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**CITY OF GRAND TERRACE'S**  
**REBUTTAL TO COMMENTS TO TEST CLAIM 17-TC-25**  
**IN RE: SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD WATER**  
**CODE SECTION 13383 ORDER TO SUBMIT METHOD TO COMPLY WITH**  
**STATEWIDE TRASH PROVISIONS**

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# Office of the City Manager

May 4, 2020

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## **RE: Rebuttal Comments of City of GRAND TERRACE in re Test Claim 17-TC-25**

Dear Ms. Halsey:

In accordance with Section 1183.3 of Title 2 of the California Code of Regulations, the City of GRAND TERRACE (“Claimant”) submits these rebuttal comments to the State Water Resources Control Board’s (“State Water Board”) and the Santa Ana Regional Water Quality Control Board’s (“Regional Water Board”) (collectively, “Water Boards”) joint Comments in opposition to the test claims filed by the cities of Brea, Cypress, Huntington Beach, Newport Beach, Orange, Seal Beach, Anaheim, Chino Hills, Costa Mesa, Garden Grove, Laguna Woods, Lake Forest, San Jacinto, Santa Ana, Tustin, Villa Park, and Yorba Linda, the County of Orange, and the cities of Grand Terrace, Irvine, Placentia, and Rialto (collectively “Claimants”) in 17-TC-07 to 17-TC-28 (“Opposition Brief”).<sup>1</sup>

Claimant’s Test Claim seeks reimbursement for the costs of implementing the requirements of the Regional Water Board’s executive order entitled: *Water Code Section 13383 Order to Submit Method to Comply with Statewide Trash Provisions; Requirements for Phase I Municipal Separate Storm Sewer System (MS4) Claimants Within the Jurisdiction of the Santa Ana Regional Water Quality Control Board* (hereafter the “Trash Order”).

## **REBUTTAL**

Contrary to the Water Boards’ Opposition Brief, the Trash Order mandated activities require Claimant to implement a “program,” the program is “new,” and Claimant lacks adequate fee authority to pay the costs of implementing the new program under Section 6 of Article XIII B of the California Constitution (“Section 6”). (Cal. Const. art. XIII B, § 6; Govt. Code, § 17556(d).)

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<sup>1</sup> Test Claims 17-TC-07 to 17-TC-28 have not been consolidated. The Commission and Water Boards appear to treat the test claims as if they have been consolidated. Claimant respectfully requests the Commission to decide the pending motion for consolidation.

The Trash Order requires Claimant to perform three activities, referred to collectively as the “Trash Order mandated activities”: (1) to select one of two tracks for implementing the Trash Provisions (the “Track Selection Mandate”); (2) if Claimant selected Track 2, to create an implementation plan describing which controls would be used, how those controls would achieve Full Capture System Equivalency, and generally justifying its selection of Track 2 (the “Implementation Plan Mandates”); and (3) to comply fully with the Trash Provisions no later than fifteen (15) years after the effective date of the Trash Provisions (December 2, 2015), or December 2, 2030 (the “Ongoing Implementation Mandates”). Trash Order pp. 3, 5, attached to Test Claim. See also, e.g., Administrative Record (“AR”) at pp. RB 8 000293, 295.

## **I. THE TRASH ORDER IMPOSES A PROGRAM BY REQUIRING CLAIMANT TO IMPLEMENT A “PROGRAM”**

The Water Boards assert at pages 18-25 that the Trash Order does not require Claimant to implement a “program” because submitting a letter to the Water Board is not a public service and all dischargers are subject to the same or more stringent requirements. This is incorrect.

The Trash Order mandated activities constitute a state mandated “program” under Section 6. The test as to whether it is a program is whether the requirements are “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities generally in the state.”<sup>2</sup>

Although only one of the standards must be met<sup>3</sup>, the Trash Order mandated activities constitute a “program” under both standards.

### **A. THE Trash Order MANDATES Claimant Provide WATER POLLUTION CONTROL Services to the Public**

Contrary to the Water Boards’ arguments, at pages 18-25, the Trash Order mandated activities require Claimant to carry out the governmental function of providing flood control and pollution control services to the public for purposes of Section 6. The Trash Order effectively converts Claimant’s flood control program into a pollution prevention program.

#### **1. Flood Control Is A Public Service**

The Water Boards issued the Trash Order to Claimant as a Permittee under a municipal separate storm sewer system (“MS4”) Permit.<sup>4</sup> Claimant’s operation of a MS4 provides essential public flood control services that protect lives and communities from flooding by

<sup>2</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>3</sup> A “program” for purposes of Section 6 exists when the mandated activity either: (1) carries out the governmental function of providing services to the public, or (2) imposes unique requirements on local governments pursuant to a statewide law or policy that do not apply generally to all residents and entities in the state. *Carmel Valley Fire Prot. Dist. v. State of California*, (1987) 190 Cal.App.3d 521, 538 (noting that the “second” prong is an “alternative”).

<sup>4</sup> Trash Order pp. 1-2, 5. See MS4 definition at 40 C.F.R. § 122.26(b).

conveying stormwater into surface waters.<sup>5</sup> The Water Boards do not challenge the fact that the provision of flood control services constitutes a public service. Instead, they argue that the Regional Water Quality Control Board does not require Claimants to operate an MS4 or discharge to surface waters.<sup>6</sup> Preliminarily, this argument is surprising. However, it is more properly considered a challenge to whether the state has “mandated” the actions at issue.<sup>7</sup> In any case, the Water Boards’ argument is unfounded for three reasons.

First, Claimant does not seek reimbursement for the costs of operating an MS4, and in fact the Water Boards do require operation of an MS4.

Second, Claimant cannot stop providing public flood control services as a practical matter, because rain water runs downhill, and a law cannot stop that.<sup>8</sup> Even if Claimant could, in practical terms, stop conveying and discharging stormwater, Claimant cannot do so as a constitutional matter since “a governmental entity may be liable under the principles of inverse condemnation for downstream damage”.<sup>9</sup> Without Claimant’s flood control services, flooding will occur, resulting in the potential taking of private property.<sup>10</sup> In fact, constitutional takings claims are premised entirely on the *public purpose* behind flood control activities.<sup>11</sup> Under *Kern High School Dist.*, Claimant does not operate the MS4 as a result of a discretionary decision but is legally compelled to do so. In contrast, the Water Boards exercised their discretion in issuing the Trash Provisions and Trash Order and directing the operation of Claimant’s MS4 in particular ways.

Finally, *County of Los Angeles v. State of California, City of Sonoma* (1987) 43 Cal.3d 46, 58 refutes the Water Boards’ position.

## 2. Pollution Control Is a Public Service

The Trash Order mandated activities constitute a *pollution control* program via the flood control system.<sup>12</sup> The Trash Selection Mandate requires Claimant to plan for the use of the MS4 to control trash.<sup>13</sup> The Implementation Plan Mandate obligates those MS4s who selected Track 2 to create an implementation plan for controlling trash generated by society.<sup>14</sup> Finally, the Ongoing Implementation Mandate requires Claimant to undertake substantive measures to

<sup>5</sup> See *House v. Los Angeles County Flood Control District* (1944) 25 Cal.2d 384, 388–389 (flood control is an exercise of police power); see also *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337–338. See also Water Code, §§ 8000-8061 (flood control by cities), 8100-8129 (flood control in counties).

<sup>6</sup> Opposition Brief at p. 21, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58.

<sup>7</sup> See, *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 742 (“*Kern High School Dist.*”).

<sup>8</sup> See *Hughey v. JMS Development Corp.* (11th Cir. 1996) 78 F.3d 1523, 1530.

<sup>9</sup> See Cal. Const. art. I, § 19; see also *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337–338.

<sup>10</sup> See, e.g., *Locklin*, 7 Cal.4th at pp. 337–338.

<sup>11</sup> *Ibid.*

<sup>12</sup> Trash Order pp. 1, 5.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

control trash generated by the public.<sup>15</sup> Unlike operation of an elevator and related safety requirements imposed on public and private entities in *Dept. of Industrial Relations*, flood control and prevention of trash entering a storm sewer system is a uniquely public service.

The Water Boards argue at page 18 that the Trash Order does not require the provision of a public service because Claimant was merely “providing information” by submitting a letter identifying Claimant’s selected method of compliance. However, the Water Boards recognize at page 21 that each of the Trash Order mandated activities is intended to implement the initial procedural steps in providing the public service of reducing residents’ and visitors’ discharge of pollutants to waters of the state. The Water Boards require Claimant to use its flood control system (which is designed to protect the public health and safety from flooding) to also provide public services related to cleaning up pollution.

To comply with the Trash Order, Claimant must augment its flood control public services by planning for and controlling pollutants generated by the public as a whole and these activities are a program that provides a public service.

The Water Boards, incorrectly state the “Trash Orders do not shift any responsibility from the State on to the Claimants”.<sup>16</sup> The Water Boards are statutorily required to regulate pollutant discharges to waters of the state and United States.<sup>17</sup> The Water Boards directly regulate thousands of dischargers through individual and general permits.<sup>18</sup> Rather than imposing the Trash Order mandated activities on the entities that generate pollutants, the Water Boards require Claimant to exercise its police power and land use authority to regulate trash generating activities.

For example, the Trash Order requires Claimants to retrofit existing flood control infrastructure with full capture devices or to implement equivalent measures to capture trash generated by the public generally.<sup>19</sup> The Trash Order requires Claimants to clean up and prevent

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<sup>15</sup> *Ibid.* If the Water Boards assert that the general discharge prohibition in the Trash Provisions is directly applicable to dischargers, then the Ongoing Implementation Mandate is clearly properly before this Commission.

<sup>16</sup> Opposition Brief at pp. 22, 27 (arguing Trash Order-mandated activities do not shift responsibility from the Water Boards to Claimant), citing *County of Los Angeles v. Comm’n on State Mandates* (2003) 110 Cal.App.4th 1176.

<sup>17</sup> Water Code, §§ 13160 (“state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act...”), 13263 (“The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge...”); see also *San Francisco Baykeeper v. Levin Enterprises, Inc.* (N.D. Cal. 2013) 12 F.Supp.3d 1208, 1211.)

<sup>18</sup> See, e.g., Opposition Brief at p. 7 (discussing issuance of Industrial General Permit and Construction General Permit).

<sup>19</sup> See Trash Order at pp. 1, 2, 5; see also, e.g., AR RB8 000291 (requiring Claimant to Install, operate, and maintain Full Capture Systems for all storm drains that capture runoff from the Priority Land Uses in their jurisdictions).

the public's trash from entering waters of the State.<sup>20</sup> Claimants may be liable for failing to implement such protective measures, even though Claimants do not generate the trash at issue.

Although the Water Boards are obligated to control pollution in waters of the state, they require Claimant to modify its flood control programs to control trash created by the public. The Trash Order mandated activities thus require public services for purposes of Section 6.

**B. the Trash Order Imposes Unique Requirements on Local Governments**

The Water Boards argue the Trash Order mandated activities do not impose unique requirements on Claimant because: (1) all dischargers, including state and federal entities, and private discharges such as industrial and construction sites, must comply with an outright prohibition on trash discharges in the Trash Provisions;<sup>21</sup> and (2) the Trash Order imposes a "less stringent implementation path".<sup>22</sup> The Water Boards also assert that it is "unripe" to assert that the Trash Order imposes unique requirements on local governments due to its "operation of a MS4 permit," because no MS4 Permit requires implementation of the Trash Provisions.<sup>23</sup>

The Water Boards' argument is incorrect:

**1. THE TRASH ORDER WAS IMPOSED ON CLAIMANT, NOT ON THE PUBLIC GENERALLY.**

The Trash Order is the executive order at issue in this Test Claim. Despite this fact, the Water Boards claim that Water Code section 13383 ("Section 13383") requires any entity "that received a [Section] 13383 order ... [to] submit information to the Water Boards."<sup>24</sup> The Water Boards' arguments omit key dispositive facts.

It is not the enactment of Section 13383 that is challenged in the present Test Claim. Section 13383 provides, in relevant part:

(a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements ... for any person who discharges, or proposes to discharge, to navigable waters ... (Water Code, § 13383(a).)

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<sup>20</sup> See Trash Order at p. 2 (requiring installation of "Full Capture Systems" or their equivalent, designed to capture trash generated by society); see also, e.g., AR RB8 000291.

<sup>21</sup> Opposition Brief at pp. 18-25.

<sup>22</sup> Opposition Brief at pp. 20, 21-24, citing *City of Sacramento v. California* (1990) 50 Cal.3d 51, 57, 67-69; *City of Richmond v. Comm'n on State Mandates* (1998) 64 Cal.App.4th 1190, 1193, 1197-1199.

<sup>23</sup> Opposition Brief at pp. 19, 25.

<sup>24</sup> Opposition Brief at pp. 18, 21.

Moreover, at pages 18 and 21 of their Opposition, the Water Boards recognize that the public generally was not issued a Water Code section 13383 order and that the Trash Order at issue here does not apply to the public generally.

Nowhere in Section 13383 is Claimant required to select one of two tracks for implementing the Trash Provisions, to create an implementation plan, or to comply fully with the Trash Provisions. Section 13383 does not require the public generally undertake the Trash Order mandated activities. The Water Boards did not issue Section 13383 orders to private dischargers or otherwise direct the public generally to identify the means of complying with the Trash Provisions or create an implementation plan for compliance. Section 13383 provides no support for the Water Boards' position.

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

The Water Boards argue that the Trash Provisions and their “outright prohibition” apply “to all dischargers of trash to surface waters, whether public or private.”<sup>25</sup> Claimant challenges specific activities mandated in the Trash Order. There is no dispute that the Trash Order imposes the Trash Order mandated activities.<sup>26</sup>

Even if the outright prohibition was at issue in this Test Claim, the prohibition applies uniquely to Claimant.<sup>27</sup> The Supreme Court in *County of Los Angeles*, 43 Cal.3d 46, held when a state mandate imposes requirements that are distinguishable from those imposed on private entities, the mandate is unique to local government.<sup>28</sup> The Water Boards recognize that the Trash Provisions treat MS4s, including Claimant, in a manner that is different from the public generally, but characterize these different requirements as more or less stringent and therefore not unique.<sup>29</sup> However, there is no dispute that the Trash Order (and Trash Provisions) do not require private entities to implement the Trash Order mandated activities.

*County of Los Angeles* and the other cases cited by the Water Boards support Claimant. In *County of Los Angeles*, the court concluded that Labor Code provisions at issue imposed

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<sup>25</sup> Opposition Brief at p. 20, see also *id.* at pp. 21, 22, 25 (asserting “the requirements of the Trash Orders [are not] unique to local government . . . because industrial dischargers must comply with the outright prohibition by eliminating all trash discharges when the Trash Provisions are implemented in their NPDES permits”).

<sup>26</sup> Test Claim, § 5 Subsection VI; Opposition Brief at pp. 9-11.

<sup>27</sup> Compare *County of Los Angeles*, *supra*, 43 Cal.3d 46 with Opposition Brief at p. 19, 24, 25; citing *City of Sacramento v. California* (1990) 50 Cal.3d 51, 57, 67-69; *City of Richmond*, *supra*, 64 Cal.App.4th at pp. 1193, 1197-1199.

<sup>28</sup> *County of Los Angeles*, 43 Cal.3d at p. 58 (concluding that Labor Code provisions imposed requirements that were “indistinguishable” as applied to public and private employers).

<sup>29</sup> Opposition Brief at p. 19, 24, 25; citing *City of Sacramento*, *supra*, 50 Cal.3d at pp. 57, 67-69; *City of Richmond*, *supra*, 64 Cal.App.4th at pp., 1193, 1197-1199; *State of California Dept. of Fin. v. Comm’n on State Mandates*, Los Angeles County Superior Court Case No. BS130730, Order Granting Petition for Writ of Mandate (Post-Remand) and Denying Cross-Petitions a Moot, Feb. 9, 2018, p. 14 (“*Los Angeles Mandates Case*”). See also *Dept. of Finance v. Commission on State Mandate* (2016) 1 Cal.5th 749.



requirements that were “indistinguishable” as applied to public and private employers.<sup>30</sup> In *City of Sacramento*, the court found that “[m]ost private employers in the state already were required to provide unemployment protection to their employees”.<sup>31</sup> In *City of Richmond*, the court noted that challenged Labor Code provisions made “workers’ compensation death benefit requirements as applicable to local governments as they are to private employers.”<sup>32</sup> Finally, the *Los Angeles Mandates Case* has been appealed and is no longer citable as law. Since that case was decided, however, the Sacramento Superior Court reached the opposite conclusion as the court in the *Los Angeles Mandates Case*, concluding:

the law imposes unique permitting requirements on government entities that operate MS4s that are not applicable to all storm water dischargers. Moreover, section 6 requires reimbursement “[w]henver the Legislature or any state agency mandates a new program or higher level of service on any local government[.]” (Cal. Const., art. XIII B, § 6, emphasis added.) The Regional Board is a state agency, and Permittees seek reimbursement for the costs they will incur due to programs that the Regional Board imposed on them. (See *County of Los Angeles, supra*, 150 Cal.App.4th at 919.) Permittees do not suggest the Regional Board has imposed, or has the authority to impose, similar requirements on non-governmental entities. Moreover, although it dealt with a different issue, the court in *County of Los Angeles* noted that “the applicability of [NPDES] permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments.”<sup>33</sup>

Here, private entities do not operate MS4 systems and are not required to perform any of the Trash Order mandated activities. As a result, the Trash Order mandated activities are “distinguishable” and unique to Claimant.

Even if the Water Boards’ interpretation of reading of case law were correct, which it is not, the outright prohibition requires the entity which generates trash to prevent that trash from being discharged to waters of the State. (AR 6198, 6212.) The Trash Order mandated activities, by contrast, require Claimant to prevent trash *generated by third parties*, which is improperly discarded in violation of the Trash Provisions, to collect that trash and prevent it from discharging to waters of the State. (AR 6200, 6212 [requiring MS4s to capture runoff and trash].) Private dischargers are not required to control trash generated by others. The Trash

<sup>30</sup> *County of Los Angeles, supra*, 43 Cal.3d at p. 58.

<sup>31</sup> *City of Sacramento, supra*, 50 Cal.3d at p. 67.

<sup>32</sup> *City of Richmond, supra*, 64 Cal.App.4th at p. 1199.

<sup>33</sup> *State of California Dept. of Finance v. Comm’n on State Mandates*, Sacramento Superior Court Case No. 34-2010-80000604, Order After Hearing on Cross-Petitions for Writ of Mandate, Feb. 6, 2020, pp. 12-13. See also *Dept. of Finance v. Commission on State Mandate* (2016) 1 Cal.5th 749.

Order mandated activities, therefore, constitute a distinguishable and more stringent requirement than is imposed on the public generally.

At page 20, the Water Boards also cite trash control requirements in NPDES permits issued to industrial dischargers and construction site operators as alleged evidence that the “public generally” is subject to more stringent requirements. Industrial and construction dischargers are a small portion of the public. However, even if, *arguendo*, they did reflect the public generally, they are not required to undertake the Trash Order mandated activities or to create and implement a plan to capture trash generated by third parties.<sup>34</sup> In fact, the Trash Provisions require Claimant to capture trash generated from priority land uses, which include *industrial* properties.<sup>35</sup> Finally, Claimant is, at times, subject to the requirements of the Industrial General Permit and/or Construction General Permit based on its own activities. Even if industrial and construction dischargers are representative of the public generally, this Test Claim does not seek a subvention of funds for complying with the trash control requirements imposed through those permits. This Test Claim only addresses the activities mandated by the Water Boards through the Trash Order.<sup>36</sup>

The Trash Order mandated activities obligate Claimant to provide flood control and pollution control services to the public and impose requirements unique to Claimant and distinguishable from the requirements applicable to private dischargers.

Finally, the Water Boards’ ripeness argument<sup>37</sup> is clearly without merit. The Water Boards state the general discharge prohibition in the Trash Provisions is directly applicable to dischargers; if so, then the Ongoing Implementation Mandate is properly before this Commission.

## II. Trash Order Requires A “New” Program or Higher Levels of Service

The test as to whether a mandate is new is whether the local government was previously required to comply with the requirement at issue. This is determined by comparing the requirement the pre-existing scheme. (*San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4<sup>th</sup> 859, 878.)

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<sup>34</sup> See Opposition Brief at pp. 1-2, 7-9, 20-22.

<sup>35</sup> AR 6208, 6221 (Trash Provisions define “Priority Land Uses” to include, in part, “industrial: land uses where the primary activities on the developed parcels involve product manufacture, storage, or distribution (e.g., manufacturing businesses, warehouses, equipment storage lots, junkyards, wholesale businesses, distribution centers, or building material sales yards)).

<sup>36</sup> Opposition Brief at p. 24 states “the state and regional water boards [may be encouraged] to issue orders imposing the same standards on MS4 operators as on other storm water discharges, potentially at greater cost to local governments”. However, if requiring Claimant to implement specific activities that exceed federal law (either as strict compliance with numeric limitations or as strict compliance with specific mandated activities), the State would remove flexibility reserved to MS4s to create their own programs, and thus directly mandate particular programs and activities for purposes of Section 6. See, *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1166-1167 (inclusion of numeric limitations in an MS4 permit is discretionary).

<sup>37</sup> Opposition Brief at pp. 19, 25.

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

First, the Water Boards argue that that every permit since 1990 required Claimant to implement and report on control measures “to reduce and/or eliminate the discharge of trash to the maximum extent practicable.”<sup>38</sup> The Water Boards, however, do not identify any pre-existing requirement to select one of two tracks for implementing the Trash Provisions, to create an implementation plan, or to capture all trash from priority land uses..

Second, the Water Boards imply there is not any new program or higher level of service because the maximum extent practicable (“MEP”) standard has always been the applicable standard. The Trash Order is not imposed via the MEP standard.<sup>39</sup> Moreover, the relevant question is whether the mandate involves an increase in the level or quality of service, which it does. (*San Diego Unified, supra*, 33 Cal.4<sup>th</sup> at p. 877.) A program or services are “new” or “higher” for purposes of Section 6 if “they did not exist prior to the enactment of [the challenged state action].”<sup>40</sup> The mandate at issue did not previously exist.

Third, contrary to the Water Boards’ assertion<sup>41</sup>, the Water Boards *are* shifting their obligation to protect water quality onto Claimant to control trash generated by third parties through specific uses of Claimant’s land use authority and police power. The Water Boards’ reliance on *County of Los Angeles* is misplaced. In *County of Los Angeles*, the Court of Appeal examined cases addressing when a shift of responsibilities from the state to the local government creates a “new” program for purposes of Section 6, and concluded no shift in obligations occurs when the state provides funding to implement certain programs and also requires a portion of the funding to be allocated to a particular activity.<sup>42</sup> Here, the Water Boards shifted their responsibility to Claimant, imposing new programs or higher levels of service, and failed to provide any funding to implement the Trash Order mandated activities, much less dictate how that funding must be allocated.

The Trash Order mandated activities are “new” programs or higher levels of service pursuant to Section 6 because the legal requirements in effect prior to adoption of the Trash Order, and before adoption of the Trash Provisions, did not require Claimant to undertake any of the Trash Order mandated activities.<sup>43</sup>

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<sup>38</sup> Opposition Brief at pp. 25-26. Mandates imposed on Claimant in MS4 permit(s) are subject to separate test claims. This Rebuttal Brief does not make any admissions or waive any arguments or defenses in those test claims.

<sup>39</sup> *Dept. of Finance v. Commission on State Mandates* [“San Diego Mandates”] (2017) 18 Cal.App.5<sup>th</sup> 661, 683-689 (rejecting such Water Board argument).

<sup>40</sup> *San Diego Unified School Dist., supra*, 33 Cal.4<sup>th</sup> at p. 878.

<sup>41</sup> Opposition Brief at pp. 22, 27, citing *County of Los Angeles, supra*, 110 Cal.App.4<sup>th</sup> at pp. 1191, 1194.

<sup>42</sup> 110 Cal.App.4<sup>th</sup> at pp. 1191-1194.

<sup>43</sup> See Test Claim, §5, subsection VI.A.3; see also *San Diego Unified School Dist. v. Comm’n on State Mandates* (2004) 33 Cal.4<sup>th</sup> 859, 878.

### III. SUBVENTION IS REQUIRED BECAUSE CLAIMANT LACKS ANY FEE AUTHORITY FOR THE MANDATED COSTS

The Water Boards do not dispute that any charge, fee, or assessment levied to pay the costs of the Trash Order Mandated Activities must “be no more than necessary to cover the reasonable costs of the government activity”<sup>44</sup> and that “the manner in which those costs are allocated to a payor must bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the activity funded by the fee.”<sup>45</sup> There also appears to be no dispute that the benefits provided by Claimant’s implementation of the Trash Order mandated activities are designed “to address the impacts trash has on the beneficial uses of surface waters”. Thus, the benefits of Claimant’s activities under the Trash Order are conferred on *all* persons within Claimant’s jurisdiction.<sup>46</sup> Thus, there is no real dispute that claimant lacks non-tax authority to levy charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

At page 28, the Water Boards purport to identify 5 general sources of authority: inspection fees,<sup>47</sup> regulatory fees,<sup>48</sup> fees from developers,<sup>49</sup> Health and Safety Code section 5471 and Public Resources Code section 40026(a)(1). At page 28, the Water Boards also assert Assembly Bill 2403 (2014)<sup>50</sup> (“AB 2403”) and Senate Bill 231 (2017)<sup>51</sup> (“SB 231”) “confirm that Claimants have authority to raise fees, without voter approval” and that “[e]ven if a voter-approval requirement did apply, the requirement does not obviate Claimants’ fee authority.”<sup>52</sup> However, as discussed below, Claimant cannot use these provisions for the mandate costs at issue while also meeting substantive requirements that would exempt these levies from the definition of tax.

#### A. THE CONSTITUTIONAL LIMITS APPLY

<sup>44</sup> Compare Test Claim, § 5 Section VIII B.1 with Opposition Brief at pp. 27-31.

<sup>45</sup> Test Claim, § 5 VIII.B.1(citing Cal. Const. art. XIII C §§ 1(e)(1), (2)) with Opposition Brief at pp. 27-31.

<sup>46</sup> Compare Test Claim, § 5 VIII.B.1 (and Trash Order at pp. 1-2, 5) with Opposition Brief at pp. 27-31.

<sup>47</sup> Opposition Brief at p. 27, citing *Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842, 844.

<sup>48</sup> Opposition Brief at p. 27, citing *Sinclair Paint Co., supra*, 15 Cal.4th at pp. 876-877; *Cal. Farm Bur. Federation v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437-438; *Cal. Ass’n of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 945; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1319, 1326.

<sup>49</sup> Opposition Brief at pp. 27-28, citing *Sinclair Paint, supra*, 15 Cal.4th at p. 877.

<sup>50</sup> Opposition Brief at p. 28, citing Cal. Stats. 2014, ch. 78, § 2 (“AB 2403”).

<sup>51</sup> *Id.*, citing Stats, 2017, ch. 536, § 2.

<sup>52</sup> Opposition Brief at pp. 28-31, citing *Paradise Irrigation Dist. v. Comm’n on State Mandates* (2019) 33 Cal.Ap.5th 174, 180-182, 187-189, 194-197; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401; and taxes imposed by “the cities of Culver City, Alameda, Palo Alto, San Clemente, San Jose, and Santa Cruz” as well as “the County of Los Angeles”.

A tax is “*any* levy, charge, or exaction *of any kind* imposed by a local government” unless one of seven specific exceptions from the definition of “tax” applies.<sup>53</sup> Two exemptions are:

- (a) charges for benefits or privileges, or for a government service or product;<sup>54</sup> and
- (b) property-related fees imposed pursuant to California Constitution Article XIII D (“Article XIII D”).<sup>55</sup>

To qualify for an exemption from the definition of “tax” a fee must meet the substantive requirements of Article XIII D.

### **1. SUBSTANTIVE REQUIREMENTS FOR Charges for benefits, privileges, services, or products**

The Water Boards do not dispute that charges for benefits, privileges, services, or products must be “...provided directly to the payor ...[and] not provided to those not charged,” (the “exclusive allocation” requirement), and must “not exceed the reasonable costs [of the government activity]” (a “proportionality” requirement).<sup>56</sup> A charge does not meet the substantive “exclusive allocation” requirement when a payor bears a disproportionate share of the fiscal burden of the benefit, privilege, service or product provided, or when the fee funds a governmental activity benefitting the public at large or those not paying the fee.<sup>57</sup>

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

### **2. SUBSTANTIVE REQUIREMENTS FOR Property-Related Fees**

Property-related fees have similar proportionality and exclusive allocation requirements as charges for benefits, privileges, services, or products, including:

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

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<sup>53</sup> Cal. Const. art. XIII C, § 1(e) (emphasis added).

<sup>54</sup> Cal. Const. art. XIII C, § 1(e)(1), (2).

<sup>55</sup> Cal. Const. art. XIII C, § 1(e)(7).

<sup>56</sup> Cal. Const. art. XIII C, §1(e)(1), (2).

<sup>57</sup> Cal. Const, art. XIII C, § 1(e); *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 (stating “it is clear from the text itself that voters intended to adopt two separate requirements: To qualify as a nontax ‘fee’ under article XIII C, as amended, a charge must satisfy both the requirement that it be fixed in an amount that is ‘no more than necessary to cover the reasonable costs of the governmental activity,’ and the requirement that ‘the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity’”).

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge ... shall not exceed the proportional cost of the service attributable to the parcel.

...

(5) No fee or charge may be imposed for general governmental services.<sup>58</sup>

Article XIII D only exempts three types of property-related fees from the voter approval requirement, and thus from the reimbursement requirement of Section 6: fees for “sewer, water, and refuse collection services.”<sup>59</sup> These three fees follow a majority protest process, which does not require voter approval.<sup>60</sup> The “protest procedure implemented by Proposition 218 is not properly construed as a deprivation of fee authority” for purposes of Section 6.<sup>61</sup> *Paradise* recognized that all other property-related fees, which are subject to voter approval, are taxes for purposes of Section 6, stating, “protest procedures for fees ... [are] in contrast to the voter-approval requirement imposed by Proposition 218 before new taxes may be imposed.”<sup>62</sup>

Unless an exception applies, a local government may not adopt property-related fees until two layers of voter approval have been achieved. First, a majority of affected owners may submit written protests at a noticed public hearing called for this purpose, prohibiting the agency from adopting the fees.<sup>63</sup> Second, new or increased stormwater fees may not be imposed “unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.”<sup>64</sup> Sewer, water, and refuse collection services are excepted from this process and are only required to comply with the first layer of voter approval – the majority protest process.

As discussed below, the Water Boards arguments (at pages 27-31), that Claimant has sources of authority to levy non-tax regulatory and property-related fees, is incorrect.<sup>65</sup>

<sup>58</sup> Cal. Const. art. XIII D, § 6(c) (“Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.”).

<sup>59</sup> Cal. Const. art. XIII D, § 6(c); see also *Paradise Irrigation Dist. v. Commission on State Mandates* [“*Paradise*”] (2019) 33 Cal.App.5th 174, 194, review denied (June 19, 2019).

<sup>60</sup> See Cal. Const. art. XIII D, § 6(c); Govt. Code § 53753 (“notice, protest, and hearing requirements”); *Paradise, supra*, 33 Cal.App.5th at p. 194.

<sup>61</sup> *Paradise, supra*, 33 Cal.App.5th at p. 194.

<sup>62</sup> *Id.* at p. 192 (emphasis in original).

<sup>63</sup> Cal. Const. art. XIII D, § 6(a)(2).

<sup>64</sup> Cal. Const. art. XIII D, § 6(c); see also *Howard Jarvis Taxpayers Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1352, 1356-1358.

<sup>65</sup> Cal. Const. art. XIII C, § 1(e)(1), (2), (7).

**B. SB 231 AND AB 2403, SALINAS and PARADISE IRRIGATION DISTRICT DO NOT ALLOW ADOPTION OF A FEE TO FUND TRASH ORDER MANDATED ACTIVITIES UNDER PROPOSITION 218'S PROTEST PROCEDURE**

The Water Boards argue SB 231 and AB 2403 limit *City of Salinas* and “confirm that Claimants have authority to raise fees, without voter approval, for costs related to their storm sewer systems.”<sup>66</sup> This is not correct under constitutional case law.

First, *Salinas* interpreted a constitutional provision; as such it is constitutional case law. In order to stand, the statute must be harmonized with the Constitution. The Commission must follow constitutional case law if it is in conflict with a statute.<sup>67</sup> The courts have the authority to interpret voter intent in initiative constitutional amendments,<sup>68</sup> and the Legislature has no authority to interpret or change the Constitution.<sup>69</sup> The Legislature previously attempted to exempt permits issued by the Water Boards from the definition of an “executive order” subject to Section 6.<sup>70</sup> The Water Boards argued that the exemption was appropriate “because the Water Boards regulate water pollution with an even hand . . . [w]hether the pollution originates from a local public agency or a private industrial source”.<sup>71</sup> The Second District Court of Appeal squarely rejected this argument,<sup>72</sup> and held the Legislature has no authority to change the Constitution.<sup>73</sup> The Commission must follow the court’s interpretation of the constitution in *City of Salinas*.<sup>74</sup>

SB 231 did not become effective until after all costs for the Track Selection Mandate were already incurred. Legislative provisions are presumed to operate prospectively and should be presumed to do so “unless express language or clear and unavoidable implication negatives the presumption.”<sup>75</sup> Here, SB 231 contains no express language and no clear or unavoidable implication to negate its prospective operation. Thus, the Commission is not authorized to apply SB 231 retroactively.

AB 2403 merely modified the definition of “water” to mean water from any source. This bill did create authority to levy charges to pay the costs of conducting the studies required by the Track Selection Mandate, to prepare the planning documents required by the Implementation Plan Mandate, or to fund the capital and operational costs imposed by the

<sup>66</sup> Opposition Brief at pp. 28-39.

<sup>67</sup> *San Buenaventura, supra*, 3 Cal.5th at p. 1209 fn. 6 (“the ultimate constitutional interpretation must rest, of course, with the judiciary”); see also *County of Los Angeles v. Comm’n on State Mandates* (2007) 150 Cal.App.4th 898, 921 (“A statute cannot trump the constitution”).

<sup>68</sup> *County of Los Angeles, supra*, 43 Cal.3d at p. 56.

<sup>69</sup> See *San Buenaventura, supra*, 3 Cal.5th at p. 1209 fn. 6; see also *County of Los Angeles, supra*, 150 Cal.App.4th at p. 921.

<sup>70</sup> *County of Los Angeles, supra*, 150 Cal.App.4th at p. 904.

<sup>71</sup> *Id.* at p. 919.

<sup>72</sup> *Id.* at p. 920.

<sup>73</sup> *Id.* at p. 921.

<sup>74</sup> *City of Salinas, supra*, 98 Cal.App.4th at pp. 1356-1359.

<sup>75</sup> *In re E.J.* (2010) 47 Cal.4th 1258, 1272; see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208.

Ongoing Implementation Mandate. The Water Boards provide no sound basis for their assumptions to the contrary.

The Water Boards state AB 2403 and SB 231 intend to interpret Proposition 218 and Section 6 contrary to *City of Salinas*.<sup>76</sup> The Commission has no authority to interpret or apply AB 2403 or SB 231 in a manner that contradicts constitutional case law.<sup>77</sup> As such, these statutes provide no non-tax authority for Claimant to impose fees to fund the Challenged Permit Provisions. Nor does *Paradise Irrigation District et al. v. Commission on State Mandates et al.* change this.<sup>78</sup>

**Background on *Paradise Irrigation District et al. v. Commission on State Mandates et al.*:**

In *Paradise*, decided in 2018, Paradise Irrigation District, South Feather Water & Power Agency, Richvale Irrigation District, Biggs-West Gridley Water District, Oakdale Irrigation District, and Glenn-Colusa Irrigation District (collectively “Water Districts”) filed a joint claim with the Commission. The Water Districts argued that the Water Conservation Act of 2009 (“Conservation Act”) imposed unfunded state mandates to conserve water and achieve water conservation goals the public agencies.

The Water Districts in *Paradise* relied on the Legislature’s passage of Senate Bill 231 (“SB 231”). SB 231 was passed in response to the decision in *Howard Jarvis Taxpayers Ass’n v. City of Salinas*, (2002) 98 Cal.App.4th 1351, which held storm water drainage fees were property-related fees requiring voter approval because storm water drains were not “sewers” that are exempt from the voter approval requirement of Proposition 218. Nor were they water services that augmented water supply, such as for drinking water or irrigation. Thus, SB 231 amended Government Code section 53750(k), in an attempt to expand the definition of “sewer” to include storm water systems for the purpose of Proposition 218 voter approval.

The *Paradise* case did not examine whether Prop 218’s “vote of the electorate” requirement would eliminate a city’s fee authority, because none of the parties in *Paradise* alleged the vote of the electorate requirement applied to water service improvements under the Conservation Act.<sup>79</sup>

The mandates at issue in *Paradise* were *conservation mandates and upgrades to water infrastructure that related directly to supplying water*. Here, the mandates Claimant has filed a test claim on are related to developing a plan for installing full capture systems, systems that stop debris from entering stormwater catch basins—in order to *prevent pollution* of “surface waters, bays and estuaries.” In *Paradise*, there was no debate that the Conservation Act’s mandates were related to *the provision of water to customers*, as opposed to general water

<sup>76</sup> See Opposition Brief at pp. 28-31.

<sup>77</sup> *San Buenaventura*, *supra*, 3 Cal.5th at p. 1209 fn 6; *County of Los Angeles*, *supra*, 150 Cal.App.4th at p. 921.

<sup>78</sup> See Opposition Brief at pp. 30-31, citing *Paradise*, *supra*, 33 Cal.App.5th at p. 194-195.

<sup>79</sup> See *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343



quality. Thus, Claimant's mandate, unlike Paradise's mandate is not related to providing water to customers.

Importantly, *none of the parties in Paradise ever even argued that the costs for upgrading water supply infrastructure required by the Conservation Act are subject to voter approval.* Thus, the Court of Appeal found SB 231 irrelevant; SB 231 attempted to amend Government Code section 53751 to declare that Proposition 218 exempts sewer and water services from the voter approval requirement. Instead, water districts in *Paradise* argued that the majority protest procedure constitutes the deprivation of their fee levying authority, and the Court of Appeal stated Proposition 218 did not undermine the Water Districts' authority to levy fees to cover the costs of upgrading water supply infrastructure.

**The *Paradise* Court Did Not Decide the Constitutionality of SB 231 or the Constitutionality of Using the Protest Procedure, as Opposed to a Vote, to Impose Fees for the Type of Mandate Involved in this Test Claim.** The *Paradise* Court did not determine the constitutionality of SB 231 in light of *Salinas*. *Salinas* interpreted a constitutional provision, Prop. 218, and determined programs for stormwater management and permit compliance for overall surface water quality are generally applicable to property owners and subject to a vote of the electorate, not the protest procedure. SB 231 attempts to change that holding that via statute enacted by the legislature, leaving open the possibility SB 231 will be found unconstitutional as applied, if it is applied to by-bass Prop. 218's vote requirement to impose a fee related to a surface water quality stormwater program.

If Claimant wished to impose a fee for its mandate compliance, it would be required to put that to a vote, as opposed to simply using the protest procedure available to *Paradise Irrigation District* because the purpose of the funds is different. (*Howard Jarvis Taxpayers Ass'n v. City of Salinas*, (2002) 98 Cal.App.4th 1351.) Therefore, it is distinguishable on that ground, i.e. under *Salinas*, fees for stormwater programs to prevent pollution (as opposed to augmenting water supply) must go to a vote of the electorate.

In *Paradise*, the Third Appellate District Court found that a tax payer could sue over fees for sewer or water even without having protested.<sup>80</sup> The *Paradise* court determined that the majority protest requirements applicable to fees for "sewer, water and refuse collection services" did not divest the water and irrigation districts of their fee authority.<sup>81</sup> *Paradise* did not consider whether the voter approval requirements of Proposition 218 divest local agencies of their fee authority for purposes of Section 6.<sup>82</sup>

The only way to harmonize SB 231, *Salinas* and *Paradise* is to conclude that while a program to *augment water supply via stormwater capture* might be anticipated by SB 231 and might constitute infrastructure to supply water subject to the protest procedure, a stormwater program solely for water *quality*—such as one to remove or prevent trash in lakes, rivers and

<sup>80</sup> *Id.* at p. 182.

<sup>81</sup> *Paradise, supra*, 33 Cal.App.5th at p. 193.

<sup>82</sup> *Id.* at p. 192 ("This voter-approval requirement, however, does not apply"); *see also Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 343 ("A decision, of course, does not stand for a proposition not considered by the court.").

estuaries—is clearly a water quality program, *not a program to supply water*. Constitutional case law is clear a mandate like the one at issue is subject to the vote of the electorate requirement, not the protest procedure. Legislative enactments cannot repeal *Salinas*, which interpreted the California Constitution.

### C. WATER BOARDS' EXAMPLES OF ALLEGED FEES ARE IN FACT TAXES

The Water Boards incorrectly cite taxes as evidence of *fee* authority.<sup>83</sup> However even if, *arguendo*, a city were to adopt a tax via the protest procedure and essentially “luck out” by not getting sued by a taxpayer group, this in no way trumps the holding in *Salinas*. Moreover, the materials submitted by the Water Boards as alleged evidence of “fees” are not legal authority.

The records cited by the Water Boards recognize Section 6 is intended to protect Claimant’s tax revenues from the limits on local government authority imposed by voter approval requirements.<sup>84</sup> These materials demonstrate local *taxes* are currently being used to fund state mandated programs, such as the Trash Order mandated activities.

Records relied on by the Water Boards regarding Culver City reference a special election requiring voter approval of the funding measure.<sup>85</sup> The Los Angeles County materials relied on by the Water Boards reference a “ballot measure” requiring two-thirds voter approval prior to imposing the funding measure.<sup>86</sup> The materials regarding San Clemente’s funding mechanism indicate the charge at issue was subject to voter approval.<sup>87</sup> Documents concerning “Measure E” do not themselves indicate which city proposed the funding source at issue or provide any evidence of a funding mechanism.<sup>88</sup> However, Chapter 3.14 of the City of Santa Cruz Municipal Code sets out the “Clean River, Beaches and Ocean Tax Ordinance” which was approved as a parcel tax in the November 2008 election.<sup>89</sup> If true, Measure E was a tax measure, not a fee. Palo Alto-related records indicate a funding mechanism approved via the two-step process required by Proposition 218: “If there is no majority opposition, then the city will

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<sup>83</sup> Compare Opposition Brief at p. 30 with *Paradise, supra*, 33 Cal.App.5th at p. 192 (“majority] *protest* procedures for fees ... [are] in contrast to the voter-approval requirement imposed by Proposition 218 before new taxes may be imposed”); *Connell, supra*, 59 Cal.App.4th at p. 398 (recognizing intent to protect taxes); and documentation from City of Alameda, Palo Alto, Culver City, San Clemente, San Jose, and Santa Cruz.

<sup>84</sup> *Kern High School Dist., supra*, 30 Cal.4th at p. 735 (referring to Section 6 as a “safety valve” protecting local tax revenues); *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 (recognizing Section 6 prevents the state from requiring local governments to assume financial responsibility for governmental functions without a subvention of funds from the state.)

<sup>85</sup> Opposition Brief, at p. F-59.

<sup>86</sup> Opposition Brief, at p. F-65.

<sup>87</sup> Opposition Brief at pp. F-15 – F-17 (stating “Why are property owners voting on this fee?” “How and when will the vote occur?”).

<sup>88</sup> Opposition Brief at pp. F-18 – F-53.

<sup>89</sup> See Attachment 1: Santa Cruz Municipal Code, § 3.14.030(b) (“The ordinance codified in this chapter was approved by the voters of the city at the consolidated state general election held on November 4, 2008, by the following vote: Yes: 76.25% No: 23.75%”).

conduct a mail ballot election”.<sup>90</sup> Documents regarding Alameda relied on by the Water Boards appear to be dated February 6, 2017.<sup>91</sup> These materials do not state how the funding mechanism was approved. Materials online reflect Alameda’s “fee” was approved by voters as recently as 2019.<sup>92</sup>

Finally, documents regarding San Jose reference Resolution 75857, dated June 14, 2011. Resolution No. 75857 appears to continue fees in place since 1960 and 1991, both pre-dating Proposition 218, and therefore not subject to the voter approval requirements imposed by Proposition 218.<sup>93</sup>

**D. THE SOURCES of fee Authority ALLEGED by the Water Boards WOULD BE A Tax If THEY WERE Imposed to Pay for the Trash Order Mandated Activities**

Claimant’s Test Claim describes how any levy, charge, or assessment to fund the Trash Order mandated activities would provide a benefit to more than those who pay the fee contrary to the exclusive allocation and proportionality requirements.<sup>94</sup> None of the general sources of authority identified by the Water Boards provide Claimant with non-tax authority to levy charges, fees, or assessments, and the Water Boards do not dispute that none of the general sources of authority can be implemented in a manner that meets the requirements for an exemption for “tax.”<sup>95</sup> Every funding source identified by the Water Boards would be considered a tax if imposed to fund the Trash Order mandated activities.

**1. INSPECTION AND REGULATORY FEES DO NOT APPLY HERE**

Claimant cannot impose inspection or regulatory fees for the costs of Trash Order mandated activities.<sup>96</sup> The Water Boards do not specify who or what would be subject to an inspection fee, but state only that “inspection fees have been held not to be subject to Proposition 218.”<sup>97</sup> The costs of implementing the Trash Order mandated activities do not include costs for conducting inspections. It would be contrary to the exclusive allocation and

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<sup>90</sup> Opposition Brief at pp. F-54 – F-55.

<sup>91</sup> Opposition Brief, at p. F-58.

<sup>92</sup> See Attachment 3: City of Alameda Official Ballot Information Guide: <https://www.alamedaca.gov/files/sharedassets/public/alameda/city-manager/stormwater-ballot-guide.pdf> (last accessed March 31, 2020).

<sup>93</sup> Attachment 2: Draft City of San Jose Resolution No. 75857, June 14, 2011, last accessed March 31, 2020 at [http://www3.sanjoseca.gov/clerk/Agenda/20110802/20110802\\_0304res.pdf](http://www3.sanjoseca.gov/clerk/Agenda/20110802/20110802_0304res.pdf); Minutes of June 14, 2011 meeting available <http://www3.sanjoseca.gov/clerk/Agenda/20110614/20110614min.pdf>, last accessed March 31, 2020.

<sup>94</sup> Test Claim, § 5, subsection VIII.B.1.

<sup>95</sup> Govt. Code, § 17556(d).

<sup>96</sup> Test Claim, § 5, subsection VIII.

<sup>97</sup> Opposition Brief at p. 27, citing *Apartment Ass’n of Los Angeles County*, *supra*, 24 Cal.4th at pp. 842, 844-845. The fee at issue in *Apartment Ass’n of Los Angeles* was a regulatory fee. *Id.* at p. 838 (“levy is regulatory (as this inspection fee clearly is)”).

proportionality requirements to charge persons for the costs of inspections that were never conducted.

Even if the Test Claim sought to fund inspection costs, which it does not, *Apartment Ass'n of Los Angeles v. City of Los Angeles* (2001) 24 Cal.4<sup>th</sup> 830, does not provide authority to impose residential inspection fees. *Apartment Ass'n* addressed an inspection fee imposed on owners of residential *rental* properties “by virtue of their ownership of a business.”<sup>98</sup> The court notes that an inspection fee imposed on residential properties absent a business would be a property-related fee subject to voter approval.<sup>99</sup> An inspection fee on residential properties as suggested by the Water Boards would violate the exclusive allocation and proportionality requirements because it would be charged to individuals who would not receive an inspection. Under, *Apartment Ass'n of Los Angeles v. City of Los Angeles* (2001) 24 Cal.4<sup>th</sup> 830, such a charge would constitute a property-related fee subject to voter approval and would not qualify as sufficient fee authority under Section 6.

## 2. REGULATORY AND/OR DEVELOPER FEES DO NOT APPLY HERE

Claimant cannot impose “regulatory” or “development” fees to fund the costs of the Trash Order mandated activities for the reasons set forth in the Test Claim.<sup>100</sup> The Water Boards do not specify who or what would be subject to a regulatory or development fee, but state “[t]he California Supreme Court has also validated the adoption of regulatory fees, providing they are not levied for unrelated revenue purposes.”<sup>101</sup> The Water Boards also state it is “reasonable to collect fees from developers for the costs associated with implementing certain provisions to control trash, particularly where trash from land development has been identified as high trash generating.”<sup>102</sup> Based on the cases cited, it appears the Water Boards believe a regulatory fee or development fee may be charged to any *undeveloped* property as a regulation of the development of land.<sup>103</sup> These assertions are not correct for several reasons.

First, a regulatory fee imposed on undeveloped property cannot satisfy the exclusive allocation requirement. Importantly, the Water Boards do not dispute that the Trash Order mandated activities are intended to address trash generated as a result of **already-developed property**.<sup>104</sup> As proposed by the Water Boards, however, a regulatory fee would be levied against *undeveloped* property for the costs of addressing issues purportedly created by

<sup>98</sup> *Apartment Ass'n of Los Angeles County, supra*, 24 Cal.4<sup>th</sup> at p. 842.

<sup>99</sup> *Id.* at p. 838.

<sup>100</sup> Test Claim, § 5, subsection VIII.1.

<sup>101</sup> Opposition Brief at p. 27, citing *Sinclair Paint Co., supra*, 15 Cal.4<sup>th</sup> at pp. 876-77, *Cal. Farm Bur. Federation, supra*, 51 Cal.4<sup>th</sup> at pp. 437-438; *California Association of Professional Scientists, supra*, 79 Cal.App.4<sup>th</sup> at p. 945; *Schmeer, supra*, 213 Cal.App.4<sup>th</sup> at p. 1326.

<sup>102</sup> Opposition Brief at pp. 27-28, citing *Sinclair Paint Co., supra*, 15 Cal.4<sup>th</sup> at p. 877.

<sup>103</sup> Opposition Brief at pp. 27-28 (asserting it is reasonable to collect fees from developers for the costs associated with implementing certain provisions to control trash), citing *Sinclair Paint, supra*, 15 Cal.4<sup>th</sup> at pp. 876-877; *Cal. Farm Bur. Fed., supra*, 51 Cal.4<sup>th</sup> at pp. 437-438; *Cal. Ass'n of Prof. Scientists, supra*, 79 Cal.App.4<sup>th</sup> at p. 945; *Schmeer, supra*, 213 Cal.App.4<sup>th</sup> at p. 1326.)

<sup>104</sup> See AR6221 (defining “Priority Land Uses” in part as “Those *developed* sites, facilities and land uses ...”) (emphasis added); see also AR 6208 (same).

*developed* property. Such a fee would benefit the owners of developed properties without charging the owners of developed property, contrary to law.<sup>105</sup>

Whether imposed pursuant to Claimant's general police power or pursuant to statutory authority, such as the Mitigation Fee Act, fees imposed on development projects may only be prospective in nature.<sup>106</sup> In *City of Lemoore*, the court of appeal determined that a fire impact fee imposed in an area already served by fire protection facilities had "no nexus [to] ... the burden posed by new housing" and was improper because the new development created "no need for additional fire protection facilities."<sup>107</sup> Here, the costs of the Trash Order mandated activities cannot be recovered in a prospective manner. Claimant necessarily incurred the costs of the mandates to address demands created by already-developed property. The Ongoing Implementation Mandate includes costs associated with *existing* development.<sup>108</sup>

Second, a regulatory fee imposed on undeveloped property cannot satisfy the exclusive allocation and proportionality requirements.<sup>109</sup> In *Isaac v. City of Los Angeles*, the Second District clarified that a fee can become a special tax subject to voter approval requirements if the fee exceeds the reasonable cost of providing the service or regulatory activity.<sup>110</sup> Charging undeveloped property for the costs of the Trash Order mandated activities would violate the exclusive allocation requirements. Charging only undeveloped properties a fee to address issues created by all properties, would result in a statutory violation in which developing properties would subsidize already developed property. Such a charge would, therefore, fall within the definition of "tax."<sup>111</sup>

The cases cited by the Water Boards provide no support for their position. *Sinclair Paint* did not address a regulatory fee imposed on *undeveloped property*. Instead, it allowed the Water Boards to impose fees on manufacturers of lead based paint for the cost of environmental damages caused by those paints, which provided a benefit to the victims and not the payors. The fee in *Sinclair Paint* related to implementing environmental and health remediation measures after harm caused by the regulated industry. *Sinclair Paint*, however, does not authorize a fee on undeveloped property to mitigate the environmental issues created by already-developed properties.

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<sup>105</sup> Cal. Const. art. XIII C, § 1(e); see also e.g., *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, 1080–1085 (varying amounts assessed on parcels for the costs of undergrounding utility lines violated the proportionality requirement because the amounts individually assessed were not based on the special benefits the undergrounding project would confer on each assessed parcel).

<sup>106</sup> See Govt. Code, §§ 66000(a), 66001(b)(3), (4); see also *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 571, as modified on denial of reh'g (July 8, 2010); see also *Tahoe Keys Property Owners Ass'n v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1483-1484 ("land use regulation must be prospective in nature because the state is constitutionally limited in the extent to which it may, through land use regulation, affect prior existing uses").

<sup>107</sup> *City of Lemoore, supra*, 185 Cal.App.4th at 571.

<sup>108</sup> See Test Claim, § 6, Declaration.

<sup>109</sup> Cal. Const. art. XIII C; see also *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597.

<sup>110</sup> *Isaac, supra*, 66 Cal.App.4th at p. 596.

<sup>111</sup> Cal. Const. art. XIII C, § 1(e)(1), (2) & (3).

Further, Proposition 26 prohibits fees that do not provide benefits directly to the entity paying the fee in a way that is separate and distinct from benefits to those not charged.<sup>112</sup> Fees and charges that directly benefit a payor may violate Proposition 26 if the service provided in exchange for those fees also benefits those not charged a fee.<sup>113</sup> Because the fee in *Sinclair Paint* benefitted victims rather than payors, presently it might engender lawsuits under Proposition 26. The Water Boards have not disputed that “the benefits conferred by the activities mandated by the Trash Order apply to all people and property in Claimant’s jurisdiction”<sup>114</sup> or that “the costs associated with implementing the mandates in the Trash Order cannot be tied to a direct benefit or service experienced by any individual businesses, property owners, or residents.”<sup>115</sup> Given Proposition 26 and the undisputed benefits provided by the Trash Order mandated activities, Claimant cannot charge any particular activity or any undeveloped properties for the costs of the Trash Order mandated activities because these costs provide a benefit to all of society (all residents, all businesses, all visitors, and all property owners), not just future developers.

In *California Farm Bureau*, the State Water Resources Control Board imposed a fee on water appropriation permit and license holders under Water Code section 1525.<sup>116</sup> The fee was intended to fund “the Division [of Water Rights]’s operations”.<sup>117</sup> Water Code section 1525 does not authorize Claimant to impose fees. Any fee imposed by Claimant must meet the exclusive allocation and proportionality requirements. The Water Boards do not identify a permit or licensing program an MS4 can use to impose a fee.<sup>118</sup> As discussed in this brief, no such program can be established due to the nature of Claimant’s provision of flood control services through the MS4.

In *Professional Scientists*, the state Department of Fish and Game imposed a fee on applications for development projects pursuant to Fish and Game Code section 711.4.<sup>119</sup> The fee funded costs incurred to conduct environmental reviews of the proposed development.<sup>120</sup> Fish and Game section 711.4 does not authorize Claimant to impose fees. Further, any fee imposed by Claimant must meet the exclusive allocation and proportionality requirements. *Professional Scientists* does not authorize Claimant to charge a fee to *undeveloped* property in order to offset the costs of addressing issues originating from *developed* property.

In *Schmeer*, the County of Los Angeles adopted an ordinance prohibiting plastic carryout bags and requiring stores to charge customers 10 cents for each paper carryout bag.<sup>121</sup> The 10-cent charge was determined not to be a tax because it was “payable to and retained by

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<sup>112</sup> Cal. Const. Art. XIII C, § 1(e)(1), (2) & (3).

<sup>113</sup> *Ibid.*

<sup>114</sup> Test Claim, § 5, subsection VIII.B.1.

<sup>115</sup> *Ibid.*

<sup>116</sup> See Opposition Brief at p. 27; *Cal. Farm Bureau*, *supra*, 51 Cal.4th at pp. 434-435.

<sup>117</sup> *Id.* at p. 432.

<sup>118</sup> Compare Opposition Brief at pp. 27-28.

<sup>119</sup> See Opposition Brief at p. 27; *Cal. Assn. of Prof. Scientists*, *supra*, 79 Cal.App.4th at p. 939.

<sup>120</sup> *Cal. Assn. of Prof. Scientists*, *supra*, 79 Cal.App.4th at p. 940.

<sup>121</sup> *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326.

the retail store and [wa]s not remitted to the county.”<sup>122</sup> This case provides no support for the Water Boards’ position. Any charge levied to pay for the costs of the Trash Order mandated activities would be paid to Claimant and would not be retained by a private party. Under the analysis in *Schmeer*, such a fee would be a tax.<sup>123</sup>

**3. PUBLIC RESOURCES CODE § 40059 AND HEALTH & SAFETY CODE § 5471 DO NOT APPLY HERE**

Claimant cannot impose fees under Health & Safety Code section 5471 or Public Resources Code section 40059 to fund the costs of the Trash Order mandated activities for purposes of Section 6, as the Water Boards assert at page 29 of their Opposition.

Public Resources Code section 40059 provides, in relevant part:

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

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

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

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

“Solid waste handling” is defined in Public Resources Code section 40195 as “the collection, transportation, storage, transfer, or processing of solid wastes.” Health & Safety Code section 5471, subdivision (a) provides:

a) In addition to the powers granted in the principal act, any entity shall have power, by an ordinance or

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<sup>122</sup> *Ibid.*

<sup>123</sup> See *id.* at p. 1327 (“the language ‘any levy, charge, or exaction of any kind imposed by a local government’ in the first paragraph of article XIII C, section 1, subdivision (e) is limited to charges payable to a local government”).

resolution approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system.

The Trash Order mandated activities include, in part, undertaking assessments of Claimant's authority and feasibility to install Full Capture Systems in Priority Land Use areas, establishing a program for funding capital improvement projects, and drafting reports of improvements, practices, and operations implemented.<sup>124</sup> These activities are not "solid waste handling" for purposes of Public Resources Code section 40059.<sup>125</sup> Similarly, these activities do not qualify as storm drainage operation or maintenance for purposes of Health & Safety Code section 5471.<sup>126</sup>

Even if some portion of the costs of implementing the Trash Order mandated activities may qualify as solid waste handling or as storm drainage operation or maintenance for purposes of these statutory provisions, any fee adopted pursuant to either statutory provision would require voter approval.<sup>127</sup>

Under *City of Salinas*, a fee imposed under Health & Safety Code section 5471 or Public Resources Code section 40059 to fund a general stormwater program is a property-related fee subject to voter approval.<sup>128</sup> As discussed above, AB 2403 and SB 231 do not provide the Commission with any authority to conclude otherwise.

Claimant lacks authority to impose a fee to fund the Trash Order mandated activities. Any alleged fee cannot meet the substantive requirements for an exclusion from the definition of tax. Subvention is required under Section 6.

## CONCLUSION

The Trash Order mandated activities are a "program" under both standards. The Trash Order mandated activities are "new" programs or higher levels of service pursuant to Section 6. Claimant lacks non-tax authority to levy charges, fees or assessments sufficient to pay for the mandated program or increased level of service. The mandate at issue constitutes a statutory mandate requiring subvention of funds under Section 6.

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<sup>124</sup> Trash Order § 6, Declaration at ¶8.

<sup>125</sup> See Commission on State Mandates, Statement of Decision, "Discharge of Stormwater Runoff – Order No. R9-2007-0001" (March 26, 2010), at pp. 114-119.

<sup>126</sup> *Id.* at pp. 117-119.

<sup>127</sup> Cal. Const. art. XIII C, § 1(e), § 2; see also *Discharge of Stormwater Runoff – Order No. R9-2001-0001*, at pp. 114-119.

<sup>128</sup> See *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1356-1358; see also *Discharge of Stormwater Runoff – Order No. R9-2001-0001*, at pp. 114-119; Opposition Brief at pp. 27-31.



**CERTIFICATION**

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct to the best of my personal knowledge, information, or belief. I further declare that all documents attached to this filing are true and correct copies of documents as they exist on the State Water Resources Control Board's publicly available website or were obtained through publicly available sources.

**SIGNATURE**

Very truly yours,

  
\_\_\_\_\_  
G. Harold Duffey,  
City Manager

MV: CMC

Enclosure: Exhibits A, B

cc: [Teresita.Sablan@Waterboards.ca.gov](mailto:Teresita.Sablan@Waterboards.ca.gov)  
[Susan.Geanacou@dof.ca.gov](mailto:Susan.Geanacou@dof.ca.gov)

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# **I. CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS**



West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article I. Declaration of Rights (Refs & Annos)

West's Ann.Cal.Const. Art. 1, § 19

§ 19. Eminent domain; just compensation; prohibition on  
acquisition for conveyance to private person; exceptions

Effective: June 4, 2008

[Currentness](#)

SEC. 19. (a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(b) The State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person.

(c) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety.

(d) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of acquiring private property for a public work or improvement.

(e) For the purpose of this section:

1. "Conveyance" means a transfer of real property whether by sale, lease, gift, franchise, or otherwise.

2. "Local government" means any city, including a charter city, county, city and county, school district, special district, authority, regional entity, redevelopment agency, or any other political subdivision within the State.

3. "Owner-occupied residence" means real property that is improved with a single-family residence such as a detached home, condominium, or townhouse and that is the owner or owners' principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. Owner-occupied residence also includes a residential dwelling unit attached to or detached from such a single-family residence which provides complete independent living facilities for one or more persons.

4. "Person" means any individual or association, or any business entity, including, but not limited to, a partnership, corporation, or limited liability company.

5. "Public work or improvement" means facilities or infrastructure for the delivery of public services such as education, police, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure; projects identified by a State or local government for recovery from natural disasters; and private uses incidental to, or necessary for, the public work or improvement.

6. "State" means the State of California and any of its agencies or departments.

#### Credits

(Added Nov. 5, 1974. Amended by [Initiative Measure \(Prop. 99, § 2, approved June 3, 2008](#), eff. June 4, 2008).)

#### [Notes of Decisions \(2605\)](#)

West's Ann. Cal. Const. Art. 1, § 19, CA CONST Art. 1, § 19

Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article XiiiB. Government Spending Limitation (Refs & Annos)

West's Ann.Cal.Const. Art. 13B, § 6

§ 6. New programs or services mandated by Legislature or state agencies; subvention; appropriation of funds or suspension of operation

Effective: June 4, 2014

[Currentness](#)

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.

#### Credits

(Adopted Nov. 6, 1979. Amended by Stats.2004, Res. c. 133 (S.C.A.4) ([Prop. 1A, approved Nov. 2, 2004](#), eff. Nov. 3, 2004); [Stats.2013, Res. c. 123 \(S.C.A.3\), § 2 \(Prop. 42, approved June 3, 2014](#), eff. June 4, 2014).)

#### [Notes of Decisions \(232\)](#)

West's Ann. Cal. Const. Art. 13B, § 6, CA CONST Art. 13B, § 6  
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West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article XIII.C. [Voter Approval for Local Tax Levies] (Refs & Annos)

West's Ann.Cal.Const. Art. 13C, § 1

§ 1. Definitions

Effective: November 3, 2010

[Currentness](#)

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.

#### **Credits**

(Added by [Initiative Measure \(Prop. 218, § 3, approved Nov. 5, 1996\)](#). Amended by [Initiative Measure \(Prop. 26, § 3, approved Nov. 2, 2010, eff. Nov. 3, 2010\)](#).)

#### [Notes of Decisions \(77\)](#)

West's Ann. Cal. Const. Art. 13C, § 1, CA CONST Art. 13C, § 1  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 1

§ 1. Application of article

**Currentness**

Sec. 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.

**Credits**

(Added by Initiative Measure (Prop. 218, § 4, approved Nov. 5, 1996).)

**Notes of Decisions (40)**

West's Ann. Cal. Const. Art. 13D, § 1, CA CONST Art. 13D, § 1  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article XIII D. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 2

§ 2. Definitions

Currentness

Sec. 2. Definitions. As used in this article:

- (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.”

**Credits**

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)




[Notes of Decisions \(32\)](#)

West's Ann. Cal. Const. Art. 13D, § 2, CA CONST Art. 13D, § 2  
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Proposed Legislation

[West's Annotated California Codes](#)  
[Constitution of the State of California 1879 \(Refs & Annos\)](#)  
[Article XIIIID. \[Assessment and Property Related Fee Reform\] \(Refs & Annos\)](#)

West's Ann.Cal.Const. Art. 13D, § 3

§ 3. Limitations on property taxes, assessments, fees and charges; electric and gas service fees

#### [Currentness](#)

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 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.

#### **Credits**

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

#### [Notes of Decisions \(9\)](#)

West's Ann. Cal. Const. Art. 13D, § 3, CA CONST Art. 13D, § 3  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 4

§ 4. Proposed assessments; procedures and requirements

Currentness

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).

**Credits**

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

[Notes of Decisions \(79\)](#)

West's Ann. Cal. Const. Art. 13D, § 4, CA CONST Art. 13D, § 4  
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West's Annotated California Codes  
Constitution of the State of California 1879 (Refs & Annos)  
Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 5

§ 5. Effective date of article; assessments exempted from procedures and requirements of Section 4

**Currentness**

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](#).

**Credits**

(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

[Notes of Decisions \(15\)](#)

West's Ann. Cal. Const. Art. 13D, § 5, CA CONST Art. 13D, § 5  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

West's Annotated California Codes

Constitution of the State of California 1879 (Refs & Annos)

Article XIIIID. [Assessment and Property Related Fee Reform] (Refs & Annos)

West's Ann.Cal.Const. Art. 13D, § 6

§ 6. New or existing increased fees and charges; procedures and requirements; voter approval

**Currentness**

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.

#### **Credits**


(Added by [Initiative Measure \(Prop. 218, § 4, approved Nov. 5, 1996\)](#).)

#### [Notes of Decisions \(92\)](#)

West's Ann. Cal. Const. Art. 13D, § 6, CA CONST Art. 13D, § 6  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

 KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version Held Invalid [Natural Resources Defense Council v. U.S. E.P.A.](#), 9th Cir., May 23, 2008

 KeyCite Yellow Flag - Negative Treatment Proposed Regulation

[Code of Federal Regulations](#)

[Title 40. Protection of Environment](#)

[Chapter I. Environmental Protection Agency \(Refs & Annos\)](#)

[Subchapter D. Water Programs](#)

[Part 122. EPA Administered Permit Programs: The National Pollutant Discharge Elimination System \(Refs & Annos\)](#)

[Subpart B. Permit Application and Special NPDES Program Requirements](#)

40 C.F.R. § 122.26

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

Effective: December 21, 2015

[Currentness](#)

<For statute(s) affecting validity, see: The Clean Water Act, [33 USCA § 1251 et seq.](#)>

(a) Permit requirement.

(1) Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit except:

(i) A discharge with respect to which a permit has been issued prior to February 4, 1987;

(ii) A discharge associated with industrial activity (see § 122.26(a)(4));

(iii) A discharge from a large municipal separate storm sewer system;

(iv) A discharge from a medium municipal separate storm sewer system;

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at [§ 122.2](#).

The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the Director may consider the following factors:



- (A) The location of the discharge with respect to waters of the United States as defined at [40 CFR 122.2](#).
- (B) The size of the discharge;
- (C) The quantity and nature of the pollutants discharged to waters of the United States; and
- (D) Other relevant factors.

(2) The Director may not require a permit for discharges of storm water runoff from the following:

(i) Mining operations composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with or that have not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations, except in accordance with paragraph (c)(1)(iv) of this section.

(ii) All field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities, except in accordance with paragraph (c)(1)(iii) of this section. Discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.

Note to paragraph (a)(2)(ii): EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.

(3) Large and medium municipal separate storm sewer systems.

(i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems.

(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either:

(A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operators of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system;

(B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or

(C) A regional authority may be responsible for submitting a permit application under the following guidelines:

(1) The regional authority together with co-applicants shall have authority over a storm water management program that is in existence, or shall be in existence at the time part 1 of the application is due;

(2) The permit applicant or co-applicants shall establish their ability to make a timely submission of part 1 and part 2 of the municipal application;

(3) Each of the operators of municipal separate storm sewers within the systems described in paragraphs (b)(4)(i), (ii), and (iii) or (b)(7)(i), (ii), and (iii) of this section, that are under the purview of the designated regional authority, shall comply with the application requirements of paragraph (d) of this section.

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system.

(vi) Co-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators.

(4) Discharges through large and medium municipal separate storm sewer systems. In addition to meeting the requirements of paragraph (c) of this section, an operator of a storm water discharge associated with industrial activity which discharges through a large or medium municipal separate storm sewer system shall submit, to the operator of the municipal separate storm sewer system receiving the discharge no later than May 15, 1991, or 180 days prior to commencing such discharge: the name of the facility; a contact person and phone number; the location of the discharge; a description, including Standard

Industrial Classification, which best reflects the principal products or services provided by each facility; and any existing NPDES permit number.

(5) Other municipal separate storm sewers. The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)(1)(v) of this section on a system-wide basis, jurisdiction-wide basis, watershed basis or other appropriate basis, or may issue permits for individual discharges.

(6) Non-municipal separate storm sewers. For storm water discharges associated with industrial activity from point sources which discharge through a non-municipal or non-publicly owned separate storm sewer system, the Director, in his discretion, may issue: a single NPDES permit, with each discharger a co-permittee to a permit issued to the operator of the portion of the system that discharges into waters of the United States; or, individual permits to each discharger of storm water associated with industrial activity through the non-municipal conveyance system.

(i) All storm water discharges associated with industrial activity that discharge through a storm water discharge system that is not a municipal separate storm sewer must be covered by an individual permit, or a permit issued to the operator of the portion of the system that discharges to waters of the United States, with each discharger to the non-municipal conveyance a co-permittee to that permit.

(ii) Where there is more than one operator of a single system of such conveyances, all operators of storm water discharges associated with industrial activity must submit applications.

(iii) Any permit covering more than one operator shall identify the effluent limitations, or other permit conditions, if any, that apply to each operator.

(7) Combined sewer systems. Conveyances that discharge storm water runoff combined with municipal sewage are point sources that must obtain NPDES permits in accordance with the procedures of § 122.21 and are not subject to the provisions of this section.

(8) Whether a discharge from a municipal separate storm sewer is or is not subject to regulation under this section shall have no bearing on whether the owner or operator of the discharge is eligible for funding under title II, title III or title VI of the Clean Water Act. See 40 CFR part 35, subpart I, appendix A(b)H.2.j.

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if:

(A) The discharge is from a small MS4 required to be regulated pursuant to § 122.32;

(B) The discharge is a storm water discharge associated with small construction activity pursuant to paragraph (b)(15) of this section;

(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of “total maximum daily loads” (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(ii) Operators of small MS4s designated pursuant to paragraphs (a)(9)(i)(A), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with §§ 122.33 through 122.35. Operators of non-municipal sources designated pursuant to paragraphs (a)(9)(i)(B), (a)(9)(i)(C), and (a)(9)(i)(D) of this section shall seek coverage under an NPDES permit in accordance with paragraph (c)(1) of this section.

(iii) Operators of storm water discharges designated pursuant to paragraphs (a)(9)(i)(C) and (a)(9)(i)(D) of this section shall apply to the Director for a permit within 180 days of receipt of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter).

(b) Definitions.

(1) Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator.

(2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

(3) Incorporated place means the District of Columbia, or a city, town, township, or village that is incorporated under the laws of the State in which it is located.

(4) Large municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census (Appendix F of this part); or

(ii) Located in the counties listed in appendix H, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(4)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described

under paragraph (b)(4)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(4)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; and

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a large municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraph (b) (4)(i), (ii), (iii) of this section.

(5) Major municipal separate storm sewer outfall (or “major outfall”) means a municipal separate storm sewer outfall that discharges from a single pipe with an inside diameter of 36 inches or more or its equivalent (discharge from a single conveyance other than circular pipe which is associated with a drainage area of more than 50 acres); or for municipal separate storm sewers that receive storm water from lands zoned for industrial activity (based on comprehensive zoning plans or the equivalent), an outfall that discharges from a single pipe with an inside diameter of 12 inches or more or from its equivalent (discharge from other than a circular pipe associated with a drainage area of 2 acres or more).

(6) Major outfall means a major municipal separate storm sewer outfall.

(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

(i) Located in an incorporated place with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census (appendix G of this part); or

(ii) Located in the counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties; or

(iii) Owned or operated by a municipality other than those described in paragraph (b)(7)(i) or (ii) of this section and that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraph (b)(7)(i) or (ii) of this section. In making this determination the Director may consider the following factors:

(A) Physical interconnections between the municipal separate storm sewers;

(B) The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in paragraph (b)(7)(i) of this section;

(C) The quantity and nature of pollutants discharged to waters of the United States;

(D) The nature of the receiving waters; or

(E) Other relevant factors; or

(iv) The Director may, upon petition, designate as a medium municipal separate storm sewer system, municipal separate storm sewers located within the boundaries of a region defined by a storm water management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in paragraphs (b)(7) (i), (ii), (iii) of this section.

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at [40 CFR 122.2](#).

(9) Outfall means a point source as defined by [40 CFR 122.2](#) at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

(10) Overburden means any material of any nature, consolidated or unconsolidated, that overlies a mineral deposit, excluding topsoil or similar naturally-occurring surface materials that are not disturbed by mining operations.

(11) Runoff coefficient means the fraction of total rainfall that will appear at a conveyance as runoff.

(12) Significant materials includes, but is not limited to: raw materials; fuels; materials such as solvents, detergents, and plastic pellets; finished materials such as metallic products; raw materials used in food processing or production; hazardous substances designated under section 101(14) of CERCLA; any chemical the facility is required to report pursuant to section 313 of title III of SARA; fertilizers; pesticides; and waste products such as ashes, slag and sludge that have the potential to be released with storm water discharges.

(13) Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. Industrial facilities (including industrial facilities that are federally, State, or municipally owned or operated that meet the description of the facilities listed in paragraphs (b)(14)(i) through (xi) of this section) include those facilities designated under the provisions of paragraph (a)(1)(v) of this section. The following categories of facilities are considered to be engaging in "industrial activity" for purposes of paragraph (b)(14):

(i) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR subchapter N (except facilities with toxic pollutant effluent standards which are exempted under category (xi) in paragraph (b)(14) of this section);

(ii) Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in [40 CFR 122.27\(b\)\(2\)-\(3\)](#) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373; (not included are all other types of silviculture facilities);

(iii) Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) including active or inactive mining operations (except for areas of coal mining operations no longer meeting the definition of a reclamation area under [40 CFR 434.11\(1\)](#) because the performance bond issued to the facility by the appropriate SMCRA authority has been released, or except for areas of non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact

with, any overburden, raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations; (inactive mining operations are mining sites that are not being actively mined, but which have an identifiable owner/operator; inactive mining sites do not include sites where mining claims are being maintained prior to disturbances associated with the extraction, beneficiation, or processing of mined materials, nor sites where minimal activities are undertaken for the sole purpose of maintaining a mining claim);

(iv) Hazardous waste treatment, storage, or disposal facilities, including those that are operating under interim status or a permit under subtitle C of RCRA;

(v) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this subsection) including those that are subject to regulation under subtitle D of RCRA;

(vi) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093;

(vii) Steam electric power generating facilities, including coal handling sites;

(viii) Transportation facilities classified as Standard Industrial Classifications 40, 41, 42 (except 4221–25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under paragraphs (b)(14) (i)–(vii) or (ix)–(xi) of this section are associated with industrial activity;

(ix) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program under 40 CFR part 403. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with section 405 of the CWA;

(x) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;

(xi) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221–25;

(15) Storm water discharge associated with small construction activity means the discharge of storm water from:



(i) Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility. The Director may waive the otherwise applicable requirements in a general permit for a storm water discharge from construction activities that disturb less than five acres where:

(A) The value of the rainfall erosivity factor (“R” in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. The rainfall erosivity factor is determined in accordance with Chapter 2 of Agriculture Handbook Number 703, Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE), pages 21–64, dated January 1997. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained at EPA's Water Docket, 1200 Pennsylvania Avenue NW, Washington, DC 20460. For information on the availability of this material at National Archives and Records Administration, call 202–741–6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html). An operator must certify to the Director that the construction activity will take place during a period when the value of the rainfall erosivity factor is less than five; or

(B) Storm water controls are not needed based on a “total maximum daily load” (TMDL) approved or established by EPA that addresses the pollutant(s) of concern or, for non-impaired waters that do not require TMDLs, an equivalent analysis that determines allocations for small construction sites for the pollutant(s) of concern or that determines that such allocations are not needed to protect water quality based on consideration of existing in-stream concentrations, expected growth in pollutant contributions from all sources, and a margin of safety. For the purpose of this paragraph, the pollutant(s) of concern include sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation) and any other pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from the construction activity. The operator must certify to the Director that the construction activity will take place, and storm water discharges will occur, within the drainage area addressed by the TMDL or equivalent analysis.

(C) As of December 21, 2020 all certifications submitted in compliance with paragraphs (b)(15)(i)(A) and (B) of this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) Any other construction activity designated by the Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to waters of the United States.

**Exhibit 1 to § 122.26(b)(15).—Summary of Coverage of “Storm Water Discharges Associated with Small Construction Activity” Under the NPDES Storm Water Program**

Automatic Designation: Required Nationwide Coverage

· Construction activities that result in a land disturbance of equal to or greater than one acre and less than five acres.

· Construction activities disturbing less than one acre if part of a larger common plan of development or sale with a planned disturbance of equal to or greater than one acre and less than five acres. (see § 122.26(b)(15)(i).)

Potential Designation: Optional Evaluation and Designation by the NPDES Permitting Authority or EPA Regional Administrator.

· Construction activities that result in a land disturbance of less than one acre based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants. (see § 122.26(b)(15)(ii).)

Potential Waiver: Waiver from Requirements as Determined by the NPDES Permitting Authority.

Any automatically designated construction activity where the operator certifies: (1) A rainfall erosivity factor of less than five, or (2) That the activity will occur within an area where controls are not needed based on a TMDL or, for non-impaired waters that do not require a TMDL, an equivalent analysis for the pollutant(s) of concern. (see § 122.26(b)(15)(i).)

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(16) Small municipal separate storm sewer system means all separate storm sewers that are:

(i) Owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.

(ii) Not defined as “large” or “medium” municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7) of this section, or designated under paragraph (a)(1)(v) of this section.

(iii) This term includes systems similar to separate storm sewer systems in municipalities, such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas, such as individual buildings.

(17) Small MS4 means a small municipal separate storm sewer system.

(18) Municipal separate storm sewer system means all separate storm sewers that are defined as “large” or “medium” or “small” municipal separate storm sewer systems pursuant to paragraphs (b)(4), (b)(7), and (b)(16) of this section, or designated under paragraph (a)(1)(v) of this section.

(19) MS4 means a municipal separate storm sewer system.

(20) Uncontrolled sanitary landfill means a landfill or open dump, whether in operation or closed, that does not meet the requirements for runoff or runoff controls established pursuant to subtitle D of the Solid Waste Disposal Act.

(c) Application requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity—

(1) Individual application. Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. Facilities that are required to obtain an individual permit or any discharge of storm water which the Director is evaluating for designation (see § 124.52(c) of this chapter) under paragraph (a)(1)(v) of this section and is not a municipal storm sewer, shall submit an NPDES application in accordance with the requirements of § 122.21 as modified and supplemented by the provisions of this paragraph.

(i) Except as provided in § 122.26(c)(1)(ii)–(iv), the operator of a storm water discharge associated with industrial activity subject to this section shall provide:

(A) A site map showing topography (or indicating the outline of drainage areas served by the outfall(s) covered in the application if a topographic map is unavailable) of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings within the drainage area of each storm water outfall, each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities (including each area not required to have a RCRA permit which is used for accumulating hazardous waste under 40 CFR 262.34); each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;

(B) An estimate of the area of impervious surfaces (including paved areas and building roofs) and the total area drained by each outfall (within a mile radius of the facility) and a narrative description of the following: Significant materials that in the three years prior to the submittal of this application have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed, in the three years prior to the submittal of this application, to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives, including the ultimate disposal of any solid or fluid wastes other than by discharge;

(C) A certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit; tests for such non-storm water discharges may include smoke tests, fluorometric dye tests, analysis of accurate schematics, as well as other appropriate tests. The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;

(D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility that have taken place within the three years prior to the submittal of this application;

(E) Quantitative data based on samples collected during storm events and collected in accordance with § 122.21 of this part from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:

(1) Any pollutant limited in an effluent guideline to which the facility is subject;

(2) Any pollutant listed in the facility's NPDES permit for its process wastewater (if the facility is operating under an existing NPDES permit);

(3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;

(4) Any information on the discharge required under § 122.21(g)(7)(vi) and (vii);

(5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation; and

(6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours);

(F) Operators of a discharge which is composed entirely of storm water are exempt from the requirements of § 122.21(g)(2), (g)(3), (g)(4), (g)(5), (g)(7)(iii), (g)(7)(iv), (g)(7)(v), and (g)(7)(viii); and

(G) Operators of new sources or new discharges (as defined in § 122.2 of this part) which are composed in part or entirely of storm water must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges composed in part or entirely of storm water must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, unless such data has already been reported under the monitoring requirements of the NPDES permit for the discharge. Operators of a new source or new discharge which is composed entirely of storm water are exempt from the requirements of § 122.21 (k)(3)(ii), (k)(3)(iii), and (k)(5).

(ii) An operator of an existing or new storm water discharge that is associated with industrial activity solely under paragraph (b)(14)(x) of this section or is associated with small construction activity solely under paragraph (b)(15) of this section, is exempt from the requirements of § 122.21(g) and paragraph (c)(1)(i) of this section. Such operator shall provide a narrative description of:

- (A) The location (including a map) and the nature of the construction activity;
  - (B) The total area of the site and the area of the site that is expected to undergo excavation during the life of the permit;
  - (C) Proposed measures, including best management practices, to control pollutants in storm water discharges during construction, including a brief description of applicable State and local erosion and sediment control requirements;
  - (D) Proposed measures to control pollutants in storm water discharges that will occur after construction operations have been completed, including a brief description of applicable State or local erosion and sediment control requirements;
  - (E) An estimate of the runoff coefficient of the site and the increase in impervious area after the construction addressed in the permit application is completed, the nature of fill material and existing data describing the soil or the quality of the discharge; and
  - (F) The name of the receiving water.
- (iii) The operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application in accordance with paragraph (c)(1)(i) of this section, unless the facility:
- (A) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to [40 CFR 117.21](#) or [40 CFR 302.6](#) at anytime since November 16, 1987; or
  - (B) Has had a discharge of storm water resulting in the discharge of a reportable quantity for which notification is or was required pursuant to [40 CFR 110.6](#) at any time since November 16, 1987; or
  - (C) Contributes to a violation of a water quality standard.
- (iv) The operator of an existing or new discharge composed entirely of storm water from a mining operation is not required to submit a permit application unless the discharge has come into contact with, any overburden, raw material, intermediate products, finished product, byproduct or waste products located on the site of such operations.
- (v) Applicants shall provide such other information the Director may reasonably require under [§ 122.21\(g\)\(13\)](#) of this part to determine whether to issue a permit and may require any facility subject to paragraph (c)(1)(ii) of this section to comply with paragraph (c)(1)(i) of this section.

(2) [Reserved]

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

(1) Part 1. Part 1 of the application shall consist of;

(i) General information. The applicants' name, address, telephone number of contact person, ownership status and status as a State or local government entity.

(ii) Legal authority. A description of existing legal authority to control discharges to the municipal separate storm sewer system. When existing legal authority is not sufficient to meet the criteria provided in paragraph (d)(2)(i) of this section, the description shall list additional authorities as will be necessary to meet the criteria and shall include a schedule and commitment to seek such additional authority that will be needed to meet the criteria.

(iii) Source identification.

(A) A description of the historic use of ordinances, guidance or other controls which limited the discharge of non-storm water discharges to any Publicly Owned Treatment Works serving the same area as the municipal separate storm sewer system.

(B) A USGS 7.5 minute topographic map (or equivalent topographic map with a scale between 1:10,000 and 1:24,000 if cost effective) extending one mile beyond the service boundaries of the municipal storm sewer system covered by the permit application. The following information shall be provided:

(1) The location of known municipal storm sewer system outfalls discharging to waters of the United States;

(2) A description of the land use activities (e.g. divisions indicating undeveloped, residential, commercial, agricultural and industrial uses) accompanied with estimates of population densities and projected growth for a ten year period within the drainage area served by the separate storm sewer. For each land use type, an estimate of an average runoff coefficient shall be provided;

(3) The location and a description of the activities of the facility of each currently operating or closed municipal landfill or other treatment, storage or disposal facility for municipal waste;

(4) The location and the permit number of any known discharge to the municipal storm sewer that has been issued a NPDES permit;

- (5) The location of major structural controls for storm water discharge (retention basins, detention basins, major infiltration devices, etc.); and
  
  - (6) The identification of publicly owned parks, recreational areas, and other open lands.
- (iv) Discharge characterization.
- (A) Monthly mean rain and snow fall estimates (or summary of weather bureau data) and the monthly average number of storm events.
  
  - (B) Existing quantitative data describing the volume and quality of discharges from the municipal storm sewer, including a description of the outfalls sampled, sampling procedures and analytical methods used.
  
  - (C) A list of water bodies that receive discharges from the municipal separate storm sewer system, including downstream segments, lakes and estuaries, where pollutants from the system discharges may accumulate and cause water degradation and a brief description of known water quality impacts. At a minimum, the description of impacts shall include a description of whether the water bodies receiving such discharges have been:
    - (1) Assessed and reported in [section 305\(b\)](#) reports submitted by the State, the basis for the assessment (evaluated or monitored), a summary of designated use support and attainment of Clean Water Act (CWA) goals (fishable and swimmable waters), and causes of nonsupport of designated uses;
  
    - (2) Listed under [section 304\(l\)\(1\)\(A\)\(i\)](#), [section 304\(l\)\(1\)\(A\)\(ii\)](#), or [section 304\(l\)\(1\)\(B\)](#) of the CWA that is not expected to meet water quality standards or water quality goals;
  
    - (3) Listed in State Nonpoint Source Assessments required by [section 319\(a\)](#) of the CWA that, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain water quality standards due to storm sewers, construction, highway maintenance and runoff from municipal landfills and municipal sludge adding significant pollution (or contributing to a violation of water quality standards);
  
    - (4) Identified and classified according to eutrophic condition of publicly owned lakes listed in State reports required under [section 314\(a\)](#) of the CWA (include the following: A description of those publicly owned lakes for which uses are known to be impaired; a description of procedures, processes and methods to control the discharge of pollutants from municipal separate storm sewers into such lakes; and a description of methods and procedures to restore the quality of such lakes);
  
    - (5) Areas of concern of the Great Lakes identified by the International Joint Commission;
  
    - (6) Designated estuaries under the National Estuary Program under [section 320](#) of the CWA;

- (7) Recognized by the applicant as highly valued or sensitive waters;
- (8) Defined by the State or U.S. Fish and Wildlife Services's National Wetlands Inventory as wetlands; and
- (9) Found to have pollutants in bottom sediments, fish tissue or biosurvey data.

(D) Field screening. Results of a field screening analysis for illicit connections and illegal dumping for either selected field screening points or major outfalls covered in the permit application. At a minimum, a screening analysis shall include a narrative description, for either each field screening point or major outfall, of visual observations made during dry weather periods. If any flow is observed, two grab samples shall be collected during a 24 hour period with a minimum period of four hours between samples. For all such samples, a narrative description of the color, odor, turbidity, the presence of an oil sheen or surface scum as well as any other relevant observations regarding the potential presence of non-storm water discharges or illegal dumping shall be provided. In addition, a narrative description of the results of a field analysis using suitable methods to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided along with a description of the flow rate. Where the field analysis does not involve analytical methods approved under 40 CFR part 136, the applicant shall provide a description of the method used including the name of the manufacturer of the test method along with the range and accuracy of the test. Field screening points shall be either major outfalls or other outfall points (or any other point of access such as manholes) randomly located throughout the storm sewer system by placing a grid over a drainage system map and identifying those cells of the grid which contain a segment of the storm sewer system or major outfall. The field screening points shall be established using the following guidelines and criteria:

- (1) A grid system consisting of perpendicular north-south and east-west lines spaced  $\frac{1}{4}$  mile apart shall be overlaid on a map of the municipal storm sewer system, creating a series of cells;
- (2) All cells that contain a segment of the storm sewer system shall be identified; one field screening point shall be selected in each cell; major outfalls may be used as field screening points;
- (3) Field screening points should be located downstream of any sources of suspected illegal or illicit activity;
- (4) Field screening points shall be located to the degree practicable at the farthest manhole or other accessible location downstream in the system, within each cell; however, safety of personnel and accessibility of the location should be considered in making this determination;
- (5) Hydrological conditions; total drainage area of the site; population density of the site; traffic density; age of the structures or buildings in the area; history of the area; and land use types;
- (6) For medium municipal separate storm sewer systems, no more than 250 cells need to have identified field screening points; in large municipal separate storm sewer systems, no more than 500 cells need to have identified field screening points; cells established by the grid that contain no storm sewer segments will be eliminated from consideration; if fewer than 250 cells in medium municipal sewers are created, and fewer than 500 in large systems are created by the overlay on the municipal sewer map, then all those cells which contain a segment



of the sewer system shall be subject to field screening (unless access to the separate storm sewer system is impossible); and

(7) Large or medium municipal separate storm sewer systems which are unable to utilize the procedures described in paragraphs (d)(1)(iv)(D) (1) through (6) of this section, because a sufficiently detailed map of the separate storm sewer systems is unavailable, shall field screen no more than 500 or 250 major outfalls respectively (or all major outfalls in the system, if less); in such circumstances, the applicant shall establish a grid system consisting of north-south and east-west lines spaced  $\frac{1}{4}$  mile apart as an overlay to the boundaries of the municipal storm sewer system, thereby creating a series of cells; the applicant will then select major outfalls in as many cells as possible until at least 500 major outfalls (large municipalities) or 250 major outfalls (medium municipalities) are selected; a field screening analysis shall be undertaken at these major outfalls.

(E) Characterization plan. Information and a proposed program to meet the requirements of paragraph (d)(2)(iii) of this section. Such description shall include: the location of outfalls or field screening points appropriate for representative data collection under paragraph (d)(2)(iii)(A) of this section, a description of why the outfall or field screening point is representative, the seasons during which sampling is intended, a description of the sampling equipment. The proposed location of outfalls or field screening points for such sampling should reflect water quality concerns (see paragraph (d)(1)(iv)(C) of this section) to the extent practicable.

(v) Management programs.

(A) A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls, that are currently being implemented. Such controls may include, but are not limited to: Procedures to control pollution resulting from construction activities; floodplain management controls; wetland protection measures; best management practices for new subdivisions; and emergency spill response programs. The description may address controls established under State law as well as local requirements.

(B) A description of the existing program to identify illicit connections to the municipal storm sewer system. The description should include inspection procedures and methods for detecting and preventing illicit discharges, and describe areas where this program has been implemented.

(vi) Fiscal resources.

(A) A description of the financial resources currently available to the municipality to complete part 2 of the permit application. A description of the municipality's budget for existing storm water programs, including an overview of the municipality's financial resources and budget, including overall indebtedness and assets, and sources of funds for storm water programs.

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) Source identification. The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(1) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) Characterization data. When “quantitative data” for a pollutant are required under paragraph (d)(2)(iii)(A)(3) of this section, the applicant must collect a sample of effluent in accordance with [40 CFR 122.21\(g\)\(7\)](#) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(1) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at [§ 122.21\(g\)\(7\)](#) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(3) For samples collected and described under paragraphs (d)(2)(iii)(A)(1) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)

Total dissolved solids (TDS)

COD

BOD<sub>5</sub>

Oil and grease

Fecal coliform

Fecal streptococcus

pH

Total Kjeldahl nitrogen

Nitrate plus nitrite

Dissolved phosphorus

Total ammonia plus organic nitrogen

Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD<sub>5</sub>, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(1) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(1) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures

for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at [40 CFR 35.2005\(20\)](#)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(1) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD<sub>5</sub>, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7)(vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(1) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) Assessment of controls. Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) Fiscal analysis. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements. The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

(e) Application deadlines. Any operator of a point source required to obtain a permit under this section that does not have an effective NPDES permit authorizing discharges from its storm water outfalls shall submit an application in accordance with the following deadlines:

(1) Storm water discharges associated with industrial activity.

(i) Except as provided in paragraph (e)(1)(ii) of this section, for any storm water discharge associated with industrial activity identified in paragraphs (b)(14)(i) through (xi) of this section, that is not part of a group application as described in paragraph (c)(2) of this section or that is not authorized by a storm water general permit, a permit application made pursuant to paragraph (c) of this section must be submitted to the Director by October 1, 1992;

(ii) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 that is not authorized by a general or individual permit, other than an airport, powerplant, or uncontrolled sanitary landfill, the permit application must be submitted to the Director by March 10, 2003.

(2) For any group application submitted in accordance with paragraph (c)(2) of this section:

(i) Part 1.

(A) Except as provided in paragraph (e)(2)(i)(B) of this section, part 1 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by September 30, 1991;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 18, 1992.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(ii) Based on information in the part 1 application, the Director will approve or deny the members in the group application within 60 days after receiving part 1 of the group application.

(iii) Part 2.

(A) Except as provided in paragraph (e)(2)(iii)(B) of this section, part 2 of the application shall be submitted to the Director, Office of Wastewater Enforcement and Compliance by October 1, 1992;

(B) Any municipality with a population of less than 250,000 shall not be required to submit a part 1 application before May 17, 1993.

(C) For any storm water discharge associated with industrial activity from a facility that is owned or operated by a municipality with a population of less than 100,000 other than an airport, powerplant, or uncontrolled sanitary landfill, permit applications requirements are reserved.

(iv) Rejected facilities.

(A) Except as provided in paragraph (e)(2)(iv)(B) of this section, facilities that are rejected as members of the group shall submit an individual application (or obtain coverage under an applicable general permit) no later than 12 months after the date of receipt of the notice of rejection or October 1, 1992, whichever comes first.

(B) Facilities that are owned or operated by a municipality and that are rejected as members of part 1 group application shall submit an individual application no later than 180 days after the date of receipt of the notice of rejection or October 1, 1992, whichever is later.

(v) A facility listed under paragraph (b)(14) (i)–(xi) of this section may add on to a group application submitted in accordance with paragraph (e)(2)(i) of this section at the discretion of the Office of Water Enforcement and Permits, and only upon a showing of good cause by the facility and the group applicant; the request for the addition of the facility shall be made no later than February 18, 1992; the addition of the facility shall not cause the percentage of the facilities that are required to submit quantitative data to be less than 10%, unless there are over 100 facilities in the group that are submitting quantitative data; approval to become part of group application must be obtained from the group or the trade association representing the individual facilities.

(3) For any discharge from a large municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by November 18, 1991;



(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application;

(iii) Part 2 of the application shall be submitted to the Director by November 16, 1992.

(4) For any discharge from a medium municipal separate storm sewer system;

(i) Part 1 of the application shall be submitted to the Director by May 18, 1992.

(ii) Based on information received in the part 1 application the Director will approve or deny a sampling plan under paragraph (d)(1)(iv)(E) of this section within 90 days after receiving the part 1 application.

(iii) Part 2 of the application shall be submitted to the Director by May 17, 1993.

(5) A permit application shall be submitted to the Director within 180 days of notice, unless permission for a later date is granted by the Director (see § 124.52(c) of this chapter), for:

(i) A storm water discharge that the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States (see paragraphs (a)(1)(v) and (b)(15)(ii) of this section);

(ii) A storm water discharge subject to paragraph (c)(1)(v) of this section.

(6) Facilities with existing NPDES permits for storm water discharges associated with industrial activity shall maintain existing permits. Facilities with permits for storm water discharges associated with industrial activity which expire on or after May 18, 1992 shall submit a new application in accordance with the requirements of 40 CFR 122.21 and 40 CFR 122.26(c) (Form 1, Form 2F, and other applicable Forms) 180 days before the expiration of such permits.

(7) The Director shall issue or deny permits for discharges composed entirely of storm water under this section in accordance with the following schedule:

(i)(A) Except as provided in paragraph (e)(7)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than October 1, 1993, or, for new sources or existing sources which fail to submit a complete permit application by October 1, 1992, one year after receipt of a complete permit application;

(B) For any municipality with a population of less than 250,000 which submits a timely Part I group application under paragraph (e)(2)(i)(B) of this section, the Director shall issue or deny permits for storm water discharges associated with industrial activity no later than May 17, 1994, or, for any such municipality which fails to submit a complete Part II group permit application by May 17, 1993, one year after receipt of a complete permit application;

(ii) The Director shall issue or deny permits for large municipal separate storm sewer systems no later than November 16, 1993, or, for new sources or existing sources which fail to submit a complete permit application by November 16, 1992, one year after receipt of a complete permit application;

(iii) The Director shall issue or deny permits for medium municipal separate storm sewer systems no later than May 17, 1994, or, for new sources or existing sources which fail to submit a complete permit application by May 17, 1993, one year after receipt of a complete permit application.

(8) For any storm water discharge associated with small construction activities identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources require permit authorization by March 10, 2003, unless designated for coverage before then.

(9) For any discharge from a regulated small MS4, the permit application made under § 122.33 must be submitted to the Director by:

(i) March 10, 2003 if designated under § 122.32(a)(1) unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under § 123.35(d)(3) (see § 122.33(c)(1)); or

(ii) Within 180 days of notice, unless the NPDES permitting authority grants a later date, if designated under § 122.32(a)(2) (see § 122.33(c)(2)).

(f) Petitions.

(1) Any operator of a municipal separate storm sewer system may petition the Director to require a separate NPDES permit (or a permit issued under an approved NPDES State program) for any discharge into the municipal separate storm sewer system.

(2) Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) The owner or operator of a municipal separate storm sewer system may petition the Director to reduce the Census estimates of the population served by such separate system to account for storm water discharged to combined sewers as defined by 40 CFR 35.2005(b)(11) that is treated in a publicly owned treatment works. In municipalities in which combined sewers are operated, the Census estimates of population may be reduced proportional to the fraction, based on estimated lengths, of the length of combined sewers over the sum of the length of combined sewers and municipal separate storm sewers where an applicant has submitted the NPDES permit number associated with each discharge point and a map indicating areas served by combined sewers and the location of any combined sewer overflow discharge point.

(4) Any person may petition the Director for the designation of a large, medium, or small municipal separate storm sewer system as defined by paragraph (b)(4)(iv), (b)(7)(iv), or (b)(16) of this section.

(5) The Director shall make a final determination on any petition received under this section within 90 days after receiving the petition with the exception of petitions to designate a small MS4 in which case the Director shall make a final determination on the petition within 180 days after its receipt.

(g) Conditional exclusion for “no exposure” of industrial activities and materials to storm water. Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is “no exposure” of industrial materials and activities to rain, snow, snowmelt and/or runoff, and the discharger satisfies the conditions in paragraphs (g)(1) through (g)(4) of this section. “No exposure” means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and/or runoff. Industrial materials or activities include, but are not limited to, material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products. Material handling activities include the storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product or waste product.

(1) Qualification. To qualify for this exclusion, the operator of the discharge must:

(i) Provide a storm resistant shelter to protect industrial materials and activities from exposure to rain, snow, snow melt, and runoff;

(ii) Complete and sign (according to § 122.22) a certification that there are no discharges of storm water contaminated by exposure to industrial materials and activities from the entire facility, except as provided in paragraph (g)(2) of this section;

(iii) Submit the signed certification to the NPDES permitting authority once every five years. As of December 21, 2020 all certifications submitted in compliance with this section must be submitted electronically by the owner or operator to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, owners or operators may be required to report electronically if specified by a particular permit or if required to do so by state law.

(iv) Allow the Director to inspect the facility to determine compliance with the “no exposure” conditions;

(v) Allow the Director to make any “no exposure” inspection reports available to the public upon request; and

(vi) For facilities that discharge through an MS4, upon request, submit a copy of the certification of “no exposure” to the MS4 operator, as well as allow inspection and public reporting by the MS4 operator.

(2) Industrial materials and activities not requiring storm resistant shelter. To qualify for this exclusion, storm resistant shelter is not required for:

(i) Drums, barrels, tanks, and similar containers that are tightly sealed, provided those containers are not deteriorated and do not leak (“Sealed” means banded or otherwise secured and without operational taps or valves);

(ii) Adequately maintained vehicles used in material handling; and

(iii) Final products, other than products that would be mobilized in storm water discharge (e.g., rock salt).

(3) Limitations.

(i) Storm water discharges from construction activities identified in paragraphs (b)(14)(x) and (b)(15) are not eligible for this conditional exclusion.

(ii) This conditional exclusion from the requirement for an NPDES permit is available on a facility-wide basis only, not for individual outfalls. If a facility has some discharges of storm water that would otherwise be “no exposure” discharges, individual permit requirements should be adjusted accordingly.

(iii) If circumstances change and industrial materials or activities become exposed to rain, snow, snow melt, and/or runoff, the conditions for this exclusion no longer apply. In such cases, the discharge becomes subject to enforcement for unpermitted discharge. Any conditionally exempt discharger who anticipates changes in circumstances should apply for and obtain permit authorization prior to the change of circumstances.

(iv) Notwithstanding the provisions of this paragraph, the NPDES permitting authority retains the authority to require permit authorization (and deny this exclusion) upon making a determination that the discharge causes, has a reasonable potential to cause, or contributes to an instream excursion above an applicable water quality standard, including designated uses.

(4) Certification. The no exposure certification must require the submission of the following information, at a minimum, to aid the NPDES permitting authority in determining if the facility qualifies for the no exposure exclusion:

(i) The legal name, address and phone number of the discharger (see § 122.21(b));

(ii) The facility name and address, the county name and the latitude and longitude where the facility is located;

(iii) The certification must indicate that none of the following materials or activities are, or will be in the foreseeable future, exposed to precipitation:

(A) Using, storing or cleaning industrial machinery or equipment, and areas where residuals from using, storing or cleaning industrial machinery or equipment remain and are exposed to storm water;

- (B) Materials or residuals on the ground or in storm water inlets from spills/leaks;
- (C) Materials or products from past industrial activity;
- (D) Material handling equipment (except adequately maintained vehicles);
- (E) Materials or products during loading/unloading or transporting activities;
- (F) Materials or products stored outdoors (except final products intended for outside use, e.g., new cars, where exposure to storm water does not result in the discharge of pollutants);
- (G) Materials contained in open, deteriorated or leaking storage drums, barrels, tanks, and similar containers;
- (H) Materials or products handled/stored on roads or railways owned or maintained by the discharger;
- (I) Waste material (except waste in covered, non-leaking containers, e.g., dumpsters);
- (J) Application or disposal of process wastewater (unless otherwise permitted); and
- (K) Particulate matter or visible deposits of residuals from roof stacks/vents not otherwise regulated, i.e., under an air quality control permit, and evident in the storm water outflow;

(iv) All “no exposure” certifications must include the following certification statement, and be signed in accordance with the signatory requirements of § 122.22: “I certify under penalty of law that I have read and understand the eligibility requirements for claiming a condition of “no exposure” and obtaining an exclusion from NPDES storm water permitting; and that there are no discharges of storm water contaminated by exposure to industrial activities or materials from the industrial facility identified in this document (except as allowed under paragraph (g)(2)) of this section. I understand that I am obligated to submit a no exposure certification form once every five years to the NPDES permitting authority and, if requested, to the operator of the local MS4 into which this facility discharges (where applicable). I understand that I must allow the NPDES permitting authority, or MS4 operator where the discharge is into the local MS4, to perform inspections to confirm the condition of no exposure and to make such inspection reports publicly available upon request. I understand that I must obtain coverage under an NPDES permit prior to any point source discharge of storm water from the facility. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly involved in gathering the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

**Credits**

[[54 FR 255](#), Jan. 4, 1989; [55 FR 48063](#), Nov. 16, 1990; [56 FR 12100](#), March 21, 1991; [56 FR 56554](#), Nov. 5, 1991; [57 FR 11412](#), April 2, 1992; [57 FR 60447](#), Dec. 18, 1992; [60 FR 17956](#), April 7, 1995; [60 FR 40235](#), Aug. 7, 1995; [64 FR 68838](#), Dec. 8, 1999; [65 FR 30907](#), May 15, 2000; [68 FR 11329](#), March 10, 2003; [70 FR 11563](#), March 9, 2005; [71 FR 33639](#), June 12, 2006; [77 FR 72974](#), Dec. 7, 2012; [80 FR 64096](#), Oct. 22, 2015]

AUTHORITY: The Clean Water Act, [33 U.S.C. 1251 et seq.](#)

[Notes of Decisions \(78\)](#)

Current through April 16, 2020, [85 FR 21305](#).

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End of Document

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Unconstitutional or Preempted Prior Version Held Unconstitutional by [California School Boards Assn. v. State of California](#), Cal.App. 3 Dist., Mar. 09, 2009

[West's Annotated California Codes](#)  
[Government Code \(Refs & Annos\)](#)  
[Title 2. Government of the State of California](#)  
[Division 4. Fiscal Affairs \(Refs & Annos\)](#)  
[Part 7. State-Mandated Local Costs \(Refs & Annos\)](#)  
[Chapter 4. Identification and Payment of Costs Mandated by the State \(Refs & Annos\)](#)  
[Article 1. Commission Procedure \(Refs & Annos\)](#)

West's Ann.Cal.Gov.Code § 17556

§ 17556. Findings; costs not mandated upon certain conditions

Effective: October 19, 2010

[Currentness](#)

The commission shall not find costs mandated by the state, as defined in [Section 17514](#), in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:

- (a) The claim is submitted by a local agency or school district that requests or previously requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this subdivision. This subdivision applies regardless of whether the resolution from the governing body or a letter from a delegated representative of the governing body was adopted or sent prior to or after the date on which the statute or executive order was enacted or issued.
- (b) The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued.
- (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
- (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. This subdivision applies regardless of whether a statute, executive order, or appropriation in the Budget Act or other bill that either provides for offsetting savings that result in no net costs or provides for additional revenue specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

(f) The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

#### Credits

(Added by Stats.1984, c. 1459, § 1. Amended by Stats.1986, c. 879, § 4; Stats.1989, c. 589, § 1; Stats.2004, c. 895 (A.B.2855), § 14; Stats.2005, c. 72 (A.B.138), § 7, eff. July 19, 2005; Stats.2006, c. 538 (S.B.1852), § 279; Stats.2010, c. 719 (S.B.856), § 31, eff. Oct. 19, 2010.)

#### Editors' Notes

#### VALIDITY

*A prior version of this section was held unconstitutional as impermissibly broad, in the decision of California School Boards Assn. v. State of California (App. 3 Dist. 2009) 90 Cal.Rptr.3d 501, 171 Cal.App.4th 1183.*

#### Notes of Decisions (23)

West's Ann. Cal. Gov. Code § 17556, CA GOVT § 17556  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess



West's Annotated California Codes  
Government Code (Refs & Annos)  
Title 5. Local Agencies (Refs & Annos)  
Division 2. Cities, Counties, and Other Agencies (Refs & Annos)  
Part 1. Powers and Duties Common to Cities, Counties, and Other Agencies (Refs & Annos)  
Chapter 4. Financial Affairs (Refs & Annos)  
Article 4.6. Proposition 218 Omnibus Implementation Act (Refs & Annos)

West's Ann.Cal.Gov.Code § 53753

§ 53753. Notice, protest, and hearing requirements

Effective: January 1, 2010

Currentness

(a) The notice, protest, and hearing requirements imposed by this section supersede any statutory provisions applicable to the levy of a new or increased assessment that is in existence on the effective date of this section, whether or not that provision is in conflict with this article. Any agency that complies with the notice, protest, and hearing requirements of this section shall not be required to comply with any other statutory notice, protest, and hearing requirements that would otherwise be applicable to the levy of a new or increased assessment, with the exception of Division 4.5 (commencing with [Section 3100](#)) of the [Streets and Highways Code](#). If the requirements of that division apply to the levy of a new or increased assessment, the levying agency shall comply with the notice, protest, and hearing requirements imposed by this section as well as with the requirements of that division.

(b) Prior to levying a new or increased assessment, or an existing assessment that is subject to the procedures and approval process set forth in [Section 4 of Article XIII D of the California Constitution](#), an agency shall give notice by mail to the record owner of each identified parcel. Each notice shall include the total amount of the proposed assessment chargeable to the entire district, the amount chargeable to the record owner's parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, and 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 for the completion, return, and tabulation of the assessment ballots required pursuant to subdivision (c), including a statement that the assessment shall not be imposed if the ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment, with ballots weighted according to the proportional financial obligation of the affected property. An agency shall give notice by mail at least 45 days prior to the date of the public hearing upon the proposed assessment. On the face of the envelope mailed to the record owner, in which the notice and ballot are enclosed, there shall appear in substantially the following form in no smaller than 16-point bold type: "OFFICIAL BALLOT ENCLOSED." An agency may additionally place the phrase "OFFICIAL BALLOT ENCLOSED" on the face of the envelope mailed to the recorded owner, in which the notice and ballot are enclosed, in a language or languages other than English.

(c) Each notice given pursuant to subdivision (b) shall contain an assessment ballot that includes the agency's address for receipt of the ballot and a place where the person returning the assessment ballot may indicate his or her name, a reasonable identification of the parcel, and his or her support or opposition to the proposed assessment. Each assessment ballot shall be in a form that conceals its contents once it is sealed by the person submitting the assessment ballot. Each assessment ballot shall be signed and either mailed or otherwise delivered to the address indicated on the assessment ballot. Regardless of the method of delivery, all assessment ballots shall be received at the address indicated, or the site of the public testimony, in order to be included in the tabulation of a majority protest pursuant to subdivision (e). Assessment ballots shall remain sealed until the

tabulation of ballots pursuant to subdivision (e) commences, provided that an assessment ballot may be submitted, or changed, or withdrawn by the person who submitted the ballot prior to the conclusion of the public testimony on the proposed assessment at the hearing required pursuant to subdivision (d). An agency may provide an envelope for the return of the assessment ballot, provided that if the return envelope is opened by the agency prior to the tabulation of ballots pursuant to subdivision (e), the enclosed assessment ballot shall remain sealed as provided in this section.

(d) At the time, date, and place stated in the notice mailed pursuant to subdivision (b), the agency shall conduct a public hearing upon the proposed assessment. At the public hearing, the agency shall consider all objections or protests, if any, to the proposed assessment. At the public hearing, any person shall be permitted to present written or oral testimony. The public hearing may be continued from time to time.

(e)(1) At the conclusion of the public hearing conducted pursuant to subdivision (d), an impartial person designated by the agency who does not have a vested interest in the outcome of the proposed assessment shall tabulate the assessment ballots submitted, and not withdrawn, in support of or opposition to the proposed assessment. For the purposes of this section, an impartial person includes, but is not limited to, the clerk of the agency. If the agency uses agency personnel for the ballot tabulation, or if the agency contracts with a vendor for the ballot tabulation and the vendor or its affiliates participated in the research, design, engineering, public education, or promotion of the assessment, the ballots shall be unsealed and tabulated in public view at the conclusion of the hearing so as to permit all interested persons to meaningfully monitor the accuracy of the tabulation process.

(2) The governing body of the agency may, if necessary, continue the tabulation at a different time or location accessible to the public, provided the governing body announces the time and location at the hearing. The impartial person may use technological methods of tabulating the assessment ballots, including, but not limited to, punchcard or optically readable (bar-coded) assessment ballots. During and after the tabulation, the assessment ballots and the information used to determine the weight of each ballot shall be treated as disclosable public records, as defined in [Section 6252](#), and equally available for inspection by the proponents and the opponents of the proposed assessment. The ballots shall be preserved for a minimum of two years, after which they may be destroyed as provided in [Sections 26202](#), [34090](#), and [60201](#).

(3) In the event that more than one of the record owners of an identified parcel submits an assessment ballot, the amount of the proposed assessment to be imposed upon the identified parcel shall be allocated to each ballot submitted in proportion to the respective record ownership interests or, if the ownership interests are not shown on the record, as established to the satisfaction of the agency by documentation provided by those record owners.

(4) A majority protest exists if the assessment ballots submitted, and not withdrawn, in opposition to the proposed assessment exceed the assessment ballots submitted, and not withdrawn, in its favor, weighting those assessment ballots by the amount of the proposed assessment to be imposed upon the identified parcel for which each assessment ballot was submitted.

(5) If there is a majority protest against the imposition of a new assessment, or the extension of an existing assessment, or an increase in an existing assessment, the agency shall not impose, extend, or increase the assessment.

(6) The majority protest proceedings described in this subdivision shall not constitute an election or voting for purposes of Article II of the California Constitution or of the Elections Code.

**Credits**

(Added by Stats.1997, c. 38 (S.B.919), § 5, eff. July 1, 1997. Amended by Stats.2000, c. 220 (S.B.1477), § 1; Stats.2001, c. 636 (S.B.539), § 1; Stats.2007, c. 670 (A.B.373), § 113; Stats.2009, c. 580 (S.B.321), § 1.)


[Notes of Decisions \(14\)](#)

West's Ann. Cal. Gov. Code § 53753, CA GOVT § 53753  
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 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

West's Annotated California Codes  
Government Code (Refs & Annos)  
Title 7. Planning and Land Use (Refs & Annos)  
Division 1. Planning and Zoning (Refs & Annos)  
Chapter 5. Fees for Development Projects (Refs & Annos)

West's Ann.Cal.Gov.Code § 66000

§ 66000. Definitions

Effective: January 1, 2007

[Currentness](#)

As used in this chapter, the following terms have the following meanings:

(a) “Development project” means any project undertaken for the purpose of development. “Development project” includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.

(b) “Fee” means a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in [Section 66477](#), fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 (commencing with [Section 65864](#)) of Chapter 4, or fees collected pursuant to agreements with redevelopment agencies that provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law ([Part 1 \(commencing with Section 33000\)](#) of Division 24 of the Health and Safety Code).

(c) “Local agency” means a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state.

(d) “Public facilities” includes public improvements, public services, and community amenities.

#### **Credits**

(Added by [Stats.1987, c. 927, § 1, operative Jan. 1, 1989](#). Amended by [Stats.1988, c. 418, § 7](#); [Stats.1990, c. 1572 \(A.B.3228\), § 14](#); [Stats.1996, c. 549 \(A.B.3081\), § 1](#); [Stats.2006, c. 538 \(S.B.1852\), § 319](#).)

[Notes of Decisions \(36\)](#)

West's Ann. Cal. Gov. Code § 66000, CA GOVT § 66000

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Chapter 5. Fees for Development Projects (Refs & Annos)

West's Ann.Cal.Gov.Code § 66001

§ 66001. Fee as condition of approval; agency requirements; public facilities

Effective: January 1, 2007

[Currentness](#)

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in [Section 65403](#) or [66002](#), may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to [Section 66006](#).

(d)(1) For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make all of the following findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted:

(A) Identify the purpose to which the fee is to be put.

(B) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.

(C) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a).

(D) Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.

(2) When findings are required by this subdivision, they shall be made in connection with the public information required by [subdivision \(b\) of Section 66006](#). The findings required by this subdivision need only be made for moneys in possession of the local agency, and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date. If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).

(e) Except as provided in subdivision (f), when sufficient funds have been collected, as determined pursuant to [subparagraph \(F\) of paragraph \(1\) of subdivision \(b\) of Section 66006](#), to complete financing on incomplete public improvements identified in paragraph (2) of subdivision (a), and the public improvements remain incomplete, the local agency shall identify, within 180 days of the determination that sufficient funds have been collected, an approximate date by which the construction of the public improvement will be commenced, or shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis, the unexpended portion of the fee, and any interest accrued thereon. By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to [Section 6061](#) and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

(g) A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan.

#### Credits

(Added by [Stats.1987, c. 927, § 1, operative Jan. 1, 1989](#). Amended by [Stats.1988, c. 418, § 8](#); [Stats.1996, c. 569 \(S.B.1693\), § 1](#); [Stats.2006, c. 194 \(A.B.2751\), § 1](#).)

#### [Notes of Decisions \(93\)](#)

West's Ann. Cal. Gov. Code § 66001, CA GOVT § 66001  
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Chapter 6. General Provisions with Respect to Sewers (Refs & Annos)  
Article 4. Sanitation and Sewerage Systems (Refs & Annos)

West's Ann.Cal.Health & Safety Code § 5471

§ 5471. Power to prescribe and collect fees, tolls, rates, rentals or other charges; use of revenues; continuance of charges; new, increased, or extended assessments

Effective: January 1, 2017

[Currentness](#)

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

(b) In addition to the powers granted in the principal act, any entity shall have power, pursuant to the notice, protest, and hearing procedures in [Section 53753 of the Government Code](#), to prescribe, revise, and collect water, sewer, or water and 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.

(c) The entity may provide that the charge for the service shall be collected with the rates, tolls, and charges for any other utility, and that any or all of these charges may be billed upon the same bill. Where the charge is to be collected with the charges for any other utility service furnished by a department or agency of the entity and over which its legislative body does not exercise control, the consent of the department or agency shall be obtained prior to collecting water, sanitation, storm drainage, or sewerage charges with the charges for any other utility. Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance, and operation of water systems and sanitation, storm drainage, or sewerage facilities, to repay principal and interest on bonds issued for the construction or reconstruction of these water systems and sanitary, storm drainage, or sewerage facilities and to repay federal or state loans or advances made to the entity for the construction or reconstruction of water systems and sanitary, storm drainage, or sewerage facilities. However, the revenue shall not be used for the acquisition or construction of new local street sewers or laterals as distinguished from main trunk, interceptor, and outfall sewers.

(d) If the procedures set forth in this section as it read at the time a standby charge was established were followed, the entity may, by ordinance or resolution adopted by a two-thirds vote of the members of the legislative body thereof, continue the charge pursuant to this section in successive years at the same rate. If new, increased, or extended assessments are proposed, the entity shall comply with the notice, protest, and hearing procedures in [Section 53753 of the Government Code](#).

**Credits**

(Formerly § 5470 added by Stats.1945, c. 979, p. 1877, § 5. Amended by Stats.1949, c. 319, p. 608, § 1; Stats.1951, c. 719, p. 1984, § 1. Renumbered § 5471 and amended by Stats.1953, c. 862, p. 2206, § 1, eff. May 23, 1953. Amended by Stats.1973, c. 545, p. 1048, § 4; Stats.1988, c. 706, § 1; Stats.1991, c. 1110 (S.B.682), § 35; Stats.2007, c. 27 (S.B.444), § 11; Stats.2016, c. 366 (S.B.974), § 16, eff. Jan. 1, 2017.)

[Notes of Decisions \(30\)](#)

West's Ann. Cal. Health & Safety Code § 5471, CA HLTH & S § 5471

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Chapter 1. General Provisions (Refs & Annos)  
Article 2. General Provisions (Refs & Annos)

West's Ann.Cal.Pub.Res.Code § 40059

§ 40059. Local determinations; extent of services; means for providing services; abrogation of existing franchises, contracts, or licenses

**Currentness**

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

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

(2) Whether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. The authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance.

(b) Nothing in this division modifies or abrogates in any manner either of the following:

(1) Any franchise previously granted or extended by any county or other local governmental agency.

(2) Any contract, license, or any permit to collect solid waste previously granted or extended by a city, county, or a city and county.

**Credits**

(Added by Stats.1989, c. 1095, § 22. Amended by Stats.1990, c. 1355 (A.B.3992), § 1, eff. Sept. 27, 1990.)

**Notes of Decisions (25)**

West's Ann. Cal. Pub. Res. Code § 40059, CA PUB RES § 40059  
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West's Ann.Cal.Pub.Res.Code § 40191

§ 40191. Solid waste

Currentness

(a) Except as provided in subdivision (b), “solid waste” means all putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, dewatered, treated, or chemically fixed sewage sludge which is not hazardous waste, manure, vegetable or animal solid and semisolid wastes, and other discarded solid and semisolid wastes.

(b) “Solid waste” does not include any of the following wastes:

(1) Hazardous waste, as defined in [Section 40141](#).

(2) Radioactive waste regulated pursuant to the Radiation Control Law (Chapter 8 (commencing with [Section 114960](#)) of Part 9 of Division 104 of the Health and Safety Code).

(3) Medical waste regulated pursuant to the Medical Waste Management Act (Part 14 (commencing with [Section 117600](#)) of Division 104 of the Health and Safety Code). Untreated medical waste shall not be disposed of in a solid waste landfill, as defined in [Section 40195.1](#). Medical waste that has been treated and deemed to be solid waste shall be regulated pursuant to this division.

**Credits**

(Added by Stats.1989, c. 1096, § 2. Amended by Stats.1990, c. 1355 (A.B.3992), § 4, eff. Sept. 27, 1990; Stats.1990, c. 1614 (A.B.1641), § 16; Stats.1992, c. 54 (A.B.961), § 15, eff. May 14, 1992; Stats.1996, c. 1023 (S.B.1497), § 403, eff. Sept. 29, 1996; Stats.1996, c. 1041 (A.B.3358), § 9.)

[Notes of Decisions \(1\)](#)

West's Ann. Cal. Pub. Res. Code § 40191, CA PUB RES § 40191

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Chapter 2. Definitions (Refs & Annos)

West's Ann.Cal.Pub.Res.Code § 40195

§ 40195. Solid waste handling; handling

[Currentness](#)

“Solid waste handling” or “handling” means the collection, transportation, storage, transfer, or processing of solid wastes.

**Credits**

(Added by [Stats.1989, c. 1095, § 22.](#))

West's Ann. Cal. Pub. Res. Code § 40195, CA PUB RES § 40195

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West's Ann.Cal.Water Code § 8000

§ 8000. Status of chapter provisions

**Currentness**

The provisions of this chapter are intended to be paramount and controlling as to all matters provided for in, and as to all questions arising out of procedure under, this chapter.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8000, CA WATER § 8000  
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West's Ann.Cal.Water Code § 8001

§ 8001. Works defined

[Currentness](#)

As used in this chapter, “works” includes canals, ditches, levees, dikes, embankments, dams, machinery, and other appropriate or ancillary means of accomplishing the purposes mentioned in this chapter.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8001, CA WATER § 8001

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West's Ann.Cal.Water Code § 8002

§ 8002. City defined

[Currentness](#)

As used in this chapter, “city” means any city, town, or municipal corporation incorporated under the laws of this State.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8002, CA WATER § 8002

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West's Ann.Cal.Water Code § 8003

§ 8003. City council defined

[Currentness](#)

As used in this chapter, “city council” includes the legislative body of any city by whatever name it may be designated.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8003, CA WATER § 8003

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Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.Water Code § 8004

§ 8004. Publication; newspaper

[Currentness](#)

Every publication required by this chapter shall be made in some newspaper published in the city.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8004, CA WATER § 8004

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West's Ann.Cal.Water Code § 8005

§ 8005. Period of publication

**Currentness**

Except as otherwise specifically provided, if publication is in a daily paper the publication shall appear in at least 10 issues thereof, and if in a weekly paper in at least two issues thereof.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8005, CA WATER § 8005

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Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.Water Code § 8006

§ 8006. Beginning of publication

[Currentness](#)

No publication shall be deemed to have begun until any required preceding publication has been completed.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8006, CA WATER § 8006

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Article 1. General Provisions (Refs & Annos)

West's Ann.Cal.Water Code § 8007

§ 8007. Public works projects; criteria

Effective: May 21, 2009

[Currentness](#)

A capital improvement project undertaken by a charter city to extend that city's water, sewer, or storm drain system or similar system to a disadvantaged community in an unincorporated area shall be considered a public work for the purpose of [Section 1720 of the Labor Code](#), but any subsequent project to construct, expand, reconstruct, install, or repair such systems that have been so extended and that are conducted within that city's political boundaries shall not be considered a public work for the purpose of [Section 1720 of the Labor Code](#) as a result of the extension. For the purpose of this section, “disadvantaged community” means a disadvantaged community as defined in [Section 79505.5](#).

