to the contrary, Kelley points to the reference in section 3 of article XIII C to "[t]he power of initiative to *affect* local taxes, assessments, fees and charges." (Italics added.) He asserts that by imposing a voter-approval requirement on future increases in water delivery charges, his initiative would "affect" those charges and therefore is within the constitutional grant of initiative power. We disagree. The entire sentence reads: "The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives." (Cal. Const., art. XIII C, § 3.) The evident purpose of this sentence is not to define how the initiative may be used to ****228** impact fees and charges, but instead to specify that the initiative power extends to charges imposed by all local public agencies and that the signature requirement applied to statewide initiatives may not be exceeded. The scope of the initiative power is set by the previous sentence, stating that "the initiative power shall not be prohibited or otherwise limited *in matters of reducing or repealing* any local tax, assessment, fee or charge." (*Ibid.,* italics added.) Thus, analysis of the text of section 3 of article XIII C supports the conclusion that the initiative power granted by that section extends only to "reducing or repealing" taxes, assessments, fees, and charges.

[8] That the voters who enacted Proposition 218 did not intend to authorize initiative measures imposing voter-approval requirements on future water delivery charge increases is confirmed by an examination of section 6 of California Constitution article XIII D. Related provisions *****83** "should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others." (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468, 14 Cal.Rptr.2d 514, 841 P.2d 1034; see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 248, 127 Cal.Rptr.2d 177, 57 P.3d 654; *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476, 66 Cal.Rptr.2d 319, 940 P.2d 906; *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 778, 38 Cal.Rptr.2d 699, 889 P.2d 1019; *Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 167, 2 Cal.Rptr.2d 536, 820 P.2d 1046.) Article XIII D, section 6, subdivision (c), says that "[*e*]*xcept 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." (Italics added.) Thus, article XIII D ***219** expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges.

At least as to fees and charges that are property related, section 6 of California Constitution article XIII D would appear to embody the electorate's intent as to when voter-approval should be required, or not required, before existing fees may be increased or new fees imposed, and the electorate chose not to impose a voter-approval requirement for increases in water service charges. Although this provision does not expressly prohibit local initiatives that would impose such a requirement, neither does it authorize them. The provisions of article XIII C support a similar conclusion. Although section 2 of article XIII C imposes voter-approval requirements for general taxes and for special taxes, nothing in article XIII C imposes a voter-approval requirement for fees or charges.

Kelley has asserted no authority other than section 3 of California Constitution article XIII C for the portion of his initiative that would require voter approval before any future increase in water delivery charges, and we have concluded that article XIII C does not authorize that

provision. Kelley apparently concedes that in the absence of the authority granted by section 3 of article XIII C, the exclusive delegation rule (*DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 775–777, 38 Cal.Rptr.2d 699, 889 P.2d 1019; *Committee of Seven Thousand v. Superior Court, supra,* 45 Cal.3d at p. 511, 247 Cal.Rptr. 362, 754 P.2d 708) bars initiative measures that infringe on the power of the Agency's governing board to set its water delivery rate and charges. Accordingly, we agree with the Court of Appeal that Kelley's initiative is invalid insofar as it seeks to impose a voter-approval requirement on future actions by the Agency's board of directors to increase the existing water rate and other charges or to impose new charges.

To some extent, this portion of the initiative is superfluous, because under Elections Code section 9323[6] voter approval is required ****229** before a local district's governing board may amend an ordinance adopted by initiative, unless the ordinance provides *****84** otherwise. (See *DeVita v. County of Napa, supra,* 9 Cal.4th at p. 788, 38 Cal.Rptr.2d 699, 889 P.2d 1019 [discussing similar statute for county ordinance]; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 40–41, 41 Cal.Rptr.2d 393 [discussing similar statute for city ordinance].) Therefore, if the voters were to approve an initiative lowering the Agency's water rate or other charge, the Agency's governing board would need voter approval before it could change the rate or charge ***220** that had been set by initiative. The Agency's governing board would not need voter approval, however, to increase a charge that was not affected by initiative or to impose an entirely new charge.

We have concluded that under section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but also that section 3 of article XIII C does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 792–793, 38 Cal.Rptr.2d 699, 889 P.2d 1019 ["We should not presume ... that the electorate will fail to do the legally proper thing."].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected (see Stats.1969, ch. 1175, § 5, p. 2274, 72B West's Ann. Wat.-Appen., *supra,* ch. 112, p. 190), will give appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D[7] will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in ***221** subdivision (b) of *****85** the same section[8] should allay customers' concerns ****230** that the agency's water delivery charges are excessive.

In holding that section 3 of article XIII C of the state Constitution authorizes initiative measures that reduce public agency water service charges, we are not holding that the authorized initiative power is free of all limitations. In particular, we are not determining whether the electorate's initiative power is subject to the statutory provision requiring that water service charges be set at a level that "will pay the operating expenses of the agency, ... provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due." (Stats.1969, ch. 1175, § 25, p. 2286, 72B West's Ann. Wat.-Appen., *supra,* ch. 112, p. 203.) That issue is not currently before us.

III

[9] We have concluded that Kelley's initiative is invalid insofar as it seeks to require voter approval before the Agency's governing board may increase water service charges or impose new charges. When a significant part of a proposed initiative measure is invalid, the measure may not be submitted to the voters. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 715–716, 206 Cal.Rptr. 89, 686 P.2d 609; *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 105–106,

248 Cal.Rptr. 290.) Accordingly, the trial court correctly determined that the initiative ***222** could not be placed on the ballot, and it properly granted judgment for the Agency, and the Court of Appeal correctly affirmed the trial court's judgment, although its reasoning differed substantially from the reasoning we use here.

The judgment of the Court of Appeal is affirmed.

GEORGE, C.J., BAXTER, WERDEGAR, CHIN, MORENO, and CORRIGAN, JJ., concur.

All Citations

39 Cal.4th 205, 138 P.3d 220, 46 Cal.Rptr.3d 73, 06 Cal. Daily Op. Serv. 6649, 2006 Daily Journal D.A.R. 9616

Footnotes

1 The Agency was formed under the name Bighorn Mountains Water Agency and acquired its current name after consolidation in 1989 with Desert View Water District. (See Wat.Code, §§ 33300–33306; Stats.1989, ch. 570, § 3, p. 1878, 73B West's Ann. Wat.-Appen. (1995 ed.) ch. 112, p. 189.)

2 Although the Agency's water rate was $4.00 per 100–cubic–foot billing unit when the initiative was circulated for signatures, it was scheduled to be reduced to $2.30 per billing unit in June 2003. Thus, one could argue, as Kelley has, that the actual reduction proposed by the initiative was not from $4.00 to $2.00, but from $2.30 to $2.00 per billing unit. We need not resolve this dispute.

3 In section 9 of article II, the state Constitution defines "referendum" as "the power of the electors to approve or reject statutes or parts of statutes *except ... statutes providing for tax levies* ...." (Cal. Const., art. II, § 9, subd. (a), italics added.) Under this definition, tax measures are exempt from referendum. (See *Rossi v. Brown* (1995) 9 Cal.4th 688, 697, 38 Cal.Rptr.2d 363, 889 P.2d 557.) But the state Constitution imposes no similar limitation on the initiative. (See *id.* at pp. 699–705, 38 Cal.Rptr.2d 363, 889 P.2d 557.)

4 Because article XIII D provides a single definition that includes both "fee" and "charge," those terms appear to be synonymous in both article XIII D and article XIII C. This is an exception to the normal rule of construction that each word in a constitutional or statutory provision is assumed to have independent significance. (*DuBois v. Workers' Comp. Appeals Bd., supra,* 5 Cal.4th at p. 388, 20 Cal.Rptr.2d 523, 853 P.2d 978.) We use the terms interchangeably in this opinion.

5 *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 101 Cal.Rptr.2d 905, which was decided before *Richmond, supra,* 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518, is disapproved insofar as it is inconsistent with this conclusion.

6 That section reads: "No ordinance proposed by initiative petition and adopted either by the district board without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance. In all other respects, an ordinance proposed by initiative petition and adopted shall have the same force and effect as any ordinance adopted by the board." (Elec.Code, § 9323.)

7 "(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

"(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

"(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." (Cal. Const., art. XIII D, § 6, subd. (a).)

8 "(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(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 imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
"(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." (Cal. Const., art. XIII D, § 6, subd. (b).)

KeyCite Yellow Flag - Negative Treatment
Distinguished by California Building Industry Association v. State Water Resources Control Board, Cal., May 7, 2018

235 Cal.App.4th 1493
Court of Appeal,
Fourth District, Division 3, California.

CAPISTRANO TAXPAYERS ASSOCIATION, INC., Plaintiff and Respondent,
v.
CITY OF SAN JUAN CAPISTRANO, Defendant and Appellant.

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Filed 4/20/2015
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As Modified May 19, 2015

Synopsis

Background: Ratepayers brought action against city to challenge water service fees under Right to Vote on Taxes Act. The Superior Court, Orange County, No. 30–2012–00594579, Gregory Munoz, J., granted declaratory judgment for ratepayers. City appealed.

Holdings: The Court of Appeal, Bedsworth, Acting P.J., held that:

[1] water fees were for service "immediately available to customers" under Right to Vote on Taxes Act;

[2] Right to Vote on Taxes Act required city to calculate the actual costs of providing water at various levels of usage; and

[3] "penalty rate" for excessive water usage was not within the penalty exception from the Act.

Affirmed in part, reversed in part, and remanded.

West Headnotes (13)

[1] Water Law
Necessity of voter approval

Water Law
Effect of usage or consumption on rate charged

Tiered water rate structures and the Right to Vote on Taxes Act are thoroughly compatible so long as those rates reasonably reflect the cost of service attributable to each parcel. Cal. Const. art. XIII D, § 6(b)(3).

2 Cases that cite this headnote

[2] Water Law
Types of Charges and Fees

Water Law
Necessity of voter approval

Water fees attributed to the cost of building a water recycling plant were for "service" that was "actually used by, or immediately available to" the ratepayers under Right to Vote on Taxes Act, even though the non-potable recycled water would not be delivered to all ratepayers, since the relevant service was simply water service, water service was immediately available to city's ratepayers, and delivery of non-potable water to some customers would free up potable water for others. Cal. Const. art. 13D, § 6(b)(4); Cal. Gov't Code § 53750(m).

2 Cases that cite this headnote

[3] Water Law
Necessity of voter approval

Water Law
Methodologies;establishment of rate base

Right to Vote on Taxes Act does not require figuring ratepayers' fees to pay for a water recycling plant on a month-to-month basis. Cal. Const. art. 13D, § 6(b)(4).

Cases that cite this headnote

[4] Water Law
Types of Charges and Fees

Under the statute providing that an agency providing water service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water for a period not to exceed five years, within a five-year period a water agency might develop a capital-intensive means of production of what is effectively new water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced. Cal. Water Code § 31020; Cal. Gov't Code § 53755.

2 Cases that cite this headnote

[5] **Water Law**
Necessity of voter approval
Water Law
Effect of usage or consumption on rate charged

The Right to Vote on Taxes Act's limit on fees to the "proportional cost of the service attributable to the parcel" protects lower-than-average water users from having to pay rates that are above the cost of service for them because those rates include capital investments their levels of consumption do not make necessary. Cal. Const. art. 13D, § 6(b)(3).

1 Cases that cite this headnote

[6] **Water Law**
Necessity of voter approval
Water Law
Effect of usage or consumption on rate charged

Under the Right to Vote on Taxes Act's limit on fees to the "proportional cost of the service attributable to the parcel," the cost for city to build a water recycling plant could not be passed on in water fees to any ratepayers whose levels of consumption were so low that they could not be said to be responsible for the need for that recycling. Cal. Const. art. 13D, § 6(b)(3).

5 Cases that cite this headnote

[7] **Water Law**
Necessity of voter approval
Water Law
Effect of usage or consumption on rate charged

City failed to assign ratepayers the "proportional cost of the service attributable to the parcel" for city's cost to build a water recycling plant, as required by the Right to Vote on Taxes Act, even though city identified four tiers of ratepayers by usage from "low" to "very excessive," where city assigned rates to each ascending tier by applying a multiplier to the rates for lower tiers, and city did not try to correlate the incremental cost of providing service at the various tiers to the prices of water at those tiers. Cal. Const. art. 13D, § 6(b)(3).

2 Cases that cite this headnote

[8] **Constitutional Law**
Intrinsic Aids to Construction

Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole.

Cases that cite this headnote

[9] **Water Law**
Rate and Amount in General

Nothing in the constitutional provision limiting water rights "to such water as shall be reasonably required for the beneficial use to be served" requires water rates to exceed the true cost of supplying that water. Cal. Const. art. 10, § 2.

1 Cases that cite this headnote

[10] **Municipal Corporations**
Submission to popular vote

The Right to Vote on Taxes Act was passed by the voters in order to curtail discretionary

models of local agency fee determination. Cal. Const. art. 13D, § 6.

Cases that cite this headnote

[11] **Water Law**
Rate and Amount in General

Nothing in the constitutional provision giving cities the right to go into the water supply business requires municipal corporations to establish fees in excess of their costs. Cal. Const. art. 11, § 9.

Cases that cite this headnote

[12] **Water Law**
Necessity of voter approval

Water Law
Rate and Amount in General

The constitutional provision limiting water rights "to such water as shall be reasonably required for the beneficial use to be served" does not require what the Right to Vote on Taxes Act's limit on fees to the "proportional cost of the service attributable to the parcel" forbids. Cal. Const. art. 10, § 2; Cal. Const. art. 13D, § 6(b)(3).

Cases that cite this headnote

[13] **Water Law**
Necessity of voter approval

Water Law
Rate and Amount in General

City's "penalty rate" for ratepayers in the "very excessive" water usage tier was not within the exception to the Right to Vote on Taxes Act's proportionality requirement for a "fine, penalty, or other monetary charge" imposed "as a result of a violation of law," since allowing city to rely on the penalty rate theory would open up a loophole so large it would virtually repeal the Act. Cal. Const. art. 13C, § 1(e)(5); Cal. Const. art. 13D, § 6(b)(3).

See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 143.

Cases that cite this headnote

****363** Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed in part; reversed in part and remanded. (No. 30–2012–00594579)

Attorneys and Law Firms

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OPINION

BEDSWORTH, ACTING P.J.

***1496** I. INTRODUCTION

Southern California is a "semi-desert with a desert heart." [1] Visionary engineers and scientists have done a

remarkable job of making our home habitable, and too many of us south of the Tehachapis never give a thought to ***1497** its remarkable reclamation. In his brilliant —if opinionated—classic *Cadillac Desert,* the late Marc Reisner laments how little appreciation there is of "how difficult it will be just to hang on to the beachhead they have made." [2]

In this case we deal with parties who have an acute appreciation of how tenuous the beachhead is, and how desperately we all must fight to protect it. But they disagree about what steps are allowable—or required—to accomplish that task. We are called upon to determine not what is the right—or even the more reasonable—approach to the beachhead's preservation, but what is the one chosen by the state's voters.

We hope there are future scientists, engineers, and legislators with the wisdom to envision and enact water plans to keep our beloved Cadillac Desert habitable. But that is not the court's mandate. Our job—and it is daunting enough—is solely to determine what water plans the voters and legislators of the past have put in place, and to determine whether the trial court's rulings complied with those plans.

We conclude the trial court erred in holding that Proposition 218 does not allow public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water —such as building a recycling plant. Its findings were that future water provided by the improvement is not immediately available to customers. (See Cal. Const., art. XIII D, § 6, subd. (b)(4)) [no fees "may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question"].) But, as applied to water delivery, the phrase "a service" cannot be read to differentiate between recycled water and traditional, potable water. Water *service* is already "immediately available" to all customers, and *continued* water service is assured by such capital improvements as water recycling plants. That satisfies the constitutional and statutory requirements.

****365** However, the trial court did not err in ruling that Proposition 218 requires public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in *Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 226 [46 Cal.Rptr.3d 73, 138 P.3d 220] (*Bighorn*) provides that water rates must reflect the "cost of the service attributable" to a given parcel. [3] While tiered, or inclined rates that go up progressively in relation to usage are perfectly ***1498** consonant with article XIII D, section 6, subdivision (b)(3) and *Bighorn,* the tiers must still correspond to the actual cost of providing service at a given level of usage. The water agency here did not try to calculate the cost of actually providing water at its various tier levels. It merely allocated all its costs among the price tier levels, based not on costs, but on predetermined usage budgets. Accordingly, the trial court correctly determined the agency had failed to carry the burden imposed on it by another part of Proposition 218 (art. XIII D, § 6, subd. (b)(5)) of showing it had complied with the requirement water fees not exceed the cost of service attributable to a parcel—at least without a vote of the electorate. That part of the judgment must be affirmed.

II. FACTS

Sometimes cities are themselves customers of a water district, the best example in the case law being the City of Palmdale, which successfully invoked Proposition 218 to challenge the rates *it* was paying to a water district. [4] (See *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926 [131 Cal.Rptr.3d 373] (*Palmdale*)). And sometimes cities are, as in the present case, their own water district. As amicus curiae Association of California Water Agencies (ACWA) points out, government water suppliers in California are a diverse lot that includes municipal water districts, irrigation districts, county water districts, and, in some cases, cities themselves. To focus on its specific role in this case as a municipal water supplier—as distinct from its role as the provider of municipal services which consume water such as parks, city landscaping or public golf courses—we will refer to appellant City of San Juan Capistrano as "City Water."

In February 2010, City Water adopted a new water rate structure recommended by a consulting firm. The way City Water calculated the new rate structure is well described in City Water's supplemental brief of November 25, 2014. [5] City Water followed a pattern generally recommended ****366** by a manual used by public water agencies throughout the western United

States known as the "M–1" manual. It first ascertained its total costs, including things like debt service on previous infrastructural improvements. It then ***1499** identified components of its costs, such as the cost of billing and the cost of water treatment. Next it identified classes of customers, differentiating, for example, between "regular lot" residential customers and "large lot" residential customers, and between construction customers and agricultural customers. Then, in regard to each class, City Water calculated four possible budgets for water usage, based on historical data of usage patterns: low, reasonable, excessive and very excessive.

[1] The four budgets were then used as the basis for four distinct "tiers" of pricing. [6] For residential customers, tier 1, the low budget, was assumed to be exclusively indoor usage, based on World Health Organization guidelines concerning the "minimum quantity of water required for survival," with adjustments for things like "low-flush toilets and other high-efficiency appliances." Tier 2, the reasonable budget, included an outdoor allocation based on "typical landscapes," and assumed "use of native plants and drought-tolerant plants." The final two tiers were based on budgets of what City Water considers excessive usages of water or overuse volumes. Using these four budgets of consumption levels, City Water allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs, and thus the four-tier system would be, taken as a whole, revenue neutral, and City Water would not make a profit on its pricing structure. City Water did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, at oral argument in this court, admitted it effectively used revenues from the top tiers to subsidize below-cost rates for the bottom tier.

Here is the rate structure adopted, as applied to residential customers:

****367**

Tier	Usage
1	Up to 6 ccf[7]
2	7 to 17 ccf[8]
3	18 to 34 ccf[9]
4	Over 34 ccf[10]

7 Ccf stands for one hundred cubic feet, which trans
Cal.App.4th at p. 184.)

8 A precise figure for the usage is complicated by a
indoor and outdoor use. Technically, tier 2 is tier 1 + 3 extra ccfs, p
average out to a total of 17 ccfs, i.e., 8 ccfs are allocated (on averag

9 Technically, tier 3 is defined as up to 200 percent
projected 17 ccf average, works out to be 34 ccf.

10 While the consultants distinguished between regu
structure made no distinction between the two.

[**Editor's Note:** The preceding image contains the references for footnotes [7 , 8 , 9 , 10].

***1500** City Water obtains water from five separate sources: a municipal groundwater recovery plant, the Metropolitan Water District, five local groundwater wells, recycled water wells, and the nearby Moulton Niguel Water District. With the exception of water obtained from the Metropolitan Water District, City Water admits in its briefing that the record does not contain any breakdown as to the relative cost of each source of supply.

The breakdown of cost from each of its various sources of water is, in percentage terms:

****368**

[**Editor's Note:** The preceding image contains the references for footnote [11]].

Source	Percent of Supply	Cost to Supply
Groundwater Recovery Plant	51.95%	Not ascertained
Metropolitan Water District	28.54%	$1,007 per acre foot[11]
Local Wells	7.79%	Not ascertained
Recycled Wells	6.11%	Not ascertained
Moulton Niguel Water District	5.61%	Not ascertained

Various percentages of City Water's overhead—or fixed costs in the record—were allocated in percentages to some of the sources of water, so the price per tier reflected a percentage of fixed costs and costs of some sources.

This chart reflects those allocations:

Tier	Price	Percentage Allocation
1	$2.47	$1.78 to fixed costs, .62 to wells
2	$3.29	$1.78 to fixed, 1.46 to wells
3	$4.94	$1.53 to fixed, .69 to wells, .17 to the Metropolitan Water District, and 2.50 to the groundwater recovery plant
4	$9.05	0 to fixed, 0 to wells, .53 to groundwater recovery plant, 2.53 to recycled, 3.32 to the Metropolitan Water District, and 2.64 to Penalty Set Aside

[11] In 2010, City Water was paying $719 per acre foot for water from the Metropolitan Water District, and that cost was projected to increase incrementally each year until it reached $1,007 per acre foot by 2014. One acre foot equals 435.6 ccf.

***1501** There is no issue in this case as to the process of the adoption of the new rates, such as whether they should have been voted on first under the article XIII C part of Proposition 218. For purposes of this appeal it is enough to say City Water adopted them. [12]

****369** In August 2012, the Capistrano Taxpayers Association, Inc. (CTA), filed this action, challenging City Water's new rates as violative of Proposition 218, specifically article XIII D, section 6, subdivision (b)(3)'s limit on fees to the "cost of the service attributable to the parcel." After a review of the administrative record and hearing, the trial court found the rates were not compliant with article XIII D, noting it "could not find any specific financial cost data in the [record] to support the substantial rate increases" in the progressively more expensive tiers. In particular the trial judge found a lack of support for the inequality between the tiers.

The statement of decision also concluded that the imposition of charges for recycling within the rate structure violated the "immediately available" provision in article XIII D, section 6, subdivision (b)(4), because *recycled* water is not used by residential parcels. (City Water concedes that when the recycling plant comes on line, it will supply water to some, but not all, of its customers. Residences, for example, are not typically plumbed to receive nonpotable recycled water.) City Water has timely appealed from the declaratory judgment, challenging both determinations.

III. DISCUSSION

A. *Capital Costs and Proposition 218*

[2] We first review the constitutional text. Article XIII D, section 6, subdivision (b)(4) provides: "No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the

property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4."

The trial court ruled City Water had violated this provision by "charging certain ratepayers for recycled water that they do not actually use and that is ***1502** not immediately available to them." The trial judge specifically found, in his statement of decision, that "City [Water] imposed a fee on all ratepayers for recycled water services and delivery of recycled water services, despite the fact that not all ratepayers used recycled water or have it immediately available to them or would ever be able to use it."

But the trial court assumed that providing recycled water is a fundamentally different kind of service from providing traditional potable water. We think not. When each kind of water is provided by a single local agency that provides water to different kinds of users, some of whom can make use of recycled water (for example, cities irrigating park land) while others, such as private residences, can only make use of traditional potable water, providing each kind of water is providing the *same* service. Both are getting water that meets their needs. Nonpotable water for some customers frees up potable water for others. And since water service is already immediately available to all customers of City Water, there is no contravention of subdivision (b)(4) in including charges to construct and provide recycled water to some customers.

On this point, *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243] (*Griffith*) is instructive. *Griffith* involved an augmentation fee on parcels that had their own wells. An objection to the augmentation fee by the well owners was that the fee included a charge for delivered water, ****370** even though some of the properties were outside the area and not actually receiving delivered water. The *Griffith* court said that even if some parcel owners weren't receiving delivered water, revenues from the augmentation fee still benefited those parcels, since they funded "activities required to prepare or implement the groundwater management program for the common benefit of all water users." (*Id.* at p. 602, 163 Cal.Rptr.3d 243.) In *Griffith* the augmentation fee was thus intended to fund aggressive capital investments to increase the general supply of water, including some customers receiving delivered water when other customers did not. It was undeniable that by funding delivered water to some customers, water was *freed up* for all customers. (See *Griffith, supra,* 220 Cal.App.4th at p. 602, 163 Cal.Rptr.3d 243; accord, *Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, [102 Cal.Rptr.3d 270] [customer in rural area who periodically went inactive still had water immediately available to him].)

In the present case, there is a Government Code definition of water, which shows water to be part of a holistic distribution system that does not distinguish between potable and nonpotable water: " 'Water' means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source." (Gov.Code, § 53750, subd. (m).)

[3] ***1503** A recycling plant, like other capital improvements to increase water supply, obviously entails a longer timeframe than a residential customer's normal one-month billing cycle. As shown in *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892 [167 Cal.Rptr.3d 687], the timeframe for the calculation of the true cost of water can be, given capital improvements, quite long. (See *id.* p. 900, 167 Cal.Rptr.3d 687 [costs amortized over a six-year period].) And, as pointed out by amicus curiae Howard Jarvis Taxpayers Association, Government Code section 53756 contemplates timeframes for water rates that can be as long as five years. [13] There is no need, then, to conclude that rates to pay for a recycling plant have to be figured on a month-to-month basis.

[4] The upshot is that within a five-year period, a water agency might develop a capital-intensive means of production of what is effectively *new* water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced. As amicus curiae Mesa Water District points out, Water Code section 31020 gives local water agencies the power to do acts to "furnish sufficient water in the district for any present or *future* beneficial use." (Wat.Code, § 31020, italics added.) The trial court thus erred in concluding the inclusion of charges to fund a recycling operation was, by itself, a violation of subdivision (b)(4).

[5] **[6]** However, the record is insufficient to allow us to determine at this level whether residential ratepayers who only use six ccf or less—what City Water considers the superconservers—are being required to pay for recycling facilities that ****371** would not be necessary but for above-average consumption. Proposition 218 protects lower-than-average users from having to pay rates that are *higher than the cost of service for them* because those rates cover capital investments their levels of consumption do not make necessary. We note, in this regard, that in *Palmdale, supra,* one of the reasons the court there found the tiered pricing structure to violate subdivision (b)(3) was the perverse effect of affirmatively penalizing conservation by some users. (See *Palmdale, supra,* 198 Cal.App.4th at pp. 937–938, 131 Cal.Rptr.3d 373; see accord, *Brydon, supra,* 24 Cal.App.4th at p. 202, 29 Cal.Rptr.2d 128 ["To the extent that certain customers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water."].)

***1504** There is a case with an analogous lacuna, the Supreme Court case of *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 [121 Cal.Rptr.3d 37, 247 P.3d 112] (*Farm Bureau*). In *Farm Bureau,* the record was also unclear as to the issue of apportionment between a regulatory activity's fees and its costs. (*Id.* at p. 428, 121 Cal.Rptr.3d 37, 247 P.3d 112.) Accordingly, the high court directed the matter to be remanded to the trial court for such necessary findings.

That seems to us the appropriate way to complete the record in our case. Following the example of *Farm Bureau,* we remand the matter for further findings on whether charges to develop City Water's nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that recycling.

B. *Tiered Pricing and Cost of Service*

1. *Basic Analysis*

We begin, as we did with the capital cost issue, with the text of the Constitution. In addition to subdivision (b)(3), the main provision at issue in this case, we also quote subdivision (b)(1), because it throws light on subdivision (b)(3). Subdivision (b) describes "Requirements for Existing, New or Increased Fees and Charges," and provides that, "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge *shall not exceed the funds required to provide the property related service.* [¶] ... [¶] (3) *The amount of a fee or charge* imposed upon any parcel or person as an incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel.*" (Italics added.)

[7] In addition to these two substantive limits on fees, article XIII D, section 6, subdivision (b)(5) puts an important procedural limit on a court's analysis in regard to the burden of proof: "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." The trial court found City Water had failed to carry its burden of proof under subdivision (b)(5) of showing its 2010 tiered water fees were proportional to the cost of service attributable to each customer's parcel as required by subdivision (b)(3).

As respondent CTA quickly ascertained, the difference between tier 1 and tier 2 is a tidy one-third extra, the difference between tier 2 and 3 is a similarly exact one-half extra, and the difference between tier 3 and tier 4 is precisely five-sixths extra. This fractional precision suggested to us that City Water did not ***1505** attempt to correlate its rates with ****372** cost of service. Such mathematical tidiness is rare in multidecimal-point calculations. This conclusion was confirmed at oral argument in this court, when City Water acknowledged it had not tried to correlate the incremental cost of providing service at the various incremental tier levels to the prices of water at those levels.

In voluminous briefing by City Water and its amici curiae allies, two somewhat overlapping core thoughts emerge: First, they contend that when it comes to water, local agencies do not have to—or should not have to—calculate the cost of water service at various incremental levels of usage because the task is simply too complex and thus not required by our Constitution. The second core thought is that even if agencies are required to calculate the actual costs of water service at various tiered levels of usage, such a calculation is necessarily, as City Water's briefing contends, a legislative or quasi-legislative, discretionary matter, largely insulated from judicial review. We cannot agree with either assertion.

The appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [79 Cal.Rptr.3d 312, 187 P.3d 37] (*Silicon Valley*): "We ' " 'must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate." ' " ' [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.] [¶] Proposition 218 specifically states that '[t]he provisions of this act shall be *liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.*' (Ballot Pamp., [Gen. Elec. (Nov. 5, 1996)] text of Prop. 218, § 5, p. 109; see Historical Notes, [2A West's Ann. Const. (2008 supp.) foll. *Cal. Const., art. XIII C.*], at p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to 'constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; *make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent.*' " (*Silicon Valley, supra,* 44 Cal.4th at p. 448, 79 Cal.Rptr.3d 312, 187 P.3d 37, italics added.)

If the phrase "proportional cost of the service attributable to *the* parcel" (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really *is* an ascertainable cost of the service that can be attributed to a specific—hence that little word "the"—parcel. Otherwise, the cost of service language would be meaningless. Why use the phrase "cost of the service to the parcel" if a local agency doesn't actually have to ascertain a cost of service to that particular parcel?

[8] ***1506** The presence of subdivision (b)(1) of section 6, article XIII D, just a few lines above subdivision (b)(3), confirms our conclusion. Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole. (*Bighorn, supra,* 39 Cal.4th at p. 228, 46 Cal.Rptr.3d 73, 138 P.3d 220.) The "proportional cost of the service" language from subdivision (b)(3) is part of a general subdivision (b), and there is an additional reference to costs in subdivision (b)(1). Subdivision (b)(1) provides that the total revenue from fees "shall not exceed the funds required to provide *the property* related service." (Italics added.)

****373** It seems to us that to comply with the Constitution, City Water had to do more than merely balance its total costs of service with its total revenues —that's already covered in subdivision (b)(1). To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since City Water didn't try to calculate the actual costs of service for the various tiers, the trial court's ruling on tiered pricing must be upheld simply on the basis of the constitutional text.