**Credits**

(Added by [Stats.2009-2010, 2nd Ex.Sess., c. 7 \(S.B.9\)](#), § 20, eff. May 21, 2009.)

West's Ann. Cal. Water Code § 8007, CA WATER § 8007

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Article 2. Preliminary Proceedings (Refs & Annos)

West's Ann.Cal.Water Code § 8010

§ 8010. City indebtedness; limits; purposes

**Currentness**

Any city may, pursuant to this chapter, incur indebtedness and liability, although in excess of the income and revenue provided by it for the current fiscal year, but not so that the aggregate funded indebtedness of the city exceeds 6 per cent of the assessed value of all the real and personal property in the city, for any or all, or any part of, the following purposes:

- (a) To protect the city from overflow by water.
- (b) To drain the city.
- (c) To secure an outlet for overflow water and drainage.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

**Notes of Decisions (2)**

West's Ann. Cal. Water Code § 8010, CA WATER § 8010  
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West's Ann.Cal.Water Code § 8011

§ 8011. Location of works

[Currentness](#)

The works may be situated within or without the territorial limits of the city.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8011, CA WATER § 8011

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West's Ann.Cal.Water Code § 8012

§ 8012. General plans and estimates

**Currentness**

The city council shall have some competent person make general plans and estimates of the cost of the contemplated works.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

**Notes of Decisions (1)**

West's Ann. Cal. Water Code § 8012, CA WATER § 8012

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Article 2. Preliminary Proceedings (Refs & Annos)

West's Ann.Cal.Water Code § 8013

§ 8013. Filing; compliance

[Currentness](#)

The general plans and estimates shall, after adoption, be filed in the office of the clerk of the city, and shall be substantially adhered to thereafter in proceedings under this chapter.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8013, CA WATER § 8013  
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West's Ann.Cal.Water Code § 8014

§ 8014. Ordinance of intention

**Currentness**

After the filing of the general plans and estimates, and by resolution or ordinance of intention passed at a regular meeting by a vote of two-thirds of all its members and approved by the executive of the city, the city council shall determine, if so advised, that the public good demands the construction, acquisition, and completion, or either, of the works.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8014, CA WATER § 8014

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West's Ann.Cal.Water Code § 8015

§ 8015. Cost determination

[Currentness](#)

The city council, by the same resolution or ordinance, shall determine, if so advised, that the cost of the works will be too great to be paid out of the ordinary income or revenue of the city.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8015, CA WATER § 8015  
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West's Ann.Cal.Water Code § 8016

§ 8016. Publication of ordinance

[Currentness](#)

The resolution or ordinance of intention, shall, after its passage and approval, be published.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8016, CA WATER § 8016

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West's Ann.Cal.Water Code § 8020

§ 8020. Special election

[Currentness](#)

Within one month after the publication of the resolution or ordinance of intention, and by resolution or ordinance passed at a regular meeting by a vote of two-thirds of all its members, and approved by the executive of the city, the city council shall call a special election, and submit to the qualified voters of the city the proposition to incur a debt for any or all of the purposes mentioned in this chapter which have been determined to be demanded for the public good.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8020, CA WATER § 8020  
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Article 3. Election (Refs & Annos)

West's Ann.Cal.Water Code § 8021

§ 8021. Contents of election call

**Currentness**

The resolution or ordinance calling the special election shall specify the following:

- (a) The purpose for which the indebtedness is proposed to be incurred.
- (b) The estimated cost of the things proposed.
- (c) That bonds of the city will issue in the amount of the estimated cost.
- (d) The number and character of the bonds.
- (e) The rate of interest to be paid.
- (f) The amount of the tax levy for each year during the outstanding of the bonds to be made for their payment.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8021, CA WATER § 8021  
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West's Ann.Cal.Water Code § 8022

§ 8022. Publication

[Currentness](#)

The resolution or ordinance calling the election shall be published.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8022, CA WATER § 8022

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West's Ann.Cal.Water Code § 8023

§ 8023. Notice of election

**Currentness**

The city council shall publish, after the publication of the resolution or ordinance calling the election and prior to the day of holding the special election, a notice of the election, which shall set forth substantially all the matters contained in the resolution or ordinance calling the election.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8023, CA WATER § 8023  
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West's Ann.Cal.Water Code § 8024

§ 8024. Manner of holding election

[Currentness](#)

The special election shall be held in the manner provided by law for holding elections in the city.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8024, CA WATER § 8024

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Article 3. Election (Refs & Annos)

West's Ann.Cal.Water Code § 8025

§ 8025. Required vote

[Currentness](#)

The votes of two-thirds of all the voters voting at the special election are necessary to authorize the incurring of any indebtedness or the issuance of any bonds under this chapter.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8025, CA WATER § 8025  
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Article 3. Election (Refs & Annos)

West's Ann.Cal.Water Code § 8026

§ 8026. Ordinance for issuance of bonds

**Currentness**

If two-thirds of all the votes cast at the special election are in favor of the proposition submitted, the city council may, by ordinance reciting the result of the election, provide for the issuance of the proposed bonds and any matter incidental thereto.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8026, CA WATER § 8026  
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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8030

§ 8030. Serial bonds; denominations

[Currentness](#)

All bonds issued under this chapter shall be serial bonds and of such denominations as the city council determines.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8030, CA WATER § 8030

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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8031

§ 8031. Maximum and minimum amounts

[Currentness](#)

No bond shall be for less than one hundred dollars (\$100) nor for more than one thousand dollars (\$1,000).

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8031, CA WATER § 8031

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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8032

§ 8032. Minimum annual payment

**Currentness**

Not less than one-fortieth part of the whole indebtedness evidenced by the whole of the issue of bonds shall be, by the terms of the bonds, made payable each and every year.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8032, CA WATER § 8032

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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8033

§ 8033. Terms of payment

**Currentness**

Each bond shall be made payable in lawful money of the United States on a day and at a place designated in the bond, with interest at the rate specified in the bond.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8033, CA WATER § 8033

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West's Ann.Cal.Water Code § 8034

§ 8034. Interest rate

[Currentness](#)

The interest rate shall not exceed 8 percent per annum, and shall be fixed by the city council.

**Credits**

(Added by Stats.1943, c. 369, p. 1896. Amended by Stats.1975, c. 130, p. 226, § 54.)

West's Ann. Cal. Water Code § 8034, CA WATER § 8034

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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8035

§ 8035. Place of payment

[Currentness](#)

The place of payment shall be either at the office of the treasurer of the city, or at some designated bank in San Francisco, Chicago, or New York.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8035, CA WATER § 8035  
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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8036

§ 8036. Execution

[Currentness](#)

The bonds shall be executed on the part of the city by the mayor or other executive, and the treasurer, and countersigned by the clerk of the city.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8036, CA WATER § 8036  
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West's Ann.Cal.Water Code § 8037

§ 8037. Interest coupons

[Currentness](#)

The interest coupons shall be numbered consecutively and signed by the treasurer.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8037, CA WATER § 8037

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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8038

§ 8038. Issuance; sale

[Currentness](#)

Any of the bonds may be issued and sold by the city council at not less than its face value.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8038, CA WATER § 8038

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Article 4. Bonds (Refs & Annos)

West's Ann.Cal.Water Code § 8039

§ 8039. Disposition of proceeds

[Currentness](#)

The proceeds of the sale of the bonds shall be deposited in the city treasury to the credit of a designated fund and shall be applied exclusively to the purposes and objects for which the electors have voted to incur indebtedness or liability until the purposes and objects are accomplished, after which the surplus, if any, may be transferred to the general fund of the city.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8039, CA WATER § 8039

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Article 5. Powers of City Council (Refs & Annos)

West's Ann.Cal.Water Code § 8050

§ 8050. Rules; employees; protection of city's rights

[Currentness](#)

The city council of every city in or for which any works are constructed for the purposes specified in this chapter, and for which indebtedness has been incurred under the provisions of this chapter may do any of the following:

- (a) Make all needed rules and regulations for acquisition, construction, and completion of the works.
- (b) Appoint all necessary agents, superintendents, and engineers to supervise and construct the works.
- (c) Protect and preserve the rights and interests of the city in respect to the works.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8050, CA WATER § 8050  
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Article 5. Powers of City Council (Refs & Annos)

West's Ann.Cal.Water Code § 8051

§ 8051. Letting contracts

[Currentness](#)

All contracts for the works shall be let, in such parcels as the city council determines, to the lowest responsible bidder, after notice inviting sealed proposals has been published.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8051, CA WATER § 8051  
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Article 5. Powers of City Council (Refs & Annos)

West's Ann.Cal.Water Code § 8052

§ 8052. Security; performance bond

[Currentness](#)

Security or bonds may be required in order to guarantee good faith in bidding and in the performance of contracts, or either, in such amount as the city council determines.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8052, CA WATER § 8052  
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Article 5. Powers of City Council (Refs & Annos)

West's Ann.Cal.Water Code § 8053

§ 8053. Rejection of bids

[Currentness](#)

The city council may reject any or all bids.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8053, CA WATER § 8053

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Article 5. Powers of City Council (Refs & Annos)

West's Ann.Cal.Water Code § 8054

§ 8054. Additional bonds for care of public funds

**Currentness**

The city council may, by resolution, require the treasurer of the city to give additional bonds for the safe custody and care of public funds derived under this chapter.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8054, CA WATER § 8054

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Article 6. Taxation (Refs & Annos)

West's Ann.Cal.Water Code § 8060

§ 8060. Annual levy

**Currentness**

The city council, at the time of fixing the general tax levy, and in the manner provided for the general tax levy, shall levy and collect each year for the term of 40 years, a tax sufficient to pay the annual interest on the bonds and also one-fortieth part of the aggregate amount of the indebtedness.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8060, CA WATER § 8060  
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Article 6. Taxation (Refs & Annos)

West's Ann.Cal.Water Code § 8061

§ 8061. Additional tax; collection

**Currentness**

The taxes required by this chapter to be levied and collected shall be in addition to all other taxes levied for municipal purposes, and shall be collected at the same time and in the same manner as other municipal taxes are collected.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8061, CA WATER § 8061

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Article 1. General Powers Relating to Flood Control (Refs & Annos)

West's Ann.Cal.Water Code § 8100

§ 8100. Appropriation of funds; purposes

**Currentness**

Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors, in their respective counties, may appropriate and expend money from the general fund of the county for any of the following purposes in connection with streams or rivers in the county:

- (a) The construction of works, improvements, levees or check dams to prevent overflow and flooding.
- (b) The protection and reforestation of watersheds.
- (c) The conservation of the flood waters.
- (d) The making of all surveys, maps and plats necessary to carry out any work, construction or improvement authorized by this article.
- (e) The carrying out of any work, construction or improvement authorized by this article outside the county if the rivers or streams affected flow in or through more than one county.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

**Notes of Decisions (3)**

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Article 2. Flood Control Work Outside of County (Refs & Annos)

West's Ann.Cal.Water Code § 8101

§ 8101. Appropriation of funds; purposes

**Currentness**

A board of supervisors may appropriate and expend money from the general or other appropriate funds of the county for the construction of works, improvements, levees or check dams to prevent the overflow and flooding of streams and rivers in the county, and for that purpose may construct works, improvements, levees or check dams outside the county.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8101, CA WATER § 8101

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Article 2. Flood Control Work Outside of County (Refs & Annos)

West's Ann.Cal.Water Code § 8102

§ 8102. Channels, streams, and rivers

**Currentness**

Work under this article may be done upon channels, streams or rivers which flow through or lie in more than one county, or where the work is reasonably necessary for the control of flood waters in the county upon a channel, river or stream which does not lie or flow in or through two or more counties.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8102, CA WATER § 8102  
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Article 2. Flood Control Work Outside of County (Refs & Annos)

West's Ann.Cal.Water Code § 8103

§ 8103. Highways, bridges, and other public works

**Currentness**

In connection with flood control work under this article, whether done by the county or by any district therein or agency thereof, highways, bridges and other public works affected thereby or which will be of public benefit, whether located in the county or wholly or partially in incorporated or unincorporated territory outside the county, may be constructed, reconstructed, remodeled, maintained, repaired or demolished.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8103, CA WATER § 8103

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West's Ann.Cal.Water Code § 8104

§ 8104. Expense of flood control work

**Currentness**

The work described in the next preceding section may be done at the expense of the county doing the flood control work, or of any district or agency therein which is doing the work. The legislative bodies of the counties and cities affected may provide by agreement that the work be done at the joint expense of the county or counties and city or cities in which the work is done.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8104, CA WATER § 8104

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West's Ann.Cal.Water Code § 8105

§ 8105. Prohibition of taxes and special assessments

**Currentness**

Nothing in this article shall be construed to authorize the imposition of any tax or special assessment either by the county or any district in, or agency of, the county on any property outside the county doing the work whether the work is done directly by the county or by any district in, or agency of the county.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8105, CA WATER § 8105  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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West's Annotated California Codes  
Water Code (Refs & Annos)  
Division 5. Flood Control (Refs & Annos)  
Part 1. Local Flood Control (Refs & Annos)  
Chapter 2. Flood Control in Counties (Refs & Annos)  
Article 2. Flood Control Work Outside of County (Refs & Annos)

West's Ann.Cal.Water Code § 8106

§ 8106. Work outside county

[Currentness](#)

Nothing in this article shall be construed to authorize the doing of any work outside the county without the consent of the legislative body of the county in which the work is to be done if in unincorporated territory or of the legislative body of any city in which any of the works are situated in whole or in part.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8106, CA WATER § 8106

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West's Annotated California Codes  
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Chapter 2. Flood Control in Counties (Refs & Annos)  
Article 3. County Flood Control Districts (Refs & Annos)

West's Ann.Cal.Water Code § 8110

§ 8110. Purposes

[Currentness](#)

The board of supervisors may provide by ordinance for the organization and government of districts for the following purposes:

- (a) To protect and preserve the banks of rivers and streams and lands lying contiguous thereto from injury by overflow or washing.
- (b) To provide for the improvement of rivers and streams.
- (c) To prevent the obstruction of rivers and streams.
- (d) To assess, levy and collect within each district a tax for the district.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

[Notes of Decisions \(11\)](#)

West's Ann. Cal. Water Code § 8110, CA WATER § 8110  
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

West's Annotated California Codes  
Water Code (Refs & Annos)  
Division 5. Flood Control (Refs & Annos)  
Part 1. Local Flood Control (Refs & Annos)  
Chapter 2. Flood Control in Counties (Refs & Annos)  
Article 4. Improvement of Non-Navigable Streams (Refs & Annos)

West's Ann.Cal.Water Code § 8125

§ 8125. Non-navigable streams defined

[Currentness](#)

“Non-navigable streams,” as used in this article, means streams and washes in a county which are not declared by law to be navigable and which are not in fact navigable for commercial purposes.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8125, CA WATER § 8125

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West's Annotated California Codes  
Water Code (Refs & Annos)  
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Chapter 2. Flood Control in Counties (Refs & Annos)  
Article 4. Improvement of Non-Navigable Streams (Refs & Annos)

West's Ann.Cal.Water Code § 8126

§ 8126. Powers of board of supervisors

**Currentness**

The board of supervisors may provide for widening, deepening, straightening, removing obstructions from, and otherwise improving non-navigable streams the overflow of which interferes with highways, and for protecting the banks and adjacent lands from overflow of non-navigable streams.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8126, CA WATER § 8126

Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

West's Annotated California Codes  
Water Code (Refs & Annos)  
Division 5. Flood Control (Refs & Annos)  
Part 1. Local Flood Control (Refs & Annos)  
Chapter 2. Flood Control in Counties (Refs & Annos)  
Article 4. Improvement of Non-Navigable Streams (Refs & Annos)

West's Ann.Cal.Water Code § 8127

§ 8127. Regulations

[Currentness](#)

The board may make regulations for the use of the streams and the repair and control of the works.

**Credits**

(Added by Stats.1943, c. 369, p. 1896.)

West's Ann. Cal. Water Code § 8127, CA WATER § 8127

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West's Annotated California Codes

Water Code (Refs & Annos)

Division 7. Water Quality (Refs & Annos)

Chapter 5.5. Compliance with the Provisions of the Federal Water Pollution Control Act as Amended in 1972 (Refs & Annos)

West's Ann.Cal.Water Code § 13383

§ 13383. Monitoring, inspection, entry, reporting, and recordkeeping requirements; establishment and maintenance; inspections

Effective: January 1, 2004

[Currentness](#)

(a) The state board or a regional board may establish monitoring, inspection, entry, reporting, and recordkeeping requirements, as authorized by [Section 13160](#), [13376](#), or [13377](#) or by subdivisions (b) and (c) of this section, for any person who discharges, or proposes to discharge, to navigable waters, any person who introduces pollutants into a publicly owned treatment works, any person who owns or operates, or proposes to own or operate, a publicly owned treatment works or other treatment works treating domestic sewage, or any person who uses or disposes, or proposes to use or dispose, of sewage sludge.

(b) The state board or the regional boards may require any person subject to this section to establish and maintain monitoring equipment or methods, including, where appropriate, biological monitoring methods, sample effluent as prescribed, and provide other information as may be reasonably required.

(c) The state board or a regional board may inspect the facilities of any person subject to this section pursuant to the procedure set forth in [subdivision \(c\) of Section 13267](#).

**Credits**

(Added by [Stats.1987, c. 1189, § 8](#). Amended by [Stats.2003, c. 683 \(A.B.897\), § 6](#).)

West's Ann. Cal. Water Code § 13383, CA WATER § 13383

Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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Barclays Official California Code of Regulations Currentness  
Title 2. Administration  
Division 2. Financial Operations  
Chapter 2.5. Commission on State Mandates  
Article 3. Test Claims

2 CCR § 1183.3

§ 1183.3. Claimant's Rebuttal.

(a) Written rebuttals to written comments concerning a test claim may be filed, and shall be certified, filed, and served in accordance with section 1181.3 of these regulations within 30 days of service of the written comments.

(b) Content and Form.

(1) If representations of fact are made, they shall be supported by documentary or testimonial evidence in accordance with section 1187.5 of these regulations.

(2) Include a copy of relevant portions of state constitutional provisions, federal statutes, and executive orders, and a copy of administrative decisions and court decisions that are cited in the rebuttal, unless the authorities are also cited in the test claim or any opposition thereto. Published court decisions arising from state mandate determinations by the Board of Control and the Commission on State Mandates, [article XIII B, section 6 of the California Constitution](#), and [Government Code sections 17500 et seq.](#), are exempt from the requirement to include a copy. The specific statutes and chapters, articles, sections, regulatory registers, and page numbers of the authorities shall be identified in the written rebuttal.

Note: Authority cited: [Sections 17527\(g\) and 17553\(a\), Government Code](#). Reference: [Sections 17530 and 17553\(a\), Government Code](#).

### HISTORY

1. New section filed 5-19-2014; operative 7-1-2014 pursuant to [Government Code section 11343.4\(a\)\(3\)](#). Exempt from OAL review and submitted to OAL for printing only pursuant to [Government Code section 17527](#) (Register 2014, No. 21).

2. Amendment of subsections (a) and (b)(2) filed 9-13-2016; operative 10-1-2016 pursuant to [Government Code section 17527\(g\)](#) (Register 2016, No. 38).

3. Amendment filed 2-27-2018; operative 4-1-2018 pursuant to [Government Code section 11343.4\(a\)](#). Exempt from OAL review and submitted to OAL for filing and printing only pursuant to [Government Code section 17527\(g\)](#) (Register 2018, No. 9).

4. Editorial correction of History 3 (Register 2018, No. 18).

5. Amendment subsections (b)(1)-(2) filed 1-23-2020; operative 4-1-2020 (Register 2020, No. 4).

This database is current through 4/17/20 Register 2020, No. 16

2 CCR § 1183.3, 2 CA ADC § 1183.3

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## **II. CASE LAW**



KeyCite Yellow Flag - Negative Treatment

Opinion Amended on Denial of Rehearing by [Defenders of Wildlife v. Browner](#), 9th Cir., December 7, 1999

191 F.3d 1159

United States Court of Appeals,  
Ninth Circuit.

**DEFENDERS OF WILDLIFE**

and The Sierra Club, Petitioners,

v.

Carol M. **BROWNER**, in her official capacity  
as Administrator of the United States

Environmental Protection Agency, Respondent.

City of Tempe, Arizona; City of Tucson, Arizona;

[City of Mesa, Arizona](#); [Pima County, Arizona](#); and

[City of Phoenix, Arizona](#), Intervenors–Respondents.

No. 98–71080.

|

Argued and Submitted Aug. 11, 1999.

|

Decided Sept. 15, 1999.

**Synopsis**

Environmental organizations sought review of Environmental Protection Agency (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations to ensure compliance with state water-quality standards. The Court of Appeals, [Graber](#), Circuit Judge, held that: (1) organizations had standing; (2) municipal storm-sewer discharges did not have to strictly comply with state water-quality standards; but (3) EPA had discretion to require that municipal discharges comply with such standards.

Petition denied.

West Headnotes (8)

[1] **Environmental Law** 🔑 Cognizable interests and injuries, in general

For purpose of statute authorizing any interested person to seek judicial review of Environmental Protection Agency (EPA) decision issuing

or denying any National Pollution Discharge Elimination System (NPDES) permit, “any interested person” means any person that satisfies the injury-in-fact requirement for Article III standing. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#); Federal Water Pollution Control Act Amendments of 1972, § 509(b)(1)(F), [33 U.S.C.A. § 1369\(b\)\(1\)\(F\)](#).

1 Cases that cite this headnote

[2] **Environmental Law** 🔑 Organizations, associations, and other groups

Environmental organizations had standing to seek judicial review of Environmental Protection Agency (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits for municipalities' storm sewers based on allegation that organizations' members used and enjoyed ecosystems affected by storm water discharges and sources thereof governed by the permits. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#); Federal Water Pollution Control Act Amendments of 1972, § 509(b)(1)(F), [33 U.S.C.A. § 1369\(b\)\(1\)\(F\)](#).

5 Cases that cite this headnote

[3] **Environmental Law** 🔑 Permit and certification proceedings

Although best practicable control technology (BPT) requirement for National Pollution Discharge Elimination System (NPDES) permits takes into account issues of practicability, the Environmental Protection Agency (EPA) also is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability. Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1)(A, C), 402(a)(1), [33 U.S.C.A. §§ 1311\(b\)\(1\)\(A, C\), 1342\(a\)\(1\)](#).

13 Cases that cite this headnote

[4] **Environmental Law** 🔑 Discharge of pollutants

Water Quality Act amendments to the Clean Water Act do not require municipal storm-sewer discharges to strictly comply with state water-quality standards, in order to obtain National Pollution Discharge Elimination System (NPDES) permit, but instead prescribe separate standard requiring reduction of discharge of pollutants to maximum extent practicable, in view of Act's distinction between municipal and industrial discharges. Federal Water Pollution Control Act Amendments of 1972, §§ 301(b)(1)(C), 402(p)(3)(B)(iii), 33 U.S.C.A. §§ 1311(b)(1)(C), 1342(p)(3)(B)(iii).

17 Cases that cite this headnote

- [5] **Administrative Law and Procedure** 🔑 Plain, literal, or clear meaning; ambiguity or silence

Questions of congressional intent that can be answered with traditional tools of statutory construction are still firmly within the province of the courts under *Chevron*, which governs review of an agency's interpretation of a statute.

5 Cases that cite this headnote

- [6] **Statutes** 🔑 Language and intent, will, purpose, or policy  
**Statutes** 🔑 Statute as a Whole; Relation of Parts to Whole and to One Another

Using traditional tools of statutory construction when interpreting a statute, courts look first to the words that Congress used, and, rather than focusing just on the word or phrase at issue, courts look to the entire statute to determine Congressional intent.

6 Cases that cite this headnote

- [7] **Statutes** 🔑 Express mention and implied exclusion; *expressio unius est exclusio alterius*

Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

4 Cases that cite this headnote

- [8] **Environmental Law** 🔑 Conditions and limitations

Environmental Protection Agency (EPA) is not prohibited from requiring, under Clean Water Act, that municipal storm-sewer discharges strictly comply with state water-quality standards, but has discretion to determine appropriate pollution controls. Federal Water Pollution Control Act Amendments of 1972, § 402(p)(3)(B)(iii), 33 U.S.C.A. § 1342(p)(3)(B)(iii).

14 Cases that cite this headnote

#### Attorneys and Law Firms

\***1160** [Jennifer Anderson](#) and David Baron, Arizona Center for Law in the Public Interest, Phoenix, Arizona, for the petitioners.

[Alan Greenberg](#), Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Denver, Colorado, for the respondent.

[Craig Reece](#), Phoenix City Attorney's Office, Phoenix, Arizona; [Stephen J. Burg](#), Mesa City Attorney's Office, Mesa, Arizona; [Timothy Harrison](#), Tucson City Attorney's Office, Tucson, Arizona; [Harlan C. Agnew](#), Deputy County Attorney, Tucson, Arizona; and [Charlotte Benson](#), Tempe City Attorney's Office, Tempe, Arizona, for the intervenors-respondents.

\***1161** [David Burchmore](#), Squire, Sanders & Dempsey, Cleveland, Ohio, for amici curiae.

Petition to Review a Decision of the Environmental Protection Agency. EPA No. 97-3.

Before: [NOONAN](#), [THOMPSON](#), and [GRABER](#), Circuit Judges.

#### Opinion

[GRABER](#), Circuit Judge:

Petitioners challenge the Environmental Protection Agency's (EPA) decision to issue National Pollution Discharge Elimination System (NPDES) permits to five municipalities, for their separate storm sewers, without requiring numeric limitations to ensure compliance with state water-quality standards. Petitioners sought administrative review of the decision within the EPA, which the Environmental Appeals Board (EAB) denied. This timely petition for review ensued. For the reasons that follow, we deny the petition.

#### FACTUAL AND PROCEDURAL BACKGROUND

Title 26 U.S.C. § 1342(a)(1) authorizes the EPA to issue NPDES permits, thereby allowing entities to discharge some pollutants. In 1992 and 1993, the cities of Tempe, Tucson, Mesa, and Phoenix, Arizona, and Pima County, Arizona (Intervenors), submitted applications for NPDES permits. The EPA prepared draft permits for public comment; those draft permits did not attempt to ensure compliance with Arizona's water-quality standards.

Petitioner **Defenders** of **Wildlife** objected to the permits, arguing that they must contain numeric limitations to ensure strict compliance with state water-quality standards. The State of Arizona also objected.

Thereafter, the EPA added new requirements:

To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the permittee shall implement the [Storm Water Management Program], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the [Storm Water Management Program] referenced in Part I.A.2, and elsewhere in the permit. This timely implementation of the requirements of this permit shall constitute a schedule of compliance

authorized by [Arizona Administrative Code, section R18-11-121\(C\)](#).

The Storm Water Management Program included a number of structural environmental controls, such as storm-water detention basins, retention basins, and infiltration ponds. It also included programs to remove illegal discharges.

With the inclusion of those "best management practices," the EPA determined that the permits ensured compliance with state water-quality standards. The Arizona Department of Environmental Quality agreed:

The Department has reviewed the referenced municipal NPDES storm-water permit pursuant to Section 401 of the Federal Clean Water Act to ensure compliance with State water quality standards. We have determined that, based on the information provided in the permit, and the fact sheet, adherence to provisions and requirements set forth in the final municipal permit, will protect the water quality of the receiving water.

On February 14, 1997, the EPA issued final NPDES permits to Intervenors. Within 30 days of that decision, Petitioners requested an evidentiary hearing with the regional administrator. *See* 40 C.F.R. § 124.74. Although Petitioners requested a hearing, they conceded that they raised only a legal issue and that a hearing was, in fact, unnecessary. Specifically, Petitioners raised only the legal question whether the Clean Water Act (CWA) requires numeric limitations to ensure strict compliance with state water-quality standards; they did not raise the factual question whether the management practices that the EPA chose would be effective.

\***1162** On June 16, 1997, the regional administrator summarily denied Petitioners' request. Petitioners then filed a petition for review with the EAB. *See* 40 C.F.R. § 124.91(a). On May 21, 1998, the EAB denied the petition, holding that the permits need not contain numeric limitations to ensure strict compliance with state water-quality standards.

Petitioners then moved for reconsideration, *see* 40 C.F.R. § 124.91(i), which the EAB denied.

## JURISDICTION

[1] [2] Title 33 U.S.C. § 1369(b)(1)(F) authorizes “any interested person” to seek review in this court of an EPA decision “issuing or denying any permit under section 1342 of this title.” “Any interested person” means any person that satisfies the injury-in-fact requirement for Article III standing. *See Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1297 (9th Cir.1992) [*NRDC II*]. It is undisputed that Petitioners satisfy that requirement. Petitioners allege that “[m]embers of **Defenders** and the Club use and enjoy ecosystems affected by storm water discharges and sources thereof governed by the above-referenced permits,” and no other party disputes those facts. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565–66, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (“[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.”); *see also NRDC II*, 966 F.2d at 1297 (“NRDC claims, inter alia, that [the] EPA has delayed unlawfully promulgation of storm water regulations and that its regulations, as published, inadequately control storm water contaminants. NRDC’s allegations ... satisfy the broad standing requirement applicable here.”).

Intervenors argue, however, that they were not parties when this action was filed and that this court cannot redress Petitioners’ injury without them. Their real contention appears to be that they are indispensable parties under *Federal Rule of Civil Procedure 19*. We need not consider that contention, however, because in fact Intervenors have been permitted to intervene in this action and to present their position fully. In the circumstances, Intervenors have suffered no injury.

## DISCUSSION

### A. Standard of Review

The Administrative Procedures Act (APA), 5 U.S.C. §§ 701–06, provides our standard of review for the EPA’s decision to issue a permit. *See American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir.1992). Under the APA, we generally review such a decision to determine whether it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

On questions of statutory interpretation, we follow the approach from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See NRDC II*, 966 F.2d at 1297 (so holding). In *Chevron*, 467 U.S. at 842–44, 104 S.Ct. 2778, the Supreme Court devised a two-step process for reviewing an administrative agency’s interpretation of a statute that it administers. *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir.1996) (“The Supreme Court has established a two-step process for reviewing an agency’s construction of a statute it administers.”). Under the first step, we employ “traditional tools of statutory construction” to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43, 104 S.Ct. 2778 (footnote omitted). If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843, 104 S.Ct. 2778. At step two, we must uphold the administrative regulation unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844, 104 S.Ct. 2778.

### \*1163 B. Background

The CWA generally prohibits the “discharge of any pollutant,” 33 U.S.C. § 1311(a), from a “point source” into the navigable waters of the United States. *See 33 U.S.C. § 1362(12)(A)*. An entity can, however, obtain an NPDES permit that allows for the discharge of some pollutants. *See 33 U.S.C. § 1342(a)(1)*.

[3] Ordinarily, an NPDES permit imposes effluent limitations on such discharges. *See 33 U.S.C. § 1342(a)(1)* (incorporating effluent limitations found in 33 U.S.C. § 1311). First, a permit-holder “shall ... achiev[e] ... effluent limitations ... which shall require the application of the best practicable control technology [BPT] currently available.” 33 U.S.C. § 1311(b)(1)(A). Second, a permit-holder “shall ... achiev[e] ... any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title).” 33 U.S.C. § 1311(b)(1)(C) (emphasis added). Thus, although the BPT requirement takes into account issues of practicability, *see Rybachek v. EPA*, 904 F.2d 1276, 1289 (9th Cir.1990), the EPA also “is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards



without regard to the limits of practicability,” *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir.1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992). See also *Ackels v. EPA*, 7 F.3d 862, 865–66 (9th Cir.1993) (similar).

The EPA's treatment of storm-water discharges has been the subject of much debate. Initially, the EPA determined that such discharges generally were exempt from the requirements of the CWA (at least when they were uncontaminated by any industrial or commercial activity). See 40 C.F.R. § 125.4 (1975).

The Court of Appeals for the District of Columbia, however, invalidated that regulation, holding that “the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402 [33 U.S.C. § 1342].” *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir.1977). “Following this decision, [the] EPA issued proposed and final rules covering storm water discharges in 1980, 1982, 1984, 1985 and 1988. These rules were challenged at the administrative level and in the courts.” *American Mining Congress*, 965 F.2d at 763.

Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA. See *NRDC II*, 966 F.2d at 1296 (“Recognizing both the environmental threat posed by storm water runoff and [the] EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA.”) (footnotes omitted). Under the Water Quality Act, from 1987 until 1994,<sup>1</sup> most entities discharging storm water did not need to obtain a permit. See 33 U.S.C. § 1342(p).

Although the Water Quality Act generally did not require entities discharging storm water to obtain a permit, it did require such a permit for discharges “with respect to which a permit has been issued under this section before February 4, 1987,” 33 U.S.C. § 1342(p)(2)(A); discharges “associated with industrial activity,” 33 U.S.C. § 1342(p)(2)(B); discharges from a “municipal separate sewer system serving a population of [100,000] or more,” 33 U.S.C. § 1342(p)(2)(C) & (D); and “[a] discharge for which the Administrator ... determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States,” 33 U.S.C. § 1342(p)(2)(E).

\*1164 When a permit is required for the discharge of storm water, the Water Quality Act sets two different standards:

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and *section 1311* of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3) (emphasis added).

C. Application of Chevron

[4] The EPA and Petitioners argue that the Water Quality Act is ambiguous regarding whether Congress intended for municipalities to comply strictly with state water-quality standards, under 33 U.S.C. § 1311(b)(1)(C). Accordingly, they argue that we must proceed to step two of *Chevron* and defer to the EPA's interpretation that the statute does require strict compliance. See *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir.1999) (“At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.”) (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 1189, 121 S.Ct. 1186, 149 L.Ed.2d 103, 68 USLW 3129 (1999).

Intervenors and *amici*, on the other hand, argue that the Water Quality Act expresses Congress' intent unambiguously and, thus, that we must stop at step one of *Chevron*. See, e.g., *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S.Ct. 927, 938–39, 140 L.Ed.2d 1 (1998) (“Because we conclude that Congress has made it clear that the *same* common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is

impermissible under the first step of *Chevron*.”) (emphasis in original); *Sierra Club v. EPA*, 118 F.3d 1324, 1327 (9th Cir.1997) (“Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of *Chevron*.”). We agree with Intervenor and amici: For the reasons discussed below, the Water Quality Act unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C). That being so, we end our inquiry at the first step of the *Chevron* analysis.

[5] [6] “[Q]uestions of congressional intent that can be answered with ‘traditional tools of statutory construction’ are still firmly within the province of the courts” under *Chevron*. *NRDC II*, 966 F.2d at 1297 (citation omitted). “Using our ‘traditional tools of statutory construction,’ *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694, when interpreting a statute, we look first to the words that Congress used.” *Zimmerman*, 170 F.3d at 1173 (alterations, citations, and internal quotation marks omitted). “Rather than focusing just on the word or phrase at issue, we look to the entire statute to determine Congressional intent.” *Id.* (alterations, citations, and internal quotation marks omitted).

As is apparent, Congress expressly required *industrial* storm-water discharges to comply with the requirements of 33 U.S.C. § 1311. See 33 U.S.C. § 1342(p)(3)(A) (“Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.”) (emphasis added). By incorporation, then, industrial \*1165 storm-water discharges “shall ... achiev[e] ... any more stringent limitation, including those necessary to meet water quality standards, treatment standards or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 1370 of this title).” 33 U.S.C. § 1311(b)(1)(C) (emphasis added); see also Sally A. Longroy, *The Regulation of Storm Water Runoff and its Impact on Aviation*, 58 J. Air. L. & Com. 555, 565–66 (1993) (“Congress further singled out industrial storm water dischargers, all of which are on the high-priority schedule, and requires them to satisfy all provisions of section 301 of the CWA [33 U.S.C. § 1311].... Section 301 further mandates that NPDES permits include requirements that receiving waters meet water quality based standards.”) (emphasis added). In other words, industrial discharges must comply strictly with state water-quality standards.

Congress chose not to include a similar provision for municipal storm-sewer discharges. Instead, Congress

required municipal storm-sewer discharges “to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(iii).

[7] The EPA and Petitioners argue that the difference in wording between the two provisions demonstrates ambiguity. That argument ignores precedent respecting the reading of statutes. Ordinarily, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (citation and internal quotation marks omitted); see also *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir.1999) (stating the same principle), *petition for cert. filed*, 68 USLW 3138 (Aug. 23, 1999). Applying that familiar and logical principle, we conclude that Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. § 1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Application of that principle is significantly strengthened here, because 33 U.S.C. § 1342(p)(3)(B) is not merely silent regarding whether municipal discharges must comply with 33 U.S.C. § 1311. Instead, § 1342(p)(3)(B)(iii) replaces the requirements of § 1311 with the requirement that municipal storm-sewer dischargers “reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants.” 33 U.S.C. § 1342(p)(3)(B)(iii). In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

Indeed, the EPA's and Petitioners' interpretation of 33 U.S.C. § 1342(p)(3)(B)(iii) would render that provision superfluous, a result that we prefer to avoid so as to give effect to all provisions that Congress has enacted. See *Government of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 634 (9th Cir.1999) (“This court generally

refuses to interpret a statute in a way that renders a provision superfluous.”), *as amended*, 1999 WL 604218 (9th Cir. Aug.12, 1999). As all parties concede, § 1342(p)(3)(B)(iii) creates a lesser standard than § 1311. Thus, if § 1311 continues to apply to municipal storm-sewer discharges, \*1166 the more stringent requirements of that section always would control.

Contextual clues support the plain meaning of § 1342(p)(3)(B)(iii), which we have described above. The Water Quality Act contains other provisions that undeniably exempt certain discharges from the permit requirement altogether (and therefore from § 1311). For example, “[t]he Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture.” 33 U.S.C. § 1342(l)(1). Similarly, a permit is not required for certain storm-water runoff from oil, gas, and mining operations. *See* 33 U.S.C. § 1342(l)(2). Read in the light of those provisions, Congress' choice to exempt municipal storm-sewer discharges from strict compliance with § 1311 is not so unusual that we should hesitate to give effect to the statutory text, as written.

Finally, our interpretation of § 1342(p)(3)(B)(iii) is supported by this court's decision in *NRDC II*. There, the petitioner had argued that “the EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments.” *NRDC II*, 966 F.2d at 1308. This court disagreed with the petitioner's interpretation of the amendments:

Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, *Congress retained the existing, stricter controls for industrial storm water dischargers but prescribed new controls for municipal storm water discharge.*

*Id.* (emphasis added). The court concluded that, under 33 U.S.C. § 1342(p)(3)(B)(iii), “*Congress did not mandate a minimum standards approach.*” *Id.* (emphasis added). The question in *NRDC II* was not whether § 1342(p)(3)(B)(iii) required strict compliance with state water-quality standards,

*see* 33 U.S.C. § 1311(b)(1)(C). Nonetheless, the court's holding applies equally in this action and further supports our reading of 33 U.S.C. § 1342(p).

In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).

#### *D. Required Compliance with 33 U.S.C. § 1311(b)(1)(C)*

[8] We are left with Intervenor's contention that the EPA may not, under the CWA, require strict compliance with state water-quality standards, through numerical limits or otherwise. We disagree.

Although Congress did not require municipal storm-sewer discharges to comply strictly with § 1311(b)(1)(C), § 1342(p)(3)(B)(iii) states that “[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the Administrator ... determines appropriate for the control of such pollutants.*” (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate. As this court stated in *NRDC II*, “Congress gave the administrator discretion to determine what controls are necessary.... NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language.” 966 F.2d at 1308.

Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which “uses best management practices (BMPs) in first-round storm water permits ... to provide for the attainment of water quality standards.” The EPA applied that approach to the permits at issue here. Under 33 U.S.C. § 1342(p)(3)(B)(iii), the EPA's choice to include \*1167 either management practices or numeric limitations in the permits was within its discretion. *See NRDC II*, 966 F.2d at 1308 (“Congress did not mandate a minimum standards approach or specify that [the] EPA develop minimal performance requirements.”). In the circumstances, the EPA did not act arbitrarily or capriciously by issuing permits to Intervenor.

PETITION DENIED.

**All Citations**

191 F.3d 1159, 30 Envtl. L. Rep. 20,116, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 9661, 1999 Daily Journal D.A.R. 12,369

**Footnotes**

- 1 As enacted, the Water Quality Act extended the exemption to October 1, 1992. Congress later amended the Act to change that date to October 1, 1994. See [Pub.L. No. 102-580](#).



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [U.S. Public Interest Research Group c. Stolt Sea Farm, Inc.](#), D.Me., February 19, 2002

78 F.3d 1523

United States Court of Appeals,

**Eleventh Circuit.**

Terrence D. HUGHEY, Plaintiff–Appellee,

v.

**JMS DEVELOPMENT****CORPORATION**, Defendant–Appellant.

Terrence D. HUGHEY, Plaintiff–

Appellee, Cross–Appellant,

v.

**JMS DEVELOPMENT CORPORATION**,

Defendant–Appellant, Cross–Appellee.

Nos. 94–8402, 94–8855.

|  
April 1, **1996**.|  
Rehearing and Suggestion for RehearingEn Banc Denied June 17, **1996**.**Synopsis**

Landowner filed citizens suit under Clean Water Act (CWA) seeking to enjoin developer from discharging stormwater runoff. The United States District Court for the Northern District of Georgia, No. 1:92–CV–2051– RHH, [Robert H. Hall](#), J., issued permanent injunction, imposed fine, and awarded landowner attorney fees and costs. Appeal was taken. The Court of Appeals, Owens, District Judge, sitting by designation, held that: (1) CWA's zero discharge standard for stormwater runoff from construction activities in absence of National Pollutant Discharge Elimination System (NPDES) permit did not apply to developer when compliance was factually impossible, and (2) injunction prohibiting developer from discharging any stormwater runoff was unenforceable “obey the law” injunction in absence of operative command capable of enforcement.

Orders vacated and injunction dissolved.

[Carnes](#), Circuit Judge, filed opinion concurring in part.

West Headnotes (6)

**[1] Federal Courts** **Injunction**

Grant of permanent injunctive relief is generally reviewed for abuse of discretion but if district court misapplies law, Court of Appeals will review and correct error without deference to lower court's determination.

[1 Cases that cite this headnote](#)**[2] Statutes** **Relation to plain, literal, or clear meaning; ambiguity**

**Statutes** **Presumptions, inferences, and burden of proof**

Congress is presumed not to have intended absurd results, and courts will not foolishly bind themselves to plain language of statute where doing so would compel odd result.

[14 Cases that cite this headnote](#)**[3] Environmental Law** **Violations and liability in general**

Clean Water Act's (CWA) zero discharge standard for stormwater runoff from construction activities in absence of National Pollutant Discharge Elimination System (NPDES) permit did not apply to developer when compliance was factually impossible due to fact that Georgia Environmental Protection Division was only agency authorized to issue NPDES permits for stormwater runoff but did not offer any such permits at time in question; developer also was in good faith compliance with local pollution control requirements that substantially mirrored proposed NPDES discharge standards, and discharges at issue were minimal. Federal Water Pollution Control Act Amendments of 1972, §§ 301(a), 402(c)(1), [33 U.S.C.A. §§ 1311\(a\), 1342\(c\)\(1\)](#); [O.C.G.A. § 12–7–6\(18\)](#).

[27 Cases that cite this headnote](#)

[4] **Injunction** 🔑 Specificity, vagueness, overbreadth, and narrowly-tailored relief

Possibility of contempt requires injunction to be tailored to remedy specific harms shown rather than to enjoin all possible breaches of law and, thus, injunction must contain operative command capable of enforcement. [Fed.Rules Civ.Proc.Rule 65\(d\)](#), 28 U.S.C.A.

[22 Cases that cite this headnote](#)

[5] **Environmental Law** 🔑 Injunction

Permanent injunction prohibiting developer from discharging any stormwater runoff as violation of Clean Water Act (CWA) was unenforceable “obey the law” injunction in absence of operative command capable of enforcement; injunction did not indicate whether developer was to stop rain from falling, build retention pond to control stormwater discharges, or construct water treatment plant. Federal Water Pollution Control Act Amendments of 1972, § 301(a), [33 U.S.C.A. § 1311\(a\)](#); [Fed.Rules Civ.Proc.Rule 65\(d\)](#), 28 U.S.C.A.

[48 Cases that cite this headnote](#)

[6] **Federal Civil Procedure** 🔑 Result; prevailing parties; “American rule”

Prevailing party or substantially prevailing party, for purposes of attorney fees request in citizen's suit under Clean Water Act (CWA), is party who prevailed in what lawsuit originally sought to accomplish. Federal Water Pollution Control Act Amendments of 1972, § 505(d), [33 U.S.C.A. § 1365\(d\)](#).

[14 Cases that cite this headnote](#)

\*1524 Appeals from the United States District Court for the Northern District of Georgia.

**Attorneys and Law Firms**

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[Stephen Edmund O'Day](#), Smith Gambrell & Russell, [Clark Sullivan](#), Mark W. Kinzer, Atlanta, GA, for appellees.

Before [ANDERSON](#) and [CARNES](#), Circuit Judges, and [OWENS](#)\*, District Judge.

[OWENS](#), District Judge:

I. INTRODUCTION

Appellant JMS Development Corporation (“JMS”) is the developer of a 19.2-acre residential subdivision in Gwinnett County, Georgia. Appellee Terence D. Hughey (“Hughey”) is a Gwinnett County homeowner admittedly opposed to all development in Gwinnett County, one of metropolitan Atlanta's fastest growing areas. Hughey's first effort to prevent development of JMS's residential subdivision was an unsuccessful suit in state court filed during the course of construction. After the subdivision had been completed, Hughey sued JMS in United States District Court alleging that JMS's completed subdivision was continuing to violate the Clean Water Act by allowing storm (rain) water runoff without possessing a National Pollutant Discharge Elimination System (“NPDES”) permit setting forth the conditions under which storm (rain) water could be discharged.

The undisputed evidence showed that JMS submitted its subdivision plans and specifications to Gwinnett County for approval and on March 31, 1992, obtained a county permit to begin construction. The undisputed evidence further showed that a Clean Water Act NPDES permit was not then available in the State of Georgia from the only agency authorized to issue such permits—Georgia's Environmental Protection Division. The district court nevertheless found that the Clean Water Act absolutely prohibited the discharge of any storm (rain) water from JMS's completed subdivision in the absence of an NPDES permit. Relying on this finding and rejecting the uncontroverted testimony that some storm (rain) water discharge beyond the control of JMS would naturally occur whenever it rained, the district court issued permanent injunctive relief pursuant to [Federal Rule of](#)

[Civil Procedure 65\(d\)](#). The injunction ordered that JMS “not discharge stormwater into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place if such discharge would be in violation of the Clean Water Act.”

The district court also fined JMS \$8,500 for continuing violations of the Clean Water Act and awarded Hughey more than \$115,000 in attorney fees and costs under [33 U.S.C. § 1365\(d\)](#). From those orders and judgment of the district court, JMS appeals.

## II. BACKGROUND

### A. The Clean Water Act

In 1972 Congress passed the Clean Water Act (“CWA”) amendments, [33 U.S.C. §§ 1251–1387](#), to remedy the federal water pollution control program which had “been inadequate in every vital aspect” since its inception in 1948. *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 203, 96 S.Ct. 2022, 2024, 48 L.Ed.2d 578 (1976). The amended CWA absolutely prohibits the discharge of any pollutant by any person, *unless* the discharge is made according to the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit. \*1525 [33 U.S.C. § 1311\(a\)](#). This “zero discharge” standard presupposes the availability of an NPDES permit, allowing for the discharge of pollutants under the conditions set forth in the permit. *Id.* § 1342(a)(1). NPDES permits are usually available from the Environmental Protection Agency (“EPA”); however, [33 U.S.C. § 1342\(c\)\(1\)](#) suspends the availability of federal NPDES permits once a state permitting program has been submitted and approved by the EPA. Thus, if a state administers its own NPDES permitting program under the auspices of the EPA, applicants must seek an NPDES permit from the state agency. *See* [33 U.S.C. § 1342\(c\)\(1\)](#); *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987).

On June 28, 1974, the State of Georgia was authorized by EPA to administer an NPDES program within its borders. The Georgia agency responsible for administration of that program is the Environmental Protection Division (“EPD”) of the Georgia Department of Natural Resources. EPA-issued NPDES permits are thus not available in Georgia.

Even though the absolute prohibition in [Section 1311\(a\)](#) applied to storm water discharges, for many years the discharge of storm (rain) water was a problem that the

EPA did not want to address.<sup>1</sup> The EPA complained that administrative concerns precluded a literal application of the CWA's absolute prohibition—if the CWA applied to storm (rain) water discharges, the EPA would be required to issue potentially millions of NPDES permits. Years of litigation ensued when the EPA promulgated NPDES permit regulations exempting uncontaminated storm water discharges from the CWA. *See, e.g., Costle, supra* note 1.

The congressional response to this baffling situation was the Water Quality Act, [Pub.L. No. 100–4, 101 Stat. 7 \(1987\)](#) (codified as amended in scattered sections of Title 33 U.S.C.), which amended the CWA to provide specifically that “storm water” discharges were within the CWA's proscription. *See* [33 U.S.C. § 1342\(p\)](#). Because of the administrative nightmare presented by the inclusion of storm (rain) water discharges, Congress chose a phased-in approach. “The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first.” *NRDC v. EPA*, 966 F.2d 1292, 1296 (9th Cir.1992).

The phased-in approach established a moratorium until October 1, 1992, on requiring permits for most storm water discharges. *Id.*; Water Quality Act, § 402(p), [33 U.S.C. § 1342\(p\)](#). However, “discharge[s] associated with industrial activity”<sup>2</sup> were excepted from this moratorium. Water Quality Act, § 402(p)(2)(B), [33 U.S.C. § 1342\(p\)\(2\)\(B\)](#). Section 402(p)(2)(B) required the EPA no later than February 4, 1989, to establish regulations setting forth permit application requirements for industrial storm water discharges. Those seeking such permits were to file an application no later than February 4, 1990, and permit applications were to be rejected or accepted by February 4, 1991. *Id.*

EPA failed to meet the statutory timetable, so it extended the deadline for submitting a permit application until October 1, 1992. The Natural Resources Defense Council (“NRDC”) sued the EPA for granting this extension. The Ninth Circuit Court of Appeals granted NRDC's request for declaratory relief, but denied injunctive relief, stating the “EPA will duly perform its statutory \*1526 duties.” *NRDC v. EPA*, 966 F.2d at 1300. On September 3, 1992, the EPA confirmed the Ninth Circuit's faith by issuing its final general permits for storm water discharges associated with industrial activity; applicants were to submit their request for a permit by no later than October 1, 1992.

Since a state agency's action in advance of that taken by the EPA might be disapproved as inconsistent with the EPA's eventual position, Georgia EPD has always followed the EPA's lead in the promulgation of NPDES permits. *See generally* Georgia EPD's Amicus Brief, at 5. Consistent with this approach, Georgia EPD began the public notice portion of the storm (rain) water discharge permit promulgation process only after the EPA had acted. On September 23, 1992, less than one month after the EPA had issued its general permits, Georgia EPD issued public notice of its intent to issue two general permits, one of which would cover storm water discharges from construction activities involving land-disturbing activities of five acres or more. An affidavit from the section chief of Georgia EPD's Water Protection Branch summarized the state of the law in Georgia up to that time: “[N]o NPDES program for issuing NPDES permits has been in place [in Georgia] for storm water runoff from construction activities.”

#### *B. The JMS Residential Subdivision*

In early 1992—when NPDES permits covering storm (rain) water were not available in Georgia—JMS planned to develop its 19.2-acre residential subdivision and for that purpose submitted its plans and specifications to Gwinnett County. In developing these plans and specifications, JMS hired a firm of consulting engineers, who were to supervise the design and control of sedimentation control measures and help ensure that JMS remained in compliance with relevant pollution control requirements.

On March 31, 1992, JMS received a permit from Gwinnett County authorizing it to conduct land-disturbing activities.<sup>3</sup> In accordance with requests from state and county officials, JMS spent more than \$30,000 installing state of the art sedimentation control devices, including silt fences, check dams, vegetation, sloping, and a sedimentation retention basin. The erosion and sedimentation control measures met or exceeded Gwinnett County's requirements.

Prior to beginning construction, JMS had done everything possible to comply with the legal requirements of building a small residential subdivision. On the county level, County Inspector George Michael Fritcher deposed that JMS was in compliance; at the state level, David Word, Chief of EPD's Water Protection Branch, stated that EPD would not (could not) have done anything with respect to an NPDES permit for storm water discharges even if JMS had applied for one prior to beginning the development; and at the federal level resort to

the EPA was foreclosed to JMS because, as noted, Georgia's NPDES program exists in lieu of the federal NPDES program.

With Gwinnett County's blessing, JMS began to clear, grade, and grub the property for the construction of streets, gutters, and storm sewers. JMS channelled its discharge of rain water as dictated by the county permit requirements. The discharges that occurred, as noted by the district court, were minimal and posed “no threat to human health.” Further, much of the damage caused by the discharges would have been “reversed with the passage of a relatively short amount of time.” Within this 19.2-acre subdivision, approximately 4.64 acres were disturbed by actual construction of storm sewers, curb, guttering, and streets.

Once all subdivision construction had been completed and the storm sewers, curbing, guttering, and streets had been dedicated or conveyed to Gwinnett County, a plat of the \*1527 completed subdivision showing approval by Gwinnett County's various agencies was recorded in the land records of Gwinnett County on August 6, 1992. JMS was from this point forward engaged in no further construction or land disturbing activities.

#### *C. Hughey's Clean Water Act Civil Action*

On August 28, 1992, Hughey sued JMS under the citizen's suit provision of the Clean Water Act, 33 U.S.C. § 1365,<sup>4</sup> alleging that JMS had violated the CWA by discharging storm (rain) water from a “point source” on its property into “the waters of the United States” without an NPDES permit. *See* 33 U.S.C. §§ 1311, 1342. Hughey alleged that JMS's discharges of storm (rain) water were in association with industrial activity. *See* 40 C.F.R. § 122.26(b)(14)(x) (industrial activity includes construction, which in turn encompasses clearing, grading, and grubbing). Because JMS's construction activities were considered “industrial” by EPA regulations, Hughey contended that JMS was required to have an NPDES permit. *See* Water Quality Act, Section 402(p)(2)(B) (establishing permit deadline for discharges associated with industrial activities). To the extent JMS had discharged without a permit, Hughey argued that JMS was subject to the “zero discharge” standard imposed by Section 1311(a). Hughey's complaint sought a declaratory judgment that JMS was liable under the CWA, as well as injunctive relief against JMS in several forms. Contemporaneously with his complaint Hughey filed a motion for a temporary restraining order (“TRO”), which the court granted after hearing from both sides on August 31, 1992.



Hughey's factual allegations were that JMS's activities caused two watercourses to become muddied during rainfall events.<sup>5</sup> The first of these watercourses is a small stream<sup>6</sup> that originates on JMS's property and traverses neighboring land for close to nine hundred (900) feet before emptying into the Yellow River, which is the second flow of water involved. Twenty-eight hundred (2800) feet below the stream's confluence with the Yellow River lives Mr. Hughey, who owns and resides on land abutting the Yellow River.

JMS initially responded to the complaint with a motion to dissolve the TRO and a motion for summary judgment. JMS conceded that rain water had run off its property and that it did not have an NPDES permit authorizing discharges under the CWA. However, JMS showed that no such permit was available from any government agency and that it had in fact obtained every permit that was available prior to initiating construction.<sup>7</sup> JMS then answered the complaint \*1528 denying liability under the CWA and demanding a jury trial.

On November 9, 1992, the district court denied JMS's motions to dissolve the TRO, to dismiss the complaint, and for summary judgment. The district court granted Hughey's motion for preliminary injunctive relief, finding that JMS was potentially liable for storm (rain) water discharges made subsequent to October 1, 1992. The preliminary injunction prohibited JMS from “discharg[ing] storm water into waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place, without a National Pollutant Discharge Elimination System permit permitting such discharge.”

More than one year later, on December 15, 1993, the district court found JMS liable under the CWA for storm (rain) water discharges into the stream on thirteen dates in 1992—June 8, 14, 30; July 1, 2; August 13, 16; September 4, 5, 27, 28; and October 4, 8. The court further found that JMS once, on June 8, 1992, discharged storm water into the Yellow River itself. These violations according to the district court were continuing (albeit minimal), *see* Order of 2/24/94, at 4, 8, and became the basis for the court's permanent injunction several months later, which issued on February 24, 1994.<sup>8</sup> Defendant in that order was instructed not to

discharge stormwater into the waters of the United States from its development property in Gwinnett County,

Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act.*

(emphasis supplied). On account of JMS's specific violations of the CWA, the district court required JMS to pay \$8,500 in civil penalties to Hughey.<sup>9</sup> Lastly, the court ordered JMS to pay Hughey more than \$115,000 in attorney fees and costs pursuant to 33 U.S.C. § 1365(d).

### III. ISSUES ON APPEAL

JMS argues that the broad, generalized language of the injunction, which in effect says nothing more than to “obey the law,” is violative of the standard of specificity required by *Federal Rule of Civil Procedure* 65(d). JMS's second contention is that it should not be punished for failing to secure an NPDES permit when no such permit was available. Finally, JMS objects to the award of attorney fees and costs.<sup>10</sup> JMS has not objected, however, to the fact that it did not receive a jury trial on the question of liability.

### IV. STANDARD OF REVIEW

[1] Although the grant of permanent injunctive relief is generally reviewed for an abuse of discretion, “if the trial court misapplies the law we will review and correct the error without deference to that court's determination.” *Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir.1993), *cert. denied*, 510 U.S. 1046, 114 S.Ct. 696, 126 L.Ed.2d 663 (1994). *See also* \*1529 *Guaranty Fin. Svcs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir.1991) (“if the court misapplied the law in making its decision [to grant the preliminary injunction] we do not defer to its legal analysis”). We review questions of law *de novo*. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir.1995).

### V. DISCUSSION

#### A. Liability Under the Clean Water Act

As noted, the CWA imposes a “zero discharge” standard in the absence of an NPDES permit. 33 U.S.C. § 1311(a). The question is whether Congress intended for this zero discharge standard to apply in the circumstances of this case.

[2] In interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results. *United States v. X-Citement Video, Inc.*,

— U.S. —, —, 115 S.Ct. 464, 468, 130 L.Ed.2d 372 (1994); *Towers v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir.1995). Courts will not foolishly bind themselves to the plain language of a statute where doing so would “compel an odd result.” *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 1984, 104 L.Ed.2d 557 (1989). For, “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454–55, 109 S.Ct. 2558, 2567, 105 L.Ed.2d 377 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945)). *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. at 527–30, 109 S.Ct. at 1994–95 (Scalia, J., concurring) (“We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the [language] ... that avoids this consequence....”).

Our jurisprudence has eschewed the rigid application of a law where doing so produces impossible, absurd, or unjust results. “[I]f a literal construction of the words of a statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that result.” *United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir.1978) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)); *see also United States v. Castro*, 837 F.2d 441, 445 (11th Cir.1988). “[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed [the purpose of the act], rather than the literal words.” *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S.Ct. 852, 857, 15 L.Ed.2d 827 (1966) (internal quotation marks omitted).

As is often the case, the legislature will use words of general meaning in a statute,

words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of *the absurd results which follow from giving such broad meaning to the words*, makes it

unreasonable to believe that the legislator intended to include the particular act.

*Public Citizen*, 491 U.S. at 454, 109 S.Ct. at 2566–67 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)) (emphasis supplied). Thus, this court has found that

[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

*Zwak v. United States*, 848 F.2d 1179, 1183 (11th Cir.1988) (quoting *Sorrells v. United States*, 287 U.S. 435, 447, 53 S.Ct. 210, 214, 77 L.Ed. 413 (1932)). For instance, common sense says that a law making it a felony for a prisoner to escape from jail “does not extend to a prisoner who breaks out when the prison is on fire—‘for he is not to be hanged because \*1530 he would not stay to be burnt.’” *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487, 19 L.Ed. 278, 280 (1869).

[3] In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. Congress could not have intended a strict application of the zero discharge standard in section 1311(a) when compliance is factually impossible. The evidence was uncontroverted that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge. George Fritcher, the county inspector charged with monitoring JMS's compliance with Gwinnett County's development permit, deposed that it was simply impossible to stop sediment from leaving the subdivision when there was a rainfall event. “[Z]ero discharge of storm water *will never be achieved* because rainfall must find its way back into the streams and rivers of this state.” Georgia EPD Amicus Brief, at 13 (emphasis supplied). Doug Ballard, president of JMS, similarly testified on cross-examination by Hughey's counsel that he could not stop the rain water that fell on his property from running

downhill, and that nobody could. The rain that fell on his property “is designed to go down those curbs and designed to go down those pipes and unless you go out there and collect it in your hand some way or other it's going to have to go somewhere.”

Moreover, JMS obtained from Gwinnett County a development permit that was issued pursuant to the County's authority under Georgia's Soil Erosion and Sedimentation Control Act of 1975 (“SESCA”), O.C.G.A. §§ 12–7–1 *et seq.* That Georgia statute, like the CWA, limited stormwater discharges during the applicable period. See O.C.G.A. § 12–7–6(18) (1992). Moreover, Georgia EPD's proposed standards for a general NPDES permit for stormwater discharges are similar to the standards for stormwater discharges contained in SESCO. David Word, the Chief of the Water Protection Branch of Georgia EPD, testified by affidavit that “the general NPDES permit proposed for stormwater runoff from construction activities ... will require permittees to perform certain erosion and sedimentation control practices, [which are] currently required under authority of the Erosion and Sedimentation Control Act of 1975.” Accordingly, the fact that JMS was issued a development permit by Gwinnett County suggests that JMS would have been able to obtain an NPDES permit from Georgia EPD, had such a permit been available.

The facts of this case necessarily limit our holding to situations in which the stormwater discharge is minimal, as it was here. The district court found that JMS's “discharges pose no threat to human health, and that much of the damage [caused by such discharges] will be reversed with the passage of a relatively short amount of time.”

This was not a case of a manufacturing facility that could abate the discharge of pollutants by ceasing operations. Nor did the discharger come to court with unclean hands: JMS made every good-faith effort to comply with the Clean Water Act and all other relevant pollution control standards. The discharges were minimal, and posed no risk to human health. In sum, we hold that Congress did not intend (surely could not have intended) for the zero discharge standard to apply when: (1) compliance with such a standard is factually impossible; (2) no NPDES permit covering such discharge exists; (3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal. *Lex non cogit ad impossibilia*: The law does

not compel the doing of impossibilities. BLACK'S LAW DICTIONARY 912 (6th ed. 1990).

Practically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that. Under these circumstances, denying summary judgment to JMS was an error of law. Cf. *Menzel v. County Utilities Corp.*, 712 F.2d 91, 95 (4th Cir.1983) (refusing to impose CWA liability for discharges during period in which effectiveness of NPDES permit was stayed by state court, since subjecting discharger to liability would serve no statutory purpose).

**\*1531 B. The Permanent Injunction—Federal Rule of Civil Procedure 65**

In addition to the fact that an injunction based upon an erroneous conclusion of law is invalid, see *United States v. Jefferson County*, 720 F.2d 1511, 1520 n. 21 (11th Cir.1983), Rule 65(d) of the Federal Rules of Civil Procedure mandates dissolution of the injunction.

Rule 65(d) sets forth the standards of specificity that every injunctive order must satisfy.

Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...

Rule 65 serves to protect those who are enjoined

by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order. As a result, one of the principal abuses of the pre-federal rules practice—the entry of injunctions that were so vague that defendant was at a loss to determine what he had been restrained from doing—is avoided. The drafting standard established by Rule 65(d)

is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.

11A WRIGHT, MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2955* (1995) (footnotes omitted). In addition to giving those enjoined “fair and precisely drawn notice of what the injunction actually prohibits,” *Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir.1994), the specificity requirement of Rule 65(d) serves a second important function:

Unless the trial court carefully frames it orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. We can hardly begin to assess the correctness of the judgment entered by District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.

*Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S.Ct. 713, 715, 38 L.Ed.2d 661, 664 (1974).

[4] Consistent with the two foregoing purposes, appellate courts will not countenance injunctions that merely require someone to “obey the law.” *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 897–98 (5th Cir.), cert. denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1974).<sup>11</sup> “Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement ... does not give the restrained party fair notice of what conduct will risk contempt.” *Epstein Family Partnership, supra*. Because of the possibility of contempt, an injunction “must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law.” *Id.* (internal quotation marks omitted). An injunction must therefore contain “an operative command capable of ‘enforcement.’” *Longshoremen's Ass'n. v. Marine Trade Ass'n.*, 389 U.S. 64, 73–74, 88 S.Ct. 201, 206–07, 19 L.Ed.2d 236, 244 (1967). See also *United States Steel Corp. v. United Mine Workers*, 598 F.2d 363, 368 (5th

Cir.1979) (party subject to contempt proceeding may defend on basis that compliance was not possible).

Here, the district court's order granting permanent injunctive relief only stated:

Defendant shall not discharge stormwater into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act.*

(emphasis supplied).

[5] Not only was this an “obey the law” injunction, it was also incapable of enforcement as an operative command. The court's order merely required JMS to stop discharges, but failed to specify how JMS was to do so. Discharges, though not defined by the order, occurred only when it rained, and *any* discharge was a violation of the order. Rain \*1532 water ran into the subdivision's government-approved streets and storm sewers; then into the small stream that started on the subdivision property; on into a tributary stream; and eventually into the Yellow River. Was JMS supposed to stop the rain from falling? Was JMS to build a retention pond to slow and control discharges? Should JMS have constructed a treatment plant to comply with the requirements of the CWA?

The injunction's failure to specifically identify the acts that JMS was required to do or refrain from doing indicates that the district court—like the CWA, the EPA, Georgia EPD, and Mr. Hughey—was incapable of fashioning an operative command capable of enforcement. As such, we must vacate this “obey the law” injunction.<sup>12</sup>

### C. Award of Attorney Fees and Costs

[6] A court issuing any final order in a Clean Water Act citizen's suit “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such award is appropriate.” 33 U.S.C. § 1365(d). A prevailing or substantially prevailing party is one who prevailed “in what the lawsuit originally sought to

accomplish.” *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 887 (9th Cir.1993).

The district court here awarded Hughey more than \$115,000 in attorney fees and costs. However, for the reasons stated above Hughey's citizen suit has not accomplished its original objective. Hughey is not a prevailing or substantially prevailing party and is thus not entitled to an award of attorney fees and costs. See *Save Our Community v. United States EPA*, 971 F.2d 1155, 1167 (5th Cir.1992) (where district court erred in finding defendant liable under the CWA, the award of attorney fees based thereon was also inappropriate).

## VI. CONCLUSION

Imposing liability upon JMS under these circumstances was a miscarriage of justice. It is inconceivable that Congress intended, let alone foresaw, a result such as this under the Clean Water Act. Environmentally safe waters are of vital importance to this nation as is evident from the fact that Congress enacted an entire statutory scheme to address the problem. Nevertheless,

[t]he inability of [Georgia EPD] to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of [the complete unavailability of an NPDES permit], or society must

tolerate slippage of an interim pollution abatement deadline.

*Republic Steel Corp. v. Train*, 557 F.2d 91, 94 (6th Cir.1977), vacated and remanded, 434 U.S. 1030, 98 S.Ct. 761, 54 L.Ed.2d 778 (1978). Balancing these concerns on the basis of the record before us, we refuse to place the burden on JMS.

The orders imposing statutory penalties and attorney fees and costs were premised on the finding that JMS was liable under the CWA. Because we REVERSE this finding of liability, those orders are VACATED.

The injunctive relief issued by the district court on February 24, 1994, was improper not only because it was premised on an error of law, but also for the alternative reasons that the injunction lacked the specificity required by Rule 65(d), and compliance with its terms was impossible. Accordingly, the permanent injunction is DISSOLVED.<sup>13</sup>

IT IS SO ORDERED.

\*1533 CARNES, Circuit Judge, concurring:

I concur in all of the Court's holdings and opinion except for Part V.B. What the Court says there about Rule 65(d) and “obey the law” injunctions may be correct, or it may be incorrect, but it is certainly dicta. Given our holding that the plaintiff in this case is not entitled to any relief at all, it matters not whether the relief he was given would have been in proper form if he had been entitled to some relief.

### All Citations

78 F.3d 1523, 42 ERC 1449, 64 USLW 2650, 34 Fed.R.Serv.3d 671, 26 Env'tl. L. Rep. 20,924

### Footnotes

- \* Honorable Wilbur D. Owens, Jr., U.S. District Judge for the Middle District of Georgia, sitting by designation.
- 1 Under the CWA, the term “pollutant” is inclusive of “rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* § 1362(6). When rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing, it falls within this description. See, e.g., *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir.1977); 40 C.F.R. § 122.2 (defining pollutant).
- 2 Under EPA guidelines, “storm water discharge associated with industrial activity” is inclusive of construction activity, which is in turn defined as “clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale.” 40 C.F.R. § 122.26(b)(14)(x). This regulation, to the extent it sought to exempt from the definition of “industrial activity” construction

sites of less than five acres, was invalidated on the grounds that it was arbitrary and capricious. *NRDC v. EPA*, 966 F.2d 1292, 1305–06 (9th Cir.1992). Even so, the regulation still provides that industrial activity is inclusive of construction.

3 According to David Tucker, Development Review Manager for Gwinnett County, this permit served as “authorization for land-disturbing activity as required by the Development Regulations of Gwinnett County [ , which] has the authority to administer [Georgia's] Soil Erosion and Sedimentation Control Act of 1975 in Gwinnett County. As part of this permitting procedure, JMS Development Corporation submitted a soil erosion and sedimentation control plan which was approved by the Gwinnett County Planning and Development.” See also Billew Affidavit; Ballard Affidavit (exh. A).

4 Section 1365(a) authorizes any citizen to “commence a civil action on his own behalf—(1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter....” The section further provides that “effluent standard or limitation” is inclusive of “an unlawful act under subsection (a) of section 1311 of this title.” Section 1311(a) makes it unlawful to discharge any pollutant without an NPDES permit.

5 The court notes as an aside that a question of fact existed concerning the degree to which JMS was responsible for increased turbidity levels in these two watercourses during rainfall events. This pivotal question of fact was not decided by a jury as demanded by JMS, but rather by the district judge. See *infra* note 13.

6 At least one expert at trial described the stream as a wet weather flow, and indeed, JMS's consulting engineer stated in his affidavit that United States Geological Survey Maps do not even delineate this unnamed tributary as a stream at all. JMS described the stream as ranging from three to seven feet in width.

7 The consulting engineers hired by JMS, in addition to seeking (and obtaining) county land disturbing permits, eventually applied for an NPDES permit from Georgia EPD on September 28, 1992, after Hughey had filed this action. Georgia EPD responded by saying no action would (could) be taken with respect to the notice of intent. David Word, Chief of the Water Protection Branch of Georgia EPD, commented on the effect of JMS's application:

EPD has received a notice of intent to comply with the general permit from JMS Development Corporation for its subdivision in Gwinnett County, Georgia. No action will be taken on this notice of intent until a general permit becomes effective. Therefore, at this time [10/8/92], *no further action is required or necessary on the part of JMS Development Corporation to be authorized to discharge storm water into waters of the State of Georgia from the subject property.*

Word Aff., at ¶ 10 (emphasis supplied). Georgia EPD simply did not have a permit to issue, either before, during, or after the subdivision's development. JMS presented this evidence to the district court in its motion to dismiss.

8 Although Georgia EPD stated in its amicus brief to the district court on October 27, 1992, that it expected to issue general NPDES permits covering storm (rain) water discharges by December 1992, such a permit was still not available as of the date on which the district court granted permanent injunctive relief.

Georgia EPD did issue its general permit; however, Mr. Hughey appealed the issuance of that permit in a separate action to the Board of Natural Resources for the State of Georgia, alleging both procedural and substantive defects in the general permit.

The administrative law judge remanded the permit to the Director of Georgia EPD because of Georgia EPD's failure to comply with procedural rules. In addition, the ALJ noted that a remand was also necessary for the Director to consider turbidity levels for storm (rain) water discharges. Due to Mr. Hughey's appeal, there was still no NPDES permit available in Georgia for the discharge of storm (rain) water when the district court entered the permanent injunction.

9 Hughey concedes that requiring payment of civil penalties to him was clear error by the district court. Civil penalties under the Clean Water Act can only be paid to the United States Treasury. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1131 n. 5 (11th Cir.1990).

10 Hughey filed a cross appeal complaining that \$115,000 was an insufficient award. When JMS was forced into bankruptcy, the cross appeal was automatically stayed under 11 U.S.C. § 362. See Appellee's Brief, at xiv n. 1. For the reasons that follow, we need not consider the merits of that appeal.

11 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

12 Hughey contends that the injunction contains the requisite specificity by reference to the prior orders granting injunctive-type relief, *i.e.*, that the permanent injunction merely continued in place what previous orders had already done. See, *e.g.*, *Keyes v. School Dist. No. 1., Denver, Colo.*, 895 F.2d 659 (10th Cir.1990), *cert. denied*, 498 U.S. 1082, 111 S.Ct. 951, 112 L.Ed.2d 1040 (1991). We doubt that such an exception exists, unless in very rare, exceptional cases. A person enjoined by court order should only be required to look within the four corners of the injunction to determine what he must do or refrain from doing. That was not the case here.

13 Because JMS has not raised the jury trial question, we will not address it now for the first time, although it would appear to require summary reversal on the issue of liability. See *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (defendants under the CWA have Seventh Amendment right to a jury trial on questions of liability).

Because we have determined that JMS cannot be liable no matter who files the complaint, we do not discuss JMS's challenge to the propriety of the citizen's suit. See, e.g., *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (citizen suits should be interstitial, not intrusive); *Northwest Environmental Advocates v. Portland*, 11 F.3d 900, vacated, 56 F.3d 979 (9th Cir.1995) (initially deciding citizen suits were unauthorized when challenging water quality standards in an NPDES permit, latter opinion found citizen suits were not so limited); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1014 n. 11 (3rd Cir.1988) (refusing to decide whether scope of citizen suits was limited). We also decline to address the issues of Hughey's standing, JMS's substantive due process challenge, and the fee award's lodestar calculation, as they are rendered unnecessary by the holding herein.

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12 F.Supp.3d 1208

United States District Court, N.D. California.

**SAN FRANCISCO BAYKEEPER**, Plaintiff,

v.

**LEVIN ENTERPRISES**, INC. et al., Defendants.

No. C-12-04338(EDL)

Filed December 18, 2013

### Synopsis

**Background:** Environmental advocacy group filed suit against operator of marine bulk terminal alleging its storm water discharges violated both the Clean Water Act (CWA) and operator's permit under the National Pollutant Discharge Elimination System (NPDES). Both sides moved for summary judgment.

**Holdings:** The District Court, Elizabeth D. Laporte, United States Chief Magistrate Judge held that:

[1] general permit for discharge of storm water associated with industrial activities required operator of marine bulk terminal to comply with discharge requirements only as to its vehicle maintenance and equipment cleaning operations;

[2] intent to sue letter was adequate to put operator on notice of alleged storm water discharge violations as to vehicle maintenance and equipment cleaning operations; but

[3] intent to sue letter failed to provide notice as to alleged commingling of discharges from permit-covered activities with those from activities where no permit coverage was required;

[4] intent to sue letter was adequate as to point source discharges; and

[5] genuine issues of material fact regarding operator's permit shield protection precluded summary judgment on storm water discharge claim.

Ordered accordingly.

West Headnotes (9)

[1] **Federal Civil Procedure** 🔑 Materiality and genuineness of fact issue

“Material facts,” for purposes of summary judgment, are those which may affect the outcome of the case. [Fed. R. Civ. P. 56](#)

[2] **Federal Civil Procedure** 🔑 Partial summary judgment

Summary adjudication under federal rule which provides that court may enter an order stating any material fact, including an item of damages or other relief that is not genuinely in dispute, and treating the fact as established in the case, may be appropriate on clearly defined issues; it can be used to narrow issues while allowing court to retain its power to adjudicate all claims and may be used to dispose of affirmative defenses. [Fed. R. Civ. P. 56\(g\)](#)

[3] **Environmental Law** 🔑 Conditions and limitations

General permit for discharges of storm water associated with industrial activities, as delegation of authority to state under CWA, required operator of marine bulk terminal at transportation facility to comply with requirements for storm water discharge only as to its vehicle maintenance and equipment cleaning operations, not as to its bulk material handling and storage operations; although operator had voluntarily managed its storm water discharges related to bulk material handling and storage waste, permit did not identify such activities as industrial activities requiring a permit, nor were such activities identified as a significant contributor of pollutants to United States water. Federal Water Pollution Control Act §§ 101, 301, 402, 402, 402, 33 U.S.C.A. §§ 1251(a), 1311(a), 1342(p)(1) and (2), 1342(p)(2)(E), 1342(p)(2)(B); 40 C.F.R. § 122.26; Cal. Water Code § 13160

3 Cases that cite this headnote



[4] **Administrative Law and Procedure** 🔑 Permissible or reasonable construction

An agency's interpretation of a statute is reasonable, and thus entitled to deference upon judicial review, where it furthers the purpose of the authorizing statute, is a permissible reading of the regulation, and is consistent with prior agency decisions, rather than a post hoc justification.

[5] **Environmental Law** 🔑 Private right of action; citizen suits

When a citizen's notice letter to an alleged polluter fails to observe the formalities required by the Clean Water Act (CWA), the court lacks jurisdiction to hear the citizen's enforcement action. Federal Water Pollution Control Act § 505, 33 U.S.C.A. § 1365(b); 40 C.F.R. § 135.3

[2 Cases that cite this headnote](#)

[6] **Environmental Law** 🔑 Notice requirements

Environmental advocacy group's notice-of-intent-to-sue letter sent to operator of marine bulk terminal to alert it of violations of state and federal regulations governing storm water discharge as to vehicle maintenance and equipment cleaning operations was adequate, under standards set forth under Clean Water Act, and thus, court had jurisdiction to hear group's enforcement action against operator, where the 20-page notice letter described the activities at operator's facility as to vehicle maintenance and rail car maintenance, detailed which activities occurred in each part of the facility, described the storm water conveyance system and discharge location, and stated that storm water discharges from the facility violated permit regulations "during and/or following every significant rain event." Federal Water Pollution Control Act §§ 301, 402, 502, 505, 33 U.S.C.A. §§ 1311(a), 1342(p)(2)(E), 1362(14), 1365(b); 40 C.F.R. §§ 135.3, 135.3(c); Cal. Water Code § 13160

[2 Cases that cite this headnote](#)

[7] **Environmental Law** 🔑 Notice requirements

Although environmental advocacy group's notice-of-intent-to-sue letter sent to operator of marine bulk terminal to alert it of violations of state and federal regulations governing storm water discharge as to vehicle maintenance and equipment cleaning operations was adequate, under standards set forth under Clean Water Act, it failed to provide notice as to alleged commingling of discharges from permit-covered activities with those from activities where no permit coverage was required, and thus court lacked jurisdiction as to this claim in enforcement action; although notice letter included a list of pollutants, discharge points, and sources of pollution that related to discharges of storm water and non-storm water from the facility, there was no mention of the word commingling or the idea that discharges from covered activities were mixed with non-covered activities so as to alert operator of the alleged violation. Federal Water Pollution Control Act §§ 101, 301, 402, 402, 505, 33 U.S.C.A. §§ 1251, 1311(a), 1365(b), 1342(p)(1) and (2), 1342(p)(2)(E); 40 C.F.R. §§ 122.26, 135.3, 135.3(a)

[2 Cases that cite this headnote](#)

[8] **Environmental Law** 🔑 Notice requirements

Environmental advocacy group's notice-of-intent-to-sue letter sent to operator of marine bulk terminal to alert it of violations of state and federal regulations governing storm water discharge included enough information about the facility's point source discharges to constitute proper notice under Clean Water Act; letter stated that industrial operations at the facility were "conducted outdoors without adequate cover to prevent storm water exposure to pollutant sources or direct discharge of pollutants via air deposition, and without secondary containment or other measures to prevent polluted storm water and/or other pollutants from discharging," it listed sources of pollutants, including vehicle and equipment maintenance areas and on-site material handling equipment such as conveyors, forklifts, and trucks, and stated that pollutants were tracked throughout the operations area and

accumulated in the parking lot and driveways, so that trucks and vehicles leaving the facility staging areas and driveways were pollutant sources tracking sediment, dirt, oil and grease, metal particles, and other pollutants off-site. Federal Water Pollution Control Act §§ 301, 402, 402, 502, 505, 33 U.S.C.A. §§ 1311(a), 1362(14), 1342(p)(1) and (2), 1342(p)(2)(E), 1365(b); 40 C.F.R. §§ 122.26, 135.3

[9] **Federal Civil Procedure** ← Environmental law, cases involving

Genuine issues of material fact as to whether point source discharges at marine bulk terminal were protected by permit shield in a general permit issued pursuant to Federal Water Pollution Control Act, so as to protect holder from strict liability for unauthorized discharges, and whether operator was compliance with the general permit, precluded summary judgment on environmental advocacy group's claim against operator of facility for violations of Clean Water Act based on alleged improper storm water discharges at the terminal. Federal Water Pollution Control Act §§ 101, 402, 33 U.S.C.A. §§ 1251, 1342(k)

1 Cases that cite this headnote

#### Attorneys and Law Firms

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Catherine W. Johnson, Hanson Bridgett LLP, Oakland, CA, Lawrence M. Cirelli, Nathan Andrew Metcalf, Sophia B. Belloli, Timothy Devon Findley, Hanson Bridgett LLP, San Francisco, CA, for Defendants.

#### ORDER GRANTING IN PART AND DENYING IN PART THE PARTIES' CROSS-MOTIONS FOR SUMMARY ADJUDICATION

ELIZABETH D. LAPORTE, United States Chief Magistrate Judge

#### I. Introduction

This case arises under the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 et seq. Plaintiff San Francisco Baykeeper, an environmental advocacy group, alleges that Defendants Levin Enterprises, Inc. (“LEI”), and Levin–Richmond Terminal Corporation (“LRTC”), which operate a marine bulk terminal (“the Levin Facility”) on the Lauritzen Canal and the Santa Fe \*1211 Channel of San Francisco Bay, have violated the CWA and their permit to discharge storm water under the National Pollutant Discharge Elimination System (“NPDES”). Plaintiff has moved for partial summary judgment on two of Defendants' affirmative defenses. Plaintiff argues that its notice-of-intent-to-sue letter was adequate, and that Defendants must have—and do have—permit coverage for all their activities at the terminal. Defendants filed a cross-motion for summary judgment as to all of Plaintiff's claims based on the inadequacy of the notice of intent to sue, and for summary judgment as to most of Plaintiff's claims based on their contention that no permit is required for most of the activities at the Levin Facility. The Court grants in part and denies in part both motions for summary judgment.

#### II. Background

##### A. Regulatory Background

##### 1. Clean Water Act

The goal of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). Section 310(a) of the CWA prohibits the discharge of pollutants from any point source into waterways without an NPDES permit. 33 U.S.C. § 1311(a). The CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

Congress established the permitting process for storm water discharge in 1987. Most discharges composed entirely of storm water are exempt from the CWA's permitting requirements, but permits are required for discharges

associated with “industrial activity.” See 33 U.S.C. § 1342(p)(1) and (2); *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1304–05 (9th Cir.1992) (detailing EPA’s regulations regarding “industrial activity” sources). EPA’s implementing regulations at 40 C.F.R. § 122.26 require NPDES permit authorization for facilities engaged in industrial activity to discharge to United States waters.

There are eleven categories of facilities engaged in industrial activity, grouped according to Standard Industrial Classification (“SIC”) codes. See 40 C.F.R. § 122.26.(b)(14). Marine transportation facilities, such as the one at issue in this case, are SIC code 4491; industrial activities at transportation facilities are defined as the portions of the facility involved in vehicle maintenance, equipment cleaning, or airport deicing operations. *Id.*

## 2. California's Permit for Industrial Dischargers

In 1973, the EPA delegated its authority to operate the NPDES program to the State of California. See 57 Fed.Reg. 43,733, 43–743–35 (listing states with permitting authority). The State Water Board is a delegated agency and is authorized to issue, implement, and enforce NPDES permits. See Cal. Water Code § 13160. This authority includes implementation and enforcement of the Permit and exercise of residual authority pursuant to 33 U.S.C. § 1342(p)(2)(E), which provides that a delegated state may determine that a storm water discharge contributing to a violation of a water quality standard, or that is a significant contributor of pollutants to United States waters, requires an NPDES permit. See 57 Fed.Reg. 43,733, 43–743–35.

The State Board issued a single statewide permit (“Permit” or “General Permit”) \*1212 for industrial discharges in 1991. See Declaration of Caroline Koch ISO Pl.’s MSJ (“Koch Decl.”) Ex. E at II. The Permit was modified in 1992 and reissued in 1997. *Id.* To lawfully discharge storm water in California, facilities engaged in certain industrial activity must comply with the terms of the Permit. 33 U.S.C. § 1342(p)(2)(B); see also Koch Decl. 1 Ex. E at I (listing regulated discharges). Facilities seeking coverage under the General Permit must submit a Notice of Intent to Comply with the General Permit (“NOI”). *Id.* Ex. E at 6. The NOI embodies the discharger’s agreement to abide by the terms of the permit. *Env’tl Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 853 (9th Cir.2003).

The Permit has four basic requirements. First, permittees must implement best management practices (“BMPs”) to reduce or prevent pollutants in storm water discharges. Second, the Permit forbids discharges of storm water that cause or contribute to an exceedance of applicable Water Quality Standards in the applicable water quality or basin plan. Third, permittees must develop and implement a Storm Water Pollution Prevention Plan (“SWPPP”). Fourth, permittees must develop and implement a Monitoring and Reporting Program (“M & RP”) in compliance with Section B of the Permit, which includes filing annual reports with the Regional Water Quality Control Board. Koch Decl. 1 Ex. E at 4, 11–23, 24–45.

## B. Factual and Procedural History of Defendants' Permits

### 1. The LRTC Permits

Defendant LRTC owns the **Levin** Facility, a dry bulk cargo marine terminal in Richmond, California, on the Inner Harbor of San Pablo Bay. Defs.’ MSJ Br. at 8. (Plaintiff states that Defendant **Levin Enterprises, Inc.**, is the owner of the Main Terminal and the North Parr Yard portions of the **Levin** Facility, and that the South Parr yard is owned by the 799 Wright Avenue LLC, whose sole owner is Defendant **Levin Enterprises, Inc.** Koch Decl. 1 ¶ 25, Ex. U (Excerpts from Defendants’ Responses to Requests for Admission) at 5–10.) It accepts dry bulk cargo from customers via truck or rail and loads the cargo into ships. There are facilities to temporarily store cargo before loading and two berths for cargo ships. Most of the cargo is stored outside. Defs.’ Br. at 8; Declaration of James Holland ISO Defs.’ Cross–Motion for Summary Judgment (“Holland Decl.”) ¶¶ 6–8. Defendant LRTC has an air permit from the Bay Area Air Quality Management District (“BAAQMD”) for the storage and handling of dry bulk cargo and its associated equipment (e.g., the bulk transport system). Holland Decl. Ex. B.

In 1992, Defendants submitted a “Notice of Intent for General Permit to Discharge Stormwater Associated with Industrial Activity” to the State Board. Koch Decl. 1 Ex. G at 2. **Levin Enterprises** is listed as the Owner/Operator, and the **Levin** Facility is described as a marine bulk terminal with an SIC code of 4491. *Id.* Under “Industrial Activities at Facility,” three activities are checked: material storage, vehicle maintenance, and material handling. *Id.* Under “Types of materials handled and/or stored outdoors,” scrap metal and

“Other: Materials loaded/unloaded ie: Bauxite, Coal, Green Coke, Hog Fuel, Aggregate, etc.” are checked. *Id.* at 3. The Facility is listed as approximately 43 acres. *Id.*

In 1997, the General Permit expired. Those facilities enrolled under the prior Permit were sent NOI certifications and instructed that to enroll under the new General Permit, they should sign the certification and return it to the State Board. \*1213 Koch Decl. 1 Ex. H at 2. Defendant signed the certification and dated it May 25, 1998. *Id.* at 3. The certification states that “I certify that the provisions of the permit, including the development of and implementation of a Storm Water Pollution Prevention Plan and a Monitoring Program Plan, will be complied with.” *Id.*

Defendants submitted their first SWPPP and M & RP for the **Levin** Facility in June of 2003. Koch Decl. 1 Exs. I, J. They submitted further SWPPPs and M & RPs dated 2006–2007 and 2011–2012. *Id.* Exs. O, P, Q. The current SWPPP, from 2013, states that Defendants “elected to manage all of the stormwater runoff” at the Facility. *Id.* Ex. S at 6.

## 2. Plaintiff's Notice-of-Intent-to-Sue Letter

On June 5, 2012, Plaintiff wrote Defendants a letter (“Notice Letter”) notifying them of Plaintiff's intent to file suit under the Clean Water Act. First Amended Compl. (“FAC”), Docket No. 12, Ex. A. The letter will be discussed in more detail below, but it is approximately 20 pages long, plus attachments, and describes Plaintiff's role as an advocacy organization, Defendants' operation, how storm water pollutes the **San Francisco** Bay watershed, how the Regional Board administers the General Permit, how Defendants' industrial activities pollute the Bay, and the specific alleged violations of the Clean Water Act.

## 3. Regional Board Communication Regarding LRTC's Permit Coverage

On March 18, 2013, the Chief of the Regional Board's Watershed Division, Shin–Roei Lee, sent Defendants a letter stating that the **Levin** Facility “has had permit coverage” under the General Permit since 1992, and is required to maintain and implement a SWPPP. Having reviewed Defendants' 2013 SWPPP and 2011–12 Annual Monitoring Report, Ms. Lee wrote:

[W]e determine that the Terminal has been and must continue to be covered by the Permit due to the following reasons:

- 1) At the Terminal, dry bulk material storage and handling of materials ... are conducted in a way that results in discharges of polluted storm water.
- 2) The Terminal lacks structural and non-structural controls necessary to prevent the discharge of pollutants associated with industrial activities at the Terminal.
- 3) Laboratory analyses of storm water samples taken from the site as reported in the 2011–2012 Annual Report show that storm water contains pollutants, including metals and suspended sediments above U.S. EPA's benchmark values (see attached table).

In summary, the Terminal is required to remain covered by and comply with the Permit. Declaration of Shin–Roei Lee, Defendants' MSJ Brief (“Lee Decl.”), Ex. A at 1–2.

On April 9, 2013, Defendants challenged Ms. Lee's letter, and on May 29, 2013, Yuri Won, the Regional Board's Senior Staff Counsel, responded:

It appears that the storage and handling of the coke piles, by itself, at the site is not identified in the statewide general industrial stormwater permit (General Permit) as requiring permit coverage. Nonetheless, we understand that the **Levin**–Richmond Terminal has filed a Notice of Intent (NOI) to comply with the General Permit with respect to the coke piles. As such, we expect the **Levin**–Richmond Terminal to comply with the General Permit as it pertains to the coke piles.

\*1214 Lee Decl. Ex. B. On May 2, 2013, Regional Board staff member Michelle Rembaum–Fox inspected the **Levin** Facility and found violations of the General Permit, laid out in a June 11, 2013 Notice of Violation letter from Ms. Lee. Lee Decl. ¶ 7 & Ex. C (“NOV letter”).

Defendants responded to the NOV letter on July 30, 2013. Declaration of Catherine Johnson ISO Defs.' MSJ ("Johnson Decl.") Ex. C. In the response, Catherine Johnson, Defendants' counsel, stated that

LRTC has been managing its bulk material storage and handling activities as if these activities were regulated by the General Permit. We have been doing so on a voluntary basis and hope to continue to so [sic].

Based on our conversations with you, we understand that you concur that the bulk material handling and storage is not subject to the General Permit. Nonetheless, you also take the position that LRTC must comply with the General Permit as to all activities identified in its Notice of Intent to Comply ("NOI"), including activities not subject to the General Permit, such as bulk material storage and handling....

LRTC wants to work cooperatively with the Regional Board. We understand that a voluntary compliance on the magnitude assumed by LRTC is highly unusual if not unprecedented and leads to some confusion on all sides.

Johnson Decl. Ex. C at 1. The letter also stated that Defendants believe that all of the issues raised in the NOV had been resolved. *Id.*

Ms. Lee, the Watershed Chief at the Regional Board, provided a declaration to Defendants that is attached to their opening brief. In it, she outlined her history with the Regional Board and her credentials; she has been the Watershed Management Division Chief since November of 2003 and supervises compliance assurance and enforcement efforts related to the Permit. Lee Decl. ¶ 2. Ms. Lee states that "[t]he Regional Water Board has no position on the disposition of this lawsuit between two private parties and provides this declaration for the purpose of clarifying certain statements or positions that may be attributed to the Regional Water Board by the parties in this case." *Id.* ¶ 4. After laying out the correspondence and inspection history, Ms. Lee states "[t]o date, the Regional Water Board has taken no formal Board action adopting the position that LRTC must continue to have Permit coverage for activities that are not subject to the General Permit." *Id.* ¶ 8. She states further that "[t]he General Permit does not identify bulk material handling and storage activities at transportation facilities as industrial activities that require a permit under the General Permit." *Id.* ¶ 9. Finally, she states that "[t]o date, the Regional Water Board has taken no formal Board action adopting the position that discharges from LRTC contribute

to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States under 40 CFR section 122.26(a)(1)(v)." *Id.* ¶ 10.

### III. Legal Standard

#### A. Summary Judgment

[1] Summary judgment shall be granted if "the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Material facts are those which may affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient \*1215 evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir.1999).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. *Id.* If the moving party meets its initial burden, the opposing party "may not rely merely on allegations or denials in its own pleading;" rather, it must set forth "specific facts showing a genuine issue for trial." See Fed. R. Civ. P. 56(e)(2); *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505. If the nonmoving party fails to show that there is a genuine issue for trial, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

#### B. Summary Adjudication

[2] The parties have asked that if the Court declines to grant summary judgment, it instead grant summary adjudication under [Federal Rule of Civil Procedure 56\(g\)](#), which provides that a court “may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.” [Fed. R. Civ. P. 56\(g\)](#). Summary adjudication may be appropriate on clearly defined issues. [California Sportfishing Protection Alliance v. Diablo Grande, Inc.](#), 209 F.Supp.2d 1059, 1065 (E.D.Cal.2002) (citing [Robi v. Five Platters, Inc.](#), 918 F.2d 1439 (9th Cir.1990)). It can be used to narrow issues while allowing the court to retain its power to adjudicate all claims. *Id.* Summary adjudication may be used to dispose of affirmative defenses. *Id.*

#### IV. Argument

There are two main questions at this stage of the case. One is which activities at the [Levin](#) Facility are covered by the General Permit. The other is whether Plaintiff's Notice Letter was sufficient. Although these issues are somewhat intertwined, and because Plaintiff's arguments have evolved over the course of briefing and oral argument, the Court will first address the scope of the coverage of the General Permit, and then consider the sufficiency of Plaintiff's Notice Letter.

##### A. Scope of Permit Coverage

The parties disagree about the most basic issue in the case: whether the vast majority of Defendants' activities require General Permit coverage. Most of the activities at the [Levin](#) Facility consist of bulk handling and storage of the cargo that Defendants load onto ships. Plaintiff argues that Defendants sought Permit coverage for all of their activities in 1992, including bulk handling and storage. Having taken advantage of the benefits of the \*1216 Permit since then, Plaintiff argues, Defendants are required to comply with the Permit's requirements. Plaintiff also argues that Defendants not only sought and received Permit coverage, but that they are required to have Permit coverage for all of their activities. Defendants state that they cannot possibly have sought coverage for something that the Permit, by its very language, does not cover, and that they are being punished for voluntarily managing their storm water discharges.

##### 1. Whether the Permit, on its Face, Covers Bulk Material Handling and Storage

As discussed above in the Facts section, California has a General Permit for Discharges of Storm Water Associated With Industrial Activities. Koch Decl. Ex. E. “Industrial activities” for a transportation facility, including a marine terminal such as the [Levin](#) Facility, are vehicle maintenance, equipment cleaning, and airport deicing. *See id.* Ex. E at 69 (“Only those portions of the facility involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) or other operations identified herein that are associated with industrial activity); *see also* 40 C.F.R. § 122.26(b)(14). It is undisputed that Defendants conduct vehicle maintenance and equipment cleaning at the [Levin](#) Facility. It is also undisputed that any activity beyond vehicle maintenance and equipment cleaning at a transportation facility does not appear in the language of the regulation or the Permit.

Defendants filed a Notice of Intent to comply with the Permit in 1992, and it checked the boxes under “Industrial Activities” for material storage, vehicle maintenance, and material handling. Koch Decl. Ex. G at 1. The NOI form that Defendants filled out in 1992 is not specific to transportation facilities. There is a place to fill out which SIC (“Standard Industrial Classification”) Code covers the filer's facility; Defendants filled out 4491 for Marine Bulk Terminal. The list of boxes to be checked is not exclusive to a transportation facility. The 1997 NOI is just over a page and asks for no details of the facility, operation, or activities, but simply requests that the signer “certify that the provisions of the permit, including the development of and implementation of a Storm Water Pollution Prevention Plan and a Monitoring Program Plan, will be complied with.” Koch Decl. Ex. H at 2; *see also* Defs.' RFN, Docket No. 74, Ex. A at 76–77.

[3] Although Plaintiff insists that there “is no dispute that Defendants sought, obtained, and continue to have Permit coverage for the entirety of the [Levin](#) Facility. Nor is there a reasonable dispute that Defendants are required to have site-wide Permit coverage,” Pl.'s Reply at 1, the Regional Board's evolving position, and the language of the Permit itself, belie that argument. Although Plaintiff is correct that an NOI is an agreement to abide by the terms of the Permit, *see Env'tl. Def. Ctr. v. Env'tl. Prot. Agency*, 344 F.3d 832, 853 (9th Cir.2003), the NOI binds its signer to the terms of the Permit, not to some standard beyond those terms. *See* Koch Decl. Ex. E (General Permit) at VII (“Certification of the NOI signifies that the facility operator intends to comply with the provisions of the General Permit.”). Plaintiff is also correct that the Court may determine the scope of Defendants' required Permit

coverage and should use principles of contract construction to do so. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 984–85 (9th Cir.1995). However, Plaintiff's statement that "the rules of contract construction dictate that unambiguous language be applied as stated" does not lead to their conclusion \*1217 that Defendant is liable for Permit coverage. Rather, the unambiguous language of the Permit provides that for a marine terminal such as Defendants' facility, the Permit covers vehicle maintenance and equipment cleaning, not bulk material handling and storage.

Plaintiff argues that Defendants could have sought to amend their NOI or terminate their Permit coverage. However, Defendants maintain that there was no need to amend their NOI or terminate Permit coverage, because they are in compliance with the Permit's terms. Defendants' counsel Catherine Johnson's July 30, 2013 letter to the Regional Board raised the possibility that LRTC might seek an alternate arrangement with the Regional Board, if its voluntary management of storm water continued to be so contentious. Johnson Decl. Ex. C. While, with the benefit of hindsight, Defendants could have taken a different course of action that might have led to less confusion, Defendants are not required to clarify Permit coverage that they are not required to have in the first place. On its face, the General Permit does not require Defendants to have Permit coverage for their bulk material storage and handling, but rather only for their vehicle maintenance and equipment cleaning operations.

## 2. Deference to the Regional Board and Delegation of Residual Authority

### a. The Evolution of the Regional Board's Opinion Regarding Permit Coverage

The Regional Board's staff has, in the past, insisted that the Defendants had and were required to have Permit coverage for all of their activities, as detailed above. However, Shin-Roei Lee, the Chief of the Regional Board's Watershed Division, subsequently provided a declaration to Defendants acknowledging the lack of any formal Regional Board position on this issue. Specifically, she states that "[t]he Regional Water Board has no position on the disposition of this lawsuit between two private parties and provides this declaration for the purpose of clarifying certain statements or positions that may be attributed to the Regional Water Board by the parties in this case." Lee Decl. ¶ 4. She adds that "[t]o date, the Regional Water Board has taken no formal Board

action adopting the position that LRTC must continue to have Permit coverage for activities that are not subject to the General Permit." *Id.* ¶ 8. She states further that "[t]he General Permit does not identify bulk material handling and storage activities at transportation facilities as industrial activities that require a permit under the General Permit." *Id.* ¶ 9. Finally, she states that "[t]o date, the Regional Water Board has taken no formal Board action adopting the position that discharges from LRTC contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States under 40 CFR section 122.26(a)(1)(v)." *Id.* ¶ 10.

There has been an evolution from the position of the Regional Board in the March 18, 2013 letter (LRTC has had permit coverage for all activities since 1992 and must continue to have it) to the May 29, 2013 letter (although the General Permit does not cover the storage and handling of the coke piles, LRTC filed a NOI to comply with the General Permit as to those coke piles and needs to remain in compliance) to the July 16, 2013 declaration (the General Permit does not cover bulk material and handling at the **Levin** Facility, and it is not the position of the Regional Board that LRTC needs to have Permit coverage for activities not subject to the Permit). This raises questions of how the Regional Board delegates its residual \*1218 authority and which Regional Board opinion the Court should consider in interpreting the statute, regulations, and the Permit.

### b. Delegation of Residual Authority

Plaintiff argues that, even if the Permit on its face does not require coverage for all of Defendants' activities, the Regional Board may use its residual authority to decide that all of Defendants' activities require Permit coverage. Defendants counter that the exercise of delegated residual authority is typically for ministerial functions, not major decisions like what kind of industrial activity is covered by the permit.

The CWA's regulations allow for the EPA Director or the administrator of an approved NPDES program to require permit coverage for a discharge that "contribute[s] to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(a)(1)(v) ("residual designation authority" or RDA). California has nine Regional Water Quality Control Boards. *Cal. Water Code*, §§ 13100, 13225. The Regional Boards have appointed board members, an executive officer,

and staff. [Cal. Water Code, §§ 13201, 13220](#). Plaintiff claims that most of the duties of the Regional Board's appointed board members may be delegated to the executive officer, and staff at the Boards frequently execute these delegated tasks, including issuing notices of violation, approving notices of termination, and exercising the residual authority to designate storm water discharges as requiring Permit coverage. *See* [Cal. Water Code §§ 13223\(a\), 13220\(d\)](#); Supp. Koch Decl. Exs. C, F–G. Where delegation to the executive officer is not permitted, the Water Code establishes a formal process. For example, cease and desist orders (§ 13301), clean up and abatement orders (§ 13304), and administrative civil liability (§ 13323) all require a formal process. Supp Koch Decl. Ex. H. Plaintiff states that the Water Code does not establish a formal process for exercising the residual authority under [33 U.S.C. § 1342\(p\)\(2\)\(E\)](#).

Defendants argue, persuasively, that Plaintiff has overstated the magnitude of decisions that may be delegated to a Regional Board's executive officer and on down to staff. The sections of the California Water Code cited by Plaintiff as showing broad authority are in fact quite specific. [Section 13223\(a\)](#) allows an executive director of a Regional Board to issue a complaint for civil liability—not to decide that an activity beyond the scope of the Permit triggers that liability. [Cal. Water Code § 13223\(a\)](#). [Section 13220\(d\)](#) lays out the resolution process should a dispute arise between different regional boards. [Cal. Water Code § 13220\(d\)](#). Neither section shows that the staff of a regional board may decide that an activity not included in the Permit itself requires Permit coverage. While it may be true that the Water Code does not require a formal process to exercise the residual authority, that does not mean that every major decision without a specific statutory section devoted to it is simply up for determination by the staff of a Regional Board.

Defendants also point out that in 2011, Plaintiff urged the State Water Board to include *all* areas of transportation facilities in the General Permit, not just those with fueling and maintenance activities. *See* Defs.' RFN Ex. C (4/29/11 Comment Letter) at 26 (noting that the draft Permit for the relevant SIC codes governs transportation facilities if they have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations, and urging that “[a]ll transportation facilities and all areas of such facilities should be included, not just those with fueling and \*1219 maintenance activities” because the facilities are “industrial in scale and involved in transporting bulk materials that are still part of industrial activity rather than the sale of a finished

product.”). The Regional Board's response to that comment was that “The Permit only covers discharges as defined in the federal regulations. Authority to add additional categories is limited to a formal designation process.” *Id.* Ex. D (2011 Draft Industrial General Permit Response to Comments) at Comment 1223. This reference to a “formal designation process” being necessary to do exactly that which Plaintiff wants to do here—include bulk handling and storage in the General Permit—effectively counters Plaintiff's argument that the Regional Board's staff can informally exercise its residual authority to make a designation of this magnitude.

Further, it does not appear that the Regional Board has tried to exercise this authority, regardless of whether the regulation allows such an exercise without a formal process. In Shin–Roei Lee's declaration supporting Defendants' cross-motion, she states that the Regional Board takes no position on the lawsuit, that the Board has taken no formal action adopting the position that LRTC needs Permit coverage for activities that are not subject to the General Permit, that the Permit does not identify bulk material handling and storage activities at transportation facilities as requiring coverage, and that “the Regional Water Board has taken no formal Board action adopting the position that discharges from LRTC contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States under [40 C.F.R. section 122.26\(a\)\(1\)\(v\)](#).” Lee Decl. ¶¶ 8–10. The section of the C.F.R. that Ms. Lee cites is the section of the regulation, discussed above, that allows a Regional Administrator to exercise the residual designated authority and require that a discharge that “contribute[s] to a violation of a water quality standard” be covered by the Permit. While the initial letters that the Regional Board sent to Defendants in March and May of 2013 indicate the staff's view that Defendants were required to have site-wide Permit coverage, such informal communication is not an official expression of Board policy.

Plaintiff's argument fails both because it has not established that staff members of the Regional Board can informally exercise the residual authority in this manner, and because there is undisputed evidence in the record that the Regional Board has specifically not taken a formal position on the precise question at issue. Although Plaintiff claims that no formal designation is required, it cannot escape the fact that its examples of the Board staff's exercise of the RDA, in the March 18, 2013 and May 29, 2013 letters, are inconsistent both with each other (because the May letter acknowledges that the Permit does not cover the coke piles, while the March



letter insists that the coke piles are covered by the Permit) and, more importantly, with Ms. Lee's declaration that the Board has not taken formal action to designate any LRTC discharges under 40 C.F.R. § 122.26(a)(1)(v). There is no dispute that 33 U.S.C. § 1342(p)(2)(E) allows the EPA administrator or the state to determine that the storm water discharge contributes to a violation of water quality standards or is a significant contributor of pollutants to the waters of the United States, and that the State of California empowers the Regional Water Boards to do so. But the Regional Board has made no such determination here.

### c. Deference to Agency Authority

The Court must consider whether the language in the statute, the Permit, and \*1220 the regulations is so ambiguous that the court needs to look to the relevant agency's interpretation for guidance. See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). On its face, the Permit does not regulate bulk handling and storage, which is the primary activity at the **Levin** Facility. However, there has been a great deal of confusion over the Permit coverage status of Defendants' activities, between the ambiguity of the checked boxes on the 1992 NOI form, the fact that Defendants have managed their storm water discharges in line with the Permit for many years, and the various statements of the Regional Board. That leaves the Court with the question of where to find the agency's interpretation. Is it the Regional Board's March 18, 2013 letter? The May 29, 2013 letter? The June 11, 2013 Notice of Violation? The Lee Declaration from July 16, 2013? As discussed above, these documents are not consistent with one another and the position appears to have evolved over time. The current position, reflected in the Lee Declaration, is that the Board “has taken no formal action adopting the position” that “LRTC must continue to have Permit coverage for activities that are not subject to the General permit” and “that discharges from LRTC contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States.” Lee Decl. ¶¶ 8–10. In other words, the Regional Board has no official interpretation to which the Court should defer.

[4] Plaintiff argues, nonetheless, that under *Chevron*, the Court should defer to the Regional Board's position that storm water discharges associated with all activities, including bulk handling and storage, are regulated by the General Permit, because that interpretation is reasonable. See *Chevron U.S.A.*

*Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). An agency's interpretation is reasonable where it furthers the purpose of the authorizing statute, is a permissible reading of the regulation, and is consistent with prior agency decisions, rather than a post hoc justification. *Decker v. Northwest Env'tl. Def. Ctr.*, — U.S. —, 133 S.Ct. 1326, 1337–38, 185 L.Ed.2d 447 (2013). Plaintiff also cites *Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) to support its position that courts should defer to informal, non-regulatory materials. In *Auer*, the Secretary of Labor's interpretation of a regulation arose in the form of a legal brief, rather than a formal regulatory interpretation. *Id.* The Supreme Court held that the interpretation was still worthy of deference, as set forth in an amicus brief, because there was “no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment.” *Id.*

Plaintiff also cites *California Pub. Interest Research Grp. v. Shell Oil Co.*, 840 F.Supp. 712 (N.D.Cal.1993) (Henderson, J.), where the issue was whether the defendant had violated the NPDES permit for discharging selenium in excess of a numeric standard set forth in an interim permit, when there was also a narrative standard. The court deferred to the interpretation of the Executive Director of the Regional Board, who testified about the standard at issue in both a declaration and a deposition. 840 F.Supp. at 716–17. The Director stated in his declaration, and subsequently reaffirmed his testimony, that the intent of the narrative standard was not to modify the numeric standard, but simply to explain it. *Id.* at 716. He stated that “it is not necessary to prove a violation of any narrative standard in an enforcement action relating to selenium.” *Id.* at 716. The court held that “the Water \*1221 Board could not be clearer: Shell is in violation of the NPDES permit when it violates the 5.8 lbs/day standard...” *Id.* at 717. The defendant argued that the Water Board had not yet formally determined whether it had violated the narrative standard and would not exercise its enforcement authority until that determination was made, but the court stated that neither of those statements was inconsistent with the Director's testimony. *Id.*

Defendants distinguish these cases, pointing out that in *Auer*, the EPA was interpreting its own regulation in an amicus brief, whereas here, the Regional Board staff was interpreting a federal regulation. In *CalPIRG v. Shell*, Defendants argue, the Board's Executive Director, who has more authority than a staff member, was testifying about the interpretation of a permit drafted by that Regional Board itself, unlike the

Permit at issue here. More persuasive is that in both *Auer* and *CalPIRG* the interpretation deferred to was set forth in a brief or in declaration or deposition testimony supporting a brief, like the Lee Declaration, rather than the Regional Board staff's prior letters. Moreover, the Lee Declaration is the most authoritative statement from the Regional Board as to its position (or lack thereof) regarding Defendants' permit coverage, and to the extent the Court defers to the agency's interpretation, it looks to the Lee Declaration. The Declaration acknowledges that the Permit, on its face, does not require coverage for bulk handling and storage and states that the Board has taken no formal position on whether Defendants must have "Permit coverage for activities that are not subject to the General Permit." Lee Decl. ¶ 8.

In the absence of a Board position to the contrary, and in light of the language of the General permit, the Court holds that Defendants are not required to have Permit Coverage for activities beyond those specifically enumerated in the Permit: equipment cleaning and vehicle maintenance and storage. The scope of what is included in those activities, and whether Plaintiff has properly noticed its claims regarding those activities, is discussed below.

### B. Notice

The Clean Water Act requires a citizen plaintiff to provide 60 days notice of its intent to sue. Defendants argue that Plaintiff's Notice Letter was insufficient and therefore that the Court does not have subject matter jurisdiction over Plaintiff's claims. Plaintiff maintains that its Notice Letter complied with the CWA's formal requirements and includes more than enough detail to put Defendants on notice of their claims. The question of whether Plaintiff's letter provided sufficient notice for the claims in the First Amended Complaint is only the first that the Court must address. Over the course of the briefing on these cross motions for summary judgment, Plaintiff introduced several new arguments about Defendants' activities at the **Levin** Facility. Although its reply brief maintains Plaintiff's argument that the 1992 NOI triggers sitewide Permit coverage, including Defendants' bulk handling and storage activities, much of the reply focuses on the widespread nature of Defendants' vehicle maintenance and equipment cleaning operation, Plaintiff's new contention that Defendants' equipment constitutes "point sources" that require Permit coverage, and its new allegation that virtually all of the storm water at the **Levin** Facility co-mingles with runoff from the maintenance and cleaning operations, requiring Permit coverage. The Court will consider whether

these arguments were sufficiently explored in Plaintiff's Notice Letter.

### \*1222 1. Citizen Enforcement of the Clean Water Act and Required Notice

A citizen plaintiff may file an enforcement action under the Clean Water Act "sixty days after the plaintiff has given notice of the alleged violation to ... any alleged violator of the standard, limitation, or order." 33 U.S.C. § 1365(b). The notice requirement is detailed in the CWA's implementing regulations, at 40 C.F.R. § 135.3. First, "[n]otice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated." 40 C.F.R. § 135.3(a). Second, the notice must describe "the activity alleged to constitute a violation." *Id.* The location of the alleged violation and the person or persons responsible for the violation must be specified, as well as the date or dates of the violation. *Id.* Finally, the contact information of the person giving notice and that person's legal counsel, if any, must be included. 40 C.F.R. § 135.3(c).

[5] Courts have described three separate functions of the notice requirement. See *Friends of Frederick Seig Grove # 94 v. Sonoma County Water Agency*, 124 F.Supp.2d 1161, 1167 n. 7 (N.D.Cal.2000). First, the enforcement function: a notice letter alerts the relevant agencies to alleged violations, which allows them to consider an enforcement action. Second, the compliance function: detailed notice allows the purported violator to come into compliance voluntarily, rather than face a lawsuit or administrative enforcement action. Third, settlement: regulators, alleged violators, and concerned plaintiffs have an opportunity to discuss solutions. *Id.* The Supreme Court has held that the 60-day notice provision should be construed strictly and that it is a mandatory prerequisite to bringing suit. *Hallstrom v. Tillamook County*, 493 U.S. 20, 23–24, 26, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989). The *Hallstrom* court rejected arguments that the notice requirement "should be given a flexible or pragmatic construction." *Id.* at 26–27, 110 S.Ct. 304. Where a notice letter fails to observe the formalities required by the Clean Water Act, the court lacks jurisdiction to hear the case. See *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1355 (9th Cir.1995).

Neither the regulation nor the Supreme Court has clearly established the specificity or level of detail that a notice letter must include. The regulation requires that the plaintiff provide enough information to permit the recipient to identify the dates of the violation, but does not specifically require the notice to contain those dates. *See* 40 C.F.R. § 135.5(a). Ideally, a plaintiff will identify a precise date, but if not, the range of the dates should be “reasonably limited.” *California Sportfishing Protection Alliance v. City of West Sacramento*, 905 F.Supp. 792, 799 (E.D.Cal.1995) (holding that dates of violation must be stated with some specificity and rejecting a notice letter that alleged hundreds of violations in a five-year range as insufficiently specific). The Ninth Circuit has held that plaintiffs are not required to “list every specific aspect or detail of every alleged violation.” *Cnty. Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir.2002). In *Friends of Frederick Seig Grove*, the court noted that:

[A] plaintiff is not required to provide in the notice letter itself an exhaustive list of each and every violation and the corresponding dates. Instead, a plaintiff must do what the CWA regulation requires: provide enough information for a defendant to identify the dates of claimed violations. When the plaintiff \*1223 has gathered the information supporting its suit from the defendant's own submissions to the relevant state agencies and cites those submissions in the notice letter, the plaintiff has satisfied the notice requirement, and a district court possesses subject matter jurisdiction over the case.

124 F.Supp.2d at 1169.

## 2. Notice Letter

Plaintiff argues that its Notice Letter more than met the requirements of the Clean Water Act. It is approximately 20 pages long and quite detailed. Prior to writing the letter, Plaintiff states, it reviewed publicly available documents, including Defendants 2003 SWPPP, its M & RP, and Annual

Reports. Koch Decl. ¶ 10. Plaintiff also visually observed the **Levin** Facility, from the street and from its boat. Declaration of Ian Wren ISO Pl.'s MSJ (“Wren Decl.”) ¶¶ 4–5. Plaintiff notes that it identified the specific permit limitations that Defendants violated (Discharge Prohibitions A(1) and A(2), Effluent Limitations B(1) and B(3), and Receiving Water Limitations C(1) and C(2)). Docket No. 12(FAC) at 48–58 and Ex. A. The letter describes the activities at the **Levin** Facility: “bulk material storage; vehicle maintenance; rail car maintenance and/or cleaning; and bulk material handling,” based on Plaintiff’s review of Defendants’ Permit documents (the June 2003 SWPPP, the NOI from 1992, and various annual reports). *Id.* at 46. The letter details which activities happen in each part of the **Levin** Facility and describes the storm water conveyance system and the discharge locations, based primarily on Defendants’ self-reported information.

As to the dates of violation, the Notice Letter states that “discharge violations of the Permit are identified in Attachment A and Attachment B. These discharge violations are ongoing and will continue each time contaminated storm water is discharged in violation of the Receiving Water Limitations of the Permit.” FAC Ex. A. at 8–18. In the sections identifying specific violations, Plaintiff’s letter states that the storm water discharges from the **Levin** Facility violate the conditions of the General Permit “during and/or following every significant rain event.” *See, e.g., id.* at 9. Attachment A shows storm water sampling results reported by Defendants that show exceedances of EPA benchmarks or Water Quality Standards and identifying which Permit provision is violated. Attachment B is a table listing the dates on which there was a significant rain event between September 2007 and March of 2012. *Id.* Exs. A, B.

The Notice Letter also identified pollutants discharged from the **Levin** Facility, information Plaintiff says it obtained from Defendants’ Annual Reports, as well as other documents. Among these pollutants are “heavy metals such as zinc, copper, lead, aluminum, iron; benzene; oil and grease; fuel and fuel additives; total suspended solids (‘TSS’); coolant, pH-affecting substances; pesticides such as DDT, aldrin, dieldrin, and endrin; and fugitive and other dust, dirt, and debris.” *Id.* at 6. The letter states that Defendants’ “failure to properly address pollutant sources and pollutants results in the exposure of pollutants associated with their industrial activities to precipitation, and results in the discharge of polluted storm water from the **Levin** Facility into Receiving Waters in violation of the Permit. *Id.* at 6–7.

Defendants object strenuously to the Notice Letter, arguing that it “provides no coherent information about the nature of the alleged violations, when or where the violations occurred or what steps LRTC could take to avoid a lawsuit.” Defs.’ MSJ Br. at 15. For example, it points to Plaintiff’s \*1224 citation of zinc levels that exceed Water Quality Standards (“WQS”) on three dates in 2011. FAC Ex. A at 13. Defendants argue that there is no numeric effluent limitation in the General Permit, and furthermore, there is no allegation about where the zinc is coming from. Without that information, Defendants argue, they cannot take any meaningful remedial action. Defendants claim that because there are no dates specified other than dates of U.S. EPA benchmark exceedances and violations of WQS, and the Permit does not include numeric limits, there are no actual permit violations for which any date is provided. Therefore, Defendants argue, the Notice Letter is inadequate on its face.

Defendants argue that many other notice cases, including *Friends of Frederick Seig Grove*, involve non-storm water point source discharges. *Friends of Frederick Seig Grove # 94 v. Sonoma County Water Agency*, 124 F.Supp.2d 1161, 1162 (N.D.Cal.2000). The permits governing those discharges do include effluent limits, unlike the General Permit at issue here. Exceeding the effluent limit in one of those permits is a per se violation, and self-monitoring requirements require dischargers to identify and disclose those exceedances. Defs.’ Reply at 8. This is not the case for the General Permit. Plaintiff acknowledges that an exceedance of WQS is not a per se General Permit violation, but contends that such an exceedance shows that Defendants are not engaging in Best Management Practices (“BMPs”), as required by the Permit. Reply at 22 n.11.

Defendants also point to factual inaccuracies in the Notice Letter. Contrary to the Notice Letter, Defendants state that the monitoring data in its Annual Reports has indicated no evidence of PCBs, MTBE, oil and grease, benzene, ethylbenzene, toluene, or nickel in storm water discharges in the last five years. Holland Decl. ¶ 18. Since Plaintiff did not conduct independent monitoring of the discharges prior to the notice letter, the only monitoring data referred to comes from Defendants’ Annual Reports. There also appears to be a dispute about whether a concrete cap at the facility is cracked, “which can result in the exposure of pollutants such as DDT.” FAC Ex. A at 12. Defendants maintain that there is no crack or sign of erosion, and that EPA inspects the facility each year and confirmed recently that the cap was sound. Holland Decl. ¶ 20 (“There are no cracks and signs of erosion

in the concrete cap that covers the Superfund site. Indeed, EPA has been inspecting the facility every year and recently confirmed, in 2012, that the concrete cap was sound.”). The EPA report that Plaintiff cites as its basis for including the cracked concrete cap states: “the integrity of the upland cap was well-maintained, and the cap was in good condition with no erosion. Although surface cracks were visible on the cap, it was indicated in the annual reports that they were not indicative of stress fractures but most likely developed subsequent to the curing of freshly-poured concrete. They were noted to be insignificant and do not require repair.” Koch Decl. Ex. B at 121.

Another Notice Letter inaccuracy cited by Defendants is the allegation that Defendants clean rail cars at the **Levin** Facility and have violated the Permit by failing to monitor its sampling discharge for rail-car-associated chemicals. FAC Ex. A at 10. (Rail-car cleaning generates significant amounts of toxic pollutants. *See* 40 C.F.R. subch. N.) According to Defendants, they have never cleaned rail cars at the facility, and their counsel repeatedly informed Plaintiff that LRTC did not clean rail cars after Plaintiff sent the Notice Letter but before it filed suit. *See* Defs.’ Reply at 6. Plaintiff included this allegation in the initial \*1225 Complaint, but not in the First Amended Complaint. *See id.*

The overarching accuracy issue appears to be rooted in Plaintiff’s pre-Notice Letter investigation, which Defendants maintain was inadequate. Defendants argue that Plaintiff failed to make a reasonable inquiry into or review publicly available information about the identify of materials stored at the terminal, Defendants’ own implemented Best Management Practices (“BMPs”), and the location and dates of alleged permit violations. The SWPPP must identify and explain a discharger’s BMPs. *See* Permit, Koch Decl. Ex. E, at 17–21. At the time it sent the Notice Letter, Plaintiff had not reviewed Defendants’ current SWPPP, but rather relied on the 2003 SWPPP, which was prepared more than 10 years ago. Plf.’s Reply at 18. Plaintiff initially made a public records request in November of 2011 to the Regional Board, and received the 1992 NOI, the 2003 SWPPP, and some Annual Reports in November 22, 2011. Koch Decl. ¶ 10. Plaintiff filed the Notice Letter on June 5, 2012. On July 3, 2012 and in September of 2012, Plaintiff followed up with another public records request to the Regional Board and received more up to date documents, including Defendants’ most recent SWPPP. Plaintiff filed its initial Complaint on August 17, 2012, apparently before it had reviewed the most recent SWPPP. According to Defendants’ counsel, Catherine

Johnson, she offered the SWPPP to Plaintiff before it filed the lawsuit. See Declaration of Catherine Johnson ISO Defs.' Reply ("Johnson Decl.") ¶ 2.

Defendants maintain that these inaccuracies and Plaintiff's reliance on outdated information mean that Plaintiff has not made the "good-faith allegations" required by the Supreme Court for proper notice under the Clean Water Act. See *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 65, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). They argue that Plaintiff's Notice Letter does not meet the purposes of the Clean Water Act: it does not help Defendants come into compliance, because there are so many purported violations with no suggested remedy that they "render the letter virtually incomprehensible," and because a letter full of "fictitious factual assertions" does not furnish the administrative agency with meaningful information. Defs.' MSJ at 18.

Plaintiff vigorously defends its Notice Letter, pointing out that it is largely based on Defendants' own self-reporting. In terms of the materials handled and stored at the facility, Plaintiff contests Defendants' assertions of inaccuracy. For example, while Defendants claim that no bauxite has been stored at the **Levin** Facility since 2008, their 2010–2011 Annual Report lists bauxite as a material handled there. See Holland Decl. ¶ 16 ("LRTC has not handled bauxite at the LRTC Facility since 2008"); Supp. Koch Decl. Ex. D, 2010–11 Annual Report, at 9 (listing bauxite). While it may be that the inclusion of bauxite in the Annual Report was mistaken, the Report is certainly a legitimate, and relatively recent, source for Plaintiff's Notice letter.