We find precedent for our conclusion in the *Palmdale* case. There, a water district obtained its water from two basic sources: 60 percent from a reservoir and the state water project, and the 40 percent balance from the district's own area groundwater wells. Most (about 72 percent) of the water went to single family residences, with irrigation users accounting for 5 percent of the distribution. (*Palmdale, supra,* 198 Cal.App.4th at p. 928, 131 Cal.Rptr.3d 373.) For the previous five years, the district had spent considerable money to upgrade its water treatment plant ($56 million) but revenues suffered from a "decline in water sales," so its reserves were depleted. The district wanted to issue more debt for "future capital projects." (*Id.* at pp. 928–929, 131 Cal.Rptr.3d 373.) Relying on consultants, the water district adopted a new, five-tiered rate structure, which progressively increased rates (for the top four tiers) for three basic categories of customers: residences, businesses, and irrigation projects. The tiered budgets for irrigation users were more stringent than for residential and commercial customers. (*Id.* at p. 930, 131 Cal.Rptr.3d 373.) The way the tiers operated, all three classes of customers got a tier 1 budget, but irrigation customers had less leeway to increase usage without progressing to another tier. Thus, for example, the tier 2 rates for residential customers did not kick in until 125 percent of the budget, but tier 2 rates for irrigation customers kicked in at 110 percent of the budget. The tiered rate structure was itself based on a monthly allocated water budget. (*Ibid.*)

Two irrigation users—the city itself and its redevelopment agency—sought to invalidate the new rates. The trial court had the advantage of the newly-decided Supreme Court opinion in *Silicon Valley,* which had clarified the

***1507** standard of review for Proposition 218 cases. There, the high court made it clear that in Proposition 218 challenges to agency action, the agency had to bear the burden of proof of demonstrating compliance with Proposition 218, and both trial and reviewing courts are to apply an independent review standard, not the traditional, deferential standards *usually* applicable in challenges to governmental action. (*Silicon Valley, supra,* 44 Cal.4th at p. 448, 79 Cal.Rptr.3d 312, 187 P.3d 37.) More directly, said *Silicon Valley,* it is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review. (See *id.* at pp. 441, 448–449, 79 Cal.Rptr.3d 312, 187 P.3d 37 [explaining why substantial evidence to support the agency action standard was too deferential in light of Prop. 218's liberal construction in favor of taxpayer feature].)

With this in mind, the *Palmdale* court held the district had failed to carry its burden of showing compliance with Proposition 218. (*Palmdale, supra,* 198 Cal.App.4th at pp. 937–938, 131 Cal.Rptr.3d 373.) The core of the *Palmdale* court's reasoning was twofold. First, there was discrimination against irrigation-only customers, giving an unfair price advantage to those customers in other classes who were inclined to inefficiently use—or, for that matter, waste—outdoor water. (The opinion noted the perfect exemplar of water waste: hosing off a parking lot.) Thus an ****374** irrigation user, such as a city providing playing fields, playgrounds and parks, was disproportionately impacted by the inequality in classes of users. (*Palmdale, supra,* 198 Cal.App.4th at p. 937, 131 Cal.Rptr.3d 373.) Second, the discrimination was gratuitous. The district's own consultants had proposed a "cost of service" option that they considered Proposition 218 compliant, but the district did not choose it because it preferred a "fixed" option providing better " 'rate stability.' " In fact the choice had the perverse effect of entailing a " '*weaker* signal for water conservation' " for " 'small customers who *conserve* water.' " (*Palmdale, supra,* 198 Cal.App.4th at pp. 937–939, 131 Cal.Rptr.3d 373, some italics added.) [14]

We recognize that *Palmdale* was primarily focused on inequality between classes of users, as distinct from classes of water rate tiers. But, just as in *Palmdale* where the district never attempted to justify the inequality "in the cost of providing water" to its various classes of customers at each tiered level (*Palmdale, supra,* 198 Cal.App.4th at p. 937, 131 Cal.Rptr.3d 373), so City Water has never attempted to justify its price points as based on *costs of service for those tiers.* Rather, City Water merely used what it thought was its legislative, discretionary power to attribute percentages of total costs to the various tiers. While an interesting conversation might be had about whether this was ***1508** reasonable or wise, we can find no room for arguing its constitutionality. It does not comply with the mandate of the voters as we understand it.

2. *City Water's Arguments*

a. *Article X, Section 2*

In supplemental briefing prior to oral argument, this court pitched a batting practice fastball question to City Water, intended to give the agency its best chance of showing that the prices for its various usage tiers, particularly the higher tiers (e.g., $4.94 for all usage over 17 ccf to 34 ccf, and $9.05 for usage over 34 ccf) corresponded with its actual costs of delivering water in those increments. We were hoping that, maybe, we had missed something in the record that would demonstrate the actual cost of delivering water for usage over 34 ccf per month really is $9.05 per ccf, and City Water would hit our question into the upper deck.

What we got back was a rejection of the very idea behind the question. As would later be confirmed at oral argument, City Water's answer was that there does not have to be a correlation between tiered water prices and the cost of service. Its position is that the "cost-of-service principle of Proposition 218" must be "balance[d]" against "the conservation mandate of article X, section 2." In short, City Water justifies the lack of a correlation between the marginal amounts of water usage represented by its various tiers and the actual cost of supplying that water by saying the lack of correlation is excused by the subsidy for low usage represented by tier 1, on the theory that subsidized tier 1 rates are somehow *required* by article X, section 2. While we agree that low-cost water rates do not, in and of themselves, offend subdivision (b)(3) (see *Morgan v. Imperial Irrigation Dist., supra,* 223 Cal.App.4th at p. 899, 167 Cal.Rptr.3d 687), we cannot adopt City Water's constitutional extrapolation of that point.

We quote the complete text of article X, ****375** section 2 in the margin. [15] Article X, section 2 was enacted in 1928 in reaction to a specific Supreme Court case

***1509** decided two years earlier, *Herminghaus v. South. California Edison Co.* (1926) 200 Cal. 81 [252 P. 607] (*Herminghaus*). The *Herminghaus* decision, as Justice Shenk wrote in his dissent there, allowed downstream riparian landowners—basically farmers owning land adjacent to a river—to claim 99 percent of the flow of the San Joaquin River even though they were actually using less than 1 percent of that flow. [16] To compound that anomaly, the downstream riparian landowners' claims came at the expense of the efforts of an electric utility company to generate electricity for general, beneficial use by building reservoirs at various points upstream on the river. (See *id.* at p. 109, 252 P. 607.) In the process of upholding the downstream landowners' "riparian rights" over the rights of the electric company to use the water to make electricity, the *Herminghaus* majority invalidated legislation aimed at preserving water in the state for a reasonable beneficial use, thereby countenancing what Justice Shenk perceived to be a plain waste of good water. (*Herminghaus, supra,* 200 Cal. at p. 123, 252 P. 607 (dis. opn. of Shenk, J.).) As our Supreme Court would describe *Herminghaus* about half a century later: "we held not only that riparian rights took priority over appropriations authorized by the Water Board, a point which had always been clear, but that as between the riparian and the appropriator, the former's use of water was not limited by the doctrine of reasonable use." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442 [189 Cal.Rptr. 346, 658 P.2d 709] (*Audubon–Mono Lake*).)

The voters overturned *Herminghaus* in the 1928 election by adopting article X, section 2, then denoted article XIV, section 3. (See *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 699 [22 P.2d 5] (*Gin Chow*).) In the 1976 Constitutional revision, old article XIV, section 3, was recodified *verbatim* as article X, section 2. (See Gray, *"In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution* ****376** (1989) 17 Hastings Const. L. Q. 225 (hereinafter "*Origins of Article X, Section 2*"). [17]

The purpose of article X, section 2 was described in *Gin Chow,* the first case to reach the Supreme Court in the wake of the adoption of what is now ***1510** article X, section 2, in 1928. Justice Shenk, having been vindicated by the voters on the point of a perceived need to prevent the waste of water by letting it flow to the sea, summarized the new amendment in terms emphasizing beneficial use: "The purpose of the amendment was stated to be 'to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea', and is an effort 'on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners. That such purpose is reflected in the language of the amendment is beyond question. Its language is plain and unambiguous. In the main it is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource, and thereby render available for beneficial use that portion of the waters of our rivers and streams which, under the old riparian doctrine, was of no substantial benefit to the riparian owner and the conservation of which will result in no material injury to his riparian right, and without which conservation such waters would be wasted and forever lost." (*Gin Chow, supra,* 217 Cal. at p. 700, 22 P.2d 5.)

The emphasis in the actual language of article X, section 2 is thus on a policy that favors the beneficial use of water as against the waste of water for nonbeneficial uses. That is what one would expect, consistent with both Justice Shenk's dissent in *Herminghaus* and his majority opinion in *Gin Chow.* (See Gray, *supra, Origins of Article X, Section 2*, 17 Hastings Const. L. Q. at p. 263 [noting emphasis in text on beneficial use].) The word "conservation" is used in the introductory sentence of the provision in the context of promoting beneficial uses: "the conservation of such waters is to be exercised *with a view to the reasonable and beneficial use thereof* in the interest of the people and for the public welfare." (Gray, *supra, Origins v. Article X, Section 2*, at p. 225, italics added.)

[9] But nothing in article X, section 2, requires water rates to exceed the true cost of supplying that water, and in fact pricing water at its true cost is compatible with the article's theme of conservation with a view toward reasonable and beneficial use. (See *Palmdale, supra,* 198 Cal.App.4th at pp. 936–937, 131 Cal.Rptr.3d 373 [reconciling article X, section 2 with Prop. 218]; accord, *Brydon, supra,* 24 Cal.App.4th at p. 197, 29 Cal.Rptr.2d 128 [noting that incremental rate structures create an incentive to reduce water use].) Thus it is hard for us to see how article X, section 2, can be read to trump subdivision (b)(3). We would note here that in times of drought—which looks increasingly like the foreseeable future—providing water can become very pricey indeed. [18] And, we emphasize,

there ***1511** is ****377** nothing at all in subdivision (b)(3) or elsewhere in Proposition 218 that prevents water agencies from passing on the incrementally higher costs of expensive water to incrementally higher users. That would seem like a good idea. But subdivision (b)(3) does require they figure out the true cost of water, not simply draw lines based on water budgets. Thus in *Palmdale,* the appellate court perceived no conflict between Proposition 218 and article X, section 2, *so long as* article X, section 2 is not read to allow water rates that exceed the cost of service. Said *Palmdale:* "California Constitution, article X, section 2 is not at odds with article XIII D *so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel.'* (Art. XIII D, § 6, subd. (b)(3).)" (*Palmdale, supra,* 198 Cal.App.4th at pp. 936–937, 131 Cal.Rptr.3d 373, italics added.) And as its history, and the demonstrated concern of the voters in 1928 demonstrates, article X, section 2 certainly does not require above-cost water rates.

In fact, if push came to shove and article X, section 2, really were in irreconcilable conflict with article XIII D, section 6, subdivision (b)(3), we might have to read article XIII D, section 6, subdivision (b)(3) to have carved out an *exception* to article X, section 2, since Proposition 218 is both more recent, and more specific. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290 [109 Cal.Rptr.3d 620, 231 P.3d 350] ["As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision."]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371 [285 Cal.Rptr. 231, 815 P.2d 304] [same].)

Fortunately, that problem has not arisen. We perceive article X, section 2 and article XIIID, section 6, subdivision (b)(3) to work *together* to promote increased supplies of water—after all, the main reason article X, section 2 was enacted in the first place was to ensure the *capture and beneficial use,* of water and prevent its wasteful draining into the ocean. As a pre–Proposition 218 case, *Brydon, supra,* 24 Cal.App.4th 178, 29 Cal.Rptr.2d 128 observed, one of the benefits of tiered rates is that it is reasonable to assume people will not waste water as its price goes up. (See *id.* at p. 197, 29 Cal.Rptr.2d 128 [noting that incremental rate structures create an incentive to reduce water use].) Our courts have made it clear they interpret the Constitution to allow tiered pricing; but the voters have made it clear they want it done in a particular way.

b. *Brydon and Griffith*

We believe the precedent most on point is *Palmdale,* and we read *Palmdale* to support the trial court's conclusion City Water did not comply ***1512** with the subdivision (b)(3) requirement that rates be proportional to cost of service. The two cases City Water relies on primarily for its opposite conclusion, *Brydon* and *Griffith,* do not support a different result.

Brydon was a pre-Proposition 218 case upholding a tiered water rate structure as against challenges based on 1978's Proposition 13 rational basis and equal protection challenges. Similar to the case at hand, the water district promulgated an "inclining block rate structure." (*Brydon, supra,* 24 Cal.App.4th at p. 182, 29 Cal.Rptr.2d 128; see p. 184 [details of four-tier structure].) Proposition 218 had not yet been enacted, so the opponents of the block rate structure did not have the "proportional cost of the service attributable to the parcel" language in subdivision (b)(3) ****378** to use to challenge the rate structure. They relied, rather, on the theory that Proposition 13 made the rate structure a "special tax," requiring a vote. As backup they made traditional rational basis and equal protection arguments. They claimed the rate structure was "arbitrary, capricious and not rationally related to any legitimate legislative or administrative objective" and, further, that the structure unreasonably discriminated against customers in the hotter areas of the district. (*Brydon, supra,* at p. 182, 29 Cal.Rptr.2d 128.) The *Brydon* court rejected both the Proposition 13 and rational basis/ equal protection arguments.

But *Brydon*—though it might still be read as evidence that tiered pricing not otherwise connected to cost of service would survive a rational basis or equal protection challenge—simply has no application to post–Proposition 218 cases. In fact, the construction of Proposition 13 applied by *Brydon* was based on cases Proposition 218 was designed to overturn. [19] The best example of such reliance was *Brydon's* declination to follow *Beaumont Investors v. Beaumont–Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal.Rptr. 567] (*Beaumont*) on the issue of the burden of proof. *Beaumont* had held it was the agency that had the burden of proof to show compliance with Proposition 13. *Brydon,* however,

said the burden was on the taxpayers to show lack of compliance. In coming to its conclusion, *Brydon* invoked *Knox v. City of Orland* (1992) 4 Cal.4th 132 [14 Cal.Rptr.2d 159, 841 P.2d 144]. *Knox,* said *Brydon,* had "cast substantial doubt" on the "propriety of shifting the burden of proof to the agency." (***1513** *Brydon, supra,* 24 Cal.App.4th at p. 191, 29 Cal.Rptr.2d 128.) But, more than a decade later, our Supreme Court in *Silicon Valley* recognized that *Knox* itself was one of the targets of Proposition 218. (See *Silicon Valley, supra,* 44 Cal.4th at p. 445, 79 Cal.Rptr.3d 312, 187 P.3d 37. [20]) In the wake of *Knox's* fate (see in particular subd. (b)(5) [changing burden of proof]), it seems safe to say that *Brydon* itself was part of the general case law which the enactors of Proposition 218 wanted replaced with stricter controls on local government discretion.

[10] **[11]** As the *Silicon Valley* court observed, Proposition 218 effected a paradigm shift. Proposition 218 was passed by the voters in order to *curtail* discretionary models of local agency fee determination. (See *Silicon Valley, supra,* 44 Cal.4th at p. 446, 79 Cal.Rptr.3d 312, 187 P.3d 37 ["As further evidence that the voters sought to curtail local agency discretion in raising ****379** funds...."].) [21] Allocation of water rates might indeed have been a purely discretionary, legislative task when *Brydon* was decided, but not after passage of Proposition 218.

The other key case in City Water's analysis of this point is *Griffith.* There, the fee itself varied according to the location of the property, e.g., whether the parcels with wells were coastal and metered, noncoastal and metered, or residential and nonmetered. Objectors to the fee asserted certain tiers in the fee, *based on the geographic differences in the parcels covered* by the fee, were not proportional to the cost they were paying. One objector in particular complained the fee was improperly established by working backwards from the overall amount of the project, subtracting other revenues, the balance being the augmentation charge, which was then apportioned among the users. (*Griffith, supra,* 220 Cal.App.4th at p. 600, 163 Cal.Rptr.3d 243.) This objector argued that the proportional cost of service had to be calculated prior to setting the rate for the charge.

***1514** The court noted the M-1 industry manual recommends such a work-backwards-from-total-cost methodology in setting rates, and held that the objectors did not attempt to explain why such an approach "offends Proposition 218 proportionality." (*Griffith, supra,* 220 Cal.App.4th at p. 600, 163 Cal.Rptr.3d 243.) The best the objectors could do was to point to what *Silicon Valley* had said about *assessments,* namely, agencies cannot start with " 'an amount taxpayers are likely to pay' " and *then* determine their annual spending budget from that. (*Ibid.* quoting *Silicon Valley, supra,* 44 Cal.4th at p. 457, 79 Cal.Rptr.3d 312, 187 P.3d 37.) The *Griffith* court distinguished the language from *Silicon Valley,* however, by saying the case before it did not entail any what-the-market-will-bear methodology. (*Griffith, supra,* 220 Cal.App.4th at p. 600, 163 Cal.Rptr.3d 243.)

The objectors had also relied on *Palmdale* for the proposition that "Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis." (*Griffith, supra,* 220 Cal.App.4th at p. 601, 163 Cal.Rptr.3d 243.) The *Griffith* court rejected that point by stating "Apportionment is not a determination that lends itself to precise calculation," for which it cited a pre–Proposition 13, pre–Proposition 218 case, *White v. County of San Diego* (1980) 26 Cal.3d 897, 903, 163 Cal.Rptr. 640, 608 P.2d 728, without any explanation. (*Griffith, supra,* 220 Cal.App.4th at p. 601, 163 Cal.Rptr.3d 243.)

When read in context, *Griffith* does not excuse water agencies from ascertaining the true costs of supplying water to various tiers of usage. Its comments on proportionality ****380** necessarily relate only to variations in property location, such as what side of a water basin a parcel might fall into. That explains its citation to *White,* which itself was not only pre-Proposition 218, but pre-Proposition 13. Moreover, while the *Griffith* court may have noted that the M-1 manual generally recommends a work-backwards approach, we certainly do not read *Griffith* for the proposition that a mere manual used by utilities throughout the western United States can trump the plain language of the California state Constitution. The M–1 manual might show working backwards is reasonable, but it cannot excuse utilities from ascertaining cost of service now that the voters and the Constitution have chosen cost of service.

To the extent *Griffith* does apply to this case, which is on the (b)(4) issue, we find it helpful and have followed it. But trying to apply it to the (b)(1) and (b)(3) issues is fatally flawed.

c. *Penalty Rates*

[12] **[13]** A final justification City Water gives for not tying tier prices to cost of service is to say it doesn't make any difference because the higher tiers can be justified as penalties not within the purview of Proposition 218 at all. (In ***1515** the context of art. X, § 2, City Water euphemistically refers to its higher tiered rates as conservation rates as if such a designation would bring them within art. X, § 2 and exempt them from subd. (b)(3), but as we have explained, art. X, § 2, does not require what article XIII D, § 6, subd. (b)(3) forbids) and designating something a "conservation rate" is no more determinative than calling it an "apple pie" or "motherhood" rate.

City Water's theory of penalty rates relies on article XIII C, section 1, subdivision (e)(5). This subdivision defines the word "tax" to exclude fines "imposed by" a local government "as a result of a violation of law."[22] That is hardly a revelation, of course. We may take as a given that Proposition 218 was never meant to apply to parking tickets.

But City Water's penalty rate theory is inconsistent with the Constitution. It would open up a loophole in article XIII D, section 6, subdivision (b)(3) so large it would virtually repeal it. All an agency supplying *any* service would need to do to circumvent article XIII D, section 6, subdivision (b)(3), would be to establish a low legal base use for that service, pass an ordinance to the effect that any usage above the base amount is illegal, and then decree that the penalty for such illegal usage equals the incrementally increased rate for that service. Such a methodology could easily yield rates that have no relation at all to the actual cost of providing the service at the penalty levels. And it would make a mockery of the Constitution.

IV. CONCLUSION

All of which leads us to the conclusion City Water's pricing violates the constitutional requirement that fees "not exceed the proportional cost of the service attributable to the parcel." (*Art. XIII D, § 6, subd. (b)(3)*.) This is not to say City Water must calculate a rate for 225 Elm Street and then calculate another for the house across the street at 226. Neither the voters nor the Constitution say ****381** anything we can find that would prohibit tiered pricing. The way Proposition 218 operates, water rates that exceed the cost of service operate as a tax, similar to the way a 'carbon tax' might be imposed on use of energy. But, we should emphasize: Just because such above-cost rates are a tax does not mean they cannot be imposed—they just have to be submitted to the relevant electorate and approved by the people in a vote. There is no reason, for example, why a water district or local government cannot, consistent with Proposition 218, seek the approval of the voters to impose a tax on water over a given level of usage—as we indicated earlier, that might be a good idea. However, if a local government body chooses to impose tiered rates unilaterally without a vote, those tiers must be based on cost of service for the incremental level of usage, not predetermined budgets. (For the moment, of course, we need not decide whether such a proposed tax would constitute a general tax or special tax.)

Having chosen to bypass the electorate, City Water's article X, section 2 position kept it from explaining to us *why* it cannot anchor rates to cost of service. Nothing in our record tells us why, for example, they could not figure out the costs of given usage levels that require City Water to tap more expensive supplies, and then bill users in those tiers accordingly. Such computations would seem to satisfy Proposition 218, and City Water has not shown in this record it would be impossible to comply with the constitutional mandate in this way or some other. As the court pointed out in *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153], the calculations required by Proposition 218 may be "complex," but "such a process is now required by the California Constitution."

***1516** Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service —water service. And water service most assuredly is immediately available to City Water's customers now.

But, because the record is unclear whether low usage customers might be paying for a recycling operation made necessary only because of high usage customers, we must reverse the trial court's judgment that the rates

here are *necessarily* inconsistent with subdivision (b)(4), and remand the matter for further proceedings with a view to ascertaining the portion of the cost of funding the recycling operation attributable to those customers whose additional, incremental usage requires its development.

By the same token, we see nothing in article XIII, section 6, subdivision (b)(3) of the California Constitution that is incompatible with water agencies passing on the true, marginal cost of water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water. Precedent and common sense both support such an approach. However, we do hold that above-cost-of-service pricing for tiers of water service is not allowed by Proposition 218 and in this case, City Water did not carry its burden of proving its higher tiers reflected its costs of service. In fact it has practically admitted those tiers do not reflect cost of service, as shown by their tidy percentage increments and City Water's refusal to defend the calculations. And so, on the subdivision (b)(3) issue, we affirm the trial court's judgment.

Given the procedural posture the case now finds itself in, the issue of who is the prevailing party is premature. That question should be first dealt with by the trial court only after all proceedings as to City Water's rate structure are final. Accordingly, we do not make an appellate cost order now, but ***1517** reserve that matter for future adjudication in the trial court. (See *Neufeld v. Balboa Ins. Co.* (2000) 84 Cal.App.4th 759, 766 [101 Cal.Rptr.2d 151] [deferring question of appellate costs in case being remanded until litigation was final].)

Moore, J., and Thompson, J., concurred.

All Citations

235 Cal.App.4th 1493, 186 Cal.Rptr.3d 362, 15 Cal. Daily Op. Serv. 3836, 2015 Daily Journal D.A.R. 4351

Footnotes

1 Webb, *The American West*, Perpetual Mirage (May 1957) Harper's Magazine.

2 Reisner, Cadillac Desert: The American West and Its Disappearing Water (1986) page 6.

3 Until *Bighorn,* there was a question as to whether Proposition 218 applied at all to water rates. In 2000, the appellate court in *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 83 [101 Cal.Rptr.2d 905] (*Jarvis v. Los Angeles*), held that a city's water rates weren't subject to Proposition 218, reasoning that water rates are mere commodity charges. *Bighorn,* however, formally disapproved *Jarvis v. Los Angeles* and held that water rates *are* subject to article XIII D of the California Constitution. (*Bighorn, supra,* 39 Cal.4th at p. 217, fn. 5, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

4 For reader convenience, we will occasionally refer in this opinion in shorthand to “subdivision (b)(1),” “subdivision (b)(3),” “subdivision (b)(4),” and “subdivision (b)(5),” and sometimes even just to “(b)(1)” “(b)(3),” “(b)(4)” or “(b)(5).” Each time those references refer to article XIII D, section 6, subdivision (b) of the California Constitution. Also, all references to any “article” are to the California Constitution.

5 We requested supplemental briefing prior to oral argument to clarify the nature of the issues and precisely what was in, and not in, the administrative record. We are indebted to able counsel on all sides for giving us their best efforts to answer our questions.

6 Such rate structures are sometimes called “inclining” as in the pre–Proposition 218 case, *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 184 [29 Cal.Rptr.2d 128] (*Brydon*). Amicus ACWA estimates that over half its members now have some sort of tiered water rate system. As we will say numerous times in this opinion, tiered water rate structures and Proposition 218 are thoroughly compatible “so long as”—and that phrase is drawn directly from *Palmdale*—those rates reasonably reflect the cost of service attributable to each parcel. (*Palmdale, supra,* 198 Cal.App.4th at p. 936, 131 Cal.Rptr.3d 373.)

7 Ccf stands for one hundred cubic feet, which translates to 748 gallons. (See *Brydon, supra,* 24 Cal.App.4th at p. 184, 29 Cal.Rptr.2d 128.)

8 A precise figure for the usage is complicated by an attempt in the rate structure to distinguish indoor and outdoor use. Technically, tier 2 is tier 1 + 3 extra ccfs, plus an outdoor allocation that is supposed to average out to a total of 17 ccfs, i.e., 8 ccfs are allocated (on average) for outdoor use.

9 Technically, tier 3 is defined as up to 200 percent of tiers 1 and 2, which, given City Water's projected 17 ccf average, works out to be 34 ccf.

10 While the consultants distinguished between regular and large lot residential customers, the final structure made no distinction between the two.

11 In 2010, City Water was paying $719 per acre foot for water from the Metropolitan Water District, and that cost was projected to increase incrementally each year until it reached $1,007 per acre foot by 2014. One acre foot equals 435.6 ccf.

12 With a minor qualification that, given our disposition, it need not be addressed in too much detail. A minor issue in the briefing is whether City Water should have made its consultants' report available for taxpayer scrutiny prior to the public hearing contemplated in article XIII D, section 6, subdivision (c). Since City Water is not able to show its price structure correlates with the actual cost of providing service at the various incremental levels even *with* the consultants' report, we need not get bogged down in this issue.

13 Government Code section 53756 provides in relevant part:
"An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following:
"(a) It adopts the schedule of fees or charges for a property-related service for a period *not to exceed five years* pursuant to Section 53755." (Italics added.)

14 As described by the court, the fixed cost option was really a "fixed variable" option, with fixed charges being 60 percent of total costs, the balance being variable. (*Palmdale, supra,* 198 Cal.App.4th at p. 929, 131 Cal.Rptr.3d 373.)

15 "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

16 "In order to have the beneficial use of less than one per cent of the maximum flow of the San Joaquin River on their riparian lands the plaintiffs are contending for the right to use the balance in such a way that, so far as they are concerned, over ninety-nine per cent of that flow is wasted. This is a highly unreasonable use or method of the use of water." (*Herminghaus, supra,* 200 Cal. at p. 123, 252 P. 607 (dis. opn. of Shenk, J.).)

17 Professor Gray's article is an exceptionally valuable source on the origins of article X, section 2.

18 It was recently noted that Santa Barbara is dusting off a desalinization plant built in the 1990's to provide additional water for the city in the current drought. (See Covarrubias, *Santa Barbara Working to Reactive Mothballed Desalinization Plant* (March 3, 2015, L.A. Times < http://www.latimes.com/local/california/la–me–santa–barbara–desal–20150303–story.html> (as of March 30, 2015) [noting, among other things, that desalination can be expensive].)

19 Two examples of early, post–Proposition 13 cases that took a strict constructionist view of the provision are *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941 (*Los Angeles County v. Richmond*) [strictly construing Proposition 13's voting requirements to avoid finding a transportation commission was a "special district"]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54, 184 Cal.Rptr. 713, 648 P.2d 935 [strictly construing words "special tax" used in section 4 of Proposition 13 as ambiguous to avoid finding municipal payroll and gross receipts tax was a "special tax"].) *Brydon* expressly relied on *Los Angeles County v. Richmond.* (See *Brydon, supra,* 24 Cal.App.4th at p. 190, 29 Cal.Rptr.2d 128.) Proposition 218 effectively reversed these cases with a liberal construction provision. (See *Silicon Valley, supra,* 44 Cal.4th at p. 448, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

20 Here is the relevant passage from *Silicon Valley:* "As the dissent below points out, a provision in Proposition 218 shifting the burden of demonstration was included in reaction to our opinion in *Knox.* The drafters of Proposition 218 were clearly aware of *Knox* and the deferential standard it applied based on *Dawson* [*v. Town of Los Altos Hills* (1976)] 16 Cal.3d 676 [129 Cal.Rptr. 97, 547 P.2d 1377]."

21 Here and there in City Water's briefing there are references to a discretionary, legislative power in regard to local municipal water agencies conferred by article XI, section 9, which was a 1970 amendment to the Constitution, though one can trace it back to the Constitution of 1879. Basically, article XI, section 9, gives cities the right to go into the water supply business. We quote its text, unamended since 1970: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent. [¶] (b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law."
Article XI, section 9 obviously does not *require* municipal corporations to establish fees in excess of their costs, so there is no incompatibility between it and the later enacted Proposition 218.

22 The relevant text from article XIII C, section 1, subdivision (e)(5) is:

> "(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following: [¶] ... [¶] (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law."

198 Cal.App.4th 926
Court of Appeal, Second
District, Division 7, California.

CITY OF PALMDALE, Plaintiff and Appellant,
v.
PALMDALE WATER DISTRICT, et al., Defendants and Respondents.

No. B224869.
|
Aug. 9, 2011.
|
As Modified Aug. 25, 2011.

Synopsis

Background: City brought action seeking to invalidate water district's water rate increase structure and corresponding bonds which district sought to issue for future capital projects and refinancing. The Superior Court, Los Angeles County, No. BC413907, Conrad R. Aragon, J., entered judgment for water district, and city appealed.

Holdings: The Court of Appeal, Woods, J., held that:

[1] proposed tiered pricing structure for irrigation customers was not proportional to the cost of providing water to each parcel;

[2] tiers constituted a "fee or charge" for purposes of Proposition 218; and

[3] goal of promoting water conservation did not allow water district to charge irrigation customers a disproportionate fee.

Reversed.

West Headnotes (7)

[1] Constitutional Law
Judicial Authority and Duty in General

The court must enforce the provisions of the Constitution and may not lightly disregard or blink at a clear constitutional mandate.

Cases that cite this headnote

[2] Constitutional Law
Policy and purpose in general

The court is obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law.

1 Cases that cite this headnote

[3] Municipal Corporations
Constitutional Requirements and Restrictions

The underlying purpose of Proposition 218, which concerned voter approval for local government general taxes and special taxes and set forth procedures, requirements, and voter approval mechanisms for local government assessments, fees, and charges, was to limit government's power to exact revenue and to curtail the deference that had been traditionally accorded legislative enactments on fees, assessments, and charges. West's Ann.Cal. Const. Arts. 13C, § 1 et seq., 13D, § 1 et seq.

3 Cases that cite this headnote

[4] Water Law
Effect of usage or consumption on rate charged

Water district's proposed tiered pricing structure, which imposed greater costs on irrigation water users, was not proportional to the cost of providing water to each parcel as required by Proposition 218 and constitutional provisions prohibiting a fee or

charge from exceeding the proportional cost of the service attributable to the parcel. West's Ann.Cal. Const. Art. 13D, § 6(b)(3, 4).