Plaintiff similarly defends its inclusion of other pollutants in the Notice Letter, noting that the June 2003 SWPPP includes Defendants' Hazardous Materials Business Plan as an appendix, and lists waste oil, gasoline, diesel fuel, lubricating oils and grease, oxygen, liquid oxygen, acetylene, mapp gas, and light aliphatic naphtha as materials stored at the **Levin** Facility. Koch Decl. Ex. I at 45–71. Plaintiff argues that it appropriately extrapolated from the fact that Defendants' self-reported industrial activities and the fact that the **Levin** Facility includes a five-acre Superfund \*1226 site contaminated by pesticides to use the phrases "including but not limited to" and "can carry" in its lists of pollutants—these lists, Plaintiff asserts, "were meant to be instructive, not exact." Plf.'s Reply at 19.

As to the dates of alleged violations and what exactly constitutes a violation, Plaintiff claims that its position is

more nuanced than Defendants describe. The Notice Letter referenced specific dates on which Defendants' storm water discharges exceeded EPA benchmarks and WQS. Plaintiff now states that these exceedances, while not per se violations of the General Permit, show that Defendants have not implemented the BMPs that meet the Permit technology standards. Plf.'s Reply at 21–22 & n.11. Plaintiff alleges that the Permit violations happen during and following every rain event, and Exhibit B to the Notice Letter is every date in an approximately 5–year period in which 0.1 inches or more of precipitation fell near the **Levin** Facility. Plaintiff also argues that Defendants' failure to comply with the SWPPP and M & RP requirements is ongoing, and puts Defendants in a daily and continuous state of violation, citing *Friends of Frederick Seig Grove # 94*, 124 F.Supp.2d at 1168 ("[C]ourts have not required a plaintiff to list a specific date for a violation that is premised on the alleged violator's failure to act.").

As to the rail car cleaning issue, Plaintiff states that its allegation was based on Defendants' self-reported activity of vehicle maintenance, and that the 1992 NOI indicated that there were "Subchapter N limits" (which are associated with rail car cleaning) applicable to the **Levin** Facility. Koch Decl. Ex. G at 3. Plaintiff maintains that its subsequent amendment of the complaint to excise allegations regarding railcar cleaning simply show that the purpose of the 60–day notice period was served. Further to that point, Plaintiff notes that after receiving the Notice Letter, Defendants revised their SWPPP and began implementing additional pollution control measures at the **Levin** Facility. See *Southwest Marine*, 236 F.3d at 997 (noting that a defendant's remedial actions taken after receipt of a notice letter supported the adequacy of the notice). Plaintiff defends its pre-Notice Letter investigation, pointing out that the Clean Water Act does not require it to conduct extensive discovery before sending a Notice Letter, but rather, review currently available information. See *Nat'l Res. Def. Council v. Southwest Marine*, 236 F.3d 985, 996–97 (9th Cir.2000). Plaintiff states that it received the June 2003 SWPPP from the Regional Board in November of 2011 and based many of its allegations on that document; when it learned of a more recent SWPPP, it requested a copy from Defendants and then from the Regional Board. Koch Decl. ¶ 17.

[6] Although the Court has some reservations about Plaintiff's Notice Letter and its pre-filing investigation, it concludes that for the claims that actually appear in the Notice Letter and the First Amended Complaint (an issue to be discussed more below), the Notice Letter is adequate. It is

undisputed that Plaintiff's letter does not fail in terms of the formalities on which several of the cited cases base their rejection of notice letters (e.g., the plaintiffs' failure to notify the relevant agencies of their intent to sue, in *Hallstrom*, 493 U.S. at 23–24, 110 S.Ct. 304, or the failure to provide the contact information for the plaintiff organizations, in *Washington Trout*, 45 F.3d at 1352). Although the Supreme Court has stated that the notice requirement must be strictly construed, *Hallstrom*, 493 U.S. at 31, 110 S.Ct. 304, it did so regarding these formalities and provided little guidance on the remaining content \*1227 of the notice. The regulation requires “sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation...” 40 C.F.R. § 135.3(a).

In *San Francisco BayKeeper v. Tosco Corp.*, 309 F.3d 1153 (9th Cir.2002), the Ninth Circuit reversed the district court's grant of summary judgment to the defendant, owners of a coke facility. The court stated that the regulations required no more than reasonable specificity in the notice letter, and that an allegation that coke spilled into the water “on each day of ship loading, even on days for which *BayKeeper* did not provide specific dates, was sufficiently specific to fulfill its notice obligation.” 309 F.3d at 1158. The court reasoned that because the defendant knew better than *BayKeeper* the dates on which it loaded ships, “[g]iven the knowledge that Tosco already had, *BayKeeper's* letter was specific enough to notify Tosco of the nature of the alleged violations, as well as the likely dates of those violations.” The court also noted its earlier decision in *Bosma Dairy*, discussed above, where a plaintiff added additional dates of similar violations to its complaint following the notice letter, and stated that “*BayKeeper* can pursue claims for such violations on other dates within the overall period specified in the letter.” *Id.* at 1159.

The *Tosco* court found that the closer question was whether *BayKeeper* could pursue its claim that Tosco was responsible for illegal discharges “ ‘on each day when the wind has been sufficiently strong to blow coke from the piles into the slough,’ ” alleged violations for which *BayKeeper* had provided no specific dates, just a general date range covered by its entire notice letter. 309 F.3d at 1159. The court held that because the notice clearly identified the alleged violation (wind blowing coke from uncovered piles into the water) and was specific enough to allow the defendant to correct the

problem (by covering or enclosing the coke piles) that notice was adequate even without specific dates. *Id.*

Here, the situation is a somewhat similar. At issue are rainy days, rather than windy ones. Plaintiff here has provided dates of significant rainfall, so it is even more specific than the notice letter approved in *Tosco*. In *WaterKeepers Northern California v. AG Indus. Mfg.*, 375 F.3d 913, 917–18 (9th Cir.2004), the Ninth Circuit reversed a district court's holding that notice was insufficient regarding dates, where the plaintiff alleged that the defendant discharged contaminated storm water during every rain event over 0.1 inches (the same standard at issue here). The *WaterKeepers* case also discusses the difference between the standards of proof for notice and for the merits of the claim, and states that the regulation requires an intent-to-sue letter to put a defendant on notice as to the violations to be alleged in the complaint. 375 F.3d at 918. In terms of providing notice about dates of violation, Plaintiff's Notice Letter is adequate.

Some of the issues raised by Defendants go more to the merits than to notice. For example, although there are some disputes about the specific chemicals alleged to have been discharged, which may point to an imperfect pre-filing investigation, Plaintiff's potential overinclusiveness does not mean that its notice is inadequate. The Ninth Circuit has stated that the “key language in the notice regulation is the phrase ‘sufficient information to permit the recipient to identify’ the alleged violations and bring itself into compliance.” *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir.2002). Although Defendants' \*1228 complaints of inaccuracy may be borne out at a later stage of the case, whether bauxite or benzene appropriately appears on a long list of potential pollutants does not mean that Plaintiff's Notice Letter is inadequate, particularly when that information came from Defendants' own documents.

The Court agrees with Defendants that Plaintiff's reliance on outdated documents is concerning. The onus is on Plaintiff to conduct an investigation into the available relevant materials. It is unclear to the Court why the initial public records request to the Regional Board, in November of 2011, did not yield the most recent SWPPP and Annual Reports. Plaintiff obtained the more recent documents from the same source after it sent the Notice Letter, and Defendants contend that Plaintiff knew about the more recent SWPPP before it filed suit. However, neither the arguable over-inclusiveness nor the reliance on older documents is fatal to Plaintiff's Notice Letter.

The next question for the Court is precisely what activities are included in the Notice Letter. Given the Court's decision that Defendants' bulk material handling and storage activities do not require Permit coverage, the issue of whether there was sufficient notice of Plaintiff's claims regarding the activities that indisputably require Permit coverage, vehicle maintenance and equipment cleaning, is highly important. The same is true of Plaintiff's new arguments that pieces of Defendants' equipment are "point sources" and that storm water runoff from Permit-covered areas commingles with runoff from other areas.

### 3. Defendants' Vehicle Cleaning and Maintenance Operation, Commingling, Point Source Discharges, and the Permit Shield

Defendants argue that it is impossible to tell whether any of Plaintiff's allegations in the Notice Letter relate specifically to vehicle maintenance and equipment cleaning, which are the activities conducted at the **Levin** Facility that indisputably require Permit coverage. 40 C.F.R. § 122.26(b)(14)(viii). Defendants complain that no equipment cleaning is identified in the Notice Letter, other than the erroneous allegation of rail car cleaning, and that the Notice Letter similarly fails to identify the location of any alleged violations relating to vehicle maintenance or equipment cleaning, or the alleged dates of those violations except for every time it rains.

Plaintiff, in its reply, claims that any deficiency in the Notice Letter's detail relating to vehicle maintenance and equipment cleaning is a result of Defendants' inadequate SWPPP, which does not include written descriptions of all vehicle maintenance and equipment cleaning operations. Supp Koch Decl. Ex. E, at 33:23–34:4, 41:22–42:9; *see also Southwest Marine*, 236 F.3d at 997 ("Although we require strict compliance with the CWA's notice requirement, we do not require citizen-plaintiffs to refer to provisions of plans that do not exist."). Further, Plaintiff argues, the violations related to vehicle maintenance and equipment cleaning are of the same type as those described in greater detail elsewhere in the Notice Letter. Plaintiff notes that in *Henry Bosma Dairy*, the Ninth Circuit held that where "in essence all of the alleged violations are a single violation that repeated over a span of time," and where "the violations originated from the same source, were of the same nature, and were easily identifiable," notice was adequate even for violations that were discovered after the notice letter was sent and which were included in the complaint. 305 F.3d at 952–53.

However, in *Henry Bosma Dairy*, the violations were precisely the same, before \*1229 and after the notice letter: cows from two dairies produced manure that ran into a single drainage ditch, Joint Drain 26.6. The court stated that "[t]he violations originated from the same source, the CAFO dairies, which deposited the same waste material, manure, into clearly identifiable navigable waters of the U.S., J.D. 26.6." 305 F.3d at 952. Here, by contrast, Plaintiff's allegations about storm water discharges from many different materials and sources over a 42-acre facility are more diverse. Plaintiff's Notice Letter must include sufficient detail as to all of its current claims and arguments to inform Defendants what they are doing wrong and what corrective actions can be taken; Plaintiff may not rely on mere assertions that violations specifically related to vehicle maintenance and equipment cleaning are of the same general type as the violations Plaintiff alleged regarding bulk material handling and storage. *See* 40 C.F.R. § 135.3(a) (requiring that a notice letter must include sufficient information for the alleged violator to identify the activity alleged to have caused a violation).

At the hearing, the Court noted that some issues seemed to have changed over the course of the briefing and asked for the parties' arguments on the following new contentions: first, that when storm water from a Permit-requiring area commingles with storm water from a non-Permit requiring area, Permit coverage of the entire facility is required; and second, that under *Ecological Rights Foundation v. Pacific Gas & Electric*, 713 F.3d 502 (9th Cir.2013), many of Defendants' conveyances and pieces of equipment are point sources. The Court will consider whether these claims were, in fact, contained in the Notice Letter, as required by the statute. First, the Court will address the scope of Defendants' vehicle maintenance and equipment cleaning operations and whether there was sufficient notice as to Plaintiff's claims regarding those operations.

#### a. Scope of Vehicle Maintenance and Equipment Cleaning at the **Levin** Facility

Plaintiff argues that these activities occur throughout the entire **Levin** Facility and that the nature of Defendants' operations requires that the entire Facility be covered by the Permit. Defendants argue that the vehicle maintenance and equipment cleaning operations are discrete and that Plaintiff is attempting to impose Permit requirements on Defendants' cargo operation, which is not regulated by the Permit.

Plaintiff's description of Defendant's vehicle maintenance and equipment cleaning operation is quite detailed, and is based on two declarations of Ian Wren, a **BayKeeper** staff member who observed the **Levin** Facility, as well as Defendants' own information. According to Plaintiff, Defendants have identified three designated maintenance areas: an equipment repair building, a lubrication area, and a locomotive repair area. Koch Decl. Ex. S (2013 SWPPP) at 9, 17–18. The Equipment Repair Building is enclosed, and the adjacent steam-cleaning containment area is covered. *Id.* at 8. The lube station is part of the Main Terminal; the entire area is paved except for piers along the Santa Fe Channel and Lauritzen Canal. *Id.* at 18. Rail cars are repaired over a concrete lined vault constructed for the purpose; the vault floor is covered with Trackman, which is hydrocarbon absorbent, to absorb drips and spills. *Id.* at 17. The Main Terminal has two fueling stations, and the cranes are fueled in situ via a mobile fueling unit. Koch Decl. Ex. P (2008–09 M & RP); Ex. S at 16.

Some large equipment is maintained where it is located rather than being \*1230 moved inside. *See* Koch Decl. Ex. S at 16 (“Equipment that cannot be serviced indoors is serviced on paved areas with appropriate absorbent booms and oil spill containment.”). For example, the four large cranes in the Main Terminal are maintained in situ. Supp. Koch Decl. Ex. E (Holland Depo.) at 32. Some equipment is brought to an equipment wash area adjacent to the maintenance area and hosed off or steam cleaned. *Id.* at 35. The Facility uses two mobile steam-cleaners and a mobile pressure washer. *Id.* at 34, 39–40, 105–106. Plaintiff alleges that it observed a mobile steam-cleaning unit deployed adjacent to a clamshell bucket storage area approximately 100 yards away from the equipment steam cleaning area. Wren Decl. ¶ 19.

Plaintiff cites a recent EPA decision, *In re San Pedro Forklift, Inc.*, CWA Appeal No. 12–02, Docket No. CWA–09–2009–0006, 2013 WL 1784788 (Env'tl. App. Bd. April 22, 2013), to support its contention that vehicle maintenance and equipment cleaning operations at the **Levin** Facility are widespread and diffuse, requiring Permit coverage for the entire Facility. In *San Pedro Forklift*, the Environmental Appeals Board reversed an ALJ's decision that the San Pedro Forklift facility was not regulated under 40 C.F.R. § 122.26(b) (14)(viii) as a transportation facility having a vehicle maintenance shop and/or equipment cleaning operations. The Appeals Board stated that the ALJ defined “vehicle maintenance shop” and “equipment cleaning operations” too narrowly, contrary to the purpose and intent of the CWA

and EPA's own interpretation of its regulations. *San Pedro Forklift*, 2013 WL 1784788, at 3. The Board held that the term “vehicle maintenance shop” in the storm water regulations refers to a “nontransient area or location that is designated for use for vehicle maintenance or in which vehicle maintenance is conducted on a regular or repeated basis, including intermittently or sporadically.” *Id.* It held that the term “equipment cleaning operations” refers to “cleaning of industrial equipment anywhere on a facility's site pursuant to a business process or practice for equipment cleaning.” *Id.* It rejected the EPA's view that evidence of any on-site vehicle maintenance or equipment cleaning activities can, by itself, establish the required elements. *Id.*

The Board discussed the regulation's history, noting that the size of a vehicle maintenance shop and other characteristics, such as whether it is covered or uncovered, do not appear to matter; storm water permits are required if any repairs, even minor ones, occur in designated areas. *Id.* at 14. Maintenance facilities frequently have outside areas where parts are stored and disposed of and where oil, grease, solvents, and other materials may accumulate. *Id.* The Board noted that “[o]ne key difference” between a vehicle maintenance shop and an equipment cleaning operation is that vehicle maintenance *must* occur in a non-transient area, whereas equipment cleaning can occur at any nontransient or transient location on the site “once it has been demonstrated that the facility has established equipment cleaning operations.” *Id.* at 18. The Board reiterated this point: “once the Region has established there is a business process or practice related to equipment cleaning, any incident of cleaning pursuant to that process or practice would be subject to the permitting requirements of the storm water regulations.” *Id.*

Defendants do not appear to dispute Plaintiff's specific factual assertions about where vehicle maintenance and equipment cleaning take place at the **Levin** Facility, although they do dispute Plaintiff's characterization of such activities as occurring throughout the entire **Levin** Facility. \*1231 They argue that Plaintiff is trying to accomplish here, at Defendants' individual marine terminal, what it could not do more broadly through statewide regulation: have the State Board agree that the Permit regulates all areas of transportation facilities, not just vehicle maintenance and equipment cleaning. *See* Defs.' RFN Ex. C at 12. As discussed above, the State Board rejected Plaintiff's contention that the Permit should cover all areas of transportation facilities because the authority to add additional categories of Permit coverage is limited to a formal designation process. *Id.* Ex. D at Comment 1223.



However, Defendants do not address the *San Pedro Forklift* Board decision in either of their briefs.

As noted above, it is undisputed that Defendants' vehicle maintenance and equipment cleaning operations require Permit coverage. Plaintiff's notice as to violations relating to vehicle maintenance and equipment cleaning was adequate. As Defendants' counsel acknowledged at the hearing, the precise extent of vehicle maintenance and equipment cleaning at Defendants' facility is an issue of fact that cannot be resolved on summary judgment.

#### **b. Commingling of Discharges from Regulated and Unregulated Activity**

Whereas Plaintiff initially argued that Defendants' vehicle maintenance and equipment cleaning operations occurred throughout the **Levin** Facility, requiring Permit coverage of the entire facility, it now also maintains that discharges associated with the vehicle maintenance and equipment cleaning operations commingle with discharges associated with bulk handling and storage, therefore requiring Permit coverage of the entire **Levin** Facility. Pl.'s Reply at 6. Plaintiff claims that there is a basis for its commingling argument in the Permit language and regulations. Storm water discharges from areas of a facility that are not “industrial” under EPA regulations are excluded from the Permit. (The “industrial areas” of the **Levin** Facility are those involving vehicle maintenance and equipment cleaning.) However, Plaintiff argues that the Permit states that discharges from areas of a facility that are not themselves “industrial” areas are excluded from the permit only as long as those discharges are *not* mixed with discharges from regulated “industrial” areas. Koch Decl. Ex. E at 79. Paragraph 9 on the “Definitions” page states that

‘Storm Water Associated with Industrial Activity’ means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program.

*Id.*

Further down, the paragraph defines “material handling activities” to exclude “areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from

the excluded areas is not mixed with storm water drained from the above described areas.” Koch Decl. Ex. E at 79. Plaintiff claims that this means that where storm water from “industrial” and non-industrial activities is commingled, the Permit<sup>1</sup> requires \*1232 compliance with its terms with respect to the activities where the storm water is commingled. Therefore, Plaintiff argues, since Defendants' vehicle maintenance and equipment cleaning operations occur throughout the site, and discharges from those industrial activities mix with other storm water from the site through ten discharge pipes and the wooden deck of the site, the Permit regulates the entire **Levin** Facility. Reply at 4, 6, *see* Koch Decl. Ex. S at 12–14; Supp. Koch Decl. Ex. E at 21–24, 35–36; 38–40, 101, 123–124, 157–58.

Defendants strongly contest this interpretation of the Permit, and argue that this is just another attempt by Plaintiff to circumvent the rule-making process, where it has been unsuccessful in convincing the Regional and State Boards to require Permit coverage for all areas of transportation facilities. They note that the provision cited by Plaintiff applies to material handling activities that *are regulated* by the General Permit—and material handling activities are *not* regulated at marine terminals, where only vehicle maintenance and equipment cleaning require General Permit coverage. In the definition cited by Plaintiff, Defendants note the second sentence: “The term does not include discharges from facilities or activities excluded from the NPDES program.” Koch Decl. Ex. E at 79. As for the “commingling” idea, the definition of “material handling activities” excludes parking lots and office buildings that are separate from the plant's industrial activities, “as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas.” *Id.* Defendants argue that even assuming that commingled discharges are regulated, no logical reading supports Plaintiff's leap to an interpretation that all activities at a marine terminal would be subject to regulation based on commingled discharge. Defendants further argue that adopting such a position would punish it for taking voluntary steps to control pollution. It claims that the “common discharge areas and discharge points” pointed to by Plaintiff are the infrastructure Defendants installed, voluntarily, to collect, screen, and filter storm water before it reaches the bay. Defendants argue that Plaintiff converts the BMPs Defendants have constructed to minimize discharge into the Bay into a vehicle for liability.

Plaintiff's commingling argument appeared for the first time in its reply brief. Before it considers the merits of

the argument, the Court must decide whether or not the commingling claim was included in Plaintiff's Notice Letter. *See* 40 C.F.R. § 135.3. Plaintiff argued at the hearing that its Notice Letter did include the commingling claim, because the letter specifically identified vehicle maintenance as a source of pollution, and the discharges from the vehicle maintenance operation mix with the discharges from the rest of the facility. Plaintiff stated that the Notice Letter described the loading and unloading of dry bulk materials, cleaning, equipment repair, and maintenance and storage areas, and the uses for several different yards at the **Levin** Facility. *See* Notice Letter (Docket No. 12) at 45–47. The Notice Letter also lists the discharge points at the facility and truck routes entering and exiting the facility. It states that:

industrial operations at the **Levin** Facility are conducted outdoors without adequate cover to prevent storm water exposure to pollutant sources or direct discharge of pollutants via air deposition, and without secondary containment \*1233 or other measures to prevent polluted storm water and/or other pollutants from discharging from the **Levin** Facility.

*Id.* at 46. The Notice Letter also states that pollutants are tracked throughout the facility operations area and accumulate in the parking lot and driveways, so that “trucks and vehicles leaving the **Levin** Facility via staging areas and driveways are pollutant sources tracking sediment, dirt, oil and grease, metal particles, and other pollutants off-site.” *Id.*

The Court asked, at the hearing, which claims in the First Amended Complaint covered the commingling argument. Plaintiff stated that the First, Fourth, and Fifth claims for violations of effluent limitations encompassed its commingling argument. These claims are, respectively, violations of: Discharge Prohibition (A)(2) (discharge of storm water containing levels of pollutants that cause or threaten to cause pollution, contamination, or nuisance); Discharge Prohibition (A)(1) (discharge of non-storm water via fugitive coke and dust from wind, conveyers, and trucks, and stockpiles and material transport systems); and Receiving Water Limitation (C)(1) (discharge of storm water containing

levels of pollutants that adversely impact human health and/or the environment exceeding water quality standards).

[7] Plaintiff is correct that the Notice Letter includes lists of pollutants, discharge points, and sources of pollution, and that the claims in the complaint relate to discharges of storm water and non-storm water from the **Levin** Facility. However, the claims are very general and focus much more on the language of the discharge prohibitions than on the mechanism of action of the pollutant (apart from (A)(1), which is specific to dust). None of the claims is specific to commingling. More importantly, there is no mention in the Notice Letter of the word “commingling” or the idea that discharges from activities covered by the Permit (vehicle maintenance and equipment cleaning) mix with discharges from activities not covered by the Permit (bulk handling and storage), therefore requiring Permit coverage. This is understandable, as the Notice Letter asserts that the entire **Levin** Facility requires Permit coverage regardless of the specific activities conducted there. Having staked out that assertion, Plaintiff's Notice Letter did not provide the required notice to Defendant of its commingling theory. The statute and regulations require that the notice include “sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated,” “the activity alleged to constitute a violation,” and the location of the alleged violation and the person or persons responsible for it, as well as the dates of violation. 40 C.F.R. § 135.3. Here, “the activity alleged to constitute a violation”—the commingling of discharges from Permit-covered activities with those from activities where no Permit coverage is required—was not mentioned in the Notice Letter. A failure to comply with the statute's notice requirements means that the Court lacks jurisdiction to hear the claim. *See Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1355 (9th Cir.1995). Therefore, the court will not address the merits of Plaintiff's commingling argument, and grants summary judgment to Defendants on that claim.

### c. Point Source Discharges

Plaintiff has another evolving argument, that pieces of Defendants' equipment constitute “point sources” under the Clean Water Act. The Clean Water Act defines a point source as “any discernable, confined and discrete conveyance, including \*1234 but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or

other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges require either General Permit or individual Permit coverage. 40 C.F.R. § 122. Plaintiff’s Third Cause of Action alleged that

Defendants discharged and continue to discharge pollutants from the **Levin** Facility to Waters of the United States without NPDES Permit coverage, in violation of Clean Water Act section 301(a), 33 U.S.C. section 1311(a), each time fugitive coke and other dust, including but not limited to dust generated by wind, conveyers, and trucks, discharges from uncovered bulk material stockpiles and/or uncovered bulk material transport systems on the **Levin** Facility to a water of the United States from 6 June 2007 through the present.

FAC ¶ 232. It now appears that, faced with a recent Ninth Circuit case that set forth a narrow definition of a “point source,” Plaintiff has shifted its arguments from fugitive dust to “direct point source discharges of pollutants from Defendants’ equipment such as trucks, railcars, front loaders, conveyors, cranes, and clamshell buckets to waters of the United States.” Reply at 13; see *Eco. Rts. Fdn. v. Pac. Gas. & Elec. Co.*, 713 F.3d 502, 508–10 (9th Cir.2013) (holding that utility poles are not “point sources” and categorizing point sources).

Plaintiff claims that *Ecological Rights Foundation* has clarified that the NPDES permit requirement applies to all discharges except a limited category of storm water discharges. Reply at 13, citing 713 F.3d at 511–14. This is a significant overstatement of the case, which states: “EPA requires NPDES permits for only certain categories of storm water discharges. The only category [the plaintiff] argues applies in this case is ‘discharge[s] associated with industrial activity.’ ” 713 F.3d at 511. Plaintiff argues that Defendants’ direct discharges of pollutants to the Bay are either prohibited non-storm water discharges violating the terms of the Permit or are unpermitted point source discharges to the waters of the United States, both of which are regulated by the Clean Water Act, even if the pollutants travel through the air, as they would

if blown from trucks, railcars, and other equipment. Reply at 13.

In *Ecological Rights Foundation*, the Ninth Circuit classified point sources into three categories: 1) things the CWA specifically identifies as point sources; 2) things constructed for the express purpose of storing pollutants or moving them from one place to another; and 3) things no one disputed were point sources. 713 F.3d at 509–10. The court included examples of cases in each category in footnotes, citing a number of the cases cited by Plaintiff in its brief. *Id.* nn.3–5 (citing, among other cases, *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180 (2d Cir.2010), *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir.2002)). For category 2, the point sources include: aerial pesticide sprayers, piled debris that collected storm water and channeled it into a nearby stream; a manure spreader (as rolling stock); bulldozers and backhoes; human-made spoil piles and sediment basins that channeled storm water; a mining operation’s drainage system; aircraft equipped with tanks spraying pesticide; a sluice box from a mine; and bulldozers and backhoes that ripped up and redistributed the pollutant, a layer of soil. *Id.* at 509 n. 4.

Plaintiff argues that Defendants’ railcars are rolling stock, a specifically enumerated \*1235 point source in Category 1 in the scheme of *Ecological Rights Foundation*. Plaintiff argues that the rest of Defendants’ equipment—the trucks, front loaders, cranes, etc.—falls under the second category or things that were constructed for the express purpose of storing pollutants or moving them from one place to another. Backhoes and bulldozers have been considered point sources. See *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir.1983) (holding that “bulldozers and backhoes were ‘point sources,’ since they collected into windrows and piles material that may ultimately have found its way back into the waters); *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir.2001) (observing that the definition of point source is extremely broad and citing *Avoyelles* to support a holding that where bulldozers and tractors pulled large metal prongs through the soil in a wetland, they constituted point sources). Plaintiff also argues that the wooden deck at the **Levin** Facility is a point source, because it is sloped to promote drainage inland but allows pollutants to discharge into the water. Supp. Koch Decl. Ex. E at 74.

Under the most recent Ninth Circuit law, at least some of Defendants’ equipment appears to constitute a point source

under the second category of storing/conveying pollutants set forth in *Ecological Rights Foundation*. Defendants' railcars are a specifically enumerated point source under the Clean Water Act. 33 U.S.C. § 1362(14). Defendants do not address this point in their reply brief, except to cite *Alaska Community Action on Toxics v. Aurora Energy Servs., LLC*, 940 F.Supp.2d 1005 (D.Alaska 2013). The court there held that the discharge of coal dust from stockpiles and equipment was not a point source discharge, because “point sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance.” 940 F.Supp.2d at 1024 (internal citations and quotations omitted). The court went on to note that a conveyance is a

means of transport, or the act of taking or carrying something from one place to another. Consequently, the Seward Facility's coal piles, stacker-reclaimer, and railcar unloader, no matter how easily they are identified as the original sources of coal dust blown into the Bay, cannot by themselves constitute “point sources” where there is no “discernible, confided, and discrete conveyance” of the dust from those sources to the water. To find otherwise would require the Court to ignore clear statutory language.

*Id.* at \*47–48 (internal citations omitted). Defendants argue that the alleged discharges of dust from their cranes, trucks, railcars, and other equipment are not point sources. However persuasive that reasoning may be, *Alaska Community Action on Toxics* is a District Court case, filed before *Ecological Rights Foundation*, and is no longer good authority where it conflicts with that Ninth Circuit case.

[8] As with Plaintiff's other evolving argument regarding commingling, the Court must consider whether Plaintiff's Notice Letter included enough information about point source discharges to constitute proper notice under the statute. At the hearing, Plaintiff's counsel cited various sections of the Notice Letter, which states that “industrial operations at the **Levin** Facility are conducted outdoors without adequate cover to prevent storm water exposure to pollutant sources or

direct discharge of pollutants via air deposition, and without secondary containment or other measures to prevent polluted storm water and/or other pollutants from discharging \*1236 from the **Levin** Facility.” Notice Letter (Docket No. 12) at 46. The Notice Letter also lists sources of pollutants, including vehicle and equipment maintenance areas and “on-site material handling equipment such as conveyors, forklifts, and trucks.” *Id.* It further states that pollutants are tracked throughout the operations area and accumulate in the parking lot and driveways, so that “trucks and vehicles leaving the **Levin** Facility via staging areas and driveways are pollutant sources tracking sediment, dirt, oil and grease, metal particles, and other pollutants off-site.” *Id.* While this description was too generic to constitute notice for Plaintiff's commingling argument, it is specific regarding equipment such as “conveyors, forklifts, and trucks,” items that the Ninth Circuit has included in its category of point sources “constructed for the express purpose of storing pollutants or moving them from one place to another.” 713 F.3d at 509. Accordingly, Plaintiff has met the statute's notice requirements as to this argument. The Notice Letter must include “sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated,” “the activity alleged to constitute a violation,” and the location of the alleged violation and the person or persons responsible for it, as well as the dates of violation. 40 C.F.R. § 135.3. Unlike Plaintiff's commingling argument, its claim that Defendants' equipment and vehicles were “pollutant sources” means that “the activity alleged to constitute a violation” appears in the Notice Letter. Notice Letter (Docket No. 12) at 46. Plaintiff's counsel noted at the hearing that the third claim in its First Amended Complaint mentions “dust generated by wind, conveyers, and trucks,” in addition to fugitive coke dust from bulk material stockpiles; this mention of the specific pieces of equipment in the First Amended Complaint bolsters Plaintiff's argument that it gave proper notice of its point source claims. FAC ¶ 232.

The Court denies Defendants' motion for summary judgment as to notice for this claim.

#### d. The Permit Shield

[9] Defendants argue that should the dust from its equipment and material piles constitute a point source discharge, it is protected by the permit shield of the General Permit, 33 U.S.C. § 1342(k) (“Compliance with a permit issued pursuant to this section shall be deemed compliance” with various

other sections). The permit shield protects the permit holder from strict liability for unauthorized discharges as long as the discharge was adequately disclosed to the permitting authority and the Permit does not expressly prohibit the discharges. See *Alaska Community Action*, 940 F.Supp.2d at 1014–15. The leading permit shield case is *Piney Run Preservation Ass'n v. County Commissioners of Carroll County*, 268 F.3d 255 (4th Cir.2001), which held that the defense applies “as long as (1) the permit holder complies with the express terms of the permit and with the Clean Water Act’s disclosure requirements and (2) the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted.” 268 F.3d at 259, see also *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir.2013) (citing *Piney Run’s* general discussion of the permit shield).

Defendants argue that the General Permit does not expressly prohibit discharges from loading and unloading activities, and that it is undisputed that they disclosed to the permitting authority that material handling and storage activities occur at the site in the 1992 NOI and in the SWPPP. \*1237 See Holland Decl. Ex. A at 14–16, 18–19, 21, 24. They argue that they are in compliance with the Permit for the regulated activities at the site.

Plaintiff argues that the Permit expressly prohibits non-storm water discharges except as provided in Special Condition (D)(1), which does not include any of Defendants’ non-storm water discharges. Koch Decl. Ex. E at 19, 21 (these exceptions include fire hydrant flushing, potable water testing, atmospheric condensates, landscape watering, ground water, foundation or footing drainage, and sea water infiltration). Plaintiff also notes that the Regional Board has cited discharges of coke as a violation of the Permit. Supp. Koch Decl. Ex. B at 9 (“Runoff from coke pile is a prohibited nonstormwater discharge.”).

The parties provided very little briefing on this argument, and it appears that there are significant disputes of fact as to whether Defendants are in compliance with the General Permit and therefore able to use the permit shield. Therefore,

the Court denies Defendants’ summary judgment motion as to this claim.

## V. Conclusion

The Court grants summary adjudication to Defendant on the issue of whether the General Permit covers all of Defendants’ activities. The language of the Permit makes clear that it covers only discharges associated with “industrial activity,” which for a marine transportation facility such as the **Levin** Facility, are vehicle maintenance and equipment cleaning operations. See 33 U.S.C. § 1342(p)(1),(2); 40 C.F.R. § 122.26(b)(14). Defendants’ bulk material and handling operation does not require Permit coverage.

The Court grants summary adjudication to Plaintiff, and denies summary adjudication to Defendants, as to the adequacy of Plaintiff’s Notice Letter, with the exception that the Court grants summary adjudication to Defendant on the issue of notice as to Plaintiff’s argument that discharges from Permit-covered activities commingle with discharges from activities not covered by the Permit, therefore triggering Permit coverage for all such discharges. This argument did not appear in Plaintiff’s Notice Letter, and therefore the Court does not have jurisdiction to consider the claim.

The Court denies summary adjudication to Defendant on the issue of notice as to Plaintiff’s argument that some of Defendants’ equipment may constitute “point sources,” under the Clean Water Act, and therefore require Permit Coverage.

The Court denies summary adjudication to Defendant on its use of the permit shield as an affirmative defense.

The Court will hold a case management conference on February 11, 2014, at 10:00 a.m., to discuss the progress of the case.

**IT IS SO ORDERED.**

## All Citations

12 F.Supp.3d 1208, 78 ERC 1343

## Footnotes

- 1 Although the EPA’s Multi-Sector General Permit does not apply to California, it contains a similar, much clearer, restriction: “Discharges that are not otherwise required to obtain NPDES permit authorization but are commingled with discharges that are authorized under this permit” are on the list of allowable discharges regulated by the permit. Decl. of Caroline Koch ISO Pl.’s Reply (“Supp. Koch Decl.”) Ex. A at 1.

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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).) \*831

### 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.] \*832

(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.

(1) 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.

(2a) “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 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.

(3a) 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.<sup>1</sup>

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).

(2b) 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.

(3b) 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.

(2c) 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.*)

(3c) 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. (4) For among the incidents<sup>2</sup> 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.<sup>3</sup> “[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.)

(3d) 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.)<sup>4</sup>

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 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.<sup>5</sup> 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. \(5\)](#)([See fn. 6.](#)) But it does provide additional evidence of the scope of the constitutional provision.<sup>6</sup>

(3e) 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 \[84 Cal.Rptr.2d 804\].](#)) (6) 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.)<sup>1</sup> 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.)



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [California Public Records Research, Inc. v. County of Yolo](#), Cal.App. 3 Dist., October 14, 2016

79 Cal.App.4th 935, 94 Cal.Rptr.2d 535, 00 Cal. Daily Op. Serv. 2760, 2000 Daily Journal D.A.R. 3719

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS et al., Plaintiffs and Respondents,

v.

DEPARTMENT OF FISH AND GAME et al., Defendants and Respondents; ALBERT W. MILLS et al., Interveners and Appellants. ALBERT W. MILLS, Plaintiff and Appellant,

v.

DEPARTMENT OF FISH AND GAME et al., Defendants and Appellants.

No. Co23075., No. Co23184.

Court of Appeal, Third District, California.

Apr. 10, 2000.

[Opinion certified for partial publication. \* ]

### SUMMARY

An individual filed a declaratory relief action challenging the constitutionality of a flat fee imposed by the Legislature pursuant to [Fish & G. Code, § 711.4](#), on those submitting project proposals to the Department of Fish and Game for environmental review. Plaintiff alleged the fee constituted a tax that was not passed by a two-thirds majority as required under Cal. Const., art. XIII A (Prop. 13). The trial court found that although the statute was not unconstitutional on its face, it was unconstitutional as applied to plaintiff. Before entry of judgment, however, the parties settled the matter, with the department agreeing to refund plaintiff's fees and to stop collecting the fees statewide. Employees of the department then filed a petition for a writ of mandate to compel the department to resume collection of the fees and to pursue retroactive collection. The writ proceeding and the declaratory relief action were consolidated. The trial court again ruled that the statute was unconstitutional as applied, but that, in the absence of an appellate finding that the statute was unconstitutional, the ruling could only be applied to the individual plaintiff. The trial court ordered the department to reinstate enforcement and to retroactively collect the fees, and the settlement order in the declaratory relief action was

modified to conform to the judgment in the writ proceedings. (Superior Court of Sacramento County, Nos. 95CS02523 and CV529928, Jeffrey L. Gunther, Judge.) \*936

The Court of Appeal affirmed in part and reversed in part the judgment entered in the declaratory relief action, and, since the court concluded that the statute was a valid regulatory fee, and was therefore constitutionally enacted, plaintiff's appeal from the judgment entered in the writ proceedings was dismissed as moot. The court held that the Legislature did not violate the supermajority requirement of Cal. Const., art. XIII A, by imposing the flat fee pursuant to [Fish & G. Code, § 711.4](#), with less than a two-thirds vote, since the exaction was a regulatory fee rather than a tax. The department met its burden of showing that the amount of fees generated by [Fish & G. Code, § 711.4](#), was far less than the cost of the environmental reviews provided. Thus, the fees were not revenue raising. Although a flat fee will seldom represent the exact cost of providing a service, the evidence was sufficient to sustain the legislative determination that a flat fee system was a reasonable means to allocate the costs of environmental review. It was reasonable to assess a flat fee and thereby reduce the cost and administrative difficulty of accounting for the services provided for each individual project. Moreover, collection of a flat fee at a uniform time eased the administrative burden of collection and provided certainty to those submitting project proposals. The court further held that there was sufficient evidence to show that there was a reasonable basis for the legislative decision to charge more for the review of a negative declaration than for the review of an environmental impact report. (Opinion by Raye, J., with Sims, Acting P. J., and Nicholson, J., concurring.)

### HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c)

Property Taxes § 7.6--Constitutional Provisions-- Proposition 13--Assessments as Fees or Taxes--Flat Fee for Environmental Review by Department of Fish and Game:Taxation § 3--Construction of Legislation.

The Legislature did not violate the super-majority requirement of Cal. Const., art. XIII A (Prop. 13) by imposing a flat fee pursuant to [Fish & G. Code, § 711.4](#), with less than a two-thirds vote, on those who submit project proposals to the Department of Fish and Game for the environmental review necessary to protect fish and wildlife, since the exaction was

a regulatory fee rather than a tax. The department met its burden of showing that the amount of fees generated by [Fish & G. Code, § 711.4](#), was far less than the cost of the environmental reviews provided. Thus, the fees were not revenue raising. Although a flat fee will seldom represent the exact cost of providing a service, the evidence was sufficient to sustain the legislative determination that a flat fee system was a reasonable means to [\\*937](#) allocate the costs of environmental review. It was reasonable to assess a flat fee and thereby reduce the cost and administrative difficulty of accounting for the services provided for each individual project. Moreover, collection of a flat fee at a uniform time eased the administrative burden of collection and provided certainty to those submitting project proposals.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 107 et seq.]

(2)

Property Taxes § 7.6--Constitutional Provisions--Proposition 13-- Assessments as Fees or Taxes:Taxation § 3-- Construction of Legislation.

The determination under Prop. 13 ([Cal. Const., art. XIII A, §§ 3, 4](#)) whether impositions are taxes or fees is a question of law for the appellate courts to decide on independent review of the facts. Ordinarily, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted, and most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges.

(3a, 3b)

Property Taxes § 7.8--Constitutional Provisions--Proposition 13--Regulatory Fees--Special Taxes.

Fees charged for the costs of regulatory activities are not special taxes under a [Cal. Const., art. XIII A, § 4](#) (Prop. 13) analysis if the fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and they are not levied for unrelated revenue purposes. A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation. The regulatory fee, to survive as a fee, does not require a precise cost-fee ratio. Legislators need only apply sound judgment and consider probabilities according to the best honest viewpoint of informed officials in determining the amount of the fee. The government bears the burden of proof. It must establish (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. The record need only demonstrate a reasonable relationship between the fees to be charged and the estimated cost of the service or program to be provided; that requirement may be satisfied by evidence showing only that the fees will generate substantially less than the anticipated costs.

(4)

Fish and Game § 3--Regulation--Fee for Environmental Review with Department of Fish and Game--Validity of Higher Fee for [\\*938](#) Review of Negative Declaration.

In proceedings to challenge the validity of a flat fee ([Fish & G. Code, § 711.4](#)) on those submitting project proposals to the Department of Fish and Game for environmental review, there was sufficient evidence to show that there was a reasonable basis for the legislative decision to charge more for the review of a negative declaration than for the review of an environmental impact report. A senior environmental specialist supervisor for the department testified at trial that the standard for a negative declaration is that a project must have no adverse impact on the environment. Thus, the department must ensure that the disclosure of the possible impacts is complete and to assure any mitigation measures are adequate. Often, the proposed mitigation measures are inadequate, and the department staff must work with the lead agency and with the project proponent to develop an acceptable negative declaration document. The supervisor testified that his staff probably spent more time on the review of a negative declaration than the review of an equivalent size project with environmental impact report documentation. Hence, due to project information collection costs and the time spent negotiating mitigation measures, the department's costs were generally higher for negative declarations.

COUNSEL

McNeill & Belton and Walter P. O'Neill for Plaintiff and Appellant and for Interveners and Appellants.

Robin L. Rivett, Sharon L. Browne and Anne M. Hawkins for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiff and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, Roderick E. Walston, Chief Assistant Attorney General, Charles W. Getz IV and Marian E. Moe, Deputy Attorneys General, for Defendants and Appellants and for Defendants and Respondents.

Dennis F. Moss for Plaintiffs and Respondents.

RAYE, J.

In this appeal we consider whether the Legislature ran afoul of the supermajority requirement of article XIII A of the California Constitution when it imposed a flat fee per environmental review by the Department \*939 of Fish and Game (Fish and Game). More precisely, we must determine whether the exactions imposed by [section 711.4 of the Fish and Game Code](#)<sup>1</sup> constitute a regulatory fee or a tax.

Determining whether an exaction is a fee or a tax has been a recurring chore since 1978 when the voters in California enacted comprehensive and constitutional tax reform. (Cal. Const., art. XIII A (the Jarvis-Gann Property Tax Initiative or Proposition 13).) An act to increase state taxes must be passed by two-thirds of the members of the Legislature and an increase in local taxes must be passed by a two-thirds vote of the qualified electors. (Cal. Const., art. XIII A, §§ 3 & 4.) Fees, by contrast, are not subject to the supermajority limitation of [article XIII A](#). Albert Mills, an appellant in both cases, insists the environmental review fees charged by Fish and Game pursuant to [section 711.4](#) constitute a tax and, therefore, are unconstitutional because the statute was passed by slightly less than a two-thirds majority.

It is well established that the amount of fees collected must not surpass the cost of the regulatory services or programs they are designed to support. We must decide whether there must be a direct correlation between the amount of a fee imposed on a specific payor and the benefits received or burdens imposed by the payor's activity. More to the point, is a flat regulatory fee in legal effect a tax subject to the supermajority requirement of California Constitution, article XIII A?

We conclude that as long as the cumulative amount of the fees does not surpass the cost of the regulatory program or service and the record discloses a reasonable basis to justify distributing the cost among payors, a fee does not become a tax simply because each payor is required to pay a predetermined fixed amount. Flat fees are not in legal effect taxes. Based on the evidentiary record before us, we find that the Legislature did not violate California Constitution, article XIII A by imposing a flat regulatory fee on those who submit project proposals to Fish and Game for the environmental review necessary to protect fish and wildlife. The consequences of our ruling to the multiple parties in these consolidated cases are explained below.

### Procedural Background

[Section 711.4](#), enacted by the Legislature in 1990, set a fee schedule to defray a portion of the costs incurred by Fish and Game in meeting its environmental review obligations under the California Environmental Quality Act and the Z'Berg-Nejedly Forest Practice Act of 1973. (§ 711.4, \*940 subds. (a), (b), (c) & (d); [Pub. Resources Code, §§ 4511, 21000](#) et seq.) [Section 711.4](#) states in relevant part: “(a) The department shall impose and collect a filing fee in the amount prescribed in subdivision (d) to defray the costs of managing and protecting fish and wildlife trust resources, including, but not limited to, consulting with other public agencies, reviewing environmental documents, recommending mitigation measures, developing monitoring requirements for purposes of the California Environmental Quality Act ..., consulting pursuant to [Section 21104.2 of the Public Resources Code](#), and other activities protecting those trust resources identified in the review pursuant to the California Environmental Quality Act. [ ] (b) The filing fees shall be proportional to the cost incurred by the department and shall be annually reviewed and adjustments recommended to the Legislature in an amount necessary to pay the full costs of department programs as specified.” For projects for which a negative declaration has been prepared, the filing fee set by the Legislature is \$1,250 and for projects for which an environmental impact report has been prepared, the filing fee is \$850. (§ 711.4, subd. (d)(3) & (4).) “The county clerk may charge a documentary handling fee of twenty-five dollars (\$25) per filing in addition to the filing fee specified in subdivision (d).” (§ 711.4, subd. (e).)

Albert W. Mills challenged the constitutionality of [section 711.4](#) in a declaratory relief action he filed in July 1991. He sought declaratory and injunctive relief in a first cause of action and a refund of his fees in a second cause of action. A demurrer was sustained without leave to amend to the second cause of action. Fish and Game sought a writ of mandate to compel the trial court to dismiss the entire complaint because Mills had not filed a claim for a tax refund. We summarily denied the petition for the writ. The trial court denied a subsequent motion for judgment on the pleadings on the same ground asserted in the writ petition.

In 1992 the Legislature amended the statute to expand the exemptions for projects for which no fees were required. The amendment passed by a two-thirds majority vote.

The case was tried in the summer of 1994 and the following spring the trial court issued a statement of decision. The

court found that although the statute was not unconstitutional on its face, on the evidence received by the court, it was unconstitutionally applied. Before the statement of decision was filed and a judgment was entered, the parties settled the lawsuit. Fish and Game agreed to refund Mills's fees, to pay his attorney fees, and to cease collection of the fees statewide.

Employees of Fish and Game, however, filed a petition for a writ of mandate to compel Fish and Game to resume collection of the fees and to \*941 pursue retroactive collection. Mills intervened in the writ proceedings, which were then consolidated with the declaratory relief action.

The trial court again ruled that [section 711.4](#) was unconstitutional as applied but that, in the absence of an appellate finding that the statute was unconstitutional, the ruling could only be applied to Mills. ([Cal. Const., art. III, § 3.5.](#)) The court ordered Fish and Game to reinstate enforcement and to retroactively collect the fees. The settlement order in the declaratory relief action was modified to conform to the judgment in the writ proceedings. The settlement order provides in pertinent part that [section 711.4](#) is not unconstitutional on its face but is unconstitutional as applied to Mills; Fish and Game is enjoined from collecting fees from Mills but is not otherwise prohibited from collecting fees.

Mills appeals both judgments. On appeal from the judgment in the declaratory relief action, he maintains [section 711.4](#) is unconstitutional on its face and, consequently, Fish and Game must be enjoined from collecting all fees. Fish and Game urges us to dismiss the appeal on multiple grounds: Mills lacks standing because, under the terms of the settlement, he is not aggrieved; the constitutionality of [section 711.4](#) is moot because it was amended by a two-thirds majority; and the trial court lacked jurisdiction because Mills failed to exhaust his administrative remedies by filing a claim for a tax refund. Fish and Game also appeals. We granted the Pacific Legal Foundation's request to file an amicus curiae brief echoing Mills's constitutional attack on the statute.

For the reasons discussed herein, we affirm in part and reverse in part the judgment entered in the declaratory relief action. Because we have concluded that [section 711.4](#) is a valid regulatory fee, and was therefore constitutionally enacted, Mills's appeal from the judgment entered in the writ proceedings is moot. That appeal is dismissed.

## Discussion

## I \*

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## II

Before we apply the ever-growing body of case law involving post-Proposition 13 fees and taxes, it is essential to understand the statutory world \*942 in which Fish and Game lives and [section 711.4](#) was born. The language of these statutes resolves some of the issues raised by Mills and provides the necessary background to analyze others.

(1a) Mills argues that Fish and Game does not operate a regulatory program and, therefore, the fee is not regulatory in nature. We disagree. Fish and Game is only one small part of a huge regulatory system in place in this state to protect and sustain the environment, but it plays a vital regulatory role under the California Environmental Quality Act (CEQA). ([Pub. Resources Code, § 21000](#) et seq.) CEQA guidelines specifically list Fish and Game as a trustee agency, a status which imposes certain obligations. Fish and Game must be consulted before a determination is made as to whether a negative declaration or an environmental impact report is required for a particular project. ([Pub. Resources Code, § 21080.3](#), subd. (a).) If an environmental impact report is required, Fish and Game must comment as to the scope and contents of this document. ([Pub. Resources Code, § 21080.4](#), subd. (a).) Later in the process, Fish and Game may be required to submit a proposed program to monitor the mitigation measures. ([Pub. Resources Code, § 21081.6.](#)) The same obligations are imposed by documents which function as environmental assessment documents such as timber harvest plans. (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 626 [216 Cal.Rptr. 5022].) *Fish and Game Code section 1802 also requires Fish and Game to consult with lead and responsible agencies.*

Fish and Game also has comparable obligations under the Forest Practice Act. ([Pub. Resources Code, § 4511](#) et seq.) Like the responsibility conferred on it under CEQA, Fish and Game must review the impact of a timber harvest plan on fish and wildlife. The Department of Forestry and Fire Protection cannot approve a timber harvest plan until it has consulted with Fish and Game. ([Pub. Resources Code, § 4582.6.](#))

Under both CEQA and the Forest Practice Act, Fish and Game is an essential link in a comprehensive attempt to safeguard the environment. The fact that Fish and Game does not

operate an independent regulatory program with a correlative accounting system does not detract from its regulatory role. The law is not so narrowly drawn. In a similar vein, the court in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 [64 Cal.Rptr.2d 447, 937 P.2d 1350] observed: “From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less 'regulatory' in nature than the initial \*943 permit or licensing programs that allowed them to operate. Moreover, imposition of 'mitigating effects' fees in a substantial amount ... also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products.” (*Id.* at p. 877.)

Having charged Fish and Game with the responsibility to manage and protect fish and wildlife through the environmental review process, the Legislature enacted a fee statute to fund Fish and Game's review functions. There are two parts of [section 711.4](#) which are germane to the constitutional question before us.

The Legislature expressly addressed proportionality. [Section 711.4](#), subdivision (b) states: “The filing fees shall be proportional to the cost incurred by the department and shall be annually reviewed and adjustments recommended to the Legislature in an amount necessary to pay the full costs of department programs as specified.”

Although the Legislature mandated a flat fee financing mechanism, it also provided an exemption for those projects with a de minimis impact on fish and wildlife. [Section 711.4](#), subdivision (d)(1) provides: “For a project which is found by the lead or certified regulatory agency to be de minimis in its effect on fish and wildlife, no filing fee shall be paid, whether or not a negative declaration or an environmental impact report is prepared pursuant to the California Environmental Quality Act.” In fact, 68 percent of the projects are found to be de minimis and a fee is not required.

In sum, the Legislature has given Fish and Game a critical regulatory role in the complex regulatory structure created to safeguard precious environmental resources. At the same time, the Legislature created a flat fee system to finance Fish and Game's environmental review. That system, by statute, must be proportional to the overall cost of environmental review, but only those who propose development projects

which have more than a de minimis impact upon fish and wildlife are required to bear the cost of review. We must determine whether the Legislature violated the Constitution by establishing such a fee system with less than a two-thirds vote.

### III

In 1991 the Legislature enacted the Childhood Lead Poisoning Prevention Act to provide evaluation, screening, and follow-up services for children who were at risk of suffering lead poisoning. The program of screening and treatment under the act was to be paid entirely by fees paid by those who \*944 contributed to lead contamination. In *Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th 866, the Supreme Court concluded the act imposed bona fide regulatory fees, not taxes.

*Sinclair* is the first published case in the post-Proposition 13 era to consider whether a state, rather than a local, fee is in legal effect a tax. “[Section 3 of article XIII A](#) restricts the enactment of changes in state taxes, as follows: 'From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members ... 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.'” (*Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th at pp. 872-873.) By contrast, there have been an abundance of cases in which courts have struggled to characterize a local exaction as a fee or a “special tax” under [California Constitution, article XIII A, section 4](#). In *Sinclair*, the Supreme Court announced that “[b]ecause of the close, 'interlocking' relationship between the various sections of [article XIII A](#)” the [section 4](#) cases “may be helpful, though not conclusive” in deciding cases under [section 3](#). (15 Cal.4th at p. 873.)

(2) The court also reiterated the fundamental principle that “whether impositions are 'taxes' or 'fees' 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*, *supra*, 15 Cal.4th at p. 874.) Ordinarily, “taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted” and “[m]ost taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges.” (*Id.* at pp. 873-874.)

*Sinclair* was particularly helpful in identifying three very different kinds of fees or assessments, viz. special assessments, development fees and regulatory fees. (See also *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 596 [77 Cal.Rptr.2d 752].) As the court pointed out, special assessments are based on the value of benefits conferred on property, and development fees are exacted in return for permits or other government privileges. Regulatory fees, enacted under the police power, are an entirely different animal. The parties have failed to distinguish between these types of fees and, consequently, have extracted general principles from cases involving one type of fee and applied them to cases involving a completely different type of fee. We have focused our research on those cases, like *Sinclair*, involving regulatory fees.

(3a) General principles have emerged. Fees charged for the associated costs of regulatory activities are not special taxes under an [article XIII A, section 4](#) analysis if the “’”fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes.“ ’” (*Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th at p. 876; *Townzen v. County of El Dorado* (1998) 64 Cal.App.4th 1350, 1359 [76 Cal.Rptr.2d 281].) “A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation.” (*San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146, fn. 18 [250 Cal.Rptr. 420].) “Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.” (*United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165 [154 Cal.Rptr. 263].) Regulatory fees are valid despite the absence of any perceived “benefit” accruing to the fee payers. (*Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [228 Cal.Rptr. 726, 721 P.2d 1111], *affd.* on other grounds *sub nom. Pennell v. City of San Jose* (1988) 485 U.S. 1 [108 S.Ct. 849, 99 L.Ed.2d 1].) Legislators “need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the regulatory fee.” (*United Business Com. v. City of San Diego*, *supra*, 91 Cal.App.3d at p. 166.)

The government bears the burden of proof. (*Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235 [211 Cal.Rptr. 567].) It must establish

(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. (*Id.* at pp. 234-235.) “Courts [look] to a variety of evidence in determining whether the agency has satisfied that burden, not all of it prepared before the adoption of the ordinance.” (*City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 282 [17 Cal.Rptr.2d 845].)

*City of Dublin v. County of Alameda*, *supra*, 14 Cal.App.4th 264, provides guidance on the quantum of proof necessary to establish the requisite fee-cost ratio. By initiative, the voters in Alameda County enacted a comprehensive recycling plan. Under the law, the plan was to be funded from a recycling fund created by a \$6 per ton surcharge on materials dumped in the county landfills. The issue presented was whether the evidence before the trial court established that the surcharge would not exceed the reasonably \*946 necessary costs of the programs it would fund. The Court of Appeal considered both the estimated costs of the programs and the basis for determining the apportionment of those costs.

The court wrote: “The trial court concluded that the requisite fee-cost relationship was not established because Measure D's programs are not yet developed and their costs cannot presently be calculated with certainty, but such specificity is not required. Instead, the record need only demonstrate a reasonable relationship between the fees to be charged and the *estimated* cost of the service or program to be provided; that requirement may be satisfied by evidence showing only that the fees will generate substantially less than the anticipated costs.” (*City of Dublin v. County of Alameda*, *supra*, 14 Cal.App.4th at p. 283, original italics.)

In a similar case, the Court of Appeal addressed the quantum of proof and proportionality. “Plaintiffs fault the report for failing to include ‘site-specific’ data showing a ‘close connection’ between new development and the fees to be imposed. However, their citation to ‘taking’ cases shows that they are blurring legal principles. [Citation.] The fee at issue here is a general one applied to all new residential development and valid if supported by a reasonable relationship between the amount of the fee and estimated cost of services. Site-specific review is neither available nor needed.” (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 333-334 [4 Cal.Rptr.2d 897].)

(1b) Fish and Game met its burden of showing that the amount of fees generated by [section 711.4](#) was far less than the cost of the environmental reviews provided. There was evidence that \$11 million had been collected in fees, but the cost of the reviews was in excess of \$20 million. Thus, the fees were not revenue raising in that they did not generate income which surpassed the cost of the services provided.

The more difficult issue is determining what latitude the Legislature has in establishing the amount of a fee imposed on an individual payor. Fish and Game argues the fees have no indicia of a tax. Since there is sufficient evidence to demonstrate that collectively the amount of the fees do not exceed the cost of the regulatory program they are collected to support, they urge us to uphold the constitutionality of [section 711.4](#). Mills, on the other hand, insists Fish and Game failed to prove the more specific requirement that the fees are proportionate to the service provided or the burden imposed. He insists the flat fee is a tax because there is no individual correlation between the amount of the fee and the cost of the benefit or burden. Whether the Legislature retains the flexibility to mandate a flat fee by a simple majority vote is the crux of this case. \*947

*Sinclair* is noteworthy for its expansive legitimation of regulatory fees. Under the formula approved by the Supreme Court, paint manufacturers are assessed fees based on their market share or their past and present responsibility for environmental lead contamination. (*Sinclair Paint Co. v. State Bd. of Equalization, supra*, [15 Cal.4th at p. 872.](#)) Market share is a novel methodology for assessing fees. Nevertheless, the court permitted present fees to be determined on the basis of past conduct when not only were fees nonexistent, but the dangers of lead-based paint were unknown.

As broad as the implications of *Sinclair* are, the Supreme Court did not have to reach the troublesome issue of proportionality, because paint manufacturers were assessed fees in proportion to their share of the market. Moreover, *Sinclair*, in moving for summary judgment, did not seek to establish that the amount of the fees bore no reasonable relationship to the social or economic burdens its operations generated. The court noted that *Sinclair* would have the opportunity at trial “to try to show that no clear nexus exists between its products and childhood lead poisoning, or that the amount of the fees bore no reasonable relationship to the social or economic 'burdens' its operations generated.”

(*Sinclair Paint Co. v. State Bd. of Equalization, supra*, [15 Cal.4th at p. 881.](#))

Close to 20 years ago, we articulated the same rule to Mills in his earlier constitutional challenge to fees charged for processing land use applications. In *Mills v. County of Trinity* (1980) [108 Cal.App.3d 656](#) [[166 Cal.Rptr. 674](#)], we stated: “[T]he special tax' referred to in [section 4 of article XIII A](#) does not embrace fees 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.” (*Id.* at pp. 659-660.) In *Mills* as in *Sinclair*, however, the case was remanded “for a factual determination of whether the fees in question are reasonably compensatory for the costs occasioned by the regulated activities.” (*Mills*, at p. 660.)

Flat regulatory fees were upheld in *Pennell v. City of San Jose, supra*, [42 Cal.3d 365](#). In *Pennell*, a rent control ordinance imposed a flat annual fee on each rental unit. It was “designed to defray the costs of providing and administering the hearing process prescribed in the ordinance, not to pay general revenue to the local government.” (*Id.* at p. 375.) The court concluded: “It is well settled that a municipality under the police power may impose a regulatory fee when, as here, the fee constitutes an amount necessary to carry out the purpose and provisions of the regulation.” (*Id.* at p. 375, fn. 11.) \*948

The court in *Pennell* appeared satisfied that the cumulative amount of the fee would support the administration and implementation of the hearing process without an examination of the benefits to be derived by individual lessees. Many lessors would never avail themselves of the hearing process at all and yet under the rent control ordinance, they, like the lessees who would petition for hearing, were required to pay the fee. *Pennell* does not require the government to prove proportionality on an individual basis. Under *Pennell*, the significant inquiry is whether the amount of the fees collected under the ordinance exceed the cost of the regulatory program they are collected to support. Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising.

While Mills cites many cases for the general proposition that fees must be apportioned according to some formula for ascertaining the benefits received or the burdens imposed by the payor's activity, he fails to cite a single regulatory fee case in which a fee was found to be a tax because



the government failed to sustain its burden of proving a reasonable apportionment. On this pivotal point, the cases require close examination for what they require and for what they do not.

Two cases involve regulatory fees, like those before us, enacted to defray the costs of programs to mitigate damage to the environment. In *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, *supra*, 203 Cal.App.3d 1132 (*San Diego Gas & Electric Co.*), and *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178 [29 Cal.Rptr.2d 128], the Courts of Appeal upheld fee structures against challenges they constituted special taxes. Both cases discuss the apportionment issue at some length.

In *San Diego Gas & Electric Co.*, *supra*, a utility company challenged an air pollution district's method of apportioning the costs of its permit programs by apportioning them among all monitored polluters according to a formula based on the amount of emissions discharged by a stationary pollution source. The emissions-based formula allowed the district to charge additional renewal permit fees based on the average pollution generated by a facility within a specific industry. The court wrote: "SDG&E argues the district has not specifically shown how the amount of emissions generated by a pollution source increase the district's indirect costs .... There is no reason to require the district to show precisely how more emissions generate more costs to justify the emission-based apportionment formula. The purpose for the district's existence is to achieve and maintain air quality standards (§ 40001), thus from an overall perspective it is reasonable to allocate costs based on a premise that the more emissions generated by a \*949 pollution source, the greater the regulatory job of the district." (203 Cal.App.3d at pp. 1147-1148, fn. omitted.)

In rejecting *San Diego Gas & Electric Co.*'s argument that the emissions-based formula eroded the intent of the voters in enacting California Constitution, article XIII A, the court explained that "Proposition 13's goal of providing effective property tax relief is not subverted by the increase in fees or the emissions-based apportionment formula. A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves, an accomplishment of the 1982 amendments to [Health and Safety Code] section 42311 and the emissions-based fee schedule." (*San Diego Gas & Electric Co.*, *supra*, 203 Cal.App.3d at pp. 1148-1149.)

In *Brydon*, water customers challenged a new rate structure as a special tax. The inclined rate structure increased price per cubic foot for increased usage. The Court of Appeal found *San Diego Gas & Electric Co.* "a sustainable analogy." "Just as the regulatory scheme set forth by the [air pollution control district] was designed to achieve a legislatively mandated ecological objective, so is the inclined block rate structure of the District a response to state-mandated water-resource conservation requirements." (*Brydon v. East Bay Mun. Utility Dist.*, *supra*, 24 Cal.App.4th at p. 192.) The court emphasized the latitude necessary to set the amount of fees to meet the regulatory objectives. "In pursuing a constitutionally and statutorily mandated conservation program, cost allocations for services provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity. [Citation.] [ ] ... [ ] ... In short, California Constitution, article XIII A does not apply to every regulatory fee simply because, as applied to one or another of the payor class, the fee is disproportionate to the service rendered." (*Id.* at pp. 193-194.)

Hence, both cases narrow the breadth of California Constitution, article XIII A as applied to regulatory fees. Both suggest a flexible assessment of proportionality within a broad range of reasonableness in setting fees. In *San Diego Gas & Electric Co.*, the use of a formula to distribute indirect costs was sustained, while in *Brydon* an inclined block rate schedule allowed the water district to discourage water consumption. Neither relied on the kind of exact apportionment calculation urged by Mills.

Still, *San Diego Gas & Electric Co.* and *Brydon*, unlike *Pennell*, did not involve flat fees. While the formula or rate structure may not have been exact, each bore some relationship to the benefit reaped or the burden \*950 imposed by the payor. Put another way, the payors had some control over the amount of the regulatory fee they were compelled to pay by the degree to which their respective activities impacted the environment. The more they polluted the air and consumed the water, the more they paid.

We acknowledge that in this case Mills had no comparable control over the amount of the fees he was charged to review his timber harvest plan. The amount of the fees is expressly set forth in section 711.4. (3b) Nevertheless, we hold that a regulatory fee, to survive as a fee, does not require a precise cost-fee ratio. A regulatory fee is enacted for purposes broader than the privilege to use a service or

to obtain a permit. Rather, the regulatory program is for the protection of the health and safety of the public. The legislative body charged with enacting laws pursuant to the police power retains the discretion to apportion the costs of regulatory programs in a variety of reasonable financing schemes. An inherent component of reasonableness in this context is flexibility. We agree with the notion that shifting the costs of environmental protection to those who seek to impact our natural resources does not subvert the objectives embodied in Proposition 13. Hence, a regulatory fee does not violate California Constitution, article XIII A when the fees collected do not surpass the costs of the regulatory programs they support and the cost allocations to individual payors have a reasonable basis in the record.

#### IV

(1c) The record before us is a vivid illustration of the need for flexibility in establishing the amount of regulatory fees. Regulatory fees, unlike other types of user fees, often 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.

Mills asserts that these problems preclude a finding of a fee. He points out that Fish and Game did not conduct the kind of study now accepted within the expert field of user fee analysis to ascertain with precision the justifiable amount of a proposed fee based on the costs involved in providing the service. He criticizes the change in accounting systems in July 1991 which obfuscates the data necessary to make credible calculations, and he bemoans \*951 the incomprehensibility of the new CALSTARS accounting system as it relates to a user fee analysis. He insists that depositing the fees into Fish and Game's preservation fund is tantamount to a tax since the preservation fund operates as a general fund for Fish and Game. And he provides many examples of how disproportionate the fees are as to certain payors. Although most projects only receive a cursory review, there is a substantial variance in the amount of time spent on more in-depth reviews, varying from a few minutes to a few weeks, with the burden falling most heavily on small timberland owners.

This evidence is undisputed. There is no question that a flat fee will seldom represent the exact cost of providing a service. Fish and Game does not pretend such a correlation exists. Since we have determined that state regulatory fees are different from other user fees, the question presented is whether the evidence in this record is sufficient to sustain the legislative determination that a flat fee system is a reasonable means to allocate the costs of environmental review.<sup>3</sup>

Mills fails to appreciate the difference between regulatory fees and more typical user fees. At trial, he offered an expert from the new cottage industry of analysts and advisers to local governments on how to legitimize their fees in the litigious climate spawned by Proposition 13. That expert's testimony reflects his misguided assumption that all fees are created equal and that, to survive constitutional attack, they must be supported by exhaustive studies, unassailable time keeping, and a precise cost-fee analysis.

He insisted that a cost analysis study was not only advisable, but necessary. "So that is why I am saying it is possible for Fish and Game to do a kind of cost analysis study. My question then would be, secondly, do they now have that in place? Have they kept track? Have they required their staff to fill in reports? I mean, they might be able to do it starting now. But have they done it? Nothing has been submitted to me showing a tracking process of the steps taken and breaking down the specific tasks and functions.

"I recall this being referenced to the fact the administrative or bookkeeping costs were too high to do that. Frankly, my judgment is that becomes a \*952 cop-out. It is not too difficult. You can organize and set up, especially in today's computerized world with P.C.'s on half the staff desks.

"Attorneys have to bill by the minutes. They have to keep track of their time.

"It is perfectly possible to keep track of time. And I think, frankly, my judgment might be that if it is difficult, if your staff are not now doing those things systematically, it needs a whole retraining and regearing."

He opined that absent retraining, regearing, studies, and analysis, a fee could not survive a constitutional challenge. He went on to suggest a rather unique correlation between the time spent and the benefits achieved. Having testified he could not find a direct relationship between payment of a fee

and providing any service, he stated: “There is no discussion of what happens as a result of the reviews. You know, do more spotted owls get saved? More fish saved? Or what. There is no functional relationship.” Again he opined that in order to sustain the constitutionality of the fee, Fish and Game must document how a forest was saved or how many spotted owls were saved by the staff.

Fish and Game urges us to dismiss his opinion for several reasons: He had never reviewed the data supporting imposition of a state fee, he did not conduct any study to determine whether the [section 711.4](#) flat fees were reasonable or proportional, and he had no familiarity with CEQA or the regulatory landscape in which Fish and Game must operate, not to mention that his proffered opinion constituted an inadmissible conclusion of law.

We need not address these specific deficiencies because we believe his testimony serves to highlight the fundamental distinction between a user fee and a regulatory fee. His testimony is predicated on many faulty assumptions based on user fees when there is an obvious correlation between cost and benefit. Moreover, in many cases, a statute demands that the amount of a fee be commensurate with the value of a service provided or the cost of a burden imposed. (See, e.g., [Gov. Code, §§ 50076, 66001](#).) No comparable statutes apply to this state-imposed regulatory fee.

From the vantage point of one who earns a living studying user fees and counseling local governments on how to insulate their fees from constitutional attack, it is not surprising he would overlook the vast discrepancy between a fee imposed or a privilege accorded an individual and a fee that apportions and distributes the collective costs of a regulation. In the latter case, the many factors this expert described as deficiencies become the [\\*953](#) reasonable justification for imposing a flat fee. That is, the Legislature may have determined that the administrative cost and burden of a statewide fee, including expensive studies and accounting, was too high when a simpler, flat fee could be imposed. Moreover, often, as here, measuring the benefits is amorphous. The Legislature could reasonably eschew a graduated fee structure based on an accounting of owls that were spared and forests that survived. He failed to understand that a legislative body in determining the amount of a regulatory fee is legitimately hampered by the many factors he describes as necessary to support a user fee.

The Legislature determined that the fee must be paid when a notice of determination is entered. Mills argues the timing

of the exaction is unfair and unreasonable because many payors pay for reviews they never receive and others receive a bargain price for an extensive and time-consuming study. It is not our role to assess the wisdom of legislation from either a public policy or public relations perspective. We are asked only to determine whether [section 711.4](#) imposes a fee or a tax. The record discloses several reasonable justifications for imposing a flat fee.

Fish and Game offered testimony that the imposition of an hourly fee for any environmental review would discourage early consultation. Often developers contact Fish and Game to discuss potential adverse impacts of a proposed project before any plans are submitted. Fish and Game then has the opportunity to engage in a collaborative process to eliminate or mitigate impacts on fish and wildlife before resources have been committed to a particular development plan.

The record also discloses that the environmental review process for a CEQA project or a timber harvest plan can involve various biologists at the regional level, consultation with biologists at headquarters and review of various data bases. Moreover, the biologists often work on several projects simultaneously and perform work which benefits all the projects. Consequently, the evidence suggests it would be cumbersome and expensive to account for multiple biologists' time, from multiple regions, working multiple projects.

The evidentiary thrust to Fish and Game's argument is that the cost of performing its duties under CEQA and the Forest Practice Act far exceeds the revenue generated under [section 711.4](#). (*City of Dublin v. County of Alameda, supra*, [14 Cal.App.4th at p. 282](#).) Under the accounting system dismantled in 1991, Fish and Game employees recorded their time and charged the time to various codes. Before changing to a new system, the [\\*954](#) employees' time sheets were surveyed and analyzed. A new coding system was predicated on these surveys and analyses. Mills complains that the new system camouflages and inflates the true costs of environmental review.

The trial court found Fish and Game met its burden of proving the cost of its environmental review programs. The court wrote, “While Plaintiff attacks the Department's method of converting its costs under its old accounting system to the new accounting program, the authorities do not require absolute precision. Rather, as long as the estimate of costs is a reasonable one, it will be upheld.”

We need not perform an appellate audit of Fish and Game's accounting systems. Having reviewed the entire record, we are satisfied there is sufficient evidence to support the trial court's finding that the cost of comprehensive environmental review far surpasses the amount of fees generated under [section 711.4](#). “[W]e would be demanding the impossible by insisting on rigorously supported findings.” [Citation.] All that our review requires is that we are able to determine that the [Legislature] acted after finding a reasonable relationship between the fee and the need to which the development contributes.” (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 247 [1 Cal.Rptr.2d 818].) Mills squabbles about the costs associated with the review of Fish and Game's own projects, the preparation of resource databases, and a few other relatively small items. His argument, like his expert's testimony, proves the point. Complex regulatory programs involve complex accounting methodologies which render a more conventional “user fee” assessment impractical or expensive.

There is also evidence that the administrative costs to implement an extensive and comprehensive time-reporting system would be high. The evidence shows that biologists often simultaneously perform the preliminary work establishing resource data for several projects and consult and research issues relating to many different projects. It is reasonable to assess a flat fee and thereby reduce the cost and administrative difficulty of accounting for the services provided for each individual project. Moreover, collection of a flat fee at a uniform time eases the administrative burden of collection and provides certainty to those who submit project proposals.

Fish and Game provides an apt analogy to demonstrate the reasonableness of flat fees. The Legislature has adopted a flat filing fee for filing an action in superior court whether the matter is a simple case requiring little time and attention or a complex case requiring intensive judicial resources from pretrial motions through a lengthy trial. By statute, statewide judicial fees [\\*955](#) cannot be increased or decreased by counties to provide any kind of graduated structure. (*Gov. Code*, § 54985, subd. (c)(1).) The fees imposed by [section 711.4](#) are quite similar. Like a civil action, the environmental review may be time and staff intensive or it may be summarily handled. In neither case does the fee operate as a tax just because a prescribed amount is charged to all who avail themselves of the opportunity to obtain discretionary government services.

(4) Finally, plaintiff also challenges the Legislature's decision to charge a higher fee for the filing of a negative declaration than for other environmental documents. As explained by a Fish and Game senior environmental specialist supervisor at trial, the standard for a negative declaration is that a project have no adverse impact on the environment. Thus, Fish and Game has the responsibility to make sure the disclosure of the possible impacts is complete and to assure any mitigation measures are adequate. Often, the proposed mitigation measures are inadequate, and Fish and Game staff must work with the lead agency and with the project proponent to develop an acceptable negative declaration document. The supervisor testified that his staff probably spends more time on the review of a negative declaration than for the review of an equivalent size project with EIR (environmental impact report) documentation. Hence, because of project information collection cost and the time spent negotiating mitigation measures, Fish and Game's costs are generally higher for negative declarations. There is a sufficient reasonable basis for the legislative decision to charge more for the review of a negative declaration than for the review of an environmental impact report.

## V

We need not address the many other issues raised by the parties in these consolidated cases rendered moot by our finding that [section 711.4](#) does constitute a regulatory fee. Moreover, we dismiss Mills's second appeal because it too is rendered moot by our finding. In the underlying case, the California Association of Professional Scientists sought to enjoin the settlement entered into by Mills and Fish and Game in the original action. The crux of the appeal is whether the trial court properly restricted its constitutional ruling to Mills alone. Since we have upheld the constitutionality of [section 711.4](#), we need not decide whether the trial court erred by invoking [article III, section 3.5 of the California Constitution](#) to limit the scope of its constitutional ruling.

Many of the arguments raised by Mills, and echoed by his expert at trial, are rooted in the perception that a flat fee is unfair. They object vociferously [\\*956](#) to the disparity between the amount of the fee and the services provided for different projects. This may be so. The scope of our inquiry, however, is not whether the fee is fair but whether the fee is, in legal effect, a tax. This case is not a challenge to the legislative power to enact a fee, nor is it a substantive constitutional challenge to the fee. We were asked to make the legal determination as to whether it is a fee exclusively for the purpose of determining whether it was properly enacted by a

majority vote. Constrained by the limited scope of appellate review, we have concluded the Legislature did not violate California Constitution, article XIII A by enacting the [section 711.4](#) fees by a simple majority vote. Any further challenge to the equity of a flat fee structure must be presented to the Legislature for the issue is political, not constitutional.

### Disposition

The appeal in case No. C023075 is dismissed. The judgment in case No. C023184 is affirmed in part and reversed in part as explained above. In both cases, Mills shall pay the costs on appeal.

Sims, Acting P. J., and Nicholson, J., concurred.

The petition of appellant Albert W. Mills for review by the Supreme Court was denied July 12, 2000. \*957

### Footnotes

- \* Pursuant to California Rules of [Court, rule 976.1](#), this opinion is certified for publication with the exception of part I.
- 1 Further statutory references to sections of an undesignated code are to this code.
- \* See footnote, [ante, page 935](#).
- 3 Evidence of the legislative history of [section 711.4](#) was admitted at trial. Legislative history can be relevant to a determination whether an exaction is a fee or a tax. (*CentexReal Estate Corp. v. City of Vallejo (1993) 19 Cal.App.4th 1358, 1362 [24 Cal.Rptr.2d 48]*.) Here, the trial court found the costs of environmental review exceeded the amount of the fees, but it found imposition of a flat fee arbitrary. Without the benefit of the Supreme Court's holding in *Sinclair* and the broad analysis of regulatory fees, the trial court narrowly construed [section 711.4](#) as a user fee requiring the amount of the fees to reflect the cost of the service provided the payor. Because we have decided that a flat fee may be a reasonable allocation of the costs of a regulatory fee and the trial court found Fish and Game had met its burden of proof on this issue, the legislative history cited by the trial court is unnecessary.



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Newhall County Water Dist. v. Castaic Lake Water Agency](#), Cal.App. 2 Dist., January 19, 2016

51 Cal.4th 421

Supreme Court of California

CALIFORNIA FARM BUREAU FEDERATION

et al., Plaintiffs and Appellants,

v.

STATE WATER RESOURCES CONTROL

BOARD, Defendant and Respondent.

No. S150518.

|

Jan. 31, 2011.

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As Modified April 20, 2011.

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Rehearing Denied April 20, 2011.

**Synopsis**

**Background:** Farm bureau federation, water associations, and individual fee payers filed lawsuit against State Water Resources Control Board (SWRCB) for declaratory and injunctive relief, and writ of mandate, after SWRCB denied plaintiffs' requests for reconsideration and refund of new annual fees imposed by statutes on holders of water right permits and licenses. The Superior Court, Sacramento County, Nos. 03CS01776 and 04CS00473, [Raymond M. Cadei, J.](#), denied plaintiffs' petitions for writ of mandate and ruled that fees imposed under statutes and emergency regulations were valid regulatory fees. Plaintiffs appealed. The Court of Appeal reversed with directions. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

**Holdings:** The Supreme Court, [Corrigan, J.](#), held that:

[1] statute requiring fees on appropriative water rights was not subject to supermajority vote requirement on its face;

[2] statute requiring fees on appropriative water rights was not subject to constitutional limitation on ad valorem real estate taxes;

[3] fees on appropriative rights held by federal entities may be allocated to federal water delivery contractors to the extent of contractors' beneficial interest;

[4] statute requiring fees on appropriative water rights did not improperly apply to federal entities themselves; and

[5] contractors' beneficial interest in federal water rights was not limited to the amount of water contracted for delivery.

Affirmed in part, reversed in part, and remanded.

Moreno, J., filed concurring opinion, in which [Werdegar, J.](#), joined.

Opinion, [53 Cal.Rptr.3d 445](#), superseded.

West Headnotes (30)

[1] **Water Law** 🔑 Nature and Elements in General

For purposes of the rule that the State Water Resources Control Board (SWRCB) regulates all appropriative water rights acquired since 1914, an “appropriative right” is the right to take water from a watercourse that does not run adjacent to a landowner's property. [West's Ann.Cal.Water Code § 1225 et seq.](#)

[5 Cases that cite this headnote](#)

[2] **Water Law** 🔑 Regulation and Permit Systems for Allocating Riparian Rights to Take or Use Water

**Water Law** 🔑 Powers and authority

The Water Rights Division of the State Water Resources Control Board (SWRCB) has no permitting or licensing authority over riparian or pueblo rights, or over appropriative rights acquired before 1914. [West's Ann.Cal.Water Code § 1225 et seq.](#)

[6 Cases that cite this headnote](#)

[3] **Water Law** — Correlative Rights of Riparian Owners

**Water Law** — Extent of right to use water in general

**Water Law** — Reasonable use

Under the common law riparian doctrine, a person owning land bordering a stream has the right to reasonable and beneficial use of water on his or her land, but a riparian owner must share the right to use water with other riparian owners.

1 Cases that cite this headnote

[4] **Taxation** — Distinguishing “tax” and “license” or “fee”

The plaintiff challenging a fee as a tax enacted in violation of the supermajority requirement for tax increases bears the burden of proof with respect to all facts essential to its claim for relief, to establish a prima facie case showing that the fee is invalid. *West's Ann.Cal. Const. Art. 13A, § 3*; *West's Ann.Cal.Evid.Code § 500*.

4 Cases that cite this headnote

[5] **Taxation** — Weight and Sufficiency of Evidence

The plaintiff challenging a fee as a tax enacted in violation of the supermajority requirement for tax increases must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief, commonly proof by a preponderance of the evidence. *West's Ann.Cal. Const. Art. 13A, § 3*; *West's Ann.Cal.Evid.Code § 500*.

[6] **Evidence** — Extent of burden in general

Unlike the “burden of producing evidence,” which may shift between the parties, the burden of proof does not shift; it remains with the party who originally bears it. *West's Ann.Cal.Evid.Code § 110*.

2 Cases that cite this headnote

[7] **Evidence** — Party asserting or denying existence of facts

**Evidence** — Failure to sustain burden

**Trial** — Prima facie case

The burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact, and if that party fails to produce sufficient evidence to make a prima facie case, it risks nonsuit or other unfavorable determination.

4 Cases that cite this headnote

[8] **Evidence** — Extent of burden in general

Once the party with the burden of proof as to a particular fact produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case. *West's Ann.Cal.Evid.Code § 110*.

4 Cases that cite this headnote

[9] **Taxation** — Distinguishing “tax” and “license” or “fee”

Once plaintiffs challenging a fee as a tax enacted in violation of the supermajority vote requirement for tax increases have made their prima facie case, the state bears the burden of production and must show (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. *West's Ann.Cal. Const. Art. 13A, § 3*.

6 Cases that cite this headnote

[10] **Taxation** — Distinguishing “tax” and “license” or “fee”

**Water Law** — Powers, proceedings and review

**Water Law** — Terms and Conditions of Permit

Water Code provision enacted by simple majority of the Legislature, requiring the State Water Resources Control Board (SWRCB) to adopt a schedule of annual fees to be paid by each appropriative right permit or license holder, did not violate the supermajority vote requirement for tax increases on its face, since it did not explicitly impose a tax, even though the fees were deposited in the Water Rights Fund along with fees from other sources, where the fees were linked to activities the SWRCB's Division of Water Rights performed. [West's Ann.Cal. Const. Art. 13A, § 3](#); [West's Ann.Cal. Water Code §§ 1525, 1551, 1552](#).

*See Annot., Constitutionality of statutes affecting riparian rights (1928) 56 A.L.R. 277; Cal. Jur. 3d Property Taxes §§ 5, 12; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, §§ 140, 130.*

**[11] Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

For purposes of determining whether a provision imposes a tax subject to constitutional supermajority vote requirement, ordinarily taxes are imposed for revenue purposes and not in return for a specific benefit conferred or privilege granted. [West's Ann.Cal. Const. Art. 13A, § 3](#).

[5 Cases that cite this headnote](#)

**[12] Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

For purposes of determining whether a provision imposes a tax subject to constitutional supermajority vote requirement, most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges, but compulsory fees may be deemed legitimate fees rather than taxes. [West's Ann.Cal. Const. Art. 13A, § 3](#).

**[13] Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

For purposes of determining whether a provision imposes a tax subject to constitutional supermajority vote requirement, a fee may be charged by a government entity so long as it does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged, but a valid fee may not be imposed for unrelated revenue purposes. [West's Ann.Cal. Const. Art. 13A, § 3](#).

[6 Cases that cite this headnote](#)

**[14] Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

For purposes of determining whether a provision imposes a tax subject to constitutional supermajority vote requirement, a regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of a regulation, such as all costs incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision, and enforcement. [West's Ann.Cal. Const. Art. 13A, § 3](#).

[1 Cases that cite this headnote](#)

**[15] Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

For purposes of determining whether a provision imposes a tax subject to constitutional supermajority vote requirement, regulatory fees are valid despite the absence of any perceived “benefit” accruing to the fee payers. [West's Ann.Cal. Const. Art. 13A, § 3](#).

**[16] Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

For a provision to impose a regulatory fee rather than a tax subject to constitutional supermajority vote requirement, legislators need only apply sound judgment and consider probabilities according to the best honest viewpoint of informed officials in determining the amount of the regulatory fee. [West's Ann.Cal. Const. Art. 13A, § 3](#).



1 Cases that cite this headnote

- [17] **Taxation** — Distinguishing “tax” and “license” or “fee”

Simply because a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax subject to constitutional supermajority vote requirement. *West's Ann.Cal. Const. Art. 13A, § 3*.

1 Cases that cite this headnote

- [18] **Taxation** — Distinguishing “tax” and “license” or “fee”

A regulatory fee does not become a tax subject to constitutional supermajority vote requirement simply because the fee may be disproportionate to the service rendered to individual payors. *West's Ann.Cal. Const. Art. 13A, § 3*.

2 Cases that cite this headnote

- [19] **Taxation** — Distinguishing “tax” and “license” or “fee”

In determining whether a provision imposes a regulatory fee rather than a tax subject to constitutional supermajority vote requirement, the question of proportionality is not measured on an individual basis; rather, it is measured collectively, considering all rate payors. *West's Ann.Cal. Const. Art. 13A, § 3*.

4 Cases that cite this headnote

- [20] **Taxation** — Distinguishing “tax” and “license” or “fee”

A fee cannot exceed the reasonable cost of regulation with the generated surplus used for general revenue collection, and an excessive fee that is used to generate general revenue becomes a tax subject to constitutional supermajority vote requirement. *West's Ann.Cal. Const. Art. 13A, § 3*.

7 Cases that cite this headnote

- [21] **Water Law** — Powers, proceedings and review

**Water Law** — Terms and Conditions of Permit

The “total amount” and “total revenue” provisions of the Water Code provision requiring the State Water Resources Control Board (SWRCB) to adopt a schedule of annual fees to be paid by each appropriative right permit or license holder does not require the SWRCB to set the fees so as to collect anything more than the administrative costs incurred in carrying out the permit functions authorized by the statute. *West's Ann.Cal. Water Code § 1525*.

- [22] **Appeal and Error** — Verdict, findings, and judgment

Remand was necessary for trial court to make sufficient factual findings for the Supreme Court to rule on the question of whether fees imposed by State Water Resources Control Board (SWRCB) on appropriative right permit or license holders, as imposed, were reasonably proportional to the costs of the regulatory program as required to be “fees” exempt from constitutional supermajority vote requirement for taxes, in denying petitions for writ of mandate and ruling that the fees were valid regulatory fees. *West's Ann.Cal. Const. Art. 13A, § 3; West's Ann.Cal. Water Code § 1525*.

2 Cases that cite this headnote

- [23] **Taxation** — Distinguishing “tax” and “license” or “fee”

**Water Law** — Powers, proceedings and review

**Water Law** — Terms and Conditions of Permit

Water Code provision requiring the State Water Resources Control Board (SWRCB) to adopt a schedule of annual fees to be paid by each appropriative right permit or license holder was not an unconstitutional “new ad valorem tax on real property” on its face, since it did not explicitly impose a tax, even though the fees

were deposited in the Water Rights Fund along with fees from other sources, where the fees were linked to activities the SWRCB's Division of Water Rights performed. [West's Ann.Cal. Const. Art. 13A, § 3](#); [West's Ann.Cal.Water Code § 1525\(a\)](#).

1 Cases that cite this headnote

[24] **Taxation** 🔑 United States entities, property, and securities

Under principles of sovereign immunity, the federal government is immune from state taxation absent its consent.

[25] **Indians** 🔑 Water Rights and Management  
**Water Law** 🔑 Powers, proceedings and review

**Water Law** 🔑 Terms and Conditions of Permit

When a private contractor's use of United States property may be taxed, federal law permits the State Water Resources Control Board's (SWRCB) practice of allocating annual fees on appropriative rights held by federal or tribal obligees that claim sovereign immunity to persons or entities that have water delivery contracts with the obligees, but the allocation is limited to the extent the contractor has beneficial or possessory use of the property. [West's Ann.Cal.Water Code §§ 1525\(a\), 1540, 1560](#).

[26] **Water Law** 🔑 Powers, proceedings and review

**Water Law** 🔑 Terms and Conditions of Permit

The Water Code provision requiring the State Water Resources Control Board (SWRCB) to adopt a schedule of annual fees to be paid by each appropriative right permit or license holder does not improperly impose the fees on water rights of the United States in violation of sovereign immunity, where the statute includes an exception for cases where

SWRCB determines that the payer “will not pay the fee based on the fact that the fee payer has sovereign immunity under” the state statute providing that the fees apply to the United States “to the extent authorized under” federal law. [West's Ann.Cal.Water Code §§ 1525\(a\), 1540, 1560](#).

[27] **Taxation** 🔑 Distinguishing “tax” and “license” or “fee”

When conducting a Supremacy Clause analysis, federal courts do not distinguish between fees and taxes. [U.S.C.A. Const. Art. 6, cl. 2](#).

[28] **Constitutional Law** 🔑 Sewer, water, and drains

**Constitutional Law** 🔑 Water, sewer, and irrigation

**Indians** 🔑 Validity

**Water Law** 🔑 Statutory provisions

**Water Law** 🔑 Terms and Conditions of Permit

The statutes providing that if a federal or tribal obligee asserts sovereign immunity against annual fees to be paid by appropriative right permit or license holders, the State Water Resources Control Board (SWRCB) may allocate the fee, or a portion of the fee, to persons or entities that have water delivery contracts with the obligee, does not facially violate state and federal rights to equal protection and due process. [U.S.C.A. Const.Amend. 14](#); [West's Ann.Cal.Const. Art. 1, §§ 7\(a\), 15](#); [West's Ann.Cal.Water Code §§ 1525\(a\), 1540, 1560](#).

[29] **Taxation** 🔑 United States entities, property, and securities

To successfully defend a Supremacy Clause challenge to a tax on persons or entities that contract with the federal government, the taxing authority must segregate and tax only the beneficial or possessory interest in the property. [U.S.C.A. Const. Art. 6, cl. 2](#).

1 Cases that cite this headnote

[30] **Water Law** 🔑 Powers and authority

**Water Law** 🔑 Contracts between federal government and local districts or associations

A fair determination of federal water delivery contractors' taxable beneficial interest in appropriative water rights held by the federal government would include consideration of the system that supports and ensures the delivery of the amount of water contracted, less any amounts used for hydroelectric generation, but not limited to the amount of water contracted for delivery. [West's Ann.Cal. Water Code §§ 1525\(a\), 1540, 1560.](#)

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#### Opinion

[CORRIGAN, J.](#)

\*428 \*\*117 The California Constitution provides that any act to increase taxes must be passed by a two-thirds vote of the Legislature.<sup>1</sup> On the other hand, statutes that create or raise regulatory fees need only \*\*\*43 the assent of a simple majority.<sup>2</sup> In 2003, the Legislature passed amendments to the Water Code<sup>3</sup> by a 53 percent majority. Current [section 1525](#) was enacted as part of these amendments. The threshold issue here is whether [section 1525, subdivision \(a\)](#) imposes a tax or a fee. We hold that the amendments and [section 1525](#) do not explicitly impose a tax and, therefore, are not facially unconstitutional. However, because the record is unclear as to whether the fees were reasonably apportioned in terms of the regulatory activity's costs and the fees assessed, we direct

the Court of Appeal to remand the matter to the trial court to make these findings.

A second issue is whether the Water Code amendments, or their implementing regulations, violate the supremacy clause of the United States Constitution by over-assessing the beneficial interests of those who hold contractual rights to delivery of water from the federally administered Central Valley Project (hereafter, the federal contractors). We conclude that the statutes are not facially unconstitutional. We further determine that the constitutionality of the implementing regulations depends on whether they fairly assess and apportion the federal contractors' beneficial interests. However, because of conflicting factual assertions and an unclear record concerning the extent and value of those interests, we also direct remand to the trial court for findings on this issue.

## I. FACTUAL AND PROCEDURAL

### BACKGROUND<sup>4</sup>

[1] [2] [3] The State Water Resources Control Board (SWRCB or Board) is responsible for the “orderly and efficient administration of ... water resources” and exercises “adjudicatory and regulatory functions of the state.” (§ 174.) The water in California belongs to the people, but the right to *use* water may be acquired as provided by law. (§§ 102, 1201.) The SWRCB's Division of **\*429** Water Rights (Water Rights Division or Division)<sup>5</sup> administers **\*\*118** the water rights program, but its authority is limited. The SWRCB regulates all appropriative water rights acquired since 1914. An appropriative right is the right to take water from a watercourse that does not run adjacent to a landowner's property. Since 1914, all appropriative rights have been acquired through a system of permits and licenses<sup>6</sup> **\*\*\*44** that the SWRCB or its predecessor state entities have issued. Before 1914, appropriative rights were acquired under common law principles or earlier statutes. The Water Rights Division has no permitting or licensing authority over riparian<sup>7</sup> or pueblo<sup>8</sup> rights, or over appropriative rights acquired before 1914. The SWRCB does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held. (§ 275.) Riparian, pueblo, and pre-1914 appropriative rights account for 38 percent of currently held water rights.

Rights regulated under SWRCB licenses and permits include about 40 percent of state water subject to water rights. The

federal government holds the remaining 22 percent of water rights. The United States Bureau of Reclamation (Bureau of Reclamation or Bureau) holds the permits and licenses to, and operates, the Central Valley Project (CVP or Project.) The **\*430** Project diverts and stores water from numerous sources.<sup>9</sup> The Bureau contracts out the responsibility to control, distribute, and use water under the permits it holds. However, these federal contracts involve use of less than 6 percent of the water over which the Bureau holds rights. The remaining water is diverted and stored by the Bureau for hydroelectric, wildlife and other purposes.

Historically, the operation of the Water Rights Division was supported by the state's general fund (General Fund), with only 0.5 percent of costs covered by fees. In 2003, the Legislative Analyst recommended that the Division's operating costs be shifted from the General Fund and covered instead by user fees imposed on permit and license holders.<sup>10</sup> The SWRCB strongly opposed the recommendation. The SWRCB pointed out that its authority to impose fees did not extend to those holding water rights that were not based on its permits and licenses. While riparian, pueblo, and pre-1914 rights (collectively, RPP rights) are protected by conditions in new (post-1914) permits and through the Water Rights Division's enforcement **\*\*\*45** of activity, the Division did not have authority to impose fees on those RPP rights holders. As noted, the RPP holders comprise 38 percent of water rights holders in California. The SWRCB argued that while **\*\*119** permit and license holders should pay their share, proportional fees on them could not cover the total cost of the Division's operation. Additionally, as explained in greater detail below, the federal Bureau of Reclamation and Indian tribes resist paying fees, relying on the principle of sovereign immunity.

These difficulties notwithstanding, the Legislature adopted the Legislative Analyst's recommendation and passed Senate Bill No. 1049 (2003-2004 Reg. Sess.), repealing certain sections of the Water Code and enacting [sections 1525-1560](#). Together, these statutes are designed to make the Water Rights Division entirely fee supported.

### A. The Fee Legislation

We begin with a summary of the relevant statutes.

#### **\*431 Section 1525**

[Section 1525](#) sets forth the parties and entities subject to the new fees.<sup>11</sup> \*\*\*[46 Section 1525, subdivision \(a\)](#) requires the SWRCB to adopt a schedule of *annual fees* to be paid by each permit or license holder. This group does not include riparian, pueblo, or pre-1914 rights holders. [Subdivision \(b\) of section 1525](#) requires the SWRCB to establish the schedule for a *one-time* \*[432 application fee](#) for permits to appropriate water, for approval of leases, and for petitions relating to those applications.

[Section 1525, subdivision \(c\)](#) provides that the SWRCB “shall set the fee schedule authorized by this section so that the total amount of fees collected pursuant to this section equals that amount necessary to recover costs” of the Division’s activities. [Subdivision \\*\\*120 \(c\)](#) sets out “recoverable costs” in substantial detail but the costs recoverable are “not limited to” those activities identified. ([§ 1525, subd. \(c\).](#)) [Subdivision \(d\)\(3\)](#) similarly requires the SWRCB to “set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act for this activity.” ([§ 1525, subd. \(d\)\(3\).](#))

In other words, the statute requires that the total budgeted cost of the Division’s operations be recovered from the fees. The SWRCB is to review and revise the fees each year as necessary, to ensure they conform with the revenue levels set in the annual budget act (Budget Act). If the revenue collected during the preceding year is either greater or less than the revenue levels set forth in the Budget Act, the SWRCB may adjust the annual fees to compensate for the disparity. ([§ 1525, subd. \(d\)\(3\).](#)) The SWRCB is also authorized to adopt “emergency regulations” to implement the fee schedule. ([§ 1525, subd. \(d\)\(1\).](#))

### **Section 1537**

[Section 1537](#) generally covers collection. While the Board sets the fees, the money is actually collected by the Board of Equalization (BOE). The BOE collects and refunds annual fees collected under the Fee Collection Procedures Law, part of the Revenue and Taxation Code, as limited by [subdivision \(b\)\(2\) through \(4\) of section 1537](#). The BOE has no role in reviewing refund claims under [section 1537](#) or the emergency regulations.

### **Sections 1540 and 1560**

[Section 1540](#) concerns the allocation of annual fees to federal contractors. [Section 1560](#) sets out the options that

may be pursued when the federal Bureau of Reclamation or an Indian tribe declines to pay a fee by relying on sovereign immunity.<sup>12</sup> \*\*\*[47](#) As relevant here, the federal government and Indian tribes are the entities eligible to assert sovereign immunity.

### **\*433 Sections 1550, 1551, and 1552**

[Sections 1550 and 1551](#) establish the Water Rights Fund, into which the BOE must deposit fees collected on behalf of the SWRCB. The Water Rights Fund is separate from the General Fund. Money in the Water Rights Fund may be used only for purposes set out in [section 1552](#), which includes SWRCB expenditures necessary to carry out the work of the Water Rights Division, BOE expenditures in connection with collecting the SWRCB fees, and the payment of refunds. ([§ 1552.](#))

### **B. The Emergency Regulations**

To implement [section 1525](#)’s fee requirement, the SWRCB adopted \*\*[121 California Code of Regulations, title 23, sections 1066 and 1073](#) (regulation 1066 and regulation 1073). These regulations set formulas to calculate annual fees for permit and license holders, and for the federal contractors. Fees for issuance, supervision, and modification of permits and licenses, i.e., the revenue-producing activities now required to cover the entire cost of the Division’s operations, were to be paid by the permit and license holders regulated by the SWRCB. No money would come from the General Fund. The Court of Appeal explained the difficulty the SWRCB had in setting the fees: “First, the SWRCB had to raise \$4.4 million immediately to cover the cost of the water rights program in the second half of the 2003–2004 fiscal year. Second, the funding source had to be ‘relatively stable.’ Third, because of time constraints, SWRCB had to rely on its existing data base in \*[434](#) calculating the amount of fees to be assessed. Fourth, although it cost SWRCB between \$17,000 and \$20,000 to process an application to appropriate water, SWRCB expected people would not seek SWRCB services if the one-time service fees were too high. Fifth, because most persons and entities subject to the annual fee held permits or licenses for less than 10 acre-feet of water, [<sup>13</sup>] a minimum fee was necessary to cover the cost of sending out the fee bills. Sixth, SWRCB anticipated that 40 percent of the water right permit and license holders would refuse to pay annual fees. Seventh, the SWRCB did not have permitting authority over certain holders of water rights (specifically the holders of riparian, pueblo and pre-1914

appropriative rights) amounting to approximately 38 percent of the water diverted in the state.”

#### **\*\*\*48 C. Annual Fee Formula for Post–1914 Permit and License Holders**

Regulation 1066 applies to post–1914 permit and license holders. Regulation 1066, subdivision (a)<sup>14</sup> set the minimum annual fee as the greater of \$100, or \$.03 for each acre-foot based on the total annual amount of diversion authorized by the permit or license.

To determine the annual fees, the Board started with the \$4.4 million budget amount and assumed it would be unable to collect 40 percent of billings from water right holders who claimed sovereign immunity or who refused to pay their bills. It divided the \$4.4 million mandated by the Legislature by 0.6 to account for the estimated 40 percent non-collection rate. This increased its targeted revenue to approximately \$7 million.

#### **D. Annual Fee Formula for Federal Contractors**

Regulation 1073, which implemented the provisions of [Water Code sections 1540 and 1560](#), addressed rights held by the Bureau of Reclamation, but contracted out to federal contractors. Regulation 1073, subdivision (b)(2) applied a formula to calculate the annual fee imposed on those contractors “[i]f the [Bureau of Reclamation] decline[d] or [was] likely to decline to pay the fee or expense ... for the [Central Valley Project].” In general, regulation 1073 assessed annual fees against contractors based on a prorated portion of the total amount of annual fees associated with all Bureau permits and licenses, rather than the portion available under the terms of their contracts.

#### **\*435 E. Proceedings Below**

In January 2004, the BOE sent fee notices to the [section 1525](#) permit and license holders and to the federal contractors. The Budget Act set a target of \$4.4 million in fee revenue because the balance for the first half of 2003–2004 was paid from General Fund revenue. \$7.4 million in water rights fees was collected for fiscal year 2003–2004. The imposition of water rights fees was challenged **\*\*122** by several groups of plaintiffs representing various water rights holders.<sup>15</sup>

Plaintiffs sought declaratory and injunctive relief and a writ of mandate. They alleged that the statutory scheme adopted by the Legislature and the emergency regulations adopted to

implement the scheme were unconstitutional both on their face and as applied. The trial court denied the writ of mandate, ruling that the money collected constituted valid regulatory fees, **\*\*\*49** rather than taxes. It also rejected plaintiffs' other constitutional claims.

The Court of Appeal reversed in part, holding that [section 1525](#) was constitutional on its face, but that “as applied” under the emergency regulations, it imposed illegal levies. It remanded the matter to the trial court with instructions that it “(1) stay further proceedings before the SWRCB and/or BOE until the SWRCB adopts new fee schedule formulas and a procedure for calculating refunds if any; (2) order the SWRCB to adopt valid fee schedule formulas within 180 days of the finality of this opinion; (3) order the SWRCB to determine the amount of annual fees improperly assessed under regulations 1066 and 1073 for the 2003–2004 fiscal year and establish a procedure for calculating refunds, if any, due within 180 days of the finality of this opinion; and (4) order the Board of Equalization, through the SWRCB, to refund any annual fees unlawfully collected to fee payers who filed timely petitions for reconsideration with the SWRCB....”<sup>16</sup>

## **\*436 II. DISCUSSION**

### **A. Standard of Review**

Whether [section 1525](#) imposes a tax or a fee is a question of law decided upon an independent review of the record. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 [Cal.4th](#) 866, 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350 (*Sinclair Paint* ).)

[4] [5] [6] The plaintiff challenging a fee bears the burden of proof to establish a prima facie case showing that the fee is invalid. (See *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, [421](#), 194 Cal.Rptr. 357, 668 P.2d 664; *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668, 3 Cal.Rptr.3d 279 (*Sargent Fletcher* ).) In other words, the plaintiff bears the burden of proof<sup>17</sup> “with respect to all facts essential to its claim for relief.” (*Homebuilders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 562, 112 Cal.Rptr.3d 7; see *Evid.Code*, § 500.) The plaintiff “must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). [Citation.] The burden of proof *does not shift* ... it remains with the party who originally

bears it.” (*Sargent Fletcher, supra*, 110 Cal.App.4th at p. 1667, 3 Cal.Rptr.3d 279, original italics.)

[7] [8] This burden of persuasion is different from the “burden of producing evidence” (see *Evid.Code*, § 110), which may shift between the parties.<sup>18</sup> “[T]he burden of producing \*\*123 evidence as to a particular fact rests on the party with the burden of proof as to that fact. [Citations.] If that party fails to produce sufficient evidence to make a prima facie case, it risks nonsuit or other unfavorable determination. [Citations.] But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence *shifts* to the other party to refute the prima facie case.” (*Sargent Fletcher, supra*, 110 Cal.App.4th at pp. 1667–1668, 3 Cal.Rptr.3d 279, original italics.)

\*\*\*50 [9] Thus, once plaintiffs have made their prima facie case, the state bears the burden of production and must show “ ‘(1) the estimated costs of the \*437 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.’ ” (*Sinclair Paint, supra*, 15 Cal.4th at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350; see *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945, 94 Cal.Rptr.2d 535 (*Prof. Scientists* ).)

## B. Valid Fee or Invalid Tax?

### Facial challenge

[10] Plaintiff Farm Bureau contends that section 1525’s annual fee requirement is unconstitutional on its face because it imposes a tax, not a valid regulatory fee.<sup>19</sup> We reject this contention.

California Constitution, article XIII A, section 3 requires that “any changes in state taxes enacted for the purpose of increasing revenues” be approved by a two-thirds majority of the Legislature. Senate Bill No. 1049 (2003–2004 Reg. Sess.) passed the Legislature with only a 53 percent majority. Thus, if the amount charged under section 1525 is a tax, it is invalid. If it is a regulatory fee, it is not subject to the supermajority requirement.

[11] [12] We have recognized that “ ‘tax’ has no fixed meaning, and that the distinction between taxes and fees is frequently ‘blurred,’ taking on different meanings in different

contexts. [Citations.]” (*Sinclair Paint, supra*, 15 Cal.4th at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) Ordinarily taxes are imposed for revenue purposes and not “in return for a specific benefit conferred or privilege granted. [Citations.] Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. [Citations.] But compulsory fees may be deemed legitimate fees rather than taxes. [Citation.]” (*Ibid.*)

[13] In contrast, a fee may be charged by a government entity so long as it does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged. A valid fee may not be imposed for unrelated revenue purposes. (*Sinclair Paint, supra*, 15 Cal.4th at p. 876, 64 Cal.Rptr.2d 447, 937 P.2d 1350; *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375, 228 Cal.Rptr. 726, 721 P.2d 1111.)<sup>20</sup>

[14] [15] [16] [17] [18] [19] \*438 The scope of a regulatory fee is somewhat flexible and is related to the overall purposes of the regulatory governmental action. “ ‘A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation.’ [Citation.] ‘Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.’ [Citation.] Regulatory fees are valid despite the absence of any perceived ‘benefit’ accruing to the fee payers. [Citation.] Legislators ‘need only apply sound judgment and consider “probabilities according to the best honest viewpoint of informed officials” in determining the amount of the \*\*\*51 regulatory fee.’ [Citation.]” (*Prof. Scientists, supra*, 79 Cal.App.4th at p. 945, 94 Cal.Rptr.2d 535.) “Simply because a fee exceeds \*\*124 the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax.” (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 700, 37 Cal.Rptr.3d 149, 124 P.3d 719.) A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194, 29 Cal.Rptr.2d 128.) The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors. (*Prof. Scientists, supra*, 79 Cal.App.4th at p. 948, 94 Cal.Rptr.2d 535.)

[20] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax.

Reference to the statutory language reveals a specific intention to avoid imposition of a tax. By its terms, [section 1525](#) permits the imposition of fees only for the costs of the functions or activities described, and not for general revenue purposes. [Section 1525, subdivision \(c\)](#) carefully sets out that the fees imposed shall relate to costs linked to issuing, monitoring, enforcing and administering licenses and permits, and lists the recoverable costs in some detail. [Section 1551](#) directs that the fees collected be deposited in the Water Rights Fund, not in the General Fund. [Section 1552](#) describes the [\\*439](#) purposes for which the money in the Water Rights Fund may be expended.<sup>21</sup> Although the fees set forth in [section 1551](#) come from various sources, including some that do not involve the services described in [section 1525](#),<sup>22</sup> it cannot be argued that the fees are excessive just because [\\*\\*\\*52](#) [sections 1551](#) and [1552](#) list a variety of revenues to be deposited in the Water Rights Fund.

[Section 1552](#) does not describe how the various revenues deposited in the Water Rights Fund should be allocated. However, no statutory language precludes the segregation and application of collected fees to fund services described in that section.<sup>23</sup>

[21] [Section 1525](#) does not require the SWRCB to collect anything more than the administrative “costs incurred” in carrying out the functions authorized in its subdivisions (a), (b) and (c). Also, [section 1525, subdivision \(c\)](#) directs the SWRCB to set the fee schedules so that the “total amount of [\\*\\*125](#) fees collected ... equals that amount necessary to recover costs incurred in connection with” the Division’s administration of the provisions of subdivisions (a) and (b). Similarly, [section 1525, subdivision \(d\)\(3\)](#) requires the SWRCB to “set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels [\\*440](#) set forth in the annual Budget Act *for this activity*.” (Italics added.) Although the “activity” subject to fees under this section could represent all of the Division’s activities, the Court of Appeal correctly noted, “[T]here is nothing in the ‘total amount’ or ‘total revenue’ provisions of subdivisions (c) and (d) that requires

the SWRCB to set the fees so as to collect anything more than the administrative ‘costs incurred’ in carrying out the permit functions authorized in subdivisions (a), (b) and (c).” Also, there is a safeguard in subdivision (d)(3) authorizing the SWRCB to “further adjust the annual fees” if it “determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the annual Budget Act....” ([§ 1525, subd. \(d\)\(3\)](#).) Thus, the fees charged under [section 1525](#) are linked to the activities the Division performs.

#### “As applied” challenge

Plaintiffs also contend [section 1525](#) is unconstitutional as applied through the fee schedule in regulation 1066 because the fees are so disproportionate that they are unreasonable. Central to the resolution of this issue is an understanding of the extent and costs of the Division’s regulatory “activity.” ([§ 1525, subd. \(d\)\(3\)](#).) The parties diverge in their approach.

As noted, on its face the statutory scheme appears simply to permit the recovery of costs the SWRCB incurs in annual supervision of water usage and the processing of applications for new or modified rights. However, plaintiffs argue the following: (1) While the Division engages in a variety of activities that benefit all water rights holders, and the general public, it is only authorized to impose fees on 40 percent of rights holders. (2) Because the statutory scheme requires that 100 percent of the Division’s annual budget must be recovered through fees, the result is that 40 percent of rights holders are charged for the entire cost of operations that benefit all rights holders and the public at large. This disparity is brought to bear not on the face of the statutes, but in the regulations authorizing fee collection. Plaintiffs claim the regulations impose unreasonable fees because they are so disproportionate to the benefit derived by the fee payors or the burden they place on the regulatory system. (See *Sinclair Paint, supra*, 15 Cal.4th at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) Therefore, plaintiffs contend the fees operate as a tax and are unconstitutional because the authority for [\\*\\*\\*53](#) their imposition was not approved by a two-thirds vote of the Legislature.

On the other hand, the SWRCB claims that the fees are proportional and that plaintiffs’ focus on the benefits of the regulatory program is misplaced. It argues that the broad benefits of the program must be distinguished from its costs. The Board contends that it can allocate the majority of its regulatory costs to persons subject to the water rights permit and license system because [\\*441](#) its costs flow



primarily from the administration of that permit and license system. It acknowledges that the benefits that result from the regulation of permits and licenses may be characterized as benefits not only to permit and license holders, but also to the general public, and other water rights holders not subject to its fee system. But, the Board argues, that does not alter the fact that its costs are largely due to its oversight and administration of the permit and license system and not the regulation of the public or other water rights holders. The Board claims that some 95 percent of its time and expense are directed toward servicing and regulating those licensees and permittees against whom the challenged fees were assessed. As we explain below, however, the trial court made no findings on this claim.

In weighing these arguments, we look to our decision in *Sinclair Paint, supra*, 15 Cal.4th at page 866, 64 Cal.Rptr.2d 447, 937 P.2d 1350. There, the plaintiff challenged the fee in question on the basis that the fee was not regulatory in nature, but rather was **\*\*126** aimed at raising revenue.<sup>24</sup> We acknowledged that “the term ‘special taxes’ ... ‘does not embrace fees 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.’” [Citations.]” (*Sinclair Paint, supra*, 15 Cal.4th at p. 876, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) We held that the fee in question was a regulatory fee and not a tax because it was “imposed ... to mitigate the actual or anticipated adverse effects of the fee payers’ operations.” (*Id.* at p. 870, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) Thus, in *Sinclair Paint*, to determine the tax or fee issue, we directed courts to examine the costs of the regulatory activity and determine if there was a reasonable relationship between the fees assessed and the costs of the regulatory activity. (*Id.* at pp. 870, 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)<sup>25</sup>

[22] Thus, the question revolves around the scope and the cost of the Division’s regulatory activity and the relationship between those costs and the fees imposed. It is further complicated by the fact that not all those who hold water rights are required to pay the fee. Unfortunately, the record before us is insufficient to resolve the “tax or fee” question. The trial court’s order lacks sufficient factual findings for us to determine whether the fees, as imposed, were reasonably proportional to the costs of the regulatory program. In fact, at the hearing on plaintiffs’ motion for a peremptory writ of mandate, **\*\*\*54** the trial court stated it did not believe it was required to make detailed findings.

**\*442** We have previously noted that “[i]t has long been the general rule and understanding that ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ [Citation.] This rule reflects an ‘essential distinction between the trial and the appellate court ... that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law....’ [Citation.] The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal.” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, 2 Cal.Rptr.3d 683, 73 P.3d 541.) Here, the trial court erred by failing to provide a sufficient record to rule on the question of law. Accordingly, this matter must be remanded. The trial court is directed to make detailed findings focusing on the Board’s evidentiary showing that the associated costs of the regulatory activity were reasonably related to the fees assessed on the payors. (*Sinclair Paint, supra*, 15 Cal.4th at p. 870, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) Of course, plaintiffs are free to renew their claim that the fees assessed exceeded the reasonable cost of the Division’s services. (*Id.* at p. 881, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)<sup>26</sup>

The trial court’s findings should include whether the fees are reasonably related to the total budgeted cost of the Division’s “activity” (see § 1525, subd. (c)), keeping in mind that a government agency should be accorded some flexibility in calculating the amount and distribution of a regulatory fee. Focusing on the activity and its associated costs will allow the trial court to determine whether the assessed fees were reasonably proportional and thus not a tax. (*Sinclair Paint, supra*, 15 Cal.4th at p. 870, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) The court must determine whether the statutory scheme and its implementing regulations provide a fair, **\*\*127** reasonable, and substantially proportionate assessment of all costs related to the regulation of affected payors.

### C. Ad Valorem Real Property Tax

Plaintiffs Northern California Water Association and Central Valley Water Project Association contend that section 1525 imposes an unconstitutional “new ad valorem tax [ ] on real property.” As these parties observe, Proposition 13 prohibits this particular category of new taxes, regardless of legislative approval. (Cal. Const., art. XIII A, § 3.)

[23] The gravamen of the contention is that the water rights obtained through the Division's permits and licenses are interests in real property, and that the license and permit charges imposed under [section 1525](#) are thus taxes \*443 improperly based on the ownership of real property interests. However, we have determined above that [section 1525](#) does not, on its face, impose a tax, as opposed to a regulatory fee unaffected by Proposition 13. A fortiori, the face of the statute assesses no new “ad valorem tax[ ] on real property.”

\*\*\*55 Any further consideration of the ad valorem real property tax issue is premature. We have deemed it necessary to remand for further evidence and findings whether the specific system of charges developed by the SWRCB under the authority of [section 1525, subdivision \(a\)](#) imposes taxes, rather than fees. If the remand leads to the conclusion that the charges are valid fees, not taxes, it will follow that they do not constitute ad valorem taxes on real property.

On the other hand, if the remand results in a conclusion that the current charges are taxes, not fees, those taxes will be unconstitutional under Proposition 13, whether or not they are “ad valorem taxes on real property” (Cal. Const., art. XIII A, § 3), because they were authorized by less than a two-thirds legislative vote (*ibid.*). Accordingly, we express no further views on this subject.

#### D. Federal Contractors

##### Facial challenge

[24] These same plaintiffs also contend that [sections 1540 and 1560](#) are unconstitutional on their face because they violate the supremacy clause of the United States Constitution. (See *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 425–437, 4 L.Ed. 579.) Under established principles of sovereign immunity, the federal government is immune from state taxation absent its consent. (See *Davis v. Michigan Dept. of Treasury* (1989) 489 U.S. 803, 812–813, 109 S.Ct. 1500, 103 L.Ed.2d 891.)

[Section 1540](#) provides in relevant part: “If the board determines that the person or entity on whom a fee or expense is imposed will not pay the fee ... based on the fact that the fee payer has sovereign immunity under [Section 1560](#), the board may allocate the fee or expense, or an appropriate portion of the fee or expense, to persons or entities who have contracts for the delivery of water from the person or entity on whom the fee or expense was initially imposed. The allocation of the fee or expense to these contractors does not affect ownership

of any permit, license, or other water right, and does not vest any equitable title in the contractors.”

[Section 1560](#) states that the fees imposed under [section 1525](#) apply to the United States and Indian tribes “to the extent authorized under federal \*444 or tribal law.” (§ 1560, subd. (a).) Also, [section 1560, subdivision \(b\)\(2\)](#) provides that the SWRCB should allocate the fees as provided in [section 1540](#) should the United States or an Indian tribe refuse to pay them.

[25] [26] [27] Thus, the plain language of [section 1540](#) provides that if a federal or tribal obligee asserts sovereign immunity under [section 1560](#), the SWRCB may allocate the fee, or a portion of the fee, to persons or entities that have water delivery contracts with the obligee. This practice is permitted under federal law when a private contractor's use of United States property may be taxed.<sup>27</sup> But the allocation is limited to the extent the contractor has beneficial or possessory use of the property. (See *United States v. County of Fresno* (1977) 429 U.S. 452, 462, 97 S.Ct. 699, 50 L.Ed.2d 683 (*County of Fresno*); *United States v. Nye County Nevada* (9th Cir.1991) 938 F.2d 1040, 1042–1043 \*\*128 (*Nye County*); *United States v. Hawkins County, Tennessee* (6th Cir.1988) 859 F.2d 20, 23 (*Hawkins County*)).<sup>28</sup> We reject \*\*\*56 the contention that the statutory scheme imposes the fees on water rights of the United States and not the private contractors. Clearly, any attempt to impose fees on the federal government would be resisted on sovereign immunity grounds.

[28] Accordingly, neither [section 1540](#) nor [section 1560](#) authorizes imposition of a fee that facially violates the supremacy clause or state and federal rights to equal protection and due process.

##### “As applied” challenge

We next address the implementing regulation. Under regulation 1073, the SWRCB assessed annual costs against the federal contractors, prorating among them the amount of annual fees associated with *all* the Bureau of Reclamation's permits and licenses—over 116 million acre-feet. However, while the Bureau holds all the permits and licenses, the contractors have contractual rights for water delivery over only 6.6 million acre-feet or about 5 percent of all rights held by the Bureau. The Court of Appeal held that regulation 1073 violated the supremacy clause because it required “the federal contractors to pay for the entire amount of annual fees that would otherwise be imposed on the Bureau.”

[29] \*445 To successfully defend a supremacy clause challenge to a tax on persons or entities that contract with the federal government, the taxing authority must segregate and tax only the beneficial or possessory interest in the property. (See *County of Fresno, supra*, 429 U.S. at p. 462, 97 S.Ct. 699; *Nye County, supra*, 938 F.2d at pp. 1042–1043; *Hawkins County, supra*, 859 F.2d at p. 23.) Thus, although the SWRCB has the authority to impose regulatory costs on the federal contractors, it can do so only to the extent of the contractors' interest.

Regulation 1073's formula required the federal contractors to pay for the entire amount of annual costs that would be imposed on the Bureau of Reclamation despite the fact that their contractual rights represented a small proportion of the whole. Plaintiffs claim that the result is a disproportionate assessment of fees, thereby making regulation 1073 unconstitutional under the supremacy clause.<sup>29</sup> (*County of Fresno, supra*, 429 U.S. at p. 462, 97 S.Ct. 699.) They contend that the fees should be based on the amount of water they contracted to deliver.

The SWRCB counters that the imposition of the fee should not be limited to the amount of water actually deliverable under the federal contracts. The SWRCB argues that it correctly calculated the fees using the face value of the permitted and licensed water rights. The face value is the total annual amount of water diversion authorized by the federally held permit or license. The SWRCB argues that the amount of diversions authorized by the federally held permits and licenses generally exceeds the amount of the water delivery contracts. The difference between the amount available for diversion and the amount actually delivered is due to factors that include hydrological variation, the need to hold water in storage for future dry years, conveyance and evaporation losses, and water releases to mitigate for project impacts on fish and wildlife.

In addition, the SWRCB argues the following. The Bureau of Reclamation controls the CVP water under permits and licenses issued and regulated by the Water \*\*\*57 Rights Division. The water is held for two primary purposes: hydroelectric power generation and water supply. The SWRCB sought to \*446 apportion a \*\*129 fair share of the regulatory costs associated with these permits and licenses to those water users who benefit through their water delivery contracts with the Bureau. As a result, the SWRCB initially discounted the value of the permits and licenses by

approximately 50 percent to account for hydroelectric power generation use, then allocated to the federal contractors a pro rata share of the regulatory costs to the remaining value of the Bureau's permits and licenses that related to water supply. Accordingly, the Board argues, these charges were reasonably calculated because they apportioned the Division's costs of administering the Bureau's permits and licenses, exclusive of those costs related to hydroelectric generation, to the federal contractors who benefited from the receipt of the water.

[30] The SWRCB asserts that this is a fair apportionment of costs that withstands a supremacy clause challenge. It argues the federal contractors' beneficial interest is not properly valued by a simple calculation of the proportion of total CVP water the contractors are entitled to receive under their contracts. It claims that a fair determination of the federal contractors' beneficial interest must include consideration of the system that supports and ensures the delivery of the amount contracted, not just the amount of water contracted for delivery. Thus, the SWRCB proposes that the federal contractors have a taxable interest in the "face value" of the Bureau's water rights held under permits and licenses, less any amounts used for hydroelectric generation.

We agree with the SWRCB. However, again due to conflicting factual assertions and an inadequate record, we cannot determine how much of the total water in question is used to support the water delivered and can thus be allocated to the federal contractors' beneficial interest. Accordingly, we remand for the trial court to determine the contractors' beneficial interest and the value of that interest. The trial court shall make findings as to whether the Board has fairly evaluated the federal contractors' beneficial interest, such that water not actually under contract for delivery is fairly attributable to the value of the delivery contracts themselves.<sup>30</sup>

## DISPOSITION

We affirm the Court of Appeal's judgment holding that the fee statutes at issue are facially constitutional. However, the Court of Appeal's judgment is \*447 reversed as to its determination that the statutes and their implementing regulations are unconstitutional as applied. We remand this matter for the Court of Appeal to remand to the trial court for proceedings consistent with this opinion.

WE CONCUR: [KENNARD](#), Acting C.J., [BAXTER](#), [WERDEGAR](#), [CHIN](#), and MORENO, JJ., and [GEORGE](#), J. \*

Concurring Opinion by MORENO, J.

I concur in the majority opinion. I write separately to offer these additional reflections on the “as applied” challenge to the fee as a tax.

**\*\*\*58** A charge that is labeled a regulatory fee may indeed be a tax in disguise if “the amount of fees assessed and paid exceeded the reasonable cost of providing the [regulatory] services for which the fees were charged, or [if] the fees were levied for unrelated revenue purposes.” (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 [Cal.4th](#) 866, 881, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) Here, there is no allegation that the fees in question are being used for unrelated revenue purposes. Rather, it is contended that only 40 percent of water rights holders are being charged a fee that by right should be charged to all water rights holders, and therefore the fee is not sufficiently linked to the regulatory costs generated by those on whom the fee is imposed and constitutes a tax.

**\*\*130** Every government entity that imposes a regulatory fee must decide who should be subject to the fee and who should not. A number of factors may go into that decision, including assessments of the regulatory burdens imposed by the various actors and the administrative convenience of imposing the fee. As the majority states: “Legislators

“need only apply sound judgment and consider ‘probabilities according to the best honest viewpoint of informed officials’ in determining the amount of the regulatory fee.” [Citation.]” (Maj. opn., *ante*, 121 Cal.Rptr.3d at pp. 50–[51](#), 247 P.3d at p. 123.) So, too, legislators and regulators need only make reasonable decisions about who should be subject to a regulatory fee.

In the present case, the State Water Resources Control Board claims that “some 95 percent of its time and expense are directed toward servicing and regulating those licensees and permittees against whom the challenged fees were assessed.” (Maj. opn., *ante*, 121 Cal.Rptr.3d at p. 53, 247 P.3d at p. 125.) The support for this contention **\*448** stems primarily from a document produced by the board on April 15, 2004, shortly after the present litigation commenced. Because of the uncertain reliability of this document, as well as the trial court’s lack of findings, remand is appropriate to determine whether the board’s decisions regarding who would be subject to the fee were reasonable.

I CONCUR: [WERDEGAR](#), J.

#### All Citations

51 Cal.4th 421, 247 P.3d 112, 121 Cal.Rptr.3d 37, 11 Cal. Daily Op. Serv. 1429, 2011 Daily Journal D.A.R. 1698

#### Footnotes

- 1 [California Constitution, article XIII A, section 3](#), originally approved by initiative as Proposition 13, sometimes referred to as the “People’s Initiative to Limit Property Taxation,” on June 6, 1978.
- 2 On November 2, 2010, the voters approved Proposition 26, which requires a two-thirds supermajority vote of the Legislature to pass certain fees. None of the parties have asserted that the law enacted by Proposition 26 applies to this case.
- 3 Hereafter, undesignated statutory references are to the Water Code.
- 4 The factual and procedural background is largely adopted from the Court of Appeal opinion.
- 5 The Division consists of three sections: permitting, licensing, and hearings and special projects. As noted by the Court of Appeal, “[t]he permitting section ‘processes water right applications, petitions to change terms in water right permits and water right licenses. Groundwater recordations, [and] statements of water diversion and use, which are a recordation function [*sic*]...’ The licensing section enforces existing permits and licenses and handles work associated with licensing a permit. The hearings and special projects section assists the SWRCB with various types of administrative hearings, reviews environmental documents filed in support of water rights applications and petitions, assists with the implementation of the Bay–Delta Water Quality Control Plan, and certifies water quality....” Although the SWRCB has other divisions in its organization, we are concerned only with the Water Rights Division.
- 6 Anyone seeking to obtain an appropriate water right files an application with the SWRCB ([§ 1225 et seq.](#)), which issues a water right permit. ([§ 1380 et seq.](#)) Beneficial use of water perfected under this post–1914 statutory scheme is confirmed by a license issued by the SWRCB. ([§§ 1605, 1610.](#)) The license is, in effect, a title or deed to the water right and is recorded in the county in which the diversion takes place. ([§ 1650.](#))

- 7 Under the common law riparian doctrine, a person owning land bordering a stream has the right to reasonable and beneficial use of water on his or her land. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307, 162 Cal.Rptr. 30, 605 P.2d 859 (*Shirokow*)). A riparian owner must share the right to use water with other riparian owners. (See *Harris v. Harrison* (1892) 93 Cal. 676, 681, 29 P. 325.)
- 8 “The pueblo water right—a distinctive feature of California water law—is the paramount right of an American city as successor of a Spanish or Mexican pueblo (municipality) to the use of water naturally occurring within the old pueblo limits for the use of the inhabitants of the city.” (Hutchins, *The Cal. Law of Water Rights* (1956) p. 256.)
- 9 “In 1933, primarily to control flooding in the Central Valley, the California Legislature approved the Central Valley Project (CVP), which is the nation’s largest water reclamation project and California’s largest water supplier. [Citation.] Originally a state project, the CVP was turned over to the federal Bureau of Reclamation, which operates the CVP under rights granted by the SWRCB.” (*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1154, 77 Cal.Rptr.3d 578, 184 P.3d 709, fn. omitted.) To achieve its purposes, “[t]he CVP operates 21 reservoirs, 11 power plants, and 500 miles of major canals and aqueducts.” (*Id.* at p. 1154, fn. 1, 77 Cal.Rptr.3d 578, 184 P.3d 709.)
- 10 The proposal called for General Fund support for the first half of the 2003–2004 fiscal year with fee increases covering the second half of the year. Thereafter, total Water Rights Division operations would be fee supported.
- 11 In relevant part, section 1525 provides:
- “(a) Each person or entity who holds a permit or license to appropriate water, and each lessor of water leased under Chapter 1.5 (commencing with Section 1020) of Part 1, shall pay an annual fee according to a fee schedule established by the board.
- “(b) Each person or entity who files any of the following shall pay a fee according to a fee schedule established by the board:
- “(1) An application for a permit to appropriate water.
- “(2) A registration of appropriation for a small domestic use or livestock stockpond.
- “(3) A petition for an extension of time within which to begin construction, to complete construction, or to apply the water to full beneficial use under a permit.
- “(4) A petition to change the point of diversion, place of use, or purpose of use, under a permit or license.
- “(5) A petition to change the conditions of a permit or license, requested by the permittee or licensee, that is not otherwise subject to paragraph (3) or (4).
- “(6) A petition to change the point of discharge, place of use, or purpose of use, of treated wastewater, requested pursuant to Section 1211.
- “(7) An application for approval of a water lease agreement.
- “(8) A request for release from priority pursuant to Section 10504.
- “(9) An application for an assignment of a state-filed application pursuant to Section 10504.
- “(c) The board shall set the fee schedule authorized by this section so that the total amount of fees collected pursuant to this section equals that amount necessary to recover costs incurred in connection with the issuance, administration, review, monitoring, and enforcement of permits, licenses, certificates, and registrations to appropriate water, water leases, and orders approving changes in point of discharge, place of use, or purpose of use of treated wastewater. The board may include, as recoverable costs, but is not limited to including, the costs incurred in reviewing applications, registrations, petitions and requests, prescribing terms of permits, licenses, registrations, and change orders, enforcing and evaluating compliance with permits, licenses, certificates, registrations, change orders, and water leases, inspection, monitoring, planning, modeling, reviewing documents prepared for the purpose of regulating the diversion and use of water, applying and enforcing the prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division, and the administrative costs incurred in connection with carrying out these actions.
- “(d)(1) The board shall adopt the schedule of fees authorized under this section as emergency regulations in accordance with Section 1530.” [¶] ... [¶]
- “(3) The board shall set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act for this activity. The board shall review and revise the fees each fiscal year as necessary to conform with the revenue levels set forth in the annual Budget Act. If the board determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the annual Budget Act, the board may further adjust the annual fees to compensate for the over or under collection of revenue.
- “(e) Annual fees imposed pursuant to this section for the 2003–04 fiscal year shall be assessed for the entire 2003–04 fiscal year.”

12 Section 1540 provides:

“If the board determines that the person or entity on whom a fee or expense is imposed will not pay the fee or expense based on the fact that the fee payer has sovereign immunity under Section 1560, the board may allocate the fee or expense, or an appropriate portion of the fee or expense, to persons or entities who have contracts for the delivery of water from the person or entity on whom the fee or expense was initially imposed. The allocation of the fee or expense to these contractors does not affect ownership of any permit, license, or other water right, and does not vest any equitable title in the contractors.”

Section 1560 provides:

“(a) The fees and expenses established under this chapter and Part 3 (commencing with Section 2000) apply to the United States and to Indian tribes, to the extent authorized under federal or tribal law.

“(b) If the United States or an Indian tribe declines to pay a fee or expense, or the board determines that the United States or the Indian tribe is likely to decline to pay a fee or expense, the board may do any of the following:

“(1) Initiate appropriate action to collect the fee or expense, including any appropriate enforcement action for failure to pay the fee or expense, if the board determines that federal or tribal law authorizes collection of the fee or expense.

“(2) Allocate the fee or expense, or an appropriate portion of the fee or expense, in accordance with Section 1540. The board may make this allocation as part of the emergency regulations adopted pursuant to Section 1530.

“(3) Enter into a contractual arrangement that requires the United States or the Indian tribe to reimburse the board, in whole or in part, for the services furnished by the board, either directly or indirectly, in connection with the activity for which the fee or expense is imposed.

“(4) Refuse to process any application, registration, petition, request, or proof of claim for which the fee or expense is not paid, if the board determines that refusal would not be inconsistent with federal law or the public interest.”

13 An acre-foot is “[t]he volume of water, 43,560 cubic feet, that will cover an area of one acre to a depth of one foot.” (American Heritage Dict. (2d college ed.1982) p. 75.)

14 Regulation 1066, subdivision (a) provided: “A person who holds a water right permit or license shall pay an annual fee that is the greater of \$100 or \$0.03 per acre-foot based on the total annual amount of diversion authorized by the permit or license.” (Cal.Code Regs., tit. 23, § 1066, subd. (a), Register 2003, No. 52 (Dec. 23, 2003).)

15 Plaintiff California Farm Bureau Federation (Farm Bureau) asserts it is authorized to take judicial action to protect the rights of farm families that hold water rights subject to the fees imposed by Senate Bill No. 1049 (2003–2004 Reg. Sess.) and the emergency regulations. The individuals named in its complaint hold water rights and have been assessed the section 1525 fees. Plaintiff Northern California Water Association represents over 70 agricultural water districts within the Sacramento River Basin, some of which hold water rights. Other members receive water under contracts with the Bureau of Reclamation, and others operate hydroelectric plants licensed or regulated by the Federal Energy Regulatory Commission.

Plaintiff Central Valley Water Project Association represents the interests of some 300 agricultural and municipal districts, agencies and communities within the Central and Santa Clara Valleys that have contracts for water from the Central Valley Project.

16 The terms “payor” and “payer” are synonymous and are used variably in case law.

17 The terms “burden of proof” and “burden of persuasion” are synonymous. (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 3, p. 157.)

18 The “burden of producing evidence” has also been referred to as the “burden of production” and the “burden of going forward.” (*Sargent Fletcher, supra*, 110 Cal.App.4th at p. 1667, 3 Cal.Rptr.3d 279.)

19 Plaintiffs do not challenge the one-time fees set forth in section 1525, subdivision (b).

20 This case does not involve a special assessment or a development fee, two types of fees that are routinely challenged under Proposition 13. (*Prof. Scientists, supra*, 79 Cal.App.4th at p. 944, 94 Cal.Rptr.2d 535.)

21 Section 1552 provides:

“The money in the Water Rights Fund is available for expenditure, upon appropriation by the Legislature, for the following purposes:

“(a) For expenditure by the State Board of Equalization in the administration of this chapter and the Fee Collection Procedures Law (Part 30 (commencing with [Section 55001](#)) of Division 2 of the Revenue and Taxation Code) in connection with any fee or expense subject to this chapter.

“(b) For the payment of refunds, pursuant to Part 30 (commencing with [Section 55001](#)) of Division 2 of the Revenue and Taxation Code, of fees or expenses collected pursuant to this chapter.

“(c) For expenditure by the board for the purposes of carrying out this division, Division 1 (commencing with [Section 100](#)), Part 2 (commencing with [Section 10500](#)) of Division 6, and Article 7 (commencing with [Section 13550](#)) of Chapter 7 of Division 7.

“(d) For expenditures by the board for the purposes of carrying out [Sections 13160](#) and [13160.1](#) in connection with activities involving hydroelectric power projects subject to licensing by the Federal Energy Regulatory Commission.

“(e) For expenditures by the board for the purposes of carrying out [Sections 13140](#) and [13170](#) in connection with plans and policies that address the diversion or use of water.”

**22** [Section 1551](#) provides:

“All of the following shall be deposited in the Water Rights Fund:

“(a) All fees, expenses, and penalties collected by the board or the State Board of Equalization under this chapter and Part 3 (commencing with [Section 2000](#)).

“(b) All funds collected under [Section 1052](#), [1845](#), or [5107](#).

“(c) All fees collected under [Section 13160.1](#) in connection with certificates for activities involving hydroelectric power projects subject to licensing by the Federal Energy Regulatory Commission.”

**23** The Court of Appeal referred to the situation as “an accounting issue that concerns how the monies are treated within the Water Rights Fund.”

**24** The plaintiff also did not contend that the fees exceeded the reasonable cost of the services provided or that they were charged for unrelated revenue purposes. (*Sinclair Paint, supra*, 15 [Cal.4th](#) at p. 876, 64 [Cal.Rptr.2d](#) 447, 937 [P.2d](#) 1350.)

**25** On remand, we also allowed plaintiffs “to prove ... that the amount of fees assessed and paid exceeded the reasonable cost of providing the ... services for which the fees were charged, or that the fees were levied for unrelated revenue purposes.” (*Sinclair Paint, supra*, 15 [Cal.4th](#) at p. 881, 64 [Cal.Rptr.2d](#) 447, 937 [P.2d](#) 1350.)

**26** Because we remand, we need not address the SWRCB’s contention that the “polluter pays” rationale justifies the annual cost allocation because the money collected supports regulatory activities that serve an important public purpose and are a valid exercise of the police power.

**27** When conducting a supremacy clause analysis, federal courts do not distinguish between fees and taxes. (See *Novato Fire Protection Dist. v. United States* (9th Cir.1999) 181 [F.3d](#) 1135, 1138–1139; *United States v. Anderson Cottonwood Irrigation Dist.* (N.D.Cal.1937) 19 [F.Supp.](#) 740, 741.)

**28** Also, [section 1560, subdivision \(a\)](#) provides that the fees are only to be collected “to the extent authorized under federal or tribal law.”

**29** We reject plaintiff Northern California Water Association’s contention that because the federal government is immune from the fee under federal law there should be no fee imposed on the federal contractors. (*County of Fresno, supra*, 429 [U.S.](#) at p. 453, 97 [S.Ct.](#) 699.)

Plaintiffs also argue that the annual fee is unconstitutional because the SWRCB failed to provide any evidence showing that this amount is reasonably related to the cost of the regulatory burden. This argument fails. The SWRCB presented evidence to the trial court in support of the amount charged for the annual fee.

**30** Because we reverse the Court of Appeal’s judgment and remand this matter to the trial court so it can make findings and a determination as to whether the fees were improperly imposed, we need not address plaintiffs’ claim that the Court of Appeal erred by limiting refunds.

\* Retired Chief Justice of California, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).



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Declined to Follow by [Connell v. Superior Court](#), Cal.App. 3 Dist., November 20, 1997

190 Cal.App.3d 521, 234 Cal.Rptr. 795

CARMEL VALLEY FIRE PROTECTION  
DISTRICT et al., Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA et  
al., Defendants and Appellants.RINCON DEL DIABLO MUNICIPAL WATER  
DISTRICT et al., Plaintiffs and Respondents,

v.

THE STATE OF CALIFORNIA et  
al., Defendants and Appellants.COUNTY OF LOS ANGELES,  
Plaintiff and Respondent,

v.

THE STATE OF CALIFORNIA et  
al., Defendants and Appellants.No. B006078., No. B011941., No. B011942.  
Court of Appeal, Second  
District, Division 5, California.  
Feb 19, 1987.**SUMMARY**

The trial court, in separate proceedings brought by three counties against the state for reimbursement of funds expended by the counties in complying with a state order to provide protective clothing and equipment for county fire fighters, issued writs of mandate compelling the state to reimburse the counties. Previously, the counties had filed test claims with the State Board of Control for reimbursement of similar expenses. The board determined that there was a state mandate and the counties should be reimbursed. The state did not seek judicial review of the board's decision. Thereafter, a local government claims bill, Sen. Bill No. 1261 (Stats. 1981, ch. 1090, p. 4191) was introduced to provide appropriations to pay some of the counties' claims for the state-mandated costs. After various amendments, the legislation was enacted into law without the appropriations. The counties then sought reimbursement by filing petitions for writs of mandate and complaints for declaratory relief. (Superior Court of Los Angeles County, No. C437471, Norman L. Epstein, Judge;

No. C514623 and No. C515319, Jack T. Ryburn, Judge.)  
\*522

In a consolidated appeal, the Court of Appeal affirmed with certain modifications. It held that, by failing to seek judicial review of the board's decision, the state had waived its right to contest the board's finding that the counties' expenditures were state mandated. Similarly, it held that the state was collaterally estopped from attacking the board's findings. It also held that the executive orders requiring the expenditures constituted the type of "program" that is subject to the constitutional imperative of subvention under [Cal. Const., art. XIII B, § 6](#). The court also held that the trial courts had not ordered an appropriation in violation of the separation of powers doctrine, and that the trial courts correctly determined that certain legislative disclaimers, findings, and budget control language did not exonerate the state from its constitutionally and statutorily imposed obligation to reimburse the counties' state-mandated costs. Further, the court held that the trial courts properly authorized the counties to satisfy their claims by offsetting fines and forfeitures due to the state, and that the counties were entitled to interest. (Opinion by Eagleson, J., with Ashby, Acting P. J., and Hastings, J., concurring.)

**HEADNOTES****Classified to California Digest of Official Reports**

(1a, 1b)

Estoppel and Waiver § 23--Waiver--Trial and Appeal--Failure to Seek Judicial Review of Administrative Decision--Waiver of Right to Contest Findings.

In a proceeding by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state waived its right to contest findings made by the State Board of Control in a previous proceeding. The board found that the costs were state-mandated and that the county was entitled to reimbursement. The state failed to seek judicial review of the board's decision, and the statute of limitations applicable to such review had passed. Moreover, the state, through its agents, had acquiesced in the board's findings by seeking an appropriation to satisfy the validated claims, which, however, was rebuffed by the Legislature.

(2)

Estoppel and Waiver § 19--Waiver--Requisites.



Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable \*523 belief that it has been waived. A right that is waived is lost forever. The doctrine of waiver applies to rights and privileges afforded by statute.

[See [Cal.Jur.3d](#), Estoppel and Waiver § 21; [Am.Jur.2d](#), Estoppel and Waiver § 154.]

(3a, 3b, 3c, 3d)

Judgments § 81--Res Judicata--Collateral Estoppel--County's Action for Reimbursement of State-mandated Costs--Findings of State Board of Control.

In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state was collaterally estopped from attacking the findings made, in a previous proceeding, by the State Board of Control that the costs were state-mandated and that the county was entitled to reimbursement. The issues were fully litigated before the board. Similarly, although the state was not a party to the board hearings, it was in privity with those state agencies which did participate. Moreover, a determination of conclusiveness would not work an injustice.

(4)

Judgments § 81--Res Judicata--Collateral Estoppel--Elements.

In order for the doctrine of collateral estoppel to apply, the issues in the two proceedings must be the same, the prior proceeding must have resulted in a final judgment on the merits, and the parties or their privies must be involved.

(5)

Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--Privity--Governmental Agents.

The agents of the same government are in privity with each other for purposes of collateral estoppel, since they represent not their own rights but the right of the government.

(6)

Judgments § 96--Res Judicata--Collateral Estoppel--Matters Concluded-- Questions of Law.

A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties

where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice.

(7)

State of California § 11--Fiscal Matters--Reimbursement to County for State-mandated Costs--New Programs.

A "new program," for purposes of determining whether the program is subject to the constitutional imperative of subvention under [Cal. Const., art. XIII B, § 6](#), is one which carries out the governmental function of providing services \*524 to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(8)

State of California § 7--Actions--Reimbursement of County Funds for State-mandated Costs--New Programs.

In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with state executive orders to provide protective clothing and equipment to county fire fighters, the trial court properly determined that the executive orders constituted the type of "new program" that was subject to the constitutional imperative of subvention under [Cal. Const., art. XIII B, § 6](#). Fire protection is a peculiarly governmental function. Also, the executive orders manifest a state policy to provide updated equipment to all fire fighters, impose unique requirements on local governments, and do not apply generally to all residents and entities in the state, but only to those involved in fire fighting.

(9)

Constitutional Law § 37--Doctrine of Separation of Powers--Violations of Doctrine--Judicial Order of Appropriation.

In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the trial court's judgment granting the writ was not in violation of the separation of powers doctrine. The court order did not directly compel the Legislature to appropriate funds or to pay funds not yet appropriated, but merely affected an existing appropriation.

(10)

Constitutional Law § 40--Distribution of Governmental Powers--Between Branches of Government--Judicial Power and Its Limits--Order Directing Treasurer to Pay on Already Appropriated Funds.

Once funds have been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures from such funds. Thus, a judgment which ordered the State Controller to draw warrants and directed the State Treasurer to pay on already-appropriated funds permissibly compelled performance of a ministerial duty.

(11)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to County for State-mandated Costs.

Appropriations affected by a court order need not specifically refer to the particular expenditure in question in order to be available. Thus, in a proceeding brought by a county for a writ of mandate to compel reimbursement \*525 by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the funds appropriated for the Department of Industrial Relations for the prevention of industrial injuries and deaths of state workers were available for reimbursement, despite the fact that the funds were not specifically appropriated for reimbursement. The funds were generally related to the nature of costs incurred by the county.

(12a, 12b)

Fires and Fire Districts § 2--Statutes and Ordinances--County Compliance With State Executive Order to Provide Protective Equipment--Federal Mandate.

A county's purchase of protective clothing and equipment for its fire fighters was not the result of a federally mandated program so as to relieve the state of its obligation (Cal. Const., art. XIII B, § 6) to reimburse the county for the cost of the purchases. The county had made the purchase in compliance with a state executive order. The federal government does not have jurisdiction over local fire departments and there are no applicable federal standards for local government structural fire fighting clothing and equipment. Hence, the county's obedience to the state executive orders was not federally mandated.

(13)

Statutes § 20--Construction--Judicial Function--Legislative Declarations.

The interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility.

(14a, 14b)

Statutes § 10--Title and Subject Matter--Single Subject Rule. In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters (Cal. Admin. Code, tit. 8, §§ 3401-3409), the trial court properly invalidated, as violating the single subject rule, the budget control language of Stats. 1981, ch. 1090, § 3. The express purpose of ch. 1090 was to increase funds available for reimbursing certain claims. The budget control language, on the other hand, purported to make the reimbursement provisions of Rev. & Tax. Code, § 2207, and former Rev. & Tax. Code, § 2231, unavailable to the county. Because the budget control language did not reasonably relate to the bill's stated purpose, it was invalid.

(15)

Statutes § 10--Title and Subject Matter--Single Subject Rule. The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in a statute's \*526 title. The rule's primary purpose is to prevent "logrolling" in the enactment of laws, which occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which might otherwise not have passed had the legislative mind been directed to them. However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose.

(16)

Statutes § 5--Operation and Effect--Retroactivity--Reimbursement to County for State-mandated Costs. The budget control language of Stats. 1981, ch. 1090, § 3, which purported to make the reimbursement provisions of Rev. & Tax. Code, § 2207 and former Rev. & Tax. Code, § 2231, unavailable to a county seeking reimbursement (Cal. Const., art. XIII B, § 6) for expenditures made in purchasing

state-required protective clothing and equipment for county fire fighters ([Cal. Admin. Code, tit. 8, §§ 3401-3409](#)), was invalid as a retroactive disclaimer of the county's right to reimbursement for debts incurred in prior years.

(17)

State of California § 13--Fiscal Matters--Limitations on Disposal-- Reimbursement to Counties for State-mandated Costs.

The budget control language of § 28.40 of the 1981 Budget Act and § 26.00 of the 1983 and 1984 Budget Acts did not exonerate the state from its constitutional and statutory obligations to reimburse a county for the expenses incurred in complying with a state mandate to purchase protective clothing and equipment for county fire fighters. The language was invalid in that it violated the single subject rule, attempted to amend existing statutory law, and was unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget.

(18)

Constitutional Law § 4--Legislative Power to Create Workers' Compensation System--Effect on County's Right to Reimbursement.

[Cal. Const., art. XIV, § 4](#), which vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system, does not affect a county's right to state reimbursement for costs incurred in complying with state-mandated safety orders.

(19)

Constitutional Law § 7--Mandatory, Directory, and Self-executing Provisions--Subvention Provisions--County Reimbursement for State-mandated Costs.

The subvention provisions of [Cal. Const., art. XIII B, § 6](#), operate so as to require the state to reimburse counties for \*527 state-mandated costs incurred between January 1, 1975, and June 30, 1980. The amendment, which became effective on July 1, 1980, provided that the Legislature "may, but need not," provide reimbursement for mandates enacted before January 1, 1975. Nevertheless, the Legislature must reimburse mandates passed after that date, even though the state did not have to begin reimbursement until the effective date of the amendment.

(20)

Mandamus and Prohibition § 5--Mandamus--Conditions Affecting Issuance--Exhaustion of Administrative Remedies--County Reimbursement for State-mandated Costs.

A county's right of action in traditional mandamus to compel reimbursement for state-mandated costs did not accrue until the county had exhausted its administrative remedies. The exhaustion of remedies occurred when it became unmistakably clear that the legislative process was complete and that the state had breached its duty to reimburse the county.

(21)

Mandamus and Prohibition § 13--Mandamus--Conditions Affecting Issuance--Existence and Adequacy of Other Remedy.

A party seeking relief by mandamus is not required to exhaust a remedy that was not in existence at the time the action was filed.

(22a, 22b)

State of California § 7--Actions--Reimbursement to County for State-mandated Costs--County's Right to Offset Fines and Forfeitures Due to State.

In a proceeding by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment for county fire fighters, the trial court did not err in authorizing the county to satisfy its claims by offsetting fines and forfeitures due to the state. The order did not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters.

(23)

Equity § 5--Scope and Types of Relief--Offset.

The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike or balance, holding himself owing or entitled only to the net difference. Although this doctrine exists independent of statute, its governing principle has been partially codified in [Code Civ. Proc., § 431.70](#) (limited to cross-demands for money).

(24)

State of California § 7--Actions--Reimbursement to County for State-mandated Costs--State's Use of Statutory Offset Authority.

In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state \*528 order to provide protective clothing and equipment to county fire fighters, the trial court did not err in enjoining the exercise of the state's statutory offset authority (*Gov. Code, § 12419.5*) until the county was fully reimbursed. In view of the state's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating the county's collection efforts from occurring.

(25)

State of California § 7--Actions--Reimbursement to County for State-mandated Costs--State's Right to Revert or Dissipate Undistributed Appropriations.

In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the trial court properly enjoined, and was not precluded by *Gov. Code, § 16304.1*, from enjoining, the state from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy the court's judgment in favor of the county.

(26)

Parties § 2--Indispensable Parties--County Auditor Controller--County Action to Collect Reimbursement From State.

In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the county auditor-controller was not an indispensable party whose absence would result in a loss of the trial court's jurisdiction. The auditor-controller was an officer of the county and was subject to the direction and control of the county board of supervisors. He was indirectly represented in the proceedings because his principal, the county, was the party litigant. Additionally, he claimed no personal interest in the action and his pro forma absence in no way impeded complete relief

(27)

Parties § 2--Indispensable Parties--Fines and Forfeitures--County Action to Collect Reimbursement From State.

In an action brought by a county for a writ of mandate to compel reimbursement by the state for costs expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the funds created by the collected fines and forfeitures which the county was allowed to offset to satisfy its claims against the state were not "indispensable parties" to the litigation. The action was not an in rem proceeding, and the ownership of a particular stake was not in dispute. Complete relief could be afforded without including the specified funds as a party.

(28)

Interest § 4--Interest on Judgments--County Action for Reimbursement of State-mandated Costs--State Reliance on Invalid Statute.

An \*529 invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest on damages under *Civ. Code, § 3287*, subd. (a). Thus, in an action brought by a county for writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state could not avoid its obligation to pay interest on the funds by relying on invalid budget control language which purported to restrict payment on reimbursement claims.

(29)

Appellate Review § 127--Review--Scope and Extent--Interpretation of Statutes.

An appellate court is not limited by the interpretation of statutes given by the trial court.

(30)

Appellate Review § 162--Determination of Disposition of Cause--Modification--Action Against State--Appropriation.

In an action against the state, an appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts.

#### COUNSEL

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Marilyn K. Mayer and Carol Hunter, Deputy Attorneys General, for Defendants and Appellants.

De Witt Clinton, County Counsel, Amanda F. Susskind, Deputy County Counsel, Ross & Scott, William D. Ross and Diana P. Scott, for Plaintiffs and Respondents.

EAGLESON, J.

These consolidated appeals arise from three separate trial court proceedings concerning the heretofore unsuccessful efforts of various local agencies to secure reimbursement of state-mandated costs.

Case No. 2d Civ. B006078 (Carmel Valley et al. case) was the first matter decided by the trial court. The memorandum of decision in that case was judicially noticed by the trial court which heard the consolidated matters in 2d Civ. B011941 (Rincon et al. case) and 2d Civ. B011942 (County of Los Angeles case). Issues common to all three cases will be discussed together \*530 under the County of Los Angeles appeal, while issues unique to the other two appeals will be considered separately.

We identify the parties to the various proceedings in footnote 1.<sup>1</sup> For literary convenience, however, we will refer to all appellants as the State and all respondents as the County unless otherwise indicated.

### Appeal In Case No. 2 Civil B011942

#### (County of Los Angeles Case)

#### Facts and Procedural History

County employs fire fighters for whom it purchased protective clothing and equipment, as required by [title 8, California Administrative Code, sections 3401-3409](#), enacted in 1978 (executive orders). County argues that it is entitled to State reimbursement for these expenditures because they constitute a state-mandated “new program” or “higher level of service.” County relies on [Revenue and Taxation Code section 2207](#)<sup>2</sup> and former \*531 section 2231,<sup>3</sup> and [California Constitution, article XIII B, section 6](#)<sup>4</sup> to support its claim.

County filed a test claim with the State Board of Control (Board) for these costs incurred during fiscal years 1978-1979 and 1979-1980.<sup>5</sup> After hearings were held on the matter, the Board determined on November 20, 1979, that there was a state mandate and that County should be reimbursed. State did not seek judicial review of this quasi-judicial decision of the Board.

Thereafter, a local government claims bill, Senate Bill Number 1261 (Stats. 1981, ch. 1090, p. 4191) (S.B. 1261) was

introduced to provide appropriations to pay some of County's claims for these state-mandated costs. This bill was amended by the Legislature to delete all appropriations for the payment of these claims. Other claims of County not provided for in S.B. 1261 were contained in another local government claims bill, Assembly Bill Number 171 (Stats. 1982, ch. 28, p. 51) (A.B. 171). The appropriations in this bill were deleted by the Governor. Both pieces of legislation, sans appropriations, were enacted into law.<sup>6</sup>

On September 21, 1984, following these legislative rebuffs, County sought reimbursement by filing a petition for writ of mandate ([Code Civ. Proc., § 1085](#)) and complaint for declaratory relief. After appropriate responses were filed and a hearing was held, the court executed a judgment on February 6, 1985, granting a peremptory writ of mandate. A writ of mandate was issued and other findings and orders made. It is from this judgment of \*532 February 6, 1985, that State appeals. The relevant portions of the judgment are set forth verbatim below.<sup>7</sup> \*533

#### Contentions

State advances two basic contentions. It first asserts that the costs incurred by County are not state mandated because they are not the result of a “new program,” and do not provide a “higher level of service.” Either or both of these requirements are the sine qua non of reimbursement. Second, assuming a “new program” or “higher level of service” exists, portions of the trial court order aimed at assisting the reimbursement process were made in excess of the court's jurisdiction.

These contentions are without merit. We modify and affirm all three judgments.

#### Discussion

##### I

#### Issue of State Mandate

The threshold question is whether County's expenditures are state mandated. The right to reimbursement is triggered when the local agency incurs “costs mandated by the state” in either complying with a “new program” or providing “an increased level of service of an existing program.”<sup>8</sup> State advances many theories as to why the Board erred in concluding that these expenditures are state-mandated costs. One of these arguments is whether the executive orders are a “new program” as that phrase has been recently defined by our

Supreme Court in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202]. \*534

As we shall explain, State has waived its right to challenge the Board's findings and is also collaterally estopped from doing so. Additionally, although State is not similarly precluded from raising issues presented by the *State of California* case, we conclude that the executive orders are a "new program" within the meaning of article XIII B, section 6.

#### A. Waiver

(1a) We initially conclude that State has waived its right to contest the Board's findings. ( 2) Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has been waived. ( *Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 432 [132 P.2d 457]; *Loughan v. Harger-Haldeman* (1960) 184 Cal.App.2d 495, 502-503 [7 Cal.Rptr. 581].) A right that is waived is lost forever. ( *L.A. City Sch. Dist. v. Landier Inv. Co.* (1960) 177 Cal.App.2d 744, 752 [2 Cal.Rptr. 662].) The doctrine of waiver applies to rights and privileges afforded by statute. ( *People v. Murphy* (1962) 207 Cal.App.2d 885, 888 [24 Cal.Rptr. 803].)

(1b) State now contends to be an aggrieved party and seeks to dispute the Board's findings. However it failed to seek judicial review of that November 20, 1979 decision (Code Civ. Proc., § 1094.5) as authorized by former Revenue and Taxation Code section 2253.5. The three-year statute of limitations applicable to such review has long since passed. ( *Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256]; Code Civ. Proc., § 338, subd. 1.)

In addition, State, through its agents, acquiesced in the Board's findings by seeking an appropriation to satisfy the validated claims. (Former Rev. & Tax. Code, § 2255, subd. (a).) On September 30, 1981, S.B. 1261 became law. On February 12, 1982, A.B. 171 was enacted. Appropriations had been stripped from each bill. State did not then seek review of the Board determinations even though time remained before the three-year statutory period expired. This inaction is clearly inconsistent with any intent to contest the validity of the Board's decision and results in a waiver.

#### B. Administrative Collateral Estoppel

(3a) We next conclude that State is collaterally estopped from attacking the Board's findings. ( 4) Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In order for the doctrine to apply, the issues in the two proceedings must \*535 be the same, the prior proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. ( *People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77, 651 P.2d 321].)

The doctrine was extended in *Sims* to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent criminal case. Our Supreme Court held that collateral estoppel applies to such prior adjudications where three requirements are met: (1) the administrative agency acted in a judicial capacity; (2) it resolved disputed issues properly before it; and (3) all parties were provided with the opportunity to fully and fairly litigate their claims. ( *Id.* at p. 479.) All of the elements of administrative collateral estoppel are present here.

(3b) The Board was created by the state Legislature to exercise quasi-judicial powers in adjudging the validity of claims against the State. ( *County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 452 [206 Cal.Rptr. 626].) At the time of the hearings, the Board proceedings were the sole administrative remedy available to local agencies seeking reimbursement for state-mandated costs. (Former Rev. & Tax. Code, § 2250.) Board examiners had the power to administer oaths, examine witnesses, issue subpoenas, and receive evidence. (Gov. Code, § 13911.) The hearings were adversarial in nature and allowed for the presentation of evidence by the claimant, the Department of Finance, and any other affected agency. (Former Rev. & Tax. Code, § 2252.)

The record indicates that the state mandate issues in this case were fully litigated before the Board. A representative of the state Division of Occupational Safety and Health and the Department of Industrial Relations testified as to why County's costs were not state mandated. Representatives of the various claimant fire districts in turn offered testimony contradicting that view. The proceedings culminated in a verbatim transcript and a written statement of the basis for the Board's decision.

State complains, however, that some of the traditional elements of the collateral estoppel doctrine are missing. In particular, State argues that it was not a party to the Board

hearings and was not in privity with those state agencies which did participate.

(5) “[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]” (*Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398 [29 Cal.Rptr. 657, 380 P.2d 97].) As we stated in our introduction of the parties in this case, the party \*536 known as “State” is merely a shorthand reference to the various state agencies and officials named as defendants below. Each of these defendants is an agent of the State of California and had a mutual interest in the Board proceedings. They are thus in privity with those state agencies which did participate below (e.g., Occupational Safety and Health Division).

It is also clear that even though the question of whether a cost is state mandated is one of law (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781 [200 Cal.Rptr. 642]), subsequent litigation on that issue is foreclosed here. (6) A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230 [123 Cal.Rptr. 1, 537 P.2d 1250]; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 Cal.App.3d 274, 286-287 [93 Cal.Rptr. 907]; *Rest.2d Judgments*, § 28, p. 273.)<sup>9</sup>

(3d) Here, the basic issues of state mandate and the amount of reimbursement arose out of County's required compliance with the executive orders. In either forum—Board or court—the claims and the evidentiary and legal determination of their validity would be considered in similar fashion.

Furthermore, a determination of conclusiveness would not work an injustice. As we have noted, the Board was statutorily created to consider the validity of the various claims now being litigated. Processing of reimbursement claims in this manner was the only administrative remedy available to County. If we were to grant State's request and review the Board's determination de novo, we would, in any event, adhere to the well-settled principle of affording “great weight” to “the contemporaneous administrative construction of the enactment by those charged with its enforcement ....” (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921 [156 P.2d 1].)

There is no policy reason to limit the application of the collateral estoppel doctrine to successive court proceedings. In *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679 [159 Cal.Rptr. 56], the doctrine was applied to bar relitigation in a subsequent civil proceeding of a zoning issue previously decided by a city board of permit appeals. We similarly hold that the questions of law decided by the Board are binding in all of the subsequent civil proceedings presented here. State therefore is collaterally \*537 estopped to raise the issues of state mandate and amount of reimbursement in this appeal.

### C. Executive Orders-A “New Program” Under Article XIII B, Section 6

(7) The recent decision by our Supreme Court in *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d at p. 49 presents a new issue not previously considered by the Board or the trial court. That question is whether the executive orders constitute the type of “program” that is subject to the constitutional imperative of subvention under *article XIII B, section 6*.<sup>10</sup> We conclude that they are.

In *State of California*, the Court concluded that the term “program” has two alternative meanings: “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.” (*Id.* at p. 56, italics added.) Although only one of these findings is necessary to trigger reimbursement, both are present here.

(8) First, fire protection is a peculiarly governmental function. (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481 [105 Cal.Rptr. 374, 503 P.2d 1382].) “Police and fire protection are two of the most essential and basic functions of local government.” (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107 [133 Cal.Rptr. 649].) This classification is not weakened by 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 classical governmental function.<sup>11</sup>

The second, and alternative, prong of the *State of California* definition is also satisfied. The executive orders manifest a

state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting.

These facts are distinguishable from those presented in *State of California*. There, the court held that a state-mandated increase in workers' compensation benefits did not require state subvention because the costs incurred by local agencies were only an incidental impact of laws that applied generally to all state residents and entities (i.e., to all workers and all governmental and nongovernmental employers). Governmental employers in that setting were indistinguishable from private employers who were obligated through insurance or direct payment to pay the statutory increases.

*State of California* only defined the scope of the word "program" as used in [California Constitution, article XIII B, section 6](#). We apply the same interpretation to former Revenue and Taxation Code section 2231 even though the statute was enacted much earlier. The pertinent language in the statute is identical to that found in the constitutional provision and no reason has been advanced to suggest that it should be construed differently. In any event, a different interpretation must fall before a constitutional provision of similar import. (*County of Los Angeles v. Payne* (1937) 8 Cal.2d 563, 574 [66 P.2d 658].)

## II

### Issue of Whether Court Orders Exceeded Its Jurisdiction

#### A. The Court Has Not Ordered an Appropriation in Violation of the Separation of Powers Doctrine

(9) State begins its general attack on the judgment by citing the longstanding principle that a court order which directly compels the Legislature to appropriate funds or to pay funds not yet appropriated violates the separation of powers doctrine. ([Cal. Const., art. III, § 3](#); [art. XVI, § 7](#); *Mandel v. Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935].)<sup>12</sup> State \*539 observes (and correctly so) that the relevant constitutional ([art. XIII B, § 6](#)) and statutory ([Rev. & Tax. Code, § 2207 & former § 2231](#)) provisions are not appropriations measures. (See *City of Sacramento*

*v. California State Legislature* (1986) 187 Cal.App.3d 393, 398 [231 Cal.Rptr. 686].) Since State otherwise discerns no manifest legislative intent to appropriate funds to pay County's claims (*City & County of S. F. v. Kuchel* (1948) 32 Cal.2d 364, 366 [196 P.2d 545]), it concludes that the judgment unconstitutionally compels performance of a legislative act.

State further argues that the judiciary's ability to reach an existing agency-support appropriation (State Department of Industrial Relations) (fn. 7, ¶ 1, *ante*) has been approved in only two contexts. First, the court can order payment from an existing appropriation, the expenditure of which has been legislatively prohibited by an unconstitutional or unlawful restriction. (*Committee to Defend Reproductive Rights v. Cory* (1982) 132 Cal.App.3d 852, 856 [183 Cal.Rptr. 475].) Second, once an adjudication has finally determined the rights of the parties, the court may compel satisfaction of the judgment from a current unexpended, unencumbered appropriation which administrative agencies routinely have used for the purpose in question. (*Mandel v. Myers, supra.*, 29 Cal.3d at p. 544.) State insists that these facts are not present here.

County rejoins that a writ of traditional mandate ([Code Civ. Proc., § 1085](#)) is the correct method of compelling State to perform a clear and present ministerial legal obligation. (*County of Sacramento v. Loeb, supra.*, 160 Cal.App.3d at pp. 451-452.) The ministerial obligation here is contained in [California Constitution, article XIII B, section 6](#) and in [Revenue and Taxation Code section 2207](#) and former section 2231. These provisions require State to reimburse local agencies for state-mandated costs.

We reject State's general characterization of the judgment by noting that it only affects an existing appropriation. It declares (fn. 7, ¶ 1, *ante*) that only funds already "appropriated by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund" shall be spent for reimbursement of County's state-mandated costs. (Italics added.) There is absolutely no language purporting to require the Legislature to enact appropriations or perform any other act that might violate separation of powers principles. (10) By simply ordering the State Controller to draw warrants and directing the State Treasurer to pay on already appropriated funds (fn. 7, ¶ 2, *ante*), the judgment permissibly compels performance of a ministerial duty: "[O]nce funds have already been



appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures \*540 from such funds. [Citations.]” ( *Mandel v. Myers*, *supra.*, 29 Cal.3d at p. 540.)

As we will discuss in further detail below, the subject funds (fn. 7, ¶ 1, *ante*) were saddled with an unconstitutional restriction (fn. 7, ¶ 7, *ante*). However, *Mandel* establishes that such a restriction does not necessarily infect the entire appropriation. There, the Legislature had improperly prohibited the use of budget funds to pay a court-ordered and administratively approved attorney's fees award. The court reasoned that as long as appropriated funds were “reasonably available for the expenditures in question, the separation of powers doctrine poses no barrier to a judicial order directing the payment of such funds.” ( *Id.* at p. 542.) The court went on to find that money in a general “operating expenses and equipment” fund was, by both the Budget Act's terms and prior administrative practice, reasonably available to pay the attorney's fees award.

Contrary to State's argument, *Mandel* does not require that past administrative practice support a judgment for reimbursement from an otherwise available appropriation. Although there was evidence of a prior administrative practice of paying counsel fees from funds in the “operating expenses and equipment” budget, this fact was not the main predicate of the court's holding. Rather, the decisive factor was that the budget item in question functioned as a “catchall” appropriation in which funds were still reasonably available to satisfy the State's adjudicated debt. ( *Id.* at pp. 543-544.)

Another illustration of this principle is found in *Serrano v. Priest* (1982) 131 Cal.App.3d 188 [182 Cal.Rptr. 387]. Plaintiffs in that case secured a judgment against the State of California for \$800,000 in attorney's fees. The judgment was not paid, and subsequent proceedings were brought against State to satisfy the judgment. The trial court directed the State Controller to pay the \$800,000 award, plus interest, from funds appropriated by the Legislature for “operating expenses and equipment” of the Department of Education, Superintendent of Public Instruction and State Board of Education. ( *Id.* at p. 192.) This court affirmed that order even though there was no evidence that the agencies involved had ever paid court-ordered attorney's fees from that portion of the budget. Relying on *Mandel*, we concluded that funds were reasonably available from appropriations enacted in the

Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent budget acts.

(11) State also incorrectly asserts that the appropriations affected by the court's order must specifically refer to the particular expenditure in question in order to be available. This notion was summarily dismissed in *Mandel v. Myers*, *supra.*, 29 Cal.3d at pp. 543-544. Likewise, in *Committee to Defend \*541 Reproductive Rights v. Cory*, *supra.*, 132 Cal.App.3d at pp. 857-858, the court decreed that payments for Medi-Cal abortions could properly be ordered from monies appropriated for other Medi-Cal services, even though this use had been specifically prohibited by the Legislature.

Applying these various principles here, we note that the judgment (fn. 7, ¶ 2, *ante*) identified funds in account numbers 8350-001-001, 8350-001-452, 8350-001-453 and 8350-001-890 as being available for reimbursement. Within these 1984-1985 account appropriations for the Department of Industrial Relations were monies for Program 40, the Prevention of Industrial Injuries and Deaths of California Workers. The evidence clearly showed that the remaining balances on hand would cover the cost of reimbursement. Since it is conceded that the fire fighting protective clothing and equipment in this case was purchased to prevent deaths and injuries to fire fighters, these funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of costs incurred by County and are therefore reasonably available for reimbursement.

#### **B. Legislative Disclaimers, Findings and Budget Control Language Are No Defense to Reimbursement**

As a general defense against the order to reimburse, State insists that the Legislature has itself concluded that the claimed costs are not reimbursable. This determination took the combined form of disclaimers, findings and budget control language. State interprets this self-serving legislation, as well as the legislative and gubernatorial deletions, as forever sweeping away State's obligation to reimburse the state-mandated costs at issue. Consequently, any order that ignores these restrictions on payment would amount to a court-ordered appropriation. As we shall conclude, these efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly.

The seminal legislation that gave rise to the 1978 executive orders was enacted by Statutes 1973, chapter 993, and is labeled the California Occupational Safety and Health Act

(Cal/OSHA). It is modeled after federal law and is designed to assure safe working conditions for all California workers. A legislative disclaimer appearing in section 106 of that bill reads: “No appropriation is made by this act ... for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on ....” The stated reason for this decision not to appropriate was that the cost of implementing the act was “minimal on a statewide basis in relation to the effect on local tax rates.” (Stats. 1973, ch. 993, § 106, p. 1954.)

**\*542**

Again, in 1974, the Legislature stated: “Notwithstanding [Section 2231 of the Revenue and Taxation Code](#), there shall be no reimbursement pursuant to this section, nor shall there be an appropriation made by this act, because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations.” (Stats. 1974, ch. 1284, § 106, p. 2787.) This statute amended section 106 of Statutes 1973, chapter 993, and was a post facto change in the stated legislative rationale for not providing reimbursement.

Presumably because of the large number of reimbursement claims being filed, the Legislature subsequently used budget control language to confirm that compliance with the executive orders should not trigger reimbursement. Some of this legislation was effective September 30, 1981, as part of a local agency and school district reimbursement bill. The control language provided that “[t]he Board of Control shall not accept, or submit to the Legislature, any more claims pursuant to ... [Sections 3401 to 3409, inclusive, of Title 8 of the California Administrative Code](#).” (Stats. 1981, ch. 1090, § 3, p. 4193.)<sup>13</sup>

Further control language was inserted in the 1981, 1983 and 1984 Budget Acts. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This language prohibits encumbering appropriations to reimburse costs incurred under the executive orders, except under certain limited circumstances.

(12a) State first challenges the trial court's finding that expenditures mandated by the executive orders were not the result of a federally mandated program (fn. 7, ¶ 8, *ante*), despite the legislative finding in Statutes 1974, chapter 1284, section 106. We agree with the court's decision that there was no federal mandate.

The significance of this no-federal-mandate finding is revealed by examining past changes in the statutory definition of state-mandated costs. As thoroughly discussed in [City of Sacramento v. State of California](#) (1984) 156 Cal.App.3d 182, 196-197 [203 Cal.Rptr. 258] disapproved on other grounds in [County of Los Angeles v. State of California, supra.](#), **43** Cal.3d at p. 58, fn. 10, the concept of federally mandated costs has provided local agencies with a financial escape valve ever since passage of the “Property Tax Relief Act of 1972.” (Stats. 1972, ch. 1406, § 1, p. 2931.) That act limited local governments' power to levy property taxes, while requiring that they be reimbursed by the State for providing compulsory increased levels of service or **\*543** new programs. However, under [Revenue and Taxation Code section 2271](#), “costs mandated by the federal government” were not subject to reimbursement and local governments were permitted to levy taxes in addition to the maximum property tax rate to pay such costs.

On November 6, 1979, the limitation on local government's ability to raise property taxes, and the duty of the State to reimburse for state-mandated costs, became a part of the California Constitution through the initiative process. [Article XIII B, section 6](#), enacted at that time, directs state subvention similar in nature to that required by the preexisting provisions of [Revenue and Taxation Code section 2207](#) and former section 2231. As a defense against this duty to reimburse local agencies, the Legislature began to insert disclaimers in bills which mandated costs on local agencies. It also amended [Revenue and Taxation Code section 2206](#) to expand the definition of nonreimbursable “costs mandated by the federal government” to include the following: “costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state.”

In applying this definition here, State offers nothing more than the bare legislative finding contained in Statutes 1974, chapter 1284, section 106. State contends that a federally mandated cost cannot, by definition, be a state-mandated cost. Therefore, if the cost is federally mandated, local agency reimbursement is not required. (13)(See fn. 14.) Although State's argument is correct in the abstract, neither the facts nor federal law supports the underlying assumption that there is a federal mandate.<sup>14</sup>

(12b) Both the Board and the court had in evidence a letter from a responsible official of the federal Occupational Safety and Health Administration (OSHA). The letter emphasizes the independence of state and federal OSHA standards: “OSHA does not have jurisdiction over the fire departments of any political subdivision of a state whether the state has elected to have its own state plan under the OSHA act or not .... [¶] More specifically, in 1978, the State of California promulgated standards applicable to fire departments in California. Therefore, California standards, rather than \*544 federal OSHA standards, are applicable to fire departments in that state ....” This theme is also reflected in a section of OSHA which expressly disclaims jurisdiction over local agencies such as County. (29 U.S.C. § 652(5).) Accordingly, as a matter of law, there are no federal standards for local government structural fire fighting clothing and equipment.

In short, while the Legislature's enactment of Cal/OSHA to comply with federal OSHA standards is commendable, it certainly was not compelled. Consequently, County's obedience to the 1978 executive orders is not federally mandated.

(14a) The trial court also properly invalidated the budget control language in Statutes 1981, chapter 1090, section 3 (fn. 7, ¶ 7, *ante*) because it violated the single subject rule.<sup>15</sup> This legislative restriction purported to make the reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231 unavailable to County.

(15) The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in the statute's title. The rule's primary purpose is to prevent “log-rolling” in the enactment of laws. This disfavored practice occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which otherwise might not have passed had the legislative mind been directed to them. ( *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1196 [219 Cal.Rptr. 664].) However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose. ( *Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172-173 [28 Cal.Rptr. 724, 379 P.2d 28].)

(14b) The stated purpose of chapter 1090 is to increase funds available for reimbursing certain claims. It describes itself as an “act making an appropriation to pay claims of local agencies and school districts for additional reimbursement for specified state-mandated local costs, awarded by the State Board of Control, and declaring the urgency thereof, to take effect immediately.” (Stats. 1981, ch. 1090, p. 4191.) There is nothing in this introduction \*545 alerting the reader to the fact that the bill prohibits the Board from entertaining claims pursuant to the Cal/OSHA executive orders. The control language does not modify or repeal these orders, nor does it abrogate the necessity for County's continuing compliance therewith. It simply places County's claims reimbursement process in limbo.

This special appropriations bill is similar in kind to appropriations in an annual budget act. Observations that have been made in connection with the enactment of a budget bill are appropriate here. “[T]he annual budget bill is particularly susceptible to abuse of [the single subject] rule. 'History tells us that the general appropriation bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage. If a rider can be attached to it, the rider can be adopted on the merits of the general appropriation bill without having to depend on its own merits for adoption.' [Citation.]” ( *Planned Parenthood Affiliates v. Swoap*, *supra.*, 173 Cal.App.3d at p. 1198.) Therefore, the annual budget bill must only concern the subject of appropriations to support the annual budget and may not constitutionally be used to substantively amend or change existing statutory law. ( *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394 [211 Cal.Rptr. 758, 696 P.2d 150].) We see no reason to apply a less stringent standard to a special appropriations bill. Because the language in chapter 1090 prohibiting the Board from processing claims does not reasonably relate to the bill's stated purpose, it is invalid.

(16) The budget control language in chapter 1090 is also invalid as a retroactive disclaimer of County's right to reimbursement for debts incurred in prior years. This legislative technique was condemned in *County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at p. 446. There, the Legislature had enacted a Government Code section which prohibited using appropriations for any purpose which had been denied by any formal action of the Legislature. The State attempted to use this code section to uphold a special appropriations bill which had deleted County's Board-

approved claims for costs which were incurred prior to the enactment of the code section. The court held that the code section did not apply retroactively to defeat County's claims: "A retroactive statute is one which relates back to a previous transaction and gives that transaction a legal effect different from that which it had under the law when it occurred ... 'Absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively.'" (*Id.* at p. 459, quoting *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 912 [159 Cal.Rptr. 791].) Similarly, the control language in chapter 1090 does not apply retroactively to County's prior, Board-approved claims. \*546

(17) Finally, the control language in section 28.40 of the 1981 Budget Act and section 26.00<sup>16</sup> of the 1983 and 1984 Budget Acts does not work to defeat County's claims. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This section is comprised of both substantive and procedural provisions. We are concerned primarily with those portions that purport to exonerate State from its constitutionally and statutorily imposed obligation to reimburse County's state-mandated costs.

The writ of mandate directed compliance with the procedural provisions of these sections and is not a point of dispute on appeal. Subsection (a) affords the Legislature one last opportunity to appropriate funds which are to be encumbered for the purpose of paying state-mandated costs, an invitation repeatedly rejected. Subsection (b) directs that the Department of Finance notify the chairpersons of the appropriate committees in each house and chairperson of the Joint Legislative Budget Committee of the need to encumber funds. Presumably, the objective of this procedure is to give the Legislature another opportunity to amend or repeal substantive legislation requiring local agencies to incur state-mandated costs. Again, the Legislature declined to act. Legislative action pursuant to subsection (b) could arguably ameliorate the plight of local agencies prospectively, but would be of no practical assistance to a local agency creditor seeking reimbursement for costs already incurred.

The first portion of each section, however, imposes a budgetary restriction on encumbering appropriated funds to reimburse for state-mandated costs arising out of compliance with the executive orders, absent a specific appropriation pursuant to subparagraph (b). For the reasons stated above, this substantive language is invalid under the single subject rule. It attempts to amend existing statutory law and is

unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget. (*Association for Retarded Citizens v. Department of Developmental Services, supra.*, 38 Cal.3d at p. 394.) Now unfettered by invalid restrictions, the appropriations involved in this case are reasonably available for reimbursement. \*547

### ***C. The Legislature's Plenary Power to Regulate Worker Safety Does Not Affect the Right to Reimbursement***

(18) State contends that [article XIV, section 4 of the California Constitution](#) vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system. It postulates that the Legislature may determine that the interest in worker safety and health is furthered by requiring local agencies to bear the costs of safety devices. This non sequitur is advanced without citation of authority.

[Article XIV, section 4](#) concerns the power to enact workers' compensation statutes and regulations. It does not focus on the issue of reimbursement for state-mandated costs, which is covered by [Revenue and Taxation Code section 2207](#) and former section 2231, and [article XIII B, section 6](#). Since these latter provisions do not effect a pro tanto repeal of the Legislature's plenary power over workers' compensation law (see *County of Los Angeles v. State of California, supra.*, [43 Cal.3d 46](#)), they do not conflict with [article XIV, section 4](#).

Moreover, even though the reimbursement issue has come before the Legislature repeatedly since 1972, no law has been enacted to exempt compliance with workers' compensation executive orders from the mandatory reimbursement provisions of [Revenue and Taxation Code section 2207](#) and former section 2231. Likewise, [article XIII B, section 6](#) does not provide an exception to the obligation to reimburse local agencies for compliance with these safety orders.

### ***D. Pre-1980 Claims Are Reimbursable Under Article XIII B, Section 6, Effective July 1, 1980***

(19) State further argues that to the extent County's claims for fiscal years 1978-1979 and 1979-1980 are predicated on the subvention provisions of [article XIII B, section 6](#), they fall within a "window period" of nonreimbursement. This assertion emanates from [section 6](#), subdivision (c), which states that the Legislature "[m]ay, but need not," provide reimbursement for mandates enacted before January 1, 1975. State reasons that because the constitutional amendment did not become effective until July 1, 1980, claims for costs

incurred between January 1, 1975 and June 30, 1980, need not be reimbursed.

This notion was rejected in *City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at p. 182 on behalf of local agencies seeking reimbursement of unemployment insurance costs mandated by a 1978 statute. Basing its decision on well-settled principles of constitutional interpretation \*548 and upon a prior published opinion of the Attorney General, the court interpreted section 6, subdivision (c) as follows: “[T]he Legislature *may* reimburse mandates enacted prior to January 1, 1975, and *must* reimburse mandates passed after that date, but does not have to begin such reimbursement until the effective date of article XIII B (July 1, 1980).” (*Id.* at p. 191, italics in original.) In other words, the amendment operates on “window period” mandates even though the reimbursement process may not actually commence until later.

We agree with this reasoning and find costs incurred by County under the 1978 executive orders subject to reimbursement under the Constitution.

**E. Claims Under Revenue and Taxation Code Section 2207 and Former Section 2231 Are Not Time-barred**

(20) State collaterally asserts that to the extent County bases its claims on Revenue and Taxation Code section 2207 and former section 2231, they are barred by Code of Civil Procedure sections 335 and 338, subdivision 1. This omnibus challenge to the order directing payment has no merit.

Code of Civil Procedure section 335 is a general introductory section to the statute of limitations for all matters except recovery of real property. Code of Civil Procedure section 338, subdivision 1 requires “[a]n action upon a liability created by statute” to be commenced within three years.

A claimant does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 77 [222 Cal.Rptr. 750].) Here, County pursued its remedy before the Board and prevailed. Thereafter, as required by law, appropriate legislation was introduced. Both the Board hearings and the subsequent efforts to secure legislative appropriations were part of the legislative process. (Former Rev. & Tax. Code, § 2255, subd. (a).) It was not until the legislation was enacted sans appropriations on September 30, 1981 (S.B. 1261) and February 12, 1982 (A.B. 171) that it became unmistakably clear that this process had ended and State had breached its

duty to reimburse. At these respective moments of breach, County's right of action in traditional mandamus accrued. County's petition was filed on September 21, 1984, within the three-year statutory period.<sup>17</sup> (*Lerner v. Los Angeles City Board of Education*, *supra.*, 59 Cal.2d at p. 398.) \*549

**F. Government Code Section 17612's Remedy for Unfunded Mandates Does Not Supplant the Court's Order**

State continues its general attack on the order directing payment by arguing that the Legislature has “defined” the remedy available to a local agency if a mandate is unfunded. That remedy is found in Government Code section 17612, subdivision (b) and reads: “If the Legislature deletes from a local government claims bill funding for a mandate, the local agency ... *may* file in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement.” (Italics added.) (See also former Rev. & Tax. Code, § 2255, subd. (c), eff. Oct. 1, 1982.)

State hints that this procedure is the only remedy available to a local agency if funding is not provided. At oral argument, State admitted that this declaration of enforceability and injunction against enforcement would be prospective only. This remedy would provide no relief to local agencies which have complied with the executive orders.

We conclude that Government Code section 17612, subdivision (b) is inapplicable here because it did not become operative until January 1, 1985. It was not in place when the Board rendered its decision on November 20, 1979; when funding was deleted from S.B. 1261 (Sept. 30, 1981) and A.B. 171 (Feb. 12, 1982); or when this litigation commenced on September 21, 1984. (21) A party is not required to exhaust a remedy that was not in existence at the time the action was filed. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 912, fn. 9 [141 Cal.Rptr. 133, 569 P.2d 727].) To abide by this post facto legislation now would condone legislative interference in a specific controversy already assigned to the judicial branch for resolution. (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at p. 201.)

Also, this remedy is purely a discretionary course of action. By using the permissive word “*may*,” the Legislature did not intend to override article XIII B, section 6 and Revenue and Taxation Code section 2207 and former section 2231. These constitutional and statutory imprimaturs each impose upon the State an obligation to reimburse for state-mandated costs.

Once that determination is finally made, the State is under a clear and present ministerial duty to reimburse. In the absence of compliance, traditional mandamus lies. (Code Civ. Proc., § 1085.)<sup>18</sup> \*550

*G. The Court's Order Properly Allows County the Right of Offset*

(22a)As the first in a series of objections to portions of the judgment which assist in the reimbursement process, State argues that the court has improperly authorized County to satisfy its claims by offsetting fines and forfeitures due to State. (Fn. 7, ¶ 5, ante.) The fines and forfeitures are those found in Penal Code sections 1463.02, 1463.03, 1463.5a and 1464; Government Code sections 13967, 26822.3 and 72056; Fish and Game Code section 13100; Health and Safety Code section 11502; and Vehicle Code sections 1660.7, 42004 and 41103.5.<sup>19</sup>

Broadly speaking, these statutes require County to periodically transfer all or part of the fines and forfeitures collected by it for specified law violations to the State Treasury. They are to be held there “to the credit” of various state agencies, or for payment into specific funds. State contends that since these statutes require mandatory, regular transfers and do not expressly permit diversion for other purposes, the court had no power to allow County to offset. State cites no authority for this contention.

(23)The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike a balance, holding himself owing or entitled only to the net difference. ( *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266].) Although this doctrine exists independent of statute, its governing principle has been partially codified (Code Civ. Proc., § 431.70) (limited to cross-demands for money).

The doctrine has been applied in favor of a local agency against the State. In *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576[159 Cal.Rptr.1], for example, the court of appeal upheld a trial court's decision to grant a writ of mandate that ordered funds awarded the County under a favorable judgment to be offset against its current liabilities to the State under the Medi-Cal program. The court stated that such an order does not interfere with the “Legislature's control over the 'submission, approval and enforcement of budgets....’” ( *Id.* at p. 592, quoting Cal. Const., art. IV, § 12, subd. (e).)

(22b)The order herein likewise does not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters. The identified \*551 fines and forfeitures are collected by the County for statutory law violations. Some of these funds remain with the County, while others are transferred to the State. State's portions are uncertain as to amount and date of transfer. State does not come into actual possession of these funds until they are transferred. State's holding of these funds “to the credit” of a particular agency, or for payment to a specific fund, does not commence until their receipt. Until that time, they are unencumbered, unrestricted and subject to offset.

*H. State's Use of its Statutory Offset Authority Was Properly Enjoined*

(24)State further contends that the trial court exceeded its jurisdiction by enjoining the exercise of State's statutory offset authority until County is fully reimbursed. (Fn. 7, ¶ 11, ante.)<sup>20</sup> This order complemented that portion of the order discussed, *infra.*, which allowed County to temporarily offset fines and forfeitures as an aid in the reimbursement process.

State correctly observes that it has not unlawfully used its offset authority during the course of this dispute. However, State has not needed to do so because it has adopted other means of avoiding payment on County's claims. In view of State's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating County's collection efforts from occurring. (See *County of Los Angeles v. State of California* (1984) 153 Cal.App.3d 568 [200 Cal.Rptr. 394].)

*I. The Injunction Against Reversion or Dissipation of Undisbursed Appropriations Is Proper*

(25)State continues that the order (fn. 7, ¶ 4, ante) enjoining it from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy this court's judgment, violates Government Code section 16304.1.<sup>21</sup> This section reverts undisbursed \*552 balances in any appropriation to the fund from which the appropriation was made. No authority is cited for State's proposition. To the contrary, *County of Sacramento v. Loeb, supra.*, 160 Cal.App.3d at pp. 456-457 expressly confirms this type of ancillary remedy as a legitimate exercise

of the court's authority to assist in collecting on an adjudicated debt, the payment of which has been delayed all too long.

That portion of the order restraining reversion is particularly innocuous because it only affects undisbursed balances in an appropriation. At the time of reversion, it is crystal clear that these remaining funds are unneeded for the primary purpose for which appropriated; otherwise, they would not exist. Moreover, that portion of the order restraining dissipation of the reimbursement award sum in a manner that would make it unavailable to satisfy a court's judgment is similarly a proper exercise of the court's authority. By not reimbursing County for the state-mandated costs, State would be contravening its constitutional and statutory obligations to subvent. To the extent it is not reimbursed, County would be compelled, contrary to law, to bear the cost of complying with a state-imposed obligation.

*J. The Auditor Controller and the Specified Funds Are Not Indispensable Parties*

(26, 27) State next contends that the Auditor Controller of Los Angeles County and the "specified" fines and forfeitures County was allowed to offset are indispensable parties. Failure to join them in the action or to serve them with process purportedly renders the trial court's order void as in excess of its jurisdiction.<sup>22</sup> State cites only the general statutory definition of an indispensable party (*Code Civ. Proc.*, § 389) to support this assertion.

The Auditor Controller is an officer of the County and is subject to the \*553 direction and control of the County board of supervisors. (*Gov. Code*, § 24000, subds. (d), (e), 26880; *L.A. County Code*, § 2.10.010.) He is indirectly represented in these proceedings because his principal, the County, is the party litigant. Additionally, he claims no personal interest in the fines and forfeitures and his pro forma absence in no way impedes complete relief.

The funds created by the collected fines and forfeitures also are not indispensable parties. This is not an in rem proceeding, and the ownership of a particular stake is not in dispute. Rather, this is an action to compel a ministerial obligation imposed by law. Complete relief may be afforded without including the specified funds as a party.

*K. County is Entitled to Interest*

(28) State insists that an award of interest to County unfairly penalizes State for not paying claims which it was prohibited by law from paying under Statutes 1981, chapter 1090, section 3. This argument is unavailing.

*Civil Code* section 3287, subdivision (a) allows interest to any person "entitled to recover damages certain, or capable of being made certain by calculation...." Interest begins on the day that the right to recover vests in the claimant. By its own terms, this section applies to any judgment debtor, "including the state...or any political subdivision of the state."

The judgment orders interest at the legal rate from September 30, 1981, for reimbursement funds originally contained in S.B. 1261, and from February 12, 1982, for the funds originally contained in A.B. 171. These are the respective dates that the bills were enacted without appropriations. As we concluded earlier, County's cause of action did not arise and its right to recover did not vest until this legislative process was complete. County offers no authority to suggest that any other vesting date is appropriate.

Furthermore, State cannot avoid its obligation to pay interest by relying on the invalid budget control language in Statutes 1981, chapter 1090, section 3. "An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under *Civil Code* section 3287, subdivision (a)." (*Olson v. Cory* (1983) 35 Cal.3d 390, 404 [197 Cal.Rptr. 843, 673 P.2d 720].)

**Appeal in Case No. 2 Civil B011941**

**(Rincon et al. Case)**

The procedural history and legal issues raised in the *Rincon et al.* appeal are essentially similar to those discussed in the County of Los Angeles matter. \*554

County, although not a party to this underlying trial court proceeding, filed a test claim with the Board. All parties agree that County represented the interests of the named respondents here.

The Board action resulted in a finding of state-mandated costs. It further found that Rincon et al. were entitled to reimbursement in the amount of \$39,432. After the Legislature and the Governor, respectively, deleted the funding from the two appropriations bills, S.B. 1261 and A.B. 171, Rincon et al. filed a petition for writ of mandate and declaratory relief. This action was consolidated for hearing

in the trial court with the action in B011942 (County of Los Angeles matter). The within judgment was also signed, filed and entered on February 6, 1985. The reimbursement order was directed against the 1984-1985 budget appropriations. State appeals from that judgment.

The court here included a judicial determination that the Board, or its successors, hear and approve the claims of certain other respondents for costs incurred in connection with the state-mandated program. (Fn. 7, ¶ 9, *ante.*) This special directive was necessary because the claims of these respondents (petitioners below) have not yet been determined.<sup>23</sup> Since we have ruled that State is barred by the doctrines of waiver and administrative collateral estoppel from raising the state mandate issue, the validity of these claims becomes a question of law susceptible to but one conclusion, and mandamus properly lies. (*County of Sacramento v. Loeb, supra.*, 160 Cal.App.3d at p. 453.) This portion of the order also underscores, for the Board's edification, the determination that the statutory restriction on the Board authority to proceed is invalid.<sup>24</sup>

Once again, our determinations and conclusions in the County of Los Angeles matter are equally applicable here.

### Appeal in Case No. 2 Civil B006078

#### (Carmel Valley et al.)

Again, the procedural history and legal issues raised in this appeal are essentially similar to those discussed in the County of Los Angeles matter.

County filed a test claim with the Board. All parties agree that the County represented the interests of the named respondents here. \*555

On December 17, 1980, the Board found that a state mandate existed and that specific amounts of reimbursement were due several respondents totalling \$159,663.80. Following the refusal of the Legislature to appropriate funds for reimbursement, Carmel Valley et al. filed a petition for writ of mandate and declaratory relief on January 3, 1983. Judgment was entered on May 23, 1984. The reimbursement order was directed against 1983-1984 budget appropriations.

The judgment differs from the other two because it does not decree a specific reimbursement amount. The trial court determined that even though the Board had approved the

claims, the State was not precluded from contesting that determination. The court's reasons were that the State, in its answer, had denied that the money claimed was actually spent, and that Board approval had not been implemented by subsequent legislation. The court concluded that the reimbursement process, of which the Board action was an intrinsic part, was "aborted."

We disagree with this portion of the court's analysis. The moment S.B. 1261 and A.B. 171 were enacted into law without appropriations, Carmel Valley et al. had exhausted their administrative remedies and were entitled to seek a writ of mandate. At the time of trial, State was barred by the doctrines of waiver and administrative collateral estoppel from contesting the state mandate issue or the amount of reimbursement. The trial court therefore should have rendered a judgment for the amount of reimbursement. Having failed to do so, this fact-finding responsibility falls upon this court. Although we ordinarily are not equipped to handle this function, the writ of mandate in this case identifies the amount of the approved claims as \$159,663.80. We accordingly will amend the judgment to reflect that amount.

The trial court also predicated its judgment for Carmel Valley et al. solely on the basis of [Revenue and Taxation Code section 2207](#) and former section 2231. In doing so, the court did not have the benefit of the decision in *City of Sacramento v. State of California, supra.*, 156 Cal.App.3d at p. 182.<sup>25</sup> That case held that mandates passed after January 1, 1975, must be reimbursed pursuant to [article XIII B, section 6 of the California Constitution](#), but that reimbursement need not commence until July 1, 1980. In light of this rule, we conclude that the trial court's decision ordering reimbursement is also supported by [article XIII B, section 6](#). \*556

State raises another point specific to this particular appeal. In its answer to the writ petition, State admitted that the local agency expenditures were state mandated. Consequently, the issue was not contested at the trial court level. However, State vigorously contends here that it is not bound by its trial court admissions because the state mandate issue is purely a question of law.

(29)State is correct in contending that an appellate court is not limited by the interpretation of statutes given by the trial court. (*City of Merced v. State of California, supra.*, 153 Cal.App.3d at p. 781.) However, State's victory on this point is Pyrrhic. Regardless of how the issue is characterized, State is precluded from contesting the Board findings on appeal



because of the independent application of the doctrines of waiver and administrative collateral estoppel. These doctrines would also have applied at the trial court level if State's answer had raised the issue of state mandate in the first instance.

We also reject State's argument, advanced for the first time on appeal, that the executive orders of 1978 initially implement legislation enacted prior to January 1, 1975, and that state reimbursement is therefore discretionary. (Cal. Const., art. XIII B, § 6, subd. (c).) Again, State is barred by the doctrines of waiver and administrative collateral estoppel from arguing that costs incurred under the executive orders are not subject to reimbursement.

State continues that the *Carmel Valley* judgment against the Department of Industrial Relations is erroneous. Since the department was never made a party in the suit, nor served with process, the resulting judgment reflects a denial of due process and is in excess of the court's jurisdiction. (See Code Civ. Proc., § 389; fn. 22, *ante*.)

This assertion is but a variant of the same argument advanced in the County of Los Angeles case, *supra*, which we rejected as meritless. The department is part of the State of California. (Lab. Code, § 50.) State extensively argued the department's position and even offered into evidence a declaration from the chief of fiscal accounting of the department. As stated earlier, agents of the same government are in privity with each other. (*People v. Sims, supra*, 32 Cal.3d at p. 487.)

*Ross v. Superior Court, supra*, 19 Cal.3d at p. 899 demonstrates how, through the notion of privity, a government agent can be held in contempt for knowingly violating a court order issued against another agent of the same government. There, a court in an earlier proceeding had decided that defendant Department of Health and Welfare must pay unlawfully withheld welfare benefits to qualified recipients. The County Board of Supervisors, \*557 who

were not parties to this action, knew about the court's order but refused to comply. The Supreme Court affirmed a trial court decision holding the Board in contempt for violating the order directing payment. The court reasoned that, as an agent of the Department of Health and Welfare, the Board did not collectively or individually need to be named as a party in order to be bound by a court order of which they had actual knowledge.

The determinations and conclusions in the County of Los Angeles case are likewise applicable here.

#### Modification of Judgments in All Three Appeals

The trial court judgments ordering reimbursement from specific account appropriations were entered many months ago. We will affirm these judgments and thereby validate the trial courts' determination that funds already appropriated for the State Department of Industrial Relations were reasonably available for payment at the time of the courts' orders.

Due to the passage of time, we requested State at oral argument to confirm whether the appropriations designated in the respective judgments are still available for encumbrance. State's counsel responded by rearguing that the weight of the evidence did not support the trial courts' findings that specific funds were reasonably available for reimbursement. Counsel further hinted that the funds may not actually be available.

We hope that counsel for the State is mistaken. But in order to emphasize our strong and unequivocal determination that the local agency petitioners be promptly reimbursed, we will take judicial notice of the enactment of the 1985-1986 Budget Act (Stats. 1985, ch. 111) and the 1986-1987 Budget Act (Stats. 1986, ch. 186). (*Serrano v. Priest, supra*, 131 Cal.App.3d at p. 197.) Both acts appropriate money for the State Department of Industrial Relations and fund the identical account numbers referred to in the trial courts' judgments. They are:

Account Numbers	1985-1986 Budget Act	1986-1987 Budget Act
8350-001-001	\$94,673,000	\$106,153,000
8350-001-452	2,295,000	2,514,000
8350-001-453	2,859,000	2,935,000
8350-001-890	16,753,000	17,864,000

(30) An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. (*Serrano v. Priest, supra.*, 131 Cal.App.3d at pp. 198, 201.) We do so here with respect to all three judgments. \*558

### Disposition

*2d Civ. B011942 (County of Los Angeles Case)*

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The words "[Fish and Game Code Section 13100](#)" are deleted from paragraph 5.

(3) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-**1987** Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

### *2d Civ. B011941 (Rincon et al. Case)*

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds

in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-**1987** Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

### *2d Civ. B006078 (Carmel Valley et al. Case)*

The judgment is modified as follows: \*559

(1) The following sentences are added to paragraph 2: "The reimbursement amounts total \$159,663.80. If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-**1987** Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

Ashby, Acting P. J., and Hastings, J., concurred.

A petition for a rehearing was denied March 17, **1987**, and appellant's petition for review by the Supreme Court was denied May 14, **1987**. Eagleson, J., did not participate therein.

\*560

### Footnotes

- 1 *2d Civ. B006078*: The petitioners below and respondents on appeal are Carmel Valley Fire Protection District, City of Anaheim, Aptos Fire Protection District, Citrus Heights Fire Protection District, Fair Haven Fire Protection District, City of Glendale, City of San Luis Obispo, County of Santa Barbara and Ventura County Fire Protection District. The respondents below and appellants here are State of California, Kenneth Cory and Jesse Marvin Unruh.
- 2d Civ. B011941*: The petitioners below and respondents on appeal are Rincon Del Diablo Municipal Water District, Twenty-Nine Palms Water District, Alpine Fire Protection District, Bonita-Sunnyside Fire Protection District, Encinitas Fire Protection District, Fallbrook Fire Protection District, City of San Luis Obispo, Montgomery Fire Protection District, San Marcos Fire Protection District, Spring Valley Fire Protection District, Vista Fire Protection District and City of Coronado. Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, State Board of Control, Kenneth Cory, State Controller, Jesse Marvin Unruh, State Treasurer, and Mark H. Bloodgood, Auditor-Controller, County of Los Angeles.

*2d Civ. B011942*: The County of Los Angeles is the petitioner below and respondent on appeal. Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, Kenneth Cory, and Jesse Marvin Unruh.

All respondents on appeal are conceded to be "local agencies," as defined in [Revenue and Taxation Code section 2211](#).

2 The pertinent parts of [Revenue and Taxation Code section 2207](#) provide: " 'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following" [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or a n increased level of service of an existing program: [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program; [¶] (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973 ..."

3 The pertinent parts of former Revenue and Taxation Code section 2231, subdivision (a) provide: "The state shall reimburse each local agency for all 'costs mandated by the state', as defined in [Section 2207](#)." This section was repealed (Stats. 1986, ch. 879, § 23), and replaced by [Government Code section 17561](#). We will refer to the earlier code section.

4 The pertinent parts of [section 6, article XIII B of the California Constitution](#), enacted by initiative measure, provide: "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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] ... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." This constitutional amendment became effective July 1, 1980.

5 County filed its test claim pursuant to former Revenue and Taxation Code section 2218, which was repealed by Statutes 1986, chapter 879, section 19.

Additionally, the Board is no longer in existence. The Commission on State Mandates has succeeded to these functions. ([Gov. Code, §§ 17525, 17630](#).)

6 The final legislation did include appropriations for other local agencies on other types of approved claims.

7 "1. The Court adjudges and declares that funds appropriated by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund may properly be and should be spent for the reimbursement of state-mandated costs incurred by Petitioner as established in this action.

"2. A peremptory writ of mandamus shall issue under the seal of this Court, commanding Respondent State of California, through its Department of Finance, to give notification in writing as specified in Section 26.00 of the Budget Act of 1984 (Chapter 258, Statutes of 1984) of the necessity to encumber funds in conformity [with ]this order and, unless the Legislature approves a bill that would enact a general law, within 30 days of said notification that would obviate the necessity of such payment, Respondent Kenn[e]th Cory, the State Controller of the State of California, or his successors in office, if any, shall draw warrants on funds appropriated for the State Department of Industrial Relations for the 1984-85 Budget Year in account numbers 8350-001-001, 8350-001-452, 8350-001-453, and 8350-001-890 as implemented in Chapter 258 Statutes of 1984, sufficient to satisfy the claims of Petitioner, plus interest, as set forth in the motion and accompanying writ of mandamus. Said writ shall also issue against Jessie [*sic*] Marvin Unruh, the State Treasurer of the State of California, and his successors in office, if any, commanding him to make payment on the warrants drawn by Respondent Kenneth Cory.

"3. Pending the final disposition of this proceeding, or the payment of the applicable reimbursement claims and interest as set forth herein, Respondents, and each of of [*sic*] them, their successors in office, agents, servants and employees and all persons acting in concert [or] participation with them, are hereby enjoined and restrained from directly or indirectly expending from the 1984-85 General Fund Budget of the State Department of Industrial Relations as is more particularly described in paragraph number 2 hereinabove, any sums greater than that which would leave in said budget at the conclusion of the 1984-85 fiscal year an amount less than the reimbursement amounts on the aggregate amount of \$307,685 in this case, together with interest at the legal rate through payment of said reimbursement amounts. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"4. Pending the final disposition of this proceeding or the payment of the reimbursement award sum at issue herein, Respondents, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly reverting the reimbursement award sum from the General Fund line-item accounts of the Department of Industrial Relations to the

General Funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"5. In addition to the foregoing relief, Petitioner is entitled to offset amounts sufficient to satisfy the claims of Petitioner, plus interest, against funds held by Petitioner as fines and forfeitures which are collected by the local Courts, transferred to the Petitioner and remitted to Respondents on a monthly basis. Those fines and forfeitures are levied, and their distribution provided, as set forth in [Penal Code Sections 1463.02, 1463.03, 14\[6\] 3.5\[a\], and 1464](#); [Government Code Sections 13967, 26822.3 and 72056](#), [Fish and Game Code Section 13100](#); [Health and Safety Code Section 11502](#) and [Vehicle Code Sections 1660.7, 42004, and 41103.5](#).

"6. The Court adjudges and declares that the State has a continuing obligation to reimburse Petitioner for costs incurred in fiscal years subsequent to its claim for expenditures in the 1978-79 and 1979-80 fiscal years as set forth in the petition and the accompanying motion for the issuance of a writ of mandate.

"7. The Court adjudges and declares that deletion of funding and prohibition against accepting claims for expenditures incurred as a result of the state-mandated program of [Title 8, California Administrative Code Sections 3401 through 3409](#) as contained in Section 3 of Chapter 109[0], Statutes of 1981 were invalid and unconstitutional.

"8. The Court adjudges and declares that the expenditures incurred by Petitioner as a result of the state-mandated program of [Title 8, California Administrative Code Sections 3401 through 3409](#) were not the result of any federally mandated program.

"9. A peremptory writ of mandamus shall issue under the seal of this Court commanding Respondent State Board of Control, or its successor-in-interest, to hear and approve the claims of Petitioner for costs incurred in complying with the state-mandated program of [Title 8, California Administrative Code Sections 3401 through 3409](#) subsequent to fiscal year 1979-80.

...."

"11. The Court adju[d]ges and declares that the State Respondents are prohibited from offsetting, or attempting to implement an offset against moneys due and owing Petitioner until Petitioner is completely reimbursed for all of its costs in complying with the state mandate of [Title 8, California Administrative Code Sections 3401 through 3409](#)."

8 This language is taken from [Revenue and Taxation Code section 2207](#) and former section 2231. [Article XIII B, section 6](#) refers to "higher" level of service rather than "increased" level of service. We perceive the intent of the two provisions to be identical. The parties also use these words interchangeably.

9 As it happened, the entire Board determination involved a question of law since the dollar amount of the claimed reimbursement was not disputed.

10 State is not precluded from raising this new issue on appeal. Questions of law decided by an administrative agency invoke the collateral estoppel doctrine only when a determination of conclusiveness will not work an injustice. Likewise, the doctrine of waiver is inapplicable if a litigant has no actual or constructive knowledge of his rights. Since the *State of California* rule had not been announced at the time of the Board or trial court proceedings herein, the doctrines of waiver and collateral estoppel are inapplicable to State on this particular issue. Both parties have been afforded additional time to brief the matter.

11 County suggests that to the extent private fire brigades exist, they are customarily part-time individuals who perform the function on a part-time basis. As such, they are excluded by the balance of the definitional term in [title 8, California Administrative Code section 3402](#), which provides, in pertinent part: "... The term [fire fighter] does not apply to emergency pick-up labor or other persons who may perform first-aid fire extinguishment as collateral to their regular duties."

12 [Article III, section 3 of the California Constitution](#) provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

[Article XVI, section 7 of the California Constitution](#) provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."

13 When Governor Brown deleted the appropriations from A.B. 171, he stated that he was relying on the pronouncements in Statutes 1974, chapter 1284 and Statutes 1981, chapter 1090.

14 We address this subject only because the trial court found that the costs were not federally mandated. Actually, State cannot raise this issue on appeal because of the waiver and administrative collateral estoppel doctrines. We note, however, where there is a quasi-judicial finding that a cost is state mandated, there is an implied finding that the cost is not federally mandated; the two concepts are mutually exclusive.

- Moreover, our task is aided by the fact that interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility. ( *City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at pp. 196-197.)
- 15 [Article IV, section 9 of the California Constitution](#) reads: “A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended.”
- 16 Each of these sections contains the following language: “No funds appropriated by this act shall be encumbered for the purpose of funding any increased state costs or local governmental costs, or both such costs, arising from the issuance of an executive order as defined in [section 2209 of the Revenue and Taxation Code](#) or subject to the provisions of [section 2231 of the Revenue and Taxation Code](#), unless (a) such funds to be encumbered are appropriated for such purpose, or (b) notification in writing of the necessity of the encumbrance of funds available to the state agency, department, board, bureau, office, or commission is given by the Department of Finance, at least 30 days before such encumbrance is made, to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee, or such lesser time as the chairperson of the committee, or his or her designee, determines.”
- 17 Technically, Statute has waived the statute of limitations defense because it was not raised in its answer. ( *Ventura County Employees' Retirement Association v. Pope* (1978) 87 Cal.App.3d 938, 956 [151 Cal.Rptr. 695].)
- 18 We leave undecided the question of whether this type of legislation could ever be held to override [California Constitution, article XIII B, section 6](#). The Constitution of the State is supreme. Any statute in conflict therewith is invalid. ( *County of Los Angeles v. Payne*, *supra.*, 8 Cal.2d at p. 574.)
- Similarly, former Revenue and Taxation Code section 2255, subdivision (c) cannot abrogate the constitutional directive to reimburse.
- 19 At oral argument, County conceded that the order authorizing offset of [Fish and Game Code section 13100](#) fines and forfeitures is inappropriate. These collected funds must be spent exclusively for protection, conservation, propagation or preservation of fish, game, mollusks, or crustaceans, and for administration and enforcement of laws relating thereto, or for any such purpose. ([Cal. Const., art. XVI, § 9](#); 20 Ops. Cal. Atty. Gen. 110 (1952).)
- 20 [Government Code section 12419.5](#) provides: “The Controller may, in his discretion, offset any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The Controller may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant.... The amount due any person or entity from the state or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided.” (See also *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 975-976 [185 Cal.Rptr. 49].)
- 21 [Government Code section 16304.1](#) provides: “Disbursements in liquidation of encumbrances may be made before or during the two years following the last day an appropriation is available for encumbrance.... Whenever, during [such two-year period], the Director of Finance determines that the project for which the appropriation was made is completed and that a portion of the appropriation is not necessary for disbursements, such portion shall, upon order of the Director of Finance, revert to and become a part of the fund from which the appropriation was made. Upon the expiration of two years...following the last day of the period of its availability, the undisbursed balance in any appropriation shall revert to and become a part of the fund from which the appropriation was made....”
- 22 [Code of Civil Procedure section 389](#), subdivision (a) provides: “A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.”
- 23 Responding to the budget control language directing it to refuse to process these claims, the Board declined to hear these matters.
- 24 Because certain claims have not yet been processed, we assume that the issue of the amount of reimbursement may still be at large. Our record is not clear on this point.

25 The decision in *City of Sacramento, supra.*, was filed just one day before the trial court signed the written order in this case. The Revenue and Taxation Code sections on which the court relied were operational before the costs claimed in this case were incurred.

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64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754,  
63 Cal. Comp. Cases 733, 98 Cal. Daily Op.  
Serv. 4644, 98 Daily Journal D.A.R. 6559

CITY OF RICHMOND, Plaintiff and Appellant,

v.

COMMISSION ON STATE MANDATES,  
Defendant and Respondent; DEPARTMENT OF  
FINANCE, Real Party in Interest and Respondent.

No. Co26835.

Court of Appeal, Third District, California.

May 28, 1998.

### SUMMARY

A city filed an administrative mandamus action against the Commission on State Mandates, seeking a determination that an amendment to [Lab. Code, § 4707](#), making local safety members of the Public Employees' Retirement System (PERS) eligible for both PERS and workers' compensation death benefits, was a state mandate to which the city was entitled to reimbursement under [Cal. Const., art. XIII B, § 6](#), which applies when a state law establishes a new program or higher level of service payable by local governments. The amendment eliminated local safety members of PERS from the coordination provisions for death benefits payable under workers' compensation and under PERS, whereby survivors of a local safety member of PERS who are killed in the line of duty receive both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter. The trial court denied the petition, finding that the amendment created an increased cost but not an increased level of service by local governments. (Superior Court of Sacramento County, No. 96CS03417, James Timothy Ford, Judge.)

The Court of Appeal affirmed. The court held that although the amendment increased the cost of providing services, that could not be equated with requiring an increased level of service, and did not constitute a new program. Neither did the amendment impose a unique requirement on local governments that was not applicable to all residents and entities within the state. The amendment merely made the workers' compensation death benefit requirements as

applicable to local governments as they are to private employers. Local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate. The court also held that assembly bill analyses stating that the amendment was a reimbursable state mandate ([Cal. Const., art. XIII B, § 6](#)), were irrelevant to \*1191 the issue. The Legislature has entrusted the determination of what constitutes a state mandate to the Commission on State Mandates, subject to judicial review, and has provided that the initial determination by Legislative Counsel is not binding on the commission. (Opinion by Morrison, J., with Puglia, P. J., and Nicholson, J., concurring.)

### HEADNOTES

#### Classified to California Digest of Official Reports

(1)

Administrative Law § 138--Judicial Review and Relief--Appellate Court-- Standard--Decision of Commission on State Mandates.

Under [Gov. Code, § 17559](#), a proceeding to set aside a decision of the Commission on State Mandates on a claim may be commenced on the ground that the commission's decision was not supported by substantial evidence. Where the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, review on appeal is generally the same. However, the appellate court independently reviews the superior court's legal conclusions as to the meaning and effect of constitutional and statutory provisions. The question of whether a law is a state-mandated program or a higher level of service under [Cal. Const., art. XIII B, § 6](#), is a question of law that is reviewed de novo.

(2a, 2b, 2c)

State of California § 11--Fiscal Matters--Reimbursement for State Mandates--Workers' Compensation Death Benefits Payable to Local Safety Members.

An amendment to [Lab. Code, § 4707](#), to eliminate local safety members of the Public Employees' Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and under PERS, whereby the survivors of a local safety member of PERS who is killed in the line of duty receive both a death benefit

under workers' compensation and a special death benefit under PERS, instead of only the latter, did not mandate a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under [Cal. Const., art. XIII B, § 6](#). Although the amendment increased the cost of providing services, that could not be equated with requiring an increased level of service, and did not constitute a new program. Neither did it impose a unique requirement on local governments that was not applicable to all residents and entities within the state. The amendment merely made the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. \*1192

(3a, 3b)

State of California § 11--Fiscal Matters--Reimbursement for State Mandates--Purpose.

[Cal. Const., art. XIII B, § 6](#), which requires a subvention of funds to reimburse local governments when a state law mandates a new program or higher level of service on local governments, was intended to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123A.]

(4)

Statutes § 43--Construction--Aids--Legislative Analysis--Reimbursement for State Mandates--Legislative Intent.

Assembly bill analyses of an amendment to [Lab. Code, § 4707](#), making local safety members of the Public Employees' Retirement System (PERS) eligible for both PERS and workers' compensation death benefits, stating that it was a reimbursable state mandate ([Cal. Const., art. XIII B, § 6](#)), were irrelevant to the issue. The Legislature has entrusted the determination of what constitutes a state mandate to the Commission on State Mandates, subject to judicial review ([Gov. Code, §§ 17500, 17559](#)) and has provided that the initial determination by legislative counsel is not binding on the commission ([Gov. Code, § 17575](#)).

COUNSEL

Nossaman, Guthner, Knox & Elliott, Robert J. Sullivan, Stephen P. Wilman, John T. Kennedy and Scott N. Yamaguchi for Plaintiff and Appellant.

Dwight L. Herr, County Counsel (Santa Cruz), Ronald R. Ball, City Attorney (Carlsbad), Michael G. Colantuono, City Attorney (Cudahay), William B. Conners, City Attorney (Monterey), Jonathan B. Stone, City Attorney (Montebello), Daniel J. McHugh, City Attorney (Redlands), Jeffrey G. Jorgensen, City Attorney (San Luis Obispo), Brian Libow, City Attorney (San Pablo), Howard, Rice, Nemerovski, Canady & Falk and Richard C. Jacobs as Amici Curiae on behalf of Plaintiff and Appellant.

Gary D. Hori and Shawn D. Silva for Defendant and Respondent.

Daniel E. Lungren, Attorney General, Linda A. Cabatic, Assistant Attorney General, Marsha Bedwell and Shelleyanne W. L. Chang, Deputy Attorneys General, for Real Party in Interest and Respondent.

### MORRISON, J.

Chapter 478 of the Statutes of 1989 (chapter 478) amended [Labor Code section 4707](#) to eliminate local safety members of the Public Employees' Retirement System (PERS) from the coordination provisions for death benefits payable under workers' compensation and under PERS. As a result, the survivors of a local safety member of PERS who is killed in the line of duty receives both a death benefit under workers' compensation and a special death benefit under PERS, instead of only the latter. This proceeding presents the question whether chapter 478 mandates a new program or higher level of service on local governments, requiring a subvention of funds to reimburse the local government under [article XIII B section 6 of the California Constitution](#). We conclude that chapter 478 is not a state mandate requiring reimbursement and affirm the judgment.

### Factual and Procedural Background

The workers' compensation system provides for death benefits payable to the deceased employee's survivors. ([Lab. Code, § 4700 et seq.](#)) There are also preretirement death benefits under PERS. ([Gov. Code, § 21530 et seq.](#)) There is a special death benefit under PERS if the death was industrial and the deceased was a patrol, state peace officer/firefighter, state safety officer, state industrial, or local safety member. ([Gov. Code, § 21537.](#)) [Labor Code section 4707](#) provides a coordination or offset for workers' compensation death benefits when the special death benefit under PERS is payable. In such cases, no workers' compensation death



benefit, other than burial expenses, is payable, except that if the PERS special death benefit is less than the workers' compensation death benefit, the difference is paid as a workers' compensation death benefit. The total death benefit is equal to the greater of the PERS special death benefit or the workers' compensation benefit, not the combination of the two death benefits.

Prior to 1989, Labor Code section 4707 provided in part: "No benefits, except reasonable expenses of burial ... shall be awarded under this division on account of the death of an employee who is a member of the Public Employees' Retirement System unless it shall be determined that a special death benefit ... will not be paid by the Public Employees' Retirement System to the widow or children under 18 years of age, of the deceased, on account of said death, but if the total death allowance paid to said widow and children shall be less than the benefit otherwise payable under this division such widow and children shall be entitled, under this division, to the difference." (Stats. 1977, ch. 468, § 4, pp. 1528-1529.) \*1194

Chapter 478 amended Labor Code section 4707 to make technical changes, to provide the death benefit is payable to the surviving spouse rather than to the widow, and to add subdivision (b). Subdivision (b) of Labor Code section 4707 reads: "The limitation prescribed by subdivision (a) shall not apply to local safety members of the Public Employees' Retirement System." (Stats. 1989, ch. 478, § 1, p. 1689.)

In 1992, David Haynes, a police officer for the City of Richmond (Richmond), was killed in the line of duty. Officer Haynes was a local safety member of PERS. His wife and children received the PERS special death benefit; they also received a death benefit under workers' compensation.

Richmond filed a test claim with the Commission on State Mandates (the Commission), contending chapter 478 created a state-mandated local cost.<sup>1</sup> Richmond sought reimbursement of the cost of the workers' compensation death benefit, estimated to be \$295,432. As part of its test claim, Richmond included legislative history of chapter 478, purporting to show a legislative intent to create a reimbursable state mandate.

The Commission denied the test claim. It found that chapter 478 dealt with workers' compensation benefits and case law held that workers' compensation laws are laws of general application and not subject to section 6 of article XIII B of

the California Constitution. It noted the legislative history containing analyses that chapter 478 was a state mandate had been prepared before the issuance of *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal.Rptr. 139, 785 P.2d 522].

Richmond filed a petition for a writ of administrative mandate under Code of Civil Procedure section 1094.5, seeking to compel the Commission to approve its claim. Both the Commission and the Department of Finance, as real parties in interest, responded. The court denied the petition, finding chapter 478 created an increased cost but not an increased level of service by local governments.

## Discussion

### I

(1) Under Government Code section 17559, a proceeding to set aside the Commission's decision on a claim may be commenced on the ground that the Commission's decision is not supported by substantial evidence. Where \*1195 the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, our review on appeal is generally the same. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304].) However, we independently review the superior court's legal conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810 [53 Cal.Rptr.2d 521].) The question of whether chapter 478 is a state-mandated program or higher level of service under article XIII B, section 6 of the California Constitution is a question of law we review de novo. (45 Cal.App.4th at p. 1810.)

With certain exceptions not relevant here, "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 program or increased level of service ...." (Cal. Const. art. XIII B, § 6, (hereafter referred to as section 6).)

In *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202], the Supreme Court considered whether laws increasing the amount employers, including local governments, had to pay in certain workers' compensation benefits were a reimbursable "higher level of service" under section 6. The court looked to the

intent of the voters in adopting the constitutional provision by initiative. (43 Cal.3d at p. 56.) Noting that the phrase "higher level of service" is meaningless alone, the court found it must be read in conjunction with the phrase "new program." The court concluded, "that the drafters and the electorate had in mind the commonly understood meanings of the term-programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*)

(2a) Richmond contends chapter 478 meets both tests to qualify as a program under section 6. Richmond contends increased death benefits are provided to generate a higher quality of local safety officers and thus provide the public with a higher level of service. Richmond argues that providing increased death benefits to local safety workers is analogous to providing protective clothing and equipment for fire fighters. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 [234 Cal.Rptr. 795], executive orders requiring updated protective clothing and equipment for firefighters were found to be reimbursable state mandates under section 6. The executive orders applied only to fire protection, a peculiarly governmental function. The court noted that police and fire \*1196 protection are two of the most essential and basic functions of local government. (190 Cal.App.3d at p. 537.) Richmond urges that since chapter 478 applies only to local safety members, it is also a state mandate directed to a peculiarly local governmental function.

In *Carmel Valley Fire Protection Dist. v. State of California*, *supra*, 190 Cal.App.3d 521, the executive order required updated equipment for the fighting of fires. The use of this equipment would result in more effective fire protection and thus would provide a higher level of service to the public. Here chapter 478 addresses death benefits, not the equipment used by local safety members. Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public. (*City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484 [235 Cal.Rptr. 101] [temporary increase in PERS benefit to retired employees which resulted in higher contribution rate by local government was not a program or service under section 6].) In *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, the increase in certain workers' compensation benefits resulted

in an increase in the cost to local governments of providing services. Nonetheless, the Supreme Court found no "higher level of service" under section 6. Similarly, a new requirement for mandatory unemployment insurance for local government employees, an increase in the cost of providing services, was not a "new program" or "higher level of service" in *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 66-70. Chapter 478 fails to meet the first test of a "program" under section 6.

Richmond urges chapter 478 meets the second test of a program under section 6 because it imposed a unique requirement on local governments that was not applicable to all residents and entities within the state. (*County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, 56.) Richmond argues that only local governments have "local safety members" and chapter 478 required double death benefits, both PERS and workers' compensation, for this specific group of employees. By requiring double death benefits for local safety members, chapter 478 imposed a unique requirement on local government.

The Commission takes a different view of chapter 478. First, it argues that chapter 478 addresses an aspect of workers' compensation law, which, under *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, is a law of general application to which section 6 does not apply. The Commission argues chapter 478 imposes no unique requirement; it merely \*1197 eliminates the previous exemption from providing workers' compensation death benefits to local safety members. As such, chapter 478 simply puts local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit. That chapter 478 affects only local government does not compel the conclusion that it imposes a unique requirement on local government. The Commission contends Richmond's view of chapter 478 is too narrow; the law must be considered in its broader context.

While Richmond's argument has surface appeal, we conclude the Commission's view is the correct one. Section 6 was designed to prevent the state from forcing programs on local government. (3a) "[T]he intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to 'force' programs on localities." (*County of*

*Los Angeles v. State of California*, *supra*, 43 Cal.3d at pp. 56-57.) "The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. [Citation.] Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear-neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*Id.* at p. 61.)

Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate. In *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, the Legislature enacted a statute requiring local governments to participate in the state's unemployment insurance system on behalf of their employees. Local entities made a claim for reimbursement. First, the Supreme Court found that like an increase in workers' compensation benefits, a requirement to provide unemployment insurance did not compel new or increased "service to the public" at the local level. (*Id.* at pp. 66-67.) The court next addressed whether the new law imposed a unique requirement on local governments.

"Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are \*1198 imposed on local governments 'unique[ly],' and not merely as an incident of compliance with general laws. State and local governments, and nonprofit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement 'new' to local agencies, but that requirement was not 'unique.' [¶] The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private

entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision." (*City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 68-69, italics in original.)

Richmond argues that Labor Code section 4707, prior to chapter 478, was not an exemption from workers' compensation, relying on *Jones v. Kaiser Industries Corp.* (1987) 43 Cal.3d 552 [237 Cal.Rptr. 568, 737 P.2d 771]. In *Jones*, the plaintiff, a city police officer, was killed in a traffic accident while on duty. His survivors brought suit against the city, contending it has created and maintained a dangerous condition at the intersection where the accident occurred. Plaintiffs argued their suit was not barred by the exclusivity provisions of workers' compensation because they did not receive a workers' compensation death benefit under Labor Code section 4707. The court rejected this argument. First, plaintiffs did receive a benefit under workers' compensation in the form of burial expenses. Further, Labor Code section 4707 was designed not to exclude plaintiffs from receiving workers' compensation benefits, but to assure they received the maximum benefit under either PERS or workers' compensation. (43 Cal.3d at p. 558.)

Under *Jones v. Kaiser Industries Corp.*, *supra*, 43 Cal.3d 552, one receiving a special death benefit under PERS rather than the workers' compensation death benefit is not considered exempt from workers' compensation for purposes of its exclusivity provisions, precluding a suit against the employer for negligence. This conclusion does not affect the analysis that chapter 478, by removing the offset provisions for employers of local safety members, merely makes local governments "indistinguishable in this respect from private employers." (*County of Los Angeles v. State of California*, *supra*, 43 Cal.3d at p. 58.)

(2b) Richmond's error is in viewing chapter 478 from the perspective of what the final result is, rather than from the perspective of what the law mandates. ( 3b) "We recognize that, as is made indisputably clear from \*1199 the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 [244 Cal.Rptr. 677, 750 P.2d 318].) ( 2c) While the result of chapter 478 is that local safety members of PERS now are eligible for two death benefits and local governments will have to fund the workers' compensation

benefit, chapter 478 does not mandate double death benefits. Instead, it merely eliminates the offset provisions of [Labor Code section 4707](#). In this regard, the law makes the workers' compensation death benefit requirements as applicable to local governments as they are to private employers. It imposes no "unique requirement" on local governments.

Further, the view that the Legislature was proceeding by stages in enacting chapter 478 finds support in the history of the nearly identical predecessor to chapter 478, Assembly Bill No. 1097 (1987-1988 Reg. Sess.). Assembly Bill No. 1097 was passed in 1988, but was vetoed by the Governor. While the final version of Assembly Bill No. 1097 was virtually identical to chapter 478 in adding subdivision (b) to [Labor Code section 4707](#) (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) as amended Mar. 22, 1988), the bill was very different when it began. The initial version of Assembly Bill No. 1097 repealed [Labor Code section 4707](#) in its entirety. (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) introduced Mar. 2, 1987.) The next version made [Labor Code section 4707](#) applicable only to state members of PERS. (Assem. Bill No. 1097 (1987-1988 Reg. Sess.) as amended June 15, 1987.) The final version left [Labor Code section 4707](#) applicable to all but local safety members of PERS.

## II

(4) As part of its test claim, Richmond included portions of the legislative history of chapter 478 to show the Legislature intended to create a state mandate. This history includes numerous bill analyses by legislative committees that state the bill creates a state-mandated local program.

[Government Code section 17575](#) requires the Legislative Counsel to determine if a bill mandates a new program or higher level of service under [section 6](#). If the Legislative Counsel determines the bill will mandate a new program or higher level of service under [section 6](#), the bill must contain a section specifying that reimbursement shall be made from the state mandate fund, that there is no mandate, or that the mandate is being disclaimed. ([Gov. Code, § 17579](#).) The Legislative Counsel found that chapter 478 imposed \*1200 a state-mandated local program. The enacted statute provided: "Notwithstanding [Section 17610 of the Government Code](#), 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. If the statewide cost of the claim for reimbursement does not exceed one

million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund." (Stats. 1989, ch. 478, § 2, p. 1689.)

One analysis concluded this language was technically deficient because it does not contain a specific acknowledgment that the bill is a state mandate. Reimbursement could not be made until the Commission held a hearing on a test claim. The analysis concluded it "should not be a serious problem because the information provided in this analysis could also be provided to the Commission on State Mandates if any local agency submits a claim for reimbursement to that Commission."

Another analysis suggested including an appropriation to avoid the necessity of the Commission having to determine that the bill was a mandate.

Richmond argues this legislative history shows the Legislature intended chapter 478 to be a state mandate and that it should be considered in making that determination. Amici curiae submitted a brief urging that case law holding that legislative history is irrelevant to the issue of whether there is a state-mandated new program or higher level of service under [section 6](#) is wrongly decided.<sup>2</sup> Amici curiae argue that the intent of the Legislature should control. They further note that the legislative history of chapter 478 shows that the initial opposition of the League of California Cities was dropped after the bill was amended to ensure reimbursement, and that the Governor signed the bill after he had vetoed a similar one that was not considered a state mandate. Amici curiae argue that to ignore the widespread understanding that the bill created a state mandate would undermine the legislative process.

In *County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th 805, plaintiff sought reimbursement for costs incurred under [Penal Code section 987.9](#) for providing certain services to indigent criminal defendants. Plaintiff argued the Legislature's initial appropriation of funds to cover the costs incurred under [Penal Code section 987.9](#) was a final and \*1201 unchallengeable determination that [section 987.9](#) constituted a state mandate. The court rejected this argument. "The findings of the Legislature as to whether [section 987.9](#) constitutes a state mandate are irrelevant." (32 Cal.App.4th at p. 818.)

The court, relying on *Kinlaw v. State of California* (1991) 54 Cal.3d 326 [285 Cal.Rptr. 66, 814 P.2d 1308], found

the Legislature had created a comprehensive and exclusive procedure for implementing and enforcing [section 6](#). (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th at pp. 818-819.) This procedure is set forth in [Government Code section 17500](#) et seq. “[T]he statutory scheme contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists, and the Commission properly determined that no state mandate existed.” (32 Cal.App.4th at p. 819.)

In *City of San Jose v. State of California*, *supra*, 45 Cal.App.4th 1802, 1817-1818, the court relied upon *County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th 805, in rejecting the argument that the determination by Legislative Counsel that a bill imposed a state mandate was entitled to deference.

Amici curiae contend these cases are wrong because they ignore the cardinal rules of statutory construction that courts must construe statutes to conform to the purpose and intent of lawmakers and that the intent of the Legislature should be ascertained to effectuate the purpose of the law.

Amici curiae are correct that “ ‘the objective of statutory interpretation is to ascertain and effectuate legislative intent.’ [Citation.]” (*Trope v. Katz* (1995) 11 Cal.4th 274, 280 [45 Cal.Rptr.2d 241, 902 P.2d 259].) Where such intent is not clear from the language of the statute, we may resort to extrinsic aids, including legislative history. (*People v. Coronado* (1995) 12 Cal.4th 145, 151 [48 Cal.Rptr.2d

77, 906 P.2d 1232].) Here, however, the issue is not the interpretation of [Labor Code section 4707](#). The parties agree it requires that the survivors of local safety members killed due to an industrial injury receive both the special death benefit under PERS and the workers' compensation death benefit. Rather, the issue is whether [section 6](#) requires reimbursement for the costs incurred by local governments under chapter 478. The Legislature has entrusted that determination to the Commission, subject to judicial review. ([Gov. Code, §§ 17500, 17559](#).) It has provided that the initial determination by Legislative Counsel is not binding on the Commission. (*Id.*, [§ 17575](#).) Indeed, the language of chapter 478 recognizes that the determination of whether the bill is a state mandate lies with **\*1202** the Commission. It reads, “if the Commission on State Mandates determines that this act contains costs mandated by the state, ...” (Stats. 1989, ch. 478, § 2, p. 1689, italics added.) While the legislative history of chapter 478 may evince the understanding or belief of the Legislature that chapter 478 created a state mandate, such understanding or belief is irrelevant to the issue of whether a state mandate exists. (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th 805, 819.)

### Disposition

The judgment is affirmed.

Puglia, P. J., and Nicholson, J., concurred.

Appellant's petition for review by the Supreme Court was denied August 19, 1998. **\*1203**

### Footnotes

- 1 " 'Test claim' means the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." ([Gov. Code, § 17521](#).)
- 2 The California State Association of Counties, and the Cities of Carlsbad, Cudahy, Montebello, Monterey, Redlands, San Luis Obispo and San Pablo filed an amici curiae brief in support of Richmond.



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [Citizens for Open Government v. City of Lodi](#), Cal.App. 3 Dist., March 28, 2012

50 Cal.3d 51, 785 P.2d 522, 266 Cal.Rptr. 139

CITY OF SACRAMENTO et  
al., Plaintiffs and Appellants,

v.

THE STATE OF CALIFORNIA et  
al., Defendants and Respondents

No. S006188.

Supreme Court of California

Jan 29, 1990.

**SUMMARY**

A city and a county filed claims with the State Board of Control seeking subvention of the costs imposed on them by Stats. 1978, ch. 2, which extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The board denied the claims, ruling that Stats. 1978, ch. 2, did not enact a state-mandated program for which reimbursement was required under Cal. Const., art. XIII B. On mandamus the trial court overruled the board and found the cost reimbursable, and the Court of Appeal affirmed. On remand, the board determined the amounts due on the claims originally submitted; however, the Legislature failed to appropriate the necessary funds for disbursement. The city then commenced a class action against the state on behalf of all local governments in the state. The complaint sought injunctive and declaratory relief barring enforcement of Stats. 1978, ch. 2, in the absence of state subvention; a writ of mandate directing that past, current, and/or future subvention funds be appropriated and disbursed, and/or that the Employment Development Department pay local agencies' past, current, and future unemployment insurance contributions from its own budget; and damages for past failures to reimburse. The trial court granted summary judgment for the state. (Superior Court of Sacramento County, No. 331607, Darrel W. Lewis, Judge.) The Court of Appeal, Third Dist., No. C002265, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing unemployment insurance

coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. However, the court held, Stats. 1978, ch. 2, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restraining local \*52 taxation; thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. (Opinion by Eagleson, J., with Lucas, C. J., Mosk, Broussard, Panelli and Kennard, JJ., concurring. Separate concurring and dissenting opinion by Kaufman, J., concurring in the judgment.)

**HEADNOTES****Classified to California Digest of Official Reports**

(1)

Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Exemptions for Federally Mandated Costs.

To the extent that a "federally mandated" cost is exempt from prior statutory limits on local taxation, Cal. Const., art. XIII A, restricting the assessment and taxing powers of state and local governments, eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling.

(2)

State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Exhaustion of Remedies.

A class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, was not barred by any failure of plaintiffs to exhaust their remedies. The city and a county had filed timely claims for reimbursement of expenses incurred, to comply with Stats. 1978, ch. 2. When the State Board of Control initially denied the claims, the city and the county pursued judicial remedies, culminating in a Court of Appeal opinion concluding that reimbursement was required.

The board then upheld the claims. Insofar as the Legislature thereafter declined to appropriate the necessary funds for disbursement, the city and the county were authorized to bring an enforcement action.

(3a, 3b)

State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Remedies Available.

Cal. Const., art. XIII, § 32, precluding any suit to enjoin or impede collection of a tax, did not bar a class action brought by a city \*53 on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B. The state contended that the only remedy open to the city was to pay its unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. However, the city was not challenging, directly or indirectly, the validity or application of the unemployment insurance law as such, or the propriety of any "tax" assessed thereunder; rather, it claimed that all its costs of affording unemployment compensation to its employees were subject to a statutory and constitutional subvention that the state refused to make. For the same reasons, the city's claim for reimbursement for past expenses was not barred.

(4)

Constitutional Law § 40--Distribution of Governmental Powers--Between Branches of Government--Judicial Power. Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds.

[See [Am.Jur.2d, Constitutional Law, § 316.](#)]

(5a, 5b, 5c)

Judgments § 81--Res Judicata--Collateral Estoppel-- Public-interest Exception--Reimbursement to Local Governments for Unemployment Insurance Costs.

In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include

state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, the state was not collaterally estopped from litigating the reimbursement issue. The city and a county had previously brought an action against the state, culminating in a Court of Appeal opinion concluding that reimbursement was required. The Legislature then declined to appropriate the necessary funds for disbursement. Even if the formal prerequisites for collateral estoppel were present, the public-interest exception to that doctrine governed, since strict application of the doctrine would foreclose any reexamination of the earlier holding, and the consequences of any error transcended those that would apply to mere private parties. \*54

(6)

Judgments § 81--Res Judicata--Collateral Estoppel-- Questions of Law.

Generally, collateral estoppel bars a party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. However, when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed.

(7)

State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Summary Judgment--Effect of Failure of Moving Party to Challenge Prior Summary Adjudication of Issues.

In a class action by a city, on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, the trial court did not lack the power to grant summary judgment for the state on the authority of a newly decided California Supreme Court case. The trial court had previously granted the city's motion for summary adjudication of issues, and the state had failed to seek timely mandamus review of that prior, contrary order. However, failure to challenge a summary adjudication order by the discretionary avenue of writ review cannot foreclose

a party from asserting subsequent changes in law that render such a pretrial order incorrect.

(8)

Judgments § 68--Res Judicata--Identity of Parties--Class Action--Where Prior Action Involved Individual Claims.

In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, res judicata did not preclude examination of an earlier Court of Appeal opinion, in an action by the city and a county, concluding that reimbursement was required. The issues presented in the current action were not limited to the validity of any finally adjudicated individual claims; rather, they encompassed the question of the state's subvention obligations in general under Stats. 1978, ch. 2.

(9a, 9b)

State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Programs--Unemployment Insurance \*55 Costs.

In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state was required under Cal. Const., art. XIII B, the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing such coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. The phrase, "To force programs on local governments," in the voters' pamphlet relating to Cal. Const., art. XIII B, § 6, confirmed that the intent underlying that section was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.

[See Cal.Jur.3d, State of California, § 78.]

(10)

State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Programs.

The concepts of reimbursable state-mandated costs in Cal. Const., art. XIII B, requiring that the state reimburse local governments for the costs of state-mandated new programs or higher levels of service, and Rev. & Tax. Code, former §§ 2207, 2231, are identical.

(11a, 11b, 11c)

State of California § 11--Fiscal Matters-- Reimbursement to Local Governments--Federally Mandated Programs--Unemployment Insurance Costs.

Stats. 1978, ch. 2, extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restricting local taxation; thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. In enacting Stats. 1978, ch. 2, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses; the alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal \*56 standards. (Disapproving, insofar as it is inconsistent with this analysis, the decision in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258].)

(12)

Constitutional Law § 11--Construction of Constitutions--Liberality and Flexibility.

Constitutional enactments must receive a liberal, practical commonsense construction that will meet changed conditions and the growing needs of the people. While a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.

(13)

State of California § 11--Fiscal Matters--Reimbursement to Local Governments--Federally Mandated Programs.



In determining whether a program is federally mandated, to exempt its cost from a local government's statutory taxation limit ([Rev. & Tax. Code, § 2271](#)), and to exclude any appropriation required to comply with the mandate from the constitutional spending limit of the affected entity ([Cal. Const., art. XIII B, § 9, subd. \(b\)](#)), the result will depend on the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. The courts and the Commission on State Mandates must respect the governing principle of [Cal. Const., art. XIII B, § 9, subd. \(b\)](#): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

#### COUNSEL

James P. Jackson, City Attorney, and William P. Carnazzo, Deputy City Attorney, for Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Paul H. Dobson, Richard M. Frank, Floyd D. Shimomura and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

De Witt W. Clinton, County Counsel (Los Angeles), Amanda F. Susskind, Deputy County Counsel, Kitt Berman, Ross & Scott and William D. Ross as Amici Curiae on behalf of Defendants and Respondents.

#### EAGLESON, J.

In response to changes in federal law, chapter 2 of the Statutes of 1978 (hereafter chapter 2/78) extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. Here we consider whether, in chapter 2/78, the state "mandate[d] a new program or higher level of service" on the local agencies, and must therefore reimburse local compliance costs under article XIII B of the California Constitution and related statutes.

We conclude that the state is *not* required to reimburse the chapter 2/78 expenses of local governments. The obligations imposed by chapter 2/78 fail to meet the "program" and "service" standards for mandatory subvention we recently set forth in [County of Los Angeles v. State of California \(1987\) 43 Cal.3d 46 \[233 Cal.Rptr. 38, 729 P.2d 202\]](#) (hereafter *County of Los Angeles*). Chapter 2/78 imposes no "unique" obligation on local governments, nor does it require them to provide new

or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, must therefore be reversed.

However, our holding does not leave local agencies powerless to counter the fiscal pressures created by chapter 2/78. Though provisions of the Revenue and Taxation Code limit local property tax levies, and article XIII B itself places spending limits on both state and local governments, "costs mandated by the federal government" are expressly excluded from these ceilings. Chapter 2/78 imposes such "federally mandated" costs, because it was adopted by the state under federal coercion tantamount to compulsion. Hence, subject to overriding limitations on taxation rates (see, e.g., [Cal. Const., art. XIII A](#)), both state and local governments may levy and spend for their chapter 2/78 coverage obligations without reduction of the fiscal limits applicable to other needs and services.

#### I. Facts.

In 1972, and again in 1973, the Legislature enacted comprehensive schemes for local property tax relief. Though frequently amended thereafter, these statutes retained three principal features. First, they placed a limit on the local property tax rate. Second, they required the *state* to reimburse local governments for their costs resulting from state laws "which mandate ... new program[s] or ... increased level[s] of service" at the local level. Finally, they allowed local governments to exceed their property taxation limits to fund certain other nondiscretionary expenses, including "costs mandated by the federal government." (Stats. 1972, ch. 1406, § 14.7, pp. \*58 2961-2967; Stats. 1973, ch. 358, § 3, pp. 783-790; [Rev. & Tax. Code, §§ 2206, 2260 et seq., 2271](#); former §§ 2164.3, 2165, 2167, 2169, 2207, 2231; [Gov. Code, § 17500 et seq.](#))

Since adoption of the Social Security Act in 1935, federal law has provided powerful incentives to enactment of unemployment insurance protection by the individual states. In current form, the Federal Unemployment Tax Act (hereafter FUTA) ([26 U.S.C. § 3301 et seq.](#)) assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year **1990**. ([26 U.S.C. §§ 3301\(1\), 3306.](#)) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax (currently computed at 6 percent for this purpose). (*Id.*, §§ 3302-3304.) A "certified" state program

also qualifies for federal administrative funds. (42 U.S.C. §§ 501-503.)

California enacted its unemployment insurance system “on the eve of the adoption of the Social Security Act” in 1935 (*Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 587-588 [81 L.Ed. 1279, 1291-1292, 57 S.Ct. 883, 109 A.L.R. 1293]; see Stats. 1935, ch. 352, § 1 et seq., p. 1226 et seq.) and has sought to maintain federal compliance ever since. Every other state has also adopted an unemployment insurance plan in response to the federal stimulus.

In 1976, Congress enacted [Public Law number 94-566](#) (hereafter [Public Law 94-566](#)). Insofar as pertinent here, [Public Law 94-566](#) amended FUTA to require for the first time that a “certified” state plan include coverage of the employees of public agencies. (Pub.L. No. 94-566 (Oct. 20, 1976) § 115(a), 90 Stat. 2670; 26 U.S.C. §§ 3304(a)(6) (A), 3309(a); see 26 U.S.C. § 3306(c)(7).) States which did not alter their unemployment compensation laws accordingly faced loss of the federal tax credit and administrative subsidy.

The Legislature thereafter adopted chapter 2/78 to conform California's system to [Public Law 94-566](#). Among other things, chapter 2/78 effectively requires the state and all local governments, beginning January 1, 1978, to participate in the state unemployment insurance system on behalf of their employees. (Stats. 1978, ch. 2, §§ 12, 24, 31, 36.5, 58-61, pp. 12-14, 16, 18, 24-27; [Unemp. Ins. Code, §§ 135](#), subd. (a), 605, 634.5, 802-804.)

In November 1979, the voters adopted Proposition 4, adding article XIII B to the state Constitution. (1) (See **fn. 1**.) Article XIII B - the so-called “Gann limit” - restricts the amounts state and local governments may \*59 appropriate and spend each year from the “proceeds of taxes.” (§§ 1, 3, 8, subds. (a)-(c).)<sup>1</sup> In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, “the Legislature or any state agency mandates a new program or higher level of service on any local government, ...” (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any “[a]ppropriations required for purposes of complying with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably

make the providing of existing services more costly.” (§ 9, subd. (b) [hereafter [section 9\(b\)](#)], italics added.)

The City of Sacramento (City) and the County of Los Angeles (County) filed claims with the State Board of Control (Board) (see Rev. & Tax. Code, former § 2250 et seq.; see now [Gov. Code, § 17550](#) et seq.) seeking state subvention of the costs imposed on them by chapter 2/78 during 1978 and portions of 1979. The Board denied the claims, ruling that chapter 2/78 was an enactment required by federal law and thus was not a reimbursable state mandate. On mandamus ([Code Civ. Proc., § 1094.5](#); Rev. & Tax. Code, former § 2253.5; see now [Gov. Code, § 17559](#)), the Sacramento Superior Court overruled the Board and found the costs reimbursable. The court ordered the Board to determine the amounts of the City's and the County's individual claims, and also to adopt “parameters and guidelines” to be applied in determining “these ... and other claims” arising under chapter 2/78. (Rev. & Tax. Code, former § 2253.2; see now [Gov. Code, §§ 17555, 17557](#).)<sup>2</sup>

In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258] (hereafter *Sacramento I*), the Court of Appeal affirmed. Among other things, the court concluded (pp. 194-199) that chapter 2/78 \*60 imposed state-mandated costs reimbursable under [section 6 of article XIII B](#), since the potential loss of federal funds and tax credits did not render [Public Law 94-566](#) so coercive as to constitute a “[mandate] ... of the federal government” under [section 9\(b\)](#). (Italics added.) We denied hearing.

On remand, the Board determined the amounts due on the claims originally submitted by the City and the County. As required by the judgment, the Board also adopted “parameters and guidelines” for reimbursement of chapter 2/78 costs to all affected local agencies. However, during the 1984 session of the Legislature, no bills were introduced for reimbursement of pre-1984 costs, and bills to fund costs in and after 1984 failed passage.

From and after the decision in *Sacramento I*, the City paid “under protest” its quarterly billings from the Employment Development Department (EDD) for unemployment compensation. Each payment included a claim for refund of unemployment taxes pursuant to [Unemployment Insurance Code section 1176](#) et seq. EDD responded to the refund claims by referring the City to its statutory subvention remedies.

Accordingly, in July 1985, the City began returning its quarterly billings unpaid. It thereupon commenced the instant class action in Sacramento Superior Court on behalf of all local governments in the state. Named as defendants were the State of California, the Governor, EDD, the state Controller and Treasurer, and the Legislature. The complaint sought (1) injunctive and declaratory relief barring enforcement of chapter 2/78 in the absence of state subvention; (2) a writ of mandate directing that past, current, and future subvention funds be appropriated and disbursed, and/or that EDD pay local agencies' past, current, and future unemployment-insurance contributions from its own budget; and (3) damages for past failures to reimburse.

Shortly after this suit was filed, the Legislature appropriated some chapter 2/78 funds for fiscal year 1984-1985 (Stats. 1985, ch. 1217, §§ 12, 17, subd. (b), pp. 4148, 4150), and it subsequently authorized limited funds in the 1986 Budget Act (Stats. 1986, ch. 186, § 2.00, p. 1006). On defendants' demurrer, the trial court later dismissed plaintiffs' claims for reimbursement for these post-1984 periods.<sup>3</sup> Thereafter, the trial court certified the suit as a class action and granted plaintiffs' motion for summary adjudication of issues based on *Sacramento I*. \*61

While the case remained pending at the trial level, we decided *County of Los Angeles*. There we held that article XIII B, and earlier subvention statutes, requires state reimbursement *only* when the state compels local governments to provide new or upgraded “programs that carry out the governmental function of providing *services to the public*, or ..., to implement a state policy, [the state] impose[s] *unique* requirements on local governments [that] do not apply generally to all residents and entities in the *state*.” (43 Cal.3d at p. 56, italics added.)

Defendants in this case thereupon moved for summary judgment, urging that extension of unemployment insurance coverage to public employees satisfied neither reimbursement standard set forth in *County of Los Angeles*. The trial court agreed and awarded summary judgment.