See Cal. Jur. 3d, Property Taxes, § 15; Cal. Jur. 3d, Public Improvements, § 3; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, §§ 143, 144.

4 Cases that cite this headnote

[5] Water Law

Effect of usage or consumption on rate charged

Water district's proposed various tiers of escalated pricing of water used by irrigation customers constituted a "fee or charge" for purposes of Proposition 218's prohibition against fees and charges assessed to a parcel owner that exceed the proportional cost of the service attributable to the parcel, as district used the tiers to calculate its customers' water rates. West's Ann.Cal. Const. Art. 13D, § 6(b)(3).

4 Cases that cite this headnote

[6] Water Law

Types of Charges and Fees

Water Law

Rate and Amount in General

Water Law

Effect of usage or consumption on rate charged

All charges for water delivery incurred after a water connection is made are charges for a "property-related service" for purposes of Proposition 218 limitation on fees or charges, regardless of whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee. West's Ann.Cal. Const. Art. 13D, §§ 2(e), 6(a)(4), (b)(3).

Cases that cite this headnote

[7] Water Law

Effect of usage or consumption on rate charged

Goal of promoting water conservation did not allow water district, in compliance with Proposition 218's limitation on fees or charges for property-related services, to employ tiered pricing structure which imposed escalating costs on irrigation-only customers, depending on their usage, that were disproportionate to rates which district charged other users. West's Ann.Cal. Const. Arts. 10, § 2, 13D, § 6(b)(3); West's Ann.Cal.Water Code § 372.

4 Cases that cite this headnote

Attorneys and Law Firms

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Daniel S. Hentschke, Oceanside, for Association of California Water Agencies (ACWA) as Amicus Curiae on behalf of Defendant and Respondent Palmdale Water District.

WOODS, J.

928 *INTRODUCTION

In this appeal, the City of Palmdale (City) asserts the trial court erred in finding the Palmdale Water District (PWD) had adopted a new water rate structure in conformity with the constitutional requirements of Proposition 218.

After conducting an independent review of the record (*Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448, 79 Cal.Rptr.3d 312, 187 P.3d 37), we conclude PWD failed to satisfy its burden to establish that its new water rate structure complies with the mandates of Proposition 218 (as set forth in art. XIII D of the Cal. Const. (article XIII D)), including the proportionality requirement which specifies that no fee or charge imposed upon any person or parcel as an incident of property ownership shall exceed

the proportional cost of the service attributable to the parcel. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

As of 2008, PWD revenues had decreased by about $1.3 million ("primarily due to a decline in water sales"), while its expenses had increased by about $1.2 million in 2008 (and $2.4 million in 2007). PWD's general manager concluded a 15 percent rate increase was necessary to balance the budget.

At a cost of $136,000, PWD retained Raftelis Financial Consultants (RFC) to prepare a rate study and recommend a new rate structure. According to RFC's water rate study report, ****375** PWD serves a population of approximately 145,000 with about 26,000 service connections. PWD's water supply consists of 60 percent surface water (from Littlerock Reservoir and the State Water Project) and 40 percent from PWD's 25 area groundwater wells. Single-family residential (SFR) customers account for 72 percent of PWD's total water usage. Remaining water usage is as follows: commercial/industrial (10 percent), multifamily residential (MFR) (9 percent), irrigation (5 percent), and construction and other customers such as schools and municipalities (4 percent).

***929** According to RFC's report, over the preceding five years, PWD had spent more than $56 million to upgrade its water treatment plant and depleted its reserves. PWD wanted to issue $38.25 million in debt by July 2009 for future capital projects and refinancing. RFC presented policy issues for the PWD board to decide, including water budget allocation defaults and methods for calculating desired fixed revenue from proposed new rates. RFC advised the board regarding two options for determining fixed revenues: a "Cost of Service" option and a "Percentage of fixed cost" option. Advantages of the Cost of Service option were noted as "Defensible—Prop 218" and "Consistent with industry standards" but one disadvantage was "Greater revenue fluctuation with varying demand." An advantage of the alternative option was "rate stability" while disadvantages included "Significant impact on small customers who conserve water" and "weaker signal for water conservation." RFC indicated fixed revenue should not exceed 30 percent of revenues.

RFC again met with PWD's board regarding the "need to adopt a water rate increase structure for a future bond issue...." It was determined PWD's new rate structure would recover 75 percent of its costs from fixed fees and 25 percent from variable fees "based on the bond team's recommendation and conservation factors...." The proposed rate structure then included a fixed monthly service charge based on meter size and commodity charges based on a water budget allocation. Residential customers were provided indoor and outdoor allocations, commercial customers received a three-year average allocation and irrigation customers received only an outdoor allocation. Commodity rates were then imposed under a tiered structure, determining how much the customer went over (or stayed within) the allocated budget.

Again, RFC presented two options for determining the commodity rates and monthly service charge: the Cost of Service (COS) option and the "Fixed/Variable Cost Allocation" (FV). With the FV option, monthly fixed charges would represent 75 percent of total costs while the COS alternative would include only billing and customer service costs plus meter charges in the fixed monthly fees. RFC indicated this option offered "more revenue stability" but a "weaker conservation signal." The reverse was true for the COS option: "less revenue stability" but a "stronger conservation signal."

When RFC presented its final water rate study report to the PWD board in March 2009, the board approved the FV option but modified it such that 60 percent of fixed costs would be recovered from fixed monthly charges and 40 percent would be recovered from variable charges.

PWD prepared a "Notice of Public Hearing" pursuant to Proposition 218, and the City (and its redevelopment agency) sent letters to PWD protesting the rate increase. PWD held a public hearing in May 2009 at which City ***930** representatives spoke against the increase and members of the public appeared to object as well. At ****376** the same meeting, the board adopted a resolution approving its 2009 bonds to replenish its reserves. "The success of this bond issue is dependent on the adoption of the pending water rate increases."

As approved, the new rate structure now imposes a fixed monthly service charge based on the size of the

customer's meter and a per unit commodity charge for the commodity charge of water used, with the amount depending upon the customer's adherence to the allocated water budget. The customer pays a higher commodity charge per unit of water above the budgeted allotment, but the incremental rate increase depends on the customer's class. More particularly, all customers pay tier 1 rates ($0.64/unit in 2009) at 0 to 100 percent of their water budget allocation. Thereafter, however, the increased rate depends on the customer category:

	SFR/MFR	Commercial	Irrigation
Tier 2 ($2.50/unit)	100–125%	100–130%	0–110%
Tier 3 ($3.20/unit)	125–150%	130–160%	110–120%
Tier 4 ($4.16/unit)	150–175%	160–190%	120–130%
Tier 5 ($5.03/unit) [1]	Above 175%	Above 190%	Above 130%

The following day, the City filed a complaint seeking to invalidate the water rate increase and the 2009 bonds. (The case was deemed related to another action filed by the City against PWD seeking injunctive and declaratory relief to stop imposition of the new rates. The cases were not consolidated.)

This action was tried in February 2010. The City sought to introduce evidence beyond the scope of the administrative record, after propounding discovery and serving Public Records Act requests for documents. The trial court granted the City's motion to amend its complaint but denied its motion to augment the record. The City filed an offer of proof identifying evidence it would have presented at trial had it been allowed to do so and requested a statement of decision. Initially, the trial court's tentative ruling was to invalidate the rate increase but after hearing oral argument and taking the matter under submission, the trial court issued its ruling validating PWD's rates and the 2009 bonds. At the court's request, both the City and PWD submitted proposed statements of decision (and the City also filed objections to PWD's statement). The court issued PWD's statement without changes. (The court mistakenly believed the City had not filed a proposed statement ***931** but, when the error was brought to the court's attention, decided PWD's statement should stand.) Judgment was entered. The City appeals.

DISCUSSION

"In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act. In adopting this measure, the people found and declared ' " 'that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.' " ' [ ]" (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640, 119 Cal.Rptr.2d 91, fns. omitted.) "Proposition 218 added articles XIII C and XIII D to the California Constitution. Article ****377** XIII C concerns voter approval for local government general taxes and special taxes. Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges. We are concerned here with article XIII D, specifically certain provisions concerning fees and charges." (*Ibid.*)

The relevant article XIII D provisions on fees and charges are as follows:

"[Section] 1. Application of article. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority.... [¶] ... [¶]

"[Section] 2. Definitions. As used in this article: [¶] ... [¶]

"(e) 'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, *including a user fee or charge for a property-related service.*[¶] ... [¶]

"(g) 'Property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

"(h) 'Property-related service' means a public service having a direct relationship to property ownership. [¶] ... [¶]

***932** "[Section] 3. Limitation of property taxes, assessments, fees and charges[.]

"(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

"(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

"(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

"(3) Assessments as provided by this article.

"(4) *Fees or charges for property related services as provided by this article.*

"(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership. [2] [¶] ... [¶]

"[Section] 6. Property Related Fees and Charges.

"(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article [(these procedures include notice to property owners, and a public hearing for proposed new or increased fees)]: [¶] ... [¶]

"(b) *Requirements for Existing, New or Increased Fees and Charges*. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets *all* of the following requirements:

"(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 imposed upon any parcel or person as an ****378** incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel.*

***933** "(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

"(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. [¶] Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. *In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.*

"(c) Voter Approval for New or Increased Fees and Charges. 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 shall be conducted not less than 45 days after the public hearing....

"(d) Beginning July 1, 1997, all fees or charges shall comply with this section." (Italics added.)

[1] **[2]** **[3]** As our Supreme Court emphasized in *Silicon Valley, supra,* 44 Cal.4th 431, 79 Cal.Rptr.3d 312, 187 P.3d 37, "We ' " 'must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate." ' " ' [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.]" (*Id.* at p. 448, 79 Cal.Rptr.3d 312, 187 P.3d 37.) "Because Proposition 218's underlying purpose was to limit government's power to exact revenue and to curtail the deference that had been traditionally accorded legislative enactments on fees, assessments, and charges, a more rigorous standard of review is warranted," and we must exercise our "independent judgment" in determining whether PWD's rate increase violates article XIII D (Prop. 218). (*Ibid.*)

[4] Among other substantive challenges, the City argues PWD failed to demonstrate that its water rates are proportional to the cost of providing water service to each parcel as required under ***934** section 6(b) (3) of article XIII D: "The Proposition 218 Ballot Pamphlet makes clear that the voters intended that 'No property owner's fee may be more than the cost to provide service to that property owner's land.' " Nevertheless, the City says, PWD's rates violate this proportionality requirement in a number of respects: (1) for no permissible purpose (according to the City), PWD admittedly targets irrigation users to pay dramatically higher and disproportionate water rates; (2) PWD's monthly service charge is arbitrary and not tied to the actual costs of providing identified services to each meter; (3) PWD's commodity charge tiers are not ****379** proportional to the costs of providing water service; and (4) PWD's water budget structure is not proportional to the costs of providing water service and fails to achieve its stated purpose. Moreover, the City urges, PWD failed to prove its revenues under the new rate structure will not exceed the costs of providing water service in contravention of Article XIII D, section 6(b)(1), and instead "all but assures that revenues PWD receives from customers in the higher tiers will be more than is required to cover PWD's costs of service." Further, the City says, PWD's new rates require irrigation users to pay for services they cannot receive in violation of section 6(b)(4) of Article XIII D.

[5] According to the City, "PWD's scheme charges a few irrigation users a vastly disproportionate share of PWD's total costs. PWD makes no showing whatsoever that PWD's cost of delivering service to those irrigation users is proportionately higher than PWD's costs of delivering service to residential and commercial users. The record shows that PWD intentionally seeks to recoup most of its costs from a relatively few irrigation users (who happen to be institutions such as the City), so as to keep costs to the vast majority of PWD's customers proportionately low. This sort of price discrimination is not allowed under Proposition 218...."

[6] In response, PWD asserts that the structuring of the various tiers does not even constitute a "fee or charge" for purposes of Proposition 218 but merely "defined percentages of a customer's water budget that define the breaking points for the applicable tiers," but this is inconsistent with the law as PWD uses these tiers to calculate its customers' water rates. "Because it is imposed for the property-related service of water delivery, [PWD's] water rate, as well as its fixed monthly charges, are fees or charges within the meaning of article XIII D...." (*Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217, 46 Cal.Rptr.3d 73, 138 P.3d 220.) "[A]ll charges for water delivery" incurred after a water connection is made "are charges for a property-related service, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." (*Ibid.*)

[7] Next, PWD says it is entitled to promote conservation in such a manner pursuant to Article X, section 2, of the California Constitution: "It is hereby ***935** declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall

be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.... This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

In addition, PWD notes, consistent with this constitutional provision, the Legislature enacted Water Code section 372 (allocation-based conservation water pricing) which provides:

"(a) A public entity may employ allocation-based conservation water pricing that meets all of the following criteria:

****380** "(1) Billing is based on metered water use.

"(2) A basic use allocation is established for each customer account that provides a reasonable amount of water for the customer's needs and property characteristics. Factors used to determine the basic use allocation may include, but are not limited to, the number of occupants, the type or classification of use, the size of lot or irrigated area, and the local climate data for the billing period. Nothing in this chapter prohibits a customer of the public entity from challenging whether the basic use allocation established for that customer's account is reasonable under the circumstances. Nothing in this chapter is intended to permit public entities to limit the use of property through the establishment of a basic use allocation.

"(3) A basic charge is imposed for all water used within the customer's basic use allocation, except that at the option of the public entity, a lower rate may be applied to any portion of the basic use allocation that the public entity has determined to represent superior or more than reasonable conservation efforts.

"(4) A conservation charge shall be imposed on all increments of water use in excess of the basic use allocation. The increments may be fixed or may be determined on a percentage or any other basis, without limitation on the number of increments, or any requirement that the increments or conservation ***936** charges be sized, or ascend uniformly, or in a specified relationship. The volumetric prices for the lowest through the highest priced increments shall be established in an ascending relationship that is economically structured to encourage conservation and reduce the inefficient use of water, consistent with Section 2 of Article X of the California Constitution.

"(b) (1) Except as specified in subdivision (a), the design of an allocation-based conservation pricing rate structure shall be determined in the discretion of the public entity.

"(2) The public entity may impose meter charges or other fixed charges to recover fixed costs of water service in addition to the allocation-based conservation pricing rate structure.

"(c) A public entity may use one or more allocation-based conservation water pricing structures for any class of municipal or other service that the public entity provides." (Wat.Code, § 372.)

While this statute contemplates allocation-based conservation pricing consistent with Article X, section 2, PWD fails to explain why this provision cannot be harmonized with Proposition 218 and its mandate for proportionality. PWD fails to identify any support in the record for the inequality *between* tiers, depending on the category of user. In addition, PWD says, "the distinct tiers for irrigation users are [further] supported by Water Code section 106, which expressly recognizes that the use of water for domestic purposes is superior to that for irrigation usage." However, the precise language of section 106 is as follows: "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the *next highest use* is for irrigation." (Wat.Code, § 106, italics added; and see *Deetz v. Carter* (1965) 232 Cal.App.2d 851, 854, 856, 43 Cal.Rptr. 321 [domestic use includes "consumption for the sustenance of human beings, for household conveniences, and for the care of livestock," but not "commercial purposes"].) Yet, under PWD's tier structure, commercial users are permitted to use amounts of water exceeding their budgeted allocation under tier 1 at a lower cost than irrigation only users—without ****381** any explanation for this disparity even attempted by PWD.

California Constitution, article X, section 2 is not at odds with article XIII D so long as, for example, conservation is attained in a manner that "shall not ***937** exceed the proportional cost of the service attributable to the

parcel." (Art. XIII D, § 6, subd. (b), par. (3).) According to the record, the efficient use of water in keeping with the policy in favor of water conservation is already built into the customer's budgeted allocation (the tier 1 rate, which is equal for all users). Yet, a review of the tier structure alone establishes that irrigation customers such as the City are charged disproportionate rates reaching tier 5 ($5.03/unit) rates at 130 percent of their budgeted allocation as compared to other users who do not reach such high rates until they exceed 175 percent (SFR/MFR) or 190 percent (commercial) without any showing by PWD of a corresponding disparity in the cost of providing water to these customers at such levels. [3] Notably, PWD's "IRR" category means customers designated as "irrigation *only* " users; PWD does not segregate the recognized outdoor and irrigation usage of its other customers such as residential or commercial users. As a result, a residential (single- or multifamily) or commercial user (constrained only by its historical three-year average usage) could waste or inefficiently use water by, for example, filling, emptying and refilling a swimming pool or excessively hosing off a worksite or parking lot without the same proportional cost because of the significant disparity in tiered rates for water use in excess of the customer's allotted water budget. According to the record, it is the irrigation-only user (perhaps, as the City urges, maintaining playing fields, playgrounds and parks for example) who is "potentially the most impacted," without a corresponding showing in the record that such impact is justified under Article X, section 2, or permissible under Article XIII D, section 6.

As stated in section 6, subdivision (b)(5) of Article XIII D, "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." According to RFC, it was the cost of service (COS) option—the option PWD did *not* choose—that was "[d]efensible [under] Prop[osition] 218," and this option was also "[c]onsistent with industry standards," but it meant "[g]reater revenue fluctuation with varying demand." On the other hand, RFC advised PWD the "[p]ercentage of fixed cost" or FV option it ultimately chose would send a "*weaker* signal for water conservation" and would mean a "[s]ignificant impact on small customers *who conserve* water," but afforded "rate ***938** stability." (Italics added.) It follows that PWD has failed to carry its burden to demonstrate compliance with the requirements of article XIII D, and the judgment must be reversed. [4]

****382** *DISPOSITION*

The judgment is reversed. The City is entitled to its costs of appeal.

We concur: PERLUSS, P.J., and ZELON, J.

All Citations

198 Cal.App.4th 926, 131 Cal.Rptr.3d 373, 11 Cal. Daily Op. Serv. 11,067, 2011 Daily Journal D.A.R. 13,081

Footnotes

1 These costs per unit are the tiered rates for 2009; the per unit cost increases each year thereafter while the tier percentages remain the same.

2 Article XIII D, section 4 sets forth procedures and requirements for assessments analogous to the procedures and requirements for fees and charges set forth in article XIII D, section 6, post. Article XIII D, section 5 specifies the effective date and exemptions from section 4.

3

	SFR/MFR	Commercial	Irrigation
Tier 2 ($2.50/unit)	100–125%	100–130%	0–110%
Tier 3 ($3.20/unit)	125–150%	130–160%	110–120%
Tier 4 ($4.16/unit)	150–175%	160–190%	120–130%
Tier 5 ($5.03/unit)	Above 175%	Above 190%	Above 130%

4 In addition to arguing PWD's rate structure violated the proportionality requirement of Proposition 218, the City says the trial court abused its discretion in denying its motion to augment (beyond the administrative record) and raises a number of additional substantive and procedural challenges, but we need not address these additional arguments in light of our disposition of the preceding issue.

131 Cal.Rptr.3d 373, 11 Cal. Daily Op. Serv. 11,067, 2011 Daily Journal D.A.R. 13,081

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97 Cal.App.4th 637, 119 Cal.Rptr.2d 91, 02 Cal. Daily Op. Serv. 3160, 2002 Daily Journal D.A.R. 3870

HOWARD JARVIS TAXPAYERS ASSOCIATION et al., Plaintiffs and Respondents,
v.
CITY OF ROSEVILLE, Defendant and Appellant.

No. C036295.
Court of Appeal, Third District, California.
Apr. 12, 2002.

SUMMARY

A taxpayers association and related parties filed an action against a city, alleging that an "in-lieu franchise fee" of 4 percent imposed by the city on the annual budgets of each of the city's utilities (water, sewer, and refuse collection), paid by the utility ratepayers and transferred to the city's general fund, violated Prop. 218 (Cal. Const., art. XIII D), which requires voter approval of local government property-related assessments, fees, and charges. The trial court entered summary judgment for plaintiffs. (Superior Court of Placer County, No. SCV7831, Frances A. Kearney, Judge.)

The Court of Appeal affirmed. The court held that the fee was subject to, and violated Prop. 218, specifically Cal. Const., art. XIII D, § 6, subd. (b), which provides that fee or charge revenues may not exceed what it costs to provide fee or charge services, and that no fee or charge may be imposed for general governmental services. The in-lieu franchise fee did not comply with either of these requirements. (Opinion by Davis, J., with Scotland, P. J., and Callahan, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Property Taxes § 7.8--Real Property Tax Limitation--In-lieu Franchise Fee--Municipal Utilities--Voter Approval Requirement.
An "in-lieu franchise fee" of 4 percent imposed by a city on the annual budgets of each of the city's utilities (water, sewer, and refuse collection), paid by the utility ratepayers and transferred to the city's general fund, was subject to Prop. 218 (Cal. Const., art. XIII D), which requires voter approval of local government property-related assessments, fees, and charges. The fee was not dependent upon the quantity of service used, which is excepted from Prop. 218, but was imposed upon a parcel or upon a person as an incident of property ownership for Prop. 218 purposes.

(2)
Property Taxes § 7.8--Real Property Tax Limitation--In-lieu Franchise Fee--Municipal Utilities--Validity--Voter Approval Requirement.
An in-lieu franchise fee of 4 percent imposed by a city on the annual budgets of each of the city's utilities (water, sewer, and refuse collection), paid by the utility ratepayers and transferred to the city's general fund, violated Prop. 218 (Cal. Const., art. XIII D), which requires voter approval of local government property-related assessments, fees, and charges, and specifically Cal. Const., art. XIII D, § 6, subd. (b), which provides that fee or charge revenues may not exceed what it costs to provide fee or charge services, and that no fee or charge may be imposed for general governmental services. The in-lieu franchise fee did not comply with either of these requirements.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C-110B; West's Key Digest System, Municipal Corporations
956(2).]

COUNSEL
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Trevor A. Grimm, Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Respondents.

DAVIS, J.

The City of Roseville (Roseville) operates three municipal utilities that provide, respectively, water, sewer, and refuse collection services. Roseville imposes an "in-lieu franchise fee" (in-lieu fee) of 4 percent on each of the utilities' annual budgets; this fee is paid by the utility ratepayers and transferred to Roseville's general fund.

This appeal presents us with two principal questions: whether Proposition 218-a descendant of Proposition 13 that covers local government fees and charges-applies to Roseville's in-lieu fee; and, if so, whether the in-lieu fee violates Proposition 218. We answer yes to both questions and affirm the judgment. ***639**

Background

Private utilities pay public authorities "franchise fees" to use government land such as streets, or for rights-of-way to provide utility service. [1] Roseville similarly imposes the in-lieu fee on its municipal utilities; "in-lieu" is the term of choice since the utilities are not private entities.

The accounting for Roseville's municipal utilities is maintained in enterprise accounts that are separate from Roseville's general fund. The in-lieu fee was conceived in 1968, and has existed in various forms since then. The in-lieu fee at issue here began in 1992, when Roseville began transferring from the utilities' enterprise accounts to its general fund a fee of 4 percent of the utilities' annual budgets.

The Howard Jarvis Taxpayers Association, together with two other groups and two individual ratepayers (collectively referred to as plaintiffs), sued Roseville over the in-lieu fee. Plaintiffs sought declaratory relief, injunctive relief, and a writ of mandate; they claimed the in-lieu fee violated Proposition 218 by imposing a fee for a property-related service that was not tied properly to the cost of providing that service. Plaintiffs initially had also sought a refund, but they abandoned that claim.

Preliminarily, Roseville argues that plaintiffs failed to exhaust their administrative remedies, and that the trial court lacked jurisdiction to entertain a suit in equity because plaintiffs had the adequate legal remedy of a refund. Similar to the situation presented in the recent high court decision in *Agnew v. State Bd. of Equalization*, however, the legal validity of the in-lieu fee is a question properly raised through an action seeking declaratory, injunctive and mandate relief; to the extent the complaint seeks a judicial determination of the legal validity of the in-lieu fee, it does not involve an issue subject to determination through the administrative refund remedy available to plaintiffs. [2]

Roseville sought to counter plaintiffs' view of the in-lieu fee (i.e., as one not tied properly to the cost of providing the utility service) by characterizing the fee as compensation or rent paid to its general fund by each of the municipal utilities for the costs of Roseville's streets, alleys and rights-of-way used to provide utility service; or as a reasonable economic return ***640** to the general fund which supports or pays for those streets, alleys and rights-of-way.

Plaintiffs and Roseville filed cross-motions for summary judgment. Plaintiffs emerged with the judgment. The trial court concluded: "Assuming without deciding that [Roseville] has the right to charge the budgets of the municipal utilities with the cost of using [Roseville's] rights[-]of[-]way, the in-lieu franchise fee as presently imposed does not appear to bear any relationship to the actual cost of maintenance of those rights[-]of[-]way, or the utilities' proportional share of that cost."

We will turn now to the first issue, whether Proposition 218 applies to the in-lieu fee. We will weave the pertinent facts into the fabric of our discussion.

Discussion

1. *Proposition 218 Applies to the In-lieu Fee*

In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act. [3] In adopting this measure, the people found and declared " 'that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.' " [4]

Proposition 218 added articles XIII C and XIII D to the California Constitution. Article XIII C concerns voter approval for local government general taxes and special taxes. Article XIII D sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges. We are concerned here with

article XIII D, specifically certain provisions concerning fees and charges.

The relevant California Constitution, article XIII D provisions on fees and charges are as follows: ***641**

"*Section 1. Application*. Notwithstanding any other provision of law, the provisions of this article shall apply to all ... fees and charges [with some exceptions, most notably, existing laws relating to development fees or charges], whether imposed pursuant to state statute or local government charter authority.... [¶] ... [¶]

"*Sec. 2. Definitions.* As used in this article: [¶] ... [¶]

"(e) 'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service. [¶] ... [¶]

"(g) 'Property ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

"(h) 'Property-related service' means a public service having a direct relationship to property ownership. [¶] ... [¶]

"*Sec. 3. Property Taxes, Assessments, Fees and Charges Limited.* ... [¶] ... [¶]

"(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership. [¶] ... [¶]

"*Sec. 6. Property-Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges.* An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article [these procedures include notice to property owners, and a public hearing for proposed new or increased fees]: [¶] ... [¶]

"*(b) Requirements for Existing, New or Increased Fees and Charges.* A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

"(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 imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. ***642**

"(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted....

"(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. [¶] Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

"*(c) Voter Approval for New or Increased Fees and Charges.* 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 shall be conducted not less than 45 days after the public hearing....

"(d) Beginning July 1, 1997, all fees or charges shall comply with this section." (Italics added.)

The issue here is whether the in-lieu fee for Roseville's water, sewer, and refuse collection services is within the California Constitution, article XIII D, section 2,

definition of "fee" or "charge"-that is, "imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service"; a " '[p]roperty-related service' means a public service having a direct relationship to property ownership." We conclude the in-lieu fee is within this definition.

We start with the definition's use of the term "agency." That term includes a charter city and any other local governmental entity. [5] Roseville and its municipal utilities fall within this definition.

That settled, the next inquiry is whether the in-lieu fee for Roseville's water, sewer, and refuse collection services is imposed "upon a parcel or ***643** upon a person as an incident of property ownership[.]" Roseville Municipal Code governs water, sewer, and refuse charges. The relevant code provisions are as follows.

For water:

"The owner of the real property served by the city shall be charged with, and shall be personally responsible for, the water bills incurred for water service to such property." [6]

"The water division shall install service connections and lay service pipes up to the coterminous of the public easement or interest in land and the property of the applicant ...." [7]

"There shall be due and payable the following monthly charges, upon submission of the bill by the City to the owner of the property supplied with service, for all treated water measured by meters for residential, commercial, industrial and manufacturing or other purposes: [¶] ... [¶] ... The total amount due and payable shall be the sum of the monthly service charge plus the quantity rate. The monthly service charge is due and payable regardless of whether water has been consumed." [8]

"The following service charges shall apply to flat rate [residential] consumers [based on property lot size] that the Environmental Utilities Director determines are not cost effective to assign metered rates." [9]

"All consumers, whether owners or not, shall maintain and keep in good repair the water pipes on the interior and exterior of the property served." [10]

For sewer:

"If a lot or other parcel of property has had an existing connection to the public sewer system ... , the connection fees ... shall not be required ***644** ...." "... The city shall construct all laterals necessary to make connections from the main sewer to the line of the property of the adjoining owner[.]" [11]

"Except as otherwise provided in this chapter, a monthly unit sewer service charge [not dependent upon discharge volume] shall be paid by each [property-based residential (i.e., depending on dwelling type)] user connected to the City-owned public sewer.... [¶] ... The monthly sewer charge shall be $15.50/sewer unit." [12] (Commercial and industrial users are property-based too, depending upon business or activity; some of these users are tied to discharge volume, and some are not.) [13]

And for refuse collection:

"Each and every householder or tenant occupying any dwelling, house, or residence, shall pay to the city ... a fixed minimum charge ... as a refuse fee. Such fixed minimum is based upon service of one (1) call per week, irrespective of whether there is any refuse to remove from any premises." [14]

"Every proprietor of each and every store, shop, apartment, house, roominghouse, or factory shall pay to the city ... a fixed minimum charge ... as a refuse fee. Such fixed minimum is based upon service of (1) call per week, irrespective of whether there is any refuse to remove from any premises." [15]

() These municipal code sections direct the provision of water, sewer, and refuse services to (owned) property. These services are first necessarily delivered to property, and then, and only then, to those living or working on the property. This recognized dichotomy discounts any argument that water, sewer, and refuse services delivered to a tenant are not property-related, that is, not directly tied to property ownership. Furthermore, California Constitution, article XIII D, section 2, subdivision (g),

states that " '[p]roperty ownership' shall be deemed to include tenancies of real property where tenants are directly liable to pay" the fee or charge. In light of these observations, we conclude that the in-lieu fee for Roseville's water, sewer, ***645** and refuse services, a fee not dependent upon the quantity of service used, is a fee imposed upon a parcel or upon a person as an incident of property ownership for Proposition 218 purposes. [16]

Our specific conclusion is buttressed by general language in California Constitution, article XIII D and in the ballot materials for Proposition 218, and by a recent state Supreme Court decision mindful of that language.

Under California Constitution, article XIII D, section 3, subdivision (b), "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." More importantly, article XIII D, section 6, subdivision (c), states that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased" unless submitted for voter approval. There would be no point in specifically exempting sewer, water and refuse collection fees and charges from this one requirement of article XIII D, and in characterizing these fees and charges in this grammatical way, if they were not subject, at least in some respects, to article XIII D's other requirements for property-related fees or charges.

In the ballot materials for Proposition 218, the Legislative Analyst's analysis bears out this view. That analysis observes: "Local governments charge fees to pay for many services to their residents. Some of these fees pay for services to property, such as garbage collection and sewer service.... [¶] ... [¶] ... Fees for water, sewer, and refuse collection service probably meet the measure's definition of a property-related fee. Gas and electric fees and fees charged to land developers are specifically exempted. [¶] ... [¶] ... The most likely fees ... affected by these provisions would be those for: [among others], water service." [17]

Our state high court, in *Apartment Assn.*, recently noted that this analysis from the Legislative Analyst "explained that Proposition 218 'would constrain local governments' ability to impose fees, assessments, and taxes,' meaning 'property-related' fees, including fees for water, sewer and refuse ***646** collection, but excluding gas and electricity charges [citation] and development fees [citation]. [Citation.] It did not refer to levies linked more indirectly to property ownership." [18]

Roseville emphasizes two passages from *Apartment Assn.* There the court concluded that Proposition 218 did not apply to an inspection fee that a city imposed on apartment landlords for code compliance inspections. [19] The inspection fee, said the court, was "imposed on landlords not in their capacity as landowners, but in their capacity as business owners" [20] In the two passages that Roseville emphasizes, the *Apartment Assn.* court stated that Proposition 218 "only restricts fees imposed directly on property owners in their capacity as such," and "applies only to exactions levied solely by virtue of property ownership." [21] This reading was based on the plain language of Proposition 218's article XIII D, section 2, subdivision (e), which defines a fee or charge as one imposed "as an incident of property ownership" rather than "on an incident of property ownership." [22]

The inspection fee in *Apartment Assn.* was imposed because the property there was being rented; here, as we have seen, the in-lieu fee was imposed because the property was being owned. As the *Apartment Assn.* court reiterated, the inspection fee was "more in the nature of a fee for a business license than a charge against property." [23] Furthermore, article XIII D, section 2, subdivision (e)'s definition of fee or charge includes "a user fee or charge for a property-related service"; a property-related service "means a public service having a direct relationship to property ownership." [24] The relationship between the inspection fee in *Apartment Assn.* and property ownership was indirect-it was "overlain by the requirement that the landowner be a landlord." [25] Here, as we have seen, the relationship between the in-lieu fee and property ownership is direct.

Roseville also cites to *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* to claim that the in-lieu fee is not subject to Proposition 218. [26] That case is distinguishable. There, the appellate court faced the question whether certain municipal water usage rates were imposed as an incident of property ownership, and therefore, required voter approval. The court noted that fees ***647** or charges for water services are specifically exempted from the voter approval requirement by California Constitution, article XIII D, section 6, subdivision (c). The court also

noted that under the ordinances setting water rates, the supply and delivery of water did not require that a person own or rent the property where the water was delivered; and that the charges for water service were usage rates-basically, commodity charges-based primarily on the amount consumed. Therefore, the water usage rates were not incident to or directly related to property ownership within the meaning of Proposition 218. [27]

By contrast, the ordinances at issue here governing the initial delivery of water, sewer, and refuse collection services are necessarily tied to property ownership. And the in-lieu fee is not a commodity charge based primarily on the amount consumed; rather, it comprises a flat 4 percent of the yearly budgets of the water, sewer, and refuse utilities, and is a blended component of the rates charged by those utilities irrespective of the amount consumed. We do not suggest that measured or metered consumption determines, on its own, whether a fee is property related within the meaning of Proposition 218; it is simply a factor to consider in an analysis like that undertaken in *Jarvis-L.A.* We also reiterate that the evidence shows, and the parties have treated, the in-lieu fee, for Proposition 218 purposes, as a separate, independent fee for water, sewer, and refuse collection services, and not simply as a component part of another fee.

We conclude that Proposition 218 applies to the in-lieu fee for Roseville's water, sewer, and refuse collection services.

2. *The In-lieu Fee Violates Proposition 218*

() Plaintiffs contend the in-lieu fee violates Proposition 218, specifically some of the cost and usage requirements set forth in section 6, subdivision (b) of California Constitution, article XIII D (hereafter section 6(b), or section 6(b) of Proposition 218). We agree.

Section 6(b)(1) states that "[r]evenues derived from the fee or charge shall not exceed the funds required to provide the property-related service." Section 6(b)(2) compatibly states that "[r]evenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed." And section 6(b)(5), in part, adds for emphasis, "[n]o fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners."

The theme of these sections is that fee or charge revenues may not exceed what it costs to provide fee or charge services. Of course, what it costs to ***648** provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service.

In line with this theme, Roseville may charge its water, sewer, and refuse utilities for the street, alley and right-of-way costs attributed to the utilities; and Roseville may transfer these revenues to its general fund to pay for such costs (the general fund supports or pays for Roseville's streets, alleys, and rights-of-way). Here, however, there has been no showing that the in-lieu fee reasonably represents these costs.

Roseville sets the in-lieu fee at a flat 4 percent of each of the three utilities' annual budgets. On its face, this fee does not represent costs. It is a flat fee. It is imposed on the utilities' budgets, presumably after their total costs have been accounted for in the budget process. If the budget of a utility increases because of a cost increase unrelated to the in-lieu fee, the in-lieu revenues, as a flat percentage of that increased budget, increase as well. The in-lieu fee is the same percentage applied to each budget, regardless of varying uses of streets, alleys and rights-of-way by the individual utilities. It cannot be said that this flat fee on budgets coincides with these costs.

Roseville concedes that the in-lieu fee was set at 4 percent "of utility expenses by a process that considered (1) what [Roseville] collects as franchise fees from private enterprises, (2) what other communities collect as franchise fees, and (3) what would be a reasonable rate of return for use of [Roseville's] rights[-]of[-]way." As plaintiffs point out, however, not one of these factors aligns with an identified cost of providing utility service, as required by Proposition 218; instead, they all ask, " 'What will the market bear?' " While Roseville may be free to impose franchise fees on private utilities on the basis of contractual negotiation rather than costs, it is not free, under section 6(b) of Proposition 218, to

impose franchise-like fees on a noncost basis regarding its municipal utilities. [28]

Relying on a valuation analysis it commissioned regarding the in-lieu fee (the Sierra West Report), Roseville notes the fee constitutes "[reasonable] compensation or rent paid to the General Fund by each of the municipal utilities as an expense for the costs of [Roseville's] streets, alleys, and rights-of-way used by such utilities in providing each separate utility service"; this report also characterizes the fee "as a reasonable economic return to the General Fund on the investment made by General Fund support of and ***649** contributions to each municipal utility." While the Sierra West Report may provide a theoretical foundation for imposing the in-lieu fee-at least with respect to compensation paid for the street, alley and right-of-way costs attributed to the utilities-the report fails to show those costs. Under section 6(b) of Proposition 218, the fee or charge must reasonably represent the cost of providing service.

Furthermore, the reliance by Roseville and by the Sierra West Report on aspects of the state Supreme Court's 1986 decision in *Hansen v. City of San Buenaventura* is problematic. [29] *Hansen* observed that a municipal utility is entitled to a reasonable rate of return and that utility rates need not be based purely on costs. [30] To support these observations, *Hansen* noted that nothing in the California Constitution forecloses a local governmental entity from " 'using the *net proceeds* of enterprises such as municipal utility systems for the benefit of its own general fund.' " [31] *Hansen*'s observations, however, were made 10 years before Proposition 218 added article XIII D to the state Constitution. Although the *Jarvis-L.A.* court relied on *Hansen* for part of its analysis, the decision in *Jarvis-L.A.* concluded that Proposition 218 did not apply to the water usage rates at issue there. [32]

We previously granted Roseville's request to take judicial notice of two local ballot measures that purported to amend Roseville's charter. These measures were approved by Roseville's electorate at a general municipal election held on November 7, 2000, after the trial court proceedings in this case. The two measures are Measure K, which received a majority vote; and Measure U, which received greater than a two-thirds vote.

Measure U amended the charter to state that "Each city-owned utility shall be financially self-sufficient, and shall fully compensate the city general fund for all goods, services, real property and rights to use or operate on or in city-owned real property."

Measure K purportedly amended the charter to provide that for purposes of accounting for the use of the public right-of-way, Roseville's utilities may pay to Roseville's general fund an in-lieu franchise fee not to exceed 4 percent of total utility operating and capital expenditures, which shall be budgeted and appropriated solely for police, fire, parks and recreation, or library services. The impartial ballot analysis for Measure K, written by Roseville's city attorney, stated that the measure, "if enacted, would validate ***650** the in[-]lieu franchise fee concept as representing an element of the actual cost of providing utility services to the public."

These measures do not turn the tide for Roseville by displaying the costs the in-lieu fee covers. Measure U simply states that Roseville's utilities will pay Roseville for what the city provides the utilities, including real property and rights to use or operate on or in city-owned real property. Proposition 218 has no quarrel with Measure U in theory, but the measure does nothing to show what the actual costs of that real property, usage or operation are. And Measure K suffers from a similar deficiency. It states that the utilities may pay an in-lieu fee "not to exceed four percent (4%) of total operating and capital expenditures"-again, this measure does nothing to show actual costs. The city attorney's analysis of Measure K is couched similarly in theoretical terms: the measure "would validate the in[-]lieu franchise fee *concept* as representing an element of the actual cost of providing utility services ...." (italics added); moreover, the in-lieu revenues under Measure K are to be spent solely on police, fire, parks and recreation, or library services, rather than on actual costs of providing utility service. Because it is unnecessary to do so, we express no views regarding the validity of Measure K.

Last, but not least, the in-lieu fee violates section 6(b) of Proposition 218 in a more direct way. Roseville concedes that "[r]evenue from the in[-]lieu franchise fee is 'placed in [Roseville's] general fund to pay for general governmental services. It has not been pledged, formally or informally[,] for any specific purpose." This concession runs afoul of section 6(b)(2) that "[r]evenues derived from the fee or charge shall not be used for any purpose other than

that for which the fee or charge was imposed." It also contravenes section 6(b)(5) that "[n]o fee or charge may be imposed for general governmental services ...." As noted, Roseville may place in its general fund the revenues derived from a cost-based in-lieu franchise fee to pay for the street, alley and right-of-way costs attributed to the water, sewer and refuse utilities.

We conclude the in-lieu fee violates section 6(b) of Proposition 218.

Disposition

The judgment is affirmed.

Scotland, P. J., and Callahan, J., concurred.

A petition for a rehearing was denied May 13, 2002, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied July 10, 2002. Brown, J., did not participate therein. ***651**

Footnotes

1 *Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949 [257 Cal.Rptr. 615] (*Santa Barbara Taxpayer Assn.*).

2 *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 319-320 [87 Cal.Rptr.2d 423, 981 P.2d 52]; see also *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 822 [107 Cal.Rptr.2d 369, 23 P.3d 601], citing *Brown v. County of Los Angeles* (1999) 72 Cal.App.4th 665, 670 [85 Cal.Rptr.2d 414].

3 See Historical Notes, 2A West's Annotated California Constitution (2002 supp.) following article XIII C, section 1, page 38; California Constitution, articles XIII C and XIII D; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 835 [102 Cal.Rptr.2d 719, 14 P.3d 930] (*Apartment Assn.*).

4 Historical Notes, 2A West's Annotated California Constitution (2002 supp.) following article XIII C, section 1, page 38.

5 California Constitution, article XIII D, section 2, subdivision (a); article XIII C, section 1, subdivision (b).

6 Roseville Municipal Code (RMC) section 14.08.010; see, however, Public Utilities Code section 10009.6 and *California Apartment Assn. v. City of Stockton* (2000) 80 Cal.App.4th 699, 701 [95 Cal.Rptr.2d 605] (a municipal utility may be prohibited from making a residential property owner pay the overdue amounts for utility services provided a prior tenant).

7 RMC section 14.08.020, subdivision A.

8 RMC section 14.08.090.

9 RMC section 14.08.100.

10 RMC section 14.08.150.

11 RMC sections 14.16.020, subdivision B., 14.16.030.

12 RMC section 14.16.200; see also RMC sections 14.16.100, 14.16.210.

13 RMC sections 14.16.220, 14.16.230, 14.16.240.

14 RMC section 9.12.100, subdivision A.

15 RMC section 9.12.100, subdivision 2A.

16 See 80 Ops.Cal.Atty.Gen. 183, 186 (1997) ("We believe that each water fee or charge must be examined individually in light of the [Proposition 218] constitutional mandate.")

17 Ballot Pamphlet, General Election (Nov. 5, 1996), Proposition 218, analysis by the Legislative Analyst, pages 73-74; see *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281] (courts may use ballot summary, arguments and analysis to construe voter-approved enactment).

18 *Apartment Assn.*, *supra*, 24 Cal.4th at page 839.

19 *Apartment Assn.*, *supra*, 24 Cal.4th at pages 833, 838.

20 *Apartment Assn.*, *supra*, 24 Cal.4th at page 840.

21 *Apartment Assn.*, *supra*, 24 Cal.4th at pages 838 and 842, respectively.

22 *Apartment Assn.*, supra, 24 Cal.4th at pages 840-843.

23 *Apartment Assn.*, *supra*, 24 Cal.4th at page 840.

24 California Constitution, article XIII D, section 2, subdivision (h).

25 *Apartment Assn.*, *supra*, 24 Cal.4th at page 843.

26 *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 83 [101 Cal.Rptr.2d 905] (*Jarvis-L.A.*).

27 *Jarvis-L.A.*, *supra*, 85 Cal.App.4th at page 83.

28 See *Santa Barbara Taxpayer Assn.*, *supra*, 209 Cal.App.3d at page 949.

29 *Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172 [233 Cal.Rptr. 22, 729 P.2d 186] (*Hansen*).

30 *Hansen, supra,* 42 Cal.3d at page 1182.

31 *Hansen, supra,* 42 Cal.3d at pages 1182-1183, quoting *Golden Gate Bridge etc. Dist. v. Luehring* (1970) 4 Cal.App.3d 204, 215 [84 Cal.Rptr. 291], italics added in *Hansen*.

32 *Jarvis-L.A., supra,* 85 Cal.App.4th at pages 81-83.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Johnson v. County of Mendocino, Cal.App. 1 Dist., August 8, 2018

237 Cal.App.4th 363
Court of Appeal, Fourth District, Division 1, California.

Jack MOORE, Appellant,
v.
CITY OF LEMON GROVE et al., Respondents.

D066670
|
Filed June 2, 2015

Synopsis

Background: Sanitation fee ratepayer filed petition for writ of mandate and equitable relief against city and city sanitation district, seeking to stop district from transferring funds collected as sewer service fees and charges to city's general fund, claiming that transfers violated Right to Vote on Taxes Act. The Superior Court, San Diego County, No. 37–2013–00045077–CU–WM–CTL, Ronald S. Prager, J., denied petition. Ratepayer appealed.

Holdings: The Court of Appeal, McIntyre, J., held that:

[1] fees were not spent for unrelated revenue purposes;

[2] fees were in amount necessary to accomplish their purpose; and

[3] fees were not imposed for general governmental services.

Affirmed.

West Headnotes (9)

[1] Municipal Corporations
Power to Tax for Special Purposes

Property-related fee or charge imposed by government agency must reasonably represent the cost of providing service. Cal. Const. art. 13D, § 6.

1 Cases that cite this headnote

[2] Administrative Law and Procedure
Matters which rest in discretion in general

Courts afford agencies reasonable degree of flexibility to apportion costs of regulatory programs in a variety of reasonable financing schemes.

Cases that cite this headnote

[3] Municipal Corporations
Power to Tax for Special Purposes

Court of Appeal presumes that judgment on question of whether fee or charge violates constitutional procedures and requirements governing property-related fees and charges imposed by government agency is correct on appeal. Cal. Const. art. 13D, § 6.

Cases that cite this headnote

[4] Municipal Corporations
Power to Tax for Special Purposes

Even when Court of Appeal exercises its independent judgment in reviewing the record on appeal from judgment on question of whether fee or charge violates constitutional procedures and requirements governing property-related fees and charges imposed by government agency, Court does not decide disputed issues of fact, and Court's review is limited to issues which have been adequately raised and supported in appellant's brief. Cal. Const. art. 13D, § 6.

1 Cases that cite this headnote

[5] Municipal Corporations
Sewer service fees

Sewer service fees collected from ratepayer by city sanitation district were not spent for unrelated revenue purposes, and thus did not violate constitutional provision providing

that property-related fee imposed by local government was prohibited unless used for purpose for which it was charged, in ratepayer's action seeking to stop district from transferring funds collected as sewer service fees and charges to city's general fund; despite contention that allocation of portion of city workers' salaries to district was not subject to any level of rigor or objective analysis, district presented evidence showing that method it used to determine amount of time city workers spent on district activities, and thus amounts transferred to city's general fund, were reasonable, and ratepayer presented no expert testimony or other authority showing district's allocation methods were illegal or otherwise improper. Cal. Const. art. 13D, § 6(b)(2); Cal. Evid. Code § 801(a).

Cases that cite this headnote

[6] **Municipal Corporations**
Power and Duty to Tax in General

When determining whether property-related fee was used for purpose it was charged by local government, courts consider all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures. Cal. Const. art. 13D, § 6(b)(2).

Cases that cite this headnote

[7] **Municipal Corporations**
Sewer service fees

Sewer service fees collected from ratepayer by city sanitation district were in amount necessary to accomplish their purpose, and thus did not exceed cost of providing sanitation services in violation of constitutional provision governing property-related fees and charges imposed by local governments, in ratepayer's action seeking to stop district from transferring funds collected as sewer service fees and charges to city's general fund; fees were appropriately spent on maintenance and management of sewer system, and evidence, including that district annually determined whether estimates of maximum fee increases provided in district rate study were accurate and that city finance department monitored expenditures to make sure they stayed within budget, sufficiently tied rates charged by district to amounts needed to run district. Cal. Const. art. 13D, § 6(b)(1).

1 Cases that cite this headnote

[8] **Municipal Corporations**
Submission to voters, and levy, assessment, and collection

Taxation
Distinguishing "tax" and "license" or "fee"

To show fee imposed by local government is not a special tax subject to approval by two-thirds vote of qualified electors, government should prove: (1) estimated costs of the service or regulatory activity, and (2) basis for determining manner in which costs are apportioned, so that charges allocated to payor bear fair or reasonable relationship to payor's burdens on or benefits from regulatory activity. Cal. Const. art. 13D, § 4.

2 Cases that cite this headnote

[9] **Municipal Corporations**
Sewer service fees

Sewer service fees collected from ratepayer by city sanitation district and transferred to city's general fund were not imposed for general governmental services, and thus did not violate constitutional provision requiring that property-related fee or charge collected from ratepayers be used to pay for service for which fee or charge was imposed, in ratepayer's action seeking to stop district from transferring funds collected as sewer service fees and charges to city's general fund; despite contention that district failed to earmark or pledge transferred funds for any specific purpose, district presented evidence linking fees to its costs and showing that fees did not

exceed cost of providing service, and district reimbursed city for services and expenditures related to services provided by city. Cal. Const. art. 13D, § 6(b)(5).

See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 143.

1 Cases that cite this headnote

****132** APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed. (No. 37–2013–00045077–CU–WM–CTL)

Attorneys and Law Firms

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Opinion

McINTYRE, J.

***366** In this case, a sanitation fee ratepayer, Jack Moore, appealed a judgment denying his petition for writ of mandate and equitable relief as against the City of Lemon Grove (the City) and the Lemon Grove Sanitation District (the District; together with the City, Respondents). Moore sought to stop Respondents from transferring funds collected as sewer service fees and charges to the City's general fund, claiming the transfers violated Proposition 218, the Right to Vote on Taxes Act. (Historical Notes, 2B West's Ann. Codes, Cal. Const. (2013 ed.) foll. art. XIII C, § 1, p. 363.) The trial court concluded that the charges at issue were subject to Proposition 218, but that the transfers did not violate Proposition 218 as the District had used reasonable methods to determine the amounts to transfer. We agree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The District manages and maintains about 67 miles of collection pipes that ****133** transport sewage to the City of San Diego treatment plants. The District possesses very little capital equipment and the City has three employees who exclusively perform District-related work. All District maintenance, facilities, administrative equipment, personnel, service, billing, regulatory and other overhead are provided by the City. The other functions required for the District to operate (accountants/finance, receptionists, analysts, engineers, inspectors, plan checkers, etc.) are provided by City employees who divide their time among various activities.

***367** Moore is a resident of the City and a sanitation fee ratepayer. He filed a petition for writ of mandate and a complaint for injunctive relief, claiming Respondents provide sewer services and impose fees and charges on users of the sewer services through semiannual property tax bills. He alleged that Respondents engaged in a practice whereby they transferred funds collected as sewer service fees and charges to the City's general fund. Further, he claimed Respondents failed to earmark these funds for a specific purpose, such as for reimbursement of shared costs or sewer maintenance and operations, but instead used the funds for general governmental purposes. Moore claimed the yearly amount transferred by Respondents to the general fund was not based on the actual costs incurred to support sewer maintenance and operations, but was calculated as about 22 percent of the annual sewer service fees collected.

Moore sought a petition for writ of mandate directing that Respondents stop all transfers to the general fund and restore all previously transferred funds received by the general fund. He also sought a declaration of rights declaring that Respondents violated *article XIII D* of the California Constitution *(article XIII D)* and an injunction enjoining Respondents from transferring funds to the general fund and requiring them to repay all previously transferred funds received by the general fund.

After considering the parties' evidence, the trial court issued a tentative ruling concluding that the sanitation fees and charges at issue were subject to Proposition 218, but finding Respondents did not violate Proposition 218. The trial court later confirmed its tentative ruling. Thereafter,

the court issued a judgment denying Moore's petition for writ of mandate. Moore timely appealed. We granted the application of the Howard Jarvis Taxpayers Association to file an amicus curiae brief on behalf of Moore.

DISCUSSION

I. *General Legal Principles*

"In 1978, California voters enacted Proposition 13, which amended the California Constitution by adding article XIII A (article XIII A). The amendment 'plac[ed] significant limits on the taxing power of local and state governments.' [Citation.] As pertinent here, article XIII A, section 4 provides, 'Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district....' " (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 760–761, 175 Cal.Rptr.3d 670 (*Shapiro*), italics omitted.)

"In 1996, California voters enacted Proposition 218, which added article XIII C (article XIII C) and article XIII D (article XIII D) to the California ***368** Constitution in order to 'close government-devised loopholes in Proposition 13.' " (*Shapiro, supra,* 228 Cal.App.4th at p. 761, 175 Cal.Rptr.3d 670.) "[T]he primary purpose of Proposition 218 was to reform the law governing local government's imposition of revenue generating devices *other* than special taxes ****134** ...." (*Id.* at p. 779, 175 Cal.Rptr.3d 670.) A "fee" or "charge" is defined as "any levy *other* than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Art. XIII D, § 2, subd. (e).)

[1] Section 6 of article XIII D sets forth the procedures and requirements governing property-related fees and charges. As relevant here, section 6 provides a fee cannot be charged in excess of the service provided; a fee can only be used for the purpose it was charged; and the fee may not be imposed for general governmental services. (Art. XIII D, § 6, subd. (b)(1), (2) & (5), hereinafter section 6(b)(1), (2) or (5).) "The theme of these sections is that fee or charge revenues may not exceed what it costs to provide fee or charge services. Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 647-648, 119 Cal.Rptr.2d 91 (*Roseville*).)

[2] As one court that examined a regulatory fee noted, some fees "are not easily correlated to a specific, ascertainable cost. This may be due to the complexity of the regulatory scheme and the multifaceted responsibilities of the department or agency charged with implementing or enforcing the applicable regulations; the multifaceted responsibilities of each of the employees who are charged with implementing or enforcing the regulations; the intermingled functions of various departments as well as intermingled funding sources; and expansive accounting systems which are not designed to track specific tasks." (*California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 950, 94 Cal.Rptr.2d 535.) Thus, courts afford agencies a reasonable degree of flexibility "to apportion the costs of regulatory programs in a variety of reasonable financing schemes." (*Ibid.*)

[3] **[4]** The agency charging the fee or charge has the burden of demonstrating compliance with these requirements. (Art. XIII D, § 6(b)(5).) The question whether a fee or charge violates article XIII D is subject to de novo review. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 450, 79 Cal.Rptr.3d 312, 187 P.3d 37.) We presume that the appealed judgment is correct. (***369** *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193.) Even when we exercise our independent judgment in reviewing the record, we do not decide disputed issues of fact (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912, 167 Cal.Rptr.3d 687) and our review "is limited to issues which have been adequately raised and supported in [the appellant's] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457.)

II. *Analysis*

The trial court concluded that the sanitation fees and charges at issue were fees as defined in article XIII D, section 2, subdivision (e) of the California Constitution and thus, were "property-related fees subject to [Proposition] 218." This finding is not at issue. Rather, Moore contends the money transferred by Respondents from the sanitation fund to the general fund is illegal because the transfers were ****135** not properly tied to actual costs incurred for the District's benefit and Respondents never properly identified and quantified the costs. Moore alleges a violation of three specific subdivisions of article XIII D, section 6. Accordingly, we address each subdivision in turn, examining whether the District met its burden of demonstrating compliance with the requirements of section 6.

A. The Fees Were Not Spent for Unrelated Revenue Purposes

[5] **[6]** A fee may only be used for the purpose for which it was charged. (Art. XIII D, § 6(b)(2).) Here, the fees at issue were collected from property owners and described as sewer service charges. Accordingly, Respondents may appropriately spend these fees on anything related to the maintenance and management of the sewer system. We consider "all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures." (*Roseville, supra,* 97 Cal.App.4th at p. 648, 119 Cal.Rptr.2d 91.)

The District presented evidence showing most functions required for it to operate are provided by City employees that divide their time among various activities. In return, the District reimburses the City for these services and expenses related to these services. Cathleen Till, the City's finance director, explained that basic operational tools that the District requires to operate include support staff, accounting software, accounts payable staff, computer and geographic information systems, human resource services, executive management and support, inspection services, engineering staff, design programs and tools, and receptionist staff. Because the District does not possess any of these software programs, computer systems, personnel, expertise, buildings for office space, etc., it relies on the City to provide these services.

Graham Mitchell is the city manager and serves as executive director of the District. As the District's executive director, Mitchell oversees the overall ***370** operation of the District, manages the employees who provide direct and support services to the District, manages the overall budget, provides policy recommendations to the District's board of directors and ensures that the District is fiscally solvent.

Mitchell explained that the shared staffing approach utilized by the District and the City creates effective economies of scale and saves the taxpayers and ratepayers of the City and the District. Mitchell also stated it is common practice in California for a city manager to provide executive management for several city-related enterprises and for city staff to provide support for the other city-related enterprises, such as a sanitation district.

Mitchell attempts to ensure an equitable and reasonable exchange of personnel and services between the City and the District. To manage the exchange of personnel and services between the City and the District, he utilizes an accounting practice in which the District transferred reimbursements to the City under two categories--—" 'Interfund Transfers for Operations' " and " 'Interfund Transfers for Administrative Services.' " Interfund Transfers for Operations relates to the direct personnel costs that the City incurs to manage and operate the District (direct costs) and the Interfund Transfers for Administrative Services represents the overhead costs associated with operating the District (indirect costs).

Till explained how the City and the District apportion indirect costs. For example, the telephone in the one-room office used by the District is charged as a direct cost to the sanitation program. However, a percentage of the telephones used by the ****136** supervising public works director, city manager and other employees who spend part of their working hours performing sanitation duties is apportioned as an indirect cost to the District. The apportionment is done in accordance with the City's best estimate of the actual time spent on sanitation matters. Till stated that general department overhead is apportioned to the general fund if services are provided to the District by that department.

Mitchell stated that Moore's inquiries over the past few years have prompted the City to create a better system to document transfers between the District and the City. After consulting with the San Diego County Grand Jury auditor, the City developed a method to determine overhead costs. The City first determines its total overhead-related costs for building expenditures,

accounting software, copiers, utilities, etc. It then determines each fund's activity's share of the overhead costs by examining the budgeted expenditures for each fund or activity. Mitchell explained that the challenge with using an expenditure model is that in any given year, expenditures can fluctuate greatly. For example, the District could have $2 million in capital improvements, which would increase its share wildly that year. Because this anomaly ***371** exists, Mitchell explained that it makes more sense to base each fund's activity's share of overhead on revenue.

Till similarly stated that revenue estimates are a good indicator of general time spent by the support departments of each special fund when dividing overhead costs and provided the following as an example. Assume she gets 30 phone calls a day about various business items. Each phone call may discuss a different budget fund. A call from the public works director may raise five or six special fund issues. Cost allocation by timesheet could not capture the allocation of each of these costs. However, a general allocation method based on how much money flowed into the programs would be a more accurate measure of the actual time spent and the loaded costs of each employee's time in each program.

Till noted that counting tasks assigned to each manager would be a misleading way to determine overhead costs, using the handling of tort claims by the risk manager/ public works director as an example. She stated that most street-related claims involve tire or wheel damage due to potholes. These claims have a very standardized process and seldom are a significant cost item. In contrast, sewer damage claims happen once or twice a year and take up significant time and resources. Till explained that for sewer backups, the District must respond as if it is the District's fault unless proven otherwise. This entails significant environmental cleanup costs and costs for damage to households and often hotel bills. It is a time-intensive process even if it is later determined that the District was not at fault. The risk manager, city manager, city attorney, public works crews and outside contractors are involved for sewer backup claims. Accordingly, one claim for tire damage and one sewer backup claim are not equal from a cost allocation perspective.

Significantly, Moore conceded at oral argument below that when a cost is incurred for the joint benefit of different divisions within a city or local government, those costs may be allocated. Moore explained that the principle used by Respondents was "okay," but that the methods used were "too ad hoc" and "not subject to any kind of objective criteria." Moore agreed with the trial court's restatement of his argument that he believed the method used by Respondents to estimate and allocate ****137** their costs was unreasonable, while Respondents believed the method to be reasonable. Below and on appeal, Moore relied on the *Roseville* case to support his argument that Respondents did not use a reasonable methodology.

At issue in *Roseville* was an "in-lieu franchise fee" (in-lieu fee). (*Roseville, supra,* 97 Cal.App.4th at p. 638, 119 Cal.Rptr.2d 91.) The *Roseville* court explained that "[p]rivate utilities pay public authorities 'franchise fees' to use government land such as streets, or for rights-of-way to provide utility service. [The ***372** city] similarly imposes the in-lieu fee on its municipal utilities; 'in-lieu' is the term of choice since the utilities are not private entities." (*Id.* at p. 639, 119 Cal.Rptr.2d 91, fn. omitted.) The city set the in-lieu franchise fee at a flat four 4 percent of the utilities' annual budgets. (*Id.* at p. 648, 119 Cal.Rptr.2d 91.) The *Roseville* court concluded that the flat fee on the annual budget violated article XIII D, section 6(b)(1) because the City made no showing that the flat fee represented actual costs, noting "[o]n its face, this fee does not represent costs. It is a flat fee." (*Roseville,* at p. 648, 119 Cal.Rptr.2d 91.) Once collected, the City transferred the flat fee into its general fund without pledging it for any specific purpose. (*Id.* at p. 650, 119 Cal.Rptr.2d 91.) The court concluded the transfer violated article XIII D, section 6(b)(2) and (5) because the flat fee was used to pay for general governmental services, not costs attributable to the services for which the fee was charged. (*Roseville,* at p. 650, 119 Cal.Rptr.2d 91.)

Similarly, in *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 26 Cal.Rptr.3d 153 (*Fresno*), the city required each municipal utility to " 'pay to the City, in lieu of property and other taxes normally placed upon private business,' " an in-lieu fee currently set at 1 percent of the assessed value of fixed assets of the utility department or division. (*Id.* at p. 917, 26 Cal.Rptr.3d 153.) The *Fresno* court concluded that the trial court properly prohibited the city from collecting the in[-]lieu fee, noting "[the city] has not even *claimed* the in[-]lieu fee approximates the cost of city services to the utility departments and divisions, much less has it established such a relationship as a fact." (*Id.* at p.