The Court of Appeal reversed on two independent grounds. First, the court ruled that defendants were collaterally estopped by *Sacramento I* to relitigate the reimbursability of chapter 2/78 costs. Second, the court found that chapter 2/78 imposed “unique requirements” on local governments, within the meaning of *County of Los Angeles*, since the legislation was aimed solely at local agencies and subjected them to obligations from which they were previously exempt.

## II. Jurisdiction; Plaintiffs' Exhaustion of Remedies.

(2) After we granted review, we asked the parties and amici curiae<sup>4</sup> to brief whether the current suit is jurisdictionally barred by any failure of plaintiffs to exhaust their remedies (see *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-295 [109 P.2d 942, 132 A.L.R. 715]), or for any other reason. If so, the summary judgment for defendants against all plaintiffs was proper notwithstanding the merits of the subvention claim. In that event, the judgment of the Court of Appeal must be reversed without consideration of the substantive issues raised by the appeal.

However, we find no failure to exhaust which would bar us from reaching the merits. Defendants concede plaintiffs exhausted all administrative remedies provided by the statutes governing subvention of state-mandated costs. The concession appears correct, at least as to the City and the County. These two agencies filed timely claims for reimbursement of expenses incurred to comply with chapter 2/78. When the Board initially denied the claims, the City and the County pursued judicial remedies culminating in \*62 *Sacramento I*. By direction of the judgment in *Sacramento I*, the Board ultimately upheld the City's and County's 1979 claims, determined their amount, and adopted “parameters and guidelines” for statewide reimbursement that were later included in the Board's government-claims report to the Legislature. (Rev. & Tax. Code, former §§ 2253.2, 2255, subd. (a).)

These procedures exhausted the City's and the County's administrative and judicial avenues, short of this suit, to obtain redress on the claims adjudicated in *Sacramento I*. Insofar as the Legislature thereafter declined to appropriate the necessary funds for disbursement by the Controller, the City and the County were authorized to bring an enforcement action. (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b); *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 72 [222 Cal.Rptr. 750]; see *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 548-549 [234 Cal.Rptr. 795].)<sup>5</sup>

(3a) Defendants urge, however, that plaintiffs essentially are seeking resolution of a “tax” question - the validity *vel non* of their unemployment tax contributions - but have failed to satisfy the special procedures applicable to such cases. Defendants insist that because article XIII, section 32, of the California Constitution broadly precludes any suit to

enjoin or impede collection of a tax (e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 838-841 [258 Cal.Rptr. 161, 771 P.2d 1247]; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 [242 Cal.Rptr. 334, 745 P.2d 1360]; *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 279-284 [165 Cal.Rptr. 122, 611 P.2d 463]), plaintiffs' claims for declaratory and injunctive relief are barred.

The only remedy constitutionally open to plaintiffs, defendants assert, is to pay their unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. (*Unemp. Ins. Code*, §§ 1176 et seq., 1241, subd. (a).) Insofar as plaintiffs' complaint *does* seek reimbursement for past contributions, defendants suggest, plaintiffs have not correctly pursued the Unemployment Insurance Code procedures.

We question, but do not decide, whether a *public entity's* contributions to the state unemployment insurance system can ever constitute a "tax" subject \*63 to [article XIII, section 32](#). Even if so, defendants' claim lacks merit under the circumstances presented here.

"The policy behind [[article XIII, section 32](#)] is to allow revenue collection to continue during [tax] litigation so that essential public services dependent on the funds are not unnecessarily disrupted. [Citation.] ...." (*Pacific Gas & Electric Co.*, *supra*, 27 Cal.3d at p. 283.) The administrative "refund" procedures established by the unemployment insurance law are designed to ensure initial examination of unemployment tax disputes by the agency with specific expertise in that area.

However, plaintiffs attempt no challenge, direct or indirect, to the validity or application of the unemployment insurance law as such, or to the propriety of any "tax" assessed thereunder. Nor have plaintiffs bypassed the agency or procedures established to decide such disputes.

Rather, plaintiffs claim that *all* their costs of affording unemployment compensation to their employees are subject to a statutory and constitutional *subvention* which the state refuses to make. It is incidental that these costs happen to include what might be characterized as a "tax." As the subvention statutes require, plaintiffs City and County have pursued all available remedies before the agency (formerly the Board, now the Commission) created to decide *subvention*

issues; that agency has upheld their submitted claims in full, but the necessary appropriations have been withheld.

Under these circumstances, the Legislature has concluded that a local entity should be forced to continue incurring the unfunded costs subject to "refund." Rather, the entity is expressly authorized to bring suit to declare such an unfunded mandate *unenforceable*. (*Rev. & Tax. Code*, former § 2255, subd. (c); *Gov. Code*, § 17612, subd. (b).)<sup>6</sup>

The importance of such a remedy stems from the fundamental legislative prerogative to control appropriations. (4) Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds. (*Mandel v. Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935].) Since the Legislature will have demonstrated its refusal to fund a particular mandate by the time a mandamus action is filed, the literal "tax refund" process urged by defendants may often be meaningless.

(3b) Insofar as plaintiffs also seek reimbursement for past expenses, similar considerations dictate that the governing statutes are those created \*64 to resolve subvention problems rather than garden-variety disputes over the unemployment insurance tax.<sup>7</sup> We find nothing in the language, history, or purpose of [article XIII, section 32](#), or of the unemployment insurance law, which bars the instant complaint. We therefore have jurisdiction to decide whether chapter 2/78 constitutes a reimbursable mandate.

### III. Collateral Estoppel; Res Judicata.

(5a) However, *plaintiffs* claim that because *Sacramento I* "finally" decided whether chapter 2/78 constitutes a reimbursable state mandate, the *state* and its agents are collaterally estopped from relitigating the issue here. The Court of Appeal agreed that the doctrine of collateral estoppel applies. Under the circumstances, we are not persuaded.

(6) Generally, collateral estoppel bars the party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874 [151 Cal.Rptr. 285, 587 P.2d 1098].) "... But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.] ...." (*Consumers Lobby Against Monopolies v.*

*Public Utilities Com.* (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)

(5b) Even if the formal prerequisites for collateral estoppel are present here, the public-interest exception governs. Whether chapter 2/78 costs are reimbursable under [article XIII B](#) and parallel statutes constitutes a pure question of law. The *state* was the losing party in *Sacramento I*, and also the only entity legally affected by that decision. Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.

Yet the consequences of any error transcend those which would apply to mere private parties. If the result of *Sacramento I* is wrong but unimpeachable, taxpayers statewide will suffer unjustly the consequences of the state's continuing obligation to fund the chapter 2/78 costs of local agencies. On the other hand, if the state fails to appropriate the funds to meet this \*65 obligation, and chapter 2/78 therefore cannot be enforced (Rev. & Tax. Code, former § 2255, subd. (c); [Gov. Code, § 17612](#), subd. (b)), the resulting failure to comply with federal law could cost California employers millions.<sup>8</sup> (7) (See **fn. 9.**), (5c) Under these circumstances, neither stare decisis nor collateral estoppel can permanently foreclose our ability to examine the reimbursability of chapter 2/78 costs.<sup>9</sup>

(8) As below, plaintiffs also argue that reconsideration of *Sacramento I* is precluded by res judicata. They suggest that the prior litigation resolved not only the *legal issues* presented by this appeal, but all *claims* among the current parties as well.

Of course, res judicata and the rule of final judgments bar us from disturbing individual claims or causes of action, on behalf of specific agencies, which have been finally adjudicated and are no longer subject to review. ([Code Civ. Proc., § 1908](#) et seq.; *Slater, supra*, 15 Cal.3d at p. 796; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810 [122 P.2d 892].) However, the issues presented in the current action are not limited to the validity of any such finally adjudicated individual claims. Rather, they encompass the question of defendants' subvention obligations *in general* under chapter 2/78. We therefore conclude that defendants may contend in this lawsuit that chapter 2/78 is not a reimbursable state mandate.<sup>10</sup> We turn to the merits of that issue. \*66

#### IV. “New Program” or “Increased Service”?

(9a) As before, defendants urge that by extending unemployment insurance coverage to local government employees, the Legislature did not mandate a “new program” or an “increased” or “higher level of service” on local governments. Thus, they assert, the local costs of providing such coverage are not subject to subvention under [article XIII B, section 6](#), or parallel statutes. (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); [Gov. Code, §§ 17514, 17561](#), subd. (a).) The trial court granted summary judgment for defendants on this basis. Contrary to the conclusions reached by the Court of Appeal, the trial court's ruling was correct.

Our analysis is controlled by our decision in *County of Los Angeles*. There we determined that a general increase in workers' compensation benefits did not, when applied to local governments, constitute a reimbursable state mandate under [article XIII B](#).

In so holding, we focused on the particular language of [article XIII B, section 6](#), which requires state subvention of a local government's costs of any “new program” or “increased level of service” imposed upon it by the state. We dismissed the notion that, by employing the quoted phrases, the voters intended *all* local costs resulting from compliance with state law to be subject to mandatory reimbursement. Rather, we explained, “[t]he concern which prompted the inclusion of [section 6](#) in [article XIII B](#) 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. ...” (43 Cal.3d at p. 56.)

Under these circumstances, we reasoned, the electorate must have intended the undefined terms “new program” and “increased level of service” to carry their “commonly understood meanings ... - programs that carry out the governmental function of providing *services to the public*, or laws which, to implement a state policy, impose *unique requirements* on local governments and do not apply generally to all residents and entities in the *state*.” (43 Cal.3d at p. 56, italics added.)

Local governments' costs of complying with a general statewide increase in the level of workers' compensation benefits do not qualify under these standards, we concluded. As we noted, “... [w]orkers' compensation is not a program administered by local agencies to provide service to the public. (10) (See **fn. 11.**) Although local agencies

must provide benefits to \*67 their employees ..., they are indistinguishable in this respect from private employers. ..." (43 Cal.3d at p. 58.)<sup>11</sup>

(9b) Similar considerations apply here. By requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased "service to the public" at the local level. Nor has it imposed a state policy "unique[ly]" on local governments. Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies "indistinguishable in this respect from private employers."

Plaintiffs nonetheless suggest there are several bases for reaching a different result here than in *County of Los Angeles*. None of the asserted distinctions has merit.

Plaintiffs first note the proponents' declaration in the voters' pamphlet that the purpose of [article XIII B, section 6](#), was to prevent the state from "forcing" unfunded programs on local agencies. Plaintiffs invoke this pamphlet language for the proposition that any new cost "forced" on local governments by state law is subject to subvention.

The claim is directly contrary to our holding in *County of Los Angeles*. As we explained, "[i]n ... context, the [pamphlet] phrase 'to force programs on local governments' confirms that the intent underlying [section 6 \[of article XIII B\]](#) was to require reimbursement to local agencies for the costs involved in carrying out *functions peculiar to government*, not for expenses incurred by local agencies as an *incidental impact* of laws that apply generally to all state residents and entities. ... [¶] The language of [section 6](#) is far too vague to support an inference that ... each time the Legislature \*68 passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. ..." (43 Cal.3d at pp. 56-57, italics added.)<sup>12</sup>

Plaintiffs next urge the Court of Appeal's premise - that chapter 2/78 did impose a "unique" requirement on local agencies within the meaning of *County of Los Angeles*, since it applied only to them, and compelled costs to which they were not previously subject. Plaintiffs cite our recent decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318]. There we held, inter alia,

that by requiring each local school district to contribute part of the expense of educating its handicapped students in state-run schools - a cost previously absorbed entirely by the state - the Legislature created a "new program" subject to subvention under [article XIII B, section 6](#). As we observed, "although the schools for the handicapped have been operated by the state for many years, the program was *new insofar as [the local districts] are concerned ...*" (P. 835, italics added.)

*Lucia Mar* is inapposite here. The education of handicapped students was clearly a traditional governmental "service to the public," and it qualified as a "program" on that basis. This function had long been performed by the state, and the only issue was whether the belated shifting of the program's costs to local governments made it "new" for subvention purposes. A negative answer to that question would have undermined a central purpose of [article XIII B, section 6](#) - to prevent the state's transfer of the *cost of government* from *itself* to the local level.

Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are imposed on local governments "unique[ly]," and not merely as an incident of compliance with general laws. State and local governments, and non-profit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement "new" to local agencies, but that requirement was not "unique." \*69

The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision.

Next, plaintiffs complain that the new costs imposed on local governments by chapter 2/78 are too great to be deemed "incidental" within the meaning of *County of Los Angeles*. However, our decision did not use the word "incidental" to mean merely "insignificant in amount." Rather, we declared that the state need not reimburse local governments for expenses *incidentally imposed* upon them by laws of general

application. In *County of Los Angeles*, we assumed that the expenses imposed *in common* on the private and public sectors by such a general law - as by the across-the-board increase in workers' compensation benefits there at issue - might be substantial. Notwithstanding this possibility, we found the voters did not intend to require a state subsidy of the public sector in such cases. (43 Cal.3d at pp. 56-58.)

Finally, plaintiffs and their amici curiae urge us to overrule *County of Los Angeles*. They insist that our “program” and “unique requirement” limitations conflict with the language and purpose of [article XIII B](#). First, they note that *nonreimbursable* state-mandated costs are expressly listed in subdivisions (a) through (c) of [article XIII B, section 6](#).<sup>13</sup> Under the maxim *inclusio unius est exclusio alterius*, they reason, further exceptions may not be implied. Second, they assert, our limiting construction allows the state to “force” many costly but unfunded requirements on local governments, which the latter must absorb without relief from their own [article XIII B](#) spending limits. This, they aver, cannot have been the voters' intent.

These arguments misapprehend both the language of [article XIII B, section 6](#), and our *County of Los Angeles* holding. Our reasoning in that case is not inconsistent with subdivisions (a) through (c) of [section 6](#). Those paragraphs simply exclude certain state-imposed costs *even if they would otherwise be reimbursable under the “new program” or “increased service” \*70 standards*. Subdivisions (a) through (c) do not purport to define what constitutes a “new program” or “increased level of service.”

Moreover, the “program” and “service” standards developed in *County of Los Angeles* create no undue risk that the state will impose expensive unfunded obligations against local agencies' [article XIII B](#) spending limits. On the contrary, our standards require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly “governmental” cost which they were not previously required to absorb.

On the other hand, as we explained in *County of Los Angeles*, extension of the subvention requirements to costs “incidentally” imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it would subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation would, in turn, cut into the *state's*

[article XIII B](#) spending limit. (§ 8, subd. (a).) We concluded that nothing in the language, history, or apparent purpose of [article XIII B](#) suggested such far-reaching limitations on legitimate state power. (43 Cal.3d at pp. 56-58.)

We remain persuaded by this reasoning.<sup>14</sup> We decline to overrule *County of Los Angeles*. Under the teaching of that case, we hold that chapter 2/78 imposes no local costs which must be reimbursed pursuant to [article XIII B, section 6](#), and parallel statutes.

#### V. “Federal” Mandate?

(11a) This case proceeded through the Court of Appeal solely on the issue whether chapter 2/78 constitutes a reimbursable “state mandate,” as defined in *County of Los Angeles*. After we granted review, and in the public interest, we also decided to reexamine a related holding contained in *Sacramento I* - that chapter 2/78 does not qualify as a “federal” mandate.

Proper application of the “federal mandate” concept has important implications beyond subvention. A “cost mandated by the federal government” is exempt from a local government's statutory taxation limit. (*Rev. & Tax. Code, § 2271*.) Moreover, an appropriation required to comply with a \*71 federal mandate is excluded from the constitutional spending limit of any affected entity, state or local (*Cal. Const., art. XIII B, § 9 (b)*). Accordingly, we requested supplemental briefs on this question.<sup>15</sup>

After due consideration, we reject *Sacramento I's* premise. We conclude that chapter 2/78 does impose “costs mandated by the federal government,” as described in [article XIII B](#) and parallel statutes.<sup>16</sup>

[Article XIII B, section 9\(b\)](#), defines federally mandated appropriations as those “required for purposes of complying with mandates of ... the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly*.” (Italics added.)

As in *Sacramento I*, plaintiffs argue that the words “without discretion” and “unavoidably” require clear *legal* compulsion not present in [Public Law 94-566](#). Defendants respond, as before, that the consequences of California's failure to comply with the federal “carrot and stick” scheme were so substantial that the state had no realistic “discretion” to refuse.<sup>17</sup> In

*Sacramento I*, the Court of Appeal adopted plaintiffs' narrow view. On reflection, we disagree.

Though [section 9\(b\)](#) seems plain on its face, we find a latent ambiguity in context. At the time [article XIII B](#) was adopted, United States Supreme Court decisions construing the Tenth Amendment *severely limited* federal power to dictate policy or programs to the sovereign states or their subdivisions.<sup>18</sup> Indeed, by its early ruling that federal unemployment insurance [\\*72](#) laws did not violate state sovereignty insofar as they merely employed a “carrot and stick” to induce state compliance ( *Steward Machine Co. v. Davis*, [supra](#), 301 U.S. 548, 585-593 [81 L.Ed. 1279, 1290-1294]), the high court helped set the stage for two generations of pervasive federal regulation by this indirect means.<sup>19</sup>

Just three years before [article XIII B](#) was adopted, the court struck down, on Tenth Amendment grounds, Congress's effort to extend the minimum-wage and maximum-hour requirements of the Fair Labor Standards Act directly to local government employees. (*National League of Cities v. Usery* (1976) 426 U.S. 833 [49 L.Ed.2d 245, 96 S.Ct. 2465].) Overruling earlier authority (see *Maryland v. Wirtz* (1968) 392 U.S. 183 [20 L.Ed.2d 1020, 88 S.Ct. 2017]), the court held in *Usery*, [supra](#), that constitutional principles of federalism prohibit Congress from using its otherwise “plenary” commerce power against the “States as States,” so as to interfere with the essential “attributes of [state government] sovereignty.” (426 U.S. at pp. 840-855 [49 L.Ed.2d at pp. 250-260].) Accordingly, said the court, Congress could not “force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. ...” (*Id.*, at p. 855 [49 L.Ed.2d at p. 259].)

*Usery* dealt with federal efforts to regulate sovereign units of government as employers. However, the court's rationale obviously applied with equal or greater force to direct federal regulation of state and local governments *as governments*. Under *Usery's* reasoning, it seems manifest that Congress's direct power to require or prohibit substantive governmental policies or programs by state or local agencies was greatly curtailed. Such power would interfere impermissibly with “integral governmental functions” and essential “attributes of [state] sovereignty.”<sup>20</sup> [\\*73](#)

After [article XIII B's](#) adoption, both the result and the reasoning of *Usery* were overruled in *Garcia v. San Antonio*

*Metro. Transit Auth.* (1985) 469 U.S. 528 [83 L.Ed.2d 1016, 105 S.Ct. 1005]. In *Garcia*, a five-justice majority concluded that the political structure of the federal system, rather than rigid categories of inviolable state “sovereignty,” constitutes state and local governments' primary protection against Congress's overreaching efforts to regulate them. ( Pp. 547-555 [83 L.Ed.2d at pp. 1031-1037].)

However, this later development does not alter two crucial facts extant when [article XIII B](#) was enacted. First, the power of the federal government to impose its direct regulatory will on state and local agencies was *then* sharply in doubt. Second, in conformity with this principle, the vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct compulsion.<sup>21</sup> That remains so to this day.

Thus, if [article XIII B's](#) reference to “federal mandates” were limited to strict legal compulsion by the federal government, it would have been largely superfluous.<sup>22</sup> (12) It is well settled that “constitutional ... enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. [Citations.] ....” (*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].) While “[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words[,] [citation] [, t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]” (*Ibid.*)

(11b) As the drafters and adopters of [article XIII B](#) must have understood, certain regulatory standards imposed by the federal government [\\*74](#) under “cooperative federalism” schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally “certified” unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and [article XIII B](#) were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double



taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.

Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of [article XIII B](#) intended to force the state to such draconian ends.

Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of [article XIII B](#).<sup>23</sup> \*75

Unlike the *Sacramento I* court, we deem significant the Legislature's persistent agreement with our construction. In 1980, after the adoption of [article XIII B](#), it amended the statutory definition of "costs mandated by the federal government" to provide that these include "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties or loss of funds to public or private persons* in the state. ..." (*Rev. & Tax. Code*, § 2206, italics added; *Stats.* 1980, ch. 1256, § 3, p. 4247.)

In *Sacramento I*, the Court of Appeal declined to apply this statutory amendment "retroactively" to [article XIII B](#). (156 *Cal.App.3d* at pp. 197-198.) The Legislature immediately responded. In 1984 statutes enacted for the express purpose of "implement[ing]" [article XIII B](#) (see *Gov. Code*, § 17500), the Legislature reiterated its 1980 definition. (*Id.*, § 17513; *Stats.* 1984, ch. 1459, § 1, p. 5114.)<sup>24</sup>

Plaintiffs contend that these statutory pronouncements deserve little interpretive weight since, among other things, they are "internally inconsistent." Plaintiffs stress the proviso in *Revenue and Taxation Code*, section 2206, and in *Government Code*, section 17513, that the phrase "' [c]osts mandated by the federal government' does *not* include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the *option* of the state, local agency, or school district." (Italics added.)

We see no fatal inconsistencies. The first clause of the proviso merely confirms, as [article XIII B](#) itself specifies, that program funds voluntarily provided by another unit of government may not be excluded from the \*76 spending limits of recipient local agencies. (Compare *art. XIII B*, §§ 8, subd. (b), 9(b).) The second clause isolates a concern which we share - that state or local governments might otherwise claim "federally mandated costs" even where participation in a federal program, or compliance with federal "standards," is a matter of true choice. (Cf., e.g., *Carmel Valley Fire Protection Dist.*, *supra*, 190 *Cal.App.3d* at pp. 542-544.)<sup>25</sup>

Given the variety of cooperative federal-state-local programs, we here attempt no final test for "mandatory" versus "optional" compliance with federal law. (13) A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of [article XIII B](#), section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

(11c) For reasons expressed above, we are satisfied under these standards that chapter 2/78 did implement a federal "mandate" within the meaning of [article XIII B](#) and prior statutes restricting local taxation. Hence, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by chapter 2/78 may tax and spend as necessary to meet the expenses required to comply with that legislation. To the extent *Sacramento I* is inconsistent with our analysis, that decision is disapproved.

## VI. Conclusion.

We have concluded that chapter 2/78 is a "federal mandate" which exempts affected state and local agencies from pertinent limits on their power to tax, appropriate, and spend. However, local governments' expenses \*77 of complying with chapter 2/78 are not subject to compulsory state subvention, because chapter 2/78 imposed no new or increased "program or service," and no "unique" requirement, on local agencies. The contrary judgment of the Court of Appeal is reversed.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., and Kennard, J., concurred.

**KAUFMAN, J.,**

Concurring and Dissenting.

I concur in the judgment. Given this court's decision in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202], I am compelled to agree that the obligation imposed on local governments by the 1978 state unemployment insurance legislation is not a "new program or higher level of service" within the meaning of [article XIII B, section 6, of the California Constitution](#), and that for this reason the state is not constitutionally obligated to provide a subvention of funds to reimburse the unemployment insurance costs of local governments. I respectfully dissent, however, from the additional conclusion, stated in part V of the majority opinion, that these unemployment insurance costs are "mandates of ... the federal government" and therefore exempt from the state and local government appropriation limits of [article XIII B](#) and from property taxation limits imposed by statute. In reaching this additional conclusion the majority decides an issue not raised by the parties and completely outside the scope of this action. As so often happens when a court reaches beyond the confines of the case before it to render a gratuitous advisory opinion, the majority decides the issue incorrectly.

All too frequently in recent years (see, e.g., *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 345, fn. 1 [256 Cal.Rptr. 543, 769 P.2d 399]) this court, in its misguided zeal to provide enlightenment, has reached out to decide an issue not tendered by the parties. The majority's failure to exercise proper judicial restraint in the instant case is another example of this trend and one I find particularly disturbing since it violates a fundamental and venerable tenet of judicial practice - i.e., "A court will not decide a constitutional question unless such construction is absolutely necessary." (*Estate of Johnson* (1903) 139 Cal. 532, 534 [73 P. 424]; accord, *People v. Williams* (1976) 16 Cal.3d 663, 667 [128 Cal.Rptr. 888, 547 P.2d 1000]; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65 [195 P.2d 1].) The federal mandate issue which the majority here decides, because it turns on the proper construction of [article XIII B, section 9, of our state Constitution](#), is a constitutional

issue. Using this case to resolve that issue is, to my mind, indefensible.

To see just how far the majority has wandered from the issues essential to the proper resolution of this case, one need only point out that this action \*78 was not brought to settle a dispute about taxation or appropriation limits, nor has this court been informed that any such dispute exists. Rather, this action was brought to enforce the holding in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258] (*Sacramento I*), that the state is constitutionally obligated to reimburse the unemployment insurance costs of local governments. The governmental entities litigating this proceeding have not sought a judicial determination of the 1978 unemployment insurance legislation's effect on their statutory or constitutional taxing or spending limits, nor have they raised any issue regarding whether unemployment insurance costs are federally mandated for any purpose. The federal mandate issue was first injected into the case by this court when we requested additional briefing on the questions whether the unemployment insurance costs of local governments are federally mandated under [article XIII B, section 9, of the state Constitution](#) and, if so, whether this conclusion necessarily exempts the state from any obligation it might otherwise have to reimburse local governments for these costs.

The majority's federal mandate discussion does not even provide an alternative ground for the holding denying reimbursement of local governments' unemployment insurance costs, for the majority purports to decide whether unemployment insurance costs are federally mandated without deciding whether resolution of this issue has any bearing on entitlement to reimbursement (see maj. opn., *ante*, p. 71, fn. 16). The majority's only justification for deciding whether unemployment insurance costs are federally mandated is that the issue has "important implications" inasmuch as federally mandated costs are "exempt from a local government's statutory taxation limit ([Rev. & Tax. Code, § 2271](#))" and "from the constitutional spending limit of any affected entity, state or local ([Cal. Const., art. XIII B, § 9\(b\)](#))." (Maj. opn., *ante*, pp. 70-71.) But the present case is an inappropriate vehicle for deciding these weighty issues since neither the state nor the local entities have any reason to contest the other's exemptions from spending or taxation limits. In other words, the parties now before us are not adverse on these issues and so have not defined and argued opposing points of view with the vigor

and thoroughness essential to proper judicial resolution of complex legal questions, particularly those of constitutional magnitude. Those who might have argued in favor of including unemployment insurance costs in the taxing and spending limits - for example, the proponents of the initiative measure by which [article XIII B](#) was enacted - are not represented in this proceeding.

Were the issue properly presented in this case, I would conclude that the unemployment insurance costs are not federally mandated. The text of a constitution "should be construed in accordance with the natural and ordinary meaning of its words." ( [\\*79 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].) The language at issue here excludes from the definition of " appropriations subject to limitation" those appropriations " required for purposes of complying with mandates of the courts or the federal government which, *without discretion, require* an expenditure for additional services or which *unavoidably* make the providing of existing services more costly." (Cal. Const., art. XIII B, § 9, subd. (b), italics added.)

The meaning of this language is clear; to look beyond the text for some other meaning is both unnecessary and improper under accepted rules of constitutional interpretation. (See [State Board of Education v. Levit](#) (1959) 52 Cal.2d 441, 462 [343 P.2d 8]; [People v. Knowles](#) (1950) 35 Cal.2d 175, 182-183 [217 P.2d 1].) A "mandate" is "an order, command [or] charge." ([Xth Olympiad Com. v. American Olym. Assn.](#) (1935) 2 Cal.2d 600, 604 [42 P.2d 1023]; see also, [Morris v. County of Marin](#) (1977) 18 Cal.3d 901, 908 [136 Cal.Rptr. 251, 559 P.2d 606] ["mandatory duty" is "an obligatory duty which a governmental entity is required to perform"; [Bridgman v. American Book Co.](#) (1958) 12 Misc.2d 63, 66 [173 N.Y.S.2d 502, 506] ["mandate" is "a command, order or direction ... which a person is bound to obey".]) The mandates to which the constitutional provision at issue refers are those "of the courts or the federal government." The coercive force of court mandates is, of course, the force of law. That "mandates of ... the federal government" are similarly limited to those obligations imposed by force of federal law is shown not only by the term "mandate" itself but also by the terms "without discretion" and "unavoidably," which plainly exclude any form of inducement using political or economic pressure rather than legal compulsion.

Laws limiting governmental appropriations and indebtedness have traditionally exempted two categories of expenditures:

those required to meet emergencies and those required to satisfy duties or mandates imposed by law. (See, e.g., [County of Los Angeles v. Byram](#) (1951) 36 Cal.2d 694, 698-700 [227 P.2d 4]; [County of Los Angeles v. Payne](#) (1937) 8 Cal.2d 563, 569-575 [66 P.2d 658]; [State v. City Council of City of Helena](#) (1939) 108 Mont. 347 [90 P.2d 514, 516]; [Raynor v. King County](#) (1940) 2 Wn.2d 199 [97 P.2d 696, 707].) The latter category has been interpreted as including only those obligations compelled by force of law, as opposed to economic or political necessity or expedience. (See [County of Los Angeles v. Byram](#), *supra*, at pp. 698-700; [County of Los Angeles v. Payne](#), *supra*, at pp. 573-574.) Article XIII B of the California Constitution follows the pattern of other similar laws; it provides exemptions for emergency appropriations in section 3, subdivision (c), and for legal duties or "mandates" in section 9, subdivision (b). I see no basis for concluding that the term "mandate," which in the context of government debt and appropriation limitations has traditionally [\\*80](#) meant a duty imposed by force of law, has suddenly acquired a novel and more expansive meaning in section 9. On the contrary, the drafters of section 9 appear to have taken pains to avoid any such interpretation.

As stated in [Sacramento I](#), "The concept of federal mandates ... is defined in section 9 of article XIII B. Subdivision (b) of that section excludes from a governmental entity's appropriation limit '[a]ppropriations required for purposes of complying with mandates of ... the federal government which, *without discretion, require* an expenditure' by the governmental entity. (Italics added.) As contemplated by [article XIII B, section 9](#), a federal mandate is one pursuant to which the federal government imposes a cost upon a governmental entity, and the entity has *no discretion* to refuse the cost. Chapter 2 [the 1978 unemployment insurance legislation] was not a federal mandate within this constitutional definition, as the State had the discretion to participate or not in the federal unemployment insurance system." ([Sacramento I](#), *supra*, 156 Cal.App.3d 182, 197, italics in original.) Giving the constitutional language its usual and ordinary meaning, I agree with the Court of Appeal that federal law "mandates" an expenditure only if the expenditure is legally compelled, and not if the federal law merely provides economic or political inducements, no matter how powerful or coercive. Since it is undisputed that the state was under no legal compulsion to enact the 1978 unemployment insurance legislation, the burdens of that legislation are not " mandates of ... the federal government."

In support of its contrary conclusion, the majority reasons as follows: (1) when article XIII B of the California Constitution was drafted and enacted, the Tenth Amendment to the United States Constitution had been construed to prohibit Congress from imposing costs on state and local governments; (2) as a result, virtually all federal laws imposing costs on state and local governments did so through "carrot and stick" incentive programs rather than by direct legal compulsion; and (3) the exemption for "mandates of ... the federal government" must be construed to encompass at least some of these incentive programs because otherwise it would be almost entirely superfluous. I find each of these points highly questionable, if not demonstratively unsound.

First, the Tenth Amendment has never been interpreted as entirely prohibiting the federal government from imposing costs on state and local government. Rather, *National League of Cities v. Usery* (1976) 426 U.S. 833 [49 L.Ed.2d 245, 96 S.Ct. 2465] defined an exception to the broad sweep of Congress's commerce clause authority. Under this exception, "traditional governmental functions" of state and local governments were protected from direct and intrusive federal regulation. (426 U.S. at p. 852 [49 L.Ed.2d at pp. 257-258].) As explained in *Garcia v. San Antonio Metro. Transit Auth.* (1985) 469 U.S. 528, 538-547 [83 L.Ed.2d 1016, 1025-1032, 105 S.Ct. 1005], the result was an inconsistent patchwork of decisions upholding or striking laws depending on whether the regulated activities were perceived by the court as being traditionally associated with state or local

government or constituting "attributes of state sovereignty." Thus, a significant number of laws imposing costs on state and local governments survived Tenth Amendment scrutiny even before the decision in *Garcia v. San Antonio Metro. Transit Auth.*, *supra*. (See, e.g., *EEOC v. Wyoming* (1983) 460 U.S. 226 [75 L.Ed.2d 18, 103 S.Ct. 1054] [holding state and local government employee retirement policies subject to federal age discrimination regulations]; see generally, Skover, "Phoenix Rising" and *Federalism Analysis* (1986) 13 Hastings Const.L.Q. 271, 286-288.) More importantly, however, I see no reason to assume that the drafters of article XIII B intended that the federal mandate exemption would have broad application, encompassing a large number of federal programs. Rather, construing the exemption narrowly seems entirely consistent with the probable intent of those who drafted the provision.

The test proposed by the majority for identifying those incentive programs which qualify as "mandates of ... the federal government" will require an extensive factual inquiry into the practical consequences of noncompliance with the federal law. It will be burdensome to apply and its outcome will be difficult to predict. Besides being wholly unnecessary to resolution of this case, and violating the probable intent of the voters who enacted article XIII B of the California Constitution,<sup>1</sup> the majority's discussion of the federal mandate issue is certain to generate more difficulties than it resolves. \*82

#### Footnotes

- 1 Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Moreover, to the extent "federally mandated" costs are exempt from prior *statutory* limits on local *taxation* (see *ante*, at pp. 57-58), article XIII A eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling. All further section references are to article XIII B of the California Constitution, unless otherwise indicated.
- 2 The claims for reimbursement were originally premised entirely on [Revenue and Taxation Code section 2201](#) et seq. While the City's and the County's mandamus petitions were pending in superior court, article XIII B was adopted. The City and the County amended their petitions to include article XIII B as an additional basis for relief, and the case proceeded accordingly.
- 3 The trial court also sustained the Legislature's demurrer without leave to amend and dismissed the Legislature as a party defendant. The Court of Appeal affirmed the dismissal in a separate proceeding. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393 [231 Cal.Rptr. 686].)
- 4 Amicus curiae briefs were filed on behalf of plaintiffs by (1) the League of California Cities, the Association of California Water Agencies, and the Fire District Association of California, and (2) the County of Los Angeles and the County Supervisors Association of California.
- 5 In 1986, the Legislature repealed [sections 2250-2255 of the Revenue and Taxation Code](#). (Stats. 1986, ch. 879, §§ 37-48, p. 3047.) The Board's functions have been transferred to the Commission on State Mandates (Commission), but the

procedures for administrative and judicial determination of subvention disputes remain functionally similar. (Gov. Code, §§ 17500 et seq., 17600 et seq.)

6 Indeed, when the City filed protective claims for “refund” with EDD in the wake of *Sacramento I*, that agency consistently disclaimed authority to decide the subvention issue presented and “suggest[ed]” that the City pursue its remedies before the Commission.

7 As we note above, courts are powerless to compel appropriations *per se*. However, that fact does not render a prayer for reimbursement of *past* costs wholly meaningless. California courts have previously recognized judicial power to fashion other appropriate reimbursement remedies. (See, e.g., *Carmel Valley Fire Protection Dist.*, *supra*, 190 Cal.App.3d at pp. 550-552; also cf. *Mandel*, *supra*, 29 Cal.3d at pp. 535-537, 539-552.) Such power is especially important where subvention is constitutionally compelled.

8 For these reasons, this case is distinguishable from *Slater v. Blackwood* (1975) 15 Cal.3d 791 [126 Cal.Rptr. 225, 543 P.2d 593], cited by the Court of Appeal. *Slater*, a suit between private parties, held only that the “injustice” exception to the rule of collateral estoppel cannot be based *solely* on an intervening change in the law. (P. 796.) Here, as we note, overriding public-interest issues are involved.

9 By the same token, the state has not ignored available remedies or otherwise “waived” its right to argue the issues presented by this appeal. The state immediately raised the applicability of *County of Los Angeles* to this suit once our decision therein became final.

Plaintiffs claim the instant trial court had no power to grant summary judgment for defendants on authority of *County of Los Angeles*. Plaintiffs assert that because defendants failed to seek timely mandamus review of the prior, contrary order granting summary adjudication of issues in *plaintiffs’* favor, the issues decided by the earlier order must be “deemed established.” (See Code Civ. Proc., § 437c, subd. (f).) We disagree. Failure to challenge a summary adjudication order by the *discretionary* avenue of writ review cannot foreclose a party from asserting *subsequent* changes in law which render such a pretrial order incorrect.

10 Plaintiffs imply that because the original claims by the City and the County were filed decided as statutory “test claims” (Rev. & Tax. Code, former §§ 2218, 2253.2; see now Gov. Code, §§ 17555, 17557), the “cause of action” adjudicated therein encompasses *all* claims by *all* local agencies for *all* years. However, the obvious purpose of the statutory “test claim” procedure is to resolve the *legal issue whether particular state legislation creates a reimbursable mandate*, not to adjudicate every individual claim for reimbursement which may thereafter accrue. The “test claim” result has *precedential* effect for all subsequent claims, but *res judicata* effect only for the individual claims which were actually adjudicated.

11 While our discussion centered on the meaning of section 6 of article XIII B, it relied heavily on the legislative history of parallel provisions of the 1972 and 1973 property tax relief statutes. When article XIII B was adopted in November 1979, the Revenue and Taxation Code already required state subvention of local “[c]osts mandated by the state,” defined as “any increased costs which a local agency is required to incur as a result of ... [¶] [a]ny law enacted after January 1, 1973, which mandates a *new program* or an *increased level of service* of an existing program.” (Rev. & Tax. Code, former §§ 2207 [italics added], 2231, subd. (a).) However, a further statutory definition of “increased level of service” to include any state mandate “which makes necessary expanded or additional costs to a county, city and county, city, or special district” had been repealed in 1975. ( *County of Los Angeles*, 43 Cal.3d at p. 55; see Rev. & Tax. Code, former § 2231, subd. (e), repealed by Stats. 1975, ch. 486, § 6, p. 999.) We found the repealer significant to the limited meaning of the statutory term “increased level of service” as later incorporated in article XIII B. (43 Cal.3d at pp. 55-56.) Our implicit conclusion, which we now make explicit, was that the statutory and constitutional concepts of reimbursable state-mandated costs are identical.

12 Indeed, our reasoning here was expressly foreshadowed in *County of Los Angeles*. There we observed: “The Court of Appeal reached a different conclusion in [*Sacramento I*], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as ... whether the expense was a ‘state mandated cost,’ rather than as whether the provision of an employee benefit was a ‘program or service’ within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.” (43 Cal.3d at p. 58, fn. 10.)

13 Article XIII B, section 6, provides that the state shall provide a subvention of funds to reimburse a local agency for costs incurred by the agency “[w]henever the [state] mandates [on the agency] a new program or higher level of service ..., except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an

- existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.”
- 14 Nor do we agree that subvention depends on whether the “benefit” of a state-imposed local requirement falls principally at the state or local level. Attempts to apply such a “benefit” test to the myriad of individual cases could easily produce debates bordering on the metaphysical. Nothing in the language or history of [article XIII B](#), or prior subvention statutes, suggests an intent to force such debates upon the Legislature each time it considers legislation affecting local governments.
- 15 For the reasons expressed in part III, *ante*, our consideration of this issue is not foreclosed by principles of collateral estoppel.
- 16 In *Sacramento I*, both the parties and the Court of Appeal assumed that if a cost was “federally mandated,” it was therefore *not* a “state mandated” cost subject to subvention. In other words, it was assumed, an expense could not be both “state mandated” and “federally mandated,” even if imposed by the state under federal compulsion. It was in this context that *Sacramento I* addressed the “federal mandate” issue. (See also [Carmel Valley Fire Protection Dist., supra](#), 190 Cal.App.3d at p. 543.) We here express no view on the question whether “federal” and “state” mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. We decide only that, insofar as an expense is “federally mandated,” as described in the state Constitution and statutes, it is exempt from the pertinent taxation and spending limits.
- 17 Ironically, the local agencies here argue *against* a “federal mandate,” with the state in opposition to that view. An anti-“federal mandate” position seems directly contrary to the local agencies’ interests, since its acceptance would mean the agencies are not eligible for exemptions from their pertinent taxing and spending limits. However, all parties appear still bound by the premise of *Sacramento I* that if a cost is “federally mandated,” it is ineligible for state subvention. As noted above (see fn. 16, *ante*), we do not decide that issue here.
- 18 The Tenth Amendment to the United States Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
- 19 The traditional categorical-aid provisions of the Social Security Act (e.g., [42 U.S.C. §§ 301](#) et seq. [old-age assistance], [601](#) et seq. [aid to needy families with dependent children], [1201](#) et seq. [aid to the blind], [1351](#) et seq. [aid to the permanently and totally disabled]), and statutes concerned with occupational safety and health (e.g., [29 U.S.C. § 651](#) et seq.), highways and mass transit (e.g., [23 U.S.C. § 101](#) et seq.), education (e.g., [20 U.S.C. § 241a](#) et seq.), and air and water pollution (e.g., [33 U.S.C. §§ 1251](#) et seq., [1311](#) et seq.; [42 U.S.C. § 7401](#) et seq.) are but a few examples of federal laws imposing greater or lesser degrees of inducement to state and local compliance with federal policies and programs.
- 20 [Hodel v. Virginia Surface Mining & Recl. Assn.](#) (1981) 452 U.S. 264 [69 L.Ed.2d 1, 101 S.Ct. 2352] later implicitly confirmed this premise. There, Virginia mine operators challenged a federal surface-mining regulatory scheme on grounds it displaced state authority and sovereignty. The federal law imposed minimum federal standards, to be enforced by federal or state officials at the state’s choice, and allowed states to take over regulation by imposing equal or higher standards of their own. ([30 U.S.C. §§ 1201](#) et seq., [1251-1254](#).) The court upheld the program, noting it regulated private persons, not the “States as States.” Moreover, said the court, since states were not ordered to adopt their own surface-mining standards, “there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [Citations.] .... “ ([452 U.S. at pp. 286-288 \[69 L.Ed.2d at pp. 22-24\].](#))
- 21 The United States Constitution includes specific limitations on the subject-matter jurisdiction of state and local governments (art. I, § 10), imposes certain direct obligations and restrictions on the “States as States” (e.g., art. I, § 2, cls. 1, 4; art. I, § 3, cls. 1, 2; art. II, § 1, cl. 2; art. IV, §§ 1, 2, cls. 1, 2; Amends. XIV, XV), and grants Congress power to prevent denial of certain constitutional rights by the states (Amends. XIII, XIV, XV). Obviously, however, these provisions account for only a minute portion of the costs incurred by state and local governments as a result of federal programs and regulations.
- 22 For this reason, federal cases cited by plaintiffs and their amici curiae for the proposition that [Public Law 94-566](#) is not “coercive “ (e.g., [County of Los Angeles, Cal. v. Marshall](#) (D.C. Cir. 1980) [631 F.2d 767 \[203 App.D.C. 185\]](#); [State, etc. v. Marshall](#) (1st. Cir. 1980) [616 F.2d 240](#)) are inapposite. Those decisions applied *Tenth Amendment* principles to determine whether [Public Law 94-566](#) was constitutionally valid. Had [Public Law 94-566](#) been struck down on this ground, it would *not* have resulted in local costs to which the “federal mandate” provisions of [article XIII B](#) might extend. Thus, applying the Tenth Amendment cases to determine whether a cost is “federally mandated “ for purposes of [article XIII B](#) presents a problem in circular reasoning.

- 23 The dissent cites two older cases for the premise that in antidebt and antispending measures, the exception recognized for "mandatory" costs and expenditures has traditionally been limited to obligations imposed by law. Neither cited decision is dispositive or persuasive here. *County of Los Angeles v. Byram* (1951) 36 Cal.2d 694 [227 P.2d 4], and the cases therein cited, concern the constitutional provision (Cal. Const., former art. XI, § 18, see now art. XVI, § 18 (hereafter section 18)) which prohibits local governments, absent voter approval, from incurring debts or liabilities which exceed in any year the income or revenue provided for such year. Section 18 is *absolute on its face* and, unlike [article XIII B](#), it contains *no express exception* for mandatory expenses. Though sometimes founded on contorted linguistic analyses (see, e.g., *City of Long Beach v. Lisenby* (1919) 180 Cal. 52, 56 [179 P. 198]), the *implied* exceptions to section 18, as recognized in *Byram* and other cases, arise from a rule of necessity and despite the absolute constitutional language. Such implied exceptions must, of course, be narrowly confined.
- On the other hand, *County of Los Angeles v. Payne* (1937) 8 Cal.2d 563 [66 P.2d 658], also cited by the dissent, construed former Political Code section 3714, which limited a local government's annual expenditures to its previously adopted budget. Section 3714 *did* contain an express exception for "mandatory expenses *required by law*." (Italics added.) *Payne's* adherence to the explicit terms of the statutory exception is hardly remarkable.
- In contrast with the measure considered in *Byram*, [article XIII B](#) and the Revenue and Taxation Code *do* expressly exempt "federally mandated " expenses from the pertinent taxation and appropriations limits. Unlike the measure construed in *Payne*, neither [article XIII B](#) nor the Revenue and Taxation Code expressly limit their exemptions to obligations " required by law." [Article XIII B](#) uses the broader terms "unavoidably " and "without discretion," suggesting recognition by the drafters and voters that forces beyond strict legal compulsion may produce expenses that are realistically involuntary. The Revenue and Taxation Code explicitly includes coercive federal "carrot and stick" requirements within the federally "mandated" costs exempt from statutory property tax limits. ([Rev. & Tax. Code, § 2206.](#))
- 24 Plaintiffs suggest that by reenacting this language in the wake of *Sacramento I*, the Legislature "acquiesced" in the Court of Appeal's narrow definition of "costs mandated by the federal government." We are not persuaded. *Sacramento I* did not *construe* the statutory language; it simply found a postdated statute *irrelevant* to the proper interpretation of [article XIII B](#). By later readopting its expanded definition in statutes designed to "implement" [article XIII B](#), the Legislature expressed its disagreement with *Sacramento I*, not its acquiescence. Contrary to the implications of *Sacramento I*, legislative efforts to resolve ambiguities in constitutional language are entitled to serious judicial consideration. (See authorities cited *ante*.)
- 25 In the *Carmel Valley* case, the state claimed, among other things, that local costs of purchasing protective clothing and equipment for firefighters, as required by regulations under the California Occupational Safety and Health Act, constituted a nonreimbursable "federal mandate " because the California standards merely "implemented" federal law. However, the evidence was contrary; a letter from the federal Occupational Safety and Health Administration disclaimed federal jurisdiction over California's political subdivisions and stated that state and federal standards were independent. ([190 Cal.App.3d at pp. 543-544.](#)) Examination of the pertinent statutory scheme reinforces the view that compliance with federal standards in this area is "optional" with the state. Other than loss of limited federal administrative funds ([29 U.S.C. § 672\(g\)](#)), the only sanction for California's decision not to maintain a federally approved occupational safety and health system is that federal standards, administered by federal personnel, will then prevail within the state. (*Id.*, § 667(b)-(h).)
- 1 Those voters no doubt will be upset to learn that their tax dollars will be dissipated in litigation to determine such metaphysical questions as whether a decision to participate in a federal program was "truly voluntary."



KeyCite Yellow Flag - Negative Treatment

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3 Cal.5th 1191

Supreme Court of California.

**CITY OF SAN BUENAVENTURA,**

Plaintiff, Cross-defendant and Appellant,

v.

**UNITED WATER CONSERVATION**

DISTRICT et al., Defendants, Cross-complainants and Appellants.

S226036

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Filed 12/4/2017

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As Modified on Denial of Rehearing 2/21/2018

**Synopsis**

**Background:** **City** filed separate petitions for writ of mandate and writ of administrative mandate and claims for reverse validation and declaratory relief against **water conservation** district that managed county groundwater resources challenging constitutionality of district's groundwater charges to **city** and other well operators for certain **water** years, which were consolidated. District filed cross-complaint, seeking declaratory relief upholding its groundwater charge. The Superior Court, Santa Barbara County, Nos. VENCI 00401714, VENCI 1414739, entered a declaratory judgment and issued the writs of mandate, ordering district to refund charges to **city** for certain **water** years. District appealed and **city** cross-appealed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

**Holdings:** The Supreme Court, [Kruger, J.](#), held that:

[1] groundwater charge did not constitute “charge for a property related service,” within meaning of constitutional provision restricting amount of such charge to proportional cost of service attributable to parcel on which it was imposed, disapproving [Pajaro Valley Water Management Agency v. Amrhein](#), 59 Cal.Rptr.3d 484, and [Griffith v. Pajaro Valley Water Management Agency](#), 163 Cal.Rptr.3d 243, and

[2] Court of Appeal was required to consider whether charge bore reasonable relationship to benefits of district's

**conservation** activities, as required for charge to qualify as nontax fee that did not require voter approval.

Affirmed in part, reversed in part, and remanded with instructions.

[Liu, J.](#), filed concurring opinion.

Opinion, [185 Cal.Rptr.3d 207](#), superseded.

West Headnotes (8)

[1] **Water Law** 🔑 [Types of Charges and Fees](#)

**Water conservation** district's groundwater charge to **city** and other well operators for **conservation** and management services did not constitute “charge for a property related service,” within meaning of constitutional provision restricting amount of such charge to proportional cost of service attributable to parcel on which it was imposed; district **conserved** groundwater in underground basins that did not correspond with parcel boundaries, basins were managed by district for benefit of public, not merely for benefit of well operators, and groups were not same, as some well operators extracted **water** for their own use, while others, such as **city**, extracted **water** for sale and distribution elsewhere; disapproving [Pajaro Valley Water Management Agency v. Amrhein](#), 59 Cal.Rptr.3d 484, and [Griffith v. Pajaro Valley Water Management Agency](#), 163 Cal.Rptr.3d 243. Cal. Const. art. XIII D, §§ 2, 6(b); Cal. **Water** Code §§ 75521, 75522.

[2] **Municipal Corporations** 🔑 [Power and Duty to Tax in General](#)

**Taxation** 🔑 [Nature of property tax](#)

Constitutional provision governing assessment and property-related fee reform 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, and places certain restrictions on each kind of exaction. Cal. Const. art. XIII D.



5 Cases that cite this headnote

[3] **Municipal Corporations** 🔑 Benefit to property in general

Whether an exaction is a property-related charge for purposes of the constitutional provision governing assessment and property-related fee reform, which provides that the amount of such charge may not exceed the proportional cost of the service attributable to the parcel, is a question of law for the appellate courts to decide on independent review of the facts. *Cal. Const. art. XIII D, § 6(b)(1, 2, 3)*.

2 Cases that cite this headnote

[4] **Municipal Corporations** 🔑 Constitutional Requirements and Restrictions

Supreme Court construes the constitutional provision governing assessment and property-related fee reform liberally to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent. *Cal. Const. art. XIII D*.

[5] **Municipal Corporations** 🔑 Benefit to property in general

A fee is charged for a property-related service, and is thus subject to the requirements of the constitutional provision governing assessment and property-related fee reform, which requires that the amount of such charge may not exceed the proportional cost of the service attributable to the parcel, if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property. *Cal. Const. art. XIII D, §§ 2(e), 6(b)*.

2 Cases that cite this headnote

[6] **Constitutional Law** 🔑 Construction of statutes in general

Whatever the Legislature's intent in enacting a statute may have been, the ultimate constitutional interpretation must rest with the judiciary.

2 Cases that cite this headnote

[7] **Water Law** 🔑 Necessity of voter approval

Court of Appeal was required to consider whether record demonstrated that **water conservation** district's groundwater charge to **city** and other well operators for **conservation** and management services, which was imposed without voter approval, bore reasonable relationship to burdens on or benefits of district's **conservation** activities, as required for charge to qualify as non-tax fee that did not require voter approval under constitutional provision governing voter approval of tax levies, in **city's** action against district challenging constitutionality of charge, especially in light of statute requiring that charges for pumping groundwater for nonagricultural uses generally must be at least three times the charges for pumping **water** for agricultural uses. *Cal. Const. art. XIII C, §§ 1(e)(1), 1(e)(2)*; *Cal. Water Code § 75594*.

3 Cases that cite this headnote

[8] **Municipal Corporations** 🔑 Benefit to property in general

To qualify as a nontax "fee" that does not require voter approval under the constitutional provision governing voter approval of tax levies, a charge must satisfy both the requirement that it be fixed in an amount that is no more than necessary to cover the reasonable costs of the governmental activity, and the requirement that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. *Cal. Const. art. XIII C, § 1(e)*.

See 9 Witkin, *Summary of Cal. Law* (11th ed. 2017) *Taxation*, § 147 et seq.

2 Cases that cite this headnote

**\*\*734 \*\*\*52** Ct.App. 2/6 B251810, Santa Barbara County, Super. Ct. Nos. VENCI 00401714, VENCI 1414739

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Keker & Van Nest, John W. Keker, Daniel Purcell, Dan Jackson and Warren A. Braunig, San Francisco, for San Diego County Water Authority as Amicus Curiae.

Aleshire & Wynder and Patricia J. Quilizapa, Irvine, for City of Cerritos, City of Downey and City of Signal Hill as Amici Curiae.

#### Opinion

Kruger, J.

**\*1197** The California Constitution, as amended by a series of voter initiatives, places limitations on the authority of state and local governments to collect revenue through taxes, fees, charges, and other types of levies. (Cal. Const., arts. XIII A, XIII C, XIII D.) This case concerns the application of these constitutional limitations to a particular **\*\*\*54** kind of local government charge: a statutorily authorized “ground water charge” imposed on well operators by a local water conservation district to fund conservation activities such as replenishing groundwater stores and preventing degradation of the water supply. (See *Wat. Code*, § 75522.) By statute, charges for pumping groundwater for nonagricultural uses generally must be at least three times the charges for pumping water for agricultural uses. (*Id.*, § 75594.)

The City of San Buenaventura (more commonly known as the City of Ventura) (City), which pumps large quantities of

groundwater for delivery to residential customers, contends that the groundwater pumping charges it pays to its local **water conservation** district, **United Water Conservation District** (District), are disproportionate to the benefits it receives from the District's **conservation** activities. It also contends that it pays a disproportionate share of the costs of those activities by virtue of the three-to-one ratio in **Water Code section 75594**. The **City** argues that the charges therefore violate article XIII D of the California Constitution (added by Prop. 218, as approved by voters, Gen. Elec. (Nov. 5, 1996)), which provides that a charge imposed “as an incident of property ownership,” including a “charge for a property related service,” may not “exceed the proportional cost” of the service that is “attributable to the parcel” on which the charge is imposed. (Cal. Const., art. XIII D, §§ 2, subd. (e), 6, subd. (b)(3).) In the alternative, the **City** argues that the charges violate article XIII C of the California Constitution (as amended by Prop. 26, as approved by voters, Gen. Elec. (Nov. 2, 2010)), which provides that local government charges are taxes that generally must be approved by voters, but exempts from this category those charges that are limited to the reasonable costs of providing a **\*\*736** special benefit or service and that bear a “fair or reasonable” relationship to the benefit to the payor of, or the payor's burden on, the government activity (Cal. Const., art. XIII C, § 1, subd. (e) (1) & (2)). The **City** argues that the groundwater pumping charges do not satisfy the criteria for exempt charges, and therefore should be considered unapproved taxes imposed in violation of the Constitution.

**\*1198** The Court of Appeal rejected both arguments. We conclude, as did the Court of Appeal, that article XIII C, as amended by Proposition 26, rather than article XIII D, supplies the proper framework for evaluating the constitutionality of the groundwater pumping charges at issue in this case. But because the Court of Appeal did not address the **City's** argument that the charges do not bear a fair or reasonable relationship to the payor's burdens on or benefits from the District's **conservation** activities, as article XIII C requires, we affirm in part, reverse in part, and remand for consideration of that question.

## I.

### A.

The District is a **water conservation** district formed under the **Water Conservation** District Law of 1931 (**Wat. Code**,

§ 74000 et seq.), to “ ‘manage, protect, **conserve** and enhance the **water** resources of the Santa Clara River, its tributaries and associated aquifers, in the most cost effective and environmentally balanced manner.’ ” The District's territory, which covers approximately 214,000 acres in central Ventura County, encompasses all or part of eight groundwater basins. <sup>1</sup>

**\*\*55** Like many groundwater basins throughout California, basins in the District's territory have suffered from what is known as “overdraft”—meaning that more **water** is being taken out than is replaced by natural processes, including rainfall and river and streamflow. Overdraft can result in saltwater intrusion into the fresh groundwater supply and can reduce the basin's capacity for groundwater storage. (See **Wat. Code**, § 75505.) To counteract overdraft and its effects, the District artificially “recharges,” or replenishes, the groundwater supply by diverting **water** from other sources and spreading it over the ground covering certain basins within district boundaries. To reduce the demand for groundwater extraction, the District also provides pipeline deliveries of **water** derived from other sources.

The **Water** Code authorizes **water conservation** districts to finance their activities by imposing a “ground **water** charge[ ]” on “the production of ground **water** from all **water**-producing facilities” within the district (or within **\*1199** certain zones in the district). (**Wat. Code**, § 75522.)<sup>2</sup> Under the code, a district may establish different zones for rate-setting purposes. (*Id.*, § 75591.) Within each zone, the district must charge a uniform rate for all **water** pumped for agricultural use, and a uniform rate for all **water** pumped for nonagricultural use. (*Id.*, §§ 75591, 75593.) Subject to an exception not relevant here (*id.*, § 75595), the rate for nonagricultural use must be between three and five times the rate for agricultural use. (*Id.*, § 75594.) Consistent with these provisions, the District imposes a volume-based charge on groundwater pumping within its territory. As required by **section 75594 of the Water Code**, the District's rates for pumping for nonagricultural use are three times those for pumping for agricultural use.

## B.

Under the California Constitution, as amended by a series of voter initiatives, local government taxes, fees, charges, and other exactions are subject to several requirements and restrictions. The first of these initiatives, Proposition 13,

added article XIII A to the Constitution. Passed in 1978, the purpose of **\*\*737** the initiative “was to assure effective real property tax relief by means of an ‘interlocking “package” ’ consisting of a real property tax rate limitation (art. XIII A, § 1), a real property assessment limitation (art. XIII A, § 2), a restriction on state taxes (art. XIII A, § 3), and a restriction on local taxes (art. XIII A, § 4).” (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 872, 64 Cal.Rptr.2d 447, 937 P.2d 1350 (*Sinclair Paint*)). The “ ‘principal provisions’ ” of the initiative “ ‘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.)’ ” (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 836, 102 Cal.Rptr.2d 719, 14 P.3d 930 (*Apartment Association*), quoting *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681, 86 Cal.Rptr.2d 592 (*Howard Jarvis*)). “ ‘To prevent local **\*\*56** 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. [Citations.]’ ” (*Apartment Association*, at p. 836, 102 Cal.Rptr.2d 719, 14 P.3d 930; see Cal. Const., art. XIII A, § 4.)

Courts uniformly held, however, that article XIII A did not restrict local governments’ ability to impose “legitimate special assessments”—that is, charges levied on owners of real property directly benefited by a local improvement to defray its costs. ( **\*1200** *Knox v. City of Orland* (1992) 4 Cal.4th 132, 141, 14 Cal.Rptr.2d 159, 841 P.2d 144.) In part to close this perceived loophole, voters in 1996 passed Proposition 218, which, among other things, “ ‘buttr[ess]e[d] Proposition 13’s limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges.’ ” (*Apartment Association*, *supra*, 24 Cal.4th at p. 837, 102 Cal.Rptr.2d 719, 14 P.3d 930, quoting *Howard Jarvis*, *supra*, 73 Cal.App.4th at p. 682, 86 Cal.Rptr.2d 592.) Article XIII D, added by Proposition 218, imposes certain substantive and procedural restrictions on taxes, assessments, fees, and charges “assessed by any agency upon any parcel of property or upon any person as an incident of property ownership.” (Cal. Const., art. XIII D, § 3, subd. (a).) Among other things, article XIII D instructs that 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.” (*Id.*, § 6, subd. (b)(3).)

Proposition 218 also added article XIII C, which restricts the authority of local governments to impose taxes by, among other things, requiring voter approval of all taxes imposed by local governments.<sup>3</sup> In 2010, voters passed Proposition 26, which further expanded the reach of article XIII C’s voter approval requirement by broadening the definition of “ ‘tax’ ” to include “any levy, charge, or exaction of any kind imposed by a local government.” (Cal. Const., art. XIII C, § 1, subd. (e).) The definition contains numerous exceptions for certain types of exactions, including for “property-related fees imposed in accordance with the provisions of Article XIII D” (*id.*, § 1, subd. (e)(7)), as well as for charges for “a specific benefit conferred or privilege granted,” or “a specific government service or product” that is 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” (*id.*, § 1, subd. (e)(1) & (2)). To fall within one of these exemptions, the amount of the charge may be “no more than necessary to cover the reasonable costs of the governmental activity,” and “the manner in which those costs are allocated to a payor” must “bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.” (*Id.*, § 1, subd. (e).)

### **\*\*738 C.**

This case arises from a long-running controversy between the **City** and the District about the District’s groundwater **\*\*57** pumping charges. In the 1980s, the **\*1201** District planned a major improvement project to divert **water** from the Santa Clara River for recharge purposes. The District proposed to finance the diversion project by imposing new pumping charges on users within a newly established rate zone comprising areas that would benefit from the project. The **City** protested, arguing that the proposed zone included a basin on which **City** wells operated that would not benefit from the project, and filed several lawsuits challenging the District’s proposal. In 1987, the parties entered a settlement agreement in which the District agreed to create a second zone for project-related charges in which the rate for nonagricultural use would be set at one-third of the previously announced rate for the first zone—that is, a rate equal to the rate imposed on agricultural users within the first zone. When the settlement agreement expired at the end of 2011, the District eliminated the special zone, resulting in substantially higher pumping rates for groundwater extractors in the affected territory, including the **City**. After providing

notice and inviting comment, the District also increased the general rate for groundwater pumping throughout the district.

The **City** again filed suit to challenge the pumping charges, contending that the charges violate either article XIII D or, in the alternative, article XIII C of the California Constitution. In support of its contention, the **City** alleged that it pays more than its fair share of the costs of the District's **conservation** efforts, both relative to agricultural users by virtue of the three-to-one ratio required under [section 75594 of the Water Code](#), and relative to other users in the district that pump from basins that receive greater benefit from the District's recharge efforts. The **City** petitioned the court for a writ of mandate under [Code of Civil Procedure section 1085](#) and for a writ of administrative mandate under [Code of Civil Procedure section 1094.5](#), and sought declaratory relief as well as a determination of invalidity under [Code of Civil Procedure section 860 et seq.](#) (commonly known as a reverse validation action (*McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1165–1166, 71 Cal.Rptr.3d 109)). The **City** challenged the 2011–2012 rates and the 2012–2013 rates in separate actions, which were consolidated in the trial court.

The trial court ruled in the **City's** favor. Relying on *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 59 Cal.Rptr.3d 484 (*Amrhein*), the trial court concluded that the pumping charges are “imposed on persons as an incident of property ownership” and thus subject to the requirements and restrictions of article XIII D. The trial court concluded, however, that the District's general practice of charging a uniform fee across an area comported with article XIII D's requirement that a property-related fee or charge “not exceed the proportional cost of the service attributable to the parcel” ([Cal. Const., art. XIII D, § 6, subd. \(b\)\(3\)](#)) because it would be infeasible for the District to attribute the costs of its **conservation** activities on a parcel-by-parcel basis, and because **\*1202** the charges in the aggregate did not exceed the reasonable costs of the District's **conservation** activities. But the trial court concluded that the three-to-one ratio mandated by [Water Code section 75594](#) did violate article XIII D's proportionality requirement because the District failed to demonstrate that “the costs relating to agricultural **water** as compared with non-agricultural **water** support [the] differential.” The trial court entered a declaratory judgment and issued the writs of mandate, ordering the District to refund the **City** \$548,296.22 for charges for the 2011–2012 **water** year and \$794,815.57 for the 2012–2013 **water** year, plus interest. **\*\*\*58** These

represent the amounts the **City** paid in excess of the District's average costs for all types of **water** usage.

The Court of Appeal reversed. It held that the pumping charges are not property-related charges or fees within the meaning of article XIII D. The court distinguished *Amrhein*, on which the trial court had relied, as involving “a unique set of facts” not present here. But the court went on to conclude that regardless of the factual setting, “a pump fee is better characterized as a charge on the **\*\*739** activity of pumping than a charge imposed by reason of property ownership.” (Citing *Orange County Water Dist. v. Farnsworth* (1956) 138 Cal.App.2d 518, 292 P.2d 927.) Moreover, the Court of Appeal held that even if the charges were “property-related charges” for purposes of article XIII D, they would not violate article XIII D's requirement that the fee “not exceed the proportional cost of the service attributable to the parcel” by virtue of the three-to-one ratio in [Water Code section 75594](#). ([Cal. Const., art. XIII D, § 6, subd. \(b\)\(3\)](#).) The court reasoned: “[Section 75594](#) does not discriminate between persons or parcels. It discriminates between types of use. [Citation.] If the **City** chooses to use its groundwater for agricultural purposes, it too can benefit from the lower rates.”

The Court of Appeal further held that the pumping charges are not taxes subject to the requirements of article XIII C. The court concluded that the charges fall within the exception for payor-specific benefits and privileges. The court reasoned that the operative question, for purposes of this exception, is whether the charges in the aggregate exceed the District's costs of providing groundwater management services. The court held that this question was effectively answered by the trial court's finding that the pumping charges in the aggregate do not exceed the District's reasonable costs.

## II.

[1] We begin by considering the **City's** argument that the District's groundwater pumping charges violate article XIII D, added by Proposition 218. The threshold question for our determination is whether the pumping charges are “imposed ... upon a parcel or upon a person as an incident of property **\*1203** ownership” within the meaning of article XIII D. ([Cal. Const., art. XIII D, § 2, subd. \(e\)](#).) We conclude that they are not, and that they therefore fall outside the reach of article XIII D.

## A.

[2] Article XIII D was passed as part of Proposition 218, an initiative designed to buttress Proposition 13's limitation on property taxes. (*Apartment Association, supra*, 24 Cal.4th at p. 837, 102 Cal.Rptr.2d 719, 14 P.3d 930.) To that end, article XIII D “ ‘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,’ ” and places certain restrictions on each kind of exaction. (*Apartment Association*, at p. 837, 102 Cal.Rptr.2d 719, 14 P.3d 930, quoting *Howard Jarvis, supra*, 73 Cal.App.4th 679, 682, 86 Cal.Rptr.2d 592.) The provisions governing fees and charges command that no fee or charge “shall be assessed ... upon any parcel of property or upon any person as an incident of property ownership” except “[f]ees or charges for property related services” that satisfy the requirements of article XIII D. (Cal. Const., art. XIII D, § 3, subd. (a)(4).) Article XIII D defines “ ‘[f]ee’ or ‘charge’ ” 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, \*\*\*59 including a user fee or charge for a property related service.” (*Id.*, § 2, subd. (e).)<sup>4</sup> A “ ‘[p]roperty-related service,’ ” in turn, is defined as a “public service having a direct relationship to property ownership.” (*Id.*, § 2, subd. (h).)

A “[p]roperty [r]elated” fee or charge within the meaning of these provisions is subject to several procedural requirements. (Cal. Const., art. XIII D, § 6.) Among other things, an agency that proposes to impose such a fee or charge must notify “the record owner of each identified parcel upon which the fee or charge is proposed for imposition” and conduct a public hearing on the proposal. (*Id.*, § 6, subd. (a)(1); *id.*, § 6, subd. (a)(2).) “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.” (*Id.*, § 6, subd. (a)(2).) “Except for fees or charges for sewer, **water**, and refuse collection services, no property related fee or charge” may be “imposed or increased” unless it is “approved by a majority vote of the property owners of the property subject to the fee or charge or, \*\*740 at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.” (*Id.*, § 6, subd. (c).)

\*1204 A covered fee or charge is also subject to a series of substantive limitations. The revenues derived from the fee or charge may not exceed the funds required to provide

the property-related service, nor may they be used for any purpose other than that for which the fee or charge was imposed. (Cal. Const., art. XIII D, § 6, subd. (b)(1) & (2).) And in a provision central to the **City's** challenge in this case, article XIII D provides that the amount of the charge may not “exceed the proportional cost of the service attributable to the parcel.” (*Id.*, § 6, subd. (b)(3).)

[3] [4] Whether an exaction is a property-related charge for purposes of article XIII D “is a question of law for the appellate courts to decide on independent review of the facts.” (*Sinclair Paint, supra*, 15 Cal.4th at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) We construe the provisions of article XIII D liberally, “ ‘to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.’ ” (*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.) The relevant government agency—here, the District—bears the burden of demonstrating compliance. (Cal. Const., art. XIII D, § 6, subd. (b)(5).)

## B.

In considering whether the District's groundwater pumping charges are property-related fees and charges for purposes of article XIII D, we do not write on a clean slate. We previously addressed the meaning of article XIII D's definition of property-related fees and charges in a trio of cases beginning with *Apartment Association, supra*, 24 Cal.4th 830, 102 Cal.Rptr.2d 719, 14 P.3d 930. In that case, we considered whether an apartment inspection fee imposed on landlords of private apartment buildings was a fee imposed “upon a parcel or upon a person as an incident of property ownership” (art. XIII D, § 2, subd. (e)) and thus subject to the requirements of article XIII D. We concluded that it was not. Article XIII D's \*\*\*60 repeated references to fees and charges imposed “ ‘as an incident of property ownership,’ ” we explained, “mean[ ] that a levy may not be imposed on a property owner as such—i.e., in its capacity as property owner—unless it 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.” (*Apartment Association, supra*, 24 Cal.4th at pp. 839–840, 102 Cal.Rptr.2d 719, 14 P.3d 930.)

In the next case in the series, *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 9 Cal.Rptr.3d 121, 83 P.3d 518 (*Richmond*), we considered whether a fee for making a new connection to a **water** system was \*1205 “imposed ‘as an incident of property ownership’ ” within the meaning of article XIII D. (*Id.* at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.) We again concluded that the fee was not “property-related” for constitutional purposes. We explained that, much as in *Apartment Association*, the fee in question was “not imposed simply by virtue of property ownership, but instead ... as an incident of the voluntary act of the property owner in applying for a service connection.” (*Richmond*, at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

In so concluding, we also rejected the challengers' argument that the fee must be “property related” because “user fee[s] or charge[s] for a property related service” are included in article XIII D's definition of property-related fees, and supplying **water** is a “property related service.” (*Cal. Const.*, art. XIII D, § 2, subd. (e).) We agreed with challengers, as an initial matter, that “supplying **water** is a ‘property-related service’ within the meaning of article XIII D's definition of a fee or charge.” (*Richmond, supra*, 32 Cal.4th at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518.) That view, we noted, finds support in ballot materials for Proposition 218, in which the Legislative Analyst opined that “[f]ees for **water**, sewer, and refuse collection service probably meet the measure's definition \*\*741 of property-related fee.” (*Ibid.*) And the Legislative Analyst's view, in turn, finds support in surrounding provisions of article XIII D, which expressly exempt certain types of utility charges from some or all of its requirements: section 3, subdivision (b) exempts fees for electrical or gas service from the scope of “charges imposed ‘as an incident of property ownership,’ ” while section 6, subdivision (c) exempts fees for sewer, **water**, and refuse collection services from article XIII D's voter approval requirements. (*Richmond*, at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518, citing *Cal. Const.*, art. XIII D, §§ 3, subd. (b), 6, subd. (c).)

But we explained in *Richmond* that even though “supplying **water**” is a property-related service, not “all **water** service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges.... [A] **water** service fee is a fee or charge ... 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.” ( \*\*\*61 *Richmond, supra*, 32 Cal.4th at p. 427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) That conclusion, we noted, is reinforced by practical considerations: Because a local government agency cannot identify in advance which property owners will seek new connections to the **water** system, it has no practical means of complying with article XIII D's requirement that the agency “identify the parcels on which the assessment will be imposed and provide an opportunity for a majority protest ....” (*Richmond*, at p. 419, 9 Cal.Rptr.3d 121, 83 P.3d 518; see *id.* at pp. 427–428, 9 Cal.Rptr.3d 121, 83 P.3d 518.)

\*1206 Finally, in *Bighorn–Desert View Water Agency v. Verjil, supra*, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220 (*Bighorn*), we considered whether a charge for ongoing **water** delivery services is a “fee or charge” for purposes 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” (art. XIII C, § 3), but contains no definition of “fee” or “charge.” We held that it is. Reasoning that the category of “fees or charges” subject to article XIII C must include, at a minimum, any fee or charge subject to article XIII D, we reaffirmed what we had said, albeit in dicta, in *Richmond*: A charge for ongoing **water** delivery is a “‘fee’ ” or “‘charge’ ” within the meaning of article XIII D. (*Bighorn, supra*, 39 Cal.4th at pp. 215–216, 46 Cal.Rptr.3d 73, 138 P.3d 220, citing *Richmond, supra*, 32 Cal.4th at pp. 426–427, 9 Cal.Rptr.3d 121, 83 P.3d 518.) This is so, we concluded, even if the total amount of the bill is usage-based, and thus depends on the customer's “voluntary decisions ... as to how much **water** to use”: “[O]nce 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.” (*Id.* at pp. 216–217, 46 Cal.Rptr.3d 73, 138 P.3d 220, fn.omitted.)

### C.

Following this trio of decisions, the Courts of Appeal have drawn different conclusions about how to evaluate

the constitutionality of groundwater pumping charges under article XIII D. In *Amrhein, supra*, 150 Cal.App.4th 1364, 59 Cal.Rptr.3d 484, the Court of Appeal considered whether a groundwater pumping charge imposed by a local **water** management agency qualified as a property-related charge subject to article XIII D. On initial hearing, the Court of Appeal, relying primarily on *Richmond* and *Apartment Association*, concluded that the pumping charge was not incidental to property ownership, for three reasons: “(1) it was incurred only through voluntary action, i.e., the pumping of groundwater ...; (2) it would never be possible for the [a]gency to comply with Article XIII D’s requirement that it calculate in advance the amount to be charged on a given well; and (3) the charge burdens those on whom it is imposed not as landowners but as **water** extractors.” (*Amrhein, supra*, 150 Cal.App.4th at pp. 1385–1386, 59 Cal.Rptr.3d 484, fn. omitted.) After *Bighorn* was decided, however, \*\*742 the *Amrhein* court granted rehearing and reversed course, concluding that its earlier view was irreconcilable with *Bighorn’s* holding that usage-based **water** delivery fees are imposed as an incident of property ownership. The court reasoned that the pumping charges at issue were comparable to usage-based **water** delivery fees, in that both charges are levied based on a property owner’s voluntary decision to consume **water**. (*Id.* at pp. 1388–1389, 59 Cal.Rptr.3d 484.) And because an “overlying owner possesses ‘special rights’ to the reasonable use of \*\*\*62 groundwater under his land,” the court explained, a \*1207 charge on groundwater pumping “is at least as closely connected to the ownership of property as is a charge on delivered **water**.” (*Id.* at pp. 1391–1392, 59 Cal.Rptr.3d 484.)

The *Amrhein* court allowed that, under *Apartment Association*, it might be argued that a “fee falls outside Article XIII D to the extent it is charged for consumption of a public service for purposes or in quantities exceeding what is required for basic (i.e., residential) use of the property.” (*Amrhein, supra*, 150 Cal.App.4th at p. 1389, 59 Cal.Rptr.3d 484.) But the court emphasized that “a large majority” of **water** extractors in the jurisdiction were using the **water** for “residential or domestic,” rather than business, purposes. (*Amrhein*, at p. 1390, 59 Cal.Rptr.3d 484; see also *id.* at p. 1397, 59 Cal.Rptr.3d 484 (conc. opn. of Bamattre–Manoukian, J.) [emphasizing record evidence showing “that the vast majority of property owners in the Pajaro Valley obtained their **water** from wells, and that alternative sources were not practically feasible”].)<sup>5</sup>

The Court of Appeal in this case, by contrast, concluded that the pumping fee does not qualify as a property-related charge subject to article XIII D. The court distinguished *Amrhein* on the ground that the record in this case contains no comparable indication that the majority of property owners in the District’s territory obtain **water** by pumping it from wells. But the court concluded that a pumping fee is in any event “better characterized as a charge on the activity of pumping than a charge imposed by reason of property ownership.” This is true, the court concluded, “even with respect to the individual household that elects to pump **water** for its own consumption.”

[5] We conclude that the Court of Appeal in this case has the better of the argument. The critical question is whether the groundwater charge—a charge for the District’s **conservation** and management services—qualifies as a “charge for a property related service.” (Cal. Const., art. XIII D, § 2, subd. (e).) The text of article XIII D provides important indications about what sort of service-related charges the voters had in mind. Article XIII D, section 6 tells us, for example, that revenues derived from the fee may not \*1208 “exceed the funds required to provide the property related service” (subd. (b)(1)); that the amount imposed on any parcel may not “exceed the proportional cost of the service attributable to the parcel” (subd. (b)(3)); and that property owners may not be charged for “potential or future use of a service” (subd. (b)(4)) or for “general governmental services” (subd. (b)(5)). The lesson \*\*\*63 that emerges from the text and cases is this: A fee is charged for a “property-related service,” and is thus subject to article XIII D, if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property.

Measured by that yardstick, the groundwater pumping charge at issue here falls \*\*743 short. To be sure, the charge is used for the **conservation** and management of groundwater, and **water** is, as we said in *Bighorn*, “indispensable to most uses of real property.” (*Bighorn, supra*, 39 Cal.4th at p. 214, 46 Cal.Rptr.3d 73, 138 P.3d 220.) But not all fees associated with obtaining **water** are property-related fees within the meaning of article XIII D; otherwise, *Richmond*, which concerned fees for making connections necessary for obtaining **water** delivery, would have been decided differently. And while *Bighorn* holds that fees for supplying **water** through an established connection are property-related service fees, charges for the service the District provides—that is, the **conservation** of limited groundwater stores, and remediation of the adverse effects of groundwater extraction



—are not property-related in the same way: The District does not “deliver” **water** “via groundwater” to any particular parcel or set of parcels, as the **City** would characterize it. The District instead **conserves** and replenishes groundwater that flows through an interconnected series of underground basins, none of which corresponds with parcel boundaries. These basins are managed by the District for the benefit of the public that relies on groundwater supplies, not merely for the benefit of the owners of land on which wells are located. (See *Wat. Code*, §§ 75521, 75522.) And as this case demonstrates, these two groups are not one and the same; while some well operators extract **water** for use on their own property, others, such as the **City**, extract **water** for sale and distribution elsewhere. (Cf. *City of Barstow* (2000) 23 Cal.4th 1224, 1240–1241, 99 Cal.Rptr.2d 294, 5 P.3d 853 [contrasting overlying with appropriative **water** rights].)

All this means that the District's services, by their nature, are not directed at any particular parcel or set of parcels in the same manner as, for example, **water** delivery or refuse collection services. (*Richmond*, *supra*, 32 Cal.4th at p. 426, 9 Cal.Rptr.3d 121, 83 P.3d 518, citing Ballot Pamp., Gen. Elec. (Nov. 5, 1996) analysis of Prop. 218 by Legis. Analyst, p. 73.) Put differently, when the District fulfills its statutory functions, it is not providing a service to the **City** in its capacity as the owner of the lands on which its wells are located, but in the **City's** capacity as an extractor of groundwater from stores that are managed for the benefit of the public.

\*1209 [6] We see no indication that the voters who approved Proposition 218—thereby, among other things, giving property owners the right to block property-related fees and charges by majority protest (*Cal. Const.*, art. XIII D, § 6, subd. (a)(2))—had this sort of charge in mind. We therefore conclude that the groundwater charge authorized by **Water Code** section 75522 is not a charge for a “property-related service” that falls within the scope of Proposition 218.<sup>6</sup>

\*\*\*64 \*\*744 III.

[7] We next turn to the **City's** argument that the District's groundwater pumping charges violate article XIII C, as amended by Proposition 26. As noted, Proposition 26 expanded the definition of “taxes” requiring voter approval to include a “levy, charge or exaction of any kind,” but exempted certain categories of exactions from its reach,

including certain charges imposed for specific government benefits, privileges, services, or products provided directly to the payor. (*Cal. Const.*, art. XIII C, § 1, subd. (e)(1) & (2).) “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 \*1210 to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.” (*Id.*, § 1, subd. (e).)

As both parties acknowledge, the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A, on the one hand, and regulatory and other fees, on the other. (See *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262, 219 Cal.Rptr.3d 859, 397 P.3d 210 (*Jacks*).) We described this distinction in *Sinclair Paint*, *supra*, 15 Cal.4th 866, 64 Cal.Rptr.2d 447, 937 P.2d 1350 which concerned the proper categorization of fees imposed on manufacturers of lead-containing products (and others) to raise revenue for a statewide **lead poisoning** evaluation, screening, and followup program. We explained that, “[i]n general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.” (*Sinclair Paint*, at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350; see *Cal. Const.*, art. XIII C, § 1, subd. (e)(1).) Accordingly, we concluded, a fee does not become a tax subject to article XIII A unless it “ “exceed[s] the reasonable cost of providing services ... for which the fee is charged.” ’ ” (*Sinclair Paint*, at p. 876, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) We \*\*\*65 further explained that “ ‘the basis for determining the manner in which the costs are apportioned’ ” should demonstrate that “ ‘charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.’ ” (*Id.* at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350, quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146, 250 Cal.Rptr. 420 (*SDG&E*).) Proposition 26 codified both requirements. (See *Cal. Const.*, art. XIII C, § 1, subd. (e) [to prove fee is not a tax, “local government bears the burden of proving ... 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 \*\*\*66 received from, the governmental activity,” and “that the amount is no more than necessary to cover the reasonable costs of the governmental activity”].)<sup>7</sup>

Both the trial court and the Court of Appeal concluded that the groundwater pumping charge was exempt from article XIII C's definition of "tax," but for different reasons. The trial court held that the charge falls within the exception for "[a]ssessments and property-related fees imposed in accordance with the provisions of Article XIII D." (Cal. Const., art. XIII C, § 1, subd. (e)(7).) The Court of Appeal concluded that the charge instead falls into \*1211 the exception for "[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." \*\*745 (*Id.*, § 1, subd. (e)(1).) The court reasoned that the charge is imposed on well operators for the privilege of extracting **water** from underground reserves, akin to a charge for entrance to a state or local park for purposes of **conserving** the resource, and that each well operator receives a benefit from the District's **conservation** activities.

The **City** does not dispute that the pumping charge is imposed for a government "privilege" or "benefit," or, alternatively, for a "government service or product" (which is subject to the same set of requirements as a fee for a government "privilege" or "benefit" under article XIII C, § 1, subd. (e)(1)) (*Id.*, subd. (e)(2)). But the **City** contends that the pumping charge cannot satisfy the remaining requirements for an exempt charge because the **City** does not benefit from the District's activities to the same extent as other pumpers, and because **Water Code section 75594's** three-to-one ratio requires the **City** and other nonagricultural users to shoulder a disproportionate share of the fiscal burden of supporting the District's activities. The **City** argues that the charges therefore violate both the requirement that the amount of a nontax charge be "no more than necessary to cover the reasonable costs of the governmental activity," and the requirement that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e).)

Although the Court of Appeal declared both requirements satisfied, its analysis addressed only the first. The Court of Appeal mentioned the "fair or reasonable relationship" requirement only in passing, noting that, "by imposing fees based upon the volume of **water** extracted, the District largely *does* charge individual pumpers in proportion to the benefit they receive from the District's **conservation** activities." But, the court concluded, "[t]hat is more than is required." What

article XIII C does require, the court reasoned, is simply that the District's pumping charges, in the aggregate, do not exceed the reasonable cost of regulating the District's groundwater supply. In support of this conclusion, the Court of Appeal cited our decision in *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438, 121 Cal.Rptr.3d 37, 247 P.3d 112 (*Farm Bureau*), in which we said that for purposes of the *Sinclair Paint* analysis, "[a] regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. [Citation.] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." *Farm Bureau* went on to say that, under \*1212 this standard, "permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection." (*Ibid.*)<sup>8</sup> So too here, the Court of Appeal held, "[t]he District need only ensure that its charges in the aggregate do not exceed its regulatory costs."

The **City** does not challenge the Court of Appeal's reliance on *Farm Bureau* in conducting the "reasonable cost" inquiry under article XIII C. It contends, however, that the court's aggregate cost analysis does not answer the separate question whether "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." (Cal. Const., art. XIII C, § 1, subd. (e).) We agree.

*Sinclair Paint*, from which the relevant article XIII C requirements are derived, made clear that the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis. ( \*\*\*67 *Sinclair Paint*, *supra*, 15 Cal.4th at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* adopted this analytical framework from the Court of Appeal's opinion in *SDG&E*, *supra*, 203 Cal.App.3d 1132, 250 Cal.Rptr. 420 which concerned permitting fees assessed under legislation that authorized "local air pollution control districts \*\*746 to apportion the costs of their permit programs among all monitored polluters according to a formula based on the amount of emissions they discharged." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350, citing *SDG&E*, *supra*, 203 Cal.App.3d at p. 1135, 250 Cal.Rptr. 420.) The Court of Appeal in that case had concluded the fees were not special taxes for purposes of article XIII A, *both* because "the amount of the regulatory fees was

limited to the reasonable costs of each district's program," and because "the allocation of costs based on emissions 'fairly relates to the permit holder's burden on the district's programs.'" (*Sinclair Paint*, at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350, quoting *SDG&E*, *supra*, 203 Cal.App.3d at p. 1146, 250 Cal.Rptr. 420.) Applying the same framework in *Sinclair Paint*, we explained that Sinclair, a manufacturer challenging the fees at issue in the case, would have the opportunity to "prove at trial that the amount of fees assessed and paid exceeded the reasonable cost of providing the protective services for which the fees were charged, or that the fees were levied for unrelated revenue purposes. [Citation.] Additionally, Sinclair will have the opportunity to try to show that no clear nexus exists between its products and childhood [lead poisoning](#), or that the amount of the fees bore no reasonable \*1213 relationship to the social or economic 'burdens' its operations generated. [Citations.]" (*Sinclair Paint*, at p. 881, 64 Cal.Rptr.2d 447, 937 P.2d 1350, italics added; see also *id.* at p. 876, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)

Our decision in *Farm Bureau*, on which the Court of Appeal in this case relied, did not alter this framework. (*Farm Bureau*, *supra*, 51 Cal.4th at pp. 436–437, 441, 121 Cal.Rptr.3d 37, 247 P.3d 112.) In *Farm Bureau*, we considered and rejected a facial challenge to a statutory user fee on certain [water](#) rights holders for purposes of supporting the State [Water](#) Resources Control Board's Division of [Water](#) Rights Division. We explained that the statutory scheme did not authorize fees for general revenue purposes, but for purposes of funding activities performed by the [Water](#) Rights Division. (*Id.* at pp. 439–440, 121 Cal.Rptr.3d 37, 247 P.3d 112.) It was in the course of this discussion that we observed that "[t]he question of proportionality is not measured on an individual basis," but is instead "measured collectively." (*Id.* at p. 438, 121 Cal.Rptr.3d 37, 247 P.3d 112.) In a separate section of the opinion, we addressed the plaintiffs' argument that the statute was unconstitutional as applied because the fee schedule established by regulation meant that, as a practical matter, 40 percent of [water](#) rights holders would be responsible for funding 100 percent of governmental activities that benefit all [water](#) rights holders and the general public. The plaintiffs argued that, for this reason, the fees were "disproportionate to the benefit derived by the fee payors or the burden they place on the regulatory system." (*Id.* at p. 440, 121 Cal.Rptr.3d 37, 247 P.3d 112.) We remanded for further consideration of that question, instructing the trial court on remand to "determine whether the statutory scheme and its implementing regulations provide a fair, reasonable, and

substantially proportionate assessment of all costs related to the regulation of affected payors." (*Id.* at p. 442, 121 Cal.Rptr.3d 37, 247 P.3d 112.) This is, in essence, the same question that the Court of Appeal in this case missed.

To be sure, pre-Proposition 26 case law made clear that, "[i]n pursuing a constitutionally and statutorily mandated [conservation](#) program, cost allocations for services provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity." (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 193, 29 Cal.Rptr.2d 128.) Article XIII A, the cases held, "does not apply to every regulatory fee simply because, as applied to one or another of the payor class, the fee is disproportionate to the service rendered." (*Id.* at p. 194, 29 Cal.Rptr.2d 128.) Courts thus held that an agency could, for example, charge a flat filing fee to defray the costs of agency environmental review, even though review of some documents undoubtedly required a greater expenditure of agency resources than others. ( \*\*\*68 *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 953, 94 Cal.Rptr.2d 535.) But the case law did not suggest that the constitutionality of a fee for a government service, for example, depended solely on whether the fees collected, in the \*\*747 aggregate, exceeded the aggregate amount necessary to provide the service to \*1214 affected payors. (See *id.* at p. 950, 94 Cal.Rptr.2d 535 [distinguishing regulatory fees from "other types of user fees" that are "easily correlated to a specific, ascertainable cost"].) Nor did the cases suggest that the constitutional framework was otherwise indifferent to allegations that a government agency lacked any reasonable basis for charging a higher fee to some payors than others. (See *id.* at p. 955, 94 Cal.Rptr.2d 535 [upholding higher fees for filing certain environmental review documents as having "sufficient reasonable basis"].)

[8] In any event, regardless of the backdrop against which Proposition 26 was passed, it is clear from the text itself that voters intended to adopt two separate requirements: To qualify as a nontax "fee" under article XIII C, as amended, a charge must satisfy *both* the requirement that it be fixed in an amount that is "no more than necessary to cover the reasonable costs of the governmental activity," and the requirement that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e).) We must presume the Legislature intended each requirement to have independent effect. (*Dix v. Superior*

*Court* (1991) 53 Cal.3d 442, 459, 279 Cal.Rptr. 834, 807 P.2d 1063.)

As noted, the Court of Appeal did mention the reasonable-relationship requirement, if only to observe that the District's volume-based charges mean that the District "largely *does* charge individual pumpers in proportion to the benefit they receive from the District's **conservation** activities." But this observation misses the entire basis of the **City's** argument: namely, that the **City** does not receive the same benefit from the District's **conservation** activities as other pumpers, and that it is required to bear a disproportionate share of the fiscal burden by virtue of **Water Code section 75594's** three-to-one ratio. We thus remand the case to the Court of Appeal with instructions to consider whether the record sufficiently establishes that the District's rates for the 2011–2012 and the 2012–2013 **water** years bore a reasonable relationship to the burdens on or the benefits of its **conservation** activities, as article XIII C requires. In making this determination, the Court of Appeal may consider whether the parties should be afforded the opportunity to supplement the administrative record with evidence bearing on this question.<sup>9</sup>

#### \*1215 IV.

The judgment of the Court of Appeal is affirmed in part and reversed in part, and the case remanded for further proceedings consistent with this opinion.

Cantil–Sakaue, C. J.

Chin, J.

Corrigan, J.

\*\*\*69 Cuéllar, J.

Irion, J. \*, concurred.

Liu, J.

I join today's opinion. But I would provide an explicit answer to a question addressed only implicitly by the court. One of the issues on which we granted review was whether **Water Code section 75594's** requirement for at least a three-to-one ratio of fees on nonagricultural use of groundwater to such fees on agricultural use survives the adoption of articles XIII C and XIII D. The answer, which is apparent from today's opinion, is that the requirement does not survive. There may be \*\*\*748 circumstances in which the three-to-one ratio is justified, but the justification will not have anything to do with **Water Code section 75594**. Instead, the justification will be that the fees imposed on ratepayers bear "a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII C, § 1, subd. (e); maj. opn., ante, 226 Cal.Rptr.3d at p.68, 406 P.3d at p. 747.)

The petition of appellant **City of San Buenaventura** for a rehearing was denied February 21, 2018, and the opinion was modified to read as printed above.

#### All Citations

3 Cal.5th 1191, 406 P.3d 733, 226 Cal.Rptr.3d 51, 17 Cal. Daily Op. Serv. 11,444, 2017 Daily Journal D.A.R. 11,454

#### Footnotes

- 1 A groundwater basin is "[a]n alluvial aquifer or a stacked series of alluvial aquifers with reasonably well-defined boundaries in a lateral direction and having a definable bottom." (Dept. of **Water** Resources, California's Groundwater, Bulletin 118 (2003) p. 216.) An aquifer is "[a] body of rock or sediment that is sufficiently porous and permeable to store, transmit, and yield significant or economic quantities of groundwater to wells and springs." (Id. at p. 214.)
- 2 For the purposes of the statute, " 'groundwater' means all **water** beneath the earth's surface," with certain exceptions not applicable here, as well as "**water** produced from artesian wells." (Wat. Code, § 75502.5.)
- 3 Article XIII C provides that all taxes imposed by local governments are either general taxes or special taxes (art. XIII C, § 2, subd. (a)), and requires all general taxes to be approved by a majority vote (art. XIII C, § 2, subd. (b)) and all special taxes to be approved by a two-thirds vote (art. XIII C, § 2, subd. (d)).
- 4 Because article XIII D includes a single definition for a " 'fee' or 'charge,' " we use those terms interchangeably here. (Cal. Const., art. XIII D, § 2, subd. (e); see *Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 214, fn. 4, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

- 5 The court in *Amrhein* cautioned that it was not deciding whether a groundwater pumping charge “is necessarily subject to all of the restrictions imposed by Article XIII D on charges incidental to property ownership” since there was “no occasion to determine whether this or a similar charge may fall within any of the express exemptions or partial exemptions set forth in that measure.” (*Amrhein, supra*, 150 Cal.App.4th at p. 1393, fn. 21, 59 Cal.Rptr.3d 484.) The Court of Appeal answered this question in the follow-on case of *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595–596, 163 Cal.Rptr.3d 243 (*Griffith*). In *Griffith*, the court held that the **water** management agency’s groundwater pumping charge fell within the provision exempting “fees or charges for sewer, **water**, and refuse collection services” from article XIII D’s voter approval requirements. (Cal. Const., art. XIII D, § 6, subd. (c).) The *Griffith* court explained this conclusion flowed from *Amrhein’s* holding that a groundwater pumping charge “does not differ materially ‘from a charge on delivered **water**.’” (*Griffith, supra*, at p. 595, 163 Cal.Rptr.3d 243, quoting *Amrhein, supra*, 150 Cal.App.4th at pp. 1388–1389, 59 Cal.Rptr.3d 484.)
- 6 The **City** contends that the Legislature implicitly concluded otherwise when it enacted the Sustainable Groundwater Management Act of 2014 (*Wat. Code, § 10720 et seq.*) (SGMA), which was enacted before the Court of Appeal issued its decision in this case. In SGMA, the Legislature provided that certain newly created “groundwater sustainability agencies” may impose groundwater pumping charges to fund the costs of groundwater management, but subject to the requirements of *article XIII D, section 6*, subdivisions (a) and (b). (*Wat. Code, § 10730.2, subsd. (a) & (c).*) Omitted from these requirements is *article XIII D, section 6*, subdivision (c), which generally forbids agencies from imposing new or increased fees unless they first gain the approval of a majority of property owners or two-thirds of the electorate residing in the affected area. It is unclear that by enacting *Water Code section 10730.2, subdivision (c)* the Legislature intended to express any judgment on the interpretive question before us, as opposed to, for example, signaling its agreement with a post-*Amrhein* appellate ruling that groundwater charges are exempt from article XIII D’s voter approval requirement as charges for “**water** service[s].” (*Griffith, supra*, 220 Cal.App.4th at p. 596, 163 Cal.Rptr.3d 243.) In any event, whatever the Legislature’s intent may have been, “the ultimate constitutional interpretation must rest, of course, with the judiciary.” (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180, 172 Cal.Rptr. 487, 624 P.2d 1215.) The Legislature is, of course, free to impose additional requirements by statute. Furthermore, although we disagree with the trial court that the fee at issue here is a property-related fee within the meaning of article XIII D, and therefore conclude that the fee is not subject to that provision’s proportionality requirement, we express no opinion about the trial court’s determination that the District’s practice of charging a uniform fee across an area because of the infeasibility of allocating costs on a parcel-by-parcel basis complies with that requirement. (See ante, 226 Cal.Rptr.3d at pp. 56–58, 406 P.3d at pp. 738.) We disapprove *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 59 Cal.Rptr.3d 484, and *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 163 Cal.Rptr.3d 243, insofar as they are inconsistent with this opinion.
- 7 As we recognized in *Jacks, supra*, 3 Cal.5th at page 262 and footnote 5, 219 Cal.Rptr.3d 859, 397 P.3d 210, although Proposition 26 codifies *Sinclair Paint* in significant part, Proposition 26 describes categories of charges imposed for reasonable regulatory costs in a manner that “does not mirror our discussion of such costs in *Sinclair Paint* [citation].” (See Cal. Const., art. XIII C, § 1, subd. (e)(3) [exempting from the definition of tax “[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”].) Here, as in *Jacks*, we have no occasion to address the extent of the difference.
- 8 Although Proposition 26 had been passed by the time we issued our decision in *Farm Bureau*, we had no occasion to address it. (See *Farm Bureau, supra*, 51 Cal.4th at p. 428, fn. 2, 121 Cal.Rptr.3d 37, 247 P.3d 112.)
- 9 The question whether the District’s rates for the 2011–2012 and the 2012–2013 **water** years be justified under article XIII C is a separate question from whether the three-to-one ratio in *Water Code section 75594* is facially unconstitutional under article XIII C, as the **City** contends. Because the specific question before us concerns the justification for the challenged rates that were imposed without voter approval, we do not reach the latter issue; the parties and interested amici are free to argue the point on remand.
- \* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

59 Cal.App.4th 382, 69 Cal.Rptr.2d 231, 97 Cal.  
Daily Op. Serv. 8821, 97 Daily Journal D.A.R. 14,255

KATHLEEN CONNELL, as  
Controller, etc., et al., Petitioners,  
v.

THE SUPERIOR COURT OF SACRAMENTO  
COUNTY, Respondent; SANTA MARGARITA  
WATER DISTRICT et al., Real Parties in Interest.

No. C024295.

Court of Appeal, Third District, California.

Nov. 20, 1997.

### SUMMARY

Several Water districts brought mandamus proceedings against the State Controller to enforce a State Board of Control decision that a statewide regulatory amendment, which increases the level of purity required when reclaimed wastewater is used for certain types of irrigation, constitutes a state-mandated program for which water districts are entitled to reimbursement from the state. The trial court entered a judgment that the state mandate was a program for which reimbursement was due, and it directed the Controller to determine the amounts of reimbursement. (Superior Court of Sacramento County, Nos. CV347181, CV357155, CV357156 and CV357950, James Timothy Ford, Judge.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its judgment and enter a new judgment denying the petitions for a writ of mandate. The court held that because the judgment plainly left matters undecided, the judgment was interlocutory and therefore was not appealable; however, the court treated the appeal as a writ petition. On the merits, the court held that the public interest exception to the doctrine of administrative collateral estoppel precluded application of the doctrine to the legal issues raised by defendant. The issues presented were not limited to the validity of any finally adjudicated individual claim, but encompassed the question of subvention obligations in general under the regulatory amendment of wastewater purification standards. The court further held that even if the amendment constitutes a new program for state-mandated costs purposes, the costs are not reimbursable, since the water districts have the authority to levy fees to pay for the program (*Wat. Code*, § 35470). *Rev. & Tax. Code*, former § 2253.2 (now *Gov. Code*, § 17556), provides

that the board shall not find a reimbursable cost if the local agency has the “authority,” i.e., the right or power, to levy service charges, fees, or assessments sufficient to pay for the mandated program. The plain language of the statute precludes a construction of “authority” to mean a practical ability in light of surrounding economic circumstances. The court also held that the public \*383 interest exception to the doctrine of administrative collateral estoppel permitted the Controller to raise that issue in the trial court. (Opinion by Sims, J., with Puglia, P. J., and Nicholson, J., concurring.)

### HEADNOTES

#### Classified to California Digest of Official Reports

(1a, 1b)

Appellate Review § 17--Decisions Appealable--Final Judgment--Necessity For Further Orders.

A judgment entered in litigation to determine whether a statewide regulatory amendment, which increases the level of purity required when reclaimed wastewater is used for certain types of irrigation, constitutes a state-mandated program for which water districts are entitled to reimbursement from the state, was not a final judgment and thus was not appealable. The challenging parties' petition sought an order directing the State Controller to issue a warrant and the State Treasurer to pay a warrant, but the judgment merely ordered the Controller to determine amounts without disposing of those matters. The record reflected the trial court's recognition that it could not order issuance or payment of warrants unless it determined appropriated funds for such expenditures were reasonably available in the state budget, but the necessary evidentiary hearing on that issue was not held. Because the judgment plainly left matters undecided, the judgment was interlocutory and therefore not appealable.

(2)

Appellate Review § 10--Jurisdiction--Appealable Judgment. An appealable judgment or order is a jurisdictional prerequisite to an appeal.

[See 9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, §§ 13-14.]

(3)

Appellate Review § 17--Decisions Appealable--Interlocutory Judgment.

An interlocutory judgment is not appealable; generally, a judgment is interlocutory if anything further in the nature of judicial action on the part of the trial court is essential to a final determination of the rights of the parties.

(4)

Mandamus and Prohibition § 44--Mandamus--To Courts--Appeal--Scope of Review.

In reviewing a trial court's ruling on a petition for a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. However, where the facts are undisputed and the issues present questions of law, the appellate court \*384 is not bound by the trial court's decision but may make its own determination.

(5)

Judgments § 81--Res Judicata--Administrative Collateral Estoppel-- Public Interest Exception--Board of Control Decision.

In litigation by several water districts against the State Controller to enforce a State Board of Control decision that a statewide regulatory amendment, which increases the level of purity required when reclaimed wastewater is used for certain types of irrigation, constitutes a state-mandated program for which water districts are entitled to reimbursement from the state, the public interest exception to the doctrine of administrative collateral estoppel precluded application of the doctrine to the legal issues raised by defendant. The issues presented were not limited to the validity of any finally adjudicated individual claim, but encompassed the question of subvention obligations in general under the regulatory amendment of wastewater purification standards. If the board's decision was wrong but unimpeachable, taxpayers statewide would suffer unjustly the consequences of a continuing obligation to fund the costs of local water districts.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 339.]

(6a, 6b)

State of California § 11--Fiscal Matters--Reimbursement for State-mandated Costs--Standards for Reclaimed Wastewater--Authority of Water Districts to Levy Fees.

Even if a statewide regulatory amendment, which increases the level of purity required when reclaimed wastewater

is used for certain types of irrigation, constitutes a new program for state-mandated costs purposes, the costs are not reimbursable, since the water districts have the authority to levy fees to pay for the program (Wat. Code, § 35470). Rev. & Tax. Code, former § 2253.2 (now Gov. Code, § 17556), provides that the Board of Control shall not find a reimbursable cost if the local agency has the "authority," i.e., the right or power, to levy service charges, fees, or assessments sufficient to pay for the mandated program. The plain language of the statute precludes a construction of "authority" to mean a practical ability in light of surrounding economic circumstances.

(7)

Statutes § 29--Construction--Language--Legislative Intent.

In construing statutes, a court's primary task is to determine the lawmakers' intent. To determine intent, the court looks first to the words themselves. If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.

\*385

(8)

Judgments § 81--Res Judicata--Administrative Collateral Estoppel-- Public Interest Exception--Legal Issue.

In litigation by several water districts against the State Controller to enforce a State Board of Control decision that a statewide regulatory amendment, which increases the level of purity required when reclaimed wastewater is used for certain types of irrigation, constitutes a state-mandated program for which water districts are entitled to reimbursement from the state, the public interest exception to the doctrine of administrative collateral estoppel permitted defendant to raise the purely legal issue that Rev. & Tax. Code, former § 2253.2 (now Gov. Code, § 17556), precluded reimbursement. The statute provides that the Board of Control shall not find a reimbursable cost if the local agency has the "authority," i.e., the right or power, to levy service charges, fees, or assessments sufficient to pay for the mandated program, and plaintiffs have such authority. The board's finding to the contrary was thus not binding.

COUNSEL

Daniel E. Lungren, Attorney General, Floyd D. Shimomura, Assistant Attorney General, Linda A. Cabatic and Susan R. Oie, Deputy Attorneys General, for Petitioners.

No appearance for Respondent.

James A. Curtis for Real Parties in Interest.

**SIMS, J.**

This case involves a dispute as to whether a statewide regulatory amendment, increasing the level of purity required when reclaimed wastewater is used for certain types of irrigation, constitutes a state-mandated program for which water districts are entitled to reimbursement from the state. (Cal. Const., art. XIII B, § 6 (hereafter, [section 6](#));<sup>1</sup> Gov. Code, § 17500 et seq.; former Rev. & Tax. Code, § 2201 et seq.) The State Controller and State Treasurer appeal from a trial court judgment granting **\*386** petitions for writ of mandate brought by Santa Margarita Water District (SMWD), Marin Municipal Water District, Irvine Ranch Water District and Santa Clara Valley Water District (the Districts), seeking to enforce a State Board of Control (the Board) decision which found the regulatory amendment constituted a reimbursable state mandate.<sup>2</sup> Appellants contend the trial court erred because (1) the amendment did not constitute a new program or higher level of service in an existing program; (2) the Districts' claim was abolished when the statutory basis for their claim—former [Revenue and Taxation Code section 2207](#)—was repealed before their rights were reduced to final judgment, and (3) the Districts' authority to levy fees to pay for the increased costs defeats their claim of a reimbursable mandate. Appellants also challenge the trial court's determination that they were collaterally estopped from challenging the Board's decision (finding a reimbursable state mandate) by their failure timely to seek judicial review of the administrative decision. We shall conclude the Districts' authority to levy fees defeats their claim of a reimbursable mandate, and appellants are not collaterally estopped from raising this matter. We therefore need not address the other contentions. Treating this appeal from a nonappealable judgment as an extraordinary writ petition, we shall direct the trial court to vacate its judgment and enter a new judgment denying the Districts' petitions.

**Factual and Procedural Background**

In 1975, the State Department of Health Services (DHS) adopted regulations (Cal. Code Regs., tit. 22, §§ 60301-60357) implementing [Water Code section 13521](#), which provides: “The State Department of Health Services shall establish uniform statewide recycling criteria for each varying type of use of recycled water where the use involves the protection of public health.” [Section 60313<sup>3</sup> of title 22 of the California Code of Regulations](#) prescribed the level of

purity required for reclaimed water to be used for landscape irrigation. **\*387**

In May 1976, SMWD adopted a plan to develop a wastewater reclamation system. In August 1976, SMWD filed an application with the responsible regional water quality control board (Water Control Board) for a permit to discharge wastewater from the proposed reclamation system. SMWD also planned to provide reclaimed water for irrigation, potentially to 2,173 acres of land.

In February 1977, the Water Control Board issued SMWD a permit for operation of a reclamation system—the Oso Creek facility. The permit required SMWD to comply with all applicable wastewater reclamation regulations then in effect.

In late 1977, SMWD learned DHS might be considering modifications to the California Code of Regulations, title 22 regulations.

In August 1978, SMWD completed construction of the Oso Creek facility, at a cost of \$17 million.

In September 1978, DHS amended the regulations. The amendment to [California Code of Regulations, title 22, section 60313<sup>4</sup>](#) increased the level of purity required before reclaimed wastewater could be used for the irrigation of parks, playgrounds and school yards. It is this amendment which allegedly constituted a state-mandated cost. SMWD modified its facility to comply with the amended regulations, completing the modifications in 1983. **\*388**

On October 1, 1982, SMWD filed a “test claim”<sup>5</sup> with the Board, alleging the regulatory amendment relating to the use of reclaimed wastewater constituted a new program or higher level of service. The test claim was made pursuant to former [Revenue and Taxation Code section 2231](#),<sup>6</sup> which required reimbursement to local agencies for costs mandated by the state (see now [Gov. Code, § 17561<sup>7</sup>](#)), and former [Revenue and Taxation Code section 2207](#), subdivisions (a) and (b)<sup>8</sup> defining “costs mandated by the state.” (See now [Gov. Code, § 17514](#).<sup>9</sup>) The test claim also cited [section 6](#) (fn. 1, *ante*). **\*389**

On July 28, 1983, the Board determined the amended regulations imposed state mandated costs. In so doing, the Board rejected the position of state agencies seeking denial of the claim on the ground that local agencies are not mandated



to use reclaimed water and because, if local agencies do choose to use it, they can recover the cost in charges made to purchasers of the water.

On January 19, 1984, the Board adopted “Parameters and Guidelines” establishing criteria for payment of claims to water districts pursuant to this mandate. (Former [Rev. & Tax. Code, § 2253.2](#); Stats. 1982, ch. 734, § 10, pp. 2916-2917; [Gov. Code, § 17557](#).)

On May 31, 1984, the Board amended its Parameters and Guidelines to provide for reimbursement of SMWD's cost of preparing and presenting the test claim.

In June 1984, the Board, pursuant to former [Revenue and Taxation Code section 2255](#),<sup>10</sup> submitted to the Legislature a statewide cost estimate of \$14 million for this mandate. The Legislature did not appropriate any funds for the mandate in 1984.

In 1985, the Legislature included an appropriation of almost \$14 million for this state-mandated cost in the budget, but the Governor vetoed the appropriation.

In 1986, a bill including \$945,000 for the subject mandate was introduced, but the bill was not enacted.

On January 27, 1987, SMWD filed in the trial court a petition for writ of mandate pursuant to [Code of Civil Procedure section 1085](#). The petition sought an order directing (1) the State Controller to issue a warrant “to pay the State's obligation to SMWD for its 'costs mandated by the state'” and (2) the State Treasurer to pay the Controller's warrant. \*390

At a hearing, the trial court upheld the Board's decision that the amended regulations required a higher level of service and held the doctrines of waiver and collateral estoppel applied to that decision, such that the state, by failing to challenge the Board's decision within the three-year statute of limitations, was barred from challenging it now. However, the trial court did allow the state to argue that the amended regulations did not come within the definition of “program,” as that word had recently been defined in [County of Los Angeles v. State of California](#) (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202].

The trial court recognized that, since there was no appropriation for this mandate in the state budget, the court could not grant the relief sought by SMWD (an order directing

the Controller to issue a warrant and the Treasurer to pay it) unless the court found the existence of funds reasonably available in the state budget which could be tapped for this purpose. The trial court stated it was not prepared to find the existence of funds reasonably available without a full evidentiary hearing. Rather than use the Board's statewide estimate, the court believed it needed to know the amount to which each water district would be entitled before it could determine whether there were funds reasonably available in the budget. The trial court ruled the exact amount of money to be reimbursed to the Districts had never been determined and referred the matter to a referee to make that determination.

In February 1989, a court-appointed referee began evidentiary hearings to determine the amount of reimbursement for each water district.

In 1989, the Legislature repealed former [Revenue and Taxation Code section 2207](#) (fn. 8, *ante*), defining “costs mandated by the state.” (Stats. 1989, ch. 589, § 7, p. 1978.)

On July 29, 1994, appellants filed in the trial court a motion for judgment on the pleadings/motion to dismiss, arguing repeal of former [Revenue and Taxation Code section 2207](#) destroyed any right to reimbursement and divested the court of jurisdiction to proceed. The motion also revisited the issue presented to and rejected by the Board, that the water districts' authority to levy fees defeated a finding that the costs were reimbursable.

In February 1995, the trial court issued its ruling denying appellants' motion for judgment on the pleadings and for dismissal. The court in its minute order determined repeal of former [Revenue and Taxation Code section 2207](#) in 1989 had not destroyed the Districts' right to reimbursement pursuant to the Board's decision, because the Board's decision was reduced to “final judgment” before the statutory repeal. The court said the Board's \*391 decision on July 28, 1983, became final in July 1986, when the applicable three-year statute of limitations for seeking judicial review lapsed. The Board's decision therefore conclusively established the Districts' right to reimbursement, and appellants were collaterally estopped from challenging the Board's decision. The court further said no discernible injustice or public interest precluded this application of collateral estoppel; rather, justice would be furthered by allowing the Districts to enforce their right to reimbursement as established by the Board.

The trial court further said the statutory authority of the Districts to levy service charges and assessments (Former [Rev. & Tax. Code, § 2253.2](#), subd. (b)(4);<sup>11</sup> Stats. 1982, ch. 734, § 10, p. 2916; [Gov. Code, § 17556](#)<sup>12</sup>) did not bar reimbursement for state-mandated costs. “When the Board determined that the 1978 amendment of the regulations establishing reclamation criteria imposed reimbursable state-mandated costs, it rejected the argument of the State Departments of Health Services and Finance that the costs were not reimbursable pursuant to former [Revenue and Taxation Code section 2253\(b\)\(4\)](#) and implicitly determined, in accordance with the presentation of [Santa Margarita Water District] that [the Districts] did not have sufficient authority to levy service charges and assessments to pay for the increased level of service mandated by the 1978 regulatory amendment. This implicit determination, resolving a mixture of legal and factual issues, became final and binding on respondents under the doctrine of collateral estoppel when they failed to seek judicial review of the Board's decision within the three-year limitations period.”

At a further hearing concerning the amount owed to each water district, the trial court stated it had erred in referring the matter to a referee and should have rendered a judgment directing the Controller to determine the amounts owed.

On June 3, 1996, the trial court entered a judgment stating (1) the Board's decision was final at the time the petitions were filed in the trial court; (2) \*392 the state mandate is a program for which reimbursement is due under [County of Los Angeles v. State of California, supra](#), 43 Cal.3d 46; (3) the court having concluded it was inappropriate for the court to determine amounts of reimbursement, the Controller was directed to make that determination. The court directed issuance of a writ commanding the Controller to determine the amounts due to the Districts.

Appellants appeal from the judgment.

The Districts filed a cross-appeal, but we dismissed the cross-appeal pursuant to stipulation of the parties.

## Discussion

### I. Appealability

(1a) Because the petition sought an order directing the Controller to issue a warrant and the Treasurer to pay a warrant but the judgment merely ordered the Controller

to determine amounts without disposing of those matters, and because the record reflected the trial court's recognition that it could not order issuance or payment of warrants unless it determined appropriated funds for such expenditures were reasonably available in the state budget<sup>13</sup> ([Carmel Valley Fire Protection Dist. v. State of California](#) (1987) 190 Cal.App.3d 521, 538-541 [234 Cal.Rptr. 795])—a determination requiring an evidentiary hearing which was not held—we requested supplemental briefing on the question whether the judgment was a final appealable judgment, as opposed to an interlocutory judgment.

(2) An appealable judgment or order is a jurisdictional prerequisite to an appeal. ([Code Civ. Proc., § 904.1](#); 9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, §§ 13-14, pp. 72-73.)

(3) An interlocutory judgment is not appealable; generally, a judgment is interlocutory if anything further in the nature of judicial action on the part of the trial court is essential to a final determination of the rights of the parties. ([Lyon v. Goss](#) (1942) 19 Cal.2d 659, 669-670 [123 P.2d 11].)

(1b) In their supplemental briefs, both sides maintain the judgment is a final appealable judgment but for different reasons. Both sides are wrong. \*393

Appellants assert the judgment is final because nothing further remains to be done by the trial court. According to appellants, the Controller, after determining what amounts are due, is supposed to submit that amount to the Legislature to appropriate the funds (though the judgment contains no such direction). Appellants assert that, if the Legislature does not appropriate the funds, the Districts' remedy would be to file a new action in the superior court to enforce the court's prior order, and to compel payment out of funds already appropriated and reasonably available for the expenditures. Appellants assert it is thus premature to consider whether appropriated funds are reasonably available to pay any reimbursement due.

The Districts' supplemental brief, while agreeing the judgment is a final appealable judgment, disputes appellants' view of what happens after the Controller determines the amounts. The Districts maintain the trial court intended for appellants to pay the amounts determined by the Controller, despite the judgment's failure so to state. The Districts claim the unresolved factual question of the existence of available appropriated funds in the budget is merely “an administrative detail” which need not be addressed by the court except in

a proceeding to enforce the judgment in the event appellants refuse to pay.

Both sides are wrong. Nothing in the judgment requires the Controller to submit an appropriations bill to the Legislature, and appellants cite no authority that would require such a procedure—which would duplicate steps previously undertaken in this case without success. Nor does anything in the judgment call for issuance or payment of warrants. *Carmel Valley Fire Protection Dist. v. State of California*, *supra*, 190 Cal.App.3d 521-a case discussed in the trial court and on appeal—recognized that a court violates the separation of powers doctrine if it purports to compel the Legislature to appropriate funds, but no such violation occurs if the court orders payment from an existing appropriation. (*Id.* at pp. 538-539.) Thus, the Districts' view of this matter as an administrative detail for a later postjudgment enforcement proceeding is unsupported.

We recognize this litigation arises from a “test claim,” which merely determines whether a state-mandated cost exists. (See fn. 5, *ante.*) Perhaps no issue of payment should arise at all at the test claim stage, though neither side so argues.

In any event, the judgment plainly leaves matters undecided.

We conclude the judgment is interlocutory and therefore not appealable.

Nevertheless, on our own motion, we shall exercise our discretion to treat the appeal as a writ petition and shall grant review on that basis. (*Morehart \*394 v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744 [29 Cal.Rptr.2d 804, 872 P.2d 143] [treating appeal as writ petition is authorized means for obtaining review of interlocutory judgments].) We shall exercise our discretion to treat the appeal as a writ petition in the interest of justice and judicial economy, because the merits of the dispositive issues have been fully briefed, both sides urge review, and the judgment compels the Controller to engage in complex factfinding determinations which may be moot if the trial court erred on the merits of the mandate issues. Given the difficulties in discerning how the former statutory process of test claims was supposed to work in practice, we believe the interests of justice and judicial economy are best served by reviewing the judgment rather than dismissing the appeal.

We stress, however, that our review is limited to contentions raised in the briefs—which do not raise issues of the propriety

of the remedy sought by the Districts. We express no view on whether the remedy sought by the Districts was an available or appropriate remedy.

## II. Standard of Review

(4) In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407 [216 Cal.Rptr. 782, 703 P.2d 122].) However, where the facts are undisputed and the issues present questions of law, the appellate court is not bound by the trial court's decision but may make its own determination. (*Ibid.*)

## III. Collateral Estoppel

We first address the trial court's determination that appellants were collaterally estopped from challenging the Board's determination of state-mandated cost (except for the ability to address the effect of a new Supreme Court case defining “program”). The trial court stated the Board's decision became final for collateral estoppel purposes in July 1986, when the statute of limitations for judicial review expired.

Appellants contend the trial court erred in applying collateral estoppel, because there was no “final judgment” for collateral estoppel purposes, since the amount of reimbursement had yet to be determined.

(5) We conclude it is not necessary to decide the parties' dispute as to whether the requirements of administrative collateral estoppel are met, because even assuming the elements are met, the doctrine of collateral estoppel should be disregarded pursuant to the public interest exception. \*395

Thus, our Supreme Court declined to apply collateral estoppel in a state-mandated costs case in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64-65 [266 Cal.Rptr. 139, 785 P.2d 522] (*Sacramento II*). There, a city and a county filed claims with the Board seeking subvention of costs imposed by a statute (Stats. 1978, ch. 2, p. 6 et seq., referred to in *Sacramento II* as “chapter 2/78”) which extended mandatory coverage under the state unemployment insurance law to include state and local governments. The Board found there was no state-mandated program and denied the claims. On mandamus, the trial court overruled the Board and found the costs reimbursable. We affirmed the trial court in a published opinion. (*City of Sacramento v. State of California* (1984)

156 Cal.App.3d 182 [203 Cal.Rptr. 258] (*Sacramento I*.) On remand, the Board determined the amounts due on the claims, but the Legislature refused to appropriate the necessary funds. The city filed a class action seeking among other things payment of the state-mandated costs. The trial court granted summary judgment for the state on the grounds the statute did not impose state-mandated costs. The Supreme Court upheld the trial court's decision.

The Supreme Court in *Sacramento II* rejected the local agencies' argument that the state was collaterally estopped from relitigating the issue whether a state-mandated cost existed, because *Sacramento I* "finally" decided the matter. (*Sacramento II, supra*, 50 Cal.3d at p. 64.) The Supreme Court said: "Generally, collateral estoppel bars the party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. [Citation.] '... But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed....' [Citation.]

"Even if the formal prerequisites for collateral estoppel are present here, the public-interest exception governs. Whether chapter 2/78 costs are reimbursable under article XIII B and parallel statutes constitutes a pure question of law. The state was the losing party in *Sacramento I*, and also the only entity legally affected by that decision. Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.

"Yet the consequences of any error transcend those which would apply to mere private parties. If the result of *Sacramento I* is wrong but unimpeachable, taxpayers statewide will suffer unjustly the consequences of the state's continuing obligation to fund the chapter 2/78 costs of local agencies...." (*Sacramento II, supra*, 50 Cal.3d at p. 64, original italics.) \*396

The Supreme Court also rejected the argument that res judicata applied. "Of course, res judicata and the rule of final judgments bar us from disturbing individual claims or causes of action, on behalf of specific agencies, which have been finally adjudicated and are no longer subject to review. [Citations.] However, the issues presented in the current action are not limited to the validity of any such finally adjudicated individual claims. Rather, they encompass the question of defendants' subvention obligations *in general*

under chapter 2/78." (*Sacramento II, supra*, 50 Cal.3d at p. 65, original italics.)

If this court's opinion finding a reimbursable mandate in *Sacramento I* did not constitute a final adjudication precluding further consideration of the matter, a fortiori the Board's decision in the instant case does not constitute a final adjudication precluding further consideration. Thus, here, as in *Sacramento II*, the issues presented are not limited to the validity of any finally adjudicated individual claim, but encompass the question of subvention obligations in general under the regulatory amendment of wastewater purification standards. If the Board's decision is wrong but unimpeachable, taxpayers statewide would suffer unjustly the consequences of a continuing obligation to fund the costs of local water districts. We reject the Districts' argument that no public interest exists in this case because only a few local entities are involved.

The Districts suggest application of the public interest exception to collateral estoppel would nullify the legislative intent to avoid multiple proceedings by creating a comprehensive and exclusive procedure for handling state mandated costs issues in the administrative forum. (E.g., *Gov. Code*, § 17500.<sup>14</sup>) However, we are bound by Supreme Court authority applying the public interest exception in a state-mandated costs case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 \*397 [20 Cal.Rptr. 321, 369 P.2d 937].) Moreover, contrary to the Districts' implication, the administrative decision is not the final word; the statutory scheme authorizes judicial review of the administrative decision. (*Gov. Code*, § 17559; former *Rev. & Tax. Code*, § 2253.5; *Stats.* 1977, ch. 1135, § 12, p. 3650.) Additionally, the instant judicial proceeding was initiated by the Districts, not by appellants. Thus, in this case application of the public interest exception to collateral estoppel is not creating multiple proceedings.

In light of the Supreme Court's decision in *Sacramento II*, we disregard earlier authority of an intermediate appellate court which applied administrative collateral estoppel to a question of law in a state-mandated costs case without express discussion of the public interest exception. (*Carmel Valley Fire Protection Dist. v. State of California, supra*, 190 Cal.App.3d at p. 536.)

We conclude that, insofar as appellants' contentions present questions of law, the public interest exception to administrative collateral estoppel governs, and we shall

therefore address the legal arguments raised in appellants' brief.

#### IV. Authority to Levy Fees

(6a) Appellants contend that, even if the regulatory amendment is a new program for state mandated costs purposes, the Districts' authority to levy fees defeats a determination that the costs are reimbursable. We agree.

At the time SMWD filed its test claim, former [Revenue and Taxation Code section 2253.2](#) provided in part:

“(b) The Board of Control shall not find a reimbursable mandate, pursuant to either Section 2250 of this code or to [Section 905.2 of the Government Code](#), in any claim submitted by a local agency or school district, pursuant to [subdivision \(a\) of Section 2218](#), if, after a hearing, the board finds that:

.....

“(4) The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or level of service.”<sup>15</sup> (Stats. 1982, ch. 734, § 10, p. 2917; Stats. 1980, ch. 1256, § 15, pp. 4253-4254.) \*398

The same provision is currently contained in [Government Code section 17556](#).<sup>16</sup>

The facial constitutionality of this provision was upheld in [County of Fresno v. State of California](#) (1991) 53 Cal.3d 482 [280 Cal.Rptr. 92, 808 P.2d 235]. The *Fresno* court rejected an argument that the statute was facially unconstitutional as conflicting with [section 6](#) (fn. 1, *ante*), which contains no exclusion of reimbursement where the local agency has authority to levy fees. [Section 6](#) requires subvention only when the costs in question can be recovered solely from tax revenues. (53 Cal.3d at p. 487.) [Government Code section 17556](#), subdivision (d), “effectively construes the term ‘costs’ in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound.” ([County of Fresno v. State of California](#), *supra*, 53 Cal.3d at p. 487.)

Here, appellants contend that, at all pertinent times, the water districts have had *authority* to levy fees to cover the costs at issue in this case. They cite provisions such as [Water](#)

[Code section 35470](#), which provides: “Any 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. The charges may include standby charges to holders of title to land to which water may be made available, whether the water is actually used or not. The 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 district purpose.”

We agree this statute on its face authorizes the Districts to levy fees sufficient to pay the costs involved with the regulatory amendment. We thus shall conclude the Board erred in finding a right to reimbursement despite this authority to levy fees, and we shall conclude appellants are not collaterally estopped from pressing this point.

The Districts do not dispute they have authority to levy fees for the costs involved in this case. Instead they argue the real issue is whether they had \*399 “sufficient” authority. They claim this issue was a mixed question of law and fact, and appellants should be collaterally estopped from raising it.<sup>17</sup>

We agree with appellants that the public interest exception to collateral estoppel should be applied here, because the issue presents a pure question of law. The Districts tried to make it a factual issue, but we shall explain why the facts presented by the District were immaterial.

Thus, in proceedings before the Board (where [Water Code section 35470](#) was cited to the Board by state agencies), SMWD did not argue it lacked “authority” to levy fees for this purpose. Instead, SMWD argued and presented evidence that it would not be economically desirable to do so. SMWD submitted declarations stating that rates necessary to cover the increased costs would render the reclaimed water unmarketable and would encourage users to switch to potable water. SMWD maintained that imposition of higher fees on users would contravene the legislative policy expressed in [Water Code section 13512](#), which directs the state to undertake all possible steps to encourage development of wastewater reclamation facilities.

The Board made no express finding concerning this issue. The record contains only the Board minutes, which reflect a

motion was made “To find a mandate and continue the issue regarding the claimant's ability to levy a service charge, to the parameters and guidelines process.” There was no second to the motion. A motion was then made to find the regulatory amendment contained a reimbursable mandate. The motion carried. The minutes then state: “Discussion: Chairperson Yost disagreed with the motion as she felt the claimant could recover their costs by levying a service charge ....” The Board's Parameters and Guidelines stated in part: “If service charges or assessments were levied to defray the cost of the new criteria, the claim must be reduced by the amount received from such charges or assessment.”

In proceedings before the trial court, SMWD admitted the district had the authority to levy fees but argued existence of authority was not enough, and the real question was whether it was economically feasible to levy fees sufficient to pay the mandated costs. Thus, SMWD's counsel stated at the hearing in the trial court: “The state keeps focusing on the question of whether the authority to issue, to assess fees and charges exists, and we have never contested that it didn't.

“But the statute which says that the Board cannot find the existence of a mandate if there's authority to assess fees and charges, and then the critical \*400 phrase, 'sufficient to pay for the mandated costs,' that's the condition with [*sic*] which they cannot satisfy.

“We proved that, the Board of Control hearing, through economic evidence. We proved it through testimony that the market was absolutely inelastic in terms of reclaimed water and potable water, that if you raise the price of reclaimed water over the potable water, that people would then buy the potable water, and that's all in the record.

“And so we showed that even though we have the authority, it was not sufficient to pay ....”

We note the record also reflects comments by SMWD's counsel to the trial court, that its customers were paying the increased costs as an “advance” against the state's obligation. The court pointed out users' payment of increased costs disproved the economic evidence SMWD had presented to the Board, that it could not raise its prices without losing its customers. The record also contains indications that the Districts funded the increased costs by diverting money from other sources. As will appear, we need not address this evidence, because it is not relevant to the question of authority to levy fees sufficient to fund the increased costs imposed by

the regulatory amendment, which is a question of law in this case.

The trial court's minute order stated the districts' authority to levy fees did not bar reimbursement for state-mandated costs, because the Board “implicitly determined” the districts did not have “sufficient” authority to levy fees to pay for the increased service mandated by the 1978 regulatory amendment, and this “implicit determination, resolving a mixture of legal and factual issues, became final and binding on [appellants] under the doctrine of collateral estoppel when they failed to seek judicial review of the Board's decision within the three-year limitations period.”

On appeal, appellants argue the sole inquiry is whether the local agency has “authority” to levy fees sufficient to pay the costs, and it does not matter whether the local agency, for economic reasons, finds it undesirable to exercise that authority. Appellants argue this presents a question of law, such that the public interest exception to collateral estoppel would apply (assuming the requirements of collateral estoppel are otherwise met).

We agree with appellants. (7) In construing statutes, our primary task is to determine the lawmakers' intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724 [257 Cal.Rptr. 708, 771 P.2d 406].) To determine intent, we look first to the words themselves. (*Ibid.*) “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature ....” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

(6b) Here, the statute is clear and unambiguous. On its face the statute precludes reimbursement where the local agency has “authority” to levy fees sufficient to pay for the mandated program or level of service. The legal meaning of “authority” includes the “Right to exercise powers; ...” (Black's Law Dict. (6th ed. 1990) p. 133, col. 1.) The lay meaning of “authority” includes “the power or right to give commands [or] take action ....” (Webster's New World Dict. (3d college ed. 1988) p. 92.) Thus, when we commonly ask whether a police officer has the “authority” to arrest a suspect, we want to know whether the officer has the legal sanction to effect the arrest, not whether the arrest can be effected as a practical matter.

Thus, the plain language of the statute precludes reimbursement where the local agency has the authority, i.e.,

the right or the power, to levy fees sufficient to cover the costs of the state-mandated program.

The Districts in effect ask us to construe “authority,” as used in the statute, as a practical ability in light of surrounding economic circumstances. However, this construction cannot be reconciled with the plain language of the statute and would create a vague standard not capable of reasonable adjudication. Had the Legislature wanted to adopt the position advanced by the Districts, it would have used “reasonable ability” in the statute rather than “authority.”

The question is whether the Districts have authority, i.e., the right or power, to levy fees sufficient to cover the costs. The Districts clearly have authority to levy fees sufficient to cover the costs at issue in this case. [Water Code section 35470](#) authorizes the levy of fees to “correspond to the cost and value of the service,” and the fees may be used “to defray the ordinary operation or maintenance expenses of the district and for any other lawful district purpose.” The Districts do not demonstrate that anything in [Water Code section 35470](#) limits the authority of the Districts to levy fees “sufficient” to cover their costs.

Thus, the economic evidence presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry.

On appeal, the Districts briefly argue economic undesirability of levying fees constitutes a lack of authority to levy fees sufficient to cover costs. They claim the evidence before the Board showed SMWD “could not” \*402 increase its fees because it was already charging as much for reclaimed as it was for potable water. However, the cited portion of the record does not show SMWD “could not” increase its fees but only that an increase would render reclaimed water unmarketable and encourage users to switch to potable water. The Districts cite no authority supporting their construction of former [Revenue and Taxation Code section 2253.2](#) (now [Gov. Code, § 17556](#)) that *authority* to levy fees sufficient to cover costs turns on economic feasibility. We have seen the plain language of the statute defeats the Districts' position.

(8) Since the issue in this case presented a question of law, we conclude the public interest exception to collateral estoppel applies. (*Sacramento II, supra*, 50 Cal.3d at p. 64.)

The Districts argue application of the public interest exception in this case raises policy concerns about the finality of

administrative decisions on state-mandated costs, because if collateral estoppel does not apply in this case, it will never apply. However, we merely hold, in accordance with Supreme Court pronouncement, that the public interest exception to collateral estoppel applies under the circumstances of this case to this state-mandated cost issue which presents solely a question of law.

The Districts argue any fees levied by the districts “cannot exceed the cost to the local agency to provide such service,” because such excessive fees would constitute a special tax. However, the districts fail to explain how this is an issue. No one is suggesting the districts levy fees that exceed their costs.

The Districts cite evidence presented to the referee in the aborted hearing to determine amounts owed to each District, that SMWD's director of finance testified SMWD has other sources of revenue from other services it provides (such as sewer service), maintains separate accounts, and borrowed funds internally from other accounts to cover costs incurred as a result of the subject mandate. The Districts assert this testimony reflects that SMWD “recognized the legal limitations on its authority to impose fees for the services that it provides.” However, nothing in this evidence demonstrates any legal limitations on the authority to levy the necessary fees.

The Districts say appellants appear to believe the Districts should require users of other services to subsidize the Districts' cost of reclaiming and selling wastewater, through excessive user fees. However, we do not read appellants' brief as presenting any such argument and in any event do not base our decision on that ground. \*403

In a footnote, the Districts make the passing comment: “In light of the adoption of Proposition 218, which added Articles XIII C and XIII D to the California Constitution this past November [1996], the authority of local agencies to recover costs for many services will be impacted by the requirement to secure the approval by majority vote of the property owners voting, to levy or to increase property related fees. See [Section 6, Article XIII D](#).” The Districts do not contend that the services at issue in this appeal are among the “many services” impacted by Proposition 218. We therefore have no need to consider what effect, if any, Proposition 218 might have on the issues in this case.

We conclude the Districts were not entitled to reimbursement of state-mandated costs, because they had authority to levy

fees sufficient to pay for the level of service mandated by the 1978 regulatory amendment. Appellants were not collaterally estopped from raising this issue in the trial court. We thus conclude the Districts' mandamus petitions should have been denied. We therefore need not address appellants' contentions that (1) the regulatory amendment did not constitute a new program or higher level of service, or (2) any right to reimbursement was abolished upon repeal of former [Revenue and Taxation Code section 2207](#).

Let a peremptory writ of mandate issue, directing the trial court to vacate its judgment and enter a new judgment denying the Districts' petitions for writ of mandate. Appellants shall recover their costs on appeal.

Puglia, P. J., and Nicholson, J., concurred.

The petition of real parties in interest for review by the Supreme Court was denied February 25, 1998. \*404

### Disposition

#### Footnotes

- 1 [Section 6](#) provides: "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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."
- 2 The trial court first held proceedings in the matter of the petition filed by the SMWD. The other three water districts had filed petitions, which were consolidated and awaiting hearing. The parties to the consolidated case filed a stipulation indicating they did not wish to relitigate the entitlement issues already decided by Judge Ford in the SMWD case, and they stipulated to assignment of their cases to Judge Ford pursuant to [California Rules of Court, rule 213](#) (assignment to one judge for all or limited purposes), for determination of amounts as to each district. The judgment expressly covers the petitions of all four districts.
- 3 [California Code of Regulations, title 22, section 60313](#), initially provided: "Landscape Irrigation. Reclaimed water used for the irrigation of golf courses, cemeteries, lawns, parks, playgrounds, freeway landscapes, and landscapes in other areas where the public has access shall be at all times an adequately disinfected, oxidized wastewater. The wastewater shall be considered adequately disinfected if at some location in the treatment process the median number of coliform organisms does not exceed 23 per 100 milliliters, as determined from the bacteriological results of the last 7 days for which analyses have been completed." (Former [§ 60313, Cal. Code Regs., tit. 22](#), Register 75. No. 14 (Apr. 5, 1975).)
- 4 [Section 60313 of California Code of Regulations, title 22](#), as amended, provides: "(a) Reclaimed water used for the irrigation of golf courses, cemeteries, freeway landscapes, and landscapes in other areas where the public has similar access or exposure shall be at all times an adequately disinfected, oxidized wastewater. The wastewater shall be considered adequately disinfected if the median number of coliform organisms in the effluent does not exceed 23 per 100 milliliters, as determined from the bacteriological results of the last 7 days for which analyses have been completed, and the number of coliform organisms does not exceed 240 per 100 milliliters in any two consecutive samples.  
"(b) Reclaimed water used for the irrigation of parks, playgrounds, schoolyards, and other areas where the public has similar access or exposure shall be at all times an adequately disinfected, oxidized, coagulated, clarified, filtered wastewater or a wastewater treated by a sequence of unit processes that will assure an equivalent degree of treatment and reliability. The wastewater shall be considered adequately disinfected if the median number of coliform organisms in the effluent does not exceed 2.2 per 100 milliliters, as determined from the bacteriological results of the last 7 days for which analyses have been completed, and the number of coliform organisms does not exceed 23 per 100 milliliters in any sample."
- 5 At the time in question, "test claim" meant "the first claim filed with the State Board of Control alleging that a particular statute or executive order imposes a mandated cost on such local agency or school district." (Former [Rev. & Tax. Code, § 2218](#); Stats. 1980, ch. 1256, § 7, p. 4249.) "Estimated claims" and "reimbursement claims" were used to make specific demand against an appropriation made for the purpose of paying such claims. (*Ibid.*)  
A similar structure, distinguishing between "test claims" and various "reimbursement claims" or "entitlement claims" continues presently in [Government Code sections 17521-17522](#).



At the time in question, the statutory procedure provided that if the Board found a mandate, it did not determine the amount to be reimbursed to the test claimant; rather, the Board then adopted a statewide cost estimate which was reported to the Legislature. (Stats. 1980, ch. 1256, p. 4246 et seq.; Stats. 1982, ch. 734, p. 2911 et seq.) It was the State Controller who determined specific amounts to be reimbursed, after the Legislature appropriated funds for that purpose. (*Ibid.*)

6 Former [Revenue and Taxation Code section 2231](#) provided in part: “(a) The state shall reimburse each local agency for all 'costs mandated by the state,' as defined in [Section 2207](#)....” (Stats. 1982, ch. 1586, § 3, p. 6264.)

7 [Government Code section 17561](#) provides in part: “(a) The state shall reimburse each local agency and school district for all 'costs mandated by the state,' as defined in [Section 17514](#)....”

8 Former [Revenue and Taxation Code section 2207](#) provided in part: “'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program; [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program ....” (Stats. 1980, ch. 1256, § 4, pp. 4247-4248.)

The test claim did *not* invoke other subdivisions of former [Revenue and Taxation Code section 2207](#), concerning “(c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973. [¶] ... [¶] ... (h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service if the local agencies have no reasonable alternatives other than to continue the optional program.” (Stats. 1980, ch. 1256, § 4, pp. 4247-4248.) Since these subdivisions were not invoked, we have no need to consider them.

9 [Government Code section 17514](#) provides: “'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of [Section 6](#) ....”

10 Former [Revenue and Taxation Code section 2255](#) provided: “At least twice each calendar year the Board of Control shall report to the Legislature on the number of mandates it has found and the estimated statewide costs of such mandates. Such report shall identify the statewide costs estimated for each such mandate and the reasons for recommending reimbursement.... Immediately on receipt of such report a local governmental claims bill shall be introduced in the Legislature. The local government claims bill, at the time of its introduction, shall provide for an appropriation sufficient to pay the estimated costs of such mandates, pursuant to the provisions of this article.” (Stats. 1980, ch. 1256, § 20, p. 4255.) The current provision is contained in [Government Code section 17600](#), which provides: “At least twice each calendar year the commission shall report to the Legislature on the number of mandates it has found pursuant to Article 1 (commencing with Section 17550) and the estimated statewide costs of these mandates. This report shall identify the statewide costs estimated for each mandate and the reasons for recommending reimbursement.”

11 At the time SMWD filed its test claim, former [Revenue and Taxation Code section 2253.2](#) provided in part: “(b) The Board of Control shall not find a reimbursable mandate ... in any claim submitted by a local agency ... if, after a hearing, the board finds that: [¶] ... [¶] (4) The local agency ... has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or level of service.” (Stats. 1982, ch. 734, § 10, p. 2916.)

12 [Government Code section 17556](#) provides in part: “The [Commission on State Mandates (formerly the Board of Control)] shall not find costs mandated by the state, as defined in [Section 17514](#), in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] ... [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.”

13 The petition for writ of mandate alleged there was a continuously appropriated State Mandates Claims Fund upon which the Legislature had placed restrictions which on their face made the fund inapplicable to the mandate at issue in this case. The petition further alleged these restrictions were unconstitutional, such that upon a judicial declaration of their unconstitutionality, there would exist funds reasonably available to pay SMWD. The trial court made no ruling on these matters. In this appeal, we need not and do not decide the propriety of the remedy sought by the Districts.

14 [Government Code section 17500](#) provides in part: “The Legislature finds and declares that the existing system for reimbursing local agencies ... for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under [Section 6](#) .... The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the

existence of state-mandated local programs. [¶] It is the intent of the Legislature in enacting this part to provide for the implementation of [Section 6](#) ... and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of [Section 6](#) ....”

15 This case presents no issue concerning any distinction between “service charges, fees or assessment,” as used in the statute. The parties on appeal frame the issue in terms of the authority to levy “fees.” We adopt their usage for the sake of simplicity.

16 [Government Code section 17556](#) provides in part: “The commission [formerly the Board] shall not find costs mandated by the state, as defined in [Section 17514](#), in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] ... [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service....”

17 The Districts assert appellants are relying on evidence that was not before the Board. However, they do not explain what they mean or give us any reference to appellants’ brief. We therefore disregard the assertion.

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110 Cal.App.4th 1176  
Court of Appeal, Second  
District, Division 7, California.

COUNTY OF LOS ANGELES,  
Plaintiff and Respondent,

v.

COMMISSION ON STATE  
MANDATES, Defendant and Appellant;  
Department of Finance, Real  
Party in Interest and Appellant.

No. B156870.

|  
July 28, 2003.

### Synopsis

**Background:** County petitioned for writ of mandate, seeking to vacate decision of the Commission on State Mandates which denied county's test claim for costs associated with statute requiring local law enforcement officers to participate in two hours of domestic violence training. The Superior Court, Los Angeles County, No. BS06497, Dzintra I. Janavs, J., granted the petition. Commission appealed.

**[Holding:]** The Court of Appeal, Muñoz (Aurelio), J., sitting by assignment, held that statute did not mandate any increased costs and thus Commission was not required to reimburse county for its costs.

Reversed with directions.

West Headnotes (18)

[1] **Mandamus** 🔑 Specific Acts

Administrative mandamus is the exclusive means to challenge a decision of the Commission on State Mandates on a subvention claim. [West's Ann.Cal.Gov.Code § 17559](#).

[2] **States** 🔑 State expenses and charges and statutory liabilities

Trial court reviews the decision of the Commission on State Mandates under the substantial evidence standard. [West's Ann.Cal.Gov.Code § 17559](#).

[3] **Administrative Law and Procedure** 🔑 Findings; evidence

When the substantial evidence test is applied by the trial court to review an administrative decision, the Court of Appeal is generally confined to inquiring whether substantial evidence supports the court's findings and judgment; however, it independently reviews the superior court's legal conclusions about the meaning and effect of constitutional and statutory provisions.

[4] **States** 🔑 State expenses and charges and statutory liabilities

Reimbursement to a county for costs incurred under a state mandate is not required unless there is a showing of actual increased costs mandated by the state. [West's Ann.Cal. Const. Art. 13B, § 6](#).

[5] **Municipal Corporations** 🔑 Limitation of Amount

**Municipal Corporations** 🔑 Power and Duty to Tax in General

**States** 🔑 Limitation of amount of indebtedness or expenditure

**Taxation** 🔑 Levy and apportionment

Goal of propositions which imposed limit on the power of state and local governments to adopt and levy taxes and complementary limit on governmental spending is to protect citizens from excessive taxation and government spending. [West's Ann.Cal. Const. Art. 13A, § 1 et seq.](#); [Art. 14, § 1 et seq.](#)

[6] **States** 🔑 State expenses and charges and statutory liabilities

The state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

[1 Cases that cite this headnote](#)

**[7] States**  [State expenses and charges and statutory liabilities](#)

A “program” falling within constitution section requiring state to pay for increased costs associated with state mandates is defined as a program which carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

[1 Cases that cite this headnote](#)

**[8] States**  [State expenses and charges and statutory liabilities](#)

A program falling under constitution section requiring state to pay for increased costs associated with state mandates is a “new program” if the local governmental entity had not previously been required to institute it. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[9] States**  [State expenses and charges and statutory liabilities](#)

“State mandates” are requirements imposed on local governments by legislation or executive orders. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[10] States**  [State expenses and charges and statutory liabilities](#)

Purpose of constitution section requiring state to pay for increased costs associated with state mandates is to avoid governmental programs from being forced on localities by the state. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[11] States**  [State expenses and charges and statutory liabilities](#)

Programs which are not unique to the government do not qualify as programs for which the state is required to pay increased costs pursuant to constitutional provision governing funding of state mandates; the programs must involve the provision of governmental services. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[12] States**  [State expenses and charges and statutory liabilities](#)

In order for a state mandate to be found under constitution section requiring state to pay for increased costs associated with state mandates, the local governmental entity must be required to expend the proceeds of its tax revenues. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[13] States**  [State expenses and charges and statutory liabilities](#)

In order for a state mandate to be found under constitution section requiring state to pay for increased costs associated with state mandates, there must be compulsion to expend revenue. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[14] States**  [State expenses and charges and statutory liabilities](#)

Statute requiring local law enforcement officers to participate in two hours of domestic violence training did not mandate any increased costs and thus Commission on State Mandates was not required to reimburse county for its costs associated with the mandate even though county had added two hours to its Peace Officer Standards and Training (POST); statute directed local law enforcement agencies to reallocate training resources rather than to add training, and state did not shift cost of a program previously administered and funded by the state. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

See 9 *Witkin, Summary of Cal. Law (9th ed. 1988) Taxation*, § 123A; 3 *Witkin, Cal. Procedure (4th ed. 1997) Actions*, § 614.

3 Cases that cite this headnote

**[15] States** — State expenses and charges and statutory liabilities

In the case of an existing program, an increase in existing costs does not result in a reimbursement requirement under constitutional section requiring state to pay for increased costs associated with state mandate. *West's Ann.Cal. Const. Art. 13B, § 6.*

**[16] States** — State expenses and charges and statutory liabilities

Under constitution section requiring state to pay for increased costs associated with state mandates, “costs” does not necessarily equal every increase in a locality's budget resulting from compliance with a new state directive; rather, the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding. *West's Ann.Cal. Const. Art. 13B, § 6.*

1 Cases that cite this headnote

**[17] States** — State expenses and charges and statutory liabilities

Legislative disclaimers, findings, and budget control language are not determinative to a finding of a state mandated reimbursable program. *West's Ann.Cal. Const. Art. 13B, § 6.*

**[18] States** — State expenses and charges and statutory liabilities

Not every increase in cost that results from a new state directive automatically results in a valid subvention claim, especially if the directive can be complied with by a minimal reallocation of resources within the entity

seeking reimbursement. *West's Ann.Cal. Const. Art. 13B, § 6.*

2 Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*422 \*1178** Paul M. Starkey, Camille Shelton, Sacramento, and Katherine Tokarski, for Defendant and Appellant Commission on State Mandates.

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Lloyd W. Pellman, County Counsel and Stephen R. Morris, Principal Deputy County Counsel, for Plaintiff and Respondent County of Los Angeles.

**Opinion**

MUNOZ (AURELIO), J. \*

A 1995 amendment to [Penal Code section 13519](#)<sup>1</sup> requires local law enforcement officers to participate in two hours of domestic violence training. The issue on appeal is whether this amendment resulted in a reimbursable state-mandated program within the meaning of [article XIII B, section 6 of the California Constitution](#) for the time spent by local law enforcement officers in such domestic violence training, although such officers were already required to spend 24 hours in continuing education training and the domestic violence training could be included within this total.

This administrative mandamus proceeding was commenced by the County of Los Angeles (County) on a “test claim” filed with and denied by the **\*1179** Commission on State Mandates (Commission) for the County's costs incurred pursuant to [section 13519](#). The trial court found that [California Constitution article XIII B, section 6](#) required the state to reimburse the County for domestic violence training because the County's needs and priorities might be detrimentally affected when the state took away two hours of training by mandating that two specific hours of training occur. The trial court remanded the proceedings to

the Commission to determine the amount of costs actually incurred by the County. We reverse.

### FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Article XIII B, section 6 of the California Constitution provides: “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 program or increased level of service...” (Cal. Const., art. XIII B, § 6.) The Commission is charged with hearing and deciding local agency claims of entitlement to reimbursement under article XIII B, section 6. (Gov.Code, § 17551, subd. (a).) Pursuit of such a claim is the exclusive remedy for this purpose (Gov.Code, § 17552), but the Commission’s decisions are subject to review by administrative mandamus, under Code of Civil Procedure section 1094.5. (Gov.Code, § 17559, subd. (b).) A “test claim” is “the first claim, \*\*423 including claims joined or consolidated with the first claim, filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state.” (Gov.Code, § 17521; see also *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 328–329, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308.)

In 1995, section 13519, subdivision (e) was amended to provide: “(e) Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d). The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government.”<sup>2</sup>

\*1180 Penal Code section 13510,<sup>3</sup> et seq. requires the State Commission on Peace Officer Standards and Training (POST) to promulgate regulations establishing minimum state standards relating to physical, mental, and moral fitness, and minimum training standards for law enforcement officers. Compliance with POST’s requirements is voluntary. (Pen.Code, § 13510 et seq.) POST has a certification program for peace officers specified in sections 13510 and 13522 and

for the California Highway Patrol. (Pen.Code, §§ 13510.1, subs.(a)-(c), 13510.3.)

On or about December 26, 1996, the County filed a “test claim”<sup>4</sup> pursuant to Government Code section 17522 with the Commission.<sup>5</sup> The test claim alleged that \*\*424 neither local police officers nor their agencies were given any choice with respect to compliance with section 13519. However, in order to implement the training, the County was required to redirect its officers from their normal work in order to attend the two-hour domestic violence training. The County alleged this substitution of the work agenda of the state for that of the local government violated California Constitution article XIII B, section 6. Furthermore, the County pointed to language in Penal Code section \*1181 13519, subdivision (e), providing that, “The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government entities.”

The test claim alleged that although POST bore the cost of producing two-hour telecourses on domestic violence, POST did not provide for any local law enforcement salary reimbursement for attendance at any type of POST-certified training, including the state-mandated costs for domestic violence training. Adherence to POST standards is voluntary by local law enforcement agencies, but POST requires a minimum of 24 hours of training every two years, to be chosen from a menu of available courses. POST does not dictate the courses that must be taken. POST courses include training in, among other things: interviewing techniques for detectives, defensive weapons, CPR, conflict resolution, bicycle patrol, ritual crime and hate group offenders, vehicle pullover and approach, confessions, courtroom demeanor, electronic vehicle recovery systems, vehicle theft investigation, and cultural awareness.

The POST program gives local law enforcement agencies flexibility in choosing training programs to meet their differing needs. In addition to domestic violence training, certain other programs are legislatively mandated: dealing with the developmentally disabled/mentally ill training (implemented July 1992); high speed vehicle pursuits (implemented November 1994); first aid/CPR (a 21-hour initial course, with a 12-hour refresher course every three years); missing persons (implemented January 1989); racial and cultural diversity (implemented August 1983); sexual harassment (implemented November 1994); and sudden

infant death syndrome (implemented July 1990). The time requirements for these other required courses vary. Some elective courses require 40 hours to complete.

However, the County alleged because there were no existing resources available for the domestic violence training, the annual training costs of the County were increased as a result of [section 13519](#). The County Sheriff's Department incurred costs of \$170,351.45 for domestic violence training for the fiscal year 1996–1997.

In support of its test claim, the County submitted legislative materials relating to [section 13519](#). These included: A July 5, 1995 memorandum in which the Assembly Committee on Appropriations stated that Senate Bill No. 132, proposing the changes **\*\*425** to 13519, understood the “training requirement could have significant costs to local law enforcement in terms of expense and public safety, as most departments will be forced to backfill for offices while the officers are being trained or will have to forego the **\*1182** backfilling and have fewer offices on patrol. Any monetary costs incurred by local law enforcement for the officer backfilling would be state-reimbursable.” The Committee noted that, “Although this bill states that the costs of the additional domestic violence training be absorbed by POST within existing resources, the reality is that this bill would create additional non-absorbable costs to POST since POST will be unable to exclude one type of training in favor of the domestic violence training, and instead will have to add this training to their current curriculum. The current curriculum of POST training is just as important to the maintaining of public safety as is the additional domestic violence training.”

In addition, the Department of Finance recognized the fiscal impact of [section 13519](#) on local law enforcement agencies, and opposed the adoption of Senate Bill No. 132. Diane M. Cummins, Deputy Director of the State Department of Finance, wrote to Senator Diane Watson on April 20, 1995, that, “This bill also specifies that training required pursuant to this measure ‘shall be funded from existing resources’, as specified. In so specifying, this bill would also require law enforcement agencies to modify existing training programs by increasing training requirements. Finance believes this bill contains a local mandate without providing necessary funding, thereby being in conflict with the California Constitution, which requires the state to fund local mandate costs. Although there is no specific information available regarding the level of additional costs which would be imposed on law enforcement

agencies, the Department of Finance is opposed to legislation which would result in additional General Fund expenditures, given the State's ongoing fiscal constraints.” The Department of Finance recognized that, “Adding mandatory domestic violence training requirement would result in an additional unknown cost for specified state and local law enforcement agencies....”

Furthermore, Gretchen Fretter, Chair of the California Academy Directors' Association (an organization of training center directors and police academy managers throughout the state) wrote Senator Watson on March 9, 1995, to express the association's concerns with Senate Bill No. 132. Fretter's analysis indicated that the mandate would incur a \$300,000 price tag for each training cycle. The California State Sheriffs' Association also wrote to express concerns about Senate Bill No. 132, including that POST estimated the domestic violence training would add costs to local agencies of at least \$750,000 per year. Glen Fine, the Deputy Executive Director of POST, on July 11, 1997, wrote to the Department of Finance to inform it that POST understood that the author of Senate Bill No. 132 was aware of POST's training requirements of 24 hours every two years, and it was “the author's intent ... that domestic violence update training become a statutorily required priority for inclusion within this 24 hours of training every two years.”

**\*1183** POST issued a bulletin in February 1996 advising local law enforcement agencies of the new domestic violence training requirement.

The Department of Finance contended that the Legislature intended the domestic violence continuing education and training to be funded from existing resources. The department also contended that POST, which was charged with developing training **\*\*426** standards for local law enforcement agencies, provided over \$21 million in existing state funds for domestic violence training. POST pointed out that the drafter of the statute recognized the 24 hours of continuing education every two years, and intended the domestic violence training to be a priority to be included within this 24-hour requirement.

At the hearing before the Commission on the test claim, representatives of the County testified that POST refused to pay for the programs, putting the burdens on local governments, and POST itself had estimated the annual cost of the program at \$750,000. A representative of the Sheriff's Department (Captain Dennis Wilson) testified that of the 24

hours required, any combination of courses could be used to meet the requirement. However, inclusion of the domestic violence training would take away two of those hours of training, resulting in only 22 hours. The Sheriff's Department would conduct domestic violence training even in the absence of the mandate; indeed, the Sheriff's Department actually conducted about 72 hours of training per officer per year. There was no funding for any of this training. The Sheriff's Department has 8,200 sworn officers, and two hours of training per officer adds up to 16,400 hours, which translates to 10 full-time officers for a year. Without funding for the domestic violence training, the Sheriff's Department therefore would lose the time equivalent of 10 officers for a year. Taking officers off the street impacts upon crime.

Martha Zavala testified on behalf of the County that the domestic violence training could not merely be subsumed within the 24 hours already required. With the training mandates already required by POST which exceed the 24-hour minimum, adding the domestic violence training only further exceeds the minimum 24 hours. There is no room to carve it out. Meeting POST requirements is not really an option. Thus, both the Sheriff's Department and the County agree they are seeking reimbursement of the costs of the training and the cost of replacing the officers on the street while in training.

A representative of POST testified that what POST provides in reimbursement to local law enforcement agencies is a small percentage of the real costs incurred. Where the training involved is through a telecourse, POST provides no reimbursement. There has been no increase in POST's budget since the amendment to [section 13519](#). About 30 of the courses provided by POST are mandated training.

**\*1184** A representative of the Department of Finance testified that the Department believed [section 13519](#) did not create state-mandated reimbursable program because the legislation indicated it was the Legislature's intent not increase the training costs of local government, and the training could be fit within the existing 24-hour requirements.

The Commission's staff prepared an analysis in advance of the hearing which found against the County. The "Staff Analysis" pointed out that [section 13519](#) was originally added by chapter 1609, Statutes of 1984.<sup>6</sup> Originally, the statute required **\*\*427** that POST develop and implement a basic course of instruction for the training of law enforcement officers in the handling of domestic violence complaints,

with local law enforcement agencies encouraged, but not required, to provide updates. These provisions of the 1984 version were the subject of a test claim filed by the City of Pasadena in 1990. That claim was denied because the original statute did not require local agencies to implement or pay for a domestic violence training program, did not increase the minimum basic training course hours or advanced officer training hours, and did not require local agencies to provide domestic violence training pursuant to the POST skills and knowledge standards.

Legally, the Staff Analysis pointed out that in order for a statute to impose a reimbursable state-mandated program, the statutory language must (1) direct or obligate an activity or task upon local government entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. (See, e.g., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.) The Staff Analysis concluded that [section 13519](#) did impose a new activity or program upon local law enforcement agencies. However, because the language of the statute requiring that the instruction be funded from existing resources, it was an open question whether the program imposed *mandated* costs. Because POST's minimum requirements remained at 24 hours before and after enactment of [section 13519](#), there were no increased training hours and costs associated with the domestic violence training course. Instead, the course should be accommodated or absorbed by **\*1185** local law enforcement agencies within their existing resources available for training. Thus, the Staff Analysis recommended denial of the test claim.

After the public hearings were held, the Commission adopted the findings of the Staff Analysis. The Commission issued its own statement of decision which substantially adopted the findings of the Staff Analysis.

Subsequently, the County filed a petition for writ of mandate with the trial court, seeking vacation of the Commission's decision. The County argued that the domestic violence training constituted a state-mandated reimbursable program because it (1) was mandatory, while the POST certification training was optional; and (2) the only way local agencies could avoid the costs of the new program would be to redirect their efforts from the training they were already providing as part of POST training, thereby losing flexibility to design programs to suit their own needs.



The Commission argued that the County's focus on "redirected" manpower costs was misplaced. Instead, the focus should be on whether the local law enforcement agencies actually experience increased expenditure of their tax revenues. (See, e.g., *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283, 101 Cal.Rptr.2d 784.) In *County of Sonoma*, the court stated that California Constitution article XIII B, section 6 was designed to prevent the state from forcing programs on local governments, and such a forced program is one which results in "increased actual expenditures \*\*428 of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with 'costs' incurred by local governments as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas." (*County of Sonoma*, at p. 1284, 101 Cal.Rptr.2d 784.) Because section 13519 did not require the County to incur "actual increased costs" because the domestic violence training could be subsumed within the 24-hour POST training requirement, no state reimbursement was required.

The Commission also argued the state had not required the County to incur increased training costs for salaries of officers to receive the two-hour training. POST's requirements did not change as a result of section 13519, and indeed, shortly after the enactment of section 13519, POST forwarded a bulletin to local law enforcement agencies suggesting they include domestic violence training within the 24-hour continuing training requirement.

\*1186 The trial court heard argument, after which the trial court adopted its tentative statement of decision in which it noted that, "Although it may be reasonable in some or even most cases for a deputy to eliminate an unrequired two-hour elective in favor of the required domestic violence instruction, what about cases where the County's needs and priorities would be affected detrimentally, if two hours of electives were taken away? At what point would additional mandated courses result in increased costs? [¶] The record also shows that, for some deputies, other state-required training already amounts to 24 hours or more per two-year period. For these deputies, the two hours of mandated domestic violence training cannot be accommodated by giving up other training but must be added on, for added cost. It appears that, if domestic violence instruction is to be funded from existing resources on a deputy-by-deputy basis, the County clearly does incur increased costs." The trial court granted the

petition, and remanded the matter for consideration of the exact amount of increased costs.

## DISCUSSION

### I. STANDARD OF REVIEW.

[1] [2] [3] The determination whether the statute here at issue established a mandate under California Constitution article XIII B, section 6, is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Under Government Code section 17559,<sup>7</sup> administrative mandamus is the exclusive means to challenge a decision of the Commission on a subvention claim. (*Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980, 64 Cal.Rptr.2d 270.) "Government Code section 17559 governs the proceeding below and requires that the trial court review the decision of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court's findings and judgment. [Citation.] However, we independently review the superior court's legal \*\*429 conclusions about the meaning and effect of constitutional and statutory provisions. [Citation.]" (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521.)

### \*1187 II. SECTION 13519'S IMPOSITION OF A DOMESTIC VIOLENCE TRAINING COURT IS NOT A STATE-MANDATED PROGRAM WITHIN THE MEANING OF CONSTITUTION ARTICLE XIII B, SECTION 6 BECAUSE IT DOES NOT CONSTITUTE AN "INCREASED LEVEL OF SERVICE."

[4] The Commission essentially makes two arguments. First, it contends that the County did not incur "increased costs." Reimbursement to the County under Constitution article XIII B, section 6 is not required unless there is a showing of actual increased costs mandated by the state. (See, e.g., *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d at pp. 54–55, 233 Cal.Rptr. 38, 729 P.2d 202; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66–67, 266 Cal.Rptr. 139, 785 P.2d 522.) In *City of Sacramento*, the court explained that the statutory concept of "costs mandated by the state" and the constitutional concept of article XIII B, section 6, are identical. (*City of Sacramento v. State of California*, *supra*, 50 Cal.3d at p. 67, fn. 11, 266 Cal.Rptr. 139, 785 P.2d

522.) Because of this limited, rather than broad definition, of “costs mandated by the state,” [article XIII B, section 6](#) does not provide reimbursement for every single increased cost. Thus, the trial court's finding that reimbursement was required where a statute results in a “redirection of local effort” or a “detrimental change in a local agency's needs and priorities” is not supported by the law. Rather, it constitutes an inappropriate injection of an equitable standard into the analysis.

Secondly, the Commission argues that no “mandate” exists. To the contrary, substantial evidence supports its finding that [section 13519](#) does not result in *increased* costs because nothing in the statute requires the County, or any other local law enforcement agency, to incur actual increased costs. The total number of hours required (the 24 minimum hours of POST training) did not increase because of the domestic violence training; rather, POST still requires 24 hours and in fact after the passage of [section 13519](#), POST forwarded a bulletin to law enforcement agencies recommending that they include domestic violence training within the 24-hour continuing professional training requirement. Because the POST standards are voluntary, if a local law enforcement agency adds two hours of domestic violence training to either the POST requirement or its own requirements, it is doing so at its own discretion.

In response, the County points out that the Commission's conclusion is based upon the erroneous premise that local law enforcement agencies could escape increased costs simply by dropping two hours of their existing POST training and substituting the new domestic violence training. However, the evidence in the legislative history indicates that this was not the intent of the Legislature when it was considering [section 13519](#), nor was it the position of **\*1188** the Department of Finance. The County also contends that local law enforcement agencies incur costs when they sacrifice their existing training programs for the new domestic violence training. Although POST does not dictate those courses for which a local law enforcement agency must offer training and POST does pay for much of the training material, most of the cost of POST training is borne by the local law enforcement agencies in the form of personnel costs while deputies spend 24 hours of work time receiving **\*\*430** training. Furthermore, if a mere legislative directive to fund a new program with existing resources would let the state off the hook for reimbursement, then the constitutional rule of mandate reimbursement would be a nullity: any new state mandate can be funded by canceling other services.

Because [California Constitution article XIII B, section 6](#) was designed to prevent the elimination of the fiscal freedom of local governmental agencies to expend their limited available resources without being straightjacketed by state-mandated programs, the Commission's “within existing resources” rule would circumvent the purposes of [article XIII B, section 6](#).

#### A. The Purposes of California Constitution Article XIII B, Section 6 Guide Our Analysis.

[5] In 1978, the voters approved Proposition 13, which added article XIII A to the California Constitution. Article XIII A “imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]” (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486, 280 Cal.Rptr. 92, 808 P.2d 235.) In 1979, Proposition 4 added article XIII B to the Constitution, which imposed a complementary limit on governmental spending. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574, 7 Cal.Rptr.2d 245, 828 P.2d 147.) These two constitutional provisions “work in tandem, together restricting California government's power both to levy and to spend for public purposes.” (*City of Sacramento v. State of California, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Their goal is to protect citizens from excessive taxation and government spending. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 61, 233 Cal.Rptr. 38, 729 P.2d 202.)

[6] [California Constitution article XIII B, section 6](#), provides in relevant part: “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 program or increased level of service.” [Article XIII B, section 6](#), prevents 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 of articles XIII A and XIII B. (*County of Fresno v. State of California, supra*, 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.) [Section 6](#) thus requires the state “to pay for any new **\*1189** governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]” (*Hayes v. Commission on State Mandates* (1992) 11 [Cal.App.4th](#) 1564, 1577, 15 Cal.Rptr.2d 547.)

[7] [8] [9] [10] [11] [12] [13] State mandate jurisprudence has established that in general, local agencies

are not entitled to reimbursement of all increased costs mandated by state law, but only those resulting from a “new” program or an “increased level of service” imposed upon them by the state. (*Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318.) A “program” is defined as a program which carries out the “governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.” (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) A program is “new” if the local governmental entity had not previously been required to **\*\*431** institute it. (*City of San Jose v. State of California, supra*, 45 Cal.App.4th at p. 1812, 53 Cal.Rptr.2d 521.) State mandates are requirements imposed on local governments by legislation or executive orders. (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 50, 233 Cal.Rptr. 38, 729 P.2d 202.) Since the purpose of California Constitution article XIII B, section 6 is to avoid governmental programs from being forced on localities by the state, programs which are not unique to the government do not qualify; the programs must involve the provision of governmental services. (*City of Sacramento v. State of California, supra*, 50 Cal.3d at p. 68, 266 Cal.Rptr. 139, 785 P.2d 522.) Further, in order for a state mandate to be found, the local governmental entity must be required to expend the proceeds of its tax revenues. (*Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, supra*, 55 Cal.App.4th at p. 986, 64 Cal.Rptr.2d 270.) Lastly, there must be compulsion to expend revenue. (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 780, 783, 200 Cal.Rptr. 642 [revisions to Code of Civil Procedure required entities exercising the power of eminent domain to compensate businesses for lost goodwill did not create state mandate, because the power of eminent domain was discretionary, and need not be exercised at all]; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) In *Lucia Mar*, the court explained article XIII B, section 6. “The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIII B because the programs are not ‘new.’” (*Lucia Mar Unified School District v. Honig, supra*, 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.)

However, in spite of all of the above, “increased level of service” is not defined in California Constitution article XIII B, section 6 or in the ballot materials. ( **\*1190** *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, 275 Cal.Rptr. 449.) Furthermore, “Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate.” (*City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197, 75 Cal.Rptr.2d 754.)

In *City of San Jose v. State of California, supra*, 45 Cal.App.4th 1802, 53 Cal.Rptr.2d 521, Government Code section 29550 authorized counties to charge cities and other local entities for costs of booking into county jails persons who had been arrested by employees of the cities and other entities. (45 Cal.App.4th at p. 1806, 53 Cal.Rptr.2d 521.) The State argued the measure merely reallocated booking costs, no shifting from state to local entities, therefore not within article XIII B, section 6. (45 Cal.App.4th at p. 1806, 53 Cal.Rptr.2d 521.) The city contended counties function as agents of the state, charged with enforcement of state's criminal laws; detaining and booking integral part of this process. (*Id.* at p. 1808, 53 Cal.Rptr.2d 521.) The Commission found maintenance of jails and detention of prisoners, had always been a local matter, and cities and counties were both forms of local government; therefore, there was no shift in costs between *state* and local entities.

Furthermore, the terms of Government Code section 29550 were discretionary, not mandatory. (*City of San Jose v. State of California, supra*, 45 Cal.App.4th at pp. 1808–1809, 53 Cal.Rptr.2d 521.) *City of San Jose* found no cost had been improperly transferred to the local government **\*\*432** entities because the cost of capture, detention and housing of persons charged with crimes had traditionally been borne by the counties. (*Id.* at p. 1813, 53 Cal.Rptr.2d 521.) *City of San Jose* rejected the cities' argument that the county was acting as agent of the state because it was “not supported by recent case authority, nor does it square with definitions particular to subvention analysis.” (*Id.* at p. 1814, 53 Cal.Rptr.2d 521.) California Constitution article XIII B treated cities and counties alike; Government Code section 17514 defines “costs mandated by the state” to mean any increased costs that a “local agency” is required to incur. Because both cities and counties were to be treated alike for purposes of subvention analysis, nothing in article XIII B, section 6 prohibits the shifting of costs between local government entities. (*City of San Jose, supra*, at p. 1815, 53 Cal.Rptr.2d 521.)

In *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, Labor Code sections 4453, 4453.1 and 4460, increased the maximum weekly wage upon which temporary and permanent disability indemnity was computed from \$231 to \$262.50 per week. In addition, Labor Code section 4702 increased certain death benefits from \$55,000 to \$75,000. The trial court held that because the changes did not exceed costs of living changes, they did not create an “increased level of service.” (43 Cal.3d at p. 52, 233 Cal.Rptr. 38, 729 P.2d 202.) The County argued the terms of California Constitution article XIII B, section 6, do not contain an exception for increased costs which do not exceed the inflation rate. (43 Cal.3d at p. 53, 233 Cal.Rptr. 38, 729 P.2d 202.) The County relied on certain repealed Revenue and \*1191 Taxation Code definitions which had equated any program which imposed “additional costs” as being within the constitutional provision of “increased level of service.” (*Id.* at p. 53, 233 Cal.Rptr. 38, 729 P.2d 202.) *County of Los Angeles* rejected this interpretation. “If the Legislature had intended to continue to equate ‘increased level of service’ with ‘additional costs,’ then the provision would be circular: ‘costs mandated by the state’ are defined as ‘increased costs’ due to an ‘increased level of service,’ which, in turn, would be defined as ‘additional costs.’ ” (*Id.* at p. 55, 233 Cal.Rptr. 38, 729 P.2d 202.) An examination of the language of California Constitution article XIII B, section 6 shows that “by itself, the term ‘higher level of service’ is meaningless.” *Id.* at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202. Rather, it must be read in conjunction with the phrase “ ‘new program.’ ” *Ibid.* “Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing ‘programs.’ ” (*Ibid.*) By “ ‘program,’ ” the voters meant “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, imposed unique requirements on local governments and do not apply generally to all residents and entities in the state.” (*Ibid.*) 233 Cal.Rptr. 38, 729 P.2d 202.) The ballot materials provided that article XIII B, section 6 would “not allow the state government to *force programs* on local governments without the state paying for them.” (43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) “Laws of general application are not passed by the Legislature to ‘force’ programs on localities.” (*Id.* at p. 57, 233 Cal.Rptr. 38, 729 P.2d 202.) In light of this, “[t]he language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an

appropriation to pay \*\*433 for any incidental increase in local costs.... If the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word ‘program’ was being used in such a unique fashion.” (*Id.* at p. 57, 233 Cal.Rptr. 38, 729 P.2d 202.) Therefore, there was no need to pay for increase in worker's compensation, because it is not a program administered by local agencies to provide service to the general public. Local government entities are indistinguishable in this respect from private employers. (*Id.* at pp. 57–58, 233 Cal.Rptr. 38, 729 P.2d 202.)

In *City of Sacramento v. State of California*, *supra*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, chapter 2 of Statutes of 1978 extended mandatory coverage under the state's unemployment insurance laws to include state and local governments and nonprofit organizations. *City of Sacramento* held there was no obligation on the part of the state to provide funds because there was no “unique” obligation imposed upon local governments, nor was there any requirement of new or increased governmental services. (50 Cal.3d at p. 57, 266 Cal.Rptr. 139, 785 P.2d 522.) As the court stated, the measure was adopted to conform California's system to federal laws. (*Id.* at p. 58, 266 Cal.Rptr. 139, 785 P.2d 522.) Because the measure required local governments to provide unemployment benefits to their own employees, the state had not compelled provision of a new or increased level of service to the public at the local level. Rather, it had merely required local government to provide the same benefits as private \*1192 employers. (*Id.* at p. 67, 266 Cal.Rptr. 139, 785 P.2d 522.) The purpose of California Constitution article XIII B, section 6 was to avoid governmental programs from being forced on localities by the state: Therefore, programs which are not unique to the government do not qualify. (50 Cal.3d at p. 67, 266 Cal.Rptr. 139, 785 P.2d 522.) The benefits at issue here have nothing to do with the provision of governmental services, and are therefore not within the scope of section 6. (50 Cal.3d at p. 68, 266 Cal.Rptr. 139, 785 P.2d 522.)

In *Lucia Mar Unified School District v. Honig*, *supra*, 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, Education Code section 59300 required school districts to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped. *Lucia Mar* held section 59300 constituted a “new” program of higher level of service because cost of program had been shifted from the state to a local entity. “The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money,

simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of [California Constitution] article XIII B because the programs are not ‘new.’ ” (44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.)

On the other hand, in *County of San Diego v. State of California*, supra, 15 Cal.4th 68, 61 Cal.Rptr.2d 134, 931 P.2d 312, pursuant to 1982 legislation, the state withdrew from counties Medi-Cal funding for medically indigent persons (MIP's). (*Id.* at pp. 79–80, 61 Cal.Rptr.2d 134, 931 P.2d 312.) To offset this change in coverage, the state set up an account as a mechanism to transfer state funds to counties to pay for Medi-Cal expenses, and sufficient funds had been available in this account to enable the state to fully fund San Diego County's Medi-Cal costs. (*Id.* at p. 80, 61 Cal.Rptr.2d 134, 931 P.2d 312.) However, in fiscal year 1990–1991, insufficient funds were available. (*Ibid.*) The state argued that no mandate for reimbursement existed because the counties had always borne the responsibility of paying for indigent medical care pursuant to *Welfare & Institutions Code section 17000*. (*County of San Diego*, at pp. 91–92, 61 Cal.Rptr.2d 134, 931 P.2d 312.) In finding \*\*434 reimbursement was mandated, the Supreme Court found that at the time *California Constitution article XIII B, section 6* was enacted, the state was fully funding Medi-Cal for MIP's and the County bore no responsibility for those costs. (*County of San Diego*, at p. 93, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Thus, in enacting Medi-Cal, the Legislature had shifted the cost of indigent medical care from the counties to the state. (*Id.* at pp. 96–97, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Given this background, the Legislature excluded MIP's from Medi-Cal, knowing full well that it would trigger the counties' obligation to pay for medical care as providers of last resort. (*Id.* at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Therefore, the 1982 legislation “mandated a ‘new program’ ” on counties by ‘compelling them to accept financial responsibility in whole or in part for a program,’ i.e., medical care for adult MIP's, ‘which was funded entirely by the state before the advent of article XIII B.’ ” (*County of San Diego v. State of California*, supra, 15 Cal.4th 68 at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312, citing *Lucia Mar Unified School District v. Honig*, supra, 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.) Otherwise, “ ‘County taxpayers would be forced to accept new taxes or see the county \*1193 forced to cut existing programs further...’ ” (*County of San Diego v. State of California*, supra, 15 Cal.4th 68 at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

The Commission relies heavily on *County of Sonoma v. Commission on State Mandates*, supra, 84 Cal.App.4th 1264, 101 Cal.Rptr.2d 784. In *County of Sonoma*, the challenged legislation added *section 97.03 to the Revenue and Taxation Code*, and reduced the amount of property tax revenue to be allocated to local government pursuant to a formula, allocating an equal portion to a “Educational Revenue Augmentation Fund (ERAF)” for distribution to school districts. (84 Cal.App.4th at pp. 1269–1270, 1275, 101 Cal.Rptr.2d 784.) The net effect of the legislation was to decrease counties' tax revenues, although school revenues remained stable, and satisfied the constitutional necessity of maintaining a minimum level of funding for schools pursuant to California Constitution article XIV, section 8. (84 Cal.App.4th at p. 1276, 101 Cal.Rptr.2d 784.) In *County of Sonoma*, the County argued that the reallocation of tax revenues constituted a state-mandated cost of a new program. (*Id.* at p. 1276, 101 Cal.Rptr.2d 784.) The court held that *section 6* subvention was limited to “increases in actual costs.” Because none of the County's tax revenues were expended, the legislation did not come within *section 6*. “Proposition 4 [the initiative enacting article XIII B] was aimed at controlling and capping government spending, not curbing changes in revenue allocations. *Section 6* is an obvious [complement] to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit. *Section 6*, located within a measure aimed at limiting expenditures, is expressly concerned when ‘costs’ incurred by local government as a result of state-mandated programs, particularly with the costs of compliance with a new program *restrict local spending in other areas*.” (84 Cal.App.4th at pp. 1283–1284, 101 Cal.Rptr.2d 784 (emphasis added).)

*County of Sonoma* discerned a further requirement of *California Constitution article XIII B, section 6*: that the costs incurred must involve programs previously funded exclusively by the state. In imposing this limitation, *County of Sonoma* relied on language in \*\*435 *County of San Diego v. State of California*, supra, 15 Cal.4th 68, 61 Cal.Rptr.2d 134, 931 P.2d 312 that “*section 6* prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of *section 6*.” (*County of San Diego v. State of California*, supra, 15 Cal.4th 68 at p. 99, fn.

20, 61 Cal.Rptr.2d 134, 931 P.2d 312.) *County of Sonoma* determined that because the statute at issue only involved a reallocation of funds between entities already jointly responsible for providing a service (education), no state-mandated reimbursable program existed. (*County of Sonoma v. Commission on State Mandates, supra*, 84 Cal.App.4th at p. 1289, 101 Cal.Rptr.2d 784.)

[14] [15] [16] \*1194 Based upon the principles discernable from the cases discussed, we find that in the instant case, the legislation does not mandate a “higher level of service.” In the case of an existing program, an increase in existing costs does not result in a reimbursement requirement. Indeed, “costs” for purposes of California Constitution article XIII B, section 6, does not equal every increase in a locality’s budget resulting from compliance with a new state directive. Rather, the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding.

We agree that POST certification is, for all practical purposes, not a “voluntary” program and therefore the County must, in order to comply with section 13519, add domestic violence training to its curriculum. POST training and certification is ongoing and extensive, and local law enforcement agencies may chose from a menu of course offerings to fulfill the 24-hour requirement. Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. Officer downtime will be incurred. However, merely by adding a course requirement to POST’s certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.

Furthermore, the state has not shifted from itself the cost of a program previously administered and funded by the state. Instead, the state is requiring certain courses to be placed within an already existing framework of training. This loss of “flexibility” does not, in and of itself, require the County to expend funds that previously had been expended on the POST program by the state. Instead, “[t]he purpose for which state subvention of funds was created, to protected local agencies from having the state transfer its cost of government from

itself to the local level, is therefore not brought into play” by a directive that POST-certified studies include domestic violence training. (*Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, supra*, 55 Cal.App.4th at p. 986, 64 Cal.Rptr.2d 270.) Any increased costs are merely “incidental” to the cost of administering the POST certification.

[17] [18] While we are mindful that legislative disclaimers, findings and budget control language are not determinative to a finding of a state-mandated reimbursable program (*Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 541, 234 Cal.Rptr. 795), our interpretation is supported by the hortatory statutory language that, “The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase \*\*436 the annual training costs of local \*1195 government entities.” (§ 13519.) Thus, while the County may lose some flexibility in tailoring its training programs, such loss of flexibility does not rise to the level of a state-mandated reimbursable program because the loss of flexibility is incidental to the greater goal of providing domestic violence training. Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement. Thus, while there may be a mandate, there are no increased costs mandated by section 13519.

## DISPOSITION

The judgment of the trial court is reversed. The trial court is directed to enter a new and different judgment denying the County’s petition for writ of mandate and reinstating the findings of the Commission.

We concur: PERLUSS, P.J., and WOODS, J.

## All Citations

110 Cal.App.4th 1176, 2 Cal.Rptr.3d 419, 03 Cal. Daily Op. Serv. 6658, 2003 Daily Journal D.A.R. 8347

## Footnotes

- \* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- 1 Hereafter [section 13519](#).
- 2 The currently enacted version of this provision is found at [section 13519, subdivision \(g\)](#), and reads, “Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d). The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government entities.” (Stats.1998, ch. 701, § 1, designated the paragraph following subd. (a) as subd. (b) and redesignated the remaining subdivisions accordingly; in redesignated subd. (c), inserted par. (5), listing the signs of domestic violence as an instruction topic, and redesignated pars. (5) to (16) as pars. (6) to (17).)
- 3 [Penal Code section 13510, subdivision \(a\)](#), provides in relevant part: “For the purpose of raising the level of competence of local law enforcement officers, [POST] shall adopt, and may from time to time amend, rules establishing minimum standards relating to physical, mental, and moral fitness that shall govern the recruitment of any city police officers, peace officer members of a county sheriff’s office, marshals or deputy marshals of a municipal court, peace officer members of a county coroner’s office....”
- 4 The test claim also challenged the incident-reporting requirements of [Penal Code section 13730](#), which imposed a new program upon local law enforcement agencies to include in the domestic violence incident report additional information regarding the use of alcohol and controlled substances by the alleged abuser, and any prior domestic violence responses to the same address. The County did not contest the Commission’s outcome relating to this portion of the test claim, and therefore this issue is not before us on appeal.
- 5 In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of California Constitution article XII B, section 6. (See [Gov.Code, § 17500 et seq.](#)) The local agency files a test claim with the Commission, which holds a public hearing and determines whether the statute mandates a new program or increased level of service. ([Gov.Code, §§ 17521, 17551, 17555.](#)) If the Commission finds that a claim is reimbursable, it then determines the amount of reimbursement. ([Gov.Code, § 17557.](#)) The local agency then follows statutory procedures to obtain reimbursement. (See [Gov.Code, § 17558 et seq.](#)) Where the Commission finds no reimbursable mandate, the local agency can challenge this finding by administrative mandate proceedings under [Code of Civil Procedure section 1094.5](#). (See [Gov.Code, § 17552](#) [these provisions “provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6”].)
- 6 The history of [section 13519](#) is as follows: Added by Statutes 1984, chapter 1609, section 2, pages 5711–5713. Amended by Statutes 1985, chapter 281, section 1, pages 1305–1306, effective July 26, 1985; Statutes 1989, chapter 850, section 3; Statutes 1991, chapter 912 (Sen. Bill No. 421), section 1, pages 4086–4088; Statutes 1993, chapter 1098 (Assem. Bill No. 1268), section 8, pages 6162–6163; Statutes 1995, chapter 965 (Sen. Bill No. 132), section 1, pages 7377–7380; Statutes 1998, chapter 606 (Sen. Bill No.1880), section 13; Statutes 1998, chapter 701 (Assem. Bill No. 2172), [section 1](#); Statutes 1999, chapter 659 (Sen. Bill No. 355), section 4. The 1995 amendment, at issue here, rewrote subdivision (e), which prior to amendment read: “(e) Forty thousand dollars (\$40,000) is appropriated from the Peace Officers Training Fund [POST] in augmentation of Item 8120–001–268 of the Budget Act of 1984, to support the travel, per diem, and associated costs for convening the necessary experts.” (Stats.1993, ch. 1098, § 8, p. 6188.)
- 7 [Government Code section 17559, subd. \(b\)](#), provides: “A claimant or the state may commence a proceeding in accordance with the provisions of [Section 1094.5 of the Code of Civil Procedure](#) to set aside a decision of the commission on the ground that the commission’s decision is not supported by substantial evidence. The court may order the commission to hold another hearing regarding the claim and may direct the commission on what basis the claim is to receive a rehearing.”



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150 Cal.App.4th 898

Court of Appeal, Second  
District, Division 3, California.

COUNTY OF LOS ANGELES  
et al., Plaintiffs and Appellants,

v.

COMMISSION ON STATE

MANDATES, Defendant and Appellant;

[Regional Water Quality Control Board](#), Los Angeles  
Region, Real Party in Interest and Respondent.  
City of Artesia, etc., et al., Plaintiffs and Appellants,

v.

[Commission on State Mandates](#),

Defendant and Appellant;

[Regional Water Quality Control Board](#), Los Angeles  
Region, Real Party in Interest and Respondent.

No. B183981.

|  
May 10, 2007.

### Synopsis

**Background:** County and cities presented test claims to California Commission on State Mandates, seeking reimbursement, pursuant to constitutional requirement for subvention arising from a state mandate, for carrying out obligations under National Pollutant Discharge Elimination System (NPDES) Permit issued by Regional Water Quality Control Board. Commission would not adjudicate claims on the ground that subvention was precluded by statute. County and cities sued Commission, seeking an order requiring State to reimburse them for carrying out new obligations, along with other relief. Commission and county and cities filed cross-motions for judgment on the pleadings. The Superior Court, Los Angeles County, Nos. BS089769 and BS089785, [Victoria G. Chaney, J.](#), entered partial grant of cross-motions. Trial court also granted in part the petitions by county and cities for a writ of mandate directing Commission to consider the test claims and determine whether county and cities were entitled to reimbursement. Commission appealed and county and cities cross-appealed.

**Holdings:** The Court of Appeal, [Aldrich, J.](#), held that

[1] Commission forfeited its statute of limitations defense based on failure to raise it in trial court, and

[2] question of whether obligations constituted federal or state mandates presented factual issues that had to be addressed in the first instance by Commission.

Affirmed.

West Headnotes (13)

[1] **States** State expenses and charges and statutory liabilities

“Subvention” under constitutional provision concerning reimbursement to local government for state-mandated programs generally means grant of financial aid or assistance, or subsidy. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

[2] **States** State expenses and charges and statutory liabilities

Constitutional rule of state subvention that requires state to pay for new governmental programs imposed on local governments does not require state to reimburse local agencies for any incidental cost that may result from enactment of state law; rather, subvention requirement is restricted to governmental services which local agency is required by state law to provide to its residents. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

[1 Cases that cite this headnote](#)

[3] **States** State expenses and charges and statutory liabilities

Constitutional rule of state subvention which requires state to reimburse local government for implementing required governmental programs is intended to prevent state from transferring



costs of government from itself to local agencies.  
[West's Ann.Cal. Const. Art. 13B, § 6.](#)

[1 Cases that cite this headnote](#)

[4] **States**  [State expenses and charges and statutory liabilities](#)

Under constitutional rule of state subvention which requires state to reimburse local government for governmentally imposed programs, reimbursement is required when state freely chooses to impose on local agencies any peculiarly governmental cost which they were not previously required to absorb. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

[1 Cases that cite this headnote](#)

[5] **Pleading**  [Judgment on Pleadings](#)  
**Pleading**  [Time for proceedings](#)

A motion for judgment on the pleadings is the equivalent of a general demurrer but is made after the time for demurrer has expired; the rules governing demurrers apply.

[6] **Pleading**  [Matters considered](#)

The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may judicially notice.

[1 Cases that cite this headnote](#)

[7] **Appeal and Error**  [Judgment on the pleadings](#)

On review of a judgment on the pleadings, the appellate court must determine if the complaint states a cause of action as a matter of law.

[1 Cases that cite this headnote](#)

[8] **Appeal and Error**  [Judgment on the pleadings](#)

On review of a judgment on the pleadings, the appellate court reviews the complaint de novo to

determine whether it alleges facts sufficient to state a cause of action under any legal theory.

[1 Cases that cite this headnote](#)

[9] **Mandamus**  [Scope and extent in general](#)

In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence; however, where the facts are undisputed and the issues present questions of law, the appellate court is not bound by the trial court's decision but may make its own determination.

[10] **Mandamus**  [Presentation and reservation in lower court of grounds of review](#)

On appeal from trial court's issuance of a writ of mandate directing the California Commission on State Mandates to set aside its decisions rejecting test claims of city and counties, which claims sought reimbursement pursuant to constitutional requirement for subvention for carrying out obligations under National Pollutant Discharge Elimination System (NPDES) Permit, Commission forfeited any right it may have had to assert 90-day statute of limitations defense, where Commission failed to raise the defense in its pleadings in the trial court. [West's Ann.Cal. Const. Art. 13B, § 6](#); [West's Ann.Cal.C.C.P. § 341.5.](#)

[2 Cases that cite this headnote](#)

[11] **Limitation of Actions**  [Matters appearing on face of pleadings](#)

The time-bar of a statute of limitations may be raised by demurrer where the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, for the reason that it fails to state facts sufficient to state a cause of action.

[11 Cases that cite this headnote](#)

**[12] Limitation of Actions** ← Waiver or estoppel by failure to plead

Forfeiture of a time-bar defense transpires by the failure to raise the applicable statute of limitations in the answer.

[6 Cases that cite this headnote](#)

**[13] States** ← State expenses and charges and statutory liabilities

In proceedings initiated by county and cities against California Commission on State Mandates for reimbursement, pursuant to constitutional requirement for subvention arising from a state mandate, for carrying out obligations under National Pollutant Discharge Elimination System (NPDES) Permit issued by Regional Water Quality Control Board, the question of whether the obligations constituted federal or state mandates presented factual issues that had to be addressed in the first instance by the Commission; although provision of Government Code would have excluded from subvention any order that included a permit issued by Regional Water Boards, that section was unconstitutional under article imposing subvention requirement whenever the Legislature “or any state agency” mandated a new program or higher level of service, making it necessary to determine whether state mandates existed. [West's Ann.Cal. Const. Art. 13B, § 6](#); [West's Ann.Cal.Gov.Code § 17516\(c\)](#).

*See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, §§ 119-122; Cal. Jur. 3d, State of California, § 101 et seq.*

[3 Cases that cite this headnote](#)

**West Codenotes****Held Unconstitutional**

[West's Ann.Cal.Gov.Code § 17516\(c\)](#)

**Attorneys and Law Firms**

**\*\*764** [Raymond G. Fortner, Jr.](#), County Counsel, [Judith A. Fries](#), Principal Deputy County Counsel for Plaintiffs and Appellants County of Los Angeles and Los Angeles County Flood Control District.

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[ALDRICH, J.](#)

**\*903 INTRODUCTION**

The California Commission on State Mandates (the Commission) appeals from the judgment entered following the partial grant of cross-motions for judgment on the pleadings. The County of Los Angeles, the Los Angeles County Flood Control District, and the Cities of Commerce, Carson, Downey, Hawaiian Gardens, Montebello, Santa Fe Springs, Signal Hill, Artesia, Beverly Hills, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino and Westlake Village (collectively, County/Cities) filed a cross-appeal from the judgment.

In 2001, the Regional Water Quality Control Board (Regional Water Board), Los Angeles Region, issued a National

Pollutant Discharge Elimination System (NPDES) Permit for municipal stormwater and urban runoff discharges, which obligated County/Cities to inspect industrial, \*904 commercial and construction water treatment facilities (which obligation County/Cities claim the State previously performed) and to install and maintain trash receptacles at transit stops.

County/Cities presented “test claims”<sup>1</sup> to the Executive Director of the Commission \*\*765 seeking reimbursement for carrying out these obligations pursuant to the constitutional requirement for subvention arising from a state mandate (Cal. Const., art. XIII B, § 6). The Executive Director returned the claims unadjudicated, because they did not involve an executive order under [section 17516 of the Government Code](#) (Section 17516c). In denying the appeals of County/Cities, the Commission noted it was without authority to declare a statute unconstitutional and concluded that Section 17516c excludes from the subvention requirement any order, which includes a permit, issued by the Regional Water Boards of the State Water Resources Control Board (State Water Board).

[Section 6 of article XIII B of the California Constitution](#) (article XIII B, section 6) provides in pertinent part: “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....” (Italics added.)

As we shall discuss, Section 17516c is unconstitutional to the extent it exempts Regional Water Boards from the constitutional state mandate subvention requirement. Its creation of an exception for Regional Water Boards, which are state agencies, contravenes the plain, unequivocal, and all-inclusive reference to “any state agency” in [article XIII B, section 6](#). Moreover, a contrary conclusion is not compelled by virtue of the fact that Section 17516c essentially mirrors the language of [section 2209, subdivision \(c\) \(§ 2209\(c\)\) of the Revenue and Taxation Code](#). A statute cannot trump the constitution.

We decline to consider the Commission's new claim that the constitutional challenge to Section 17516c by County/Cities is barred by the 90-day limitation period of [section 341.5 of the Code of Civil Procedure](#). This statute of limitations defense, which should have been raised before the trial court, is not cognizable on this appeal.

\*905 The Commission urges that should this court conclude Section 17516c is unconstitutional, the appropriate remedy is to afford the Commission the opportunity to pass on the merits of the subject test claims on the issues of whether: (1) the subject permit qualifies as a state mandated program under [article XIII B, section 6](#); (2) the permit amounts to a new program or higher level of service; and (3) the permit imposes costs on local entities ([Gov.Code, §§ 17514, 17556](#)). We find its position persuasive.

The cross-appeal filed by County/Cities is premised on the theory that if subvention of funds from the Commission is foreclosed by Section 17516c, County/Cities are entitled to pursue an independent action against the Regional Water Board, Los Angeles Region (LA Regional Water Board). This cross-appeal, which is simply protective in nature, is moot.

In sum, we uphold the trial court's issuance of a writ of mandate directing the Commission to set aside its decisions affirming its Executive Director's rejections of the subject test claims and to consider fully these test claims and determine whether County/Cities are entitled to reimbursement without consideration of Section 17516c, and we affirm the judgment in its entirety.

## BACKGROUND

### 1. [Article XIII B, section 6, Subvention of Funds for State Mandates](#)

“The electorate approved Proposition 4 in 1979, thus adding \*\*766 article XIII B to the state Constitution. While the earlier Proposition 13 limited the state and local governments' power to increase taxes (see Cal. Const., art. XIII A, added by initiative measure in Primary Elec. (June 6, 1978)), Proposition 4, the so-called ‘Spirit of 13,’ imposed a complementary limit on the rate of growth in governmental spending.” ([San Francisco Taxpayers Assn. v. Board of Supervisors](#) (1992) 2 Cal.4th 571, 574, 7 Cal.Rptr.2d 245, 828 P.2d 147.) This measure also “provided [for] reimbursement to local governments for the costs of complying with certain requirements mandated by the state.” ([Long Beach Unified Sch. Dist. v. State of California](#) (1990) 225 Cal.App.3d 155, 172, 275 Cal.Rptr. 449.)

“[V]oters were told that [section 6](#) of Proposition 4 was intended to prevent state government attempts ‘to force programs on local governments without the state paying

for them.’ (Ballot Pamp., Special Statewide Elec. [ (Nov. 6, 1979) ] p. 18.)” (*County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1282, 101 Cal.Rptr.2d 784; see also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202 [intent was not all local costs arising from compliance with state law to be reimbursable; rather, intent was to prevent “the perceived \*906 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”].)

“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. [Citation.] 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. [Citations.] 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*.” (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, 280 Cal.Rptr. 92, 808 P.2d 235, italics original; see also, *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6, 244 Cal.Rptr. 677, 750 P.2d 318 [a reimbursement requirement was “enshrined in the Constitution ... to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources”].)

Article XIII B, section 6 provides: “(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 such 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.”

[1] “ ‘Subvention’ generally means a grant of financial aid or assistance, or a \*\*767 subsidy. [Citation.] As used in connection with state-mandated costs, the basic legal requirements of subvention can be easily stated; it is in the application of the rule that difficulties arise.

[2] [3] [4] “Essentially, the constitutional rule of state subvention provides that the state is required to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.] This does not mean that the state is required to \*907 reimburse local agencies for any incidental cost that may result from the enactment of a state law; rather, the subvention requirement is restricted to governmental services which the local agency is required by state law to provide to its residents. [Citation.] The subvention requirement is intended to prevent the state from transferring the costs of government from itself to local agencies. [Citation.] Reimbursement is required when the state ‘freely chooses to impose on local agencies *any* peculiarly “governmental” cost which they were not previously required to absorb.’ [Citation.]” (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, at 1577–1578, 15 Cal.Rptr.2d 547.)

The subvention requirement of article XIII B, section 6 is triggered if “the Legislature or any state agency” mandates a new program or higher level of service. (Art. XIII B, § 6.) Such requirement is inapplicable where the additional costs on local governments are imposed by a federal mandate, i.e., the federal government. Article XIII B, section 9, subdivision (b), defines federally mandated appropriations as those “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*.”<sup>2</sup> (Italics added.)

2. *Existence of State Mandate Matter for the Commission*  
Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under article XIII B, section 6, is a matter for the Commission to determine in the first instance.

\*908 A local government initiates the process for subvention under [article XIII B, section 6](#) by filing a claim with the Commission. \*\*768 (Gov.Code, § 17521; cf. *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89, 61 Cal.Rptr.2d 134, 931 P.2d 312 [futility exception to exhaustion of administrative remedies doctrine applicable to failure to file claim before Commission].) The initial claim is referred to as a “test claim.” (Gov.Code, § 17521.)

“The Legislature enacted [Government Code sections 17500 through 17630](#) to implement [article XIII B, section 6](#). (Gov.Code, § 17500.)” (*County of Fresno v. State of California, supra*, 53 Cal.3d at p. 484, 280 Cal.Rptr. 92, 808 P.2d 235.) The provisions of [Government Code sections 17500 et seq.](#) “provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by” [article XIII B, section 6](#). (Gov.Code, § 17552.)

“It created a ‘quasi-judicial body’ (*ibid.*) called the Commission on State Mandates ... ( [Gov.Code], § 17525) to ‘hear and decide upon [any] claim’ by a local government that the local government ‘is entitled to be reimbursed by the state for costs’ as required by [article XIII B, section 6](#). (Gov.Code, § 17551, subd. (a).) It defined ‘costs’ as ‘costs mandated by the state’—‘any increased costs’ that the local government ‘is required to incur ... as a result of any statute ..., or any executive order implementing any statute ..., which mandates a new program or higher level of service of any existing program’ within the meaning of [article XIII B, section 6](#). (Gov.Code, § 17514.) Finally, in [section 17556\(d\)](#) it declared that ‘The commission shall not find costs mandated by the state ... if, after a hearing, the commission finds that’ the local government ‘has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.’ ” (*County of Fresno v. State of California, supra*, 53 Cal.3d at p. 484, 280 Cal.Rptr. 92, 808 P.2d 235.)

### 3. Regional Water Board Order Not “Executive Order”

Section 17516c defines, in pertinent part, an “[e]xecutive order” [as] any order, plan, requirement, rule, or regulation issued by ... [a]ny agency ... of state government[.]” except an “[e]xecutive order” does not include any order, plan, requirement, rule, or regulation issued by the State Water ... Board or by any regional water ... board pursuant to Division 7 (commencing with [Section 13000](#)) of the Water Code.”<sup>3</sup> (Added by Stats.1984, ch. 1459, § 1.)

\*909 In light of the above definition, the subject permit issued by an order of the LA Regional Water Board cannot constitute an “executive order implementing any statute[,] ... which mandates a new program or higher level of service of an existing program within the meaning of” the \*\*769 [article XIII B, section 6](#) requirement of subvention of funds to local governments for carrying out a state mandate. (Gov.Code, § 17514.)

### 4. Procedural Posture

LA Regional Water Board issued Order No. 01–182, which adopted NPDES Permit No. CAS004001 (Permit). This Permit imposed two obligations on County/Cities for the purpose of regulating municipal stormwater and urban runoff discharges in Los Angeles County. The first required County/Cities to inspect industrial, commercial and construction sites to ensure compliance with the law, and the other required County/Cities to install and maintain trash receptacles at transit stops.

County/Cities filed four test claims, i.e., Test Claims 03–TC–04, 03–TC–19, 03–TC–20, and 03–TC–21, seeking reimbursement of costs for carrying out these obligations. The Executive Director rejected these test claims as excluded from subvention pursuant to Section 17516c.

In the administrative appeals, the Commission found it was bound by Section 17516c, upheld its executive director’s decision, and denied the appeals.

In their amended and consolidated petitions and complaints, County/Cities sought, among other things: (1) an order requiring the State to reimburse them for the new programs or higher level of service under the permit or, alternatively, to allow them to offset payment of permit and other fees or moneys owed or to be transferred to the State against their costs; (2) an order enjoining State from refusing to reimburse them in the future; or, alternatively, (3) a preemptory writ of mandate directing the Commission to accept their test claims and find they are entitled to reimbursement; (4) a declaration that [section 17516](#) is unconstitutional; (5) a preemptory writ of mandate directing LA Regional Water Board either to delete or not \*910 enforce the subject obligations under the permit; and (6) a stay of the challenged portions of the permit.

The Commission and County/Cities filed cross-motions for judgment on the pleadings. The trial court granted the Commission’s motion as to the second cause of action for

declaratory relief. The court explained: “The only actual controversy between [County/Cities] and [Commission] is whether [County/Cities]’ claims should be deemed reimbursable. The sole and exclusive procedure by which to adjudicate this controversy is a mandate action under [Code of Civil Procedure section 1094.5](#). ([Government Code sections 17552, 17559.]) The only pertinent relief under ... [section 1094.5](#) is a finding that [the Commission] ‘has not proceeded in the manner required by law.’ Declaratory relief is not available.”

After construing the motion addressed to the third cause of action as a motion to strike improper requested relief, the court granted the motion and struck that part of the third cause of action requesting an order directing the Commission to find their claims to be reimbursable on the ground “[t]he court has no power at this time to do so. [Citations.]”

Turning to County/Cities’ motion for judgment on the pleadings, the trial court granted the motion as to the third cause of action for extraordinary writ relief, except as to the stricken request for improper relief.<sup>4</sup>

The court found that to the extent Section 17516c excepted the orders of Regional **\*\*770** Water Boards from the definition of “executive orders,” Section 17516c was unconstitutional in that it expressly contravened [article XIII B, section 6](#). The court ordered the Commission to set aside its order affirming its executive director’s rejections of the four test claims and to consider these claims on the merits.

In granting in part County/Cities’ petitions for a writ of mandate, the trial court found the Commission, “though it proceeded as required by statutory law, as it was constrained to do, has not proceeded as required by superior constitutional law. ([Code Civ. Proc.](#), [§] [1094.5](#), subd. (a).) The question whether [County/Cities] state valid claims for reimbursement must be remanded to [C]ommission, which is ordered to consider [these] claims on their merits. [Citations.]”

**\*911** A peremptory writ of mandate was issued on May 24, 2005. Judgment was entered the same date. This appeal and cross-appeal followed.

#### STANDARD OF REVIEW

[5] [6] [7] [8] “The standard for reviewing a judgment on the pleadings is settled: ‘A motion for judgment on the

pleadings is the equivalent of a general demurrer but is made after the time for demurrer has expired. The rules governing demurrers apply. [Citation.] The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may judicially notice. [Citations.] On review we must determine if the complaint states a cause of action as a matter of law.’ [Citation.] ‘We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal theory. [Citation.]’ [Citation.]” (*McCormick v. Travelers Ins. Co.* (2001) 86 [Cal.App.4th](#) 404, 408, 103 Cal.Rptr.2d 258.)

[9] “In reviewing the trial court’s ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407, 216 Cal.Rptr. 782, 703 P.2d 122.) However, where the facts are undisputed and the issues present questions of law, the appellate court is not bound by the trial court’s decision but may make its own determination. (*Ibid.*)” (*Connell v. Superior Court* (1997) 59 [Cal.App.4th](#) 382, 394, 69 Cal.Rptr.2d 231.)

#### DISCUSSION

##### 1. *Defense of Statute of Limitations Forfeited*

[10] On appeal for the first time, the Commission asserts the challenge of County/Cities to the constitutionality of Section 17156c is barred by the 90–day limitation period of [section 341.5 of the Code of Civil Procedure](#), which governs the timeliness of actions challenging the constitutionality of state funding for municipalities, school districts, special districts, and local agencies.

[Code of Civil Procedure section 341.5](#) provides: “Notwithstanding any other provision of law, any action or proceeding in which a county, city, city and county, school district, special district, or any other local agency is a plaintiff or petitioner, that is brought against the State of California challenging the constitutionality of any statute relating to state funding for counties, cities, cities and counties, school districts, special districts, or other local agencies, shall be commenced within 90 days of the effective date of the **\*912** statute at issue in the action. For purposes of this section, ‘State of California’ means the State of California itself, or any of its agencies, departments, commissions, boards, or public officials.” (Added by **\*\*771** Stats.1994, ch. 155

(Assem. Bill No. 860), § 1, eff. July 11, 1994; amended by Stats.1994, ch. 156 (Sen. Bill No. 2127), § 1, eff. July 11, 1994.)

The Commission argues the constitutional challenge to Section 17516c is time-barred, because: “[Government Code section 17500 et seq.](#), including [section 17516](#), relates to state funding for counties and cities relative to state-mandated local programs.... [S]ection 17516 was enacted in 1984 and became effective January 1, 1985. The petition in this case challenging [section 17516](#) as unconstitutional was filed April 28, 2004[.]” which was more than 90 days after the effective date of [section 17516](#).

[11] [12] The time-bar of a statute of limitations may be raised by demurrer “[w]here the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, [for the reason that] it fails to state facts sufficient to state a cause of action. [Citation.]” (*ABF Capital Corp. v. Berglass* (2005) 130 [Cal.App.4th](#) 825, 833, 30 Cal.Rptr.3d 588.) Forfeiture of a time-bar defense transpires by the failure to raise the applicable statute of limitations in the answer. (See e.g., *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581, 15 Cal.Rptr. 641, 364 P.2d 473; *Davies v. Krasna* (1975) 14 Cal.3d 502, 508, 121 Cal.Rptr. 705, 535 P.2d 1161; *Mitchell v. County Sanitation District No. 1 of Los Angeles County* (1957) 150 Cal.App.2d 366, 371, 309 P.2d 930; see also, *Code Civ. Proc.*, § 458.)

As the Commission concedes, it did not raise “[[Code of Civil Procedure](#)] [section 341.5](#) as an affirmative defense in its pleadings in the trial court.” This omission signifies that the Commission therefore has forfeited any right it may have had to assert [section 341.5](#) to bar, as untimely, the claims of County/Cities to the constitutionality of Section 17516c.

For a contrary conclusion, the Commission argues “the statute of limitations to challenge an administrative action is jurisdictional and should not be considered waived. (*United Farm Workers of America v. Agricultural Labor Relations Board* (1977) 74 Cal.App.3d 347, 350, 141 Cal.Rptr. 437; *Tielsch v. City of Anaheim* (1984) 160 Cal.App.3d 576, 578, 206 Cal.Rptr. 740; *Donnellan v. City of Novato* (2001) 86 [Cal.App.4th](#) 1097, 1103, 103 Cal.Rptr.2d 882.) If a time limit in a mandamus proceeding is held to be jurisdictional, estoppel or waiver cannot extend the time. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666, 674, 125 Cal.Rptr. 757, 542 P.2d 1349.)”

\*913 The Commission's fall-back position is that this court should exercise its discretion to determine the applicability of the time-bar, because this “issue is a question of law rather than of fact” and “[t]his matter affects the public interest since [County/Cities] are seeking reimbursement from the state for costs incurred to comply with a permit” issued by the LA Regional Water Board. In other words, “taxpayers statewide could unjustly suffer the consequences of funding a local program if [Code of Civil Procedure section 341.5](#) is not considered and ... [section 17516](#) is held to be unconstitutional.” As authority, the Commission relies primarily on *City of Sacramento v. State of California* (1990) 50 Cal.3d at pages 64–65, 266 Cal.Rptr. 139, 785 P.2d 522 [where issue of law rather than fact raised, public-interest exception governs over collateral estoppel bar] and *Connell v. Superior Court, supra*, 59 [Cal.App.4th](#) at pages 387–388, 396–397, 69 Cal.Rptr.2d 231 [public interest exception applicable to allow review of question of law as to whether recycled waste water regulation constituted reimbursable state mandate].)

Neither of the Commission's positions is successful. In the first instance, the time-<sup>\*\*772</sup> bar of [section 341.5](#) of the [Code of Civil Procedure](#) applies to a challenge to the constitutionality of any statute relating to state funding for counties and other local governmental entities, *not* to a challenge to an action by an administrative agency. As for the second, neither *City of Sacramento* nor *Connell* stand for the proposition that the bar of the applicable statute of limitations may be raised for the first time on appeal.

Additionally, the Commission's characterization of the public interest to be served is a non sequitur. If [section 17516](#) were in fact unconstitutional, it does not follow that “taxpayers statewide could *unjustly* suffer the consequences of funding a local program[.]” (Italics added.) How could such funding result in injustice when any requirement of reimbursement to local governments would be under the constitutional compulsion of [article XIII B, section 6](#)?

## 2. Existence of Federal or State Mandate Issue for the Commission

[13] It is undisputed that a federal mandate is not subject to the subvention requirement of [article XIII B, section 6](#) for a state mandate. Accordingly, if the Permit, including the subject two obligations thereunder, constitutes a federal mandate, the constitutionality of Section 17516c is not implicated, and thus, no issue as to its constitutionality is before this court to address on the merits. (See *People ex*

*rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912, 83 Cal.Rptr. 670, 464 P.2d 126 [“The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.”].)

**\*914** In its amicus curiae brief, LA Regional Water Board takes the position that, as a matter of law, Section 17516c is consistent with [article XIII B, section 6](#) (and thus not unconstitutional) “to the extent Division 7, Chapter 5.5 (commencing with [Water Code section 13370](#))” simply implements federal mandates under the Clean Water Act (33 U.S.C. § 1342(b)). The water boards, i.e., the State Water Board and its Regional Water Boards, implement the federal permit program under Chapter 5.5, which the California Legislature enacted to by-pass administration of such program directly by the federal Environmental Protection Agency.

LA Regional Water Board takes the further position that the federal mandate nature of its NPDES permits remains constant although it exercises discretion to control the discharge of pollutants through municipal stormwater programs not appearing in federal regulations. Specifically, LA Regional Water Board argues: “When a state [Regional Water Board] issues an NPDES permit requiring municipalities to inspect facilities as a means of controlling their discharge of pollutants, this is not shifting state responsibilities onto local agencies [, because f]ederal law imposes inspection requirements upon municipal permittees.”

As for the trash receptacle obligation, LA Regional Water Board points out the Clean Water Act allows the use of programs to control discharge of pollutants in connection with a municipal stormwater permit and argues one such program under the Permit is the ability of “municipalities to employ ‘Best Management Practices’ (BMPs) to ... attain water quality standards.” It identifies “[t]he Permit’s trash receptacle requirement as one such [BMP].”

It further argues that the trash receptacle obligation cannot be deemed a state-mandated program, because it is not “an absolute requirement. Any permittee may petition the Regional Water Board to substitute another equally effective BMP for one included within the Permit.[] [For instance, i]f a permittee demonstrates that **\*\*773** a pre-existing program or level of service will be equally effective in controlling pollution, it may seek to substitute that program.”

We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances. As explained ante, the existence of a federal, as contrasted with a state, mandate is not easily ascertainable.

By letter, we invited the parties and LA Regional Water Board to address whether an obligation under an NPDES permit by a Regional Water Board can qualify as a state mandate within the meaning of [article XIII B, section 6](#), assuming an NPDES permit itself qualified as a federal mandate, and if so, **\*915** why each of the subject two obligations does or does not constitute a state mandate. We have received their responses.

a. “NPDES” Permits Issued by Regional Water Boards

“California cases have repeatedly explained the complicated web of federal and state laws and regulations concerning water pollution, especially storm sewer discharge into the public waterways. (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619–621, 26 Cal.Rptr.3d 304, 108 P.3d 862 (*Burbank* ); *Building Industry Assn. of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872–875, 22 Cal.Rptr.3d 128; *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092–1094, 1 Cal.Rptr.3d 76; *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1451–1453, 126 Cal.Rptr.2d 389.)

For purposes of this case, the important point is described by the California Supreme Court in *Burbank*: “Part of the federal Clean Water Act [33 U.S.C. § 1251 et seq.] is the National Pollutant Discharge Elimination System (NPDES), ‘[t]he primary means’ for enforcing effluent limitations and standards under the Clean Water Act. (*Arkansas v. Oklahoma* [ (1992) 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239].) The NPDES sets out the conditions under which the federal EPA or a state with an approved water quality control program can issue permits for the discharge of pollutants in wastewater. (33 U.S.C. § 1342(a) & (b).) In California, wastewater discharge requirements established by the regional [water] boards are the equivalent of the NPDES permits required by federal law. (§ 13374.)” (*Burbank, supra*, 35 Cal.4th at p. 621, 26 Cal.Rptr.3d 304, 108 P.3d 862.)

“California’s Porter–Cologne Act ([Wat.Code, § 13000 et seq.](#)) establishes a statewide program for water quality control.



Nine regional [water] boards, overseen by the State [Water] Board, administer the program in their respective regions. (Wat.Code, §§ 13140, 13200 et seq., 13240, and 13301.) Water Code sections 13374 and 13377 authorize the Regional [Water] Board to issue federal NPDES permits for five-year periods. (33 U.S.C. § 1342, subd. (b)(1)(B).)<sup>5</sup> (*City of Rancho Cucamonga* \*\*774 v. *Regional Water Quality* \*916 *Control Bd.* (2006) 135 Cal.App.4th 1377, 1380–1381, 38 Cal.Rptr.3d 450.) In a related case, Division Five of this District upheld the authority of LA Regional Water Board to issue the Permit here. (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 999–1000, 50 Cal.Rptr.3d 619 [holding the nine Regional Water Boards authorized under state law to issue NPDES permits] review den.)

b. *Potential Federal and State Components of NPDES Permit*

As expected, LA Regional Water Board contends that as in the case of NPDES “permits as a whole, the individual conditions of an NPDES permit are federally required to meet the mandates of the Clean Water Act.” It argues: “The Permit is federally required. The conditions within it are federally required to implement the Clean Water Act’s mandates. The two cannot be separated into a ‘federal’ permit with ‘state’ conditions. [Citation.]”

County/Cities respond, contrariwise, that “[a]n NPDES permit can contain both federal and non[-]federal requirements.” As case authority, they rely primarily on *Burbank*, *supra*, 35 Cal.4th 613, 26 Cal.Rptr.3d 304, 108 P.3d 862. Our Supreme Court concluded that under the supremacy clause of the federal Constitution, a Regional Water Board must comply with the federal Clean Water Act in issuing an NPDES permit. (*Id.* at pp. 626–627, 26 Cal.Rptr.3d 304, 108 P.3d 862.) Nonetheless, “[u]nder the federal Clean Water Act, each state is free to enforce its own water quality laws so long as its effluent limitations are not ‘less stringent’ than those set out in the Clean Water Act [citation].” (*Id.* at p. 620, 26 Cal.Rptr.3d 304, 108 P.3d 862.) The Court thus acknowledged in *Burbank* that an NPDES permit may contain terms federally mandated and terms exceeding federal law. (See also, *Burbank*, *supra*, at pp. 618, 628, 26 Cal.Rptr.3d 304, 108 P.3d 862.) County/Cities also point out that the potential for non-federally mandated components of an NPDES permit is acknowledged under both federal law<sup>6</sup> and state law.<sup>7</sup>

\*\*775 \*917 Additionally, County/Cities argue “that an obligation imposed on a municipality arises as a result of a federal law or program does not, in and of itself, render that obligation a federal mandate.” Rather, they assert that to qualify as a federal mandate, “federal law itself must impose the obligation upon the municipality.” They point out Government Code section 17556 provides that costs flowing from a federal mandate may be subject to subvention if such costs exceed such mandate.<sup>8</sup> They also cite two cases in support of their position.

In *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589, our Supreme Court concluded the costs incurred by school districts in holding mandatory expulsion hearings under Education Code section 48915 were state mandates subject to subvention under article XIII B, section 6. The court explained that expulsion was mandated under the Education Code, rather than federal law, and thus, the fact the costs were incurred to comport with federal due process, a federal mandate, was not controlling. (*San Diego Unified School Dist. v. Commission on State Mandates*, *supra*, at pp. 880–882, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

In the other case, *Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, the appellate court concluded that the finding a mandate was federal turned on whether “the state freely chose to impose the costs upon the local agency as a means of implementing a federal program” and that under these circumstances, “the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.” (*Id.* at p. 1594, 15 Cal.Rptr.2d 547.)

c. *Existence of State Mandates Matter for the Commission*

A review of the pleadings and the matters that may be judicially noticed (Evid.Code, §§ 451, 452, 459) leads to the inescapable conclusion that whether the two obligations in question constitute federal or state mandates presents factual issues which must be addressed in the first instance by the \*918 Commission if Section 17516c were found to be unconstitutional. Resolution of the federal or state nature of these obligations therefore is premature and, thus, not properly before this court.

In its response, the Commission argues that if this court determines Section 17516c is unconstitutional, the subject test claims “should be remanded to ... Commission to ‘decide in the first instance whether a local agency is entitled to reimbursement under [article XIII B,] section 6[.]’ (*Lucia Mar Unified School District v. Honig* [supra], 44 Cal.3d 830, 837 [244 Cal.Rptr. 677, 750 P.2d 318]; Gov.Code, § 17552.)”

The Commission stated that on such remand, it would apply the following cases in determining whether state mandates exist: *City of Sacramento v. State of California*, supra, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, which sets forth various factors and criteria for determining whether the federal program imposes a mandate on the state; \*\*776 *Hayes v. Commission on State Mandates*, supra, 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, which it contends “provides guidance on whether the state, in turn, has mandated a federal program on the local governments”; *Long Beach Unified Sch. Dist. v. State of California*, supra, 225 Cal.App.3d 155, 275 Cal.Rptr. 449, which analyzes whether the state-mandated activities exceed federal requirements; and *San Diego Unified School Dist. v. Commission on State Mandates*, supra, 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589, which also provides guidance on this same issue.

### 3. “Executive Order” under Revenue and Taxation Code Not Probative

The Commission contends the exclusion of orders of the Regional Water Boards from the definition of “executive order” in Section 17516c does not contravene article XIII B, section 6, because section 17516 derives from the definition of “executive order” in Revenue and Taxation Code section 2209,<sup>9</sup> of which the voters were presumed to have known to exist \*919 when they adopted Proposition 4 (i.e., art. XIII B, § 6) in 1979, and thus, Proposition 4 intended to endorse and continue such exclusion from the definition of “executive order” which was later carried over to Section 17516c. We disagree.

We further disagree with the Commission’s reliance on a presumption that when the voters adopted Proposition 1A in November 2004, they knew of, and thus, necessarily approved of Section 17516c’s exclusion of orders of Regional Water Boards from the definition of “executive order.”

Our focus, instead, must be on the import of article XIII B, section 6, not on the pre-constitutional scheme for subvention of funds to local agencies of which section 2209 of the

Revenue and Taxation Code was part. As our Supreme Court instructs: “In construing the meaning of the constitutional provision (i.e., article XIII B, section 6), our inquiry is not focused on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. [Citation.]” (*County of Los Angeles v. California*, supra, 43 Cal.3d 46, at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

The subvention requirement of article XIII B, section 6 applies “[w]henver the Legislature or any state agency mandates a new program or higher level of service....” The all-encompassing “any state agency” language defeats any perceived presumption that the electorate intended to incorporate into article XIII B, section 6 the exclusion of a particular state agency, e.g., the Regional Water Board, from its subvention requirement.

### \*\*777 4. Section 17516c Unconstitutional as to Regional Water Boards

LA Regional Water Board argues in its amicus brief that Section 17516c is constitutional for the additional reason that its exemption from the subvention requirement of article XIII B, section 6, is “appropriate because the Water Boards regulate water pollution with an even hand. Whether the pollution originates from a local public agency or a private industrial source, the Water Boards must assure their permits protect water quality consistent with state and federal law.”

This argument is not persuasive. Whether the permit in question issued by Regional Water Boards governs both public and private pollution dischargers to the same extent presents factual issues not yet resolved. 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. (See *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 530–531, 534, 537, 541, 234 Cal.Rptr. 795 [executive orders for protective fire clothing and equipment state mandated even if record, which was incomplete, revealed private sector firefighters also subject to the executive orders].)

In contrast, the constitutional infirmity of Section 17516c is readily apparent from its plain language that the definition of “ ‘[e]xecutive order’ does not include any order, plan,

requirement, rule, or regulation *issued by the State Water ... Board or by any regional water ... board* pursuant to Division 7 (commencing with [Section 13000](#)) of the [Water Code](#).” (§ 17516c, italics added.) This exclusion of any order issued by any Regional Water Board contravenes the clear, unequivocal intent of [article XIII B, section 6](#) that subvention of funds is required “[w]henever ... *any state agency* mandates a new program or higher level of service on any local government ....”<sup>10</sup> (§ 17516c, italics added.) We therefore conclude that Section 17516c is unconstitutional to the extent it excludes “any order ... issued by ... any regional water ... board pursuant to Division 7 (commencing with [Section 13000](#)) of the [Water Code](#)” from the definition of “‘executive order.’ ”

This conclusion leads to the further conclusion that whether one or both of the subject two obligations constitutes a state mandate necessitating subvention of funds under [article XIII B, section 6](#) is an issue that must in the first instance be resolved by the Commission. Accordingly, we uphold the trial court's issuance of a writ of mandate directing the Commission to vacate its decisions affirming its executive director's rejection of the four test claims and to consider these claims on the merits.

#### 5. Cross-Appeal Moot

County/Cities filed a protective cross-appeal from the judgment to the extent the trial court dismissed the portions of their writ of mandate petitions against LA Regional Water Board.<sup>11</sup> The threshold **\*\*778** issue raised is whether County/Cities are entitled to proceed directly in superior court against LA **\*921** Regional Water Board for reimbursement relief if they are statutorily precluded from obtaining a hearing before the Commission.

County/Cities' position is they are entitled to a hearing on the merits of their claims before either the Commission or LA Regional Water Board. If this court determines the Commission's jurisdiction is exclusive, the Commission must afford them a hearing and determine the merits of their subvention claim under [article XIII B, section 6](#). If not exclusive, County/Cities must be allowed to seek relief directly against Regional Water Board before the superior court.

#### Footnotes

LA Regional Water Board argues County/Cities have no right to seek subvention relief from a Regional Water Board, because reimbursement of costs mandated by state must be pursued through the statutory subvention scheme, which is “the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by [Section 6 of Article XIII B...](#)” ([Gov.Code, § 17552](#).) Their claims thus must be addressed exclusively to the Commission in first instance.

The cross-appeal against LA Regional Water Board is moot in light of our above conclusion that the Commission is to hear and determine the merits of the County/Cities' test claims. We therefore do not reach the merits of the issues raised in the cross-appeal.

#### CONCLUSION

Section 17516c is unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of “executive orders” for which subvention of funds to local governments for carrying out state mandates is required pursuant to [article XIII B, section 6](#). The trial court therefore properly issued a writ of mandate directing the Commission to resolve the four test claims on the merits without reference to Section 17516c. In light of this conclusion, we need not, and therefore do not, address the issues raised on the now moot cross-appeal.

#### **\*922** DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal and cross-appeal.

We concur: [KLEIN, P.J.](#), and [CROSKEY, J.](#)

#### All Citations

150 Cal.App.4th 898, 58 Cal.Rptr.3d 762, 07 Cal. Daily Op. Serv. 5216, 2007 Daily Journal D.A.R. 6622

- 1 “ ‘Test claim’ means the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state.” (Gov.Code, § 17521.)
- 2 “In 1980, after the adoption of [article XIII B](#), [the Legislature] amended the statutory definition of ‘costs mandated by the federal government’ to provide that these include ‘costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties or loss of funds to public or private persons in the state...*’ (Rev. & Tax.Code, § 2206, italics added; Stats.1980, ch. 1256, § 3, p. 4247.)” (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 75, 266 Cal.Rptr. 139, 785 P.2d 522.)
- There is no precise formula or rule for determining whether the “costs” are the product of a federal mandate. Our Supreme Court explained: “Given the variety of cooperative federal-state-local programs, we here attempt no final test for ‘mandatory’ versus ‘optional’ compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of [article XIII B, section 9\(b\)](#): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.” (*City of Sacramento v. State of California, supra*, 50 Cal.3d at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522.)
- 3 Section 17516c further provides: “It is the intent of the Legislature that the State Water ... Board and regional water ... boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. ‘Major’ means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility.”
- LA Regional Water Board argues the trial court’s ruling sustaining its demurrer to the fourth cause of action for a writ of mandate directing it to delete the subject two obligations under the Permit as violative of [section 17516](#) should be upheld, because [section 17516](#) “applies to construction of major waste treatment facilities, not trash receptacles or inspections.” This analysis, however, is inconsistent with the plain language of [section 17516](#) in its entirety.
- 4 In the third cause of action, County/Cities sought a writ of mandate ([Code Civ. Proc., § 1094.5](#)) compelling a court finding that [section 17516](#) was unconstitutional on its face or as applied in this action and directing the Commission to accept their test claims for filing and approving them for reimbursement.
- 5 In pertinent part, [article XIII B, section 6](#), provides: “[T]he Legislature may, but need not, provide a subvention of funds for the following mandates: [¶] ... [¶] (3) Legislative mandates enacted prior to January 1, 1995, or executive orders ... initially implementing legislation enacted prior to January 1, 1975.” ([Art. XIII B, § 6](#), subd. par. (a)(3).) LA Regional Water Board argues that subvention under [article XIII B, section 6](#), is not required as to the Permit, because it is an executive order implementing the Porter–Cologne Act, ([Wat. Code, § 13020 et seq.](#)) which is legislation enacted in 1969. This argument fails for the reason that the executive order resulting in the 2001 Permit was not one “initially” implementing such pre–1975 legislation. Equally unsuccessful is LA Regional Water Board’s apparent argument that Section 17516c should be deemed constitutional for the reason that “most of” the Porter–Cologne Act (Division 7) was enacted prior to 1975. The fatal fallacy of this position is that the exclusion of Section 17516c applies to all orders issued pursuant to Division 7 regardless of the date the statute in question was enacted.
- 6 In this regard, they rely on this federal statute: “Except as expressly provided in this Act [[33 USCS §§ 1251 et seq.](#)], nothing in this Act [[33 USCS §§ 1251 et seq.](#)] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation ... is in effect under this Act [[33 USCS §§ 1251 et seq.](#)], such State [, etc.] ... may not adopt or enforce any effluent limitation or other limitation ... which is less stringent than the effluent limitation, or other limitation....” ([33 U.S.C. § 1370.](#))
- 7 On this point, they rely on this statutory provision: “Notwithstanding any other provision of this division, the state board or the regional boards shall, as required or authorized by the Federal Water Pollution Control Act, as amended, issue waste discharge requirements ... which apply and ensure compliance with all applicable provisions of the act and acts amendatory thereof or supplementary, thereto, together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” ([Wat.Code, § 13377.](#))
- 8 [Government Code section 17556, subdivision \(c\)](#), provides: “The commission shall not find costs mandated by the state, as defined in [Section 17514](#), in any claim submitted by a local agency or school district, if, after a hearing, the commission

finds ... [¶] ... [¶][t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.”

9 Revenue and Taxation Code section 2209(c) provides: “ ‘Executive order’ means any order, plan, requirement, rule or regulation issued ... [¶] ... [¶][b]y any agency ... of state government; provided that the term ‘executive order’ shall not include any order ... issued by the State Water ... Board or by any regional water ... board pursuant to Division 7 (commencing with Section 13000) of the Water Code.

“It is the intent of the Legislature that the State Water ... Board and regional water ... boards will not adopt enforcement orders against publicly owned discharges which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available.

“ ‘Major’ means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility.” (Rev. & Tax Code, § 2209(c); added by Stats.1974, ch. 457, p. 1079, § 2 and amended by Stats.1975, ch. 486, p. 998, § 2, eff. Sept. 2, 1975.)

10 At oral argument, when asked to identify the public policy or other reason that would be served by exempting Regional Water Boards from the constitutional subvention requirement, counsel for LA Regional Water Board responded exemption is warranted, because water is an important concern. No one can quarrel with the fact water plays an important role in California. Nonetheless, this reason does not compel the conclusion that an exemption should be carved out for Regional Water Boards as contrasted with those state agencies which regulate other important state interests.

11 The trial court sustained the demurrer to the fourth cause of action for a writ of mandate directing LA Regional Water Board to delete or not enforce the inspection and trash receptacle obligations. The court granted its own motion for judgment on the pleadings without leave to amend as to LA Regional Water Board on the first cause of action for a writ of mandate directing reimbursement; the second cause of action for declaratory relief; and the fifth cause of action for a writ of mandate directing LA Regional Water Board to delete or not enforce the subject obligations.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [San Diego Unified School Dist. v. Commission on State Mandates](#), Cal., August 2, 2004

214 Cal.App.3d 1538

Court of Appeal, Third District, California.

COUNTY OF LOS ANGELES,

Plaintiff and Appellant,

v.

DEPARTMENT OF INDUSTRIAL RELATIONS,

etc., et al., Defendants and Respondents.

No. C005023.

|

Oct. 27, 1989.

|

Review Denied Jan. 17, 1990.

### Synopsis

After Board of Control denied county's claim for reimbursement for costs of complying with elevator fire and earthquake safety regulations, county filed petition for a writ of mandate and a complaint for declaratory and injunctive relief against the Department of Industrial Relations. The Superior Court, Sacramento County, Darrel W. Lewis, J., entered summary judgment for Department and county appealed. The Court of Appeal, Carr, J., held that: (1) Department was not precluded by Board's prior decision from raising issue of whether regulations were a "program" as defined by Supreme Court case interpreting constitutional provision for local government reimbursement of expenses of state-mandated local programs, and (2) regulations did not meet definition of "program" so as to entitle county to reimbursement.

Affirmed.

West Headnotes (3)

[1] **Labor and Employment** 🔑 Regulatory agencies

Even assuming that all elements of administrative collateral estoppel were met, prior decision by Board of Control approving claims of other local governments for reimbursement for costs of complying with elevator fire and

earthquake safety regulations did not preclude Department of Industrial Relations from raising issue of whether regulations were a "program" as defined by Supreme Court case interpreting constitutional provision for local government reimbursement of expenses of state-mandated local programs since Board made decision before Supreme Court decided case.

4 Cases that cite this headnote

[2] **Courts** 🔑 Highest appellate court

Court of Appeal was bound to follow Supreme Court ruling which established definition of "program" to be used in determining whether reimbursement is required under constitutional provision for local government reimbursement of expenses of state-mandated local programs. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

[3] **States** 🔑 State expenses and charges and statutory liabilities

Elevator fire and earthquake safety regulations were not a "program" subject to constitutional provision for local government reimbursement of expenses of state-mandated local programs; regulations did not impose a unique requirement on local governments in that they applied to all elevators and not just to those which were publicly owned and providing elevators equipped with fire and earthquake safety features was not a governmental function. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

2 Cases that cite this headnote

### Attorneys and Law Firms

\*1540 \*\*352 De Witt W. Clinton, County Counsel, [Paul T. Hanson](#), Principal Deputy County Counsel, for plaintiff and appellant.

[John K. Van de Kamp](#), Atty. Gen., [Richard M. Frank](#), Supervising Deputy Atty. Gen., [Linda A. Cabatic](#), Deputy Atty. Gen., for defendants and respondents.

## Opinion

CARR, Associate Justice.

In this appeal from summary judgment in favor of defendant State Department of Industrial Relations (State), plaintiff County of Los Angeles (County) asserts rights to reimbursement for programs alleged to be state mandated. County filed a complaint and petition for mandate claiming reimbursement from State for costs incurred in complying with new elevator earthquake and fire safety regulations promulgated by the California Occupational Safety and Health Administration (OSHA). The trial court concluded these regulations did not constitute a state-mandated program requiring reimbursement and entered summary judgment for State.

County urges three alternative bases of recovery on appeal: (1) principles of administrative collateral estoppel preclude State from relitigating whether the safety regulations amount to a state-mandated program, (2) even if State is not bound by an earlier administrative decision, the definition of “program” articulated in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202 (*Los Angeles*) and relied upon by the trial court is inapplicable to this case, and (3) even if *Los Angeles* applies, the OSHA regulations fit its definition.<sup>1</sup> We disagree with each claim and shall affirm the judgment.

### \*\*353 FACTUAL AND PROCEDURAL BACKGROUND

In 1975, OSHA added or amended numerous elevator fire and earthquake safety measures in Title 8 of the California Code of Regulations (i.e., §§ 3014, subds. (c), (d); 3015, subd. (c); 3030, subds. (f), (k); 3032, subds. \*1541 a), (c); 3034, subd. (a); 3041, subds. (c), (d); 3053, subd. (c); and 3111, subd. (c).<sup>2</sup> These regulations applied to all elevators, whether publicly or privately owned.

At the time relevant herein, reimbursement provisions for expenses incurred in complying with state-mandated local programs were embodied in *Revenue and Taxation Code* sections 2201, et seq. *Revenue and Taxation Code* section 2231, subdivision (a) provided in part: “The state shall reimburse each local agency for all ‘costs mandated by the state’, as defined in Section 2207.” (Stats.1978, ch. 794, §

1.1, p. 2546.) That section stated: “ ‘Costs mandated by the state’ means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program; [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program; [¶] (c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973.” (Stats.1977, ch. 1135, § 4, p. 3646.)<sup>3</sup>

In 1979, voters enacted Proposition 4, adding article XIII B to the California Constitution. Section 6 of that article provides: “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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.” This provision became effective July 1, 1980. (See *Cal. Const.*, art. XIII B, § 10.)

\*1542 These statutory and constitutional provisions granted relief to local governments whose powers to raise property taxes had been curtailed but who were still subject to increased expenses through the imposition of state-mandated local programs. (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835–836, 244 Cal.Rptr. 677, 750 P.2d 318.) The state was now required to reimburse local governments for costs associated with these programs.

In 1979, the City and County of San Francisco sought reimbursement for the costs of complying with the elevator fire and earthquake safety regulations. The State Board of Control (Board) approved the claim, adopted “parameters and guidelines”, and also adopted “statewide cost estimates” for these regulations. State did not seek review of the Board’s decision although authorized to do so by former *Revenue and Taxation Code* section 2253.5 (Stats.1978, ch. 794, § 8, p. 2551).

**\*\*354** Despite the Board's decision, the Legislature did not appropriate funds for reimbursement, finding the elevator earthquake safety regulations did not impose reimbursable state-mandated costs. (Stats.1982, ch. 1586, § 10, p. 6268.) The Legislature further stated it could not determine whether the elevator fire safety regulation imposed a reimbursable state-mandated cost and declared the operation of the regulation suspended “until a court determines whether this provision contains a mandate reimbursable under [Section 2231 of the Revenue and Taxation Code.](#)” (Stats.1982, ch. 1586, § 11, p. 6268.)

County subsequently filed a claim with the Board for reimbursement of costs already incurred in complying with the fire safety regulation and those anticipated in complying with the earthquake safety provisions. The Board informed County of the Legislature's decision not to provide subvention of funds for costs incurred in association with these OSHA regulations and denied the claim.

In October 1983, County filed its petition for writ of mandate and a complaint for declaratory and injunctive relief, and trial was eventually set for July 1988. In April 1988, State moved for summary judgment, asserting the elevator safety regulations did not meet the definition of “program” recently articulated in *Los Angeles, supra*, [43 Cal.3d 46](#), [233 Cal.Rptr. 38](#), [729 P.2d 202](#). In that case, the Supreme Court considered whether local governments were entitled to reimbursement for costs incurred in complying with legislation increasing workers' compensation benefit payments. The court held programs were reimbursable under [article XIII B](#) only if they were “programs that carry out the governmental function of providing services to the public, or **\*1543** 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.” (*Id.* at p. [56](#), [233 Cal.Rptr. 38](#), [729 P.2d 202](#).) The court concluded [article XIII B](#) “has no application to, and the State need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive.” (*Id.* at pp. [57–58](#), [233 Cal.Rptr. 38](#), [729 P.2d 202](#), fn. omitted.)

Relying on *Los Angeles*, State asserted the regulations did not constitute a “program” requiring reimbursement for costs incurred because they (1) applied to all elevators, both publicly and privately owned, and (2) did not require County to carry out a governmental function of providing services

to the public. County disagreed, urging the *Los Angeles* definition was met and further, that State was estopped to challenge the Board's earlier finding that the regulations imposed a reimbursable state-mandated cost. The trial court granted State's motion for summary judgment; this appeal followed. We shall affirm.

## DISCUSSION

### I

County asserts principles of administrative collateral estoppel preclude State from challenging the Board's earlier decision finding the elevator safety regulations to be a reimbursable state-mandated program. County errs.

In *Carmel Valley Fire Protection Dist. v. State of California* (1987) [190 Cal.App.3d 521](#), [234 Cal.Rptr. 795](#) (*Carmel Valley*), the court considered whether costs incurred in purchasing protective clothing and equipment for firefighters as required by new administrative regulations were state-mandated costs entitling the county to reimbursement. The court found the State was precluded from relitigating the issues of state mandate and amount of reimbursement because the Board had previously decided these issues in ruling on the county's claim and the State by failing to seek judicial review of the Board's decision waived its right to contest the Board's findings. (*Id.* at p. [534](#), [234 Cal.Rptr. 795](#).) In reaching this conclusion, the court relied inter alia on principles of administrative collateral estoppel, which the court described as follows:

“Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In **\*\*355** order for the doctrine to apply, the issues in the two proceedings must be the same, the prior **\*1544** proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. (*People v. Sims* (1982) [32 Cal.3d 468](#), [484](#), [186 Cal.Rptr. 77](#), [651 P.2d 321](#) [ ].) [¶] The doctrine was extended in *Sims* to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent criminal case. Our Supreme Court held that collateral estoppel applies to such prior adjudications where three requirements are met: (1) the administrative agency acted in a judicial capacity; (2) it resolved disputed issues properly before it; and (3) all parties were provided with the opportunity to fully and fairly litigate their claims. (*Id.* at p.



479, 186 Cal.Rptr. 77, 651 P.2d 321.)” (*Carmel Valley, supra*, 190 Cal.App.3d at pp. 534–535, 234 Cal.Rptr. 795.)

Although administrative collateral estoppel precluded the relitigation of certain issues, the *Carmel Valley* court noted the *Los Angeles* decision presented a new issue not previously considered by the Board, whether the regulations constitute the type of “program” requiring subvention of funds under article XIII B, section 6. (*Id.* at p. 537, 234 Cal.Rptr. 795.) The court held, “State is not precluded from raising this new issue on appeal. Questions of law decided by an administrative agency invoke the collateral estoppel doctrine only when a determination of conclusiveness will not work an injustice. Likewise the doctrine of waiver is inapplicable if a litigant has no actual or constructive knowledge of his rights. Since the [*Los Angeles*] rule had not been announced at the time of the Board or trial court proceedings herein, the doctrines of waiver and collateral estoppel are inapplicable to State on this particular issue.” (*Id.* at p. 537, fn. 10, 234 Cal.Rptr. 795.)

[1] The same principle is applicable in the instant case. Assuming arguendo that all of the elements of administrative collateral estoppel are met, the fact remains that the test claim involving the elevator safety regulations was filed with the Board in 1979, eight years before the *Los Angeles* rule was enunciated by our Supreme Court. Nothing in the record supports any assertion that the Board in 1979 considered if this were a program within the meaning of *Los Angeles*. Indeed the Board would have been preternaturally prescient if it had done so. State was free to raise the “program” question in its motion for summary judgment and we turn now to that issue.

## II

County asserts the *Los Angeles* decision does not apply to this case or, if it does, that the elevator safety regulations are a “program” as defined by *Los Angeles*. Both contentions are without merit.

[2] \*1545 County attempts to distinguish *Los Angeles* from the case at bar by relying on two differences: (1) in *Los Angeles*, the Board ruled against the local governments but here the Board ruled in County's favor; and (2) in *Los Angeles*, the court's ruling was compelled to avoid finding an implied repeal of the state constitution's provisions relating to worker's compensation; and here no constitutional problems are presented. County provides no further analysis of these

distinctions and we find them meaningless. *Los Angeles* clearly established a definition of “program” to be used in determining whether reimbursement must be provided under article XIII B, and we are bound to follow that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

As noted, the *Los Angeles* court established two alternative meanings for the term “programs.” Programs are reimbursable under article XIII B if they are “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.” (*Los Angeles, supra*, 43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

[3] County acknowledges the elevator safety regulations apply to all elevators, \*\*356 not just those which are publicly owned.<sup>4</sup> As these regulations do not impose a “unique requirement” on local governments, they do not meet the second definition of “program” established by *Los Angeles*.

Nor is the first definition of “program” met. County submitted a declaration by deputy county counsel providing: “It is my opinion that all of the buildings owned or leased by County are used for ‘peculiarly governmental functions’ or are used by County for purposes mandated by state law... [¶] It is my opinion, ... that in all buildings owned or leased by County which have elevators, those elevators are strictly necessary for the purposes [just] described. In other words, without those elevators no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings.... It is my opinion that federal and state laws and court decisions about access for handicapped persons require elevators in all public buildings of more than one story.” These thoughts had occurred to counsel only shortly before County's opposition to the summary judgment motion was due to be filed.

County asserts this declaration “proves that all passenger elevators in all county buildings are necessary for the performance of *peculiarly governmental* \*1546 *functions* by County including *duties mandated* on County by State.” (Emphasis in original.) Even if we were to treat the submitted declaration as something more than mere opinion, County has missed the point. The regulations at issue do not mandate elevator service; they simply establish

safety measures. In determining whether these regulations are a program, the critical question is whether the *mandated program* carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not “a governmental function of providing services to the public.”<sup>5</sup>

As the regulations in question do not meet the definition of “program” established by *Los Angeles*, County was not entitled to reimbursement for costs incurred in complying with these provisions and the court properly granted State's motion for summary judgment.

DISPOSITION

The judgment is affirmed. State to recover costs.


PUGLIA, P.J., and DeCRISTOFORO, J., concur.

All Citations

214 Cal.App.3d 1538, 263 Cal.Rptr. 351, 1990 O.S.H.D. (CCH) P 28,784

Footnotes

- 1 The first portion of County's brief is devoted to arguing a non-issue, i.e., why a separation of powers issue is not pertinent to this appeal. As the trial court granted summary judgment in favor of State, it did not decide how to order reimbursement or provide other relief without impinging on the Legislature's authority. County is right, the separation of powers question is irrelevant and we do not consider it.
- 2 The regulations in question outline various safety measures such as (1) the securing of machinery and equipment, (2) elevator car enclosures, (3) emergency operations, and (4) the installation of guide rails, supports and fastenings.
- 3 [Revenue and Taxation Code section 2231](#) was repealed in 1986 (Stats.1986, ch. 879, § 23) and reenacted as [Government Code section 17561](#) (Stats.1986, ch. 879, § 6). The definition of “costs mandated by the state” is now embodied in [Government Code section 17514](#) and provides: “ ‘Costs mandated by the state’ means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of [Section 6 of Article XIII B of the California Constitution](#).”
- 4 An affidavit submitted by State in support of its motion for summary judgment established that 92.1 percent of the elevators subject to these regulations are privately owned, while only 7.9 percent are publicly owned or operated.
- 5 This case is therefore unlike *Lucia Mar, supra*, in which the court found the education of handicapped children to be a governmental function ([44 Cal.3d at p. 835, 244 Cal.Rptr. 677, 750 P.2d 318](#)) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. ([190 Cal.App.3d at p. 537, 234 Cal.Rptr. 795.](#))

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [San Diego Unified School Dist. v. Commission on State Mandates](#), Cal., August 2, 2004

43 Cal.3d 46, 729 P.2d 202, 233 Cal.Rptr. 38

COUNTY OF LOS ANGELES  
et al., Plaintiffs and Appellants,

v.

THE STATE OF CALIFORNIA et  
al., Defendants and Respondents.

CITY OF SONOMA et al., Plaintiffs and Appellants,

v.

THE STATE OF CALIFORNIA et  
al., Defendants and Respondents

L.A. No. 32106.

Supreme Court of California

Jan 2, 1987.

### SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service mandated by the state for workers' compensation benefits. The trial court found that [Cal. Const., art. XIII B, § 6](#), requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the

necessity of further proceedings before the board. The court held that when the voters adopted [art. XIII B, § 6](#), their intent was not to require the state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by [art. XIII B, § 6](#). Finally, the court held that no pro tanto repeal of [Cal. Const., art. XIV, § 4](#) (workers' compensation), was intended or made necessary by \*47 the adoption of [art. XIII B, § 6](#). (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

### HEADNOTES

#### Classified to California Digest of Official Reports

(1)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Costs to Be Reimbursed.

When the voters adopted [Cal. Const., art. XIII B, § 6](#) (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

(2)

Statutes § 18--Repeal--Effect--"Increased Level of Service." The statutory definition of the phrase "increased level of service," within the meaning of [Rev. & Tax. Code, § 2207](#), subd. (a) (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

[See [Am.Jur.2d, Statutes, § 384.](#)]

(3)

Constitutional Law § 13--Construction of Constitutions--Language of Enactment.

In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

(4)

Constitutional Law § 13--Construction of Constitutions--Language of Enactment--"Program."

The word "program," as used in [Cal. Const., art. XIII B, § 6](#) (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on \*48 local governments and do not apply generally to all residents and entities in the state.

(5)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Increases in Workers' Compensation Benefits.

The provisions of [Cal. Const., art. XIII B, § 6](#) (reimbursement to local agencies for new programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of [art. XIII B, § 6](#). Accordingly, the State Board of Control properly denied reimbursement to local governmental entities for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees be covered by unemployment insurance.)

[See [Cal.Jur.3d, State of California, § 78](#).]

(6)

Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts.

Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

(7)

Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts--Pro Tanto Repeal of Constitutional Provision.

The goals of [Cal. Const., art. XIII B, § 6](#) (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of [art. XIII B, § 6](#), did not effect a pro tanto repeal of [Cal. Const., art. XIV, § 4](#), which gives the Legislature plenary power over workers' compensation. \*49

#### COUNSEL

De Witt W. Clinton, County Counsel, Paula A. Snyder, Senior Deputy County Counsel, Edward G. Pozorski, Deputy County Counsel, John W. Witt, City Attorney, Kenneth K. Y. So, Deputy City Attorney, William D. Ross, Diana P. Scott, Ross & Scott and Rogers & Wells for Plaintiffs and Appellants.

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#### GRODIN, J.

We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain

workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. (1) We conclude that when the voters adopted [article XIII B, section 6](#), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or \*50 increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by [section 6](#).

We recognize also the potential conflict between [article XIII B](#) and the grant of plenary power over workers' compensation bestowed upon the Legislature by [section 4 of article XIV](#), but in accord with established rules of construction our construction of [article XIII B, section 6](#), harmonizes these constitutional provisions.

## I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in [section 6](#) (hereafter [section 6](#)): "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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative

mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning.<sup>1</sup>

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which \*51 employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of [Labor Code sections 4453, 4453.1 and 4460](#) increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from \$231 per week to \$262.50 per week. The amendment of [section 4702 of the Labor Code](#) increased certain death benefits from \$55,000 to \$75,000. No appropriation for increased state-mandated costs was made in this legislation.<sup>2</sup>

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to [Revenue and Taxation Code section 2207](#).<sup>3</sup> They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to pay the increased benefits until the state provided reimbursement.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost

of living raises were not expressly \*52 excepted from the requirement of state reimbursement in [section 6](#) the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922, p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from \$73.50 to \$168, and the maximum from \$262.50 to \$336. For permanent partial disability the weekly wage was raised from a minimum of \$45 to \$105, and from a maximum of \$105 to \$210, in each case for injuries occurring on or after January 1, 1984. ([Lab. Code, § 4453.](#)) A \$10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed ([Lab. Code, § 4553](#)), and the maximum death benefit was raised from \$75,000 to \$85,000 for deaths in 1983, and to \$95,000 for deaths on or after January 1, 1984. ([Lab. Code, § 4702.](#))

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[n]otwithstanding [section 6 of Article XIII B of the California Constitution](#) and [section 2231 ... of the Revenue and Taxation Code.](#)" (Stats. 1982, ch. 922, § 17, p. 3372.)<sup>4</sup>

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in [Revenue and Taxation Code section 2207](#), subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation

Code or \*53 [section 6](#). The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings ([Lab. Code, § 3202.5](#)); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine ([Lab. Code, §§ 3601-3602](#)); and changes in death and disability benefits and in liability in serious and willful misconduct cases. ([Lab. Code, § 4551.](#))

The court also held: "[T]he changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego appeal from this latter portion of the judgment only.