928, 26 Cal.Rptr.3d 153.) The *Fresno* court stated that if the city wished to recover all of its costs from user fees, it must reasonably determine the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel. (*Id.* at p. 923, 26 Cal.Rptr.3d 153.)

The trial court rejected Moore's argument that the instant case was akin to the in-lieu fees at issue in *Roseville*. The court found that, unlike the *Roseville* case, "Respondents provided ample evidence that the amount of money transferred to the [g]eneral [f]und [was] based on [r]eliable estimates of time spent by City workers on sanitation issues." We agree.

In *Roseville* and *Fresno,* each city made no attempt to show that the flat fees represented the actual cost of providing the service as required by article XIII D, section 6(b)(2). (*Roseville, supra,* 97 Cal.App.4th at p. 648, 119 Cal.Rptr.2d 91; *Fresno, supra,* 127 Cal.App.4th at p. 928, 26 Cal.Rptr.3d 153.) Here, in contrast, Respondents presented evidence on this issue. Unlike *Roseville* and *Fresno,* Moore's challenge is to Respondents' method of showing they used the fees collected for only the purpose for which the fees were charged. Moore separately addressed personnel costs and overhead costs. We do the same.

As to personnel costs, Moore acknowledged that some city workers spent time on sanitation activities and, to the extent ****138** city workers did so, a portion of ***373** their salaries can be allocated to the District. Moore explained he is not seeking to cut off salary reimbursements; rather, he is concerned that the salary allocations were not subjected to any level of rigor or objective analysis. At oral argument below, Moore's counsel admitted "[i]n principle" transferring money to the general fund to pay for a portion of nonsanitation worker salaries that worked on sanitation matters was "okay," but complained about the allocation methods used by Respondents. Moore also testified he believed some money should be transferred to the general fund to compensate for employee time.

Thus, at issue is the method used by Respondents to determine the amount of time city workers spend on District activities and thus, the amounts transferred to the general fund. On this issue, Till stated that after sanitation rates are established, she and her staff monitor expenditures to make sure that they stay within budget. Her department tracks direct costs to the sewer program to ensure they stay within budgetary parameters, she interviews department directors and makes adjustments to personnel allocations between various funds, and directors are required to review and analyze for which funds the work of their respective staff applies.

Although Till was not employed by the City during the preparation of the budgets for fiscal years 2009-2010 and 2010-2011, she created spreadsheets for these fiscal years by reviewing previous budgets and identifying the staff allocated to the District. She also reviewed handwritten notes identifying the various individuals with a percentage. Although these spreadsheets were created after the fact, Mitchell stated that Respondents employed the same analysis, albeit informally with written notes justifying the transfers to the general fund.

Our review of the totality of the evidence shows Respondents' methods were informal. For example, although Mitchell asked Till to interview each of the department directors to identify the amount of time spent on District activities and then interview individual staff members to verify the amount of time, Till never interviewed employees to determine if the percentages were accurate. Similarly, Till did not provide instructions on determining percentages. She assumed that based on their supervisory roles, directors knew what percentage of time employees were spending on certain directives. While the informality of Respondents' method for determining the percentage of time employees spend on District matters is not ideal, we concur with the trial court's implied conclusion that no unconstitutionality exists.

As to overhead costs, Till stated that "[g]eneral department overhead is apportioned to the General Fund *if* services are provided to the [District] by that [particular] department." (Italics added.) After the City determines its total overhead related costs, it then determines each fund or activity's share ***374** of the overhead costs by examining the budgeted expenditures for each fund or activity. Mitchell explained it makes more sense to base each fund's or activity's share of overhead on revenue and not expenditures as expenditures can vary greatly year to year.

The District's revenue is specifically tied to expenditures through the Lemon Grove Sanitation District Wastewater Enterprise Rate Study (the Five-Year Rate Study). An

independent consultant develops the Five-Year Rate Study by reviewing past and projected expenditures, such as costs associated with capital improvement projects, sewer line maintenance, contracted services, and administration (including indirect operational costs). The Five-Year ****139** Rate Study averages out costs over a five-year period and then determines the revenue required to cover those charges from year to year to avoid ratepayers experiencing spikes in sewer bills the year of a large capital project. Mitchell explained that this process helps to ensure that ratepayers do not overpay for sewer services.

Moore argues that Respondents transferred a flat fee to the general fund that bore no relation to costs. He cited evidence that for the 2010-2011 fiscal year, Respondents transferred a flat 11 percent of sanitation revenues to the general fund as administration/indirect costs and the following fiscal year, this percentage increased to 13.5 percent. This argument is misleading as it ignores the methodology used by Respondents to calculate the percentages transferred. Namely, Respondents calculated the percentage to transfer to the general fund by dividing sanitation expenditures by sanitation revenue. As Mitchell explained, reviewing staff report time revealed that amounts budgeted for sanitation "pretty close[ly]" corresponded to time actually spent on sanitation matters.

Moore asserts Respondents provided no authority to support their "revenue-centric methodology," noting Respondents argued in conclusory fashion that their method of cost allocation was reasonable and legal. We disagree.

Here, Respondents presented evidence regarding the methods used and the trial court found the evidence showed "apportioning the funds based on revenue [was] reasonable under the circumstances." This evidence consists mainly of declarations from the City's manager, finance director and clerk. While Moore is dissatisfied with the explanations provided by these individuals regarding Respondents' cost allocation methods, these explanations constitute evidence and the trial court impliedly found the evidence satisfied Respondents' burden of demonstrating compliance with the requirements of article XIII D, section 6.

***375** Moore presented no expert testimony or other authority showing Respondents' allocation methods were illegal or otherwise improper. Rather, cost allocation methods used by governments present a subject beyond the trial court's and our common experience and knowledge. (Evid. Code, § 801, subd. (a) [an expert's opinion must relate to a subject matter that is sufficiently beyond common experience that it assists the trier of fact].) On this record, we cannot conclude that Respondents' cost allocation methods were improper or that Respondents improperly spent fees for unrelated revenue purposes in violation of article XIII D, section 6(b)(2).

B. The Fees Were in Amounts Necessary to Accomplish Their Purpose

[7] **[8]** We next examine whether the fees imposed by the District exceeded the cost of providing the service. (Art. XIII D, § 6(b)(1).) As a preliminary matter, we note Moore did not specifically challenge in his appellate briefing the trial court's implied conclusion that Respondents did not violate section 6(b)(1). Nonetheless, because the parties generally jumbled all their arguments together, we exercise our discretion to address this issue. To show a fee is " 'not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.' " (*Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1346, 60 Cal.Rptr.3d 698.)

As explained above, we determined Respondents appropriately spend the fees ****140** collected from ratepayers on the maintenance and management of the sewer system. The District explained its revenue is tied to expenditures through the Five-Year Rate Study and we concluded that Respondents reasonably apportioned the funds based on revenue. (*Ante,* pt. A.)

As allowed by law, the Five-Year Rate Study identifies the maximum fee increases that the District can apply annually. This same approach was used in the previous rate study published in 2007. The District board annually determines whether the estimates identified in the Five-Year Rate Study are accurate based on new cost conditions. In 2007 and 2011, the District board increased the sanitation rates consistent with the amounts set forth in the current and prior Five-Year Rate Study. In later years, the District lowered the rate increases to an amount

below that set forth in the current the Five-Year Rate Study. After sanitation rates are established, the City finance department monitors expenditures to make sure they stay within budget. Additionally, direct costs to the District are tracked to ensure they stay within budgetary ***376** parameters. Finally, Till interviews department directors and makes adjustments to personnel allocations between various funds. This evidence sufficiently tied the rates charged by the District to the amounts needed to run the District as required by section 6(b)(1).

C. The Fees Were Not Imposed for General Governmental Services

[9] Article XIII D, section 6(b)(5) provides in part: "No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." Viewed in conjunction with section 6(b)(1) and (2), the purpose of section 6(b)(5) is to require that a fee or charge collected from ratepayers be used to pay for the service for which the fee or charge was imposed and not general governmental services.

To show a violation of article XIII D, section 6(b)(5), Moore relies on the following discussion in *Roseville*: "[The city] concedes that '[r]evenue from the in[-]lieu franchise fee is ... placed in [the city's] general fund to pay for general governmental services. *It has not been pledged, formally or informally[,] for any specific purpose*.' This concession runs afoul of section 6(b)(2) that '[r]evenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.' It also contravenes section 6(b)(5) that '[n]o fee or charge may be imposed for general governmental services....' " (*Roseville, supra,* 97 Cal.App.4th at p. 650, 119 Cal.Rptr.2d 91, italics added.)

Namely, Moore cites to the above italicized language to assert Respondents violated article XIII D, section 6(b)(5) because they failed to earmark or pledge the transferred funds for any specific purpose. Rather, once Respondents determined the proper amount needed to cover the District's share of personnel and overhead expenses, the funds were placed in the City's general fund. Although not specifically argued by Moore, he appears to suggest that the funds placed in the general fund need to be specifically earmarked as payment for particular overhead or personnel costs of the District. We conclude Respondents' action did not violate section 6(b)(5).

First, as addressed above, *Roseville* is distinguishable because the city imposed a flat fee to cover the cost of water, sewer, and refuse collection services, but failed to connect the flat fee to the cost of providing these services. (*Ante,* pt. A.) Significantly, after noting fees "must reasonably represent ****141** the cost of providing [the] service," the *Roseville* court stated, "In line with this theme, [the city] may charge its water, sewer, and refuse utilities for the street, alley and right-of-way costs attributed to the utilities; ***377** and [the city] may transfer these revenues to its general fund to pay for such costs (the general fund supports or pays for [the city's] streets, alleys, and rights-of-way)." (*Roseville, supra,* 97 Cal.App.4th at p. 648, 119 Cal.Rptr.2d 91.) The *Roseville* court reaffirmed this statement at the end of its opinion: "As noted, [the city] may place in its general fund the revenues derived from a cost-based in-lieu franchise fee to pay for the street, alley and right-of-way costs attributed to the water, sewer and refuse utilities." (*Id.* at p. 650, 119 Cal.Rptr.2d 91.) In other words, if fees are properly linked to costs, article XIII D, section 6(b) does not prevent those properly imposed fees from then being placed in a general fund. The statement of the *Roseville* court that the funds transferred to the general fund were not earmarked or pledged for any specific purpose must be considered based on the facts presented.

Here, Respondents presented evidence linking the fees to its costs and showing its fees did not exceed the cost of providing the service. (*Ante,* pts. A. & B.) The District then reimburses the City for services and expenditures related to the services provided by the City. As Till stated, the general fund can subsidize any other fund, including sanitation. Respondents' action of reimbursing the general fund for its costs did not violate article XIII D, section 6(b)(5).

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

WE CONCUR:

NARES, Acting P.J.

O'ROURKE, J.

All Citations

237 Cal.App.4th 363, 188 Cal.Rptr.3d 130, 15 Cal. Daily Op. Serv. 5539, 2015 Daily Journal D.A.R. 6032

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247 Cal.App.2d 317, 55 Cal.Rptr. 494

NORTHEAST SACRAMENTO COUNTY SANITATION DISTRICT, Plaintiff and Appellant,
v.
NORTHRIDGE PARK COUNTY WATER DISTRICT OF SACRAMENTO COUNTY, Defendant and Respondent.

Civ. No. 11269.
Court of Appeal, Third District, California.
Dec. 16, 1966.

HEADNOTES

(1)
Sanitary Districts § 6.1--Construction and Maintenance of Facilities-- Cost of Relocation.
A county sanitation district must compensate a county water district for the latter's costs when required to relocate its water mains because of an extension of the sanitation district's sewer facilities, since there is no priority between a county water district and a county sanitation district; both agencies serve their separate users in the interests of the public health and safety.

See **Cal.Jur.2d,** Drains and Sewers, § 9 et seq; **Am.Jur.2d,** Drains and Drainage Districts, § 31 et seq.

(2)
Sanitary Districts § 6.1--Construction and Maintenance of Facilities-- Cost of Relocation.
Where the water lines of a county water district were in place first and had to be relocated to make way for new lines being installed by a county sanitation district, and each district involved comprised a separate group of people who would benefit, the county water district should have the right to be compensated.

(3)
Sanitary Districts § 6.1--Construction and Maintenance of Facilities-- Cost of Relocation.
No statute gives a sanitation district superior rights over a water district in the matter of relocation.

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Frank G. Finnegan, Judge. Affirmed.

Action to determine whether a county sanitation district must compensate a county water district for the latter's costs when required to relocate its water mains because of an extension of the sanitation district's sewer facilities. Judgment for defendant affirmed.

COUNSEL
John B. Heinrich, County Counsel, and Lawrence E. Viau, Jr., Deputy County Counsel, for Plaintiff and Appellant.
Lambert, Lemmon & Winchell and John V. Lemmon for Defendant and Respondent.

PIERCE, P. J.

([1]) The sole question on this appeal is whether a county sanitation district must compensate a county water district for the latter's costs when required to relocate its water mains because of an extension of the sanitation district's sewer facilities (both works being located beneath county roads). The trial court held that it must. We agree with that holding upon the principles of law and reasoning related below.

Northridge is a county water district created under the provisions of section 30000 et seq. of the Water Code. Its function is to provide water for domestic purposes to people within its boundaries located within a part of Sacramento County. It owns and operates a water distribution system at least a part of which consists of water lines located beneath the surface of county roads. County water districts come into existence by an election of the voters within the boundaries of the proposed district. (Wat. Code, § 30295.) They are managed by a board of directors also elected by the voters within the district. (Wat. Code, § 30732 et seq.)

Appellant Northeast is a county sanitation district organized under the provisions of section 4700 et seq. of the Health and Safety Code. It operates and maintains sewers in a portion of Sacramento County. Its boundaries are not coterminus with the boundaries of the water district. It also comes into existence by an election at which "only voters registered *in the proposed* ***319** *district* may vote." (§ 4716.) (Italics supplied.) [1] Sanitation districts are also managed by a board of directors selected

in various ways. This particular district, because it is carved wholly out of unincorporated territory, has as its board of directors the county supervisors; but they are not supervisors *qua* supervisors; they are a board of directors. [2]

Both districts have statutory rights to build and maintain their facilities in and beneath public roads (sanitation districts, Health & Saf. Code, §§ 4759 and 4759.1; water districts, Wat. Code, §§ 31060-31062.)

Both districts derive their revenues for the construction and maintenance of their works and for the services they afford by assessments and taxes levied upon the people within their districts. (See, e.g., re sanitation districts, Health & Saf. Code, § 4747, 4780 et seq.; re water districts, Wat. Code, § 35900 et seq., § 36725 et seq.)

In 1963 Northeast constructed sewers in and under the same county roads where lay the water mains of Northridge already constructed. This required a relocation of the latter. A dispute arose as to Northeast's obligation to pay for the relocation. By agreement Northridge moved its mains and Northeast paid the cost of such relocation without prejudice to a suit for reimbursement. This suit was brought to resolve the question.

Northeast argues that a county could compel a water district to relocate its lines without remibursement of costs whenever the county chose to install works of its own and therefore it has the same superior status over Northridge because it is managed by the board of supervisors. We may assume (but we by no means concede) the premise. The conclusion drawn is a *non sequitur.* Sacramento County's Board of Supervisors (in this particular sanitation district) happens to act ex officio as the board of directors. When they do so they do not act as the governing body of the county or for the county. When representing Northeast they are as much an independent board of directors as is the board of directors of Northridge. That ***320** portion of the public residing within Northridge does not as a whole either benefit by or bear the burden of taxation for the works of the sanitation district.

In *County of Contra Costa v. Central Contra Costa Sanitary Dist.* (1960) 182 Cal.App.2d 176 [5 Cal.Rptr. 783] (hearing by Supreme Court denied), a county acting solely on behalf of a flood control district, performed the work of relocating the sewer line of a sanitary district [3] already in existence extending over and across a thoroughfare, to wit: a county bridge. The relocation was made necessary by the flood control district's project to deepen a creek channel. The county sought compensation from the sanitary district for the cost of such relocation. The county's right of recovery was denied in both the trial and appellate courts. One of the contentions of the county was that the right of way of the sanitary district was but a franchise which it identified with the franchise of a privately-owned public utility. The court's opinion (per Presiding Justice Bray) states (on p. 179): "... Obviously a sanitary district bears no resemblance to a privately owned public utility. It is a public corporation organized under the provisions of the Sanitary District Act of 1923 (Health & Saf. Code, § 6400 et seq.). Moreover, the sanitary district's right to a sewer line in the street is due, first, to the fact that it was there when the county acquired the street, and secondly, to the rights given by section 6518, Health and Safety Code. A privately owned public utility, on the other hand, derives its right to streets under franchises which require it to move its facilities whenever required by the authorities at its own expense.

"As said by the Honorable Wakefield Taylor in his memorandum of decision, the sanitary district's right to maintain its sewer line 'is a species of real property and neither the Flood Control District nor the County Board of Supervisors acting on behalf of said District and for its purposes has any right to appropriate or interfere with property already dedicated to a public use, without legal process and the payment of just compensation. The cost of relocation should not be borne by the taxpayers of the County generally nor by the taxpayers ***321** of the Sanitary District, but rather by the people resident within the Flood Control zone benefited by the improvement.' " (With reference to the quoted statement see Van Alstyne, *Governmental Tort Liability*: *A Public Policy Prospectus,* 10 U.C.L.A. L.Rev. 463, 501-502.)

The *Contra Costa Sanitary Dist.* case, *supra,* involved the relocation of sewer lines to accommodate the construction of flood control drainage works. The case at bench involves the relocation of water mains. The trial court could find no priority between the functions performed by Northeast and those performed by Northridge. Neither can we. One provides for water brought in and used for domestic purposes; the other takes care of the disposition of that water (plus human and other wastes) after it is

used. As we see it, one is no more or less important in our society than the other. Both agencies serve their separate users in the interests of the public health and safety. It is important that the water supply be reasonably pure (e.g., lest a typhoid epidemic result). It is equally, but no more important, that sewerage be properly disposed of for similar public health reasons.

A water district is also empowered to provide sewer lines (see footnote 3). It would indeed seem an absurdity to hold that the water lines of such a district which bring the water to the home have a lesser status than the lines which take the water away after domestic use.

([2]) Each district here involved comprises a separate group of people who will benefit and should be burdened only by the building and maintenance of its own public works. Why should the taxpayers of Northridge be taxed to pay the costs of a sewerage disposal system which does not benefit them? Why should the taxpayers of Northeast receive a free ride for this not inconsiderable item of expense in the building of said sewerage system?

The obvious inequities of the postulated result become magnified when one remembers that the water lines of Northridge were in place first and had to be relocated to make way for new lines being installed by Northeast, a district which performs functions not perceptibly different from the functions of Northridge-certainly as regards the running of its lines beneath the surface of the street. Under such circumstances the district whose facilities are first in place should have the right to be compensated when it is determined it has to relocate its lines. ***322**

The court in the *Contra Costa Sanitary District* case, *supra,* so held and we agree with that holding. ([3]) As stated above, no statute gives a sanitation district superior rights over a water district in the matter of relocation. In the matter of condemnation for a higher public use California's statute, Code of Civil Procedure, section 1241, subdivision 2, referring to resolutions of necessity, treats sanitary, sanitation and water districts exactly the same. (In the matter of denying-under certain conditions-the right of condemnation for a higher public use, subdivision 3 of the same statute refers specifically to water districts, only generally to other "public utility districts.") Our Supreme Court in the very recent case of *City of Beaumont v. Beaumont Irrigation Dist.,* 63 Cal.2d 291 [46 Cal.Rptr. 465, 405 P.2d 377] (Sept. 1965) held that under the latter statute the irrigation district's domestic water system could not be condemned by a city.

In addition to its favorable position in the area of eminent domain, a water district has been expressly given special powers. Water Code section 31062 provides in part: "[A] district has the same rights and privileges appertaining to the rights of way as are granted to municipalities within the State." One of those privileges is, in an appropriate situation, to "exercise police powers equal in extent to those of the state." (*McKay Jewelers, Inc. v. Bowron,* 19 Cal.2d 595, 600 [122 P.2d 543, 139 A.L.R. 1188].)

These matters we point out to illustrate that so far at least as the Legislature is concerned water districts, in the hierarchy of governmental agencies, do not occupy a position inferior to counties, cities and other public entities.

As noted, *County of Contra Costa v. Central Contra Costa Sanitary Dist., supra,* 182 Cal.App.2d 176, discussed (and distinguished) the rules applicable to the nature of a franchise of a privately-owned public utility in a public street as compared to the franchise of a public agency. A franchise, whether it be owned by a private utility or a public agency, is property. A franchise to lay pipes or conduits in a street is real property in the nature of an easement. (*Stockton Gas etc. Co. v. San Joaquin County,* 148 Cal. 313, 321 [83 P. 54, 7 Ann. Cas. 511, 5 L.R.A. N.S. 174]; *Balestra v. Button,* 54 Cal.App.2d 192 [128 P.2d 816].) In *Southern Cal. Gas Co. v. City of Los Angeles,* 50 Cal.2d 713, 716 [329 P.2d 289], our Supreme Court, while recognizing the private utility's franchise in a public street is property created by contract and that its ***323** rights cannot be taken or damaged without payment of just compensation (Cal. Const., art. I, § 14; U.S. Const., Amend. XIV, § 1), nevertheless held (on p. 716) that the utility accepts its franchise rights in a public street "subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way *for a proper governmental use of the streets."* (Italics supplied.) The phrase (emphasized by us) does not limit the precedential governmental uses to rights to repair, maintain and reconstruct the street involved. In *Southern Cal. Gas Co., supra,* the city was causing a gas line relocation to enable it to put in a sewer line.

As we see it, there is no inequity in the rule asserted. It is a consideration the privately-owned utility pays for

the right, usually a monopoly, to furnish its designated services to a section of the public for which the latter pays at rates which, though regulated, are designed to afford the utility's shareholder's private profit after deducting all expense outlays (including the costs of relocation under discussion.)

It would be a mistake to identify the rights of a public entity to lay its facilities in a public street with the rights of a private utility, although both rights are sometimes called franchises. *Contra Costa Sanitary Dist., supra,* points out this fallacy. It has been held, however, in at least two cases that even the right, easement or franchise of a public utility, may under some circumstances be required to assume the burden of the costs of relocating its lines. When that occurs it must be justified under a proper exercise of the police power. In *State of California v. Marin Municipal Water Dist.,* 17 Cal.2d 699 [111 P.2d 641], it was held that the state could do this when relocation of the municipal water district's lines was made necessary to reconstruct a state highway. There, however, an express statute, section 680 of the Streets and Highways Code, had given the Department of Public Works the authority to require removal of a pipeline at the owner's expense when necessary "to insure the safety of the traveling public." It was held (on p. 706) that the Legislature's action was "clearly within that residuary power of the state to protect the health, safety, and morals of its inhabitants known as the 'police power.' " The court added that determination of whether a statute constitutes a taking of property without due process of law or an impairment of the obligation of a contract on the one hand or on the other hand a proper exercise of the ***324** police power is a balancing process. The court stated: "If the benefit to the public [as a whole] outweighs the burden on the individual, the statute is a valid exercise of the 'police power.' " (P. 706) The court (also on p. 706) stressed: "The trial court found in the present case that the removal and relocation of defendant's main was necessary to insure the safety of the traveling public and to permit the construction of the highway. ... The benefit to the public as a whole thus clearly outweighs the burden imposed upon defendant, and the legislation is therefore valid."

East Bay Municipal Utility Dist. v. County of Contra Costa, 200 Cal.App.2d 477 [19 Cal.Rptr. 506] (hearing by Supreme Court denied), is the second case referred to wherein one public agency, a municipal water district, was held obligated to pay the costs of relocating its facilities (water mains) underneath an existing county road to accommodate the reconstruction of that road by the county. Since a county and not the state was involved Streets and Highways Code section 680 was inapplicable. The court held, nevertheless, that the obligation to relocate at the public agency's cost would be implied. There is language in the decision which equates a privately owned utility with a public agency and a statement that "the controlling factor ... is the all-important distinction between a governmental and merely proprietary use of the street." (P. 481.) We can only accept that statement with reservation. Since the holding was that the right of the traveling public-the public as a whole-has a paramount right in an existing street, its maintenance, repair and reconstruction, superior to that of another public agency to lay its facilities in and under that street, the rule is established law by Supreme Court decision and must be accepted, but that case is distinguishable from the case at bench. In the stated sense "governmental use" means the right of government, whether it be the state, county, city or any other public entity (including a water district to which the police power also has been conferred) to exercise that power in a proper situation. But in the sense that the right exists in favor of one public agency and against another without any of the weighing and balancing upon which the validity of an attempted exercise of the police power hinges and solely because of some unexplained and inexplicable "governmental versus proprietary" distinction-that is a proposition which we do not accept as a true measure of the respective rights of public entities in the field of relocation ***325** cost allocation. Although the Supreme Court in *Southern Cal. Gas Co., supra,* 50 Cal.2d 713, 718, did refer to a municipal water district as operating in a proprietary capacity, that statement must be read in the context described above.

It is noteworthy that in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 216 [11 Cal.Rptr. 89, 359 P.2d 457], the Supreme Court's opinion remarks that the "governmental versus proprietary" distinction operated both "illogically" and "inequitably" as applied to the law of governmental immunity from liability in torts. It was in that field that the distinction had been born (see Prosser, Law of Torts (3d ed.) p. 1005). Regarding the application of the doctrine Dean Prosser states: " '[R]ules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs.' "[4] Under the Government Tort Liability Act of 1963 (Gov.

Code, § 900 et seq.) the distinction has been abandoned in the field of government immunity from torts.

To maintain the "Governmental versus proprietary function" as a test in the determination of relocation cost allocation is no less specious. In *Nissen v. Cordua Irrigation Dist.,* 204 Cal. 542 [269 P. 171], an irrigation district furnishing water for irrigation of lands was held to be performing a governmental function, yet as we have seen a district furnishing a domestic water supply is said to be performing a proprietary act. Fire departments which have been uniformly held to be governmental (see Van Alstyne, *op cit.,* p. 18) would be useless without water and water mains. We agree with the court in *Washington Township v. Ridgewood Village* 26 N.J. 578 [141 A.2d 308, 311]: "[W]hatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur."

As between two public agencies located as these two are located, each district when performing the identical type of ***326** function-the laying of pipe lines in a public street-should pay its own way. That is both equitable and sound law.

The judgment is affirmed.

Friedman, J., and Regan, J., concurred.
A petition for a rehearing was denied January 10, 1967, and appellant's petition for a hearing by the Supreme Court was denied February 8, 1967.

Footnotes

1 The county board of supervisors initiates the proceedings to form the district. A hearing, however, must be held and whenever 2 percent of the registered voters object to the formation of the district it must either be abandoned or an election called as stated. (Health & Saf. Code, § 4715.)

2 Sometimes the board will be a mixture of elected private individuals, a member, or members, of the governing body of cities, counties or other public agencies, lying wholly or partly within its boundaries. (Health & Saf. Code, §§ 4730, 4730.1.)

3 In the interests of exactitude a sanitary district is not the same as a sanitation district. The former is formed under Health and Safety Code section 6400 et seq., the latter, as stated, under section 4700 of said code. Both are authorized to construct sewers; so also, by the way, is a water district (Wat. Code, § 35500 et seq.).

4 As stated by Professor Van Alstyne, California Government Tort Liability (Cont. Ed. Bar), pages 18-19, section 1.17: "Inadequacies of Governmental-Proprietary Distinction ... Manifestly, the distinction was unsatisfactory. It offered no solid grounds for prediction, invited test litigation, operated in a fortuitous and erratic fashion, and had little relevance to either the social need for risk distribution or the economic feasibility of shifting from the injured individual to the public treasury losses due to serious injuries."

75 Cal.App.3d 957, 142 Cal.Rptr. 584

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Plaintiff and Appellant,
v.
REDEVELOPMENT AGENCY OF THE CITY OF REDLANDS et al., Defendants and Respondents

Civ. No. 17831.
Court of Appeal, Fourth District, Division 2, California.
December 15, 1977.

SUMMARY

In an action by a telephone and telegraph company against a city and its redevelopment agency to recover costs of relocating telephone lines under streets vacated in furtherance of a redevelopment project, the trial court granted defendants' motion for judgment on the pleadings and entered judgment that plaintiff take nothing by its complaint. The complaint alleged that the city redevelopment agency had notified plaintiff of the proposed vacation of the streets and the necessity of relocating the lines, and that the agency had rejected plaintiff's claim of costs incurred in the relocation of the lines. The complaint sought recovery for the costs on the theory of inverse condemnation and on the theory that relocation was required without affording plaintiff prior notice and an opportunity to be heard. (Superior Court of San Bernardino County, No. 168995, Don A. Turner, Judge.)

The Court of Appeal affirmed. The court held that the California Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.) did not require the city or the redevelopment agency to compensate plaintiff for the expense of relocating its facilities to other city streets. The court also held that apart from the Community Redevelopment Law, a municipality is not required to compensate a utility for relocating its facilities to accommodate an urban redevelopment project even though the plan contemplates ultimate development of the property to industrial or commercial uses. Finally, the court rejected plaintiff's claim that it should be compensated for its relocation costs on the ground it was not afforded notice and an opportunity to be heard before being required to relocate, in light of the fact that plaintiff did not allege that the city failed to comply with the notice and hearing requirements of the Community Redevelopment Law or the provisions of the Streets and Highways Code pertaining to vacation of city streets, and that plaintiff did not contend that it could amend its complaint to so allege.(Opinion by Tamura, J., with Gardner, P. J., and McDaniel, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Public Housing and Urban Renewal § 5--Urban Renewal Projects-- Vacation of Streets--Liability for Costs of Relocating Underground Telephone Lines--Inverse Condemnation.
The California Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.) regulating redevelopment projects by municipalities in blighted areas, does not require a city or its redevelopment agency to compensate a utility company for the expense of relocating its facilities to other streets from streets vacated in furtherance of the redevelopment project. Thus, relocation by a telephone company of its lines under streets vacated by a city in furtherance of a redevelopment project could not form the basis for an action by the telephone company against the city in inverse condemnation for the cost of relocation of the lines.

[See **Cal.Jur.3d,** Eminent Domain, § 83; **Am.Jur.2d,** Eminent Domain, § 181.]

(2)
Telegraphs and Telephones § 3--Franchises--Use of Public Streets.
While the right granted to a telephone company by Pub. Util. Code, § 7901, providing that telegraph or telephone corporations may construct lines along or on any public road or highway, has often been termed a “franchise,” it is not a grant of a proprietary interest in the street. The utility acquires only a limited right to use these streets to the extent necessary to furnish communication services to the public, and the franchise is subject to an implied obligation to relocate the facilities when necessary to make way for a proper governmental use of the streets.

(3)

Public Housing and Urban Renewal § 5--Urban Renewal Projects-- Construction of Redevelopment Law--Utility's Relocation Costs.
In light of the nature of a telephone company's franchise to construct lines on or along public streets as authorized by Pub. Util. Code, § 7901, the Community Redevelopment Law Health & Saf. Code, §§ 33391, 33395), empowering a redevelopment agency to acquire real property by eminent domain and providing that property already devoted to a public use may be acquired by the redevelopment agency through eminent domain, cannot be construed to mean that relocation of telephone lines along or under a public street may be required only through exercise of the power of eminent domain or that compensation must be paid as though compelled by the federal and state Constitutions. The statutes are merely provisions empowering a redevelopment agency to exercise the power of eminent domain without which the power could not be exercised.

(4)
Eminent Domain § 8--Uses and Purposes Authorized--Legislative Determination.
In granting a public agency the power of eminent domain, the Legislature may prescribe the kinds of property that may be taken as well as the purpose for which property may be condemned. Conferral of the power of eminent domain, however, does not mean the power must be invoked or compensation must be paid when the agency's action does not result in a constitutionally compensable taking or damaging of the property.

(5a, 5b)
Public Housing and Urban Renewal § 5--Urban Renewal Projects-- Liability for Relocation of Utility's Facilities--Governmental or Proprietary Function.
A utility's right to compensation for relocation of its facilities in furtherance of a redevelopment project instituted by a municipality should depend, not on whether the municipal activity is governmental or proprietary, but on whether compensation has been required by the Legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right. Thus, a telephone company was not entitled to compensation from a city for relocation of its telephone lines located under streets vacated pursuant to an urban renewal project, on the ground that the city was acting in a proprietary capacity when it required relocation of the facilities.

(6a, 6b)
Public Housing and Urban Renewal § 5--Urban Renewal Projects-- Proper Function of Government.
Municipal acquisition of blighted areas for redevelopment under the Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.) is a proper function of government, and vacation of public streets in furtherance of a redevelopment project is likewise an exercise of a governmental function.

(7)
Statutes § 42--Construction--Aids--In General--Legislative Policy Declarations.
While legislative policy declarations contained in a statute are not binding on the courts, as statements of policy they are entitled to great weight, and it is not the duty or prerogative of the court to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation.

(8)
Public Housing and Urban Renewal § 5--Urban Renewal Projects-- Relocation of Utility's Facilities--Notice and Opportunity to Be Heard.
A telephone company was not denied procedural due process on the ground that it was not afforded notice and opportunity to be heard before being required to relocate telephone lines under streets being vacated in furtherance of an urban renewal project, where the telephone company had ample opportunity to be heard both on the scope and nature of the redevelopment plan as well as on the city's intention to vacate the streets in question.

COUNSEL
Donald R. King, Gerald H. Genard, Tony R. Skogen and Eugene Topel for Plaintiff and Appellant.
Welebir, Brunick & Taylor and Edward F. Taylor for Defendants and Respondents.
Eugene B. Jacobs, Robert P. Berkman, Mark D. Breakstone, John W. Witt, City Attorney (San Diego), William S. Shaffran, Deputy City Attorney, Daniel J. Curtin, Jr., City Attorney (Walnut Creek), P. Lawrence Klose, City Attorney (Petaluma), McDonough, Holland, Schwartz & Allen and Joseph E. Coomes, Jr., as Amici Curiae on behalf of Defendants and Respondents.

TAMURA, J.

The central issue on this appeal is whether a telephone company must bear the cost of relocating underground facilities it maintains in street rights-of-way where relocation is necessitated by ***961** vacation of the streets in furtherance of a redevelopment project under the Community Redevelopment Law (Health & Saf. Code, § 33000 et seq.).

For reasons expressed below, we have concluded that the utility must relocate its facilities at its own expense.

The pertinent facts are not in dispute. In 1972 the City Council of the City of Redlands approved a redevelopment plan which included as one of its major elements the construction of a shopping mall in a blighted downtown area and called for the city's cooperation in the vacation of streets, alleys, and other public ways and the relocation of sewers, water mains, and other public facilities. The project required the vacation of two streets in which Pacific Telephone and Telegraph Company (PT&T) maintained underground long distance telephone cables pursuant to rights granted by Public Utilities Code section 7901. [1]

The city redevelopment agency notified PT&T of the proposed vacation of the streets and the necessity of relocating the company's facilities to other city streets. PT&T responded it would relocate upon payment of its relocation costs. The city declined to so agree, undertook street vacation proceedings, and adopted a resolution vacating and abandoning the streets without reserving public utility easements therein. [2] PT&T relocated its facilities under protest, submitted a claim to the city for $72,088.64, and, upon rejection of the claim, commenced the instant action against the city and the city redevelopment agency to recover the relocation costs.

PT&T's complaint alleged the facts summarized above and sought recovery on two theories: (1) Inverse condemnation and (2) damages for requiring relocation without affording the utility prior notice and an opportunity to be heard. In their answer, the city and the agency admitted the factual allegations of the complaint but denied liability. ***962** Each side moved for a judgment on the pleadings. The court initially granted PT&T's motion but, on a motion for reconsideration, granted defendants' motion and entered judgment that PT&T take nothing by its complaint. PT&T appeals.

PT&T concedes the common law rule to be that, in the absence of a provision to the contrary, a public utility's franchise rights in a public street are subject to an implied obligation to relocate its facilities at the utility's own expense when necessary to make way for a proper governmental use of the street. (*New Orleans Gaslight Co.* v. *Drainage Commission of New Orleans*, 197 U.S. 453, 461-462 [49 L.Ed. 831, 835, 25 S.Ct. 471, 473-474]; *L.A. County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 334 [333 P.2d 1]; *Southern Cal. Gas Co.* v. *City of L.A.*, 50 Cal.2d 713, 716 [329 P.2d 289].) However, PT&T maintains: (1) The common law rule does not govern the instant relocation because (a) the Community Redevelopment Law contemplates reimbursement of relocation expenses incurred by a utility, and (b) apart from the Community Redevelopment Law, a municipality must compensate a utility for relocating its facilities to accommodate an urban redevelopment project when the plan contemplates ultimate development of the property to industrial or commercial uses; and (2) assuming applicability of the common law rule, the utility was nevertheless entitled to damages in the amount of the relocation expenses, because it was not afforded notice and an opportunity to be heard on the necessity for relocating its facilities. In the ensuing discussion, we examine those contentions seriatim and conclude that they are without merit.

I

() The utility's primary contention is that the case at bench is not governed by the common law rule because relocation was occasioned by a redevelopment project under the Community Redevelopment Law. The argument rests on Health and Safety Code sections 33390, 33391, and 33395. [3]

Section 33390 defines the term "real property" as including "[e]very estate, interest, privilege, easement, franchise, and right in land"; section 33391 empowers a redevelopment agency to "[a]cquire real property by eminent domain"; and section 33395 provides that "[p]roperty alreadydevoted ***963** to a public use may be acquired by the agency through eminent domain." PT&T's argument takes the following form: The right granted to a telephone company by Public Utilities Code section

7901 constitutes a franchise and hence is a species of "real property" as that term is defined in section 33390; PT&T's right to maintain its facilities in the streets in question is "[p]roperty already devoted to a public use" within the meaning of section 33395; the only method by which a redevelopment agency may acquire "[p]roperty already devoted to a public use" is by eminent domain; relocation costs incurred by PT&T were, therefore, recoverable in an inverse condemnation action. We are unpersuaded.

() While the right granted to a telephone company by Public Utilities Code section 7901 has often been termed a "franchise" (*Pac. Tel. & Tel. Co. v. City & County of S. F.*, 51 Cal.2d 766, 770-771 [336 P.2d 514]; *Pac. Tel. & Tel. Co.* v. *City of Los Angeles*, 44 Cal.2d 272, 276 [282 P.2d 36]; *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 119 [116 P. 557]), it is not a grant of a proprietary interest in the street (*County of L.A.* v. *Southern Cal. Tel. Co.*, 32 Cal.2d 378, 387 [196 P.2d 773]; *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 197 Cal.App.2d 133, 154 [17 Cal.Rptr. 687]). The utility acquires only a limited right to use the streets to the extent necessary to furnish communication services to the public (*County of L.A.* v. *Southern Cal. Tel. Co., supra*, 32 Cal.2d 378, 387; *Pacific Tel. & Tel. Co. v. City & County of San Francisco, supra*, 197 Cal.App.2d 133, 154), and the franchise is subject to an implied obligation to relocate the facilities when necessary to make way for a proper governmental use of the streets (*Pacific Tel. & Tel. Co. v. City & County of San Francisco, supra*, 197 Cal.App.2d 133, 154; see *L.A. County Flood Control Dist. v. Southern Cal. Edison Co., supra*, 51 Cal.2d 331, 334; *Southern Cal. Gas Co. v. City of L.A., supra*, 50 Cal.2d 713, 716.)

() In light of the nature of the utility's franchise or privilege, sections 33391 and 33395 cannot be construed to mean that relocation may be required only through exercise of the power of eminent domain or that compensation must be paid as though compelled by the federal and state Constitutions. Section 33391 is merely a provision empowering a redevelopment agency to exercise the power of eminent domain without which the power could not be exercised. (*City of Beaumont* v. *Beaumont Irr. Dist.*, 63 Cal.2d 291, 293 [46 Cal.Rptr. 465, 405 P.2d 377]; *County of Marin* v. *Superior Court*, 53 Cal.2d 633, 636 [2 Cal.Rptr. 758, 349 P.2d 526]; *People v. Superior Court*, 10 Cal.2d 288, 295-296 [***964** 73 P.2d 1221]; *San Bernardino County Flood etc. Dist.* v. *Superior Court*, 269 Cal.App.2d 514, 518 [75 Cal.Rptr. 24].) The same is true of section 33395 authorizing the agency to acquire by eminent domain property already devoted to a public use. () In granting a public agency the power of eminent domain, the Legislature may prescribe the kinds of property that may be taken as well as the purpose for which property may be condemned. (*Eden Memorial Park Assn. v. Superior Court*, 189 Cal.App.2d 421, 425 [11 Cal.Rptr. 189].) Conferral of the power of eminent domain, however, does not mean the power must be invoked or compensation must be paid where the agency's action does not result in a constitutionally compensable taking or damaging of property. () The city's insistence that the utility do that which it impliedly agreed to do when it accepted the franchise offer contained in Public Utilities Code section 7901 did not result in a taking or damaging of the utility's franchise rights. The city's action did not impose on the utility a burden it had not already assumed when it accepted the franchise by constructing its facilities in public streets. (*L.A. County Flood Control Dist.* v. *Southern Cal. Edison Co., supra*, 51 Cal.2d 331, 336.) Thus, the required relocation cannot form the basis for an action in inverse condemnation. In order to state a cause of action for inverse condemnation, there must be an invasion or appropriation of some valuable property right possessed by the claimant. (*Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120 [109 Cal.Rptr. 799, 514 P.2d 111].)

Although the Legislature may grant a utility the right to compensation for relocating its facilities to accommodate a proper governmental use of the street, such right should not be deemed to have been given unless the Legislature specifically so provides. (*Southern Cal. Gas. Co.* v. *City of L.A., supra*, 50 Cal.2d 713, 719; *First Nat. Bank of Boston v. Maine Turnpike Auth.*, 153 Me. 131, 152 [136 A.2d 699, 711]; *Consolidated Edison of New York v. Lindsay*, 24 N.Y.2d 309 [300 N.Y.S.2d 321, 248 N.E.2d 150, 154]; *Appalachian Power Co. v. City of Huntington*, W.Va. [210 S.E.2d 471, 475].) The sections of the Community Redevelopment Law on which PT&T bases its claim do not, either singly or collectively, manifest a legislative will that a utility be compensated for relocating facilities maintained in a public street pursuant to Public Utilities Code section 7901.

PT&T's contention is similar to another utility's unsuccessful argument in *L.A. County Flood Control Dist. v. Southern Cal. Edison Co., supra*, 51 Cal.2d 331. There, the Southern California Edison Co. based

itsentitlement ***965** to relocation costs on an amendment to the Los Angeles County Flood Control Act which provided that "'nothing in this act contained shall be deemed to authorize said district in exercising any of its powers to take, damage or destroy any property or to require the removal, relocation, alteration or destruction of any bridge, railroad, wire line, pipeline, facility or other structure unless just compensation therefor be first made, in the manner and to the extent required by the Constitution of the United States and the Constitution of California.' (Stats. 1953, ch. 1139, p. 2635, § 1.)" (*Id.*, at p. 336.) The utility argued that the quoted provision meant that compensation must be made in the same manner and to the same extent as if a constitutionally compensable taking or damaging of property had occurred. (*Id.*, at pp. 336-337.) In rejecting the contention, our high court interpreted the statute as providing for compensation only as required by the state and federal Constitutions. (*Id.*, at p. 337.) The court reasoned that had the Legislature intended to go beyond constitutional demands, it would have so provided as it had done elsewhere. *(Id.)* The court cited as an example the Marin County Flood Control and Water Conservation District Act which provides that the district shall "'*in addition to the damage for the taking, injury, or destruction of property*, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location. ...' (Stats. 1953, ch. 666, p. 1915, 1919; ...)" (*Id.*, italics added.) In the case at bench, neither the Community Redevelopment Law nor Public Utilities Code section 7901 contains any express direction to compensate a utility for relocation expenses.[4] The broad definition of "real property" in section 33390 does not constitute an express legislative directive to reimburse utilities for relocation of their facilities. (See *Consolidated Edison Co. of New York v. Lindsay, supra*, 24 N.Y.2d 309 [248 N.E.2d 150, 154].)

We recognize that our analysis of the pertinent provisions of the Community Redevelopment Law is at variance with the view expressed in *East Bay Muni. Utility Dist. v. Richmond Redevelopment Agency*, 51 Cal.App.3d 789 [124 Cal.Rptr. 606]. There, after a brief recitation of the ***966** substance of sections 33390, 33391 and 33395, the Court of Appeal concluded: "The apparent purpose of Health and Safety Code sections 33390, 33391 and 33395 is to protect franchise holders, including utilities, from uncompensated seizures of property occasioned by redevelopment projects. (See *Vermont Gas Systems, Inc. v. City of Burlington* (1971) 130 Vt. 75, 82 [286 A.2d 275, 279]; *City of Center Line* v. *Michigan Bell Tel. Co*. (1970) 26 Mich.App. 659 [182 N.W.2d 769], affd. 387 Mich. 260 [196 N.W.2d 144]; *Mayor etc. of Baltimore v. Baltimore Gas & Elec. Co*. (1959) 221 Md. 94 [156 A.2d 447]; *In re Gillen Place, Borough of Brooklyn, etc*. (1952) 304 N. Y. 215 [106 N.E.2d 897]; *City of Columbus v. Indiana Bell Telephone Co*. (1972) 152 Ind.App. 22 [281 N.E.2d 510].)

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"Therefore, if the relocating costs had been incurred as a result of an exercise of governmental power by the redevelopment agency (through an eminent domain proceeding or by a taking established as compensable in an inverse condemnation action) EBMUD would have been entitled to recover. ..." (*East Bay Muni. Utility Dist. v. Richmond Redevelopment Agency, supra*, 51 Cal.App.3d 789, 794.)

We would first observe that the *East Bay* court nevertheless affirmed the judgment denying recovery from the redevelopment agency for the utility district's cost of relocating its water mains. (*Id.*, at p. 795.) The reviewing court held that the trial court's implied finding that relocation was not occasioned by the exercise of the agency's power of eminent domain was supported by the record in that it appeared the utility had intended to replace its existing water main with a larger line, its engineers had planned the relocation, the redevelopment agency was never apprised of the cost of relocation, there was no resistance to the planned relocation and a claim for compensation was never filed. (*Id.*, at pp. 794-795.) Thus, the quoted language is dictum.

In any event while we have the highest regard for the author of the *East Bay* opinion, for reasons heretofore stated, we respectfully decline to share the view expressed in the court's dictum.

Nor are we persuaded by the cases from other jurisdictions cited by the *East Bay* court. In the cited cases, relocation costs were held to be compensable either because of the particular language of the state statute or redevelopment ordinance or on the theory that it was somehow unfair to require the utility to bear relocation costs where the urban renewal orredevelopment ***967** project contemplated ultimate development by private individuals

for commercial or industrial purposes. Among the cited cases, PT&T relies most heavily upon *City of Center Line* v. *Michigan Bell Tel. Co*., 26 Mich.App. 659 [182 N.W.2d 769], affd. 387 Mich. 260 [196 N.W.2d 144]. There, the Michigan Court of Appeal held that the utility should recover relocation expenses because (1) otherwise the ultimate private developers would benefit at the expense of another private corporation (the utility) and (2) since urban renewal is "a socially-oriented program operating under the guise of the police power," the relocation costs should be borne by the taxpayers rather than the consumers of the utility service. (*City of Center Line* v. *Michigan Bell Tel. Co., supra*, 26 Mich.App. 659 [182 N.W.2d 769, 770-771].) The Michigan Supreme Court was unimpressed with the first reason given by the Court of Appeal, but held that the second reason, though as expressed was "unfelicitous," was sound and in accord with the legislative will. (*In re City of Center Line*, 387 Mich. 260 [196 N.W.2d 144, 146].) The statutory analysis, however, merely consisted of the following cryptic conclusions: "The whole tenor of the act is for the city to acquire private interests through purchase. The inclusion in the definition of real property in Sec. 2(e) of 'every estate, interest, *privilege, easement*' and the direction to the city to acquire such real property in Sec. 5 obviates the constitutional question of whether it is necessary to reimburse a utility for relocation costs when a public use entails the removal and relocation of equipment. [¶] We hold that the RBA [Rehabilitation of Blighted Areas] act requires that the city reimburse a utility for costs for removal and relocation of its equipment necessitated by the implementation of an urban renewal plan under the act." (*In re City of Center Line, supra*, 387 Mich. 260 [196 N.W.2d 144, 146-147].) As we have explained, we do not so analyze the California Community Redevelopment Law.

Other out-of-state cases which we believe to be better reasoned have held that a utility must bear the expense of a utility relocation necessitated by an urban renewal or redevelopment project. (*Southern Union Gas Co.* v. *City of Artesia*, 81 N.M. 654 [472 P.2d 368, 369-370]; *Consolidated Edison of New York v. Lindsay, supra*, 24 N.Y.2d 309 [248 N.E.2d 150, 153-154]; *New York Telephone Co. v. City of Binghamton*, 18 N.Y.2d 152 [272 N.Y.S.2d 359, 219 N.E.2d 184, 188]; *Bristol Tennessee Housing Auth. v. Bristol Gas. Corp*., 219 Tenn. 194 [407 S.W.2d 681, 682-683]; *Appalachian Power Co. v. City of Huntington, supra*, 210 S.E.2d 471, 475.) ***968**

We hold that the California Community Redevelopment Law does not require the city or agency to compensate PT&T for the expense of relocating its facilities to other city streets. We perceive nothing fundamentally unfair in requiring the utility to bear the relocation expenses as a part of its cost of doing business. It is for the Legislature to decide whether those expenses should be shifted to the taxpayers. It has not so decided in the Community Redevelopment Law.

() PT&T maintains, however, that apart from the Community Redevelopment Law it is entitled to recover relocation expenses because the city and the agency were acting in a proprietary capacity. This contention must also be rejected.

The labels "governmental function" and "proprietary function" are of dubious value in terms of legal analysis in any context. The classification has been employed primarily in the tort field as a judicial technique for determining questions of common law governmental immunity. The distinction was, as Professor Van Alstyne observes, manifestly unsatisfactory: "It offered no solid grounds for prediction, invited test litigation, operated in a fortuitous and erratic fashion, and had little relevance to either the social need for risk distribution or the economic feasibility of shifting from the injured individual to the public treasury losses due to serious injuries. The eradication of the distinction from the governmental immunity doctrine was attributed in *Muskopf* to the fact that it operated both 'illogically' and 'inequitably.' *Muskopf v. Corning Hosp. Dist*. (1961) 55 C2d 211, 216, 11 CR 89, 92." (Van Alstyne, Cal. Government Tort Liability (Cont.Ed.Bar 1964) § 1.17, p. 19.)

The classification is not a serviceable tool for decision making in the present context. "The distinction between 'governmental function' and 'proprietary function' is a sort of abstraction difficult to make meaningful in a day when municipalities continually find new ways to exercise police power in their efforts to cope with the pressing needs of their citizens." (*New York Telephone Co. v. City of Binghamton, supra*, 18 N.Y.2d 152 [219 N.E.2d 184, 186].) A utility's right to compensation should depend, not on whether municipal activity is "governmental" or "proprietary," but on whether compensation has been required by the Legislature, or whether there has been

a constitutionally compensable taking or damaging of a valuable property right.

PT&T urges that *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 [64 L.Ed. 121, 40 S.Ct. 76], and ***969** *Postal Tel.-Cable Co.*v. *San Francisco*, 53 Cal.App. 188 [199 P. 1108], compel us to apply the distinction in determining its right to compensation. Even were we to feel so compelled, those cases do not aid PT&T's cause. They are readily distinguishable under traditional governmental and proprietary function concepts. They involved utility relocations required to accommodate a public utility business carried on by a municipality. Under traditional tests, such enterprises were uniformly treated as being proprietary in nature. (Van Alstyne, Cal. Government Tort Liability (Cont.Ed.Bar 1964) § 1.17, p. 18.)

() However, in this day and age it is too late to quarrel with the proposition that elimination of urban blight by acquiring and clearing areas so infected and converting them into sites for commercial and industrial development is a legitimate governmental function. (*New York Telephone Co. v. City of Binghamton, supra*, 18 N.Y.2d 152 [219 N.E.2d 184, 187]; *Bristol Tennessee Housing Auth. v. Bristol Gas Corp., supra*, 407 S.W.2d 681, 683.) To hold otherwise would be viewing "present day conditions under the myopic eyes of years now gone." (*Redevelopment Agency* v. *Hayes*, 122 Cal.App.2d 777, 803 [266 P.2d 105].) In *New York Telephone Co. v. City of Binghamton, supra*, the New York Court of Appeal held that it need not endorse or reject the "governmental-proprietary" distinction drawn in *In re Gillen Place, Borough of Brooklyn, etc.*, 304 N.Y. 215 [106 N.E.2d 897], cited in the *East Bay* court's dictum and relied upon by PT&T, because "clearing, replanning and rehabilitation of substandard and insanitary areas is a public purpose separate in itself regardless of subsequent use of the property." (*New York Telephone Co. v. City of Binghamton, supra*, 18 N.Y.2d 152 [219 N.E.2d 184, 186-187].) We agree.

In this state, the Community Redevelopment Law contains the following legislative policy declaration: "(c) That the redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and *are governmental functions of state concern* in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist." (§ 33037, subd. (c), italics added.) () While such legislative declarations are not binding on the courts, as statements of policy they are "entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable ***970** foundation" (*The Housing Authority* v. *Dockweiler*, 14 Cal.2d 437, 449-450 [94 P.2d 794]; accord *Fellom* v. *Redevelopment Agency*, 157 Cal.App.2d 243, 248 [320 P.2d 884].) () Our courts have respected the legislative policy declaration. Municipal acquisition of blighted areas for redevelopment under the Community Redevelopment Law has consistently been held to be a proper function of government. (*In re Redevelopment Plan For Bunker Hill*, 61 Cal.2d 21, 41, 71 [37 Cal.Rptr. 74, 389 P.2d 538]; *Redevelopment Agency v. Hayes, supra*, 122 Cal.App.2d 777, 800-802.) Vacation of public streets in furtherance of a redevelopment project is expressly authorized by section 33220 and is likewise an exercise of a governmental function.

() PT&T's contention that it is entitled to compensation on the theory that the city and the agency were acting in a proprietary capacity is without merit.

II

() The utility's due process argument merits little consideration. PT&T urges that even if this court should conclude that relocation did not involve a "taking" or "damaging" of the utility's property, it was nevertheless denied procedural due process because it was not afforded notice and an opportunity to be heard before being required to relocate. The only authority cited is *Leppo v. City of Petaluma*, 20 Cal.App.3d 711 [97 Cal.Rptr. 840]. *Leppo* is inapposite. That was an action for damages for the demolition of a building as a public nuisance. (*Id.*, at p. 715.) The reviewing court held that absent an emergency, a municipality must give the owner notice and an opportunity to be heard before it may order demolition of a building as a public nuisance. (*Id.*, at pp. 718-719.) As we have explained, in the case at bench there has been no taking or damaging of the utility's property.

Furthermore, PT&T had ample opportunity to be heard both on the scope and nature of the redevelopment plan as well as on the city's intention to vacate the streets in question. PT&T did not allege that the city or the agency

failed to comply with the notice and hearing requirements of the Community Redevelopment Law (§§ 33348, 33349, 33355, 33356, 33360-33363) or the provisions of the Streets and Highways Code pertaining to vacation of city streets (Sts. & Hy. Code, §§ 8322-8323). Nor does it contend it could amend its complaint to so ***971** allege. In the absence of such allegation, it must be presumed that the city and agency proceeded in the manner required by law.

The judgment is affirmed.

Gardner, P. J., and McDaniel, J., concurred.

A petition for a rehearing was denied January 5, 1978, and appellant's petition for a hearing by the Supreme Court was denied February 23, 1978.

Footnotes

1 Public Utilities Code section 7901 provides: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

2 The city is empowered, in its discretion, to reserve and to except from the vacation of a street an easement to construct, maintain, and operate utility facilities pursuant to existing franchises. (Sts. & Hy. Code, § 8330.)

3 Unless otherwise indicated, all section references in this opinion are to the Health and Safety Code.

4 When the Legislature intends that a utility be reimbursed for its relocation costs, it has said so in specific and direct language. For example, in addition to the instance cited by the Supreme Court in *L.A. County Flood Control Dist. v. Southern Cal. Edison Co., supra*, 51 Cal.2d 331, 337, the Legislature has expressly provided for reimbursement of relocation costs of utility facilities maintained in freeways (Sts. & Hy. Code, §§ 702, 703), relocations required by the Southern California Rapid Transit District (Pub. Util. Code, § 30631), and relocations required by the Reclamation Board in connection with certain flood control projects (Wat. Code, § 8617.5).

KeyCite Yellow Flag - Negative Treatment
Distinguished by Bay Area Cellular Telephone Co. v. City of Union City, Cal.App. 1 Dist., April 29, 2008

32 Cal.4th 409
Supreme Court of California

Jerry RICHMOND et al., Plaintiffs and Appellants,
v.
SHASTA COMMUNITY SERVICES DISTRICT, Defendant and Respondent.

No. S105078.
|
Feb. 9, 2004.

Synopsis

Background: Property owners brought action challenging constitutionality of resolution adopted by water district that increased connection fee charged to new users and continued unchanged, as part of connection fee, a fee for fire suppression. The Superior Court, Shasta County, No. 0134636, Richard A. McEachen, J., upheld enactment. Property owners appealed. The Court of Appeal affirmed in part and reversed in part. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:

[1] district's capacity charge, imposed on applicants for new service connections, was not an "assessment" subject to state constitutional restrictions;

[2] district's fee for fire suppression as part of new connection fee was not subject to constitutional restrictions on fees; and

[3] district could amend ordinance establishing new connection fees by resolution.

Judgment of the Court of Appeal reversed and matter remanded to that court with directions.

Opinion, 116 Cal.Rptr.2d 343, superseded.

West Headnotes (9)

[1] Water Law
Charges as Taxes or Assessments

Water district's capacity charge, imposed on applicants for new service connections, was not an "assessment" subject to state constitutional restrictions on assessments, since district could only estimate number of connections and could not identify specific parcels for which new applications would be made, as required by constitutional provision. West's Ann.Cal. Const. Art. 13D, §§ 2, 4.

See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, §§ 110A, 110B; Cal. Jur. 3d, Property Tax, § 4.

16 Cases that cite this headnote

[2] Constitutional Law
General Rules of Construction

The principles of constitutional interpretation are similar to those governing statutory construction.

4 Cases that cite this headnote

[3] Constitutional Law
Intent in general

The aim of constitutional interpretation is to determine and effectuate the intent of those who enacted the constitutional provision at issue.

7 Cases that cite this headnote

[4] Constitutional Law
Meaning of Language in General

Constitutional Law
Plain, ordinary, or common meaning

To determine intent of enactors of a constitutional provision, the Supreme Court begins by examining the constitutional text, giving the words their ordinary meanings.

3 Cases that cite this headnote

[5] **Constitutional Law**
Reasonableness of result
Constitutional Law
Meaning of Language in General

Courts construe constitutional phrases liberally and practically; where possible they avoid a literalism that effects absurd, arbitrary, or unintended results.

Cases that cite this headnote

[6] **Constitutional Law**
Meaning of Language in General
Constitutional Law
Relation to former constitution
Statutes
Defined terms;definitional provisions
Statutes
Legislative Construction

Rule, holding that when a term has been given a particular meaning by a judicial decision it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions, does not apply when the statute or constitutional provision contains its own definition of the term at issue; if the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.

2 Cases that cite this headnote

[7] **Water Law**
Connection and capitalization fees

Water district's capacity charge, imposed on applicants for new service connections, was not a "development fee"; district had no authority to approve or disapprove property development, and a property owner could request a new service connection without proposing any new development.

19 Cases that cite this headnote

[8] **Water Law**
Charge for fire protection service

Water district's fee for fire suppression as part of new connection fee was not subject to constitutional restrictions on fees, since it was not imposed as an incident to ownership; although supplying water was a property-related service within constitutional definition of a fee or charge, a water service fee was a "fee or charge" only if it was imposed upon a person as an incident of property ownership, and making a new connection to the system was not such imposition, since it resulted from an owner's voluntary decision to apply for the connection. West's Ann.Cal. Const. Art. 13D, §§ 2(e), 3(b), 6(a, b); West's Ann.Cal.Gov.Code §§ 61621, 61621.3.

24 Cases that cite this headnote

[9] **Water Law**
Connection and capitalization fees

Water district could amend ordinance establishing new connection fee by resolution under authority of Mitigation Fee Act, which allowed such action by ordinance or resolution; district was not subject to statute requiring sewage system actions to be enacted by ordinance. West's Ann.Cal.Gov.Code § 66016(b); West's Ann.Cal.Health & Safety Code § 5471.

3 Cases that cite this headnote

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Opinion

KENNARD, J.

In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act, which added articles XIII C and XIII D to the California Constitution. (See *Apartment Assn. of Los Angeles County,* ***415** *Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 835, 102 Cal.Rptr.2d 719, 14 P.3d 930.) Article XIII D of the state Constitution (hereafter article XIII D) specifies various restrictions and requirements for assessments, fees, and charges that local governments impose on real property or on persons as an incident of property ownership. Here, the main issue is whether a charge that a local water district imposed as a condition of making a new connection to the water system, and that the district used to finance capital improvements to the water system, is subject to the restrictions of article XIII D. Other questions presented are whether article XIII D prohibits a local water district from continuing to include in the new connection fees a fire suppression charge, the proceeds of which are used to purchase firefighting and emergency medical equipment for the district's volunteer fire department, and whether an ordinance imposing a water connection fee may be amended by a resolution.

On these questions, we conclude: (1) a capacity charge imposed as a condition for making a new connection to a water system, the proceeds of which are used to finance capital improvements, is not an assessment within the meaning of article XIII D, and thus it is not subject to article XIII D's restrictions on assessments; (2) a fire suppression fee imposed as a condition for making a new connection to a water system, the proceeds of which are used to purchase firefighting and emergency medical *****124** equipment, is not a property-related fee or charge under article XIII D, and thus it is not subject to article XIII D's prohibition against property-related fees and charges for general governmental services; and (3) an ordinance enacted by a community services district to impose a water connection fee may be amended by a resolution. Because these conclusions are consistent with the trial court's judgment but inconsistent with part of the Court of Appeal's opinion, we will reverse that court's judgment with directions to affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

Because neither party petitioned the Court of Appeal for a rehearing, we take the facts largely from that court's opinion. (See Cal. Rules of Court, rule 28(c)(2).)