## II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of [section 6](#), or are an "increased level of service"<sup>5</sup> described in subdivision (a) of [Revenue and Taxation Code section 2207](#). The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of [section 6](#) is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in [section 2231](#), subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of [section 2231](#) in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in

article XIII B to readopt the \*54 definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289].)<sup>6</sup> On that basis the court concluded that increased costs were no longer tantamount to an increased level of service.

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions.<sup>7</sup>

### III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state" means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law ... which mandates a new program or an increased level of service of an existing program." (*Rev. & Tax. Code § 2207*.) As noted, however, the definition of that term which had been \*55 included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when *Revenue and Taxation Code section 2231*, which had replaced section 2164.3 in 1973, was repealed and a new *section 2231* enacted. (Stats. 1975, ch. 486, §§ 6 & 7, p. 999.)<sup>8</sup> Prior to repeal, Revenue and Taxation Code section 2164.3, and later *section 2231*, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that " "Increased level of service" means any requirement mandated by state law or executive regulation ... which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

(2) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in

enacting *section 2207*, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange* (1978) 86 Cal.App.3d 394, 402 [150 Cal.Rptr. 286]; see also *Eu v. Chacon, supra*, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of *section 2207*. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

(3) In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted *article XIII B* in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [210 Cal.Rptr. 226, 693 P.2d 811].) In *section 6*, the electorate commands that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither *section 6* nor the current statutory reimbursement scheme.

(4) Looking at the language of *section 6* then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent

that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing “programs.” But the term “program” itself is not defined in [article XIII B](#). What programs then did the electorate have in mind when [section 6](#) was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term - programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of [section 6](#) in [article XIII B](#) 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. In their ballot arguments, the proponents of [article XIII B](#) explained [section 6](#) to the voters: “Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.” (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase “to force programs on local governments” confirms that the intent underlying [section 6](#) was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not \*57 for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to “force” programs on localities.

The language of [section 6](#) is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of [section 6](#), the language would have explicitly indicated that the word “program” was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]; *Big Sur Properties v. Mott* (1976) 63 Cal.App.3d 99, 105 [132 Cal.Rptr. 835].) Nothing in the history of [article XIII B](#) that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this

construction or the additional indirect, but substantial impact it would have on the legislative process.

Were [section 6](#) construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by [article XIII B](#). (Rev. & Tax. Code, §§ 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe [section 6](#) as applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote.<sup>9</sup> Certainly no such intent is reflected in the language or history of [article XIII B](#) or [section 6](#).

(5) We conclude therefore that [section 6](#) has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation \*58 benefits that employees of private individuals or organizations receive.<sup>10</sup> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See [Lab. Code](#), § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of [section 6](#).

#### IV

(6) Our construction of [section 6](#) is further supported by the fact that it comports with controlling principles of construction which “require that in the absence of irreconcilable conflict among their various parts,



[constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 1 Cal.3d 801, 813-814 [114 Cal.Rptr. 577, 523 P.2d 617]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].) (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 676 [194 Cal.Rptr. 781, 669 P.2d 17].)

Our concern over potential conflict arises because [article XIV, section 4](#),<sup>11</sup> gives the Legislature “plenary power, unlimited by any provision of \*59 this Constitution” over workers' compensation. Although seemingly unrelated to workers' compensation, [section 6](#), as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between [section 6](#) and the plenary power over workers' compensation granted to the Legislature by [article XIV, section 4](#) is apparent.

The County of Los Angeles, while recognizing the impact of [section 6](#) on the Legislature's power over workers' compensation, argues that the “plenary power” granted by [article XIV, section 4](#), is power over the substance of workers' compensation legislation, and that this power would be unaffected by [article XIII B](#) if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural \*60 limitations on the Legislature, such as the “single subject rule” (art. IV, § 9), as to which [article XIV, section 4](#), has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If [section 6](#) were applicable, therefore,

[article XIII B](#) would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed [article XIII B](#) would restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of [article XIV, section 4](#), or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of [section 6](#) permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as [section 6](#) to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329 [178 Cal.Rptr. 801, 636 P.2d 1139]. There, by coincidence, [article XIV, section 4](#), was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, [article XIV, section 4](#), would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of [article XIV, section 4](#), granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because [article XIV, section 4](#), did not give the Legislature the authority to enact the statute. [Article XIV, section 4](#), did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. “It is well established that the adoption of [article XIV, section 4](#) 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that \*61 amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 695, [151 P. 398].) A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization of the objectives of the new article. (*Methodist Hosp. of Sacramento v. Saylor*

(1971) 5 Cal.3d 685, 691-692 [97 Cal.Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 115-117 [148 Cal.Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of [article XIV, section 4](#) are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power - the disciplining of attorneys - that otherwise rests exclusively with this court?" (*Husted v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of [article XIV, section 4](#), and no pro tanto repeal need be found.

(7) A similar analysis leads to the conclusion here that no pro tanto repeal of [article XIV, section 4](#), was intended or made necessary here by the adoption of [section 6](#). The goals of [article XIII B](#), of which [section 6](#) is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220].) [Section 6](#) had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of [article XIII A](#) in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage - costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

Therefore, since the objectives of [article XIII B](#) and [section 6](#) can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, [section 6](#) did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in **\*62** benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that [section 6](#) has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal - whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

## V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Bird, C. J., Broussard, J., Reynoso, J., Lucas, J., and Panelli, J., concurred.

## MOSK, J.

I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither [article XIII B, section 6, of the Constitution](#) nor [Revenue and Taxation Code sections 2207 and 2231](#) require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of [section 2231, subdivision \(a\)](#), that the state

reimburse local government for “all costs mandated by the state.”

merely to provide a cost-of-living \*63 adjustment. I agree with the Court of Appeal that this was permissible.

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but

Appellants' petition for a rehearing was denied February 26, 1987. \*64

#### Footnotes

- 1 The analysis by the Legislative Analyst advised that the state would be required to “reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders.” Elsewhere the analysis repeats: “[T]he initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates. ... The one ballot argument which made reference to [section 6](#), referred only to the “new program” provision, stating, “Additionally, this measure [¶] (1) will not allow the state government to force programs on local governments without the state paying for them.”
- 2 The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either [Revenue and Taxation Code section 2231](#), or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation. Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of \$510 on which to base benefits, an unspecified appropriation was included.
- 3 The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.
- 4 The same section “recognized,” however, that a local agency “may pursue any remedies to obtain reimbursement available to it” under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.
- 5 The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.
- 6 The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either [section 6](#), adopted by the electorate in the prior year, or of [Revenue and Taxation Code section 2207](#), subdivision (a) enacted in 1975. (Cf. *California Employment Stabilization Co. v. Payne* (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting [section 6](#). The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)
- 7 We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See [Code Civ. Proc. § 1094.5](#), subd. (f).)
- 8 Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to [Revenue and Taxation Code sections 2218-2218.54](#) had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of [Revenue and Taxation Code section 2231](#),

subdivision (a) that “[t]he state shall reimburse each local agency for all ‘costs mandated by the state,’ as defined in [Section 2207](#)” and the additional command of subdivision (b) that any statute imposing such costs “provide an appropriation therefor.” (*County of Orange v. Flourney* (1974) 42 Cal.App.3d 908, 913 [117 Cal.Rptr. 224].)

9 Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 [149 Cal.Rptr. 239, 583 P.2d 1281].)

10 The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a “state mandated cost,” rather than as whether the provision of an employee benefit was a “program or service” within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

11 **Section 4:** “The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

“The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

“The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

“Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed.” (Italics added.)



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 15 Cal.4th 68, 931 P.2d 312, 61 Cal.Rptr.2d 134,  
 Med & Med GD (CCH) P 45,112, 97 Cal. Daily  
 Op. Serv. 1555, 97 Daily Journal D.A.R. 2296

COUNTY OF SAN DIEGO, Cross-  
 complainant and Respondent,

v.

THE STATE OF CALIFORNIA et al.,  
 Cross-defendants and Appellants.

No. S046843.

Supreme Court of California

Mar 3, 1997.

### SUMMARY

After a county's unsuccessful administrative attempts to obtain reimbursement from the state for expenses incurred through its County Medical Services (CMS) program, and after a class action was filed on behalf of CMS program beneficiaries seeking to enjoin termination of the program, the county filed a cross-complaint and petition for a writ of mandate ([Code Civ. Proc., § 1085](#)) against the state, the Commission on State Mandates, and various state officers, to determine the county's rights under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service). The county alleged that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The trial court found that the state had an obligation to fund the county's CMS program. (Superior Court of San Diego County, No. 634931, Michael I. Greer, \* Harrison R. Hollywood, and Judith D. McConnell, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D018634, affirmed the judgment of the trial court insofar as it provided that [Cal. Const., art. XIII B, § 6](#), required the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required the county to spend at least \$41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. The Court of Appeal remanded to the commission to determine the reimbursement amount and appropriate statutory remedies.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it held that the exclusion of medically indigent adults from Medi-Cal imposed a mandate on the county within the meaning of [Cal. Const., art. XIII B, § 6](#). The Supreme Court reversed the judgment insofar as it held that the state required the county to spend at least \$41 million on the CMS \*69 program in fiscal years 1989-1990 and 1990-1991, and remanded the matter to the commission to determine whether, and by what amount, the statutory standards of care (e.g., [Health & Saf. Code, § 1442.5](#), former subd. (c), [Welf. & Inst. Code, §§ 10000, 17000](#)) forced the county to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which the county was entitled. The court held that the trial court had jurisdiction to adjudicate the county's mandate claim, notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The court also held that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was [Welf. & Inst. Code, § 17000](#), enacted in 1965, rather than the 1982 legislation, and since [Cal. Const., art. XIII B, § 6](#), did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, [Welf. & Inst. Code, § 17000](#), requires a county to support indigent persons only in the event they are not assisted by other sources. The court further held that there was a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide the medical care. While [Welf. & Inst. Code, § 17001](#), confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of [Welf. & Inst. Code, § 17000](#), or be struck down as void by the courts. The court also held that the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the commission to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its CMS program. (Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., \* and Aldrich, J., † concurring. Dissenting opinion by Kennard, J.)

## HEADNOTES

## Classified to California Digest of Official Reports

(1)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program.

\*70 Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service), 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 Cal. Const., arts. XIII A and XIII B, impose. With certain exceptions, [Cal. Const., art. XIII B, § 6](#), essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

(2a, 2b)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Jurisdiction--With Pending Test Claim.

The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its

authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering the futility exception to the exhaustion requirement, given that the commission rejected the other county's claim.

(3)

Administrative Law § 99--Judicial Review and Relief--Administrative Mandamus--Jurisdiction--As Derived From Constitution.

The power of superior courts to perform mandamus review of administrative decisions derives in part from [Cal. Const., art. VI, § 10](#). \*71 That section gives the Supreme Court, Courts of Appeal, and superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." The jurisdiction thus vested may not lightly be deemed to have been destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

(4)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate.

In a county's action against the state to determine the county's rights under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was [Welf. & Inst. Code, § 17000](#), enacted in 1965, rather than the 1982 legislation, and since [Cal. Const., art. XIII B, § 6](#), did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, [Welf. & Inst. Code, § 17000](#), requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended

to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe rules ([Welf. & Inst. Code, § 14000.2](#)), and Medi-Cal was administered by state departments and agencies.

[See [9 Witkin, Summary of Cal. Law \(9th ed. 1989\) Taxation, § 123.](#)]

(5a, 5b)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards-- \*72 Eligibility.

In a county's action against the state to determine the county's rights under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While [Welf. & Inst. Code, § 17001](#), confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of [Welf. & Inst. Code, § 17000](#) (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although [Welf. & Inst. Code, § 17000](#), does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under [Welf. & Inst. Code, § 17000](#). The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. (Disapproving [Bay General Community Hospital v. County of San Diego](#) (1984) 156 Cal.App.3d 944 [203 Cal.Rptr. 184] insofar as it holds that a county's responsibility under [Welf. & Inst. Code, § 17000](#),

extends only to indigents as defined by the county's board of supervisors, and suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of [Welf. & Inst. Code, § 17000](#), but do not qualify for Medi-Cal.)

(6)

Public Aid and Welfare § 4--County Assistance--Counties' Discretion.

Counties may exercise their discretion under [Welf. & Inst. Code, § 17001](#) (county board of supervisors or authorized agency shall adopt standards of aid and care for indigent and dependent poor), only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose ([Gov. Code, § 11374](#)). Despite the counties' statutory discretion, courts have consistently invalidated county welfare regulations that fail to meet statutory requirements. \*73

(7)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Existence of Mandate--Discretion to Set Standards--Service.

In a county's action against the state to determine the county's rights under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. [Welf. & Inst. Code, § 17000](#), mandates that medical care be provided to indigents, and [Welf. & Inst. Code, § 10000](#), requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing [Welf. & Inst. Code, § 17000](#), have held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, [Health & Saf. Code, § 1442.5](#), former subd. (c), also spoke to the level of services that

counties had to provide under [Welf. & Inst. Code, § 17000](#), requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. (Disapproving [Cooke v. Superior Court \(1989\) 213 Cal.App.3d 401 \[261 Cal.Rptr. 706\]](#) to the extent it held that Health & Saf. Code, § 1442.5, former subd. (c), was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that services in the county were reduced.)

(8)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Minimum Required Expenditure.

In a county's action against the state to determine the county's rights under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service), in which the trial court found that the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults mandated a reimbursable new program entitling the county to reimbursement, the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the Commission on State Mandates to determine the amount of any reimbursement due, erred in finding the county \*74 had a minimum required expenditure on its County Medical Services (CMS) program. The Court of Appeal relied on [Welf. & Inst. Code, former § 16990, subd. \(a\)](#), which set forth the financial maintenance-of-effort requirement for counties that received California Healthcare for the Indigent Program (CHIP) funding. However, counties that chose to seek CHIP funds did so voluntarily. Thus, [Welf. & Inst. Code, former § 16990, subd. \(a\)](#), did not mandate a minimum funding requirement. Nor did [Welf. & Inst. Code, former § 16991, subd. \(a\)\(5\)](#), establish a minimum financial obligation. That statute required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its allocation from various sources was less than the funding it received under [Welf. & Inst. Code, § 16703](#), for 1988-1989. Nothing about this requirement imposed on the county a minimum funding requirement.

(9)

State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Government for State-mandated

Program--County's Reimbursement for Cost of Health Care to Indigent Adults--Proper Mandamus Proceeding:Mandamus and Prohibition § 23--Claim Against Commission on State Mandates.

In a county's action against the state to determine the county's rights under [Cal. Const., art. XIII B, § 6](#) (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under [Code Civ. Proc., § 1085](#), was not an improper vehicle for challenging the commission's position. Mandamus under [Code Civ. Proc., § 1094.5](#), commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under [Code Civ. Proc., § 1085](#), as one brought under [Code Civ. Proc., § 1094.5](#), and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under [Cal. Const., art. XIII B, § 6](#), was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate. \*75

COUNSEL

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Lloyd M. Harmon, Jr., County Counsel, John J. Sansone, Acting County Counsel, Diane Bardsley, Chief Deputy County Counsel, Valerie Tehan and Ian Fan, Deputy County Counsel, for Cross-complainant and Respondent.

CHIN, J.

[Section 6 of article XIII B of the California Constitution \(section 6\)](#) requires the State of California (state), subject to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henver the Legislature or any state agency mandates a new program or higher level of service ...." In this action, the County of San Diego (San Diego or the County) seeks reimbursement under [section 6](#) from the state for the costs of providing health care services to certain adults who formerly received medical care under



the California Medical Assistance Program (Medi-Cal) (see [Welf. & Inst. Code, § 14063](#))<sup>1</sup> because they were medically indigent, i.e., they had insufficient financial resources to pay for their own medical care. In 1979, when the electorate adopted [section 6](#), the state provided Medi-Cal coverage to these medically indigent adults without requiring financial contributions from counties. Effective January 1, 1983, the Legislature excluded this population from Medi-Cal. (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357.) Since that date, San Diego has provided medical care to these individuals with varying levels of state financial assistance.

To resolve San Diego's claim, we must determine whether the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" on San Diego within the meaning of section 6. The Commission on State Mandates (Commission), which the Legislature created to determine claims under section 6, has ruled that section 6 does not apply to the Legislature's action and has rejected reimbursement claims like San Diego's. (See [Kinlaw v. State of California](#) (1991) 54 Cal.3d 326, 330, fn. 2 [285 Cal.Rptr. 66, 814 P.2d 1308] (*Kinlaw*)). The trial court and Court of Appeal in this case disagreed with the Commission, finding that San Diego was entitled to reimbursement. The state seeks \*76 reversal of this finding. It also argues that San Diego's failure to follow statutory procedures deprived the courts of jurisdiction to hear its claim. We reject the state's jurisdictional argument and affirm the finding that the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" within the meaning of section 6. Accordingly, we remand the matter to the Commission to determine the amount of reimbursement, if any, due San Diego under the governing statutes.

### I. Funding of Indigent Medical Care

Before the start of Medi-Cal, "the indigent in California were provided health care services through a variety of different programs and institutions." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3 (Preliminary Report).) County hospitals "provided a wide range of inpatient and outpatient hospital services to all persons who met county indigency requirements whether or not they were public assistance recipients. The major responsibility for supporting county hospitals rested upon the counties, financed primarily through property taxes, with minor contributions from" other sources. (*Id.* at p. 4.)

Medi-Cal, which began operating March 1, 1966, established "a program of basic and extended health care services for recipients of public assistance and for medically indigent persons." ([Morris v. Williams](#) (1967) 67 Cal.2d 733, 738 [63 Cal.Rptr. 689, 433 P.2d 697] (*Morris*); *id.* at p. 740; see also Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 103.) It "represent[ed] California's implementation of the federal Medicaid program (42 U.S.C. §§ 1396-1396v), through which the federal government provide[d] financial assistance to states so that they [might] furnish medical care to qualified indigent persons. [Citation.]" ([Robert F. Kennedy Medical Center v. Belshé](#) (1996) 13 Cal.4th 748, 751 [55 Cal.Rptr.2d 107, 919 P.2d 721] (*Belshé*)). "[B]y meeting the requirements of federal law," Medi-Cal "qualif [ied] California for the receipt of federal funds made available under title XIX of the Social Security Act." ([Morris, supra](#), 67 Cal.2d at p. 738.) "Title [XIX] permitted the combination of the major governmental health care systems which provided care for the indigent into a single system financed by the state and federal governments. By 1975, this system, at least as originally proposed, would provide a wide range of health care services for all those who [were] indigent regardless of whether they [were] public assistance recipients ...." (Preliminary Rep., *supra*, at p. 4; see also Act of July 30, 1965, Pub.L. No. 89-97, § 121(a), 79 Stat. 286, reprinted in 1965 U.S. Code \*77 Cong. & Admin. News, p. 378 [states must make effort to liberalize eligibility requirements "with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources"].)<sup>2</sup>

However, eligibility for Medi-Cal was initially limited only to persons linked to a federal categorical aid program by age (at least 65), blindness, disability, or membership in a family with dependent children within the meaning of the Aid to Families with Dependent Children program (AFDC). (See Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.) pp. 548, 550 (1971 Legislative Analyst's Report).) Individuals possessing one of these characteristics (categorically linked persons) received full benefits if they actually received public assistance payments. (*Id.* at p. 550.) Lesser benefits were available to categorically linked persons who were only medically indigent, i.e., their income and resources, although rendering them ineligible for cash aid, were "not sufficient to meet the cost of health care." ([Morris, supra](#), 67 Cal.2d at p. 750; see also 1971 Legis. Analyst's Rep., *supra*, at pp.

548, 550; Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, pp. 105-106.)

Individuals not linked to a federal categorical aid program (non-categorically linked persons) were ineligible for Medi-Cal, regardless of their means. Thus, “a group of citizens, not covered by Medi-Cal and yet unable to afford medical care, remained the responsibility of” the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal.App.3d 1059, 1061 [100 Cal.Rptr. 629] (*Hall*)). In establishing Medi-Cal, the Legislature expressly recognized this fact by enacting former section 14108.5, which provided: “The Legislature hereby declares its concern with the problems which will be facing the counties with respect to the medical care of indigent persons who are not covered [by Medi-Cal] ... and ... whose medical care must be financed entirely by the counties in a time of heavily increasing medical costs.” (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116.) The Legislature directed the Health Review and Program Council “to study this problem and report its findings to the Legislature no later than March 1, 1967.” (*Ibid.*)

Moreover, although it required counties to contribute to the costs of Medi-Cal, the Legislature established a method for determining the amount of their contributions that would “leave them with []sufficient funds to provide hospital care for those persons not eligible for Medi-Cal.” (*Hall, supra*, 23 Cal.App.3d at p. 1061, fn. omitted.) Former section 14150.1, \*78 which was known as the “county option” or the “option plan,” required a county “to pay the state a sum equal to 100 percent of the county’s health care costs (which included both linked and nonlinked individuals) provided in the 1964-1965 fiscal year, with an adjustment for population increase; in return the state would pay the county’s entire cost of medical care.”<sup>3</sup> (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 581 [159 Cal.Rptr. 1] (*Lackner*)). Under the county option, “the state agreed to assume all county health care costs ... in excess of” the county’s payment. (*Id.* at p. 586.) It “made no distinction between ‘linked’ and ‘nonlinked’ persons,” and “simply guaranteed a medical cost ceiling to counties electing to come within the option plan.” (*Ibid.*) “Any difference in actual operating costs and the limit set by the option provision [was] assumed entirely by the state.” (Preliminary Rep., *supra*, at p. 10, fn. 2.) Thus, the county option “guarantee[d] state participation in the cost of care for medically indigent persons who [were] not otherwise covered by the basic Medi-Cal program or other repayment programs.”<sup>4</sup> (1971 Legis. Analyst’s Rep., *supra*, at p. 549.)

Primarily through the county option, Medi-Cal caused a “significant shift in financing of health care from the counties to the state and federal government.... During the first 28 months of the program the state ... paid approximately \$76 million for care of non-Medi-Cal indigents in county hospitals.” (Preliminary Rep., *supra*, at p. 31.) These state funds paid “costs that would otherwise have been borne by counties through increases in property taxes.” (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1974-1975 Budget Bill, Sen. Bill No. 1525 (1973-1974 Reg. Sess.) p. 626 (1974 Legislative Analyst’s Report).) “[F]aced with escalating Medi-Cal costs, the Legislature in 1967 imposed strict guidelines on reimbursing counties electing to come under the ‘option’ plan. ([Former] § 14150.2.) Pursuant to subdivision (c) of [former] section 14150.2, the state imposed a limit on its obligation to pay for medical services to nonlinked persons \*79 served by a county within the ‘option’ plan.” (*Lackner, supra*, 97 Cal.App.3d at p. 589; see also Stats. 1967, ch. 104, § 3, p. 1019; Stats. 1969, ch. 21, § 57, pp. 106-107; 1974 Legis. Analyst’s Rep., *supra*, at p. 626.)

In 1971, the Legislature substantially revised Medi-Cal. It extended coverage to certain noncategorically linked minors and adults “who [were] financially unable to pay for their medical care.” (Legis. Counsel’s Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83; see Stats. 1971, ch. 577, §§ 12, 23, pp. 1110-1111, 1115.) These medically indigent individuals met “the income and resource requirements for aid under [AFDC] but [did] not otherwise qualify[] as a public assistance recipient.” (56 Ops.Cal.Atty.Gen. 568, 569 (1973).) The Legislature anticipated that this eligibility expansion would bring “approximately 800,000 additional medically needy Californians” into Medi-Cal. (Stats. 1971, ch. 577, § 56, p. 1136.) The 1971 legislation referred to these individuals as “[n]oncategorically related needy person [s].” (Stats. 1971, ch. 577, § 23, p. 1115.) Subsequent legislation designated them as “medically indigent person[s]” (MIP’s) and provided them coverage under former section 14005.4. (Stats. 1976, ch. 126, § 7, p. 200; *id.* at § 20, p. 204.)

The 1971 legislation also established a new method for determining each county’s financial contribution to Medi-Cal. The Legislature eliminated the county option by repealing former section 14150.1 and enacting former section 14150. That section specified (by amount) each county’s share of Medi-Cal costs for the 1972-1973 fiscal year and set forth a formula for increasing the share in subsequent years based on

the taxable assessed value of certain property. (Stats. 1971, ch. 577, §§ 41, 42, pp. 1131-1133.)

For the 1978-1979 fiscal year, the state assumed each county's share of Medi-Cal costs under former section 14150. (Stats. 1978, ch. 292, § 33, p. 610.) In July 1979, the Legislature repealed former section 14150 altogether, thereby eliminating the counties' responsibility to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 74, p. 1043.) Thus, in November 1979, when the electorate adopted section 6, "the state was funding Medi-Cal coverage for [MIP's] without requiring any county financial contribution." (*Kinlaw, supra*, 54 Cal.3d at p. 329.) The state continued to provide full funding for MIP medical care through 1982.

In 1982, the Legislature passed two Medi-Cal reform bills that, as of January 1, 1983, excluded from Medi-Cal most adults who had been eligible \*80 under the MIP category (adult MIP's or Medically Indigent Adults).<sup>5</sup> (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357; *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 411 [261 Cal.Rptr. 706] (*Cooke*)). As part of excluding this population from Medi-Cal, the Legislature created the Medically Indigent Services Account (MISA) as a mechanism for "transfer[ing] [state] funds to the counties for the provision of health care services." (Stats. 1982, ch. 1594, § 86, p. 6357.) Through MISA, the state annually allocated funds to counties based on "the average amount expended" during the previous three fiscal years on Medi-Cal services for county residents who had been eligible as MIP's. (Stats. 1982, ch. 1594, § 69, p. 6345.) The Legislature directed that MISA funds "be consolidated with existing county health services funds in order to provide health services to low-income persons and other persons not eligible for the Medi-Cal program." (Stats. 1982, ch. 1594, § 86, p. 6357.) It further provided: "Any person whose income and resources meet the income and resource criteria for certification for [Medi-Cal] services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.)

After passage of the 1982 legislation, San Diego established a county medical services (CMS) program to provide medical care to adult MIP's. According to San Diego, between 1983 and June 1989, the state fully funded San Diego's CMS program through MISA. However, for fiscal years 1989-1990 and 1990-1991, the state only partially funded San Diego's CMS program. For example, San Diego asserts that, in fiscal

year 1990-1991, it exhausted state-provided MISA funds by December 24, 1990. Faced with this shortfall, San Diego's board of supervisors voted in February 1991 to terminate the CMS program unless the state agreed by March 8 to provide full funding for the 1990-1991 fiscal year. After the state refused to provide additional funding, San Diego notified affected individuals and medical service providers that it would terminate the CMS program at midnight on March 19, 1991. The response to the County's notification ultimately resulted in the unfunded mandate claim now before us.

## II. Unfunded Mandates

Through adoption of Proposition 13 in 1978, the voters added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486 [280 Cal.Rptr. 92, 808 P.2d 235] (*County of Fresno*)). The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574 [7 Cal.Rptr.2d 245, 828 P.2d 147].) (1) These two constitutional articles "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522].) Their goals are "to protect residents from excessive taxation and government spending. [Citation.]" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*)).

California Constitution, article XIII B includes section 6, which is the constitutional provision at issue here. It provides in relevant part: "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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] ... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Section 6 recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. (*County of Fresno, supra*, 53 Cal.3d at p. 487.) Its purpose 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. (*County of Fresno, supra*, 53 Cal.3d at p. 487; *County of Los Angeles, supra*, 43 Cal.3d at p. 61.) With certain exceptions, section 6 “[e]ssentially” requires the state “to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]” (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577 [15 Cal.Rptr.2d 547].)

In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. (*Gov. Code, § 17500 et seq.*) The local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. (*Gov. Code, §§ 17521, 17551, 17555.*) If the Commission finds a claim to be reimbursable, it must determine the amount of reimbursement. (*Gov. Code, § 17557.*) The local agency must then follow certain statutory procedures to \*82 obtain reimbursement. (*Gov. Code, § 17558 et seq.*) If the Legislature refuses to appropriate money for a reimbursable mandate, the local agency may file “an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement.” (*Gov. Code, § 17612, subd. (c).*) If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under section 1094.5 of the Code of Civil Procedure. (*Gov. Code, § 17559.*) Government Code section 17552 declares that these provisions “provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6 ....”

### III. Administrative and Judicial Proceedings

#### A. The Los Angeles Action

On November 23, 1987, the County of Los Angeles (Los Angeles) filed a claim (the Los Angeles action) with the Commission asserting that the exclusion of adult MIP's from Medi-Cal constituted a reimbursable mandate under section 6. (*Kinlaw, supra*, 54 Cal.3d at p. 330, fn. 2.) Alameda County subsequently filed a claim on November 30, 1987, but the Commission rejected it because of the pending Los Angeles action. (*Id.* at p. 331, fn. 4.) Los Angeles refused to permit Alameda County to join as a claimant, but permitted San Bernardino County to join. (*Ibid.*)

In April 1989, the Commission rejected the Los Angeles claim, finding no reimbursable mandate.<sup>6</sup> (*Kinlaw, supra*, 54 Cal.3d at p. 330, fn. 2.) It found that the 1982 legislation did not impose on counties a new program or a higher level of service for an existing program because counties had a “pre-existing duty” to provide medical care to the medically indigent under section 17000. That section provides in relevant part: “Every county ... shall relieve and support all incompetent, poor, indigent persons ... lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.” Section 17000 did not impose a reimbursable mandate under section 6, the Commission further reasoned, because it “was enacted prior to January 1, 1975 ....” Finally, the Commission found no mandate because the 1982 legislation “neither establish[ed] the level of care to be provided nor ... define[d] the class of persons determined to be eligible for medical care since these criteria were established by boards of supervisors” pursuant to section 17001.

On March 20, 1990, the Los Angeles Superior Court filed a judgment reversing the Commission's decision and directing issuance of a peremptory \*83 writ of mandate. On April 16, 1990, the Commission and the state filed an appeal in the Second District Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.)<sup>7</sup> In early 1992, the parties to the Los Angeles action agreed to settle their dispute and to seek dismissal. In April 1992, after learning of this agreement, San Diego sought to intervene. Explaining that it had been waiting for resolution of the action, San Diego requested that the Court of Appeal deny the dismissal request and add (or substitute in) the County as a party. The Court of Appeal did not respond. On December 15, 1992, the parties to the Los Angeles action entered into a settlement agreement that provided for vacation of the superior court judgment and dismissal of the appeal and superior court action. Consistent with the settlement agreement, on December 29, 1992, the Court of Appeal filed an order vacating the superior court judgment, dismissing the appeal, and instructing the superior court to dismiss the action without prejudice on remand.<sup>8</sup>

#### B. The San Diego Action

##### 1. Administrative Attempts to Obtain Reimbursement

On March 13, 1991, San Diego submitted an invoice to the State Controller seeking reimbursement of its uncompensated expenditures on the CMS program for fiscal year 1989-1990.

The Controller is a member of the Commission. ([Gov. Code, § 17525.](#)) On April 12, the Controller returned the invoice “without action,” stating that “[n]o appropriation has been given to this office to allow for reimbursement” of medical costs for adult MIP's and noting that litigation was pending regarding the state's reimbursement obligation. On December 18, 1991, San Diego submitted a similar invoice for the 1990-1991 fiscal year. The state has not acted regarding this second invoice. \*84

## 2. Court Proceedings

Responding to San Diego's notice of intent to terminate the CMS program, on March 11, 1991, the Legal Aid Society of San Diego filed a class action on behalf of CMS program beneficiaries seeking to enjoin termination of the program. The trial court later issued a preliminary injunction prohibiting San Diego “from taking any action to reduce or terminate” the CMS program.

On March 15, 1991, San Diego filed a cross-complaint and petition for writ of mandate under [Code of Civil Procedure section 1085](#) against the state, the Commission, and various state officers.<sup>9</sup> The cross-complaint alleged that, by excluding adult MIP's from Medi-Cal and transferring responsibility for their medical care to counties, the state had mandated a new program and higher level of service within the meaning of section 6. The cross-complaint further alleged that the state therefore had a duty under section 6 to reimburse San Diego for the entire cost of its CMS program, and that the state had failed to perform its duty.

Proceeding from these initial allegations, the cross-complaint alleged causes of action for indemnification, declaratory and injunctive relief, reimbursement and damages, and writ of mandate. In its first declaratory relief claim, San Diego alleged (on information and belief) that the state contended the CMS program was a nonreimbursable, county obligation. In its claim for reimbursement, San Diego alleged (again on information and belief) that the Commission had “previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement from the State for the costs of such programs.” “Under these circumstances,” San Diego asserted, “denial of the County's claim by the Commission ... is virtually certain and further administrative pursuit of this claim would be a futile act.”

For relief, San Diego requested a judgment declaring the following: (1) that the state must fully reimburse San Diego if it “is compelled to provide any CMS Program services to plaintiffs ... after March 19, 1991”; (2) that section 6 requires the state “to fully fund the CMS Program” (or, alternatively, that the CMS program is discretionary); (3) that the state must pay San Diego for all of its unreimbursed costs for the CMS program during the \*85 1989-1990 and 1990-1991 fiscal years; and (4) that the state shall assume responsibility for operating any court-ordered continuation of the CMS program. San Diego also requested that the court issue a writ of mandamus requiring the state to fulfill its reimbursement obligation. Finally, San Diego requested issuance of preliminary and permanent injunctions to ensure that the state fulfilled its obligations to the County.

In April 1991, San Diego determined that it could continue operating the CMS program using previously unavailable general fund revenues. Accordingly, San Diego and plaintiffs settled their dispute, and plaintiffs dismissed their complaint.

The matter proceeded solely on San Diego's cross-complaint. The court issued a preliminary injunction and alternative writ in May 1991. At a hearing on June 25, 1991, the court found that the state had an obligation to fund San Diego's CMS program, granted San Diego's request for a writ of mandate, and scheduled an evidentiary hearing to determine damages and remedies. On July 1, 1991, it issued an order reflecting this ruling and granting a peremptory writ of mandate. The writ did not issue, however, because of the pending hearing to determine damages. In December 1992, after an extensive evidentiary hearing and posthearing proceedings on the claim for a peremptory writ of mandate, the court issued a judgment confirming its jurisdiction to determine San Diego's claim, finding that section 6 required the state to fund the entire cost of San Diego's CMS program, determining the amount that the state owed San Diego for fiscal years 1989-1990 and 1990-1991, identifying funds available to the state to satisfy the judgment, and ordering issuance of a peremptory writ of mandate.<sup>10</sup> The court also issued a peremptory writ of mandate directing the state and various state officers to comply with the judgment.

The Court of Appeal affirmed the judgment insofar as it provided that section 6 requires the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required San Diego to spend at least \$41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those

portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. It remanded the matter to the Commission to determine the reimbursement amount and appropriate statutory remedies. We then granted the state's petition for review.

#### IV. Superior Court Jurisdiction

(2a) Before reaching the merits of the appeal, we must address the state's assertion that the superior court lacked jurisdiction to hear San \*86 Diego's mandate claim. According to the state, in *Kinlaw, supra*, 54 Cal.3d 326, we “unequivocally held that the orderly determination of [unfunded] mandate questions demands that only one claim on any particular alleged mandate be entertained by the courts at any given time.” Thus, if a test claim is pending, “other potential claims must be held in abeyance ....” Applying this principle, the state asserts that, since “the test claim litigation was pending” in the Los Angeles action when San Diego filed its cross-complaint seeking mandamus relief, “the superior court lacked jurisdiction from the outset, and the resulting judgment is a nullity. That defect cannot be cured by the settlement of the test claim, which occurred after judgment was entered herein.”

In *Kinlaw*, we held that individual taxpayers and recipients of government benefits lack standing to enforce section 6 because the applicable administrative procedures, which “are the exclusive means” for determining and enforcing the state's section 6 obligations, “are available only to local agencies and school districts directly affected by a state mandate ....” (*Kinlaw, supra*, 54 Cal.3d at p. 328.) In reaching this conclusion, we explained that the reimbursement right under section 6 “is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services.” (*Id.* at p. 334.) We concluded that “[n]either public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues.” (*Id.* at p. 335.)

In finding that individuals do not have standing to enforce the section 6 rights of local agencies, we made several observations in *Kinlaw* pertinent to operation of the statutory process as it applies to entities that do have standing. Citing [Government Code section 17500](#), we explained that “the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6 ... because the absence

of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process.” (*Kinlaw, supra*, 54 Cal.3d at p. 331.) Thus, the governing statutes “establish[] procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created.” (*Id.* at p. 333.) Specifically, “[t]he legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies ....” (*Id.* at p. 331.) Describing the Commission's application of the test-claim procedure to claims regarding exclusion of adult MIP's from Medi-Cal, we observed: “The test claim by the County of Los Angeles was filed prior to that \*87 proposed by Alameda County. The Alameda County claim was rejected for that reason. (See [[Gov. Code](#)], § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the [adult MIP exclusion] issues .... Los Angeles County declined a request from Alameda County that it be included in the test claim ....” (*Id.* at p. 331, fn. 4.)

Consistent with our observations in *Kinlaw*, we here agree with the state that the trial court should not have proceeded to resolve San Diego's claim for reimbursement under section 6 while the Los Angeles action was pending. A contrary conclusion would undermine one of “the express purpose[s]” of the statutory procedure: to “avoid[] multiple proceedings ... addressing the same claim that a reimbursable state mandate has been created.” (*Kinlaw, supra*, 54 Cal.3d at p. 333.)

(3) However, we reject the state's assertion that the error was jurisdictional. The power of superior courts to perform mandamus review of administrative decisions derives in part from [article VI, section 10 of the California Constitution](#). (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 138 [93 Cal.Rptr. 234, 481 P.2d 242]; *Lipari v. Department of Motor Vehicles* (1993) 16 Cal.App.4th 667, 672 [20 Cal.Rptr.2d 246].) That section gives “[t]he Supreme Court, courts of appeal, [and] superior courts ... original jurisdiction in proceedings for extraordinary relief in the nature of mandamus ....” (Cal. Const., art. VI, § 10.) “The jurisdiction thus vested may not lightly be deemed to have been destroyed.” (*Garrison v. Rourke* (1948) 32 Cal.2d 430, 435 [196 P.2d 884], overruled on another ground in *Keane v. Smith* (1971) 4 Cal.3d 932, 939 [95 Cal.Rptr. 197, 485 P.2d 261].) “While the courts are subject to reasonable statutory regulation of procedure and other matters, they will

maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.” (*Garrison, supra*, at p. 436.) ( 2b) Here, we find no statutory provision that either “expressly provide[s]” (*id.* at p. 435) or otherwise “clearly intend[s]” (*id.* at p. 436) that the Legislature intended to divest all courts other than the court hearing the test claim of their mandamus jurisdiction.

Rather, following *Dowdall v. Superior Court* (1920) 183 Cal. 348 [191 P. 685] (*Dowdall*), we interpret the governing statutes as simply vesting primary jurisdiction in the court hearing the test claim. In *Dowdall*, we determined the jurisdictional effect of Code of Civil Procedure former section 1699 on actions to settle the account of trustees of a testamentary trust. Code of Civil Procedure former section 1699 provided in part: “Where any trust \*88 has been created by or under any will to continue after distribution, the Superior Court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust.” (Stats. 1889, ch. 228, § 1, p. 337.) We explained that, under this section, “the superior court, sitting in probate upon the distribution of an estate wherein the will creates a trust, retain[ed] jurisdiction of the estate for the purpose of the settlement of the accounts under the trust.” (*Dowdall, supra*, 183 Cal. at p. 353.) However, we further observed that “the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction thereof.” (*Ibid.*)

Similarly, we conclude that, under the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction. Thus, if an action asserting the same unfunded mandate claim is filed in any other superior court, that court, upon being informed of the pending test claim, should postpone the proceeding before it

and allow the court having primary jurisdiction to determine the test claim.

However, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction. As we explained in *Dowdall*, a court that refuses to defer to another court's primary jurisdiction “is not without jurisdiction.” (*Dowdall, supra*, 183 Cal. at p. 353.) Accordingly, notwithstanding pendency of the Los Angeles action, the trial court here did not lack jurisdiction to determine San Diego's mandamus petition. (See *Collins v. Ramish* (1920) 182 Cal. 360, 366-369 [188 P. 550] [although trial court erred in refusing to abate action because of former action pending, new trial was not warranted on issues that the trial court correctly decided]; *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 772 [25 Cal.Rptr.2d 192] (*Garamendi*) [“rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to comply renders subsequent proceedings void”]; *Stearns v. Los Angeles City School Dist.* (1966) 244 Cal.App.2d 696, 718 [53 Cal.Rptr. 482, 21 A.L.R.3d 164] [where trial court errs in failing to stay proceedings in \*89 deference to jurisdiction of another court, reversal would be frivolous absent errors regarding the merits].) <sup>11</sup>

The trial court's failure to defer to the primary jurisdiction of the court hearing the Los Angeles action did not prejudice the state. Contrary to the state's assertion, the trial court did not “usurp” the Commission's “authority to determine, in the first place, whether or not legislation creates a mandate.” The Commission had already exercised that authority in the Los Angeles action. Moreover, given the settlement of the Los Angeles action, which included vacating the judgment in that action, the trial court's exercise of jurisdiction here did not result in one of the principal harms that the statutory procedure seeks to prevent: multiple decisions regarding an unfunded mandate question. Finally, the lack of an administrative record specifically relating to San Diego's claim did not prejudice the state because the threshold determination of whether a statute imposes a state mandate is an issue of law. (*County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340, 347 [280 Cal.Rptr. 310].) To the extent that an administrative record was necessary, the record developed in the Los Angeles action could have been submitted to the trial court. <sup>12</sup> (See *Los Angeles Unified School Dist. v. State of California* (1988) 199 Cal.App.3d 686, 689 [245 Cal.Rptr. 140].)

We also find that, on the facts of this case, San Diego's failure to submit a test claim to the Commission before seeking judicial relief did not affect the superior court's jurisdiction. Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 640 [21 Cal.Rptr.2d 453]; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73-77 [222 Cal.Rptr. 750] (*County of Contra Costa*)). However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they “can establish an exception to” the exhaustion requirement. (*County of Contra Costa, supra*, 177 Cal.App.3d at p. 77.) The futility exception to the exhaustion requirement applies if a county can “state with assurance that the [Commission] would rule adversely in its own particular case. [Citations.]” (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 870 [226 Cal.Rptr. 119, 718 P.2d 106]; see also *County of Contra Costa, supra*, 177 Cal.App.3d at pp. 77-78.) \*90

We agree with the trial court and the Court of Appeal that the futility exception applied in this case. As we have previously noted, San Diego invoked this exception by alleging in its cross-complaint that the Commission's denial of its claim was “virtually certain” because the Commission had “previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement ....” Given that the Commission rejected the Los Angeles claim (which alleged the same unfunded mandate claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile. Therefore, we reject the state's jurisdictional argument and proceed to the merits of the appeal.

#### V. Existence of a Mandate Under Section 6

(4) In determining whether there is a mandate under section 6, we turn to our decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318] (*Lucia Mar*). There, we discussed section 6's application to Education Code section 59300, which “requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped.” (*Lucia Mar, supra*, at p. 832.) Before 1979, the Legislature had statutorily required school districts “to contribute to the education of pupils from the districts at the state schools [citations] ....” (*Id.* at pp.

832-833.) The Legislature repealed the statutory requirements in 1979 and, on July 12, 1979, the state assumed full-funding responsibility. (*Id.* at p. 833.) On July 1, 1980, when section 6 became effective, the state still had full-funding responsibility. On June 28, 1981, Education Code section 59300 took effect. (*Lucia Mar, supra*, at p. 833.)

Various school districts filed a claim seeking reimbursement under section 6 for the payments that Education Code section 59300 requires. The Commission denied the claim, finding that the statute did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, the latter “reasoning that a shift in the funding of an existing program is not a new program or a higher level of service” under section 6. (*Lucia Mar, supra*, 44 Cal.3d at p. 834.)

We reversed, finding that a contrary result would “violate the intent underlying section 6 ....” (*Lucia Mar, supra*, 44 Cal.3d at p. 835.) That section “was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of the [] \*91 restrictions on the taxing and spending power of the local entities” that articles XIII A and XIII B of the California Constitution imposed. (*Lucia Mar, supra*, at pp. 835-836.) “The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 ... because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6 ....” (*Id.* at p. 836, italics added, fn. omitted.) We thus concluded in *Lucia Mar* “that because [Education Code] section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—an obligation the school districts did not have at the time article XIII B was adopted—it calls for [the school districts] to support a 'new program' within the meaning of section 6.” (*Ibid.*, fn. omitted.)

The similarities between *Lucia Mar* and the case before us “are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children



in state schools; in the present case from 1971-197[8] the state and county shared the cost of caring for [adult MIP's] under the Medi-Cal program.... [F]ollowing enactment of [article XIII A], the state took full responsibility for both programs.” (*Kinlaw, supra*, 54 Cal.3d at p. 353 (dis. opn. of Broussard, J.)) As to both programs, the Legislature cited adoption of article XIII A of the California Constitution, and specifically its effect on tax revenues, as the basis for the state's assumption of full funding responsibility. (Stats. 1979, ch. 237, § 10, p. 493; Stats. 1979, ch. 282, § 106, p. 1059.) “Then in 1981 (for handicapped children) and 1982 (for [adult MIP's]), the state sought to shift some of the burden back to the counties.” (*Kinlaw, supra*, 54 Cal.3d at p. 353 (dis. opn. of Broussard, J.))

Adopting the Commission's analysis in the Los Angeles action, the state nevertheless argues that *Lucia Mar* “is inapposite.” The school program at issue in *Lucia Mar* “had been wholly operated, administered and financed by the state” and “was unquestionably a 'state program.'” “'In contrast,'” the state argues, “'the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for'” it under [section 17000](#) and its predecessors.<sup>13</sup> The courts have interpreted [section 17000](#) as “impos[ing] upon counties a duty to \*92 provide hospital and medical services to indigent residents. [Citations.]” (*Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 557 [254 Cal.Rptr. 905].) Thus, the state argues, the source of San Diego's obligation to provide medical care to adult MIP's is [section 17000](#), not the 1982 legislation. Moreover, because the Legislature enacted [section 17000](#) in 1965, and section 6 does not apply to “mandates enacted prior to January 1, 1975,” there is no reimbursable mandate. Finally, the state argues that, because [section 17001](#) give counties “complete discretion” in setting eligibility and service standards under [section 17000](#), there is no mandate. A contrary conclusion, the state asserts, “would erroneously expand the definition of what constitutes a 'new program' under” section 6. As we explain, we reject these arguments.

## A. The Source and Existence of San Diego's Obligation

### 1. The Residual Nature of the Counties' Duty Under [Section 17000](#)

The state's argument that San Diego's obligation to provide medical care to adult MIP's predates the 1982 legislation contains numerous errors. First, the state misunderstands San Diego's obligation under [section 17000](#). That section

creates “the *residual* fund” to sustain indigents “who cannot qualify ... under any specialized aid programs.” (*Mooney, supra*, 4 Cal.3d at p. 681, italics added; see also *Board of Supervisors v. Superior Court, supra*, 207 Cal.App.3d at p. 562; *Boehm v. Superior Court* (1986) 178 Cal.App.3d 494, 499 [223 Cal.Rptr. 716] [general assistance “is a program of last resort”].) By its express terms, the statute requires a county to relieve and support indigent persons *only* “when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.” (§ 17000.)<sup>14</sup> “Consequently, to the extent that the state or federal governments provide[d] care for [adult MIP's], the [C]ounty's obligation to do so [was] reduced ....” (*Kinlaw, supra*, 54 Cal.3d at p. 354, fn. 14 (dis. opn. of Broussard, J.))<sup>15</sup>

As we have explained, the state began providing adult MIP's with medical care under Medi-Cal in 1971. Although it initially required counties to \*93 contribute generally to the costs of Medi-Cal, it did not set forth a specific amount for coverage of MIP's. The state was primarily responsible for the costs of the program, and the counties were simply required to contribute funds to defray the state's costs. Beginning with the 1978-1979 fiscal year, the state paid all costs of the Medi-Cal program, including the cost of medical care for adult MIP's. Thus, when section 6 was adopted in November 1979, to the extent that Medi-Cal provided medical care to adult MIP's, San Diego bore no financial responsibility for these health care costs.<sup>16</sup>

The California Attorney General has expressed a similar understanding of Medi-Cal's effect on the counties' medical care responsibility under [section 17000](#). After the 1971 extension of Medi-Cal coverage to MIP's, Fresno County sought an opinion regarding the scope of its duty to provide medical care under [section 17000](#). It asserted that the 1971 repeal of former section 14108.5, which declared the Legislature's concern with the counties' problems in caring for indigents not eligible for Medi-Cal, evidenced a legislative intent to preempt the field of providing health services. (56 Ops.Cal.Atty.Gen., *supra*, at p. 571.) The Attorney General disagreed, concluding that the 1971 change “did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal.” (*Id.* at p. 569.) The Attorney General explained: “The statement of concern acknowledged the obligation of counties to continue to provide medical assistance under [section 17000](#); the removal of the statement of concern was not accompanied by elimination of such duty on the part of the counties, *except as the addition of* [MIP's]

to the Medi-Cal program would remove the burden on the counties to provide medical care for such persons.” (*Id.* at p. 571, italics added.) \*94

Indeed, the Legislature's statement of intent in an uncodified section of the 1982 legislation excluding adult MIP's from Medi-Cal suggests that it also shared our understanding of [section 17000](#). Section 8.3 of the 1982 Medi-Cal revisions expressly declared the Legislature's intent “[i]n eliminating [M]edically [I]ndigent [A]dults from the Medi-Cal program ...” (Stats. 1982, ch. 328, § 8.3, p. 1575; Stats. 1982, ch. 1594, § 86, p. 6357.) It stated in part: “It is further the intent of the Legislature to provide counties with as much flexibility as possible in organizing county health services to serve *the population being transferred*.” (Stats. 1982, ch. 328, § 8.3, p. 1576; Stats. 1982, ch. 1594, § 86, p. 6357, italics added.) If, as the state contends, counties had always been responsible under [section 17000](#) for the medical care of adult MIP's, the description of adult MIP's as “the population being transferred” would have been inaccurate. By so describing adult MIP's, the Legislature indicated its understanding that counties did not have this responsibility while adult MIP's were eligible for Medi-Cal. These sources fully support our rejection of the state's argument that the 1982 legislation did not impose a mandate because, under [section 17000](#), counties had always borne the responsibility for providing medical care to adult MIP's.

## **2. The State's Assumption of Full Funding Responsibility for Providing Medical Care to Adult MIP's Under Medi-Cal**

To support its argument that it never relieved counties of their obligation under [section 17000](#) to provide medical care to adult MIP's, the state characterizes as “temporary” the Legislature's assumption of full-funding responsibility for adult MIP's. According to the state, “any ongoing responsibility of the county was, at best, only temporarily, partially, alleviated (and never supplanted).” The state asserts that the Court of Appeal thus “erred by focusing on one phase in th[e] shifting pattern of arrangements” for funding indigent health care, “a focus which led to a myopic conclusion that the state alone is forever responsible for funding the health care for” adult MIP's.

A comparison of the 1978 and 1979 statutes that eliminated the counties' share of Medi-Cal costs refutes the state's claim. The Legislature expressly limited the effect of the 1978 legislation to one fiscal year, providing that the state “shall pay” each county's Medi-Cal cost share “for the period from

July 1, 1978, to June 30, 1979.” (Stats. 1978, ch. 292, § 33, p. 610.) The Legislative Counsel's Digest explained that this section would require the state to pay “[a]ll county costs for Medi-Cal” for “the 1978-79 fiscal year only.” (Legis. Counsel's Dig., Sen. Bill No. 154, 4 Stats. 1978 (Reg. Sess.), Summary Dig., p. 71.) The digest further explained that the purpose of the bill containing this section was “the *partial* relief of local government from the *temporary* difficulties brought about by the approval of Proposition 13.” \*95 (*Id.* at p. 70, italics added.) Clearly, the Legislature knew how to include words of limitation when it intended the effects of its provisions to be temporary.

By contrast, the 1979 legislation contains no such limiting language. It simply provided: “[Section 14150 of the Welfare and Institutions Code](#) is repealed.” (Stats. 1979, ch. 282, § 74, p. 1043.) In setting forth the need to enact the legislation as an urgency statute, the Legislature explained: “The adoption of Article XIII A ... may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately.” (Stats. 1979, ch. 282, § 106, p. 1059.) In describing the effect of this legislation, the Legislative Counsel first explained that, “[u]nder existing law, the counties pay a specified annual share of the cost of” Medi-Cal. (Legis. Counsel's Dig., Assem. Bill No. 8, 4 Stats. 1979 (Reg. Sess.), Summary Dig., p. 79.) Referring to the 1978 legislation, it further explained that “[f]or the 1978-79 fiscal year only, the state pays ... [¶] ... [a]ll county costs for Medi-Cal ...” (*Ibid.*) The 1979 legislation, the digest continued, “provid[ed] for state assumption of all county costs of Medi-Cal.” (*Ibid.*) We find nothing in the 1979 legislation or the Legislative Counsel's summary indicating a legislative intent to eliminate the counties' cost share of Medi-Cal only temporarily.

The state budget process for the 1980-1981 fiscal year confirms that the Legislature's assumption of all Medi-Cal costs was not viewed as “temporary.” In the summary of his proposed budget, then Governor Brown described Assembly Bill No. 8, 1981-1982 Regular Session, generally as “a long-term local financing measure” (Governor's Budget for 1980-1981 as submitted to Legislature (1979-1980 Reg. Sess.) Summary of Local Government Fiscal Relief, p. A-30) through which “[t]he total cost of [the Medi-Cal] program was *permanently* assumed by the State ...” (*Id.* at p. A-32, italics added.) Similarly, in describing to the Joint Legislative Budget Committee the Medi-Cal funding item in

the proposed budget, the Legislative Analyst explained: “Item 287 includes the state cost of ‘buying out’ the county share of Medi-Cal expenditures. Following passage of Proposition 13, [Senate Bill No.] 154 appropriated \$418 million to relieve counties of all fiscal responsibility for Medi-Cal program costs. Subsequently, [Assembly Bill No.] 8 was enacted, *which made permanent state assumption of county Medi-Cal costs.*” (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1980-1981 Budget Bill, Assem. Bill No. 2020 (1979-1980 Reg. Sess.) at p. 721, italics added.) Thus, the state errs in asserting that the 1979 legislation eliminated the counties’ financial support of Medi-Cal “only temporarily.”

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### 3. State Administration of Medical Care for Adult MIP's Under Medi-Cal

The state argues that, unlike the school program before us in *Lucia Mar*, *supra*, 44 Cal.3d 830, which “had been wholly operated, administered and financed by the state,” the program for providing medical care to adult MIP’s “has never been operated or administered by” the state. According to the state, Medi-Cal was simply a state “reimbursement program” for care that [section 17000](#) required counties to provide. The state is incorrect.

One of the legislative goals of Medi-Cal was “to allow eligible persons to secure basic health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability.” (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 104.) “In effect, this meant that poorer people could have access to a private practitioner of their choice, and not be relegated to a county hospital program.” (*California Medical Assn. v. Brian* (1973) 30 Cal.App.3d 637, 642 [106 Cal.Rptr. 555].) Medi-Cal “provided for reimbursement to both public and private health care providers for medical services rendered.” (*Lackner*, *supra*, 97 Cal.App.3d at p. 581.) It further directed that, “[i]nsofar as practical,” public assistance recipients be afforded “free choice of arrangements under which they shall receive basic health care.” (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 115.) Finally, since its inception, Medi-Cal has permitted county boards of supervisors to “prescribe rules which authorize the county hospital to integrate its services with those of other hospitals into a system of community service which offers free choice of hospitals to those requiring hospital care. The intent of this section is to eliminate discrimination or segregation based on economic disability so that the county hospital and other hospitals in the community share in providing

services to paying patients and to those who qualify for care in public medical care programs.” (§ 14000.2.) Thus, “Medi-Cal eligibles were to be able to secure health care in the same manner employed by the general public (i.e., in the private sector or at a county facility).” (1974 Legis. Analyst’s Rep., *supra*, at p. 625; see also Preliminary Rep., *supra*, at p. 17.) By allowing eligible persons “a choice of medical facilities for treatment,” Medi-Cal placed county health care providers “in competition with private hospitals.” (*Hall*, *supra*, 23 Cal.App.3d at p. 1061.)

Moreover, administration of Medi-Cal over the years has been the responsibility of various state departments and agencies. (§§ 10720-10721, 14061-14062, 14105, 14203; *Belshé*, *supra*, 13 Cal.4th at p. 751; *Morris*, *supra*, 67 Cal.2d at p. 741; Summary of Major Events, *supra*, at pp. 2-3, 15.) Thus, “[i]n adopting the Medi-Cal program the state Legislature, for the most part, shifted indigent medical care from being a county responsibility to a State \*97 responsibility under the Medi-Cal program. [Citation.]” (*Bay General Community Hospital v. County of San Diego* (1984) 156 Cal.App.3d 944, 959 [203 Cal.Rptr. 184] (*Bay General*); see also Preliminary Rep., *supra*, at p. 18 [with certain exceptions, Medi-Cal “shifted to the state” the responsibility for administration of the medical care provided to eligible persons].) We therefore reject the state’s assertion that, while Medi-Cal covered adult MIP’s, county facilities were the sole providers of their medical care, and counties both operated and administered the program that provided that care.

The circumstances we have discussed readily distinguish this case from *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 [38 Cal.Rptr.2d 304], on which the state relies. There, the court rejected the claim that [Penal Code section 987.9](#), which required counties to provide criminal defendants with certain defense funds, imposed an unfunded state mandate. Los Angeles filed the claim after the state, which had enacted appropriations between 1977 and 1990 “to reimburse counties for their costs under” the statute, made no appropriation for the 1990-1991 fiscal year. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 812.) In rejecting the claim, the court first held that there was no state mandate because [Penal Code section 987.9](#) merely implemented the requirements of federal law. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at pp. 814-816.) Thus, the court stated, “[a]ssuming, arguendo, the provisions of [[Penal Code](#)] [section 987.9](#) [constituted] a new program” under section 6, there was no state mandate. (*County of Los Angeles v. Commission*

on *State Mandates*, *supra*, at p. 818.) Here, of course, it is unquestionably the state that has required San Diego to provide medical care to indigent persons.

In dictum, the court also rejected the argument that, under *Lucia Mar*, *supra*, 44 Cal.3d 830, the state's "decision not to reimburse the counties for their programs under [Penal Code] section 987.9" imposed a new program by shifting financial responsibility for the program to counties. (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal.App.4th at p. 817.) The court explained: "In contrast [to *Lucia Mar*], the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under [Penal Code] section 987.9. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility." (*Ibid.*) Here, as we have explained, between 1971 and 1983, the state administered and bore financial responsibility for the medical care that adult MIP's received under Medi-Cal. The Medi-Cal program was not simply a \*98 method of reimbursement for county costs. Thus, the state's reliance on this dictum is misplaced.<sup>17</sup>

In summary, our discussion demonstrates the Legislature excluded adult MIP's from Medi-Cal *knowing* and *intending* that the 1982 legislation would trigger the counties' responsibility to provide medical care as providers of last resort under section 17000. Thus, through the 1982 legislation, the Legislature attempted to do precisely that which the voters enacted section 6 to prevent: "transfer[] to [counties] the fiscal responsibility for providing services which the state believed should be extended to the public."<sup>18</sup> (*County of Los Angeles*, *supra*, 43 Cal.3d at p. 56; see also *City of Sacramento v. State of California*, *supra*, 50 Cal.3d at p. 68 [A "central purpose" of section 6 was "to prevent the state's transfer of the *cost of government* from *itself* to the local level."].) Accordingly, we view the 1982 legislation as having mandated a "new program" on counties by "compelling them to accept financial responsibility in whole or in part for a program," i.e., medical care for adult MIP's, "which was funded entirely by the state before the advent of article XIII B."<sup>19</sup> (*Lucia Mar*, *supra*, 44 Cal.3d at p. 836.)

A contrary conclusion would defeat the purpose of section 6. Under the state's interpretation of that section, because section 17000 was enacted before 1975, the Legislature could eliminate the *entire* Medi-Cal program and shift

to the counties under section 17000 complete financial responsibility for medical care that the state has been providing since 1966. However, the taxing and spending limitations imposed by articles XIII A and XIII B would greatly limit the ability of counties to meet their expanded section 17000 obligation. "County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further ...." (*Kinlaw*, *supra*, 54 Cal.3d at p. 351 (dis. opn. of Broussard, J.)) As we have previously explained, the voters, recognizing that articles XIII A and XIII B left counties "ill equipped" to assume such increased financial responsibilities, adopted section 6 precisely to avoid this result. (\*99 *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) Thus, it was the voters who decreed that we must, as the state puts it, "focus[] on one phase in th[e] shifting pattern of [financial] arrangements" between the state and the counties. Under section 6, the state simply cannot "compel[] [counties] to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B ...."<sup>20</sup> (*Lucia Mar*, *supra*, 44 Cal.3d at p. 836.)

#### B. County Discretion to Set Eligibility and Service Standards

(5a) The state next argues that, because San Diego had statutory discretion to set eligibility and service standards, there was no reimbursable mandate. Citing section 16704, the state asserts that the 1982 legislation required San Diego to spend MISA funds "only on those whom the *county* deems eligible *under § 17000*," "gave the county exclusive authority to determine the level and type of benefits it would provide," and required counties "to include [adult MIP's] in their § 17000 eligibility **only to the extent state funds were available and then only for 3 years.**"<sup>21</sup> (Original emphasis.) According to the state, under section 17001, "[t]he counties have \*100 complete discretion over the determination of eligibility, scope of benefits and how the services will be provided."<sup>22</sup>

The state exaggerates the extent of a county's discretion under section 17001. It is true "case law ... has recognized that section 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents. [Citations.]" (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 211 [211 Cal.Rptr. 398, 695 P.2d 695] (*Robbins*)). However, there are "clear-cut limits" to this discretion. (*Ibid.*) (6) The counties may exercise their discretion "only within fixed boundaries. In administering

General Assistance relief the county acts as an agent of the state. [Citation.] When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. (Gov. Code, § 11374.)” (*Mooney, supra*, 4 Cal.3d at p. 679.) Thus, the counties' eligibility and service standards must “carry out” the objectives of section 17000. (*Mooney, supra*, 4 Cal.3d at p. 679; see also *Poverty Resistance Center v. Hart* (1989) 213 Cal.App.3d 295, 304-305 [261 Cal.Rptr. 545]; § 11000 [“provisions of law relating to a public assistance program shall be fairly and equitably construed to effect the stated objects and purposes of the program”].) County standards that fail to carry out section 17000's objectives “are void and no protestations that they are merely an exercise of administrative discretion can sanctify them.” (*Morris, supra*, 67 Cal.2d at p. 737.) Courts, which have “ ‘final responsibility for the interpretation of the law,’ ” must strike them down. (*Id.* at p. 748.) Indeed, despite the counties' statutory discretion, “courts have consistently invalidated ... county welfare regulations that fail to meet statutory requirements. [Citations.]” (*Robbins, supra*, 38 Cal.3d at p. 212.)

### 1. Eligibility

(5b) Regarding eligibility, we conclude that counties must provide medical care to all adult MIP's. As we emphasized in *Mooney*, section 17000 requires counties to relieve and support “ ‘all indigent persons lawfully resident therein, ’ when such persons are not supported and relieved by their relatives“ or by some other means.’ ” (*Mooney, supra*, 4 Cal.3d at p. 678; see also *Bernhardt v. Board of Supervisors* (1976) 58 Cal.App.3d 806, 811 [130 Cal.Rptr. 189].) Moreover, section 10000 declares that the statutory “purpose” of division 9 of the Welfare and Institutions Code, which includes \*101 section 17000, “is to provide for protection, care, and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to *all* of its needy and distressed.” (Italics added.) Thus, counties have no discretion to refuse to provide medical care to “indigent persons” within the meaning of section 17000 who do not receive it from other sources.<sup>23</sup> (See *Bell v. Board of Supervisors* (1994) 23 Cal.App.4th 1695, 1706 [28 Cal.Rptr.2d 919] [eligibility standards may not “defeat the purpose of the statutory scheme by depriving qualified recipients of mandated support”]; *Washington v. Board of*

*Supervisors* (1993) 18 Cal.App.4th 981, 985 [22 Cal.Rptr.2d 852] [courts have repeatedly “voided county ordinances which have attempted to redefine eligibility standards set by state statute”].)

Although section 17000 does not define the term “indigent persons,” the 1982 legislation made clear that all adult MIP's fall within this category for purposes of defining a county's obligation to provide medical care.<sup>24</sup> As part of its exclusion of adult MIP's, that legislation required counties to participate in the MISA program. (Stats. 1982, ch. 1594, §§ 68, 70, 86, pp. 6343-6347, 6357.) Regarding that program, the 1982 legislation amended section 16704, subdivision (c) (1), to require that a county board of supervisors, in applying for MISA funds, “assure that it will expend such funds only for [specified] health services ... provided to persons certified as eligible for such services pursuant to Section 17000 ....” (Stats. 1982, ch. 1594, § 70, p. 6346.) At the same time, the 1982 legislation amended section 16704, subdivision (c)(3), to provide that “[a]ny person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided.” (Stats. 1982, ch. 1594, § 70, p. 6346.) As the state correctly explains, under this provision, “counties had to include [Medically Indigent Adults] in their [section] 17000 eligibility” standards. By requiring counties to make all adult MIP's eligible for services paid for with MISA funds, while at the same time requiring counties to promise to spend such funds *only* on those certified as eligible under section 17000, the Legislature established that all adult MIP's are “indigent persons” for purposes of the counties' duty to provide medical care under section 17000. Otherwise, the counties could not comply with their promise. \*102

Our conclusion is not affected by language in section 16704, subdivision (c)(3), making it “operative only until June 30, 1985, unless a later enacted statute extends or deletes that date.”<sup>25</sup> As we have explained, the subdivision established that adult MIP's are “indigent persons” within the meaning of section 17000 for medical care purposes. As we have also explained, section 17000 requires counties to relieve and support *all* “indigent persons.” Thus, even if the state is correct in asserting that section 16704, subdivision (c)(3), is now inoperative and no longer prohibits counties from excluding adult MIP's from eligibility for medical services, section 17000 has that effect.<sup>26</sup>

Additionally, the coverage history of Medi-Cal demonstrates that the Legislature has always viewed all adult MIP's as "indigent persons" within the meaning of [section 17000](#) for medical care purposes. As we have previously explained, when the Legislature created the original Medi-Cal program, which covered only categorically linked persons, it "declar[ed] its concern with the problems which [would] be facing the counties with respect to the medical care of indigent persons who [were] not covered" by Medi-Cal, "whose medical care [had to] be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116 [enacting former § 14108.5].) Moreover, to ensure that the counties' Medi-Cal cost share would not leave counties "with insufficient funds to provide hospital care for those persons not eligible for Medi-Cal," the Legislature also created the county option. (*Hall, supra*, 23 Cal.App.3d at p. 1061.) Through the county option, "the state agreed to assume all county health care costs ... in excess of county costs incurred during the 1964-1965 fiscal year, adjusted for population increases." (*Lackner, supra*, 97 Cal.App.3d at p. 586.) Thus, the Legislature expressly recognized that the categorically linked persons initially eligible for Medi-Cal did not constitute all "indigent persons" entitled to medical care under [section 17000](#), and required the state to share in the financial responsibility for providing that care.

In adding adult MIP's to Medi-Cal in 1971, the Legislature extended Medi-Cal coverage to noncategorically linked persons "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83.) This \*103 description was consistent with prior judicial decisions that, for purposes of a county's duty to provide "indigent persons" with hospitalization, had defined the term to include a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." (*Goodall v. Brite* (1936) 11 Cal.App.2d 540, 550 [54 P.2d 510].)

Moreover, the fate of amendments to [section 17000](#) proposed at the same time suggests that, in the Legislature's view, the category of "indigent persons" entitled to medical care under [section 17000](#) extended even *beyond* those eligible for Medi-Cal as MIP's. The June 17, 1971, version of Assembly Bill No. 949 amended [section 17000](#) by adding the following: "however, the health needs of such persons shall be met under [Medi-Cal]." (Assem. Bill No. 949 (1971 Reg. Sess.) § 53.3, as amended June 17, 1971.) The Assembly deleted

this amendment on July 20, 1971. (Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971, p. 37.) Regarding this change, the Assembly Committee on Health explained: "The proposed amendment to [Section 17000](#), ... which would have removed the counties' responsibilities as health care provider of last resort, is deleted. This change was originally proposed to clarify the guarantee to hold counties harmless from additional Medi-Cal costs. It is deleted since it cannot remove the fact that counties are, by definition, a 'last resort' for any person, with or without the means to pay, who does not qualify for federal or state aid." (Assem. Com. on Health, Analysis of Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971 (July 21, 1971), p. 4.)

The Legislature's failure to amend [section 17000](#) in 1971 figured prominently in the Attorney General's interpretation of that section only two years later. In a 1973 published opinion, the Attorney General stated that the 1971 inclusion of MIP's in Medi-Cal "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (56 Ops.Cal.Atty.Gen., *supra*, at p. 569.) He based this conclusion on the 1971 legislation, relevant legislative history, and "the history of state medical care programs." (*Id.* at p. 570.) The opinion concluded: "The definition of medically indigent in [the chapter establishing Medi-Cal] is applicable only to that chapter and *does not include all those enumerated in section 17000*. If the former medical care program, by providing care only for a specific group, public assistance recipients, did not affect the responsibility of the counties to provide such service under [section 17000](#), we believe the most recent expansion of the medical assistance program does not affect, *absent an express legislative intent to the contrary*, the duty of the counties under [section 17000](#) to continue to provide services to those eligible under [section 17000](#) but not under [Medi-Cal]." (*Ibid.*, italics added.) The Attorney General's opinion, although not binding, is entitled to considerable weight. \*104 (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829 [25 Cal.Rptr.2d 148, 863 P.2d 218].) Absent controlling authority, it is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of [section 17000](#) and would have taken corrective action if it disagreed with that construction. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [270 Cal.Rptr. 796, 793 P.2d 2].)

In this case, of course, we need not (and do not) decide whether San Diego's obligation under [section 17000](#) to provide medical care extended beyond adult MIP's. Our

discussion establishes, however, that the obligation extended *at least* that far. The Legislature has made it clear that all adult MIP's are "indigent persons" under [section 17000](#) for purposes of San Diego's obligation to provide medical care. Therefore, the state errs in arguing that San Diego had discretion to refuse to provide medical care to this population.<sup>27</sup>

## 2. Service Standards

(7) A number of statutes are relevant to the state's argument that San Diego had discretion in setting service standards. [Section 17000](#) requires in general terms that counties "relieve and support" indigent persons. [Section 10000](#), which sets forth the purpose of the division containing [section 17000](#), declares the "legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life," so "as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." (§ 10000.) "[Section 17000](#), as authoritatively interpreted, mandates that medical care be provided to indigents and [section 10000](#) requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care ...." (*Tailfeather v. Board of Supervisors* (1996) 48 Cal.App.4th 1223, 1245 [56 Cal.Rptr.2d 255] (*Tailfeather*)).

Courts construing [section 17000](#) have held that it "imposes a mandatory duty upon all counties to provide 'medically necessary care,' not just \*105 emergency care. [Citation.]" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1108 [18 Cal.Rptr.2d 487]; see also *Gardner v. County of Los Angeles* (1995) 34 Cal.App.4th 200, 216 [40 Cal.Rptr.2d 271]; § 16704.1 [prohibiting a county from requiring payment of a fee or charge "before [it] renders medically necessary services to ... persons entitled to services under [Section 17000](#)"].) It further "ha[s] been interpreted ... to impose a minimum standard of care below which the provision of medical services may not fall." (*Tailfeather, supra*, 48 Cal.App.4th at p. 1239.) In *Tailfeather*, the court stated that "[section 17000](#) requires provision of medical services to the poor at a level which does not lead to unnecessary suffering or endanger life and health ...." (*Id.* at p. 1240.) In reaching this conclusion, it cited *Cooke, supra*, 213 Cal.App.3d at page 404, which held that [section 17000](#) requires counties to provide "dental care sufficient to remedy substantial pain and infection." (See also § 14059.5 [defining "[a] service [as] 'medically necessary' ... when it is reasonable

and necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain"].)

During the years for which San Diego sought reimbursement, Health and Safety Code section 1442.5, former subdivision (c) (former subdivision (c)), also spoke to the level of services that counties had to provide under [Welfare and Institutions Code section 17000](#).<sup>28</sup> As enacted in September 1974, former subdivision (c) provided that, whether a county's duty to provide care to all indigent people "is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment received by people who cannot afford to pay for their health care shall be the same as that available to nonindigent people receiving health care services in private facilities in that county." (Stats. 1974, ch. 810, § 3, p. 1765.) The express "purpose and intent" of the act that contained former subdivision (c) was "to insure that the duty of counties to provide health care to indigents [was] properly and continuously fulfilled." (Stats. 1974, ch. 810, § 1, p. 1764.) Thus, until its repeal in September 1992,<sup>29</sup> former subdivision (c) "[r]equire[d] that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county." (Legis. Counsel's Dig., Sen. Bill No. 2369, 2 Stats. 1974 (Reg. Sess.) Summary Dig., p. 130; see also *Gardner v. County of Los Angeles, supra*, 34 Cal.App.4th at p. 216; \*106 *Board of Supervisors v. Superior Court, supra*, 207 Cal.App.3d at p. 564 [former subdivision (c) required that care provided "be comparable to that enjoyed by the nonindigent"].)<sup>30</sup> "For the 1990-91 fiscal year," the Legislature qualified this obligation by providing: "nothing in [former] subdivision (c) ... shall require any county to exceed the standard of care provided by the state Medi-Cal program. Notwithstanding any other provision of law, counties shall not be required to increase eligibility or expand the scope of services in the 1990-91 fiscal year for their programs." (Stats. 1990, ch. 457, § 23, p. 2013.)

Although we have identified statutes relevant to service standards, we need not here define the precise contours of San Diego's statutory health care obligation. The state argues generally that San Diego had discretion regarding the services it provided. However, the state fails to identify either the specific services that San Diego provided under its CMS program or which of those services, if any, were not required under the governing statutes. Nor does the state argue that San Diego could have eliminated all services and complied with statutory requirements. Accordingly, we reject the state's

argument that, because San Diego had some discretion in providing services, the 1982 legislation did not impose a reimbursable mandate.<sup>31</sup>

## VI. Minimum Required Expenditure

(8) The Court of Appeal held that, under the governing statutes, the Commission must initially determine the precise amount of any reimbursement due San Diego. It therefore reversed the damages portion of the trial court's judgment and remanded the matter to the Commission for this determination. Nevertheless, the Court of Appeal affirmed the trial court's finding that the Legislature required San Diego to spend at least \$41 million on its CMS program for fiscal years 1989-1990 and 1990-1991. In affirming this finding, the Court of Appeal relied primarily on [Welfare and Institutions Code section 16990](#), subdivision (a), as it read at all relevant times. The state contends this provision did not mandate that San Diego spend any minimum amount on the CMS program. It further asserts that the Court of Appeal's "ruling in effect sets a damages baseline, in contradiction to [its] ostensible reversal of the damage award." \*107

Former section 16990, subdivision (a), set forth the financial maintenance-of-effort requirement for counties that received funding under the California Healthcare for the Indigent Program (CHIP). The Legislature enacted CHIP in 1989 to implement Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (codified at [Rev. & Tax. Code, § 30121](#) et seq.). Proposition 99, which the voters approved on November 8, 1988, increased the tax on tobacco products and allocated the resulting revenue in part to medical and hospital care for certain persons who could not afford those services. ([Kennedy Wholesale, Inc. v. State Bd. of Equalization \(1991\) 53 Cal.3d 245, 248, 254 \[279 Cal.Rptr. 325, 806 P.2d 1360\].](#)) During the 1989-1990 and 1990-1991 fiscal years, former section 16990, subdivision (a), required counties receiving CHIP funds, "at a minimum," to "maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year," adjusted annually as provided. (Stats. 1989, ch. 1331, § 9, p. 5427.) Applying this provision, the Court of Appeal affirmed the trial court's finding that the state had required San Diego to spend in fiscal years 1989-1990 and 1990-1991 at least \$41 million on the CMS program.

We agree with the state that this finding is erroneous. Unlike participation in MISA, which was mandatory, participation in CHIP was voluntary. In establishing CHIP, the Legislature

appropriated funds "for allocation to counties *participating in*" the program. (Stats. 1989, ch. 1331, § 10, p. 5436, italics added.) Section 16980, subdivision (a), directed the State Department of Health Services to make CHIP payments "upon application of the county assuring that it will comply with" applicable provisions. Among the governing provisions were former sections 16990, subdivision (a), and 16995, subdivision (a), which provided: "To be eligible for receipt of funds under this chapter, a county may not impose more stringent eligibility standards for the receipt of benefits under [Section 17000](#) or reduce the scope of benefits compared to those which were in effect on November 8, 1988." (Stats. 1989, ch. 1331, § 9, p. 5431.)

However, San Diego has cited no provision, and we have found none, that *required* eligible counties to participate in the program or apply for CHIP funds. Through [Revenue and Taxation Code section 30125](#), which was part of Proposition 99, the electorate directed that funds raised through Proposition 99 "shall be used to supplement existing levels of service and not to fund existing levels of service." (See also Stats. 1989, ch. 1331, §§ 1, 19, pp. 5382, 5438.) Counties not wanting to supplement their existing levels of service, and who therefore did not want CHIP funds, were not bound by the program's requirements. Those counties, including San Diego, that chose to \*108 seek CHIP funds did so voluntarily.<sup>32</sup> Thus, the Court of Appeal erred in concluding that former section 16990, subdivision (a), mandated a minimum funding requirement for San Diego's CMS program.

Nor did former section 16991, subdivision (a)(5), which the trial court and Court of Appeal also cited, establish a minimum financial obligation for San Diego's CMS program. Former section 16991 generally "establish[ed] a procedure for the allocation of funds to each county receiving funds from the [MISA] ... for the provision of services to persons meeting certain Medi-Cal eligibility requirements, based on the percentage of newly legalized individuals under the federal Immigration Reform and Control Act (IRCA)." (Legis. Counsel's Dig., Assem. Bill No. 75, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 548.) Former section 16991, subdivision (a)(5) required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its combined allocation from various sources was less than the funding it received under [section 16703](#) for fiscal year 1988-1989.<sup>33</sup> Nothing about this state reimbursement requirement imposed on San Diego a minimum funding requirement for its CMS program.



Thus, we must reverse the judgment insofar as it finds that former sections 16990, subdivision (a), and 16991, subdivision (a)(5), established a \$41 million spending floor for San Diego's CMS program. Instead, the various statutes that we have previously discussed (e.g., §§ 10000, 17000, and Health & Saf. Code, § 1442.5, former subd. (c)), the cases construing those statutes, and any other relevant authorities must guide the Commission's determination of the level of services that San Diego had to provide and any reimbursement to which it is entitled. \*109

## VII. Remaining Issues

(9) The state raises a number of additional issues. It first complains that a mandamus proceeding under [Code of Civil Procedure section 1085](#) was an improper vehicle for challenging the Commission's position. It asserts that, under [Government Code section 17559](#), review by administrative mandamus under [Code of Civil Procedure section 1094.5](#) is the exclusive method for challenging a Commission decision denying a mandate claim. The Court of Appeal rejected this argument, reasoning that the trial court had jurisdiction under [Code of Civil Procedure section 1085](#) because, under section 6, the state has a ministerial duty of reimbursement when it imposes a mandate.

Like the Court of Appeal, but for different reasons, we reject the state's argument. “[M]andamus pursuant to [[Code of Civil Procedure](#)] [section 1094.5](#), commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of 'a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' [Citations.] The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except where modified by statute. [Citations.]” (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 673-674 [170 Cal.Rptr. 484, 620 P.2d 1032].) Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under [Code of Civil Procedure section 1085](#) as one brought under [Code of Civil Procedure section 1094.5](#) and should deny a demurrer asserting that the wrong mandamus statute has been invoked. (*Woods, supra*, 28 Cal.3d at pp. 673-674; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 813-814 [140 Cal.Rptr. 442, 567 P.2d 1162].) Thus, even if San Diego identified the wrong mandamus statute, the error did not affect the trial court's ability to grant mandamus relief.

“In any event, distinctions between traditional and administrative mandate have little impact on this appeal ....” (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1584 [18 Cal.Rptr.2d 680].) The determination whether the statutes here at issue established a mandate under section 6 is a question of law. (*County of Fresno v. Lehman, supra*, 229 Cal.App.3d at p. 347.) In reaching our conclusion, we have relied on no facts that are in dispute. Where, as here, a “purely legal question” is at issue, courts “exercise independent judgment ... , no matter whether the issue arises by traditional or administrative mandate. [Citations.]” (*McIntosh, supra*, 14 Cal.App.4th at p. 1584.) As the state concedes, even under [Code of Civil Procedure section 1094.5](#), a judgment must “be reversed if based on erroneous conclusions of law.” Thus, any differences between the two mandamus statutes have had no impact on our analysis. \*110

The state next contends that the trial court prejudicially erred in denying the “peremptory disqualification” motion that the Director of the Department of Finance filed under [Code of Civil Procedure section 170.6](#). We will not review this ruling, however, because it is reviewable only by writ of mandate under [Code of Civil Procedure section 170.3](#), subdivision (d). (*People v. Webb* (1993) 6 Cal.4th 494, 522-523 [24 Cal.Rptr.2d 779, 862 P.2d 779]; *People v. Hull* (1991) 1 Cal.4th 266 [2 Cal.Rptr.2d 526, 820 P.2d 1036].)

Nor can we address the state's argument that the trial court erred in granting a preliminary injunction. The May 1991 order granting the preliminary injunction was “immediately and separately appealable” under [Code of Civil Procedure section 904.1](#), subdivision (a)(6). (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645 [4 Cal.Rptr.2d 689].) Thus, the state's attempt to challenge the order in an appeal filed after entry of final judgment in December 1992 was untimely.<sup>34</sup> (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 251 [256 Cal.Rptr. 194].) Moreover, the state's attempt to appeal the order granting the preliminary injunction is moot because of (1) the trial court's July 1 order granting a peremptory writ of mandate, which expressly “supersede[d] and replace[d]” the preliminary injunction order and (2) entry of final judgment. (*Sheward v. Citizens' Water Co.* (1891) 90 Cal. 635, 638-639 [27 P. 439]; *People v. Morse* (1993) 21 Cal.App.4th 259, 264-265 [25 Cal.Rptr.2d 816]; *Art Movers, Inc., supra*, 3 Cal.App.4th at p. 647.)

Finally, the state requests that we reverse the trial court's reservation of jurisdiction regarding an award of attorney

fees. This request is premature. In the judgment, the trial court “retain[ed] jurisdiction to determine any right to and amount of attorneys’ fees ....” This provision does not declare that San Diego in fact has a right to an award of attorney fees. Nor has San Diego asserted such a right. As San Diego states, at this point, “[t]here is nothing for this Court to review.” We will not give an advisory ruling on this issue.

### VIII. Disposition

The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP’s from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least \$41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is \*111 remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c); *Welf. & Inst. Code*, §§ 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

C. J., Mosk, J., Baxter, J., Anderson, J.,\* and Aldrich, J., †  
]]]] concurred.

### KENNARD, J.

I dissent.

As part of an initiative measure placing spending limits on state and local government, the voters in 1979 added [article XIII B to the California Constitution](#). [Section 6](#) of this article provides that when the state “mandates a new program or higher level of service on any local government,” the state must reimburse the local government for the cost of such program or service. Under subdivision (c) of this constitutional provision, however, the state “may, but need not,” provide such reimbursement *if the state mandate was enacted before January 1, 1975*. (*Cal. Const.*, [art. XIII B, § 6](#), subd. (c).) Subdivision (c) is the critical provision here.

Because the counties have for many decades been under a state mandate to provide for the poor, a mandate that existed before the voters added article XIII B to the state Constitution, the express language of subdivision (c) of [section 6 of article XIII B](#) exempts the state from any *legal obligation* to reimburse the counties for the cost of medical care to the

needy. The fact that for a certain period after 1975 the state directly paid under the state Medi-Cal program for these costs did not lead to the creation of a new mandate once the state stopped doing so. To hold to the contrary, as the majority does, is to render subdivision (c) a nullity.

The issue here is not whether the poor are entitled to medical care. They are. The issue is whether the state or the counties must pay for this care. The majority places this obligation on the state. The counties’ win, however, may be a pyrrhic victory. For, in anticipation of today’s decision, the Legislature has enacted legislation that will drastically reduce the counties’ share of other state revenue, as discussed in part III below.

### I

Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor. (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 677-678 \*112 [94 Cal.Rptr. 279, 483 P.2d 1231].) Since 1965, this obligation has been codified in [Welfare and Institutions Code section 17000](#). (Stats. 1965, ch. 1784, § 5, p. 4090.) That statute states in full: “Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.” (*Welf. & Inst. Code*, § 17000.) Included in this is a duty to provide medical care to indigents. (*Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 557 [254 Cal.Rptr. 905].)

A brief overview of the efforts by federal, state, and local governments to furnish medical services to the poor may be helpful.

Before March 1, 1966, the date on which California began its Medi-Cal program, medical services for the poor “were provided in different ways and were funded by the state, county, and federal governments in varying amounts.” (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3.) The Medi-Cal program, which California adopted to implement the federal Medicaid program (42 U.S.C. § 1396 et seq.; see *Morris v. Williams* (1967) 67 Cal.2d 733, 738 [63 Cal.Rptr. 689, 433 P.2d 697]), at first limited eligibility to those persons “linked” to a federal categorical aid program by being over age 65, blind, disabled, or a member of a family with dependent children. (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis

of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.), pp. 548, 550.) Persons not linked to federal programs were ineligible for Medi-Cal; they could obtain medical care from the counties. (*County of Santa Clara v. Hall* (1972) 23 Cal.App.3d 1059, 1061 [100 Cal.Rptr. 629].)

In 1971, the Legislature revised Medi-Cal by extending coverage to certain so-called “noncategorically linked” persons, or “medically indigent persons.” (Stats. 1971, ch. 577, §§ 12, 13, 22.5, 23, pp. 1110-1111, 1115.) The revisions included a formula for determining each county's share of Medi-Cal costs for the 1972-1973 fiscal year, with increases in later years based on the assessed value of property. (*Id.* at §§ 41, 42, pp. 1131-1133.)

In 1978, California voters added to the state Constitution article XIII A (Proposition 13), which severely limited property taxes. In that same year, to help the counties deal with the drastic drop in local tax revenue, the Legislature assumed the counties' share of Medi-Cal costs. (Stats. 1978, ch. 292, § 33, p. 610.) In 1979, the Legislature relieved the counties of their obligation to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 106, p. 1059.) \*113 Also in 1979, the voters added to the state Constitution article XIII B, which placed spending limits on state and local governments and added the mandate/reimbursement provisions at issue here.

In 1982, the Legislature removed from Medi-Cal eligibility the category of “medically indigent persons” that had been added in 1971. The Legislature also transferred funds for indigent health care services from the state to the counties through the Medically Indigent Services Account. (Stats. 1982, ch. 328, §§ 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, §§ 19, 86, pp. 6315, 6357.) Medically Indigent Services Account funds were then combined with county health service funds to provide health care to persons not eligible for Medi-Cal (Stats. 1982, ch. 1594, § 86, p. 6357), and counties were to provide health services to persons in this category “to the extent that state funds are provided” (*id.*, § 70, p. 6346).

From 1983 through June 1989, the state fully funded San Diego County's program for furnishing medical care to the poor. Thereafter, in fiscal years 1989-1990 and 1990-1991, the state partially funded San Diego County's program. In early 1991, however, the state refused to provide San Diego County full funding for the 1990-1991 fiscal year, prompting a threat by the county to terminate its indigent medical care program. This in turn led the Legal Aid Society of San Diego

to file an action against the County of San Diego, asserting that [Welfare and Institutions Code section 17000](#) imposed a legal obligation on the county to provide medical care to the poor. The county cross-complained against the state. The county argued that the state's 1982 removal of the category of “medically indigent persons” from Medi-Cal eligibility mandated a “new program or higher level of service” within the meaning of [section 6 of article XIII B of the California Constitution](#), because it transferred the cost of caring for these persons to the county. Accordingly, the county contended, [section 6](#) required the state to reimburse the county for its cost of providing such care, and prohibited the state from terminating reimbursement as it did in 1991. The county eventually reached a settlement with the Legal Aid Society of San Diego, leading to a dismissal of the latter's complaint.

While the County of San Diego's case against the state was pending, litigation was proceeding in a similar action against the state by the County of Los Angeles and the County of San Bernardino. In that action, the Superior Court for the County of Los Angeles entered a judgment in favor of Los Angeles and San Bernardino Counties. The state sought review in the Second District Court of Appeal in Los Angeles. In December 1992, the parties to the Los Angeles case entered into a settlement agreement providing for dismissal of the appeal and vacating of the superior court judgment. \*114 The Court of Appeal thereafter ordered that the superior court judgment be vacated and that the appeal be dismissed.

The County of San Diego's action against the state, however, was not settled. It proceeded on the county's claim against the state for reimbursement of the county's expenditures for medical care to the indigent.<sup>1</sup> The majority holds that the county is entitled to such reimbursement. I disagree.

## II

[Article XIII B, section 6 of the California Constitution](#) provides: “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 program or increased level of service, *except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] ... [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.*” (Italics added.)<sup>2</sup>

Of importance here is [Welfare and Institutions Code section 17000](#) (hereafter sometimes [section 17000](#)). It imposes a legal obligation on the counties to provide, among other things, medical services to the poor. (*Board of Supervisors v. Superior Court*, *supra*, 207 Cal.App.3d at p. 557; *County of San Diego v. Viloria* (1969) 276 Cal.App.2d 350, 352 [80 Cal.Rptr. 869].) [Section 17000](#) was enacted long before and has existed continuously since January 1, 1975, the date set forth in subdivision (c) of [section 6 of article XIII B of the California Constitution](#). Thus, [section 17000](#) falls within subdivision (c)'s language of “[l]egislative mandates enacted prior to January 1, 1975,” rendering it exempt from the reimbursement provision of [section 6](#).

Contrary to the majority's conclusion, the Legislature's 1982 legislation removing the category of “medically indigent persons” from Medi-Cal did not meet [California Constitution, article XIII B, section 6](#)'s requirement of imposing on local government “a new program or higher level of service,” and therefore did not entitle the counties to reimbursement from the state under [section 6 of article XIII B](#). The counties' legal obligation to provide medical care arises from [section 17000](#), not from the subsequently enacted [\\*115](#) 1982 legislation. The majority itself concedes that the 1982 legislation merely “trigger[ed] the counties' responsibility to provide medical care as providers of last resort under [section 17000](#).” (Maj. opn., *ante*, at p. 98.) Although certain actions by the state and the federal government during the 1970's and 1980's may have alleviated the counties' financial burden of providing medical care for the indigent, those actions did not supplant or remove the counties' existing legal obligation under [section 17000](#) to furnish such care. (*Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 411 [261 Cal.Rptr. 706]; *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136, 151 [201 Cal.Rptr. 768].)

The state's reimbursement obligation under [section 6 of article XIII B of the California Constitution](#) arises only if, after January 1, 1975, the date mentioned in subdivision (c) of [section 6](#), the state imposes on the counties “a new program or higher level of service.” That did not occur here. As I pointed out above, the counties' legal obligation to provide for the poor arises from [section 17000](#), enacted long before the January 1, 1975, cutoff date set forth in subdivision (c) of [section 6](#). That statutory obligation remained in effect when during a certain period after 1975 the state assumed the financial burden of providing medical care to the poor, in an effort to help the counties deal with a drastic drop in local revenue as a result of the voters' passage of Proposition 13,

which severely limited property taxes. Because the counties' statutory obligation to provide health care to the poor was created before 1975 and has existed unchanged since that time, the state's 1982 termination of Medi-Cal eligibility for “medically indigent persons” did not create a “new program or higher level of service” within the meaning of [section 6 of article XIII B](#), and therefore did not obligate the state to reimburse the counties for their expenditures in health care for the poor.

### III

In imposing on the state a legal obligation to reimburse the counties for their cost of furnishing medical services to the poor, the majority's holding appears to bail out financially strapped counties. Not so.

Today's decision will immediately result in a reduction of state funds available to the counties. Here is why. In 1991, the Legislature added [section 11001.5 to the Revenue and Taxation Code](#), providing that 24.33 percent of the moneys collected by the Department of Motor Vehicles as motor vehicle license fees must be deposited in the State Treasury to the credit of the Local Revenue Fund. In anticipation of today's decision, the Legislature stated in subdivision (d) of this statute: “This section shall cease to be operative on [\\*116](#) the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal [that]: [¶] ... [¶] (2) The state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982.” ([Rev. & Tax. Code, § 11001.5](#), subd. (d); see also *id.*, [§ 10753.8](#), subd. (b).)

The loss of such revenue, which the Attorney General estimates at “hundreds of millions of dollars,” may put the counties in a serious financial bind. Indeed, realization of the scope of this revenue loss appears to explain why the County of Los Angeles, after a superior court victory in its action seeking state reimbursement for the cost of furnishing medical care to “medically indigent persons,” entered into a settlement with the state under which the superior court judgment was effectively obliterated by a stipulated reversal. (See *Nearly v. Regents of University of California* (1992) 3 Cal.4th 273 [10 Cal.Rptr.2d 859, 834 P.2d 119].) In a letter addressed to the Second District Court of Appeal, sent while the County of Los Angeles was engaged in settlement negotiations with the state, the county's attorney

referred to the legislation mentioned above in these terms: “This legislation was quite clearly written with this case in mind. Consequently, to pursue this matter, *the County of Los Angeles risks losing a funding source it must have to maintain its health services programs at current levels.* The additional funding that might flow to the County from a final judgment in its favor in this matter, is several years away *and is most likely of a lesser amount than this County's share of the vehicle license fees.*” (Italics added.) Thus, the County of Los Angeles had apparently determined that a legal victory entitling it to reimbursement from the state for the cost of providing medical care to the category of “medically indigent persons” would not in fact serve its economic interests.

I have an additional concern. According to the majority, whenever there is a change in a state program that has the effect of increasing a county's financial burden under [section 17000](#) there must be reimbursement by the state. This means that so long as [section 17000](#) continues to exist, an increase in state funding to a particular county for the care of the poor, once undertaken, may be irreversible, thus locking the state into perpetual financial assistance to that county for health care to the needy. This would, understandably, be a major disincentive for the Legislature to ever increase the state's funding of a county's medical care for the poor.

The rigidity imposed by today's holding will have unfortunate consequences should the state's limited financial resources prove insufficient to **\*117** reimburse the counties under [section 6 of article XIII B of the California Constitution](#) for the “new program or higher level of service” of providing medical care to the poor under [section 17000](#). In that event, the state may be required to modify this “new program or higher level of service” in order to reconcile the state's reimbursement obligation with its finite resources and its other financial commitments. Such modifications are likely to take the form of limitations on eligibility for medical care or on the amount or kinds of medical care that the counties must provide to the poor under [section 17000](#). A more flexible system—one that actively encouraged shared state and county responsibility for indigent medical care, using a variety of innovative funding mechanisms—would be less likely to result in a curtailment of medical services to the poor.

And if the Legislature is unable or unwilling to appropriate funds to comply with the majority's reimbursement order, the law allows the county to file “in the Superior Court

of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement.” (Gov. Code, § 17612, subd. (c); see maj. opn., *ante*, at p. 82.) Such a declaration would do nothing to alleviate the plight of the poor.

### Conclusion

The dispute in this case ultimately arises from a collision between the taxing limitations on the counties imposed by article XIII A of the state Constitution and the preexisting, open-ended mandate imposed on them under [Welfare and Institutions Code section 17000](#) to provide medical care for the poor. As I have explained, the Legislature's assumption thereafter of some of the resulting financial burden to the counties did not repeal [section 17000](#)'s mandate, nor did the Legislature's later termination of its financial support create a new mandate. In holding to the contrary, the majority imposes on the Legislature an obligation that the Legislature does not have under the law.

I recognize that my resolution of this issue—that under existing law the state has *no legal obligation* to reimburse the counties for health expenditures for the poor—would leave the counties in the same difficult position in which they find themselves now: providing funding for indigent medical care while maintaining other essential public services in a time of fiscal austerity. But complex policy questions such as the structuring and funding of indigent medical care are best left to the counties, the Legislature, and ultimately the electorate, rather than to the courts. It is the counties that must figure out how to allocate the limited budgets imposed on them by the electorate's adoption of articles XIII A and XIII B of the California Constitution among indigent medical care programs and a host of other pressing **\*118** and essential needs. It is the Legislature that must decide whether to furnish financial assistance to the counties so they can meet their [section 17000](#) obligations to provide for the poor, and whether to continue to impose the obligations of [section 17000](#) on the counties. It is the electorate that must decide whether, given the ever-increasing costs of meeting the needs of indigents under [section 17000](#), counties should be afforded some relief from the taxing and spending limits of articles XIII A and XIII B, both enacted by voters' initiative. These are hard choices, but for the reasons just given they are better made by the representative branches of government and the electorate than by the courts. **\*119**

## Footnotes

- \* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- \* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- † Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- 1 Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.
- 2 Congress later repealed the requirement that states work towards expanding eligibility. (See Cal. Health and Welfare Agency, The Medi-Cal Program: A Brief Summary of Major Events (Mar. 1990) p. 1 (Summary of Major Events).)
- 3 Former section 14150.1 provided in relevant part: “[A] county may elect to pay as its share [of Medi-Cal costs] one hundred percent ... of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county .... If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county ....” (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 121.)
- 4 Former section 14150 provided the standard method for determining the counties' share of Medi-Cal costs. Under it, “a county was required to pay the state a specific sum, in return for which the state would pay for the medical care of all [categorically linked] individuals .... Financial responsibility for nonlinked individuals ... remained with the counties.” (*Lackner, supra*, 97 Cal.App.3d at p. 581.)
- 5 In this opinion, the terms “adult MIP's” and “Medically Indigent Adults” refer only to those persons who were excluded from the Medi-Cal program by the 1982 legislation.
- 6 San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles action.
- 7 In setting forth the facts relating to the Los Angeles action, we rely in part on the appellate record from that action, of which we take judicial notice. (*Evid. Code*, §§ 452, subd. (d), 459.)
- 8 The settlement resulted from 1991 legislation that changed the system of health care funding as of June 30, 1991. (See § 17600 et seq.; Stats. 1991, chs. 87, 89, pp. 231-235, 243-341.) That legislation provided counties with new revenue sources, including a portion of state vehicle license fees, to fund health care programs. However, the legislation declared that the statutes providing counties with vehicle license fees would “cease to be operative on the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal” that “[t]he state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982.” (*Rev. & Tax. Code*, §§ 10753.8, subd. (b)(2), 11001.5, subd. (d)(2); see also Stats. 1991, ch. 89, § 210, p. 340.) Los Angeles and San Bernardino Counties settled their action to avoid triggering these provisions. Unlike the dissent, we do not believe that consideration of these recently enacted provisions is appropriate in analyzing the 1982 legislation. Nor do we assume, as the dissent does, that our decision necessarily triggers these provisions. That issue is not before us.
- 9 The cross-complaint named the following state officers: (1) Kenneth W. Kizer, Director of the Department of Health Services; (2) Kim Belshé, Acting Secretary of the Health and Welfare Agency; (3) Gray Davis, the State Controller; (4) Kathleen Brown, the State Treasurer; and (5) Thomas Hayes, the Director of the Department of Finance. Where the context suggests, subsequent references in this opinion to “the state” include these officers.
- 10 The judgment dismissed all of San Diego's other claims.
- 11 In *Garamendi, supra*, 20 Cal.App.4th at pages 771-775, the court discussed procedural requirements for raising a claim that another court has already exercised its concurrent jurisdiction. Given our conclusion that the trial court's error here was not jurisdictional, we express no opinion about this discussion in *Garamendi* or the sufficiency of the state's efforts to raise the issue in this case.
- 12 Notably, in discussing the options still available to San Diego, the state asserts that San Diego “might have been able to go to superior court and file a [mandamus] petition based on the record of the prior test claim.”

- 13 “County General Assistance in California dates from 1855, and for many years afforded the only form of relief to indigents.” (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 677 [94 Cal.Rptr. 279, 483 P.2d 1231] (*Mooney*)). Section 17000 is substantively identical to former section 2500, which was enacted in 1937. (Stats. 1937, chs. 369, 464, pp. 1097, 1406.)
- 14 See also *County of Los Angeles v. Frisbie* (1942) 19 Cal.2d 634, 639 [122 P.2d 526] (construing former section 2500); *Jennings v. Jones* (1985) 165 Cal.App.3d 1083, 1091 [212 Cal.Rptr. 134] (counties must support all indigent persons “having no other means of support”); *Union of American Physicians & Dentists v. County of Santa Clara* (1983) 149 Cal.App.3d 45, 51, fn. 10 [196 Cal.Rptr. 602]; *Rogers v. Detrich* (1976) 58 Cal.App.3d 90, 95 [128 Cal.Rptr. 261] (counties have duty of support “where such support is not otherwise furnished”).
- 15 In asserting that Medi-Cal coverage did not supplant San Diego’s obligation under section 17000, the dissent incorrectly relies on *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768] (*Madera*) and *Cooke, supra*, 213 Cal.App.3d 401. (Dis. opn., *post*, at p. 115.) In *Madera*, the court voided a county ordinance that extended county benefits under section 17000 only to persons “ ‘meeting all eligibility standards for the Medi-Cal program.’ ” (*Madera, supra*, 155 Cal.App.3d at p. 150.) The court explained: “Because all funding for the Medi-Cal program comes from either the federal or the state government ..., [c]ounty has denied any financial obligation whatsoever from county funds for the medical care of its indigent and poor residents.” (*Ibid.*) Thus, properly understood, *Madera* held only that Medi-Cal does not relieve counties of their obligation to provide medical care to persons who are “indigent” within the meaning of section 17000 but who are ineligible for Medi-Cal. The limit of *Madera*’s holding is apparent from the court’s reliance on a 1979 opinion of the Attorney General discussing the scope of a county’s authority under section 17000. (*Madera, supra*, 155 Cal.App.3d at pp. 151-152.) The Attorney General explained that “[t]he county obligation [under section 17000] to provide general relief extends to those indigents who do not qualify under specialized aid programs, ... including Medi-Cal.” (62 Ops.Cal.Atty.Gen. 70, 71, fn. 1 (1979).) Moreover, the *Madera* court expressly recognized that state and federal programs “alleviate, to a greater or lesser extent, [a] [c]ounty’s burden.” (*Madera, supra*, 155 Cal.App.3d at p. 151.) In *Cooke*, the court simply made a passing reference to *Madera* in dictum describing the coverage history of Medi-Cal. (*Cooke, supra*, 213 Cal.App.3d at p. 411.) It neither analyzed the issue before us nor explained the meaning of the dictum that the dissent cites.
- 16 As we have previously explained, even before 1971 the state, through the county option, assumed much of the financial responsibility for providing medical care to adult MIP’s.
- 17 Because *County of Los Angeles v. Commission on State Mandates, supra*, 32 Cal.App.4th 805, is distinguishable, we need not (and do not) express an opinion regarding the court’s analysis in that decision or its conclusions.
- 18 The state properly does not contend that the provision of medical care to adult MIP’s is not a “program” within the meaning of section 6. (See *County of Los Angeles, supra*, 43 Cal.3d at p. 56 [section 6 applies to “programs that carry out the governmental function of providing services to the public”].)
- 19 Alternatively, the 1982 legislation can be viewed as having mandated an increase in the services that counties were providing through existing section 17000 programs, by adding adult MIP’s to the indigent population that counties already had to serve under that section. (See *County of Los Angeles, supra*, 43 Cal.3d at p. 56 [“subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing ‘programs’ ”].)
- 20 In reaching a contrary conclusion, the dissent ignores the electorate’s purpose in adopting section 6. The dissent also mischaracterizes our decision. We do not hold that “whenever there is a change in a state program that has the effect of increasing a county’s financial burden under section 17000 there must be reimbursement by the state.” (Dis. opn., *post*, at p. 116.) Rather, we hold that section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6. Whether the state may discontinue assistance that it initiated after section 6’s adoption is a question that is not before us.
- 21 As amended in 1982, section 16704, subdivision (c)(1), provided in relevant part: “The [county board of supervisors] shall assure that it will expend [MISA] funds only for the health services specified in Sections 14132 and 14021 provided to persons certified as eligible for such services pursuant to Section 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount required to obtain the maximum allocation under Section 16702.” (Stats. 1982, ch. 1594, § 70, p. 6346.) Section 16704, subdivision (c)(3), provided in relevant part: “Any person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person’s ability to pay. A county may not establish a payment requirement which would deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care

service .... The provisions of this paragraph shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandates [sic] that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date.” (Stats. 1982, ch. 1594, § 70, pp. 6346-6347.)

22 Section 17001 provides: “The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county.”

23 We disapprove *Bay General, supra*, 156 Cal.App.3d at pages 959-960, insofar as it (1) states that a county's responsibility under section 17000 extends only to indigents as defined by the county's board of supervisors, and (2) suggests that a county may refuse to provide medical care to persons who are “indigent” within the meaning of section 17000 but do not qualify for Medi-Cal.

24 Our conclusion is limited to this aspect of a county's duty under section 17000. We express no opinion regarding the scope of a county's duty to provide other forms of relief and support under section 17000.

25 The 1982 legislation made the subdivision operative until June 30, 1983. (Stats. 1982, ch. 1594, § 70, p. 6347.) In 1983, the Legislature repealed and reenacted section 16704, and extended the operative date of subdivision (c)(3) to June 30, 1985. (Stats. 1983, ch. 323, §§ 131.1, 131.2, pp. 1079-1080.)

26 Given our analysis, we express no opinion about the statement in *Cooke, supra*, 213 Cal.App.3d at page 412, footnote 9, that the “life” of section 16704, subdivision (c)(3), “was implicitly extended” by the fact that the “paragraph remains in the statute despite three subsequent amendments to the statute ....”

27 Although asserting that nothing required San Diego to provide “all” adult MIP's with medical care, the state never precisely identifies which adult MIP's were legally entitled to medical care and which ones were not. Nor does the state ever directly assert that some adult MIP's were not “indigent persons” under section 17000. On the contrary, despite its argument, the state seems to suggest that San Diego's medical care obligation under section 17000 extended even beyond adult MIP's. It asserts: “At no time prior to or following 1983 did Medi-Cal ever provide medical services to, or pay for medical services provided to, all persons who could not afford such services and therefore might be deemed 'medically indigent.' ... For some period prior to 1983, Medi-Cal paid for services for *some* indigent adults under its 'medically indigent adults' category.... [A]t *no time* did the state ever assume financial responsibility for all adults who are too indigent to afford health care.” (Original italics.)

28 The state argues that former subdivision (c) is irrelevant to our determination because, like section 17000, it “predate[d] 1975.” Our previous analysis rejecting this argument in connection with section 17000 applies here as well.

29 Statutes 1992, chapter 719, section 2, page 2882, repealed former subdivision (c) and enacted a new subdivision (c) in its place. This urgency measure was approved by the Governor on September 14, 1992, and filed with the Secretary of State on September 15, 1992.

30 We disapprove *Cooke, supra*, 213 Cal.App.3d at page 410, to the extent it held that Health and Safety Code section 1442.5, former subdivision (c), was merely “a limitation on a county's ability to close facilities or reduce services provided in those facilities,” and was irrelevant absent a claim that a “county facility was closed [or] that any services in [the] county ... were reduced.” Although former subdivision (c) was contained in a section that dealt in part with closures and service reductions, nothing limited its reach to that context.

31 During further proceedings before the Commission to determine the amount of reimbursement due San Diego, the state may argue that particular services available under San Diego's CMS program exceeded statutory requirements.

32 Consistent with the electorate's direction, in its application for CHIP funds, San Diego assured the state that it would “[e]xpend [CHIP] funds only to supplement existing levels of services provided and not to fund existing levels of service ....” Because San Diego's initial decision to seek CHIP funds was voluntary, the evidence it cites of state threats to withhold CHIP funds if it eliminated the CMS program is irrelevant.

33 Former section 16991, subdivision (a)(5), provided in full: “If the sum of funding that a county received from its allocation pursuant to Section 16703, the amount of reimbursement it received from federal State Legalization Impact Assistance Grant [(SLIAG)] funding for indigent care, and its share of funding provided in this section is less than the amount of funding the county received pursuant to Section 16703 in fiscal year 1988-89 the state shall reimburse the county for the amount of the difference. For the 1990-91 fiscal year, if the sum of funding received from its allocation, pursuant to Section 16703 and the amount of reimbursement it received from [SLIAG] Funding for indigent care that year is less than the amount of funding the county received pursuant to Section 16703 in the 1988-89 fiscal year, the state shall reimburse the amount of the difference. If the department determines that the county has not made reasonable efforts to document and claim federal SLIAG funding for indigent care, the department shall deny the reimbursement.” (Stats. 1989, ch. 1331, § 9, p. 5428.)



- 34 Despite its argument here, when it initially appealed, the state apparently recognized that it could no longer challenge the May 1991 order. In its March 1993 notice of appeal, it appealed only from the judgment entered December 18, 1992, and did not mention the May 1991 order.
- \* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- † Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- 1 I agree with the majority that the superior court had jurisdiction to decide this case. (Maj. opn., [ante](#), at pp. 86-90.)
- 2 [Section 6 of article XIII B](#) pertains to two types of mandates: new programs and higher levels of service. The words “such subvention” in the first paragraph of this constitutional provision makes the subdivision (c) exemption applicable to both types of mandates.

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30 Cal.4th 727, 68 P.3d 1203, 134 Cal.Rptr.2d 237, 176 Ed. Law Rep. 894, 03 Cal. Daily Op. Serv. 4288, 2003 Daily Journal D.A.R. 5463  
Supreme Court of California

DEPARTMENT OF FINANCE,  
Plaintiff and Appellant,

v.

COMMISSION ON STATE MANDATES, Defendant  
and Respondent; KERN HIGH SCHOOL DISTRICT  
et al., Real Parties in Interest and Respondents.

No. S109219.  
May 22, 2003.

#### SUMMARY

The Department of Finance brought an administrative mandate proceeding against the Commission on State Mandates, challenging its decision that two statutes-requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings-constituted a reimbursable state mandate under [Cal. Const., art. XIII B, § 6](#). The trial court denied the petition. (Superior Court of Sacramento County, No. 00CS00866, Ronald B. Robie, Judge.) The Court of Appeal, Third Dist., No. C037645, rejected the department's position, concluding that a state mandate is established when the local governmental entity has no reasonable alternative and no true choice but to participate in the program, and incurs the additional costs associated with an increased or higher level of service.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the statutes do not constitute a reimbursable state mandate. Thus, the claimants (two public school districts and a county) were not entitled to reimbursement. The claimants could not show that they were legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions were mandatory elements of education-related programs in which the claimants participated, without regard to whether the claimants' participation was voluntary or compelled. If a school district elects to participate in any

underlying voluntary education-related funded program, the obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. In this case, the claimants were not legally compelled to participate in eight of the nine underlying funded programs. Even if the claimants were legally compelled to participate in one of the nine programs, they were nevertheless not entitled to reimbursement from the state for such expenses, because they \*728 were free at all relevant times to use funds provided by the state for that program to pay required program expenses, including notice and agenda costs. The court further held that the claimants failed to show that they were compelled to participate in the underlying programs. Moreover, the costs associated with the notice and agenda requirements were modest, and nothing in the governing statutes or regulations suggested that a school district was precluded from using a portion of the program funds obtained from the state to pay associated notice and agenda costs. (Opinion by George, C. J., expressing the unanimous view of the court.)

#### HEADNOTES

##### Classified to California Digest of Official Reports

(1)

State of California § 11--Fiscal Matters--Reimbursable State Mandate-- School Programs--Statutory Requirements to Provide Notice and to Post Agenda of Meetings-- Participation in Programs as Legally Compelled.

In proceedings to determine whether statutes, requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings, were reimbursable mandates under [Cal. Const., art. XIII B, § 6](#), the Court of Appeal erred in concluding that the claimants (two public school districts and a county) were entitled to reimbursement. The claimants could not show that they were legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions were mandatory elements of education-related programs in which the claimants participated, without regard to whether the claimants' participation was voluntary or compelled. If a school district elects to participate in any underlying voluntary education-related funded program, the obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. The proper focus under a legal compulsion inquiry

is upon the nature of the claimants' participation in the underlying programs themselves. In this case, the claimants were not legally compelled to participate in eight of the nine underlying funded programs. Even if the claimants were legally compelled to participate in one of the nine programs, they were nevertheless not entitled to reimbursement from the state for such expenses, because they were free at all relevant times to use funds provided by the state for that program to pay required program expenses, including notice and agenda costs.

[See 9 Witkin, *Summary of Cal. Law* (9th ed. 1989) *Taxation*, § 123A; West's Key Number Digest, States  111.] \*729

(2a, 2b, 2c)

State of California § 11--Fiscal Matters--Reimbursable State Mandate--School Programs--Statutory Requirements to Provide Notice and to Post Agenda of Meetings--Participation in Programs as Compelled--As Practical Matter. In proceedings to determine whether statutes, requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings, were reimbursable mandates under *Cal. Const., art. XIII B, § 6*, in which claimants (two public school districts and a county) failed to show that they were legally compelled to participate in the underlying funded programs and incur notice and agenda costs, the claimants also failed to show that, as a practical matter, they were compelled to participate in the underlying programs. Although the claimants sought to show that they had no true choice other than to participate in the programs, and that the absence of a reasonable alternative to participation was a de facto mandate, they did not face penalties such as double taxation or other severe consequences for not participating, and hence they were not mandated under *Cal. Const., art. XIII, § 6*, to incur increased costs. Moreover, the costs associated with the notice and agenda requirements were modest, and nothing in the governing statutes or regulations suggested that a school district was precluded from using a portion of the program funds obtained from the state to pay associated notice and agenda costs. The asserted compulsion stemmed only from the circumstance that the claimants found the benefits of various funded programs too beneficial to refuse. However, the state is not prohibited from providing school districts with funds for voluntary programs, and then effectively reducing that grant by requiring the districts to incur expenses in order to meet conditions of program participation.

(3)

Municipalities § 23--Powers--Relationship Between State and Local Governments.

Unlike the federal-state relationship, sovereignty is not an issue between state and local governments.

(4)

State of California § 11--Fiscal Matters--Reimbursable State Mandate-- Purpose.

The purpose of *Cal. Const., art. XIII B, § 6* (reimbursable state mandates), 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.

COUNSEL

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney General, Manuel M. Medeiros and Louis R. Mauro, Assistant Attorneys \*730 General, Catherine M. Van Aken and Leslie R. Lopez, Deputy Attorneys General, for Plaintiff and Appellant.

Paul M. Starkey, Camille Shelton and Eric D. Feller for Defendant and Respondent.

Jo Anne Sawyerknoll, Jose A. Gonzales and Arthur M. Palkowitz for Real Party in Interest and Respondent San Diego Unified School District.

No appearance by Real Parties in Interest and Respondents Kern High School District and County of Santa Clara.

Ruth Sorensen for California State Association of Counties, City of Buenaventura, City of Carlsbad, City of Dixon, City of Indian Wells, City of La Habra Heights, City of Merced, City of Monterey, City of Plymouth, City and County of San Francisco, City of San Luis Obispo, City of San Pablo, City of Tracy and City of Walnut Creek as Amici Curiae on behalf of Real Parties in Interest and Respondents.

Diana McDonough, Harold M. Freiman, Cynthia A. Schwerin and Lozano Smith for California School Boards Association, through its Education Legal Alliance as Amici Curiae on behalf of Real Parties in Interest and Respondents.

**GEORGE, C. J.**

*Article XIII B, section 6, of the California Constitution* provides: "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 program or increased level of service ...." (Hereafter *article XIII B, section 6*.)

Real parties in interest—two public school districts and a county (hereafter claimants)—participate in various education-related programs that are funded by the state and, in some instances, by the federal government. Each of these underlying funded programs in turn requires participating public school districts to establish and utilize specified school councils and advisory committees. Statutory provisions enacted in the mid-1990's require that such school councils and advisory committees provide notice of meetings, and post agendas for those meetings. (See [Gov. Code, § 54952](#); [\\*731 Ed. Code, § 35147](#).) We granted review to determine whether claimants have a right to reimbursement from the state for their costs in complying with these statutory notice and agenda requirements.

We conclude, contrary to the Court of Appeal, that claimants are not entitled to reimbursement under the circumstances presented here. Our conclusion is based on the following determinations:

First, we reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that the notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled. Second, we conclude that as to *eight* of the nine underlying funded programs here at issue, claimants have not been legally compelled to participate in those programs, and hence cannot establish a reimbursable state mandate as to those programs based upon a theory of legal compulsion. Third, assuming (without deciding) that claimants have been legally compelled to participate in *one* of the nine programs, we conclude that claimants nonetheless have no entitlement to reimbursement from the state for such expenses, because they have been free at all relevant times to use funds provided by the state for that program to pay required program expenses—including the notice and agenda costs here at issue.

Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur notice and agenda-related costs. Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion—for example, if the

state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program—claimants here faced no such practical compulsion. Instead, although claimants argue that they have had “no true option or choice” other than to participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of various funded programs “too good to refuse”—even though, as a condition of program participation, they have been forced to incur some costs. On the facts presented, the cost of compliance with conditions of participation in these funded programs does not amount to a reimbursable state mandate.

Accordingly, we shall reverse the judgment of the Court of Appeal. [\\*732](#)

## I.

A number of statutes establish various school-related educational programs, such as the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act ([Ed. Code, § 54720](#) et seq.), Programs to Encourage Parental Involvement ([Ed. Code, § 11500](#) et seq.), and the federal Indian Education Program ([20 U.S.C. § 7421](#) et seq. [former [25 U.S.C. § 2604](#) et seq.]). Under these statutes, participating school districts are granted state or federal funds to operate the program, and are required to establish school site councils or advisory committees that help administer the program. Program funding often is substantial—for example, on a statewide basis, funding provided by the state for school improvement programs (see [Ed. Code, §§ 52010](#) et seq., [62000](#), [62000.2](#), subd. (b), [62002](#)) for the 1998-1999 fiscal year totaled approximately \$394 million. (Cal. Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)

In the mid-1990's, the Legislature passed legislation designed to make the operations of the councils and advisory committees related to such programs more open and accessible to the public. First, effective April 1, 1994, the Legislature enacted [Government Code section 54952](#), which expanded the reach of the Ralph M. Brown Act (Brown Act) ([Gov. Code, § 54950.5](#) et seq.)—California's general open meeting law—to apply to all such official local advisory bodies.<sup>1</sup> Second, effective July 21, 1994, [Education Code section 35147](#) superceded [Government Code section 54952](#), with respect to the application of the Brown Act to designated councils and advisory committees. Although the earlier (Government Code) statute had made *all* local

government councils and advisory committees subject to *all* provisions of the Brown Act, the later (Education Code) statute generally exempts councils and advisory committees of nine specific programs from compliance with all provisions of the Brown Act, and imposes instead its own separately described requirement that all such councils and advisory committees related to those nine programs be open to the public, provide notice of meetings, and post meeting agendas.<sup>2</sup> \*733

Compliance with these notice and agenda rules in turn imposed various costs on the affected councils and committees. Claimants Kern High School District, San Diego Unified School District, and County of Santa Clara filed “test claims” (see *Gov. Code, § 17521*) with the Commission on State Mandates (Commission), seeking reimbursement for the costs incurred by school councils and advisory committees in complying with the new statutory notice and agenda requirements. (See generally *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-333 [285 Cal.Rptr. 66, 814 P.2d 1308] [describing legislative procedures implementing art. XIII B, § 6].)<sup>3</sup> In a statement of decision issued in mid-April 2002, the Commission found in favor of claimants. It concluded that the statutory notice and agenda requirements impose reimbursable state mandates for the costs of preparing meeting agendas, posting agendas, and providing the public an opportunity to address the respective council or committee. \*734

Acting through the Department of Finance, the State of California (hereafter Department of Finance or Department) thereafter brought this administrative mandate proceeding under *Government Code section 17559*, subdivision (b), to challenge the Commission's decision. The San Diego Unified School District took the lead role on behalf of claimants; the Kern High School District and the County of Santa Clara did not appear in the court proceedings below and have not appeared in this court.

In November 2000, the trial court, agreeing with the Commission, denied the mandate petition.<sup>4</sup> The Department of Finance appealed, arguing that the school councils and advisory committees at issue serve categorical aid programs in which school districts participate “voluntarily,” often as a condition of receiving state or federal program funds. The Department of Finance asserted that the state has not *compelled* school districts to participate in or accept funding for any of those underlying programs—and hence has not required the establishment of any of the councils and

committees that serve the programs. Instead, the Department of Finance argued, the state merely has set out reasonable conditions and rules that must be adhered to if a local entity elects to participate in a program and receive program funding. Accordingly, the Department of Finance asserted, because local entities are not required to undertake or continue to participate in the programs, the state, by enacting *Government Code section 54952* and *Education Code section 35147*, has not imposed a “mandate,” as that term is used in *article XIII B, section 6*. It follows, the Department of Finance asserted, that claimants have no right to reimbursement under *article XIII B, section 6*.

In a July 2002 decision, the Court of Appeal rejected the position taken by the Department of Finance. The appellate court concluded that a state mandate is established under *article XIII B, section 6*, when the local governmental entity has “no reasonable alternative” and “no true choice but to participate” in the program, and incurs the additional costs associated with an increased or higher level of service.<sup>5</sup>

We granted review to consider the Court of Appeal's construction of the term “state mandate” as it appears in *article XIII B, section 6*. \*735

## II.

Article XIII A (adopted by the voters in 1978 as Proposition 13), limits the *taxing* authority of state and local government. *Article XIII B* (adopted by the voters in 1979 as Proposition 4) limits the *spending* authority of state and local government.

*Article XIII B, section 6*, provides as follows: “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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.” *Article XIII B* became operative on July 1, 1980. (*Id.*, § 10.)

We have observed that *article XIII B, section 6*, “recognizes that *articles XIII A* and *XIII B* severely restrict the taxing

and spending powers of local governments. [Citation.] Its purpose 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.” (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 [61 Cal.Rptr.2d 134, 931 P.2d 312] (*County of San Diego*)). We also have observed that a reimbursable state mandate does not arise merely because a local entity finds itself bearing an “additional cost” imposed by state law. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 55-57 [233 Cal.Rptr. 38, 729 P.2d 202].) The additional expense incurred by a local agency or school district arising as an “incidental impact of a law which applied generally to all ... entities” is not the “type of expense ... [that] the voters had in mind when they adopted [section 6 of article XIII B](#).” (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 [244 Cal.Rptr. 677, 750 P.2d 318]; see also *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [280 Cal.Rptr. 92, 808 P.2d 235]; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*)).<sup>6</sup>

The focus in many of the prior cases that have addressed [article XIII B, section 6](#), has been upon the meaning of the terms “new program” or [\\*736](#) “increased level of service.” In the present case, we are concerned with the meaning of state “mandate.”

### III.

#### A.

(1) In its briefs, the Department of Finance asserts that [article XIII B, section 6](#), reflects an intent on the part of the drafters and the electorate to limit reimbursement to costs that are forced upon local governments as a matter of legal compulsion. The Commission's briefs take a similar approach, arguing that reimbursement under the constitutional provision requires a showing that a local entity was “ordered or commanded” to incur added costs. At oral argument, both the Department and the Commission retreated somewhat from these positions, and suggested that legal compulsion may not be a necessary condition of a finding of a reimbursable state mandate in all circumstances. For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is *necessary* in order to establish a right to reimbursement under [article XIII B,](#)

[section 6](#), because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate.