Defendant Shasta Community Services District (the District) is a local public entity organized under the community services district law (Gov.Code, § 61000 et seq.). It operates a water system for residential and commercial users and a volunteer fire department that provides both fire suppression and emergency medical services. In February 1994, the District adopted an ordinance (No. 1–94) establishing a "standard connection fee" of $2,000, plus the cost of a water meter, for new water service connections. ***416** According to the ordinance, this fee included a capacity charge [1] of $600 for future improvements to the water system and a fire suppression charge of $400. The ordinance did not expressly allocate the remaining $1,000, but one may infer that it covered the cost of installing the water service connection because the ordinance also provided that if the water main was not on the same side of the street or highway as the property to be served, "the District will charge the actual ****521** cost of the connection to the extent such cost exceed[s] the sum of $1,000."

In November 1997, the District adopted a resolution (No. 10–97) to amend this ordinance. According to the resolution, applicants for new water service connections would be required to pay: (1) a "standard connection fee"; (2) the actual cost of a water meter; and (3) if the property owner chose to have the District install the service connection, the "actual cost of the materials,

labor, and overhead" for installing the "entire service connection including the meter, line setter, meter box, appurtenant equipment, and mainline extension, if any." The "standard connection fee" consisted of a $3,176 capacity charge for capital improvements to the water system and a $400 fire suppression charge. The resolution stated that the $3,176 capacity charge was "based upon estimated project costs of $762,300 for future improvements assigned to the new development of 240 future connections which equals $3,176 per connection."

In March 1998, plaintiffs Jerry Richmond, Linda Panich, Hank Edelstein, and Victoria Edelstein, both individually and doing business as a joint venture, brought this action to test the validity of the resolution increasing the fees for new connections. (Code Civ. Proc., § 860; Gov.Code, §§ 66013, 66022.) They alleged that they owned real property within the District and also within an area proposed for annexation into the District. They challenged the resolution on many grounds, only three of which are relevant here: (1) The resolution imposed an assessment within the meaning of article XIII D, but ***125 the District had not satisfied the constitutional requirements for imposing an assessment; (2) the $400 fire suppression charge was a "fee" or "charge" within the meaning of article XIII D, and it violated article XIII D's prohibition against fees or charges for general governmental services; and (3) the 1994 ordinance could be amended only by another ordinance, not by a mere resolution. Plaintiffs requested a declaratory judgment that the resolution was void and a permanent injunction restraining the District from enforcing it.

*417 The action was tried to the court without a jury. At the trial, the District presented evidence showing, among other things, that the capital improvements to be funded by the $3,176 capacity charge, including a new 500,000–gallon storage tank, would both remedy existing deficiencies in the water system and expand the system's ability to provide service to new customers through new connections. The $3,176 charge was calculated by allocating 50 percent of the cost of the improvements to new connections and 50 percent to existing connections. Water customers throughout the district would benefit from the improvements, but customers in certain higher-elevation areas would receive somewhat less benefit than other customers. After considering the evidence, the superior court granted judgment for the District. The court concluded: (1) The connection fee imposed by resolution No. 10–97 is not a special assessment but a development fee exempt from article XIII D; (2) the fire suppression charge is merely the continuation of a fee imposed before article XIII D was enacted; and (3) the connection fee could legally be adopted by a resolution (enactment of an ordinance was not required).

On plaintiffs' appeal, the Court of Appeal affirmed the judgment, except as to the fire suppression charge. The court reasoned that the District's connection fee was not an assessment within the meaning of article XIII D because that constitutional provision by implication defines an assessment as a charge imposed on specific identified parcels, whereas the connection fee was not imposed on identified parcels. Because the connection fee was imposed only when a property owner requested a new service connection, the specific properties for which connections would be sought could not be identified (although the number of such requests could be estimated), and thus the connection charge could not be characterized as an assessment. The Court of Appeal also concluded that the connection fee, because it was incurred only when the owner voluntarily requested a new service connection, was properly characterized as a development fee, and as such it was exempt from the requirements of article XIII D.

**522 With respect to the fire suppression charge, however, the Court of Appeal accepted plaintiff's argument that it was a fee for general governmental services prohibited by section 6, subdivision (b)(5), of article XIII D. The Court of Appeal rejected the District's argument that this provision did not apply to fees authorized by laws enacted before article XIII D became effective, but only to fees that were newly enacted or increased thereafter.

Finally, the Court of Appeal concluded that the District could validly use a resolution to amend an ordinance.

*418 II. THE CAPACITY CHARGE

[1] [2] [3] [4] To determine whether the District's $3,176 capacity charge, imposed only on applicants for new service connections, violates article XIII D's restrictions on assessments, we must interpret our state Constitution. "The principles of constitutional interpretation are similar to those governing statutory

construction." ***126 (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122, 105 Cal.Rptr.2d 46, 18 P.3d 1198.) The aim of constitutional interpretation is to determine and effectuate the intent of those who enacted the constitutional provision at issue. (*Ibid.*) To determine that intent, we begin by examining the constitutional text, giving the words their ordinary meanings. (*Ibid.;* accord, *Leone v. Medical Board* (2000) 22 Cal.4th 660, 665, 94 Cal.Rptr.2d 61, 995 P.2d 191.)

Section 2 of article XIII D defines an "assessment" as "any levy or charge upon real property ... for a special benefit conferred upon the real property...." (Art. XIII D, § 2, subd. (b).) It defines "special benefit" as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large...." (*Id.,* § 2, subd. (i).)

Section 4 of article XIII D establishes procedures and requirements for assessments. A local public agency may not impose an assessment, as defined in article XIII D, unless: (1) the agency identifies "all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed" (art. XIII D, § 4, subd. (a)); (2) the agency obtains an engineer's report that supports the assessment (*id.,* § 4, subd. (b)); (3) the assessment does not exceed the reasonable cost of the proportional special benefit conferred on the affected parcel (*id.,* § 4, subds. (a) & (f)); and (4) after giving notice to affected property owners and holding a public hearing, the agency does not receive a majority protest based on ballots "weighted according to the proportional financial obligation of the affected property" (*id.,* § 4, subds. (c)-(e)).

To determine what constitutes an assessment under article XIII D, it is necessary to consider not only article XIII D's definition of an assessment, but also the requirements and procedures that article XIII D imposes on assessments. Article XIII D requires that an agency imposing an assessment identify "all parcels which *will* have a special benefit conferred upon them and upon which an assessment *will* be imposed." (Art. XIII D, § 4, subd. (a), italics added.) The agency then must give written notice of the proposed assessment to the owners of these identified parcels (*id.,* § 4, subd. (c)) and provide an opportunity for a protest using ballots "weighted according to the proportional financial obligation of the affected property" (*id.,* § 4, subd. (e)).

*419 Because the capacity charge is imposed only on property owners who apply for a new service connection, the District cannot identify the parcels upon which the capacity charge will be imposed. Here, the District *estimated* that there would be 240 new connection applications, but the District did not and could not *identify* the specific parcels for which new connection applications would be made. At most, the District can identify the parcels within its boundaries on which the capacity charge *would* be imposed *if* the owners applied for a service connection. But the matter is more complex, because many existing undeveloped parcels would likely be subdivided into an indeterminable number of smaller parcels, for each of which a connection might be requested, thus making it impossible to now determine "the proportional financial obligation of the affected property." And even this understates the problem, because owners of property outside the District's **523 boundaries may seek service connections by applying for annexation of their property into the District. Therefore, it is impossible for the District to comply with article XIII D's requirement that the agency identify the parcels on which the assessment will be imposed ***127 and provide an opportunity for a majority protest weighted according to the proportional financial obligation of the affected property.

We agree with the Court of Appeal that the proper conclusion to be drawn from this impossibility of compliance is that an assessment within the meaning of article XIII D must not only confer a special benefit on real property, but also be imposed on identifiable parcels of real property. Because the District does not impose the capacity charge on identifiable parcels, but only on individuals who request a new service connection, the capacity charge is not an assessment within the meaning of article XIII D.

[5] This construction is consistent with settled rules of constitutional interpretation. "Courts construe constitutional phrases liberally and practically; where possible they avoid a literalism that effects absurd, arbitrary, or unintended results." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 327, 182 Cal.Rptr. 506, 644 P.2d 192; see also *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147, 43 Cal.Rptr.2d 693, 899 P.2d 79 ["a practical construction is preferred"].) Construing article XIII D's definition of assessment as applying only to charges imposed

on identifiable parcels avoids the probably unintended result of prohibiting local water districts from imposing capacity charges, no matter how modest or reasonable, for new connections because of the inherent impossibility of identifying in advance the parcels for which new connections would later be requested.

This construction is also consistent with article XIII D's definition of an assessment as a "levy or charge *upon real property* ...." (Art. XIII D, § 2, ***420** subd. (b), italics added.) [2] The District does not impose the capacity charge on real property as such, but on individuals who apply for new service connections. It is the applicant who must pay, and the District may not impose a lien or otherwise have recourse to the property to compel payment. Rather, the District simply does not initiate water service until the charge is paid. A charge that operates in this way cannot be described as a charge upon real property, within the meaning of article XIII D.

Finally, this construction is consistent with the aim of Proposition 218 to enhance taxpayer consent. Here, the District proposed to divide the costs of new capital improvements between users receiving service through existing connections and users applying for new connections. This case concerns only imposition of costs on new connections. Presumably, any costs imposed on customers receiving service through existing connections would be subject to article XIII D's voter approval requirements, and thus their consent. Customers who apply for new connections give consent by the act of applying. Moreover, water connection fees are already subject to significant constraints under Government Code section 66013. [3]

*****128** ***421** ****524** Plaintiffs rely on this court's decision in *****129** *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 228 Cal.Rptr. 47, 720 P.2d 935 (*San Marcos*). The issue there was whether a provision of the state Constitution exempting public entities from payment of property taxes (Cal. Const., art. XIII, § 3, subd. (b)) applied to a local water district's capacity fee, used to fund capital improvements to the water system. The constitutional property tax exemption for public entities had been construed to include ***422** special assessments, but not user fees, and thus the issue presented to this court was whether the capacity charge was more properly characterized as a special assessment or as a user fee for purposes of this constitutional provision. We concluded that a capacity charge was a hybrid, in the sense that it had some characteristics of a user fee and some characteristics of an assessment. (*San Marcos, supra,* at p. 163, 228 Cal.Rptr. 47, 720 P.2d 935.) We concluded also, however, that the fee should be considered an assessment for purposes of the public entity property tax exemption. We established a bright-line rule that "a fee aimed at assisting a utility district to defray costs of capital ****525** improvements will be deemed a special assessment from which other public entities are exempt." (*Id.* at pp. 164–165, 228 Cal.Rptr. 47, 720 P.2d 935.) [4]

San Marcos, supra, 42 Cal.3d 154, 228 Cal.Rptr. 47, 720 P.2d 935, is not on point here. We were not there construing the term "assessment" as used in article XIII D; instead, we were construing the constitutional provision exempting public entities from property taxes (Cal. Const., art. XIII, § 3, subd. (b)), a provision in which the term "assessment" does not appear. In deciding what constituted an assessment in *San Marcos,* we sought to determine and effectuate the constitutional purpose for exempting public entities from property taxes, a purpose that plays no role in interpreting the provisions of article XIII D that are at issue here. The characteristic that we found determinative for identifying assessments in *San Marcos*—that the proceeds of the fee were used for capital improvements—forms no part of article XIII D's definition of assessments. For each of these reasons, we agree with the Court of Appeal that *San Marcos* is not helpful, much less controlling, in this strikingly different context. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."]; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1008, 239 Cal.Rptr. 656, 741 P.2d 154 [a word may have different legal meanings in different contexts]; *In re Marriage of Buol* (1985) 39 Cal.3d 751, 757, fn. 6, 218 Cal.Rptr. 31, 705 P.2d 354 [same].)

[6] Plaintiffs invoke the rule that when a term has been given a particular meaning by a judicial decision, it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1188–1189, 124 Cal.Rptr.2d 186, 52 P.3d 116; *Arnett v. Dal* *****130** *Cielo* (1996) 14 Cal.4th 4, 19, 56 Cal.Rptr.2d 706, 923

***423** P.2d 1.) Plaintiffs argue that *San Marcos, supra,* 42 Cal.3d 154, 228 Cal.Rptr. 47, 720 P.2d 935, gave the term "assessment" a precise legal meaning as applying to capacity charges used to fund capital improvements, and therefore the term "assessment" in article XIII D, enacted after *San Marcos,* must be construed to have the same meaning. But the rule that plaintiffs invoke does not apply when, as here, the statute or constitutional provision contains its own definition of the term at issue: "If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063, 103 Cal.Rptr.2d 751, 16 P.3d 166.) Here, article XIII D provides both an express definition of assessment and an implied qualification of that definition through the requirement that the agency identify the specific parcels on which the assessment will be imposed.

Plaintiffs next rely on the definition of assessment in Government Code section 53750, part of the Proposition 218 Omnibus Implementation Act (Gov.Code, §§ 53750–53753) that the Legislature enacted in 1997. (Stats.1997, ch. 38, § 5.) Government Code section 53750 states that "[f]or purposes of Article XIII C and Article XIII D of the California Constitution" an "assessment" means "any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided." (Gov.Code, § 53750, subd. (b).) As plaintiffs point out, this definition does not distinguish between charges imposed only in response to a request for service and charges imposed on previously identified parcels. In this respect, ****526** the statutory definition is no different from the constitutional definition in section 2, subdivision (b), of article XIII D. But the statutory provisions implementing article XIII D, like article XIII D itself, assume that assessments are imposed only on identified parcels. Under Government Code section 53753, subdivision (b), before levying a new or increased assessment, an agency must give notice " to the record owner of each identified parcel." Government Code section 53750, subdivision (g), defines an "identified parcel" as "a parcel of real property that an agency has identified as having a special benefit conferred upon it and upon which a proposed assessment is to be imposed...." Because the statutory provisions merely reflect the constitutional provisions, they do not alter our conclusion that under article XIII D an assessment is a charge imposed on previously identified parcels, and not a charge imposed only as a condition of extending service through a new service connection.

Arguing that a charge imposed only on property owners who voluntarily seek a governmental service or approval may properly be characterized as an assessment, plaintiffs call our attention to the Integrated Financing District ***424** Act (Gov.Code, § 53175 et seq.), under which local agencies may establish "contingent assessments" payable only when a landowner applies for development approval. (See *id.,* § 53187.) As plaintiffs point out, the Integrated Financing District Act includes notice and majority protest provisions for owners of property subject to the contingent assessment (*id.,* § 53183). (See *Southern Pacific Pipe Lines, Inc. v. Board of Supervisors* (1992) 9 Cal.App.4th 451, 461–462, 11 Cal.Rptr.2d 745.) We agree that the District's capacity charge is similar to a contingent assessment under the Integrated Financing District Act, but this *****131** observation does not assist plaintiffs. Unlike article XIII D, the Integrated Financing District Act does not require a local agency to identify in advance the particular parcels that *will be* subject to the assessment. Instead, the notice of intention to impose a contingent assessment goes to all owners of property within the proposed assessment zone, and the assessment cannot be imposed if protested by "the owners of more than one-half of the area of the property within the proposed ... district which is proposed to be subject to the contingent assessment immediately or in the future...." (Gov.Code, § 53183, subd. (d).) Thus, under the Integrated Financing District Act, in contrast to article XIII D, all owners of property *potentially* subject to a charge are entitled to notice and a weighted vote.

Article XIII D could have been written, like the Integrated Financing District Act, to cover contingent assessments as well as assessments imposed only on previously identified parcels. But it was not written in that manner, and we remain persuaded that a capacity charge contingent on some voluntary action by the property owner is not an assessment within the meaning of article XIII D.

[7] Plaintiffs argue that the Court of Appeal erred in characterizing the District's capacity charge as a development fee. Observing that development fees "are imposed only if a property owner elects to

develop" (*Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 Cal.App.4th 1256, 1267, 53 Cal.Rptr.2d 424), the Court of Appeal reasoned that the District's capacity charge, because it was imposed only in response to a property owner's voluntary decision to request a service connection, should be considered a development fee and thus exempt from the requirements of article XIII D under its section 1, subdivision (b), stating that "[n]othing in this article ... shall be construed to ... [a]ffect existing laws relating to the imposition of fees or charges as a condition of property development."

Plaintiffs insist that the District's capacity charge cannot be a development fee because the District has no authority to approve or disapprove property development, and because a property owner may request a new service connection without proposing any new development, such as when the owner ***425** of a previously developed residential parcel decides to use the District's water instead of water from an existing well on the property.

We agree with plaintiffs that the District's capacity charge is not a development fee. It is similar to a development fee in being imposed ****527** only in response to a property owner's voluntary application to a public entity, but it is different in that the application may be only for a water service connection without necessarily involving any development of the property. (See *Utility Cost Management v. Indian Wells Valley Water Dist., supra,* 26 Cal.4th at p. 1191, 114 Cal.Rptr.2d 459, 36 P.3d 2 [noting that a capacity charge "might apply regardless of whether a development project is at issue"]; *Capistrano Beach Water Dist. v. Taj Development Corp.* (1999) 72 Cal.App.4th 524, 530, 85 Cal.Rptr.2d 382 [concluding that a capacity charge is not a development fee under the Mitigation Fee Act (Gov.Code, § 66000 et seq.)].) Our agreement that the capacity charge is not a development fee does not assist plaintiffs, however, because it does not mean that the capacity charge is an assessment within the meaning of article XIII D. The capacity charge is neither an assessment nor a development fee under article XIII D.

We conclude, as did the trial court and the Court of Appeal, that the District's *****132** capacity charge is not an assessment under article XIII D.

III. THE FIRE SUPPRESSION CHARGE

Article XIII D provides: "No fee or charge may be imposed for general governmental services including, but not limited to, police, *fire,* ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." (Art. XIII D, § 6, subd. (b)(5), italics added.) At the trial below, the evidence showed that the District uses the proceeds of the fire suppression component of the connection fee to purchase equipment for its volunteer fire department, including both firefighting equipment and emergency medical equipment. [5] The fire department provides firefighting and emergency medical services to the public at large. Accordingly, the District's fire suppression charge is "imposed for general governmental services" within the meaning of section 6, subdivision (b)(5), of article XIII D, and it is prohibited by that provision if it satisfies article XIII D's definition of a "fee or charge."

***426** Article XIII D defines a "fee" or "charge" as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (*Id.,* § 2, subd. (e).) It defines "property-related service" as "a public service having a direct relationship to property ownership." (*Id.,* § 2, subd. (h).)

[8] The District argues that the connection fee, including its fire suppression component, does not fall within article XIII D's definition of a fee or charge because it is not imposed "upon a parcel or upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) The District does not impose the fee on parcels of real property but on persons who apply for a water service connection. The District does not impose the fee on such persons "as an incident of property ownership" but instead as an incident of their voluntary decisions to request water service. If a person fails to pay the connection fee, the District does not collect it by levying upon the person's property. Rather, because the person applying for service has not satisfied a condition for extending service, the District does not make the water connection and does not provide water service.

We agree that a connection charge, because it is not imposed "as an incident of property ownership" (art. XIII D, § 2, subd. (e)), is not a fee or charge under article XIII D. A connection fee is not imposed simply by virtue of property ownership, but instead it is imposed as an

incident of the voluntary act of **528 the property owner in applying for a service connection.

Urging a different construction, plaintiffs rely on article XIII D's definition of a fee or charge as "including a user fee or charge for a property-related service." (*Id.,* § 2, subd. (e).) They argue that supplying water is a "property-related service," and, therefore, all charges for water service must be deemed to be imposed ***133 "upon a person as an incident of property ownership."

We agree that supplying water is a "property-related service" within the meaning of article XIII D's definition of a fee or charge. In the ballot pamphlet for the election at which article XIII D was adopted, the Legislative Analyst stated that "[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of property-related fee." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any *427 delinquent service charges (see Gov.Code, §§ 61621, 61621.3). But the Legislative Analyst was apparently referring to fees imposed on existing water service customers, not fees imposed as a condition of initiating water service in the first instance.

Several provisions of article XIII D tend to confirm the Legislative Analyst's conclusion that charges for utility services such as electricity and water should be understood as charges imposed "as an incident of property ownership." For example, subdivision (b) of section 3 provides that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership" under article XIII D. Under the rule of construction that the expression of some things in a statute implies the exclusion of other things not expressed (*In re Bryce C.* (1995) 12 Cal.4th 226, 231, 48 Cal.Rptr.2d 120, 906 P.2d 1275), the expression that electrical and gas service charges are not within the category of property-related fees implies that similar charges for other utility services, such as water and sewer, are property-related fees subject to the restrictions of article XIII D.

This implication is reinforced by subdivision (c) of article XIII D, section 6, which expressly excludes "fees or charges for sewer, water, and refuse collection services" from the voter approval requirements that article XIII D imposes on property-related fees and charges. Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements. (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 645, 119 Cal.Rptr.2d 91 [reaching the same conclusion].)

Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.

***134 Any doubt on this point is removed by considering the requirements that article XIII D imposes on property-related fees and charges. As with assessments, article XIII D requires local government agencies to identify the *428 parcels affected by a property-related fee or charge. Specifically, it requires the agency to identify "[t]he parcels **529 upon which a fee or charge is proposed for imposition." (Art. XIII D, § 6, subd. (a)(1).) As we have explained, it is impossible for the District to comply with such a requirement for connection charges, because the District cannot determine in advance which property owners will apply for water service connection. As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are

not subject to article XIII D's restrictions on property-related fees.

Because the connection fee, including the fire suppression charge, is not a property-related fee or charge within the meaning of article XIII D, it is not subject to article XIII D's prohibition on property-related fees or charges for general governmental services.

IV. AMENDMENT OF AN ORDINANCE BY A RESOLUTION

[9] Government Code section 66016, part of the Mitigation Fee Act (Gov.Code, § 66000 et seq.), provides in subdivision (b): "Any action by a local agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge shall be taken only by ordinance *or resolution.*" (Italics added.) We agree with the Court of Appeal that this provision authorizes the District to use a resolution to increase existing connection fees, and that this authorization applies even when the fees were initially imposed by an ordinance.

Arguing to the contrary, plaintiffs assert that the Mitigation Fee Act is procedural rather than substantive. In other words, it does not give local water districts substantive authority to impose fees, but instead it merely regulates the manner in which fees may be imposed. But whether a fee imposed by ordinance may be amended by resolution is essentially a question of procedure, not substance. Therefore, we may and do construe Government Code section 66016 as giving the District authority to use a resolution to amend a fee ordinance.

In support of their position that the District may not use a resolution to amend an ordinance imposing a connection fee, plaintiffs rely on *Cavalier Acres, Inc. v. San Simeon Acres Community Services District* (1984) 151 Cal.App.3d 798, 199 Cal.Rptr. 4 (*Cavalier Acres*), in which the Court of Appeal concluded that a community services district could impose or increase water charges only by ordinance. In reaching this conclusion, the *Cavalier Acres* Court of Appeal relied on Government Code section 61621.5 and Health and Safety Code section 5471. Relying on the rule of construction that when two statutory provisions conflict, the one that is more specific controls, ***429** the *Cavalier Acres* Court of Appeal stated that, as applied to water charges imposed by a community services district, Government Code section 61621.5 and Health and Safety Code section 5471 were both more specific than Government Code section 66016.

Government Code section 61621.5 is part of the Community Services District Law (Gov.Code, § 61000 et seq.). As here relevant, it provides: "Except as otherwise provided in this section, a district may *by ordinance* adopt regulations binding upon all persons to govern the construction and use of its facilities and property, including regulations imposing reasonable charges for the use thereof." (Gov.Code, § 61621.5, subd. (a), italics added.) By its *****135** terms, this provision applies only to charges for the use of a community services district's *facilities,* not charges for its *services.* The Community Services District Law gives districts authority to impose charges for services, including charges for water, in a different section, Government Code section 61621. (See *Waterman Convalescent Hospital, Inc. v. Jurupa Community Services Dist.* (1996) 53 Cal.App.4th 1550, 1552–1553, 62 Cal.Rptr.2d 264.) As relevant here, it provides: "A district may prescribe, revise and collect rates or other charges for the services and facilities furnished by it...." (Gov.Code, § 61621.) Nothing in this provision requires a community services district to act by ordinance rather than by resolution when, as here, it revises and prescribes the charges for water service.

Health and Safety Code section 5471 is part of article 4 ("Sanitation and Sewerage Systems") of chapter 6 ("General Provisions with Respect to Sewers") of part 3 ("Community Facilities") of division 5 ("Sanitation") of ****530** the Health and Safety Code. As relevant here, it reads: "In addition to the powers granted in the principal act, *any entity* shall have power, *by an ordinance* 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, including *water,* sewer standby or immediate availability 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...." (Italics added.)

Health and Safety Code section 5471 does not apply to the District because it is not an "entity" within the meaning of this provision. Health and Safety Code section 5470 states that " '[e]ntity' means and includes counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts,

and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." The District is a public agency organized as a community services district under the Community Services District Law (Gov.Code, § 61000 et seq.) to provide water service. Nothing in the record indicates it is authorized ***430** to construct, maintain, or operate sewers or sewerage systems. In this respect, *Cavalier Acres, supra,* 151 Cal.App.3d 798, 199 Cal.Rptr. 4, is distinguishable because the community services district at issue there provided both water and sewer services. (See *id.* at p. 800, 199 Cal.Rptr. 4.)

Moreover, even if we assume that Health and Safety Code section 5471 applies to the District, that provision, by its terms, confers authority "[i]n addition to" the authority otherwise granted to a public entity. In other words, its main purpose is to supplement rather than to limit a public agency's authority to impose charges for water or sewer services in connection with a water or sewerage system. For a public agency organized as a community services district, the "principal act" (*ibid.*) providing its authority is the Community Services District Law (Gov.Code, § 61000 et seq.). As we have seen, Government Code section 61621 authorizes community services districts to establish charges for water services without requiring that they act by ordinance rather than by resolution, and Government Code section 66016, part of the Mitigation Fee Act (Gov.Code, § 66000 et seq.), expressly authorizes districts to use either a resolution or an ordinance to impose or increase a service charge. We do not read Health and Safety Code section 5471 as limiting or abrogating that authority.

Again, we find *Cavalier Acres, supra,* 151 Cal.App.3d 798, 199 Cal.Rptr. 4, to be *****136** distinguishable. In 1984, when the Court of Appeal decided *Cavalier Acres,* the wording of Health and Safety Code section 5471 was materially different. The introductory phrase ("In addition to the powers granted in the principal act") was not present, having been added later by amendment. (Stats.1988, ch. 706, § 1, p. 2348.) The 1988 amendment demonstrates the Legislature's intent that Health and Safety Code section 5471 not be read as limiting the powers conferred on public entities by the laws under which they were organized.

V. CONCLUSION

Before beginning to provide water service to real property through a new connection, the District requires its new customers to pay a capacity fee and a fire suppression fee. Both of these fees are used to fund capital improvements, the former to the water system and the latter to the volunteer fire department. Because these fees are imposed only on the self-selected group of water service applicants, and not on real property that the District has identified or is able to identify, and because neither fee can ever become a charge on the property itself, we conclude that neither fee is subject to the restrictions that article XIII D imposes on property assessments and property-related fees. We also conclude that the District could properly use a resolution to amend an ordinance establishing these fees.

***431** The judgment of the Court of Appeal is reversed and the matter is remanded to that court with directions to affirm the trial court's judgment.

****531** WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, BROWN and MORENO, JJ.

All Citations

32 Cal.4th 409, 83 P.3d 518, 9 Cal.Rptr.3d 121, 2004 Daily Journal D.A.R. 1146, 2004 Daily Journal D.A.R. 1429

Footnotes

1 The Government Code defines a "capacity charge" as "a charge for facilities in existence at the time a charge is imposed or charges for new facilities to be constructed in the future that are of benefit to the person or property being charged." (Gov.Code, § 66013, subd. (b)(3).)

2 In this regard, it may be instructive to compare article XIII D's definition of an assessment as a "levy or charge upon real property" (*id.,* § 2, subd. (b)) with its definition of a fee or charge as a "levy ... upon a parcel or upon a person as an incident of property ownership ..." (*id.,* § 2, subd. (e)). Although a property-related fee or charge may be imposed either on the property itself or upon the owner as an incident of ownership, a levy must be imposed on the property itself to qualify as an assessment under article XIII D.

3 Government Code section 66013 provides:

"(a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.

"(b) As used in this section:

"(1) 'Sewer connection' means the connection of a structure or project to a public sewer system.

"(2) 'Water connection' means the connection of a structure or project to a public water system, as defined in subdivision (f) of Section 116275 of the Health and Safety Code.

"(3) 'Capacity charge' means a charge for facilities in existence at the time a charge is imposed or charges for new facilities to be constructed in the future that are of benefit to the person or property being charged.

"(4) 'Local agency' means a local agency as defined in Section 66000.

"(5) 'Fee' means a fee for the physical facilities necessary to make a water connection or sewer connection, including, but not limited to, meters, meter boxes, and pipelines from the structure or project to a water distribution line or sewer main, and that does not exceed the estimated reasonable cost of labor and materials for installation of those facilities.

"(c) A local agency receiving payment of a charge as specified in paragraph (3) of subdivision (b) shall deposit it in a separate capital facilities fund with other charges received, and account for the charges in a manner to avoid any commingling with other moneys of the local agency, except for investments, and shall expend those charges solely for the purposes for which the charges were collected. Any interest income earned from the investment of moneys in the capital facilities fund shall be deposited in that fund.

"(d) For a fund established pursuant to subdivision (c), a local agency shall make available to the public, within 180 days after the last day of each fiscal year, the following information for that fiscal year:

"(1) A description of the charges deposited in the fund.

"(2) The beginning and ending balance of the fund and the interest earned from investment of moneys in the fund.

"(3) The amount of charges collected in that fiscal year.

"(4) An identification of all of the following:

"(A) Each public improvement on which charges were expended and the amount of the expenditure for each improvement, including the percentage of the total cost of the public improvement that was funded with those charges if more than one source of funding was used.

"(B) Each public improvement on which charges were expended that was completed during that fiscal year.

"(C) Each public improvement that is anticipated to be undertaken in the following fiscal year.

"(5) A description of each interfund transfer or loan made from the capital facilities fund. The information provided, in the case of an interfund transfer, shall identify the public improvements on which the transferred moneys are, or will be, expended. The information, in the case of an interfund loan, shall include the date on which the loan will be repaid, and the rate of interest that the fund will receive on the loan.

"(e) The information required pursuant to subdivision (d) may be included in the local agency's annual financial report.

"(f) The provisions of subdivisions (c) and (d) shall not apply to any of the following:

"(1) Moneys received to construct public facilities pursuant to a contract between a local agency and a person or entity, including, but not limited to, a reimbursement agreement pursuant to Section 66003.

"(2) Charges that are used to pay existing debt service or which are subject to a contract with a trustee for bondholders that requires a different accounting of the charges, or charges that are used to reimburse the local agency or to reimburse a person or entity who advanced funds under a reimbursement agreement or contract for facilities in existence at the time the charges are collected.

"(3) Charges collected on or before December 31, 1998.

"(g) Any judicial action or proceeding to attack, review, set aside, void, or annul the ordinance, resolution, or motion imposing a fee or capacity charge subject to this section shall be brought pursuant to Section 66022.

"(h) Fees and charges subject to this section are not subject to the provisions of Chapter 5 (commencing with Section 66000), but are subject to the provisions of Sections 66016, 66022, and 66023.

"(i) The provisions of subdivisions (c) and (d) shall only apply to capacity charges levied pursuant to this section."

4 In response to our *San Marcos* decision, the Legislature granted local water districts authority to impose capacity charges on other public entities, thereby removing the public entity exemption. (See Gov.Code, §§ 54999–54999.6; *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1189, 114 Cal.Rptr.2d 459, 36 P.3d 2; *City of*

Marina v. Board of Trustees (2003) 109 Cal.App.4th 1179, 1182–1183, 135 Cal.Rptr.2d 815; *Utility Cost Management v. East Bay Mun. Utility Dist.* (2000) 79 Cal.App.4th 1242, 1246–1247, 94 Cal.Rptr.2d 777.)

5 Government Code section 50078 authorizes "[a]ny local agency which provides fire suppression services" to "determine and levy an assessment for fire suppression services." Plaintiffs have argued that the District may not rely on this provision as authority for its fire suppression fee because Government Code section 50001 defines "local agency" to include only cities and counties. Plaintiffs have overlooked Government Code section 50078.1, subdivision (b), which defines "local agency," as used in Government Code section 50078, to include any city, county, "or special district."

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26 N.J. 578
Supreme Court of New Jersey.

TOWNSHIP OF WASHINGTON, In the COUNTY of BERGEN, etc., et al., Plaintiffs-Respondents,
and
Borough of Ho-Ho-Kus, a Municipal Corporation of the State of New Jersey, Intervening Plaintiff-Respondent,
v.
VILLAGE OF RIDGEWOOD, in the County of Bergen, etc., et al., Defendants-Appellants.
Charles W. GRENZ et al., Plaintiffs-Respondents,
v.
VILLAGE OF RIDGEWOOD, in the County of Bergen, etc., et al., Defendants-Appellants.

No. A-78.
|
Argued Feb. 3, 1958.
|
Decided May 5, 1958.

Synopsis

Suit against village and others to require removal of water tank structure. The Superior Court, Chancery Division, 46 N.J.Super. 152, 134 A.2d 345, ordered partially constructed tank to be removed, and village appealed. The Supreme Court certified appeal on its own motion prior to consideration by Appellate Division. The Supreme Court, Weintraub, C.J., held that where village gave no consideration to conflict in zoning schemes of adjoining municipalities where water storage tank was to be erected and did not consider the land uses near the site, and gave no consideration to alternate method of providing adequate water storage facilities, decision to construct water tank was arbitrary.

Affirmed.

Heher, Proctor and Jacobs, JJ., dissented.

West Headnotes (6)

[1] **Municipal Corporations**
Acts or Omissions Constituting Violations of Regulations
Zoning and Planning
Residential Districts

Construction of elevated water storage tank did not violate municipal zoning ordinance which authorized village to construct any municipally owned or village building, structure or use in a one-family district.

1 Cases that cite this headnote

[2] **Zoning and Planning**
Proceedings for Variances and Exceptions

Where permit to erect water storage tank structure was approved informally and approval did not meet statutory requirements for a variance, approval was invalid.

Cases that cite this headnote

[3] **Municipal Corporations**
Purposes for which property may be acquired or held

Where village proposed to construct elevated water storage tank on ground partially within another village, fact that ordinance of other village by its terms forbade improvement did not prevent first village from acquiring property of other village to construct tank, in view of the statutes authorizing municipality to acquire land, within or without municipality, for purposes of supplying water. R.S. 40:62-49, 65, N.J.S.A.

Cases that cite this headnote

[4] **Municipal Corporations**
Acts or Omissions Constituting Violations of Regulations

Zoning and Planning
Government and related entities

In determining question whether village, which acquired property in another village for purposes of constructing elevated water storage tank, would violate other village's zoning ordinance, distinctions between "proprietary" and "governmental" functions were immaterial. R.S. 40:62-49, 65, N.J.S.A.

15 Cases that cite this headnote

[5] Water Law
Reservoirs, conduits, pumping stations, wells, and other works

Village, in erecting water storage tank structure, was required to act reasonably in exercise of its authority to erect such a structure.

1 Cases that cite this headnote

[6] Water Law
Reservoirs, conduits, pumping stations, wells, and other works

Where village gave no consideration to conflict in zoning schemes of adjoining municipalities where water storage tank was to be erected and did not consider land uses near site, and gave no consideration to alternate method of providing adequate water storage facilities, decision to construct elevated water tank was arbitrary and trial court properly ordered that portion of tank already constructed be removed. R.S. 40:62-49, 65, N.J.S.A.

8 Cases that cite this headnote

Attorneys and Law Firms

***580** ****309** James A. Major argued the cause for appellants (William E. Reinhardt, Ridgewood, on the brief).

Lloyd L. Schroeder, Hackensack, argued the cause for respondent Washington Tp. and others.

Marshall Crowley, Newark, argued the cause for respondents Charles W. Grenz and others (Toner, Crowley, Woelper & Vanderbilt, Newark, attorneys; Marshall Crowley, Newark, of counsel; Robert A. Matthews, Newark, on the brief).

Thomas McNulty, Jersey City, argued the cause for intervening respondent Borough of Ho-Ho-Kus (Milton, McNulty & Augelli Jersey City, attorneys; Paul A. Vivers, Ridgewood, on the brief).

Opinion

The opinion of the court was delivered by

WEINTRAUB, C.J.

The Chancery Division of the Superior Court entered a judgment directing the Village of Ridgewood to dismantle and remove an elevated steel water tower it erected upon Van Emburgh Avenue, partially within the village and partially within the Borough of Ho-Ho-Kus. 46 N.J.Super. 152, 134 A.2d 345 (1957). Ridgewood appealed and we certified the appeal on our own motion prior to consideration of it by the Appellate Division.

Ridgewood operates a water supply system serving itself the Boroughs of Glen Rock and Midland Park and the Township of Wyckoff, and meeting the needs of the inhabitants and municipalities, including fire fighting. The water is obtained from deep-rock wells. There are no reservoirs; storage to meet the increased demands of certain days or portions thereof is provided by tanks.

The pressure being inadequate, Ridgewood engaged a consulting engineer, Mr. Crew, to devise a plan for additional storage. He recommended three tanks, all elevated, one at the Van Emburgh site here involved, another on Goffle Road in Ridgewood, and the third on the Cedarhill site in Wyckoff. The anticipated total cost was $1,701,000.

***581** In view of the sum involved, Ridgewood solicited the opinion of another expert, Mr. Capen. Mr. Capen, then some 1,200 miles away, was familiar with the Goffle site, and on the basis of his recollection of it, said in his report:

> 'In areas where elevated tanks have been established (and particularly where such installation has been made prior to nearby residential

> developments) repetition of the practice may well be in order. A very serious question is raised, however, in regard to placing an elevated tank in the Goffle area, near Goffle Road. There are a number of substantial residences in the vicinity which will probably be adversely affected in value by such a structure. It is therefore recommended that the entire matter of this storage be carefully reviewed and that an underground or ground level storage ****310** tank be substituted. This procedure is not a new trend but has been adopted in various residential communities.'

This recommendation was explored and a decision made to shift from the Goffle site to another on Lafayette Avenue in Wyckoff, where a tank could be installed partially below ground level. The change was profitable. Instead of the Goffle tank, designed to provide storage of two million gallons at an estimated cost of $499,000, Ridgewood obtained storage of 2 1/4 million gallons at Lafayette at a cost of $243,672.84.

With respect to the proposed Cedarhill tank, the Board of Adjustment of Wyckoff refused approval because of objections to an elevated structure. Ridgewood thereupon selected another site where as of the time of trial a ground level tank was to be installed without increase in cost and with an increase in capacity from one million to 2 1/4 million gallons.

Thus as to two of the sites, objections to elevated tanks led to their abandonment in favor of tanks at or below ground level.

Mr. Capen's report was received in February 1955. In September 1955 Mr. Crew approached the governing body of Ho-Ho-kus with respect to the Van Emburgh improvement. The testimony is not harmonious, but it is clear that the officials of Ho-Ho-Kus understood the tank would be at ground level, the same as the existing water tanks of Ho-Ho-Kus, and as such would be shielded by trees. In ***582** the light of Mr. Capen's report, Mr. Crew should have been explicit, but was not. The board of adjustment and planning board approved, and a permit issued. The approvals were granted informally; Ridgewood concedes that the statutory requirements for a variance or exception were not met, and that if the zoning ordinance of Ho-Ho-Kus applies, it can claim no benefit from the wholly irregular grant.

When the work got under way, it was realized that an elevated structure was involved. It in fact would tower to the height of 160 feet. Ho-Ho-Kus immediately adopted a resolution rescinding the permit, and Ho-Ho-Kus and the abutting Township of Washington and residents affected instituted these actions promptly. About 75 to 85% Of the structure itself was completed by the time of trial, representing a cost of some $80,000.

Three issues are involved: (1) whether the improvement violates the zoning ordinance of Ridgewood; (2) whether it violates the zoning ordinance of Ho-Ho-Kus, and (3) whether the action of Ridgewood in any event constitutes an unreasonable and arbitrary exercise of delegated power.

I

[1] We are satisfied that neither zoning ordinance applies.

In Thornton v. Village of Ridgewood, 17 N.J. 499, 111 A.2d 899 (1955), a question involved was whether Ridgewood could acquire property within its one-family district for use as an administrative building and assembly hall. It was held that the zoning statute does not restrain the power of a municipality to determine where to locate municipal facilities within its borders, and hence the issue became whether the zoning ordinance itself accomplished a restriction. As the ordinance then read, 'any governmentally owned or operated building' was authorized in the one-family district. It was concluded that the proposed use came within the quoted phrase.

In the course of Thornton, it was indicated that the phrase 'governmentally owned or operated' would 'seem to bar governmental buildings devoted to industrial or proprietary ***583** use' (17 N.J. at page 514, 111 A.2d at page 906). For the obvious purpose of meeting that view, Ridgewood amended its ordinance to substitute 'Any Municipally owned or operated building, structure or use' for the phrase quoted above. There can be no doubt that the amendatory expression embraces the storage tank, and hence there is no violation by Ridgewood of its own ordinance.

**311 [2] [3] With respect to so much of the site as is situate in Ho-Ho-Kus, it is conceded that the zoning ordinance of that municipality by its terms forbids the improvement and, as pointed out above, that the informal variance cannot be sustained. The issue accordingly is whether Ridgewood is bound by the ordinance of Ho-Ho-Kus in the use of property as part of a water supply system. We think it is not.

We see no difference between this case and Aviation Services, Inc., v. Board of Adjustment of Hanover Township, 20 N.J. 275, 119 A.2d 761, 765 (1956), in which it was held that a municipality's power to establish and maintain an airport was not subject to the zoning ordinance of another municipality in which the airport was situate. In Aviation Services, the municipality was authorized to acquire and establish airports 'within or without' its boundaries, with power to condemn. Here R.S. 40:62-49, N.J.S.A., provides:
'Any municipality may provide and supply water, or an additional supply of water, * * * in any one or more of the following methods:

'(g) Any municipality may purchase, condemn or otherwise acquire the necessary lands, and rights or interests in lands, water rights and rights of flowage or diversion, within or without the municipality, for the purpose of a water supply, or an additional water supply, and for the connection thereof with the municipality, and in case of highway or other public or quasi public structures, may require the same to be abandoned as far as necessary for such purposes, and to be relaid, if necessary, by some other route or in some other location. * * *'

The lands necessary for 'a water supply' must include lands necessary for facilities required to meet the needs of the consumer. The consent of such other municipality is required *584 only with respect to the laying of pipes or mains 'in and under any and all streets, highways, alleys and public places' in that municipality, subject to the power of the Superior Court to direct the terms of such laying if consent should be refused. N.J.S.A. 40:62-65.

This result has a baneful potential, but so does a contrary holding. The problem invites a legislative solution committing the final decision to a body other than the interested municipalities themselves, but if Aviation Services correctly found the legislative will in that case, the same considerations dictate the same answer here.

[4] Plaintiffs urge that the supply of water is a 'proprietary' rather than a 'governmental' function and hence should be subject to the Ho-Ho-Kus ordinance.

We cannot agree that the distinction between governmental and proprietary functions is relevant to this controversy. The distinction is illusory; whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur. The distinction has proved useful to restrain the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities which government today pursues to meet the needs of the citizens. Cloyes v. Delaware Township, 23 N.J. 324, 129 A.2d 1, 57 A.L.R.2d 1327 (1957). We see no connection between that classification and the problem before us. Surely the supply of water cannot be deemed to be a second-class activity in the scheme of municipal functions. Nor is it significant that the municipality serves areas in addition to its own, for from the nature of the subject, cooperative action among municipalities is imperative and consonant with the governmental nature of the activity.

II

[5] [6] But Ridgewood was required to act reasonably in the exercise of its authority, **312 *585 Aviation Services, supra (20 N.J. at page 285, 119 A.2d at page 766), and the circumstance that its own interests conflicted with those of Ho-Ho-Kus and Washington emphasized that obligation. Among the considerations which Ridgewood should have weighed but in fact ignored were the zoning schemes of the municipal plaintiffs and the land uses abutting and near the site.

Mr. Crew was concerned solely with the engineering aspects. Despite Mr. Capen's Caveat and the confirmation of it by experience with respect to the Goffle and Cedarhill sites recited above, Ridgewood made no effort to re-evaluate its plan for an elevated tank on the Van Emburgh property. The testimony shows without contradiction that the residential development there was equal or superior to that at either of the other sites and that Mr. Capen had

not adverted to the interest of property owners at the Van Emburgh location only because he was not aware of that development.

Mr. Crew and Mr. Capen agreed a ground level tank could be used at Van Emburgh Avenue if pumping facilities were added. Mr. Crew stated that a gravity flow system would yield a better quality of water, but conceded that a satisfactory, wholesome supply would be furnished by ground level storage tanks. Mr. Capen made no reference to that subject and in fact had suggested pumping at the Goffle site if a ground level tank were used. The difference between the two approaches is one of cost. If the elevated tank should be used, the estimated cost for the complete installation is $226,026, whereas if the tank is placed at ground level the pumping facilities would increase the outlay to a total of $272,700. Mr. Capen would prefer to add an inlet pipe costing another $60,000 but agreed the improvement could be engineered to operate without it. The annual bill for pumping would be $5,000, less a saving of the higher maintenance costs of an elevated structure.

It appears further that immediately before trial consideration was given to alternate sites, and that one permitting a ground level tank with gravity flow operation is available at an estimated expenditure of $292,600. This exceeds the original proposal by some $66,000, part of which is attributable ***586** to the increase in costs in the intervening period (and perhaps also to the inclusion of land costs; it is not clear whether the figure of $226,026 for the elevated tank installation includes the value of the land which Ridgewood had acquired back in 1940).

Hence Ridgewood could have placed the tank at ground level, either at the Van Emburgh site or the alternate site. The difference is one of cost described above. Under the circumstances, Ridgewood should have assumed that cost rather than visit the burden of an elevated structure of 160 feet upon the other municipalities. We agree with the trial court's finding that Ridgewood acted arbitrarily.

The judgment is accordingly affirmed.

***595** For affirmance: Chief Justice WEINTRAUB and Justices WACHENFELD, BURLING and FRANCIS-4.

For affirmance and remandment: Justices HEHER, JACOBS and PROCTOR-3.

HEHER, J. (for affirmance).

By section 4 of the Ridgewood zoning ordinance, as amended December 8, 1953, 'Any municipally owned or operated building, structure or use' is permissible in a one-family zone; and this includes a corporate or proprietary function or use as well as uses strictly governmental in nature.

As pointed out in Reid Development Corporation v. Parsippany-Troy Hills Township 10 N.J. 229, 89 A.2d 667 (1952), ****313** there are cases holding that the maintenance and operation of a water system for protection against fire and other dangers to the public health and safety constitute a governmental function comprehended in the delegated local police power. But there is general agreement that the distribution of water by a municipality to its inhabitants for domestic and commercial uses is a private or proprietary activity or service which is subject to the principles and rules of conduct applicable to private corporations. This is the rule in New Jersey. Lehigh Valley R. Co. v. Jersey City, 103 N.J.L. 574, 138 A. 467 (Sup.Ct.1927), affirmed 104 N.J.L. 437, 140 A. 920 (E. & A. 1928); Fay v. City of Trenton, 126 N.J.L. 52, 18 A.2d 66 (E. & A. 1941); Mongiello v. Borough of Hightstown, 17 N.J. 611, 112 A.2d 241, 48 A.L.R.2d 1216 (1955). See, also, Olesiewicz v. City of Camden, 100 N.J.L. 336, 126 A. 317 (E. & A. 1924). And such is the case, A fortiori, where, as here, the water system has been constituted ***587** a self-liquidating utility under R.S. 40:1-78, N.J.S.A., empowered to serve other municipalities as well as its own inhabitants. Compare Morganweck v. Egg Harbor City, 106 N.J.L. 141, 147 A. 468 (E. & A. 1929); Cloyes v. Delaware Township, 23 N.J. 324, 129 A.2d 1, 57 A.L.R.2d 1327 (1957); Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 138 A.2d 402 (1958). But the operation has been held not to be within the rate-regulating function of the Board of Public Utility Commissioners. In re Borough of Glen Rock, 25 N.J. 241, 135 A.2d 506 (1957).

A municipally-owned and -controlled water system may not be used to supply the needs of another municipality and its inhabitants without express legislative sanction. We do not have here a cooperative entity comprising several municipal corporations for joint operation of a water system in the common interest, a common ownership, management and service, although it does not necessarily follow that that would be a determinative circumstance. By our statute, a municipality owning and controlling its own water supply may contract for

the sale and delivery of water to residents of another municipality, R.S. 40:62-83, N.J.S.A. or may supply water to 'dwellers and other consumers of water' in other municipalities 'through which its mains may pass,' and 'for that purpose may lay its mains and water pipes' in the streets and highways of the other municipality, R.S. 40:62-85, N.J.S.A., but in each of such cases only with the consent of the other municipality. And see R.S. 40:62-84, N.J.S.A., providing that a municipality owning and controlling waterworks may contract for such service directly with another municipality. There is no legislative mandate to do what was done here as a governmental function, either express or implied.

The weight of authority elsewhere is that in the particular circumstances the municipality acts in a proprietary or private capacity, just as would an individual or a private corporation in the prosecution of the same enterprise. Taber v. City of Benton Harbor, 280 Mich. 522, 274 N.W. 324 (Sup.Ct.1937). And compare ***588** O'Brien v. Town of Greenburgh, 239 App.Div. 555, 268 N.Y.S. 173 (App.Div.1934), affirmed 266 N.Y. 582, 195 N.E. 210 (Ct.App.1935).

In this latter case, involving a garbage disposal plant, a distinction was made 'between the acts of a municipality in the performance of a governmental function carrying out a legislative mandate' and 'acts which may be deemed municipal or corporate acts'; the 'difference is that in the first instance the municipality is executing the legislative mandate related to a public duty generally, while in the other it is exercising its private rights as a corporate body.'

A municipal corporation 'owning and operating a water system' and selling water to individuals, although engaged in a public service, 'does so in its business or proprietary capacity, and not in any governmental capacity, and * * * no distinction ****314** is to be drawn between such business whether engaged in by a municipality or by a private corporation.' Baltis v. Village of Westchester, 3 Ill.2d 388, 121 N.E.2d 495 (Sup.Ct.1954).

The distinction between governmental and proprietary functions is not necessarily the same for state and local purposes as in the application of federal statutes imposing a tax on the salaries of municipal officers and employees engaged in the performance of governmental functions, for 'a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby.' Brush v. Commissioner of Internal Revenue, 300 U.S. 352, 57 S.Ct. 495, 81 L.Ed. 691, 108 A.L.R. 1428 (1937).

The local legislative design to exempt the waterworks from the operation of the Ridgewood zoning ordinance is clear and imperative.

But under the Ho-Ho-Kus zoning ordinance, Ridgewood's land ownership extending into the Borough is within a zone restricted to the highest residence use, an area where dwellings range in value between $25,000 and $50,000; and ***589** Ridgewood's planned municipal or corporate use is by its nature within the interdiction of the Ho-Ho-Kus use regulation.

In Thornton v. Village of Ridgewood, 17 N.J. 499, 111 A.2d 899 (1955), reference was made to the doctrine, Bassett, Zoning, pp. 31, 212, that municipal and state officials 'usually comply with zoning requirements as a matter of comity'; the 'municipality which ordains should be the first to obey its own ordinance'; but '(t)he need of a public building in a certain location ought to be determined by the federal, state, or municipal authority, and its determination on the question of necessary or desirable location cannot be interfered with by a local zoning ordinance'; no zoning ordinance, it was said, 'can prevent the municipal, state, or federal government from erecting buildings in the form and on the site needed by the public.' And Yokley, Zoning Law and Practice (2d ed.), s 40, was there cited for the proposition that the local police power in this regard is subject only to 'the supreme law of the land or a definitely fixed legislative policy of the state.' The subjection of the municipality to its own zoning regulations is in accord with principle and sound policy where the use or function is inherently corporate or proprietary. Ordinarily, a local law authorizing the use of lands or a building in a given zone for a municipal purpose may be regarded as an amendment or repeal of the zoning ordinance, Pro tanto, although the doctrine of reasonable classification may then be involved, depending on the nature of the use and the circumstances. Reichelderfer v. Quinn, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331, 83 A.L.R. 1429 (1932); Lees v. Sampson Land Co., 372 Pa. 126, 92 A.2d 692, 40 A.L.R.2d 1171 (Sup.Ct.1952). There is no occasion now to consider the operation of this principle under our zoning statute, prescribing as it does the mode and manner of effecting changes in a local

zoning ordinance. R.S. 40:55-35, as amended by L.1948, c. 305, N.J.S.A.

And the corollary theorem is that Ridgewood's land in Ho-Ho-Kus is bound by the use-restriction to residences of ***590** the highest class laid down in the Borough's zoning ordinance. We are not here concerned with a water source vital to the essential public welfare, but rather the storage of water for distribution by the pressure of gravity, the alternative, for reasons of cost alone, to underground or ground-level distribution that in structure and mechanism would not be so violent in its intrusion upon the character of the zone district and the essential rights of those who had established their dwellings there in reliance on the reserved use.

In Baltis v. Village of Westchester, supra, the Supreme Court of Illinois said of a proposed water-storage standpipe, having ****315** a capacity of 1,500,000 gallons, in its own first-class residence zone:

> '* * * This court has many times held that a purchaser of property subject to a general zoning ordinance has the right to rely upon the rule of law that the classification made in the general ordinance will not be changed unless the change is required for the public good.'

There, also, it was contended that the planned facility was necessary to provide the city with adequate fire protection and sufficient water for its inhabitants and industries, and was therefore a governmental function. The court held, quoting from the Michigan case of Taber v. City of Benton Harbor, supra, that the city, in this service, acted in its municipal or proprietary capacity, and was bound by its own zoning ordinance 'so long as such ordinance is in force and (it) is not excepted from its provisions as would an individual or private corporation in attempting to engage upon the same project under the same conditions'; it is 'undoubtedly true that under the provisions of the charter the city owes a duty to its inhabitants to maintain an adequate water system, but in so providing it cannot proceed in disregard of the plain legislative enactments of the duly elected representatives of its citizens.' The New York case of O'Brien v. Town of Greenburgh, supra, was cited for the principle.

***591** Thus it is that, in this activity, Ridgewood is engaged in a municipal or corporate function, and in the pursuit of the endeavor it is bound equally with all others, individual or corporate, by the terms of the Ho-Ho-Kus zoning ordinance. There is no statutory exemption, either express or implied, from the operation of the Ho-Ho-Kus use limitation. R.S. 40:62-65, as amended by L.1953, c. 37, N.J.S.A., merely authorizes the extension of pipes and mains in and under the streets of another municipality 'for the purpose of connecting its waterworks with the pipes and mains so laid or to be laid' for the supplying of water 'in one or more of the methods' provided by the statute, but only with the consent of the other municipality. There is provision for a review in case such consent is refused in the Superior Court, and affirmative action on terms.

There is not here an exertion of delegated state power that by the legislative will is not subject to the local use-zoning process, as in Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955), and Hill v. Borough of Collingswood, 9 N.J. 369, 88 A.2d 506 (1952). See, also, Decatur Park District v. Becker, 368 Ill. 442, 14 N.E.2d 490 (Sup.Ct.1938).

I have a different view of Aviation Services, Inc., v. Board of Adjustment of Hanover Township, 20 N.J. 275, 119 A.2d 761 (1956). There, Morristown's airport operation in Hanover Township was an exercise of the authority conferred by R.S. 40:8-1 et seq., N.J.S.A. A municipality is thereby empowered, R.S. 40:8-2, as amended by L.1947, c. 85, N.J.S.A., to acquire and operate airports and landing fields 'within or without the limits of (the) municipality' and, R.S. 40:8-4 and 40:8-5, N.J.S.A., to 'acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity.' And the holding was that the 'absence of any language which would limit a municipal airport undertaking, either within or without its boundaries, and the bestowal of the power of eminent domain to subserve the program all reflect legislative intent to immunize the acquisition and maintenance from the zoning power,' but that the authority ***592** 'must be reasonably exercised in response to the public need * * *.' Compare Petition of City of Detroit, 308 Mich. 480, 14 N.W.2d 140 (Sup.Ct.1944).

There is no showing, none whatever, that Ridgewood's lands in Ho-Ho-Kus are 'necessary for facilities required to meet the needs of the consumer.' It does not ****316** matter that Ridgewood is now the owner of the lands

in Ho-Ho-Kus. If it were not in such ownership, on what principle could Ridgewood condemn this particular piece of land in Ho-Ho-Kus for water storage purposes, notwithstanding the zoning limitation? R.S. 40:62-49(g), N.J.S.A., authorizes a municipality to purchase, condemn or otherwise acquire 'the necessary lands, and rights or interests in lands, and water rights and rights of flowage or diversion, within or without the municipality, for the purpose of a water supply, or an additional water supply, and for the connection thereof with the municipality, * * *.'

This provision by its own terms has to do with water rights and rights of flowage or diversion for the purpose of a water supply and connection thereof with the municipality; and, without undertaking a more specific delineation of the terms, it is enough to say that they patently do not include the use of Ridgewood's lands in Ho-Ho-Kus for the erection of a water tower contrary to local use-zoning, to serve the inhabitants of three nearby municipalities as well as its own, and the land, if in other proprietorship, could not in this context have been condemned for such use. The condemnation statute has no such sweep. There is no showing of need for land in Ho-Ho-Kus for the given purpose, much less the land in question; presumably, the motivating consideration is the economic advantage of using land now in Ridgewood's ownership, even though in part beyond its borders in an area restricted against such use. R.S. 40:62-65, N.J.S.A., requiring the consent of the other municipality for the extension of pipes and mains, is significant in this regard. Why this particular provision if there be the claimed broad power to condemn? Can it be that, though consent be required for the mere extension of pipes and ***593** mains, Ridgewood may, Ex proprio vigore, store and distribute water to other municipalities through a plant maintained in Ho-Ho-Kus' highest class residence district? It is to be borne in mind that Ho-Ho-Kus has no interest whatever in the operation; neither it nor its inhabitants are to have water service from Ridgewood. Ridgewood may undertake to supply water to other municipalities, but not by subverting Ho-Ho-Kus' zone plan, and thus to lay the burden on its neighbor, In invitum. Simple justice so ordains.

Compare R.S. 40:55-50, N.J.S.A., which renders 'public utilities' subject to such use regulations unless the Board of Public Utility Commissioners shall determine, after hearing on notice, that 'the present or proposed situation of the building or structure in question is reasonably necessary for the service, convenience or welfare of the public.' And see In re Borough of Glen Rock, supra.

Indeed, Ridgewood's brief requests that, if there be an adverse determination of these issues, it be afforded time to take other measures to solve its problem, saying that '(i)t may be feasible to completely contain the structure within the Village boundaries and thus no application to Ho-Ho-Kus be necessary,' a seeming concession that in itself negates peremptory need.

Local use-zoning and water power derive from the Legislature, and they are to be reconciled accordingly to advance the essential public interest; the one predominates over the other only when and to the extent directed by the over-all legislative authority. And the statute itself provides the means of modifying zoning rules and regulations. Zoning is a major constitutionally-secured public policy that is not to be sacrificed save in the service of an imperative public need recognized as such by the legislative authority.

I submit that there is no jurisdiction in equity, nor at law, for that matter, to enjoin submission by Ho-Ho-Kus (and such is a postulate of the majority opinion) to this invasion of its first-class residence zone by an alien use deemed by the court to ****317** be 'reasonable' in its exercise as compared with other more conspicuous means of accomplishing ***594** the same end. And if the given use of its lands in Ho-Ho-Kus is not subject to the established use-restrictions, then is it reasonable thus to outlaw a much less expensive mechanism, both as to capital outlay and cost of operation, and in the face of expert opinion evidence that 'a gravity flow system would yield a better quality of water'? Compare Wallerstein v. Westchester Joint Water Works, 166 Misc. 34, 1 N.Y.S.2d 111 (Sup.Ct.1937). There, also, the water tower had been almost completed. And if the whole of the land so used were situated in Ridgewood, could the gravity-flow use be enjoined in equity as arbitrary on the hypothesis that since the ground-level mechanism is feasible, Ridgewood 'should have assumed (the greater) cost rather than visit the burden of an elevated structure of 160 feet upon the municipalities'? The choice of means would then rest in the discretion and judgment of the local authority. It is, I would suggest, the zoning restriction established by Ho-Ho-Kus that alone restrains Ridgewood's use of the lands in question.

We have here the problem of a local political boundary dividing an expanse of land area peculiarly suitable for the highest residence use, and so zoned by the adjoining municipalities save that in one a variant use is allowable that is denied in the other, a border conflict involving something more than the mere nonconforming use of Ridgewood's land in Ho-Ho-Kus. Ho-Ho-Kus may assert its sovereignty over lands within its limits, except as otherwise ordained by the Legislature, but it cannot oppose a different use of adjacent lands in Ridgewood unless such use constitutes a nuisance-a clash of interests that suggests the wisdom of coordinate inter-municipal action for the essential common good.

I would affirm the judgment and remand the cause with direction to stay execution until plaintiff is afforded an opportunity to take such further action in the light of the foregoing considerations as it may be advised.

PROCTOR, J., joins in this opinion.

All Citations

26 N.J. 578, 141 A.2d 308

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 November 9, 2018, I served the:

- **Claimant's Rebuttal Comments filed November 9, 2018**

  Lead Sampling in Schools, Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017, 17-TC-03
  City of San Diego, Claimant

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 November 9, 2018 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/16/18

Claim Number: 17-TC-03

Matter: Lead Sampling in Schools, Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017

Claimant: City 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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