#### 1.

The Department of Finance and the Commission maintain that the drafters of [article XIII B, section 6](#), borrowed that provision's basic idea and structure—and the gist of its “state mandate” language—from then existing statutes. (See generally *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577-1581 [15 Cal.Rptr.2d 547].) At the time of the drafting and enactment of [article XIII B, section 6](#), former [Revenue and Taxation Code section 2231, subdivision \(a\)](#) (currently [Gov. Code, § 17561](#), subd. (a)) provided: “The state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207....” And at that same time, former [Revenue and Taxation Code section 2207](#) (currently [Gov. Code, § 17514](#)) provided: “'Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the [\\*737](#) following: [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program ....”

As the Department of Finance observes, we frequently have looked to ballot materials in order to inform our understanding of the terms of a measure enacted by the electorate. (See, e.g., *County of Fresno v. State of California, supra*, 53 Cal.3d 482, 487 [reviewing ballot materials concerning [art. XIII B](#)].) The Department stresses that the ballot materials pertaining to [article XIII B](#) in two places suggested that a state mandate comprises something that a local government entity is required or forced to do. The Legislative Analyst stated: “'State mandates' are *requirements imposed* on local governments by legislation or executive orders.” (Ballot Pamp., Special Statewide Elec. (Nov. 6, 1979) Prop. 4, p. 16, italics added.) Similarly, the measure's proponents stated that the provision would “not allow the state governments to *force* programs on local governments without the state paying for them.” (*Id.*, arguments in favor of Prop. 4, p. 18, capitalization removed, italics added.) The Department concludes that the ballot materials fail to suggest that a reimbursable state mandate might be found to exist outside the context of legal compulsion.

The Department of Finance and the Commission also assert that subsequent judicial construction of former [Revenue and](#)

Taxation Code sections 2231 and 2207-upon which, as just discussed, article XIII B, section 6, apparently was based-suggests that a narrow meaning was accorded the term “state mandate” at the time article XIII B, section 6, was enacted. The Department relies primarily upon *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 [200 Cal.Rptr. 642] (*City of Merced*). Claimants and amici curiae on their behalf assert that *City of Merced* either is distinguishable or was wrongly decided. We proceed to describe *City of Merced* at some length.

In *City of Merced, supra*, 153 Cal.App.3d 777, the city wished either to purchase or to condemn (under its eminent domain authority) certain privately owned real property. If the city were to elect to proceed by eminent domain, it would be required by a then recent enactment (*Code Civ. Proc.*, § 1263.510) to compensate the property owner for loss of its “business goodwill.” The city did elect to proceed by eminent domain, and in April 1980 the Merced Superior Court issued a final order in condemnation, directing the city to pay the property owner for the latter’s loss of business goodwill. The city did so and then sought reimbursement from the state, arguing that the new statutory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced*, at p. 780.) \*738

The constitutional reimbursement provision contained in article XIII B, section 6, did not become operative until July 1, 1980. Accordingly, the City of Merced sought reimbursement under the then existing statutory authority-Revenue and Taxation Code former sections 2231 and 2207-which, as noted, apparently had served as the model for the constitutional provision.

The State Board of Control-which at the time exercised the authority now exercised by the Commission-agreed with the City of Merced and found a reimbursable state mandate. (*City of Merced, supra*, 153 Cal.App.3d 777, 780.) The city’s approved claim for reimbursement “was included, along with other similar claims, as a [budget] line item in chapter 1090, Statutes of 1981.” (*Ibid.*) The Legislature, however, refused to authorize the reimbursement, and directed the board not to accept, or submit, any future claim for reimbursement for business goodwill costs. (*Ibid.*)

The City of Merced then sought a writ of mandate commanding the Legislature to provide reimbursement. The trial court denied that request, and the Court of Appeal

affirmed. The court concluded that, as a matter of law, the city’s increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*City of Merced, supra*, 153 Cal.App.3d 777, 781-783.) The court reasoned: “[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.” (*Id.*, at p. 783.)

The court in *City of Merced, supra*, 153 Cal.App.3d 777, found its construction of former Revenue and Taxation Code sections 2231 and 2207 - as those statutory provisions read at the time they served as the model for article XIII B, section 6-to be confirmed by the subsequent legislative action amending former Revenue and Taxation Code section 2207 (and related former section 2207.5). As the court explained: “... Senate Bill No. 90 (Russell), 1979-1980 Regular Session ... added Revenue and Taxation Code section 2207, subdivision (h): [¶] ‘Costs mandated by the state’ means any increased costs which a local agency is required to incur as the result of the following: [¶] ... [¶] (h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service if the local agencies have no reasonable alternatives other than to continue the optional program.’ ” (*City of Merced, supra*, 153 Cal.App.3d 777, 783-784, italics added.) \*739

(Of relevance here, Senate Bill No. 90 (1979-1980 Reg. Sess.) also added a substantively identical provision to former Revenue and Taxation Code section 2207.5-a specialized section that addressed reimbursable state mandates as they related to a school district.)<sup>7</sup>

The court in *City of Merced* continued: “Senate Bill No. 90 became effective on July 1, 1981, [more than a year] after plaintiff incurred the cost of business goodwill for which it seeks reimbursement. Subdivision (h) appears to have been included in the bill to provide for reimbursement of increased costs in an optional program such as eminent domain when the local agency has no reasonable alternative to eminent domain. The legislative history of Senate Bill No. 90 supports the conclusion that subdivision (h) was added to Revenue and Taxation Code section 2207 to extend state liability rather

than to clarify existing law.” (*City of Merced, supra*, 153 Cal.App.3d 777, 784, italics added.)

After examining two legislative committee reports,<sup>8</sup> the court in *City of Merced, supra*, 153 Cal.App.3d 777, asserted that they “characterize Senate Bill No. 90 as expanding the definition of local reimbursable costs. The Legislative Analyst’s Report ... on Senate Bill No. 90 similarly includes a statement that the bill expands the definition of state-mandated costs. Such characterizations of the purpose of Senate Bill No. 90 are consistent only with the conclusion that, *until that bill was enacted, increased costs incurred in an optional program such as eminent domain were not state mandated*. Thus the cost of business goodwill for which plaintiff was required [by *Code of Civil Procedure, section 1263.510*] to pay in April 1980, was not a state-mandated cost. It follows that the trial court properly denied the \*740 petition for a writ of mandamus to compel payment of that cost.” (*City of Merced, supra*, 153 Cal.App.3d 777, 785, italics added.)

In other words, the court in *City of Merced* concluded that former *Revenue and Taxation Code sections 2231 and 2207*, as they read at the time they served as the model for *article XIII B, section 6*, contemplated a narrow definition of reimbursable state mandate, and not the subsequently expanded definition of reimbursable state mandate found in the 1981 amendments to the Revenue and Taxation Code.<sup>9</sup>

A few months after the Court of Appeal filed its opinion in *City of Merced, supra*, 153 Cal.App.3d 777, the Legislature overhauled the law pertaining to state mandates and reimbursements by amending both the Revenue and Taxation Code and the Government Code. (Stats. 1984, ch. 1459, p. 5113.) The Department of Finance and the Commission assert that two aspects of the legislative overhaul are particularly relevant to the issue we address here.

First, the Department of Finance and the Commission assert that the Legislature enacted a new section of the Government Code—*section 17514*—in order to implement the reimbursable-state-mandate directive of *article XIII B, section 6*.<sup>10</sup> The Department and the Commission assert that in enacting that provision, the Legislature readopted the original, *narrow* definition of reimbursable state mandate found in the initial versions of former Revenue and Taxation Code section 2207—which, the Department and the Commission maintain, existed at the time *article XIII B, section 6*, was drafted and adopted, and which defined “costs mandated by the state” as those

“which a local agency is *required* to incur.” (See Stats. 1975, ch. 486, § 1.8, p. 997 [Rev. & Tax. Code, former § 2207]; Stats. 1977, ch. 1135, § 5, p. 3646 [Rev. & Tax. Code, former § 2207]; Stats. 1984, ch. 1459, § 1, p. 5114 [Gov. Code, § 17514], italics added.) This same statutory language also had been recently construed at that time in *City of Merced, supra*, 153 Cal.App.3d 777, as recognizing as a reimbursable state mandate only that imposed when the local entity is legally compelled to engage in the underlying practice or program.

\*741

Second, the Department of Finance and the Commission observe, in enacting *Government Code section 17514*, the Legislature also provided that the use of the broader definition contained in the *amended* versions of Revenue and Taxation Code former *sections 2207 and 2207.5* (which became effective July 1, 1981) should be phased out, but that the definition could be used to determine claims that arose prior to 1985. (See Stats. 1984, ch. 1459, § 1, p. 5123; 68 Ops.Cal.Atty.Gen. 224 (1985).)

In other words, the Department of Finance and the Commission assert, in the Legislature’s 1984 overhaul of the statutory scheme implementing *article XIII B, section 6*, the Legislature embraced and codified the narrow definition of reimbursable state mandate set out in former *Revenue and Taxation Code section 2207* (and construed in *City of Merced*) as the appropriate test in implementing the constitutional provision. Moreover, the Department and the Commission maintain, the Legislature limited the continued use of the broader definition of a statutorily imposed reimbursable state mandate (set out in the amendments to former *Revenue and Taxation Code sections 2207 and 2207.5*, effective in mid-1981) to a small and ever-decreasing number of cases. Five years later, the Legislature repealed former *Revenue and Taxation Code sections 2207 and 2207.5* (see Stats. 1989, ch. 589, §§ 7 & 8, p. 1978)—thereby finally discarding the broad definition of statutorily imposed reimbursable state mandate found in subdivision (h) of each of those statutes.

As noted above, the Department of Finance and the Commission assert in their briefs that based upon the language of *article XIII B, section 6*, and the statutory and case law history described above, the drafters and the electorate must have intended that a reimbursable state mandate arises only if a local entity is “required” or “commanded” —that is, legally compelled—to participate in a program (or to provide a service) that, in turn, leads unavoidably to increasing the costs incurred by the entity.



(*City of Merced, supra*, 153 Cal.App.3d 777, 783; see also *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174 [275 Cal.Rptr. 449] [construing the term “mandates,” for purposes of art. XIII B, § 6, “in the ordinary sense of 'orders' or 'commands' ”]; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284 [101 Cal.Rptr.2d 784] (*County of Sonoma*) [Legislature's interpretation of art. XIII B, § 6, in Gov. Code, 17514, as limited to “costs which a ... school district is required to incur” is entitled to great weight].)<sup>11</sup>

## 2.

Claimants and amici curiae on their behalf assert that even if “legal compulsion” is the governing standard, they meet that test because, they argue, claimants have been legally compelled to incur compliance costs under [Government Code section 54952](#) and [Education Code section 35147](#), subdivision (c). The Commission-but not the Department-supports claimants' proposed application of the legal compulsion test.

In so arguing, claimants focus upon the circumstance that a school district *that participates* in one of the underlying programs listed in [Education Code section 35147](#), subdivision (b), must comply with program requirements, including the statutory notice and agenda obligations, set out in [Government Code section 54952](#) and [Education Code section 35147](#), subdivision (c). Claimants assert: “[O]nce [a district] participates in one of the educational programs at issue, it does not thereafter have the option of performing that activity in a manner that avoids incurring costs mandated by amended [Government Code section 54952](#) and [Education Code section 35147](#).”

The Department of Finance, relying upon *City of Merced, supra*, 153 Cal.App.3d 777, asserts that claimants err by focusing upon a school district's legal obligation to comply with program conditions, rather than focusing upon whether the school district has a legal obligation to participate in the underlying program to which the conditions attach. As suggested above, the core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds-even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice. (*Id.*, at p. 783.) Claimants concede that *City of Merced* conflicts

with their contrary view, but they assert that the opinion is distinguishable and ask us to decline to follow, or extend, that decision.

Claimants stress-as we acknowledged above-that *City of Merced, supra*, 153 Cal.App.3d 777, was decided in the context of an eminent domain proceeding, and that the appellate court was engaged in construing the *statutory* reimbursement scheme rather than [article XIII B, section 6](#). Claimants also assert that although the City of Merced had discretion whether or \*743 not to exercise its power of eminent domain, and was under no compulsion to do so, in the present case “school site council and advisory committee meetings cannot be held in a manner that avoids application of [the requirements of] [Government Code section 54952](#) and [Education Code section 35147](#).”

The points relied upon by claimants neither call into doubt nor persuasively distinguish *City of Merced, supra*, 153 Cal.App.3d 777. The truer analogy between that case and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.<sup>12</sup>

We therefore reject claimants' assertion that merely because they participate in one or more of the various education-related funded programs here at issue, the costs they incurred in complying with program conditions have been legally compelled and hence constitute reimbursable state mandates. We instead agree with the Department of Finance, and with *City of Merced, supra*, 153 Cal.App.3d 777, that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves.

## 3.

Turning to that question-and without deciding whether a finding of legal compulsion to participate in an underlying program is *necessary* in order to establish a right to reimbursement under [article XIII B, section 6](#)-we \*744

conclude, upon review of the applicable statutes, that claimants are, and have been, free from legal compulsion as to eight of the nine underlying funded programs here at issue. As to one of the funded programs, we shall assume, for purposes of analysis, that a district's participation in the program is in fact legally compelled.

**a.**

It appears to be conceded that, as to most of the nine education-related funded programs at issue, school districts are not legally compelled to participate in those programs. For example, the American Indian Early Childhood Education Program (*Ed. Code*, § 52060 et seq.), which implements projects designed to develop and test educational models to increase reading and math competence of students in preschool and early grades, states that school districts “may apply” to be included in the project (*id.*, § 52063) and, if accepted to participate, will receive program funding (*id.*, § 52062). *Education Code* section 52065 in turn states that each school district that receives funds provided by section 52062 “shall establish a districtwide American Indian advisory committee for American Indian early childhood education.” Plainly, a school district's initial and continued participation in the program is voluntary, and the obligation to establish or maintain an advisory committee arises only if the district elects to participate in, or continue to participate in, the program. Although the language of most of the other implementing statutes varies, they generally follow this same approach, with the same result: Participation in most of the programs listed in *Education Code* section 35147 is voluntary, and the obligation to establish or maintain a site council or advisory committee arises only if a district elects to participate in, or continue to participate in, the particular program.

Although *claimants* do not assert that they have been legally compelled to participate in *any* underlying program for which they have sought reimbursement for their compliance costs—and, indeed, their briefing suggests the opposite<sup>13</sup>—the Commission and amicus curiae Education Legal Alliance assert that the school improvement program (a “sunsetting,” but still funded, program that disburses funds for all aspects of school operation and performance; *Ed. Code*, §§ 52012 et seq., 62000, 62000.2, subd. (b), 62002) legally compels school districts to establish site councils without regard to whether the district participates in the underlying funded program to which the site councils apply. The Commission and amici curiae rely upon *Education Code* section 52010, which states in relevant part: “*With the exception of* \*745

*subdivisions (a) and (b) of Section 52011*, the provisions of this chapter shall apply only to school districts and schools which participate in school improvement programs authorized by this article.” (Italics added.) Section 52011, subdivision (b), in turn provides that “each school district shall: [¶] ... [¶] (b) *Adopt policies* to ensure that prior to scheduled phase-in, a school site council as described in *Section 52012* is established at each school site to consider whether or not it wishes the local school to participate in the school improvement program.” (Italics added.)

The Commission and amici curiae read these provisions as requiring all schools and school districts throughout the state to “establish a school site council even if the school [or district] does not participate in the school improvement program.” We disagree. Reasonably construed, the statutes require only that a school district adopt “policies” (i.e., a *plan*) “to ensure” that *if* the district elects to participate in the School Improvement Program, a school site council *will*, “prior to phase-in” of the districtwide program, exist at each school, so that each individual school will be able to decide whether it wishes to participate in the district's program. In other words, the statutes require that districts adopt policies or plans for school site councils—but the statutes do not require that districts adopt councils themselves unless the district first elects to participate in the underlying program.<sup>14</sup>

We therefore conclude that, as to eight of the nine funded programs, the statutory notice and agenda obligations exist and apply to claimants only because they have *elected* to participate in, or continue to participate in, the various underlying funded programs—and hence to incur notice and agenda costs that are a condition of program participation. Accordingly, no reimbursable state mandate exists with regard to any of these programs based upon a theory that such costs were incurred under legal compulsion.<sup>15</sup> \*746

**b.**

The Commission and amicus curiae Education Legal Alliance also assert that the Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (another “sunsetting,” but still funded, program; *Ed. Code*, §§ 52160 et seq., 62000, 62000.2, subd. (d), 62002) legally compels school districts to establish advisory committees, regardless whether the district participates in the underlying funded program to which the advisory committees apply. The Commission and amicus curiae rely upon *Education Code* section 52176's command that each school district with more than 50 pupils of limited

English language proficiency, and each school within that district with more than 20 pupils of such proficiency, “shall establish a districtwide [or individual school site] advisory committee on bilingual education.” (*Id.*, subds. (a) & (b), italics added.)

The Department of Finance responds that because the Chacon-Moscone Bilingual-Bicultural Education program sunsetted in 1987, school districts that have participated in that program since that date have done so not as a matter of legal compulsion, but by their own choice made when they applied for and were granted such program funds.

We note some support for the Department's view. [Education Code section 64000](#) et seq., which governs the funding application process, includes the “sunsetted” Chacon-Moscone Bilingual-Bicultural Education program as one of many optional programs for which a district *may* seek funding. (*Id.*, subd. (a)(4).) But, the Commission argues, another statutory provision suggests that Chacon-Moscone Bilingual-Bicultural Education program advisory committees are mandatory in any event. The Commission notes that section 62002.5 provides that advisory committees “which are in existence pursuant to statutes or regulations as of January 1, 1979, shall continue subsequent to termination of funding for the programs sunsetted by this chapter.” (Italics added.)

We need not, and do not, determine whether claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, or to maintain a related advisory committee. Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, we nevertheless conclude that under the circumstances here presented, [\\*747](#) the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under [article XIII B, section 6](#), because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda-related expenses.

We note that, based upon the evaluations made by the Commission, the costs associated with the notice and agenda requirements at issue in this case appear rather modest.<sup>16</sup> And, even more significantly, we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the

implementation of the underlying funded program to pay the associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. (See [Ed. Code, § 52168](#), subd. (b) [“School districts may claim funds appropriated for purposes of this article for expenditures in, but not limited to, the following categories: [¶] ... [¶] (6) Reasonable district administrative expenses ....”].) We believe it is plain that the costs of complying with program-related notice and agenda requirements qualify as “[r]easonable district administrative expenses.” Therefore, even if we assume for purposes of analysis that school districts have been legally compelled to participate in the funded Chacon-Moscone Bilingual-Bicultural Education program, we view the state's provision of program funding as satisfying, in advance, any reimbursement requirement.

It is conceivable, with regard to some programs, that increased compliance costs imposed by the state might become so great-or funded program grants might become so diminished-that funded program benefits would not cover the compliance costs, or that expenditure of granted program funds on administrative costs might violate a spending limitation set out in applicable regulations or statutes. In those circumstances, a compulsory program participant likely would be able to establish the existence of a reimbursable [\\*748](#) state mandate under [article XIII B, section 6](#). But that certainly is not the situation faced by claimants in this case. At most, claimants, by being compelled to incur notice and agenda compliance costs-and pay those costs from program funds-have suffered a relatively minor diminution of program funds available to them for substantive program purposes. The circumstance that the program funds claimants may have wished to use exclusively for substantive program activities are thereby reduced, does not in itself transform the related costs into a reimbursable state mandate. (See [County of Sonoma, supra](#), 84 Cal.App.4th 1264 [art. XIII B, § 6, provides no right of reimbursement when the state reduces revenue granted to local government].) Nor is there any reason to believe that use of granted program funds to pay the relatively modest costs here at issue would violate any applicable spending limitation.<sup>17</sup>

We therefore conclude that because claimants are and have been free to use funds from the Chacon-Moscone Bilingual-Bicultural Education program to pay required program expenses (including the notice and agenda costs here at issue), claimants are not entitled under [article XIII B, section 6](#), to reimbursement from the state for such expenses.

**B.**

(2a) Claimants contend that even if they have not been *legally compelled* to participate in most of the programs listed in [Education Code section 35147](#), subdivision (b), and hence have not been *legally required* to incur the related notice and agenda costs, they nevertheless have been compelled as a practical matter to participate in those programs and hence to incur such costs. Claimants assert that school districts have “had no true option or choice but to participate in these [underlying education-related] programs. *This absence of a reasonable alternative to participation is a de facto mandate.*” As explained below, on the facts of this case, we disagree. \*749

**1.**

Claimants and amici curiae supporting them, relying upon this court's broad interpretation of the federal mandate provision of [article XIII B, section 9](#),<sup>18</sup> in *City of Sacramento, supra*, 50 Cal.3d 51, 70-76, assert that we should recognize and endorse such a broader construction of [section 6](#) of that article—a construction that does not limit the definition of a reimbursable state mandate to circumstances of *legal compulsion*.

In *City of Sacramento, supra*, 50 Cal.3d 51, we considered whether various federal “incentives” for states to extend unemployment insurance coverage to all public employees constituted a reimbursable state mandate under [article XIII B, section 6](#), or a federal mandate within the meaning of [article XIII B, section 9](#).

We concluded in *City of Sacramento, supra*, 50 Cal.3d 51, that there was no reimbursable state mandate under [article XIII B, section 6](#), because the implementing state legislation did not impose any new or increased “program or service,” or “unique” requirement, upon local entities. (*City of Sacramento*, at pp. 66-70.)

Turning to the question whether the state legislation constituted a “federal mandate” under [article XIII B, section 9](#), we acknowledged in *City of Sacramento, supra*, 50 Cal.3d 51, that there was no legal compulsion requiring the states to participate in the federal plan to extend unemployment insurance coverage to all public employees. We nevertheless found that the costs related to the program constituted a federal mandate, for purposes of [article XIII B, section 9](#). Our opinion concluded that because the financial consequences

to the state and its residents of failing to participate in the federal plan were so onerous and punitive—we characterized the consequences as amounting to “certain and severe federal penalties” including “double ... taxation” and other “draconian” measures (*City of Sacramento*, at p. 74)—as a practical matter, for purposes of [article XIII B, section 9](#), the state was mandated to participate in the federal plan to extend unemployment insurance coverage. \*750

Claimants, echoing the reasoning of the Court of Appeal below, assert that because this court in *City of Sacramento, supra*, 50 Cal.3d 51, broadly construed the term “federal mandate”—to include not only the situation in which a state or local entity is itself legally compelled to participate in a program and thereby incur costs, but also the situation in which the governmental entity's participation in the federal program is the coerced result of severe penalties that would be imposed for noncompliance—consistency requires that we afford a similarly broad construction to the concept of a state mandate. In other words, claimants argue, the word “mandate,” used in two separate sections of [article XIII B](#), should not be given two different meanings.

The Department and the Commission disagree. They assert that, to begin with, a finding of a *federal mandate* under [section 9 of article XIII B](#) has a wholly different purpose and effect as compared with a finding of a *state mandate* under [section 6](#) of that article. The Department and the Commission argue that although a finding of a state mandate may result in reimbursement from the state to a local entity for costs incurred by the local entity, expenditures made in order to comply with a federal mandate are excluded from the constitutional spending cap imposed by [article XIII B](#) upon any affected state or local entity, because such expenditures are not considered to be an exercise of the state or local authority's discretionary spending authority.

Moreover, the Department and the Commission assert, our conclusion in *City of Sacramento, supra*, 50 Cal.3d 51, regarding the proper construction of [article XIII B, section 9](#), relied upon “crucial facts” (*City of Sacramento*, at p. 73) that do not pertain to the wholly separate issue that we face here—the proper interpretation of [article XIII B, section 6](#). They observe that, as we explained in *City of Sacramento*, when [article XIII B](#) was enacted: “First, the power of the federal government to impose its direct regulatory will on state and local agencies was *then* sharply in doubt.<sup>19</sup> Second, in conformity with this principle, the vast bulk of cost-producing federal influence on government

at the state and local levels was by inducement or incentive rather than direct [legal] compulsion. That remains so to this day. [¶] Thus, if [article XIII B](#)'s reference to 'federal mandates' were limited to strict legal compulsion by the federal government, it would have been largely superfluous. It is well settled that 'constitutional ... enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. [Citations.] ...' (*Amador Valley* \*751 *Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) While '[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words[,] [citation] [, t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]' (*Ibid.*)" (*City of Sacramento, supra*, 50 Cal.3d 51, 73, fns. omitted.)

The Department of Finance and the Commission argue that these factors have no bearing upon the proper interpretation of what constitutes a state mandate under [article XIII B, section 6](#). (3)(See fn. 20) They assert that, unlike the federal government, which for a time was severely restricted in its ability to directly impose legal requirements upon the states (see *City of Sacramento, supra*, 50 Cal.3d 51, 71-73), the State of California has suffered no such restriction, vis-a-vis local government entities, except in matters involving purely local affairs.<sup>20</sup> (2b) Accordingly, the Department and the Commission argue, in contrast with the situation we faced when construing [article XIII B, section 9](#), we would not render superfluous the restriction in [section 6](#) of that article, were we narrowly to interpret its term "mandate" to include only programs in which local entities are legally compelled to participate.

We find it unnecessary to resolve whether our reasoning in *City of Sacramento, supra*, 50 Cal.3d 51, applies with regard to the proper interpretation of the term "state mandate" in [section 6 of article XIII B](#). Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento, supra*, 50 Cal.3d 51, applies equally in the context of [article XIII, section 6](#), for reasons set out below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe ... penalties" such as "double ... taxation" and other "draconian" consequences (*City of Sacramento, supra*, 50 Cal.3d at p. 74), and hence have not been "mandated," under [article XIII, section 6](#), to incur increased costs.

## 2.

(4) As we observed in *County of San Diego, supra*, 15 Cal.4th 68, 81, [article XIII B, section 6](#)'s "purpose is to preclude the state from shifting \*752 financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities." (2c) In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under [article XIII B, section 6](#), properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.

As noted, claimants argue that they have had "no true option or choice" but to participate in the various programs here at issue, and hence to incur the various costs of compliance, and that "the absence of a reasonable alternative to participation is a de facto [reimbursable state] mandate." In the same vein, amici curiae on behalf of claimants emphasize that as a practical matter, many school districts depend upon categorical funding for various programs. Amicus curiae California State Association of Counties asks us to interpret [article XIII B, section 6](#), as providing state reimbursement for programs that are "indirectly state mandated." (Italics added.) Amicus curiae Education Legal Alliance goes so far as to assert that unless we recognize a right to reimbursement for costs such as those here at issue, "California schools could be forced to [forgo] participation in important categorical programs that supply necessary financial and educational support to those segments of the student population that need the most assistance. Alternatively, California schools could be forced to cut other student programs or services to fund these procedural requirements."

The record in the case before us does not support claimants' characterization of the circumstances in which they have been forced to operate, and provides no basis for resolving the accuracy of amici curiae's warnings and predictions. Indeed, we are skeptical of the assertions of claimants and amici curiae.

As observed *ante* (fn. 16), the costs associated with the notice and agenda requirements at issue in this case appear rather modest. Moreover, the parties have not cited, nor have we found, anything in the governing statutes or regulations, or in the record, to suggest that a school district is precluded from using a portion of the program funds obtained from the state to pay associated notice and agenda costs. As noted above, under the Chacon-Moscone Bilingual-Bicultural Education program (*Ed. Code, § 52168*, subd. (b)(6)), such authority

has been granted. As to three of the remaining programs here at issue, such authority also is explicit, or at least strongly implied. (See [20 U.S.C. § 7425\(d\)](#) [federal Indian Education Program]; [\\*753 Ed. Code, §§ 63000](#), subds. (c), (g), 63001 [school improvement program and McAtteer Act].) We do not perceive any reason why the Legislature would contemplate a different rule for any of the other programs here at issue, and claimants have advanced no such reason.<sup>21</sup>

As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the notice and agenda requirements, or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation—in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits.

In essence, claimants assert that their participation in the education-related programs here at issue is so beneficial that, as a practical matter, they feel they must participate in the programs, accept program funds, and—by virtue of [Government Code section 54952](#) and [Education Code section 35147](#)—incur expenses necessary to comply with the procedural conditions imposed on program participants. Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of [\\*754](#) continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstance that the Legislature has determined that the

requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary.<sup>22</sup> (See *County of Sonoma, supra*, [84 Cal.App.4th 1264](#) [art. XIII B, § 6, provides no right of reimbursement when the state *reduces* revenue granted to local government].) We reject the suggestion, implicit in claimants' argument, that the state cannot legally provide school districts with funds for voluntary programs, and then effectively reduce that funding grant by requiring school districts to incur expenses in order to meet conditions of program participation.

In sum, the circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants' phrasing, a “de facto” reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento, supra*, [50 Cal.3d 51](#), a claimant that elects to discontinue participation in one of the programs here at issue does not face “certain and severe ... penalties” such as “double ... taxation” or other “draconian” consequences (*id.*, at p. 74), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of [article XIII B, section 6](#).

#### IV

For the reasons stated, we conclude that claimants have failed to establish that they are entitled to reimbursement under [article XIII B, section 6, of the California Constitution](#), with regard to any of the program costs here at issue. [\\*755](#)

The judgment of the Court of Appeal is reversed.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred. [\\*756](#)

#### Footnotes

- [Government Code section 54952](#), a provision of the Brown Act, provides in relevant part: “As used in this chapter, 'legislative body' means: [¶] (a) The governing body of a local agency or any other local body created by state or federal statute. [¶] (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body....”
- [Education Code section 35147](#) provides in relevant part: “(a) Except as specified in this section, any meeting of the councils or committees specified in subdivision (b) is exempt from ... the Ralph M. Brown Act.... [¶] (b) The councils and schoolsite advisory committees established pursuant to Sections 52012, 52065, 52176, and 52852, subdivision (b) of Section 54425, Sections 54444.2, 54724, and 62002.5, and committees formed pursuant to Section 11503 or [Section 2604 of Title 25 of the United States Code](#), are subject to this section. [¶] (c) Any meeting held by a council or committee

specified in subdivision (b) shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee. Notice of the meeting shall be posted at the schoolsite, or other appropriate place accessible to the public, at least 72 hours before the time set for the meeting. The notice shall specify the date, time, and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon. The council or committee may not take any action on any item of business unless that item appeared on the posted agenda or unless the council or committee members present, by unanimous vote, find that there is a need to take immediate action and that the need for action came to the attention of the council or committee subsequent to the posting of the agenda....”

The nine school site councils and advisory committees specified in subdivision (b), above, were established as part of the following programs: The school improvement program (Ed. Code, § 52010 et seq.; see *id.*, §§ 62000, 62000.2, subd. (b), 62002) [a general program that disburses funds for all aspects of school operation and performance]; the American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); the Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (Ed. Code, § 52160 et seq.; see *id.*, 62000, 62000.2, subd. (d)); the School-Based Program Coordination Act (Ed. Code, § 52850 et seq. [a program designed to coordinate various categorical aid programs]); the McAteer Act (Ed. Code, § 54400 et seq. [various compensatory education programs for “disadvantaged minors”]); the Migrant Children Education Programs (Ed. Code, § 54440 et seq.); the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act (Ed. Code, § 54720 et seq. [a program designed to address truancy and dropout issues]); the Programs to Encourage Parental Involvement (Ed. Code, § 11500 et seq.); and the federal Indian Education Program (20 U.S.C. § 7421 et seq. [former 25 U.S.C. § 2601 et seq.].)

3 In December 1994, Santa Clara County filed the first test claim, asserting that [Government Code section 54952](#) imposed a reimbursable state mandate. In December 1995, Kern High School District filed a test claim asserting that [Education Code section 35147](#) imposes a reimbursable state mandate. These two claims were consolidated, and San Diego Unified School District was added as a coclaimant.

4 The trial court stated: “Two primary issues are raised in this matter. The first issue is whether the 1993 amendments to the Brown Act [that is, enactment of [Government Code section 54952](#)] and the 1994 enactment of ... [[Education Code section 35147](#)] mandate a new program or higher level of service. The Court concludes that they do. The second issue is whether a reimbursable state mandate is created only when an advisory council or committee which is subject to the Brown Act is required by state law. The Court concludes that it is not.”

5 The Court of Appeal also concluded that [Government Code section 54952](#) and [Education Code section 35147](#) establish a “higher level of service” under [article XIII B, section 6](#). We need not and do not review that determination here, and express no view on the validity of that conclusion.

6 As we observed in [City of Sacramento, supra, 50 Cal.3d at page 70](#), “extension of the subvention requirements to costs ‘incidentally’ imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it would subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation would, in turn, cut into the state’s [article XIII B](#) spending limit. ([[Art. XIII B,](#)] § 8, subd. (a).)” We reaffirmed that “nothing in the language, history, or apparent purpose of [article XIII B](#) suggested such far-reaching limitations on legitimate state power.” (50 Cal.3d at p. 70.)

7 Revised section 2207.5 provided that “ [c]osts mandated by the state’ means any increased costs which a school district is required to incur as a result of ... [¶] ... [¶] (h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1978, which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service *if the school districts have no reasonable alternatives other than to continue the optional program.*” (Stats. 1980, ch. 1256, § 5, pp. 4248-4249, eff. July 1, 1981, italics added.)

8 The court in [City of Merced](#) asserted: “The Report of the Assembly Revenue and Taxation Committee ... includes a statement: ‘*SB 90* further defines “mandated costs” in Sections 4 and 5 to include the following: [¶] ... [¶] e. Where a statute or executive order adds *new requirements to an existing optional program*, which increases costs if the local agency has no reasonable alternative than to continue that optional program.’ (Rep., p. 1, italics in original.) [¶] Additionally, the Ways and Means Committee’s Staff Analysis ... notes that Senate Bill No. 90: ‘Expands the definition of *local* reimbursable costs mandated and paid by the state to include: [¶] ... [¶] e. Statutes or executive orders adding *new requirements to an existing optional program*, which increases costs if the local agency has no reasonable alternative than to continue that optional program.’ (P. 2, italics in original.)” ([City of Merced, supra, 153 Cal.App.3d at p. 784.](#))

9 We need not, and do not, decide whether the court in [City of Merced, supra, 153 Cal.App.3d 777](#), correctly characterized the statutory history of the 1981 amendments to the Revenue and Taxation Code.

- 10 [Government Code section 17514](#) reads: “ ‘Costs mandated by the state’ means any increased costs which a local agency or school district is *required* to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of [Section 6 of Article XIII B of the California Constitution](#).” (Italics added.)
- 11 Although, as described immediately below (in pt. III.A.2.), the Commission attempts to defend on other grounds its determination below in favor of claimants, the Commission strongly disputes the Court of Appeal's broad interpretation of state mandate as encompassing circumstances in which a local entity is not “ordered or commanded” to perform a task that in turn requires it to incur additional costs.
- 12 The Commission further attempts to distinguish [City of Merced, supra, 153 Cal.App.3d 777](#), by observing that the eminent domain statute at issue in that case made clear, in the *same* statute that imposed the requirement that an entity employing eminent domain also compensate for lost business goodwill, the discretionary nature of the decision whether to acquire property by purchase or instead by eminent domain. The Commission argues that no such express statement concerning local government discretion is set out in the statutes here at issue. As we explain *post*, part III.A.3.a., however, the underlying program statutes at issue in this case (with one possible exception—see *post*, pt. III.A.3.b.) make it clear that school districts retain the discretion not to participate in any given underlying program—and, as we explain *post*, footnote 22, the circumstance that the notice and agenda requirements of these elective programs were enacted *after* claimants first chose to participate in the programs does not make claimants' choice to continue to participate in those programs any less voluntary.
- 13 Claimants at one point characterize themselves as having “*decided* to participate in the programs listed in [Education Code section 35147](#).” (Italics in added.)
- 14 Amicus curiae California School Boards Association suggests that provisions of two other programs—the School-Based Program Coordination Act ([Ed. Code, § 52850](#) et seq.) and the School-Based Pupil Motivation and Maintenance Program and Dropout Recovery Act ([Ed. Code, § 54720](#) et seq.)—require that site councils be established, whether or not the school district participates in the underlying program. In both instances, the statutes make it clear that “prior to a school beginning to develop a [program] plan,” the district first must establish a local school site council that in turn will “consider whether or not it wishes the local school to participate in the” program. Amicus curiae misreads the statutes; in both instances, the statutes make it clear that these requirements apply “only to school districts and schools *which participate in*” the respective programs (see [Ed. Code, §§ 52850, 54722](#), italics added), and each statutory scheme provides that school site councils “shall be established at each school *which participates in*” the program. (*Id.*, [§§ 52852, 54722](#), italics added.)
- 15 In this case, we have no occasion to decide whether a reimbursable state mandate would arise in a situation in which a local entity voluntarily has elected to participate in a program but also has committed to continue its participation for a specified number of years, and the state imposes additional requirements at a time when the local entity is not free to end its participation.
- 16 Costs of compliance with the notice and agenda requirements have been estimated as amounting to approximately \$90 per meeting for the 1994-1995 fiscal year, and incrementally larger amounts in subsequent years, up to \$106 per meeting for the 2000-2001 fiscal year, for each committee or advisory council. (See State Controller, State Mandated Costs Claiming Instrns. No. 2001-08, School Site Councils and Brown Act Reform (June 4, 2001), Parameters and Guidelines (Mar. 29, 2001) [and implementing forms].) Under these formulae, a district that has 10 schools, each with one council or advisory committee that meets 10 times a year, would be forced to incur approximately \$9,000 to \$10,000 in costs to comply with statutory notice and agenda requirements. Presumably, such costs are minimal relative to the funds allocated by the state to the school district under these programs. (We hereby grant the Commission's request that we take judicial notice of these and related documents, and of the Commission's December 13, 2001 Statewide Cost Estimate for reimbursement to school districts of notice and agenda-related expenses.)
- 17 With regard to the Chacon-Moscone Bilingual-Bicultural Education program, claimants assert that “[s]tate regulations place a ceiling on the amount of program funds that may be expended for indirect costs at three percent of the district's funding ....” (See [Cal. Code Regs., tit. 5, §§ 3900](#), subd. (g) & 3947, subd. (a).) As the Department observes, applicable statutory provisions appear to set the limit for such expenses for the *same* program at no more than 15 percent of granted program funds. (See [Ed. Code, §§ 63000](#), subd. (d), 63001.) Even assuming, for purposes of analysis, that the regulation, and not the statute, applies with regard to this program, it seems clear that the notice and agenda costs here at issue fall far below 3 percent of granted program funds. Indeed, claimants concede: “The notice and agenda costs at issue are administrative costs that appear to fall within [the regulatory] provisions.”



- 18 That provision states: " 'Appropriations subject to limitation' for each entity of government do not include: [¶] ... [¶] (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."
- 19 See discussion in [City of Sacramento, supra](#), 50 Cal.3d at pages 71-73.
- 20 Unlike the federal-state relationship, sovereignty is not an issue between state and local governments. Claimant school districts are agencies of the state, and not separate or distinct political entities. (See [California Teachers Assn. v. Hayes \(1992\) 5 Cal.App.4th 1513, 1524 \[7 Cal.Rptr.2d 699\]](#).)
- 21 Nor is there any reason to believe that expenditure of granted program funds on the notice and agenda costs at issue would violate any spending limitation set out in applicable regulations or statutes. Claimants assert that with regard to the school improvement programs, state regulations ([Cal. Code Regs., tit. 5, §§ 3900](#), subd. (b), 3947, subd. (a)) limit spending on administrative expenses to no more than 3 percent of granted program funds. As the Department observes, applicable statutory provisions appear to set the limit for such expenses for the *same* program at no more than 15 percent of granted program funds. (See [Ed. Code, §§ 63000](#), subd. (c), 63001.) But even assuming, for purposes of analysis, that the regulations apply with regard to this program, claimants have made no showing that the notice and agenda costs here at issue exceed 3 percent of granted program funds. As noted *ante*, at page 732, statewide program grants for the school improvement programs alone amounted to approximately \$394 million in fiscal year 1998-1999. According to the Commission, statewide notice and agenda costs for *all nine* of the programs here at issue amounted to only \$5.2 million during that same period. (See *Com. on State Mandates, Adopted Statewide Cost Estimate*, Dec. 13, 2001, p. 1.) Similarly, claimants have not demonstrated that the notice and agenda costs here at issue exceed the administrative costs spending limitations set for the federal Indian Education Program (see [20 U.S.C. § 7425\(d\)](#) [5 percent limitation]) and for the McAteer Act's "compensatory education programs" (see [Ed. Code, §§ 63000](#), subd. (g), 63001 [15 percent limitation].)
- 22 Claimants assert that the notice and agenda requirements were imposed for the first time by [Government Code section 54952](#) and [Education Code section 35147](#) in the mid-1990's—"after the school districts decided to participate in the programs listed in [Education Code section 35147](#)." Even if we assume, contrary to the opposing position of the Department of Finance, that claimants first were subjected to notice and agenda requirements only after their respective school districts elected to participate in the programs, a school district's *continued* participation in the programs would be no less voluntary. As noted above, school districts have been, and remain, legally free to decline to continue to participate in the eight programs here at issue.

170 Cal.App.4th 1355  
Court of Appeal, Third District, California.

DEPARTMENT OF FINANCE,  
Plaintiff and Appellant,

v.

COMMISSION ON STATE MANDATES,  
Defendant and Respondent.

No. C056833.

Feb. 6, 2009.

### Synopsis

**Background:** State Department of Finance petitioned for a writ of administrative mandamus to overturn decision of Commission on State Mandates that the Public Safety Officers Procedural Bill of Rights Act (POBRA) constituted a state-mandated program for school districts and special districts that employed peace officers. The Superior Court, Sacramento County, No. 07CS00079, [Lloyd G. Connelly, J.](#), denied writ. Department of Finance appealed.

**[Holding:]** The Court of Appeal, [Butz, J.](#), held that POBRA did not constitute state-mandated program for school districts and special districts that was reimbursable under state constitutional provision.

Reversed.

[Scotland, P.J.](#), concurred and filed opinion.

West Headnotes (5)

**[1] States** 🔑 State expenses and charges and statutory liabilities

If a local government participates voluntarily, i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement under state constitution. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

1 Cases that cite this headnote

**[2] States** 🔑 State expenses and charges and statutory liabilities

As to cities, counties, and such districts that have as an ordinary, principal, and mandatory duty the provision of policing and firefighting services within their territorial jurisdiction, new statutory duties that increase the costs of police and firefighter services are prima facie reimbursable under state constitutional provision requiring state to bear the costs of new mandates on local government; this is true, notwithstanding a potential argument that such a local government's decision is voluntary in part, as to the number of personnel it hires. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[3] Education** 🔑 Right to instruction in general

A school district has an analogous basic and mandatory duty to educate students.

**[4] States** 🔑 State expenses and charges and statutory liabilities

Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs attendant to those actions cannot fairly and reasonably be characterized as voluntary for purposes of determining if state reimbursement under state constitutional provision requiring state to bear the costs of new mandates on local government. [West's Ann.Cal. Const. Art. 13B, § 6.](#)

**[5] States** 🔑 State expenses and charges and statutory liabilities

Public Safety Officers Procedural Bill of Rights Act (POBRA) did not constitute a state-mandated program for school districts and special districts that was reimbursable under state constitutional provision requiring state to bear the costs of new mandates on local government; the districts were permitted by statute, but not required, to employ peace officers

who supplemented the general law enforcement units of cities and counties. [West's Ann.Cal. Const. Art. 13B, § 6](#); [West's Ann.Cal.Gov.Code § 3300 et seq.](#)

See *Cal. Jur. 3d, Schools, § 8*; *Cal. Jur. 3d, State of California, § 102*; 9 *Witkin, Summary of Cal. Law (10th ed. 2005) Tax, §§ 120, 121.*

#### 1 Cases that cite this headnote

#### Attorneys and Law Firms

**\*\*94** Edmund G. Brown, Jr., Attorney General, [Christopher E. Krueger](#), Assistant Attorney General, [Douglas J. Woods](#), Jill Bowers and Jack Woodside, Deputy Attorneys General, for Plaintiff and Appellant.

[Camille Shelton](#), Chief Legal Counsel, for Defendant and Respondent.

#### Opinion

[BUTZ, J.](#)

**\*1357** [Article XIII B, section 6 of the California Constitution](#)<sup>1</sup> requires the state to **\*\*95** bear the costs of new mandates on local government. However, if a local government entity voluntarily undertakes the costs, they do not constitute a reimbursable state mandate. (See, e.g., *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 884–887, 16 Cal.Rptr.3d 466, 94 P.3d 589 (*San Diego Unified School Dist.*); **\*1358** *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 742–745, 134 Cal.Rptr.2d 237, 68 P.3d 1203 (*Kern High School Dist.*)) The Public Safety Officers Procedural Bill of Rights Act (POBRA),<sup>2</sup> initially enacted in 1976 (Stats.1976, ch. 465, § 1, p. 1202), requires state and local government agencies that employ peace officers to provide them with procedural rights and protections when they are subjected to investigation, interrogation or discipline. ([Gov.Code, § 3300 et seq.](#))

In this case plaintiff state Department of Finance (Finance) petitioned for a writ of administrative mandamus to overturn the decision of defendant Commission on State Mandates (the Commission) that POBRA constitutes a state-mandated program for school districts and special districts that employ

peace officers. The superior court denied the petition. We decide POBRA is not a reimbursable mandate as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties. The judgment denying Finance's petition for writ of administrative mandamus is reversed.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 1995, the City of Sacramento filed a test claim with the Commission pursuant to the versions of [Government Code sections 17521 and 17560](#) then in effect, seeking reimbursement under [article XIII B, section 6](#), of the costs incurred in complying with the POBRA procedural requirements. In 1999, pursuant to the version of [Government Code section 17551](#) then in effect, the Commission held a public hearing on the test claim and issued a statement of decision determining that certain POBRA procedural protections exceeded federal and state constitutional due process requirements and imposed reimbursable state-mandated costs upon cities, counties, school districts and special districts under [article XIII B, section 6](#). In 2000, pursuant to [Government Code section 17557](#), the Commission adopted parameters and guidelines for the reimbursement of the costs incurred by those local government entities in providing the POBRA procedural protections determined to be state-mandated.

In 2005, the Legislature enacted [Government Code section 3313](#), directing the Commission to “review its statement of decision regarding the [POBRA] test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with the California Supreme Court Decision in *San Diego Unified School Dist. [v. Commission of State Mandates]* (2004) 33 Cal.4th 859[, 16 Cal.Rptr.3d 466, 94 P.3d 589] and other applicable court decisions.” ([Gov.Code, § 3313](#), added by Stat.2005, ch. 72, § 6, eff. July 19, 2005.)

**\*\*96** **\*1359** Pursuant to [Government Code section 3313](#), on April 26, 2006, the Commission held a public hearing. The only pertinent factual “testimony” at the hearing was an assertion that most school districts do not employ peace officers: “Of the approximately 1,200 local educational agencies receiving state school safety grant funding, only approximately 140 of those reported using the funding for hiring peace officers.” After the matter was submitted, the

Commission adopted a statement of decision reconsidering its 1999 statement of decision. The Commission decided that POBRA imposes, consistent with *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589, a partly, reimbursable state-mandated program on cities, counties, school districts, and special districts identified in [Government Code section 3301](#) that employ peace officers. As to the school districts and special districts, the Commission reasoned as follows:

“For the reasons below, the Commission finds that the [POBRA] legislation constitutes a state-mandated program for school districts and the special districts identified in [Government Code section 3301](#) that employ peace officers.

“Under a strict application of the *City of Merced [v. State of California]* (1984) 153 Cal.App.3d 777, 200 Cal.Rptr. 642] case, the requirements of the [POBRA] legislation would not constitute a state-mandated program within the meaning of [article XIII B, section 6](#) for school districts and the special districts that employ peace officers ‘for the simple reason’ that the ability of the school district or special district to decide whether to employ peace officers ‘could control or perhaps even avoid the extra costs’ of the [POBRA] legislation. But here, the Legislature has declared that, as a matter of statewide concern, it is necessary for [POBRA] to apply to all public safety officers, as defined in the legislation. As previously indicated, the California Supreme Court [in *Baggett v. Gates* (1982) 32 Cal.3d 128, 139–141, 185 Cal.Rptr. 232, 649 P.2d 874] concluded that the peace officers identified in [Government Code section 3301](#) of the [POBRA] legislation provide an ‘essential service’ to the public and that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the state.

“In addition, in 2001, the Supreme Court [in *In re Randy G.* (2001) 26 Cal.4th 556, 562–563, 110 Cal.Rptr.2d 516, 28 P.3d 239] determined that school districts, apart from education, have an ‘obligation to protect pupils from other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.’ The court further held that California fulfills its obligations under the safe schools provision of the Constitution ([Cal. Const., art. I, § 28, \\*1360](#) subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline. The arguments by the school districts

regarding the safe schools provision of the Constitution caused the Supreme Court in *San Diego Unified [School Dist.]* to question the application of the *City of Merced* case.

“[ ] ... [ ]

“Thus, as indicated by the Supreme Court in *San Diego Unified [School Dist., supra]*, 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589], a finding that the [POBRA] legislation does not constitute a state-mandated program for school districts and special districts identified in [Government Code section 3301](#) would conflict with past decisions like *Carmel Valley [Fire Protection \*\*97 Dist. v. State]* (1987) 190 Cal.App.3d 521, 537, 234 Cal.Rptr. 795], where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that ‘[p]olice and fire protection are two of the most essential and basic functions of local government.’ The constitutional definition of ‘local government’ for purposes of [article XIII B, section 6](#) includes school districts and special districts. ([Cal. Const., art. XIII B, § 8](#)[, subd. (d) ].)

“Accordingly, the Commission finds that [POBRA] constitutes a state-mandated program for school districts that employ peace officers. The Commission further finds that [POBRA] constitutes a state-mandated program for the special districts identified in [Government Code section 3301](#). These districts include police protection districts, harbor or port police, transit police, peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.” (Fns. omitted.)

In January 2007, Finance petitioned for a writ of administrative mandamus to overturn the decision of the Commission as to school districts and special districts permitted but not required to hire peace officers. The Commission answered, opposing the petition. After oral argument the matter was submitted. Thereafter, on July 3, 2007, the trial court issued its ruling, denying the petition on the following essential reasoning:

“As a practical matter, the establishment of a police department and the employment of peace officers by school districts, community college districts and other local agencies is not an optional program: when the districts and agencies decide to exercise their statutory authority to employ peace officers, they do not have a genuine choice of alternative measures that meet their agency-specific needs for security

and law enforcement, such as a large urban school district's need for security and police officers to supplement city \*1361 police or a municipal water district's need for park rangers with the authority and powers conferred upon peace officers to issue citations and make arrests in district recreational facilities. ( [Pen.] Code, § 830.34, *subd. (d)* [subd. (d) added by] & *Wat.Code*, [§ 71341.5, added by] *Stats.2004*, ch. 799, [§§ 1 & 2]; [see] *Sen. Com. on Public Safety*, analysis of *Assem. Bill No. 1119* [ (2004 Reg. Sess.) ] [granting 'essential authority' to municipal water districts to employ park rangers with the powers conferred on peace officers by *Pen.Code*, § 830.34, *subd. (d)*,] [italics added].) Rather, the specific security and law enforcement needs of the districts and agencies compel their decisions to employ peace officers and prevent them from controlling or avoiding the costs of providing [POBRA] procedural protections, much as student misconduct that jeopardizes the safe, secure and peaceful learning environment for other students may provide the practical compulsion for a school district to pursue discretionary expulsion proceedings and subject the district to the costs of mandated hearing procedures. (See *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at p. 887, fn. 22, 16 Cal.Rptr.3d 466, 94 P.3d 589.) In marked contrast, the city in *City of Merced* had options to acquire property by eminent domain, by purchase or by other means and was not forced to proceed by eminent domain with its required payment for business goodwill, while the school districts in *Kern High School Dist.* could continue to operate and educate their students without participating in specified educational grant programs and without incurring the mandatory notice and agenda costs associated with the grant programs.

\*\*98 “To the extent that school districts, community college districts and other local government agencies do exercise discretion in deciding to employ peace officers identified in *Government Code* section 3301, the decisions do not involve the type of discretion that would or should preclude reimbursement of state-mandated program costs under [article XIII B,] section 6. When the districts and agencies decide to use their specific statutory authorities and powers to employ peace officers, they determine how to use the authorities and powers to fulfill their existing obligations and functions, not to undertake new program activities. If such discretionary decisions by the districts and agencies are found to foreclose the districts and agencies from obtaining reimbursement of the [POBRA] costs triggered by their employment of peace officers, the state would be able to shift financial responsibility for carrying out new state-mandated program activities to the districts and agencies,

in contravention of the intent underlying [article XIII B,] section 6 and [Government Code] section 17514. (*San Diego Unified School Dist.*, *supra*, 33 Cal.4th at pp. 887–888[ 16 Cal.Rptr.3d 466, 94 P.3d 589].) Similarly, as the California Supreme Court observed in *San Diego Unified School Dist.*, the Court of Appeal in *Carmel Valley [Fire Protection Dist. v. State]*, *supra*, 190 Cal.App.3d 521[ 234 Cal.Rptr. 795], apparently did not contemplate that discretionary decisions by local fire protection agencies regarding the number of firefighters the agencies needed to employ \*1362 to fulfill their essential fire-protection functions would foreclose reimbursement of the costs incurred by the agencies for state-mandated protective clothing and safety equipment; such foreclosure of reimbursement, based on the agencies' discretion to limit the number of firefighters they employed and thereby control or even avoid the mandated costs, would contravene the intent underlying [article XIII B,] section 6 and [Government Code] section 17514. ( [*San Diego Unified School Dist.*, *supra*,] 33 Cal.4th at pp. 887–888[ 16 Cal.Rptr.3d 466, 94 P.3d 589].)” (Fn. omitted.)

Finance appeals from the judgment denying the petition.

## DISCUSSION

Finance contends that the trial court erred in upholding the Commission's determination that, as to districts not compelled by statute to employ peace officers, the POBRA requirements are a reimbursable state mandate.<sup>3</sup> Finance argues that the judgment rests on the insupportable legal conclusion that these districts are, as a practical matter, compelled to exercise their authority to hire peace officers.<sup>4</sup> We agree.

### I. Case Law on Incurring Costs Voluntarily

The issue here principally turns on three leading opinions, commencing with \*\*99 *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 200 Cal.Rptr. 642 (*City of Merced*). *City of Merced* holds that an amendment of the eminent domain law requiring compensation for business goodwill is not a reimbursable mandate under former *Revenue and Taxation Code* section 2231, the antecedent of article XIII B, section 6. (*City of Merced*, *supra*, 153 Cal.App.3d at p. 783, 200 Cal.Rptr. 642.) The *City of Merced* rationale is that because the city was not required to obtain property by eminent domain, the program permitting

use of that power was voluntary, and the requirement of compensation for business goodwill accordingly was not a mandate. “[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of **\*1363** eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.” (*Ibid.*)

*City of Merced* is critiqued in the second case of the triad, *Kern High School Dist.*, *supra*, 30 Cal.4th at pages 737–740, 134 Cal.Rptr.2d 237, 68 P.3d 1203. In *Kern High School Dist.*, the Commission decided that two statutes requiring school site councils and advisory committees for certain educational programs to provide notice of meetings and to post agendas for those meetings constituted a reimbursable state mandate under [article XIII B, section 6](#). The Supreme Court held that the statutes do not constitute a reimbursable state mandate, as districts were neither legally compelled nor as a practical matter compelled to participate in the programs. (*Id.* at pp. 745, 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

In *Kern High School Dist.*, the Department of Finance asserted in its brief that based upon the language of [article XIII B, section 6](#), and on the *City of Merced*, “a reimbursable state mandate arises only if a local entity is ‘required’ or ‘commanded’—that is, legally compelled—to participate in a program (or to provide a service) that, in turn, leads unavoidably to increasing the costs incurred by the entity.” (*Kern High School Dist.*, *supra*, 30 Cal.4th at p. 741, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) The Supreme Court said, “[T]he core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate....” (*Id.* at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) The high court decided that, with one possible exception, the programs in issue were not legally compelled and that the possible exception was not a mandate because the state supplied sufficient funding to cover the additional costs. (*Id.* at pp. 743–748, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

The reimbursable mandate proponents argued that the legal compulsion standard was too narrow and that they should also be reimbursed because they had been compelled “as a *practical matter*” to participate in the programs. (*Kern High*

*School Dist.*, *supra*, 30 Cal.4th at p. 731, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) The Supreme Court summarized its response to that claim as follows: “Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program—claimants here faced no such practical compulsion. Instead, although claimants argue that they have had ‘no true option or choice’ other than to **\*\*100** participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have **\*1364** found the benefits of various funded programs ‘too good to refuse’—even though, as a condition of program participation, they have been forced to incur some costs. On the facts presented, the cost of compliance with conditions of participation in these funded programs does not amount to a reimbursable state mandate. (*Ibid.*)

“In sum, the circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants’ phrasing, a ‘de facto’ reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento [v. State of California (1990)]* 50 Cal.3d 51[, 266 Cal.Rptr. 139, 785 P.2d 522], a claimant that elects to discontinue participation in one of the programs here at issue does not face ‘certain and severe ... penalties’ such as ‘double ... taxation’ or other ‘draconian’ consequences (*id.* at p. 74[, 266 Cal.Rptr. 139, 785 P.2d 522] ), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of [article XIII B, section 6](#).” (*Kern High School Dist.*, *supra*, 30 Cal.4th at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

The last case of the triad that governs this case is *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589. In *San Diego Unified School Dist.*, the key issue was whether state requirements for expulsion hearings, not compelled by state criteria for expulsion and thus in a sense discretionary, were a reimbursable mandate. The holding did not reach that issue, as the court decided the costs were attributable to federal due process requirements. (*Id.* at pp. 888–890, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Nonetheless, the Supreme Court discussed at length the reach of *City of Merced’s* “voluntary” rationale, and rejected extending it whenever some element of discretion in incurring the cost

existed, e.g., in deciding how many firefighters to hire into a fire department. (*San Diego Unified School Dist.*, at pp. 886–888, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

“The Department and the Commission argue ... that any right to reimbursement for hearing costs triggered by discretionary expulsions—even costs limited to those procedures that assertedly exceed federal due process hearing requirements—is foreclosed by virtue of the circumstance that when a school pursues a discretionary expulsion, it is not acting under compulsion of any law but instead is exercising a choice. In support, the Department and the Commission rely upon *Kern High School Dist.*, *supra*, 30 Cal.4th 727[, 134 Cal.Rptr.2d 237, 68 P.3d 1203], and *City of Merced*[, *supra*,] 153 Cal.App.3d 777[, 200 Cal.Rptr. 642].” (*San Diego Unified School Dist.*, *supra*, 33 Cal.4th at p. 885, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

The Supreme Court went on to state, in *San Diego Unified School Dist.*:

“The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of \*1365 *City of Merced*, *supra*, 153 Cal.App.3d 777[, 200 Cal.Rptr. 642], should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist.*, *supra*, 30 Cal.4th 727[, 134 Cal.Rptr.2d 237, 68 P.3d 1203]. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program.

\*\*101 “Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley [Fire Protection Dist. v. State]*, *supra*, 190 Cal.App.3d 521[, 234 Cal.Rptr. 795], an executive order requiring that county

firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.* at pp. 537–538[, 234 Cal.Rptr. 795].) The court in *Carmel Valley [Fire Protection Dist. v. State]* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced*, *supra*, 153 Cal.App.3d 777[, 200 Cal.Rptr. 642], such costs would not be reimbursable for the simple reason that the local agency’s decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.” (*San Diego Unified School Dist.*, *supra*, 33 Cal.4th at pp. 887–888, 16 Cal.Rptr.3d 466, 94 P.3d 589, fns. omitted.)

## II. Costs of POBRA Are Incurred Voluntarily by School Districts and Special Districts That Are Permitted but Not Required to Employ Peace Officers

[1] The result of the cases discussed above is that, if a local government participates “voluntarily,” i.e., without legal compulsion or compulsion as a \*1366 practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement. The Commission concedes there is no legal compulsion for the school and special districts in issue to hire peace officers. As related, *Kern High School Dist.* suggests “involuntarily” can extend beyond “legal compulsion” to “compelled as a practical matter to participate.” (*Kern High School Dist.*, *supra*, 30 Cal.4th at p. 748, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) However, the latter term means facing “ ‘certain and severe ... penalties’ such as ‘double ... taxation’ or other ‘draconian’ consequences” and not merely having to “adjust to the withdrawal of grant money along with the lifting of program obligations.” (*Id.* at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) There is nothing in this record to show that the school and special districts in issue are practically compelled to hire peace officers.

The Commission points to two considerations to overcome the rule that participation in a voluntary program means additional costs are not mandates. The first is that the Legislature has declared that application of POBRA procedures to all **\*\*102** public safety officers is a matter of statewide concern. The second consideration is that the Legislature has promulgated various rights to public safety<sup>5</sup> and rights and duties of peace officers,<sup>6</sup> which it is claimed, recognize “the need for local government entities to employ peace officers when necessary to carry out their basic functions.” Neither consideration persuasively supports the claim of practical compulsion.

The consideration that the Legislature has determined that all public safety officers should be entitled to POBRA protections is immaterial. It is almost always the case that a rule prescribed by the Legislature that applies to a voluntary program will, nonetheless, be a matter of statewide concern and application. For example, the rule in *Kern High School Dist.* was that any district in the state that participated in the underlying funded educational programs was required to abide by the notice of meetings and agenda posting requirements. When the Legislature makes such a rule, it only says that if you participate you must follow the rule. This is not a rule that bears on compulsion to participate. (Cf. *Kern High School Dist.*, *supra*, 30 Cal.4th at p. 743, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [the proper focus of a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs, not that costs incurred in complying with program conditions have been legally compelled].)

**\*1367** Similarly, we do not see the bearing on a necessity or practical compulsion of the districts to hire peace officers, of any or all the various rights to public safety and duties of peace officers to which the Commission points. If affording those rights or complying with those duties as a practical matter could be accomplished only by exercising the authority given to hire peace officers, the Commission's argument would be forceful. However, it is not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply.

The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts “employ peace officers when necessary to carry out the essential obligations and functions

established by law.” However, the “necessity” that is required is facing “ ‘certain and severe ... penalties' such as ‘double ... taxation’ or other ‘draconian’ consequences.” (*Kern High School Dist.*, *supra*, 30 Cal.4th at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203, quoting *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74, 266 Cal.Rptr. 139, 785 P.2d 522.) That cannot be established in this case without a concrete showing that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences.

The Commission notes that *Carmel Valley Fire Protection Dist. v. State* characterizes police protection as one of “ ‘the most essential and basic functions of local government.’ ” (*Carmel Valley Fire Protection Dist. v. State*, *supra*, 190 Cal.App.3d at p. 537, 234 Cal.Rptr. 795, quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107, 133 Cal.Rptr. 649.) However, that characterization is in the context of cities, counties, and districts that have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction. A fire protection district perforce must hire firefighters to supply that protection.

[2] [3] [4] Thus, as to cities, counties, and such districts, new statutory duties that increase the costs of such services are prima facie reimbursable. This is true, notwithstanding a potential argument that such a local government's decision is voluntary in part, as to the number of personnel it hires. (See *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at p. 888, 16 Cal.Rptr.3d 466, 94 P.3d 589.) A school district, for example, has an analogous basic and mandatory duty to educate students. In the course of carrying out that duty, some “discretionary” expulsions will necessarily occur. (*Id.* at p. 887, fn. 22, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Accordingly, *San Diego Unified School Dist.* suggests additional costs of “discretionary” expulsions should not be considered voluntary. Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs **\*1368** attendant to those actions cannot fairly and reasonably be characterized as voluntary under the rationale of *City of Merced*. (See *San Diego Unified School Dist.*, *supra*, 33 Cal.4th at pp. 887–888, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

[5] However, the districts in issue are authorized, but not required, to provide their own peace officers and do not have provision of police protection as an essential and basic function. It is not essential unless there is a showing that, as a



practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions. As there is no such showing in the record, the Commission erred in finding that POBRA constitutes a state-mandated program for school districts and the special districts identified in [Government Code section 3301](#). Similarly, the superior court erred in concluding as a matter of law that, “[a]s a practical matter,” the employment of peace officers by the local agencies is “not an optional program” and “they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement.”

### DISPOSITION

The judgment is reversed. Each party shall bear its own costs on appeal. ([Cal. Rules of Court, rule 8.278\(a\)\(3\), \(5\)](#).)

I concur: [BLEASE, J.](#)

[SCOTLAND, P.J.](#), concurring.

The Public Safety Officers Procedural Bill of Rights Act (POBRA) requires that peace officers employed by state and local governments must be provided with procedural rights and protections when they are subjected to investigation, interrogation, or discipline.

In this case, both the Commission on State Mandates and the trial court concluded that as to local school districts and special districts which are permitted by statute, but not required, to employ peace officers, the requirements of POBRA are a reimbursable mandate within the meaning of [article XIII B, section 6 of the California Constitution](#), which compels the State to bear the costs of new mandates imposed on local governments.

**\*\*104** The Commission on State Mandates reasoned that finding POBRA requirements are not reimbursable mandates would conflict with various laws that require local districts to provide safe school environments for students.

**\*1369** The trial court held the State must reimburse local school districts and special districts for the cost of POBRA requirements because, “[a]s a practical matter, the establishment of a police department and the employment of peace officers by school districts, community college districts and other local agencies is not an optional program”; “they do not have a genuine choice of alternative measures that meet

their agency-specific needs for security and law enforcement, such as a large urban school district's need for security and police officers to supplement city police or a municipal water district's need for park rangers with the authority and powers conferred upon peace officers to issue citations and make arrests in district recreational facilities.”

My colleagues disagree with the Commission and the trial court. They conclude that because the local districts are not required to employ peace officers, and since there was no showing that exercising the authority to hire peace officers is the only reasonable means to carry out the districts' core mandatory functions, POBRA is not a reimbursable mandate as to those districts.

My instinct tells me the trial court was right in concluding that, even if such local districts are not compelled by law to hire peace officers to perform the districts' core functions, they must do so “as a practical matter.” However, instinct is insufficient to support a legal conclusion.

As the Department of Finance points out, the administrative record “is silent concerning the law enforcement needs and practices of [K–12] school districts and special districts,” and there is “no evidence showing that K–12 school districts cannot meet the safe schools requirement by relying on or contracting with city and county law enforcement.” Indeed, as the Department notes, the trial court “correctly observed that one could not know, ‘based on facts in this administrative record[,] that there is any law enforcement problem in any school in the State or the police have failed to provide adequate police services[.]’ ”

In sum, the Department persuasively argues: “Although state law authorizes these districts to hire peace officers, it does not require them to do so. Neither does state law penalize the districts in any way if they decide not to hire peace officers. Thus, state law does not legally or practically compel the districts to hire peace officers. And the districts are not entitled to reimbursement merely because their discretionary decision to hire officers triggers [POBRA]-related costs.”

**\*1370** Accordingly, I agree with my colleagues that the California Supreme Court precedent discussed in their opinion compels us to conclude that local districts' compliance with POBRA as to peace officers they employ is not a reimbursable State mandate because such districts are not required by law to employ peace officers and there is nothing in the record to support a finding that they are

“practically” required to establish police departments and hire peace officers. Therefore, I concur in the opinion.

**All Citations**

170 Cal.App.4th 1355, 89 Cal.Rptr.3d 93, 241 Ed. Law Rep. 255, 09 Cal. Daily Op. Serv. 1588, 2009 Daily Journal D.A.R. 1816

**Footnotes**

- 1 Article references are to the California Constitution.  
[Article XIII B, section 6](#), subdivision (a), in pertinent part, states as follows: “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, [subject to specified exceptions].”
- 2 The statute’s commonly used name is the Peace Officers Bill of Rights Act and the acronym POBRA is one used by the Supreme Court. (See [Mays v. City of Los Angeles \(2008\) 43 Cal.4th 313, 317 & fn. 1, 320, 74 Cal.Rptr.3d 891, 180 P.3d 935.](#))
- 3 [Government Code section 17514](#) states: “Costs mandated by the state means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of [Section 6 of Article XIII B of the California Constitution.](#)”
- 4 Whether a statute imposes a reimbursable state mandate is said to be a question of law. (E.g., [County of San Diego v. State of California \(1997\) 15 Cal.4th 68, 109, 61 Cal.Rptr.2d 134, 931 P.2d 312.](#)) In any event, that is the way the parties have litigated the issue in this case.
- 5 E.g., [article I, section 28](#), subdivision (c) (announcing a right to attend grade school campuses that are safe); [Education Code section 38000, subdivision \(a\)](#) (authorizing school boards to hire peace officers to ensure safety of pupils and personnel); and [Education Code section 72330, subdivision \(a\)](#) (authorizing a community college district to employ peace officers as necessary to enforce the law on or near campus).
- 6 E.g., [Penal Code sections 830.31–830.35, 830.37](#) (powers of arrest extend statewide), and 12025 (permitting peace officers to carry concealed weapons).



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by *Ivory Education Institute v. Department of Fish & Wildlife*, Cal.App. 2 Dist., November 1, 201844 Cal.3d 1188, 753 P.2d 585, 246 Cal.Rptr. 629,  
56 USLW 2627, Prod.Liab.Rep. (CCH) P 11,762

GREGORY EVANGELATOS, Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, Respondent; VAN WATERS &  
ROGERS, INC., et al., Real Parties in Interest.  
VAN WATERS & ROGERS, INC., Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES  
COUNTY, Respondent; GREGORY  
EVANGELATOS et al., Real Parties in Interest

No. S000194.

Supreme Court of California

Apr 21, 1988.

**SUMMARY**

A high school student who was injured while attempting to make fireworks at home with chemicals purchased in a retail store brought an action for personal injuries against the retailer and the wholesale distributor of the chemicals. Before trial began, Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; *Civ. Code, § 1431* et seq.) was enacted, and the student and both defendants filed motions seeking a determination whether the proposition would be applied to the case. The trial court found that Proposition 51 was constitutional and that it applied to all cases that had not gone to trial prior to its effective date. The student and one of the defendants filed separate mandate petitions challenging the trial court's decision. The Court of Appeal, Second Dist., Div. Two, Nos. B021968, B022000, concluded that the trial court had correctly ruled as to the validity and retroactive application of the proposition.

The Supreme Court affirmed the decision of the Court of Appeal insofar as it upheld the constitutionality of Proposition 51, but reversed as to the retroactivity finding. The court held that Proposition 51 was not unconstitutionally vague and that it did not violate equal protection guarantees. However,

the court held, the proposition could not be applied to the student's action. Under *Civ. Code, § 3* (no provision of the code is retroactive unless expressly so declared), and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure. Further, there was nothing in the statutory "findings and declaration of purpose" or the brochure materials to suggest that retroactivity was even considered during the \*1189 enactment process; and retroactive application could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then existing state of the law. (Opinion by Arguelles, J., with Mosk, Acting C. J., Broussard and Panelli, JJ. concurring. Separate concurring and dissenting opinion by Kaufman, J., with Eagleson, J., and Anderson (Carl W.), J., \* concurring.)

**HEADNOTES****Classified to California Digest of Official Reports**

(1a, 1b, 1c)

Torts § 9--Persons Liable--Joint and Several Tortfeasors--Statutory Limitation of Liability for Noneconomic Damages-- Vagueness.

Proposition 51 (*Civ. Code, § 1431* et seq.), which modified the traditional common law joint and several liability doctrine by limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault, is not unconstitutionally vague. Although language of the proposition may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play, application of the statute in many instances will be quite clear. Application of the statute in ambiguous situations can be resolved by trial and appellate courts in time-honored, case-by-case fashion by reference to the language and purposes of the statutory scheme as a whole.

(2)

Constitutional Law § 113--Substantive Due Process--Statutory Vagueness and Overbreadth.

So long as a statute does not threaten to infringe on exercise of rights under *U.S. Const., 1st Amend.*, or other constitutional rights, ambiguities, even if numerous, do not justify the invalidation of the statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct, a party

must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that the law is impermissibly vague in all of its applications.

(3)

Statutes § 19--Construction--Initiatives.

The judiciary's traditional role of interpreting ambiguous statutory language or filling in the gaps of statutory schemes is as applicable to initiative measures as it is to measures adopted by the Legislature. \*1190

(4)

Constitutional Law § 83--Equal Protection--Classification--Judicial Review--Tort Reform Proposition.

On appeal of a judgment upholding the validity of Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; [Civ. Code, § 1431](#) et seq.), the traditional "rational relationship" standard, and not the more stringent "strict scrutiny" standard, was applicable in determining whether the proposition violated equal protection guarantees due to allegedly impermissible distinctions between economic and noneconomic damages and between plaintiffs injured by solvent tortfeasors and those injured by insolvent ones.

(5)

Torts § 9--Persons Liable--Joint and Several Tortfeasors--Limitation of Liability for Noneconomic Damages--Equal Protection.

Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; [Civ. Code, § 1431](#) et seq.) does not violate equal protection guarantees. There is no constitutional impediment to differential treatment of economic and noneconomic losses, and the proposition reflects no intent to discriminate between injured victims on the basis of the solvency of the tortfeasors by whom they are injured. The doctrine of joint and several liability is not a constitutionally mandated rule of law immune from legislative modification or revision; rather, the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution.

(6a, 6b, 6c, 6d, 6e, 6f)

Torts § 9--Persons Liable--Joint and Several Tortfeasors--Limitation of Liability for Noneconomic Damages--Retroactive Application.

In a personal injury action, the trial court erred in holding that Proposition 51 (limiting an individual joint tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault; [Civ. Code, § 1431](#) et seq.) should constitutionally be applied to cases tried after its effective date, where the cause of action arose before the effective date of the proposition. Under [Civ. Code, § 3](#) (no provision of the code is retroactive unless expressly so declared), and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supported prospective operation of the measure. Further, there was nothing in the legislative history to suggest that retroactivity was even considered during the enactment process; and retroactive application could have unfair consequences for all parties who acted in reliance on the then existing state of the law.

(7)

Statutes § 5--Operation and Effect--Retroactivity--Tort Reform Statute.

The application of a tort reform statute to a cause of action \*1191 that arose prior to the effective date of the statute but that is tried after the effective date constitutes retroactive application of the statute.

(8)

Statutes § 5--Operation and Effect--Retroactivity--Presumption as to Prospectivity.

Legislation must be considered as addressed to the future, not to the past. A retroactive operation will not be given to a statute that interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature. [Disapproving [Andrus v. Municipal Court](#) (1983) 143 Cal.App.3d 1041 [192 Cal.Rptr. 341], insofar as that case suggests that where one provision of a code states that other provisions of the code are not retroactive unless expressly so declared, that provision has no application to amendments to the code and applies only to the original provisions of the code.]

[See [Cal.Jur.3d, Statutes, § 23](#); [Am.Jur.2d, Statutes, § 3533](#).]

(9)

Statutes § 5--Operation and Effect--Effect of No Express Provision as to Retroactivity.

Even when a statute does not contain an express provision mandating retroactive application, the legislative history or the context of enactment may provide a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that it may be found appropriate to accord the statute retroactive application.

(10)

Statutes § 19--Construction--Initiatives.

Initiative measures are subject to the ordinary rules and canons of statutory construction.

(11)

Statutes § 5--Operation and Effect--Retroactivity--Presumption as to Prospectivity.

The presumption of prospectivity of a legislative enactment assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

(12)

Statutes § 5--Operation and Effect--Retroactivity--Presumption as to Prospectivity--Effect of Cases Concerning Measure of Damages for Conversion.

The line of cases applying statutory amendments that modify the legal measure of damages recoverable in an action for wrongful conversion of personal or real property to all trials conducted after the effective date of the revised statute cannot properly be interpreted as displacing ordinary principles of statutory interpretation with regard to the question of retroactivity. \*1192

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#### ARGUELLES, J.

In June 1986, the voters of California approved an initiative measure, the Fair Responsibility Act of 1986 (*Civ. Code*, §§ 1431 to 1431.5) - popularly known as, and hereafter referred to, as Proposition 51 - which modified the traditional, common law "joint and several liability" doctrine, limiting an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault.<sup>1</sup> Just a few weeks after the election, the underlying \*1193 personal injury action in this case - which arose out of a July 1980 accident and which had been pending for nearly five years prior to the June 1986 election - was assigned for trial. Before the trial began, the parties requested the trial court to determine, inter alia, whether the newly revised joint and several liability doctrine would apply to this case. Plaintiff contended that the new legislation should not be applied for a number of reasons, maintaining (1) that Proposition 51 is unconstitutional on its face, and (2) that, in any event, the measure does not apply retroactively to causes of action which accrued prior to its effective date.<sup>2</sup> Defendants contested both arguments.

The trial court concluded (1) that Proposition 51 is constitutional on its face and (2) that it should be applied to all cases coming to trial after its effective date, including this case, regardless of when the cause of action accrued. Reviewing the trial court's ruling in these consolidated pretrial writ proceedings, the Court of Appeal upheld the trial court's determination in all respects, declining - with respect to the retroactivity issue - to follow another recent Court of Appeal decision, *Russell v. Superior Court* (1986) 185 Cal.App.3d 810 [230 Cal.Rptr. 102], which had concluded that Proposition 51 does not apply retroactively to causes of action which arose prior to the initiative's effective date.

Because of the importance of the issues and the conflict in Court of Appeal decisions on the retroactivity question, we granted review.

As we shall explain, we have concluded that the Court of Appeal judgment should be affirmed in part and reversed in part. On the constitutional question, we agree with the Court of Appeal that plaintiff's facial constitutional challenge to Proposition 51 is untenable. Past decisions of this court make it quite clear that the initiative measure - in modifying the common law rule governing the potential liability of multiple tortfeasors - violates neither the due process nor equal protection guaranties of the state or federal Constitution. Although the proposition's language leaves a number of issues of interpretation and application to be decided in future cases, those unsettled questions provide no justification for striking down the measure on its face.

On the question of retroactivity, we conclude that the Court of Appeal erred in ruling that Proposition 51 applies to causes of action which accrued before the measure's effective date. It is a widely recognized legal principle, specifically embodied in [section 3 of the Civil Code](#), that in the absence of a clear legislative intent to the contrary statutory enactments apply **\*1194** prospectively. The drafters of the initiative measure in question, although presumably aware of this familiar legal precept, did not include any language in the initiative indicating that the measure was to apply retroactively to causes of action that had already accrued and there is nothing to suggest that the electorate considered the issue of retroactivity at all. Although defendants argue that we should nonetheless infer a legislative intent on the part of the electorate to apply the measure retroactively from the general purpose and context of the enactment, the overwhelming majority of prior judicial decisions - both in California and throughout the country - which have considered whether similar tort reform legislation should apply prospectively or retroactively when the statute is silent on the point have concluded that the statute applies prospectively. Reflecting the common-sense notion that it may be unfair to change "the rules of the game" in the middle of a contest, these authorities persuasively demonstrate that the general legal presumption of prospectivity applies with full force to a measure, like the initiative at issue here, which substantially modifies a legal doctrine on which many persons may have reasonably relied in conducting their legal affairs prior to the new enactment.

Contrary to the extravagant rhetoric of the dissenting opinion, our conclusion that Proposition 51 must properly

be interpreted to apply prospectively does not postpone or delay the operative effect of Proposition 51 and is in no way inconsistent with the fact that the measure was adopted in response to a liability crisis. As we explain, the new legal doctrine established by Proposition 51 went into effect the day following the passage of the initiative and could immediately be relied on by insurance companies to reduce insurance premiums and by potential tort defendants to resume activities they may have curtailed because of the preexisting joint and several liability rule. Indeed, although the dissenting opinion vigorously asserts that Proposition 51's relationship to a liability crisis proves that the electorate must have intended that the measure would be applied retroactively, that assertion is clearly belied by the numerous recent tort reform statutes, adopted in other states in response to the same liability crisis, which, by their terms, are expressly prospective in operation. (See post, pp. 1219-1220.) As these statutes demonstrate, a prospective application of Proposition 51 is totally compatible with the history and purpose of the initiative measure.

#### I.

In July 1980, plaintiff Gregory Evangelatos, an 18-year-old high school student, was seriously injured in his home, apparently while attempting to make fireworks with chemicals purchased from a retail store. In July 1981, plaintiff filed an action for damages against the retailer (Student Science **\*1195** Store, Inc.), the wholesale distributor (Van Waters & Rogers, Inc.), and four manufacturers of the chemicals he was using, alleging that defendants were liable for his injuries on both negligence and strict liability theories. The causes of action against three of the manufacturers were dismissed on summary judgment and plaintiff voluntarily dismissed the action against the fourth manufacturer. The case proceeded against the retailer and the wholesale distributor of the chemicals.

On June 23, 1986, almost five years after the action had been filed, the case was assigned for trial. Before the trial began, plaintiff and the two remaining defendants filed motions with the trial court seeking a determination whether Proposition 51, which had been approved by the voters just three weeks earlier at the June 3, 1986, election, would be applied in this case. The motions sought a determination of the constitutional validity of the proposition and, if valid, a resolution of various questions relating to the applicability and proper interpretation of the measure.

After briefing, the trial court issued a lengthy written statement, ruling on five separate issues. The court concluded (1) that Proposition 51 was validly enacted and is not unconstitutional on its face; (2) that the measure applies to all cases, including the present proceeding, which had not gone to trial before June 4, 1986, the date on which the initiative measure became effective, regardless of when the cause of action arose; (3) that in determining each defendant's "several" liability for a portion of plaintiff's noneconomic damages under the proposition, the trier of fact may consider the conduct of all persons whose fault contributed to plaintiff's injury, not just the conduct of plaintiff and defendants who are parties to the action; (4) that future medical expenses and loss of future earnings are "economic damages" within the meaning of Proposition 51 for which defendants remain jointly and severally liable; and (5) that for purposes of apportioning fault in this case, the summary judgment that had been entered in favor of three manufacturers constituted a determination that no causative fault could properly be attributed to them.

Immediately following the ruling, plaintiff and one of the defendants (Van Waters & Rogers, Inc.) filed separate mandate petitions in the Court of Appeal, challenging different aspects of the trial court's decision. The Court of Appeal initially denied both petitions summarily, and the parties then sought review in this court. Shortly before the petitions reached us, another Court of Appeal rendered its decision in *Russell v. Superior Court*, *supra*, 185 Cal.App.3d 810, holding Proposition 51 inapplicable to all causes of action which accrued before the measure's effective date. On October 29, 1986, our court denied a petition for review in *Russell* and transferred the two petitions in this matter to the Court of Appeal with \*1196 directions to issue alternative writs. Our order directed the Court of Appeal's attention to the *Russell* decision.

On remand, the Court of Appeal issued alternative writs, consolidated the matters for briefing and argument, and ultimately concluded that the trial court had correctly resolved all of the questions at issue, including the facial constitutionality of the measure and its applicability to the instant case. Although the Court of Appeal recognized that the *Russell* court had reached a contrary conclusion on the retroactivity issue, it disagreed with the *Russell* decision, concluding that, while the initiative measure contained no express or affirmative indication that the measure was intended to apply retroactively, in its view "the legislative intent was for the statute to take effect immediately and to

apply to as many cases as feasible." Finding that it would be unduly disruptive to require retrial of all tort cases that had been tried before the enactment of Proposition 51 but in which judgments had not yet become final, the Court of Appeal concluded that "[t]he maximum feasible application of the Act is to all cases yet to be tried, including this one."

Both plaintiff and defendant petitioned for review, and we granted review to resolve the important questions presented by the case.

## II.

Before analyzing either the constitutional or retroactivity issues, we believe it may be useful to place Proposition 51's modification of the common law joint and several liability doctrine in brief historical perspective.

Prior to the adoption of comparative negligence principles in California in the mid-1970's, the jury, in assessing liability or awarding damages in an ordinary tort action, generally did not determine the relative degree or proportion of fault attributable either to the plaintiff, to an individual defendant or defendants, or to any nonparties to the action. Under the then-prevailing tort doctrines, the absence of any inquiry into relative culpability had potentially harsh consequences for both plaintiffs and defendants. On the one hand, if a plaintiff was found to be at all negligent, no matter how slight, under the contributory negligence rule he was generally precluded from obtaining any recovery whatsoever. (See generally 4 Witkin, *Summary of Cal. Law* (8th ed. 1974) *Torts*, § 683, p. 2968 and authorities cited.) On the other hand, if a defendant was found to be at all negligent, regardless of how minimally, under the joint and several liability rule he could be held responsible for the full damages sustained by the plaintiff, even if other concurrent tortfeasors had also been partially, or even primarily, responsible for the injury. (See *id.*, § 35, pp. 2333-2334.) Moreover, the governing \*1197 rules at that time gave the plaintiff unilateral authority to decide which defendant or defendants were to be sued (see *id.*, § 37, p. 2335); a defendant who had been singled out for suit by the plaintiff generally had no right to bring other tortfeasors into the action, even if the other tortfeasors were equally or more responsible for the plaintiff's injury (see *id.*, § 46, p. 2346).<sup>3</sup>

In *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], this court took an initial step in modifying this traditional common law structure, ameliorating the hardship to the plaintiff

by abrogating the all-or-nothing contributory negligence doctrine and adopting in its place a rule of comparative negligence. *Li* held that “the contributory negligence of the person injured ... shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering.” (13 Cal.3d at p. 829.)

In *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], our court took the next step in modifying the traditional structure, this time altering the preexisting common law doctrines to diminish the hardship to defendants. Although the *American Motorcycle* court concluded that the traditional common law joint and several liability doctrine should be retained - relying, in part, on the fact that at that time the “overwhelming majority” of jurisdictions that had adopted comparative negligence had also retained the joint and several liability rule (20 Cal.3d at p. 590) - at the same time the *American Motorcycle* court held (1) that plaintiffs should no longer have the unilateral right to determine which defendant or defendants should be included in an action and that defendants who were sued could bring other tortfeasors who were allegedly responsible for the plaintiff’s injury into the action through cross-complaints (20 Cal.3d at pp. 604-607), and (2) that any defendant could obtain equitable indemnity, on a comparative fault basis, from other defendants, thus permitting a fair apportionment of damages among tortfeasors. (See 20 Cal.3d at pp. 591-598.)

Subsequent cases established that under the principles articulated in *American Motorcycle, supra*, 20 Cal.3d 578, a defendant may pursue a comparative equitable indemnity claim against other tortfeasors either (1) by filing a cross-complaint in the original tort action or (2) by filing a separate indemnity action after paying more than its proportionate share of \*1198 the damages through the satisfaction of a judgment or through a payment in settlement. (See, e.g., *Sears, Roebuck & Co. v. International Harvester Co.* (1978) 82 Cal.App.3d 492, 496 [147 Cal.Rptr. 262]; *American Bankers Ins. Co. v. Avco-Lycoming Division* (1979) 97 Cal.App.3d 732, 736 [159 Cal.Rptr. 70].) In addition, more recent decisions also make clear that if one or more tortfeasors prove to be insolvent and are not able to bear their fair share of the loss, the shortfall created by such insolvency should be apportioned equitably among the remaining culpable parties - both defendants and plaintiffs. (See, e.g., *Paradise Valley Hospital v. Schlossman* (1983) 143 Cal.App.3d 87 [191 Cal.Rptr. 531]; *Ambriz v. Kress* (1983) 148 Cal.App.3d 963 [196 Cal.Rptr. 417].)

Although these various developments served to reduce much of the harshness of the original all-or-nothing common law rules, the retention of the common law joint and several liability doctrine produced some situations in which defendants who bore only a small share of fault for an accident could be left with the obligation to pay all or a large share of the plaintiff’s damages if other more culpable tortfeasors were insolvent.

The initiative measure in question in this case was addressed to this remaining issue. While recognizing the potential inequity in a rule which would require an injured plaintiff who may have sustained considerable medical expenses and other damages as a result of an accident to bear the full brunt of the loss if one of a number of tortfeasors should prove insolvent, the drafters of the initiative at the same time concluded that it was unfair in such a situation to require a tortfeasor who might only be minimally culpable to bear all of the plaintiff’s damages. As a result, the drafters crafted a compromise solution: Proposition 51 retains the traditional joint and several liability doctrine with respect to a plaintiff’s *economic* damages, but adopts a rule of several liability for *noneconomic* damages, providing that each defendant is liable for only that portion of the plaintiff’s noneconomic damages which is commensurate with that defendant’s degree of fault for the injury.<sup>4</sup> It was this compromise measure - which drew heavily \*1199 upon a number of bills which had been passed by the Senate but not by the Assembly in a number of preceding legislative sessions (see Sen. Bill No. 75 (1985-1986 Reg. Sess.); Sen. Bill No. 575 (1983-1984 Reg. Sess.); Sen. Bill No. 500 (1981-1982 Reg. Sess.)) - that was adopted by the electorate in the June 1986 election.

Although Proposition 51 is the first legislative modification of the joint and several liability doctrine to be enacted in California, in recent years analogous statutory alterations of the traditional common law joint and several liability rule have been adopted by many states throughout the country, often as part of a comprehensive legislative implementation of comparative fault principles. The revisions of the joint and several liability doctrine in other jurisdictions have taken a variety of forms: several states have abolished joint and several liability entirely and replaced it with a “pure” several liability rule,<sup>5</sup> other states have formulated various guidelines to distinguish between more culpable and less culpable tortfeasors and have adopted several liability only for the less culpable tortfeasors,<sup>6</sup> and still others, like California, have distinguished between different categories of



damages sustained in an injury, retaining some form of joint and several liability for “economic” or “medically related” damages, while adopting some form of several liability for “pain and suffering” and other noneconomic damages.<sup>7</sup> Thus, while Proposition 51 unquestionably made a \*1200 substantial change in this state's traditional tort doctrine, when viewed from a national perspective it becomes apparent that the measure's modification of the common law joint and several liability rule was not an isolated or aberrant phenomenon but rather paralleled similar developments in the evolution and implementation of the comparative-fault principle in other states.

Having briefly reviewed the historical background of Proposition 51, we turn initially to plaintiff's broad claim that the Court of Appeal erred in failing to strike down the initiative measure as unconstitutional on its face.

### III.

Plaintiff contends that Proposition 51 is facially unconstitutional on two separate grounds, asserting (1) that the measure is “too vague and ambiguous” to satisfy the due process requirements of either the state or federal Constitutions, and (2) that the enactment violates both the state and federal equal protection clauses by establishing classifications that are not rationally related to a legitimate state interest. As we shall see, both of these constitutional claims are similar to contentions raised just a few years ago in a series of cases challenging the validity of a variety of provisions of another legislative tort reform measure, the Medical Injury Compensation Reform Act of 1975 (MICRA) (Stats. 1975, 2d Ex. Sess. 1975-1976, chs. 1, 2, pp. 3949-4007), an enactment which modified a number of common law tort doctrines in the medical malpractice area. Our decisions in the earlier MICRA cases clearly establish that plaintiff's current constitutional challenges lack merit.

#### A.

(1a) Plaintiff initially contends that Proposition 51 is unconstitutionally vague. Relying on the United States Supreme Court's classic statement of the vagueness doctrine in *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126] - “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law” - plaintiff maintains that Proposition 51 is subject to just such a criticism.

To support his \*1201 contention, plaintiff catalogues a series of questions relating to the application of Proposition 51 to which he suggests the language of the measure provides no clear answer.<sup>8</sup> He asserts that the existence of these numerous unanswered questions renders the measure unconstitutionally vague on its face and warrants the invalidation of the enactment in its entirety.

Plaintiff's contention is plainly flawed. Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. (2) So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct - like the initiative measure at issue here - a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that “the law is impermissibly vague *in all of its applications.*” (Italics added.) (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497 [71 L.Ed.2d 362, 371, 102 S.Ct. 1186].) Plaintiff clearly has not satisfied this burden.

Plaintiff's vagueness claim echoes a similar constitutional argument that was raised in *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377-378 [204 Cal.Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233], with respect to section 667.7 of the Code of Civil Procedure, a section of MICRA which provided for the periodic payment of judgments in medical malpractice cases under certain circumstances. In *American Bank*, plaintiff claimed, inter alia, that the statutory provision mandating periodic payment “should ... be struck down as unconstitutionally 'void for vagueness, ambiguity and unworkability,' because it leaves unanswered many questions as to how a trial court is to actually formulate a comprehensive payment schedule without the benefit of very detailed special jury verdicts.” (36 Cal.3d at p. 377.) After noting that the practical problems of application \*1202 were by no means insurmountable, we went on to point out that “[i]n any event, plaintiff provides no authority to support its claim that the remaining uncertainties which may inhere in the statute provide a proper basis for striking it down on its face. As with other innovative procedures and doctrines - for example, comparative negligence - in the first instance trial courts will deal with novel problems that arise in time-honored case-by-

case fashion, and appellate courts will remain available to aid in the familiar common law task of filling in the gaps in the statutory scheme. [Citation.]” (*Id.* at p. 378.)

Precisely the same reasoning applies in this case. (1b) Although the language of Proposition 51 may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play, the application of the statute in many instances will be quite clear. Thus, for example, while plaintiff cites the statute's lack of clarity on the retroactivity issue, there is no question but that the statute applies to causes of action accruing after its effective date; similarly, although plaintiff complains that the statute is not clear as to whether it applies to causes of action based on intentional tortious conduct or how it should be applied with respect to cases involving absent tortfeasors, the statute's application in an ordinary multiple tortfeasor comparative negligence action in which all tortfeasors are joined is not in doubt. Further, as stated in *American Bank, supra*, 36 Cal.3d 359, when situations in which the statutory language is ambiguous arise, the statute's application can be resolved by trial and appellate courts “in time-honored, case-by-case fashion,” by reference to the language and purposes of the statutory schemes as a whole. ( 3) The judiciary's traditional role of interpreting ambiguous statutory language or “filling in the gaps” of statutory schemes is, of course, as applicable to initiative measures as it is to measures adopted by the Legislature. (See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244-246 [149 Cal.Rptr. 239, 583 P.2d 1281].) ( 1c) Accordingly, there is no merit to plaintiff's claim that the statute should be struck down as unconstitutionally vague on its face.

## B.

(4)(See fn. 9.) , ( 5) Plaintiff alternatively contends that Proposition 51 violates the state and federal equal protection guaranties, allegedly because the classifications drawn by the statute are not rationally related to a legitimate state interest.<sup>9</sup> Plaintiff claims in particular that the statute is \*1203 invalid under the equal protection clause (1) because it discriminates between the class of injured persons who suffer economic damage and the class of injured persons who suffer noneconomic damage providing full protection for those who suffer economic damage but a lesser protection for those who suffer noneconomic damage, and (2) because it improperly discriminates within the class of victims who suffer noneconomic damage, permitting full recovery

for victims who are injured by solvent tortfeasors, but providing only partial recovery to victims injured by insolvent tortfeasors. Both claims are clearly without merit.

Plaintiff's challenge to the proposition's disparate treatment of economic and noneconomic damages parallels a similar equal protection attack that was directed at [Civil Code section 3333.2](#), a provision of MICRA which placed a \$250,000 limit on the noneconomic damages which may be recovered in a medical malpractice action, but which placed no similar limit on economic damages. In rejecting that equal protection challenge in *Fein v. Permanente Medical Group, supra*, 38 Cal.3d 137, we explained that there is clearly a rational basis for distinguishing between economic and noneconomic damages and providing fuller protection for economic losses,<sup>10</sup> and observed that “[t]he equal protection clause certainly does not require the Legislature to limit a victim's recovery for out-of-pocket medical expenses or lost earnings simply because it has found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses.” (38 Cal.3d at p. 162.) In similar fashion, the equal protection clause clearly does not require a state to modify the traditional joint and several liability rule as it applies to economic damages, simply because the state has found it appropriate to limit an individual tortfeasor's potential liability for an injured person's noneconomic damages. Indeed, the distinction which Proposition 51 draws between economic and noneconomic damages is, in general terms, less severe than the statutory distinction upheld in *Fein*; Proposition 51 places no dollar limit on the noneconomic damages a plaintiff may properly recover, but simply provides that each individual tortfeasor will be liable only for that share of the plaintiff's noneconomic damages which is \*1204 commensurate with the tortfeasor's comparative fault. There is no constitutional impediment to such differential treatment of economic and noneconomic losses.

Nor is Proposition 51 vulnerable to constitutional attack on the basis of plaintiff's claim that it improperly discriminates within the class of plaintiffs who have suffered noneconomic harm. Plaintiff asserts that the statute draws an arbitrary distinction between persons with noneconomic damages who have been injured by solvent tortfeasors and those who have been injured by insolvent defendants, permitting full recovery of noneconomic damages by the former class but only partial recovery by the latter class. The terms of the proposition itself, however, reflect no legislative intent to discriminate between injured victims on the basis of the solvency of the

tortfeasors by whom they are injured; instead, the measure quite clearly is simply intended to limit the potential liability of an individual defendant for noneconomic damages to a proportion commensurate with that defendant's personal share of fault.

Although one consequence of the statute's adoption of several liability for noneconomic damages will be that persons who are unfortunate enough to be injured by an insolvent tortfeasor will not be able to obtain full recovery for their noneconomic losses, that consequence does not render the provision unconstitutional. Under any tort liability scheme, a plaintiff who is injured by a single tortfeasor who proves to be insolvent is, of course, worse off than a plaintiff who is injured by a single tortfeasor who can pay an adverse judgment. Such "differential treatment" flowing from the relative solvency of the tortfeasor who causes an injury, however, has never been thought to render all tort statutes unconstitutional or to require the state to compensate plaintiffs for uncollectible judgments obtained against insolvent defendants. And while the common law joint and several liability doctrine has in the past provided plaintiffs a measure of protection from the insolvency of a tortfeasor when there are additional tortfeasors who are financially able to bear the total damages, plaintiff has cited no case which suggests that the joint and several liability doctrine is a constitutionally mandated rule of law, immune from legislative modification or revision. As with other common law tort doctrines - like the doctrines at issue in the recent line of MICRA decisions (see, e.g., *American Bank & Trust Co. v. Community Hospital*, *supra*, 36 Cal.3d 359, 366-374 [modification of common law doctrine providing for payment of judgment in lump sum]; *Barme v. Wood* (1984) 37 Cal.3d 174 [207 Cal.Rptr. 816, 689 P.2d 446] [modification of collateral source rule]; *Fein v. Permanente Medical Group*, *supra*, 38 Cal.3d 137 [limitation of noneconomic damages]) - the allocation of tort damages among multiple tortfeasors is an entirely appropriate subject for legislative resolution. In this regard, it is worth recalling that Proposition \*1205 51 does not require the injured plaintiff to bear the entire risk of a potential tortfeasor's insolvency; solvent defendants continue to share fully in such risk with respect to a plaintiff's economic damages.

In sum, although reasonable persons may disagree as to the wisdom of Proposition 51's modification of the common law joint and several liability doctrine, the measure is not unconstitutional on its face.

#### IV.

(6a) Plaintiff's second major contention is that even if the lower courts were correct in upholding the constitutionality of the proposition, the trial court and Court of Appeal were nonetheless in error in concluding that the newly enacted statute should apply retroactively to causes of action - like the present action - which accrued prior to the effective date of the initiative measure. Plaintiff points out that prior to the enactment of Proposition 51 many individuals - both plaintiffs and defendants - relied on the then-existing joint and several liability doctrine in deciding which parties to join in litigation and whether to accept or reject settlement offers relating to such preexisting claims, and plaintiff contends that because there is nothing in the terms of the proposition which indicates that it is to apply retroactively to defeat such reliance, the lower courts erred in giving it such an application. In response, defendants contend that retroactive application is warranted in light of the nature and purposes of the initiative measure.

#### A.

Before analyzing the retroactivity principles and precedents discussed by both parties, we must address a threshold contention, raised by a number of amici, who assert that there is no need to consider the retroactivity issue at all in this case. Although defendants themselves do not suggest that application of Proposition 51 to causes of action which accrued prior to its effective date but which did not come to trial until after such effective date would constitute only a prospective, rather than a retroactive, application of the measure, several amici have put forth that suggestion, arguing that by confining the measure's operation to trials conducted after the initiative's effective date the Court of Appeal simply applied Proposition 51 prospectively. The Court of Appeal did not rest its conclusion on this theory and, as we explain, the governing cases do not support amici's contention.

In *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 [182 P.2d 159] - perhaps the leading modern California decision on the subject - the same argument was raised by injured parties who contended that a new statute, increasing workers' compensation benefits, should be applied \*1206 to awards made by the workers' compensation board after the effective date of the new statute, even though the awards pertained to injuries which the workers had suffered before the new legislation was enacted. The injured employees argued that such an application of the statute to future awards would constitute a prospective, rather than a retroactive, application of the statute.

In *Aetna Cas.*, this court, speaking through Chief Justice Gibson, emphatically rejected the argument, explaining that “[a] retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.” (30 Cal.2d at p. 391.) “Since the industrial injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery.” (*Id.* at p. 392.) (7) Decisions of both the United States Supreme Court and the courts of our sister states confirm that the application of a tort reform statute to a cause of action which arose prior to the effective date of the statute but which is tried after the statute's effective date would constitute a retroactive application of the statute. (See, e.g., *Winfree v. Nor. Pac. Ry. Co.* (1913) 227 U.S. 296 [57 L.Ed. 518, 33 S.Ct. 273]; *Joseph v. Lowery* (1972) 261 Or. 545 [495 P.2d 273].) Accordingly, amici's argument that the legal principles relating to the retroactive application of statutes are not relevant in this case is clearly without merit.

### B.

The fact that application of Proposition 51 to the instant case would constitute a retroactive rather than a prospective application of the statute is, of course, just the beginning, rather than the conclusion, of our analysis. Although plaintiff maintains that a retroactive application of the statute would be unconstitutional (cf. *In re Marriage of Buol* (1985) 39 Cal.3d 751, 759-764 [218 Cal.Rptr. 31, 705 P.2d 354]), defendants properly observe that in numerous situations courts have upheld legislation which modified legal rules applicable to pending actions. (See, e.g., *San Bernardino County v. Indus. Acc. Com.* (1933) 217 Cal. 618, 627-629 [20 P.2d 673].) Because the question whether a statute is to apply retroactively or prospectively is, in the first instance, a policy question for the legislative body which enacts the statute, before reaching any constitutional question we must determine whether, as a matter of statutory interpretation, Proposition 51 should properly be construed as prospective or retroactive. If, as a matter of statutory interpretation, the provision is prospective, no constitutional question is presented.

(8) In resolving the statutory interpretation question, we are guided by familiar legal principles. In the recent decision of *United States v. Security \*1207 Industrial Bank* (1982) 459 U.S. 70, 79-80 [74 L.Ed.2d 235, 243-244, 103 S.Ct. 407], Justice (now Chief Justice) Rehnquist succinctly captured the well-established legal precepts governing the interpretation of a statute to determine whether it applies

retroactively or prospectively, explaining: “*The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.] This court has often pointed out: ‘[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. ... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be “the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.”*” [Citation.]” (Italics added.)

California authorities have long embraced this general principle. As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d 388 - the seminal retroactivity decision noted above - “[i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.” (30 Cal.2d at p. 393.) This rule has been repeated and followed in innumerable decisions. (See, e.g., *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 884 [221 Cal.Rptr. 509, 710 P.2d 309]; *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App.3d 263, 272 [209 Cal.Rptr. 266]. See generally 5 Witkin, *Summary of Cal. Law* (8th ed. 1974) *Constitutional Law*, § 288, pp. 3578-3579.)

Indeed, *Civil Code section 3*, one of the general statutory provisions governing the interpretation of all the provisions of the Civil Code - including the provision at issue in this case - represents a specific legislative codification of this general legal principle, declaring that “[n]o part of [this Code] is retroactive, unless expressly so declared.” (Italics added.)<sup>11</sup> Like similar provisions found in many other codes (see, e.g., \*1208 *Code Civ. Proc.*, § 3; *Lab. Code*, § 4), *section 3* reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted “unless express language or clear and unavoidable implication negatives the presumption.” (*Glavinich v. Commonwealth Land Title Ins. Co.*, *supra*, 163 Cal.App.3d 263, 272.)

The dissenting opinion - relying on passages in a few decisions of this court to the effect that the presumption of prospectivity is to be “subordinated ... to the transcendent canon of statutory construction that the design of the Legislature be given effect ... [and] is to be applied only after, considering all pertinent factors, it is determined that it

is impossible to ascertain the legislative intent” ( *Marriage of Bouquet*, *supra*, 16 Cal.3d 583, 587 [italics deleted]; *Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 686-687 [91 Cal.Rptr. 585, 478 P.2d 17]; *In re Estrada*, *supra*, 63 Cal.2d 740, 746) - apparently takes the position that the well-established legal principle which Justice Rehnquist suggested was “familiar to every law student” (see *United States v. Security Industrial Bank*, *supra*, 459 U.S. 70, 79 [74 L.Ed.2d 235, 243]) is inapplicable in this state and that *Civil Code section 3* and other similar statutory provisions have virtually no effect on a court's determination of whether a statute applies prospectively or retroactively. The language in the decisions relied on by the dissent, however, generally has not been, and should not properly be, interpreted to mean that California has embraced a unique application of the general prospectivity principle, distinct from the approach followed in other jurisdictions (see generally 2 Sutherland on Statutory Construction (4th ed. 1986) § 41.04, pp. 348-350), so that the principle that statutes are presumed to operate prospectively ordinarily has no bearing on a court's analysis of the retroactivity question and may properly be considered by a court only as a matter of last resort and then only as a tie-breaking factor.

In the years since *Estrada*, *supra*, 63 Cal.2d 740, *Mannheim*, *supra*, 3 Cal.3d 678, and *Marriage of Bouquet*, *supra*, 16 Cal.3d 583, both this court and the Courts of Appeal have generally commenced analysis of the question of whether a statute applies retroactively with a restatement of the fundamental principle that “legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.” (See, e.g., *Fox v. Alexis* (1985) 38 Cal.3d 621, 637 [214 Cal.Rptr. 132, 699 P.2d 309]; *White v. Western Title Co.*, *supra*, 40 Cal.3d 870, 884; *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511]; *Baker v. Sudo* (1987) 194 Cal.App.3d 936, 943 [240 Cal.Rptr. 38]; *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1156 [221 Cal.Rptr. 675]; *Glavinich v. Commonwealth Land Title Ins. Co.*, *supra*, 163 Cal.App.3d 263, 272.) These numerous precedents demonstrate that California continues to adhere to the time-honored principle, codified \*1209 by the Legislature in *Civil Code section 3* and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. The language in *Estrada*, *Mannheim*, and *Marriage of Bouquet* should not be

interpreted as modifying this well-established, legislatively-mandated principle.

(6b) Applying this general principle in the present matter, we find nothing in the language of Proposition 51 which expressly indicates that the statute is to apply retroactively.<sup>12</sup> Although each party in this case attempts to stretch the language of isolated portions of the statute to support the position each favors,<sup>13</sup> we believe that a fair reading of the proposition as a whole makes it clear that the subject of retroactivity or prospectivity was simply not addressed. As we have explained, under *Civil Code section 3* and the general principle of prospectivity, the absence of any express provision directing retroactive application strongly supports prospective operation of the measure. Although defendants raise a number of claims in an attempt to escape the force of this well-established principle of statutory interpretation, none of their contentions is persuasive.

### C.

Defendants initially contend that even though there is no express language in the statute calling for retroactive application, an intent that the provision should apply retroactively can clearly be inferred from the objectives of the legislation, as reflected in the stated “findings and declaration of purpose” accompanying the provision and in the ballot arguments which \*1210 were before the voters at the time the measure was adopted.<sup>14</sup> (9) As defendants correctly point out, on a number of occasions in the past we have found that even when a statute did not contain an express provision mandating retroactive application, the legislative history or the context of the enactment provided a sufficiently clear indication that the Legislature intended the statute to operate retrospectively that we found it appropriate to accord the statute a retroactive application. (See, e.g., *Marriage of Bouquet*, *supra*, 16 Cal.3d 583; *Mannheim*, *supra*, 3 Cal.3d 678, 686.)<sup>15</sup>

(6c) Defendants assert that consideration of the factors deemed relevant to the inquiry into legislative intent in those cases - e.g., “[the] context [of the legislative enactment], the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject” ( *Marriage of \*1211 Bouquet*, *supra*, 16 Cal.3d 583, 587) - supports retroactive application of the legislation at issue here. As we shall explain, we cannot agree.

To begin with, unlike *Marriage of Bouquet* or *Mannheim*, there is nothing in either the statutory “findings and declaration of purpose” or the brochure materials which suggests that, notwithstanding the absence of any express provision on retroactivity, the retroactivity question was actually consciously considered during the enactment process. In *Marriage of Bouquet*, the court, in concluding that the statute at issue in that case should be applied retroactively, relied, in part, on the Legislature's adoption of a resolution, shortly after the enactment of the measure, indicating that the retroactivity question was specifically discussed during the legislative debate on the measure and declaring that the provision was intended to apply retroactively (see *Marriage of Bouquet*, *supra*, 16 Cal.3d at pp. 588-591); in *Mannheim*, the statute in question incorporated by reference a separate statutory scheme which had expressly been made retroactive, and the *Mannheim* court reasoned that the Legislature must have intended the later statute to have a parallel application to the provision on which it was expressly fashioned. (See *Mannheim*, *supra*, 3 Cal.3d at pp. 686-687.) Defendants can point to nothing in the election brochure materials which provide any comparable confirmation of an actual intention on the part of the drafters or electorate to apply the statute retroactively.

Indeed, when “the history of the times and of legislation upon the same subject” (*Marriage of Bouquet*, *supra*, 16 Cal.3d at p. 587) is considered, it appears rather clear that the drafters of Proposition 51, in omitting any provision with regard to retroactivity, must have recognized that the statute would not be applied retroactively. As we have noted briefly above, the tort reform measure instituted by Proposition 51 paralleled somewhat similar tort reform legislation - MICRA - which was enacted in the mid-1970's in response to a liability insurance crisis in the medical malpractice field. In *Bolen v. Woo* (1979) 96 Cal.App.3d 944, 958-959 [158 Cal.Rptr. 454] and *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 911-912 [159 Cal.Rptr. 791], two separate panels of the Court of Appeal addressed the question whether one of the tort reform provisions of MICRA should apply retroactively to a cause of action that accrued prior to MICRA's enactment but which was tried after the act went into effect. In both *Bolen* and *Robinson*, the courts held that in the absence of a specific provision in the legislation calling for such retroactive application, the general presumption of prospective application should apply; the *Bolen* court observed that if the Legislature had intended the statute to apply retroactively it “could very easily have inserted such language in the statute itself. It chose not to do so.” (96

Cal.App.3d at p. 959.) Because at least one of the principal institutional proponents and drafters of Proposition 51 was very \*1212 much involved in the post-MICRA litigation,<sup>16</sup> it appears inescapable that - given the *Bolen* and *Robinson* decisions - the drafters of Proposition 51 would have included a specific provision providing for retroactive application of the initiative measure if such retroactive application had been intended. (Cf. *Aetna Cas. & Surety Co., supra*, 30 Cal.2d 388, 396 [“it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended.”].) Since the drafters declined to insert such a provision in the proposition - perhaps in order to avoid the adverse political consequences that might have flowed from the inclusion of such a provision - it would appear improper for this court to read a retroactivity clause into the enactment at this juncture.

#### D.

Defendants contend, however, that whether or not *the drafters* of the proposition intended that the measure would apply retroactively, it is the intent of *the electorate* that is controlling, and they maintain that, in light of the purposes of the proposition, it is evident that the voters must have intended a retroactive application.

This argument, while novel, is flawed in a number of fundamental respects. To begin with, although the intent of the electorate would prevail over the intent of the drafters if there were a reliable basis for determining that the two were in conflict, in the present case there is simply no basis for finding any such conflict. Neither the Legislative Analyst's analysis of Proposition 51 nor any of the statements of the proponents or opponents that were before the voters in the ballot pamphlet spoke to the retroactivity question, and thus there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all. (10) Because past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction (see, e.g., *Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 579-582 [203 P.2d 758]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, *supra*, 22 Cal.3d 208, 244-246), informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure - like other statutes - would be \*1213 applied prospectively because no express provision for retroactive application was included in the proposition.

(6d) Furthermore, defendants' claim that the "remedial" purpose of the measure necessarily demonstrates that the electorate must have intended that the proposition apply retroactively cannot be sustained. Although the "findings and declaration of purpose" included in the proposition clearly indicate that the measure was proposed to remedy the perceived inequities resulting under the preexisting joint and several liability doctrine and to create what the proponents considered a fairer system under which "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault" (Civ. Code, § 1431.1), such a remedial purpose does not necessarily indicate an intent to apply the statute retroactively. Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively. In light of the general principles of statutory interpretation set out above, and particularly the provisions of Civil Code section 3, the contention is clearly flawed. (See, e.g. *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, supra, 30 Cal.2d at p. 395.)<sup>17</sup>

What defendants' contention overlooks is that there are special considerations - quite distinct from the merits of the substantive legal change embodied in the new legislation - that are frequently triggered by the \*1214 application of a new, "improved" legal principle retroactively to circumstances in which individuals may have already taken action in reasonable reliance on the previously existing state of the law. Thus, the fact that the electorate chose to adopt a new remedial rule for the future does not necessarily demonstrate an intent to apply the new rule retroactively to defeat the reasonable expectations of those who have changed their position in reliance on the old law. (11) The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance.

The Oregon Supreme Court's decision in *Joseph v. Lowery*, supra, 495 P.2d 273 illustrates the point quite well, in a context closely related to the instant case. The question at issue in *Joseph* was whether a newly enacted comparative-negligence statute should be applied retroactively to a cause of action which accrued before the passage of the statute but which did not come to trial until after the new law went into effect. The plaintiff in that case, like defendants in this case,

argued forcefully that the court should infer from the remedial nature of the legislative change that the Legislature intended to apply the newly enacted, more equitable comparative negligence rule to all cases tried after the passage of the new legislation, even when the cause of action accrued prior to the enactment; the plaintiff emphasized, in this regard, that the defendant's "primary conduct" at the time of the accident was obviously not undertaken in reliance on the contributory negligence doctrine.

The Oregon Supreme Court rejected the plaintiff's argument for retroactive application of the statute, explaining: "Certainly, no one has an accident upon the faith of the then existing law. However, it would come as a shock to someone who has estimated his probable liability arising from a past accident, and who has planned his affairs accordingly, to find that his responsibility therefor is not to be determined as of the happening of the accident but is also dependent upon what the legislature *might* subsequently do. Every day it is necessary in the conduct of the affairs of individuals and of businesses to make a closely calculated estimate of the responsibility or lack thereof resulting from an accident or from other unforeseen and unplanned circumstances and to act in reliance on such estimate. We believe there is merit in the prior view of this court, as demonstrated by its decisions, that, in the absence of an indication to the contrary, legislative acts should not be construed in a manner which changes legal rights and responsibilities arising out of transactions which occur prior to the passage of such acts." (495 P.2d at p. 276.) The vast majority of other courts - including the United States Supreme Court - which have faced the question whether a remedial statute replacing the all-or-nothing contributory negligence doctrine \*1215 with a more equitable comparative negligence rule should be applied retroactively to causes of action which accrued prior to the date of the comparative negligence statute, when the enactment is silent on the retroactivity issue, have reached the same conclusion as the *Joseph* court, applying the new remedial statute prospectively only.<sup>18</sup>

(6e) Although, as we have noted, there is no indication that the voters in approving Proposition 51 consciously considered the retroactivity question at all, if they had considered the issue they might have recognized that retroactive application of the measure could result in placing individuals who had acted in reliance on the old law in a worse position than litigants under the new law. We briefly examine why retroactive application of the proposition could have such a consequence.

To begin with, plaintiffs whose causes of action arose long before Proposition 51 was enacted will often have reasonably relied on the preexisting joint and several liability doctrine in deciding which potential tortfeasors to sue and which not to sue. Given the joint and several liability rule, plaintiffs may reasonably have determined that while there may have been other tortfeasors - in addition to the defendants named in their complaint - who might also be responsible for their injuries, there was no reason to go to the added expense and effort to attempt to join such other tortfeasors, since plaintiffs could recover all of their damages - economic and noneconomic - from the named defendants. Such plaintiffs would have understood, of course, that under the then-governing rules, the named defendants could bring any additional tortfeasors into the suit through cross-complaints if the defendants desired.

While Proposition 51 itself, of course, does not bar a plaintiff from joining additional tortfeasors - indeed, its effect in the future well may be to encourage plaintiffs to join every conceivable responsible party - the \*1216 retroactive application of the measure to preexisting causes of action would frequently have the effect of depriving plaintiffs of any opportunity to recover the proportion of noneconomic damages attributable to absent tortfeasors, because in many cases the statute of limitations on the plaintiff's preexisting cause of action against such an absent tortfeasor will have run before the enactment of Proposition 51.<sup>19</sup> Thus, while there is nothing in the language or legislative history of Proposition 51 to suggest that the electorate intended to cut off a plaintiff's opportunity to obtain full recovery for noneconomic damages, the retroactive application of the measure would frequently have just such an effect.

In similar fashion, retroactive application of the proposition to actions which were pending prior to the adoption of the measure would frequently defeat the reasonable expectations of parties who entered into settlement agreements in reliance on the preexisting joint and several liability rule. Acting on the assumption that any nonsettling defendants would remain fully liable for both economic and noneconomic damages, plaintiffs in pre-Proposition 51 actions may frequently have settled with some defendants for a lesser sum than they would have accepted if they were aware that the remaining defendants would only be severally liable for noneconomic damages. By contrast, plaintiffs who settle causes of action accruing after Proposition 51 would be fully aware of the applicable principles.

Furthermore, retroactive application of Proposition 51 could also have unanticipated, adverse consequences for settling defendants as well. As noted above, under pre-Proposition 51 law, a defendant could choose to enter into a settlement agreement with the plaintiff which settled the plaintiff's entire claim against all defendants, and could thereafter bring an equitable comparative indemnity action against other tortfeasors to compel them to bear their fair share of the amount which the settling defendant had paid in settlement of the plaintiff's claim. (See, e.g., *Sears, Roebuck & Co. v. International Harvester Co.*, *supra*, 82 Cal.App.3d 492, 496; *American Bankers Ins. Co. v. Avco-Lycoming Division*, *supra*, 97 Cal.App.3d 732, 736.) Under preexisting law, if a settling defendant pursued such a course of action and if one or more of the culpable tortfeasors proved to be insolvent, the shortfall caused by such insolvency would be shared on an equitable basis by all of the solvent tortfeasors. (See, e.g., *Paradise Valley Hospital v. Schlossman*, *supra*, 143 Cal.App.3d 87, 93.) If Proposition 51 were applied \*1217 retroactively to causes of action that accrued prior to its enactment, however, a nonsettling tortfeasor who was faced with an indemnity claim brought by a settling tortfeasor would be able to limit his liability for noneconomic damages to a percentage equal to his own personal degree of fault, and the settling tortfeasor - who had entered into the settlement in reliance on the preexisting state of the law - would be left to absorb by himself any proportion of the noneconomic damages that was attributable to an insolvent tortfeasor or tortfeasors.

Thus, retroactive application of the measure to past litigation could have unexpected and potentially unfair consequences for all parties who acted in reliance on the then-existing state of the law. Prospective application of the measure, while withholding the remedial benefits of the provision from defendants in pending actions, would assure that all parties to litigation were aware of the basic "ground rules" when they decided whom to join in the action and on what terms the case should be settled.

Of course, we do not suggest that most or even many voters were aware of the consequences that would result from the retroactive application of Proposition 51. A review of these consequences does indicate, however, that a voter who supported the remedial changes embodied in Proposition 51 would not necessarily have supported the retroactive application of those changes to defeat the reasonable expectations of individuals who had taken irreversible actions in reliance on the preexisting state of the law.



To avoid misunderstanding, a caveat is in order. It is no doubt possible that an informed electorate, aware of the consequences of retroactive application, would nonetheless have chosen to make the statute retroactive if the retroactivity or prospectivity issue had been directly presented to it. The crucial point is simply that because Proposition 51 did not address the retroactivity question, we have no reliable basis for determining how the electorate would have chosen to resolve either the broad threshold issue of whether the measure should be applied prospectively or retroactively, or the further policy question of *how* retroactively the proposition should apply if it was to apply retroactively: i.e., whether the new rule should apply to cases in which a complaint had not yet been filed, to cases which had not yet come to trial, to cases in which a trial court judgment had not yet been entered, or to cases which were not yet final on appeal.<sup>20</sup> \*1218

As we have explained above, the well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent gives recognition to the fact that retroactive application of a statute often entails the kind of unanticipated consequences we have discussed, and ensures that courts do not assume that the Legislature or the electorate intended such consequences unless such intent clearly appears. Because in the present matter there is nothing to suggest that the electorate considered these results or intended to depart from the general rule that statutory changes operate prospectively, prospective application is required.<sup>21</sup>

#### E.

Defendants next argue that even if the remedial nature of Proposition 51 is not sufficient to indicate an intent on the part of the electorate to apply the measure retroactively, this court should infer such an intent from the fact that the measure's statement of purpose and the election brochure arguments demonstrate that the proposition was adopted to meet a liability insurance crisis. Defendants maintain that because it will be years before causes of action which accrue after the effective date of the proposition actually come to trial, a prospective application of the measure would not effectuate the purpose of alleviating the insurance crisis and thus could not have been intended by the electorate. For a number of reasons, we conclude that this argument cannot be sustained.

To begin with, defendants' account of the consequences of prospective application of the measure is inaccurate in

a number of significant respects. First, because liability insurance premiums are based in part, if not exclusively, on the damages that the insurance company anticipates it will incur for the risks which will be covered by the policy, any anticipated reduction in damages to be awarded in the future for causes of action which arise \*1219 during policy periods following the act should logically be reflected in an immediate reduction in the premiums which potential defendants pay for post-act insurance coverage. Thus, prospective application of the proposition could reasonably have been expected to afford immediate benefits to potential defendants. Similarly, to the extent governmental or other activities had been curtailed because of the fear of the anticipated financial consequences of future accidents, the knowledge that any such future incidents would be governed by the provisions of Proposition 51 would logically support prompt resumption of the activities.

Moreover, because the insurance premiums which potential defendants had paid prior to the enactment of Proposition 51 for coverage of pre-Proposition 51 accidents were presumably computed, at least in part, on the assumption that the then-prevailing joint and several liability doctrine would apply to the covered incidents, a retroactive application of the measure might be expected to provide a windfall to defendants' insurers, rather than a direct benefit to the insureds themselves because the initiative contained no provision requiring insurers to return any portion of previously collected premiums to their insureds. Indeed, this potential consequence of retroactive application may have been one reason the drafters of the measure chose not to include an express retroactivity provision in the measure; if this potential insurance company windfall from retroactive application had been brought to the attention of the electorate, it might well have detracted from the popularity of the measure.

Finally, defendants' suggestion that a prospective application of Proposition 51 will mean that it will be years before the measure will affect the actual damages paid by defendants in tort cases overlooks the fact that the vast majority of tort actions are resolved by settlement rather than by trial. Because the amounts at which cases are settled reflect the defendant's potential liability at trial, the effects of Proposition 51 on damages actually paid by defendants are likely to be felt at a much earlier date than defendants predict even if the measure is applied prospectively.

Thus, we cannot agree that prospective application is inconsistent with the objective of alleviating a liability-insurance crisis.

Indeed, a review of other statutory provisions, similar to Proposition 51, which were enacted in other states at approximately the same time as Proposition 51 and in response to the same concerns over the effects of high liability insurance premiums,<sup>22</sup> demonstrates that this factor does not necessarily \*1220 evidence an intent to apply the statute retroactively to all cases tried after the effective date of the enactment. In the numerous statutes altering the joint and several liability rule which were enacted throughout the country in 1986 and 1987, the various state legislatures not only adopted different substantive variants of several liability (see fns. 5, 6, 7, *ante*), but also arrived at differing conclusions as to whether the newly enacted statutes should be applied retroactively to preexisting causes of action. Several of the new statutes were explicitly made applicable only to causes of action accruing after the date of the new legislation (Fla.Stat. Ann. § 768.71(2) (West Supp. 1987); Mo. Ann. Stat. § 538.235 (Vernon Supp. 1987); Ill. Ann. Stat., ch. 110, note following paras. 2-1117, 2-1118 (Smith-Hurd Supp. 1987); 1987 Nev. Stat., ch. 709, § 2), some of the enactments apply only to cases filed on or after the effective date of the statute (1986 Colo. Sess. Laws, ch. 108, § 7; 1986 Wash. Laws, ch. 305, § 910; 1986 N.Y. Laws, ch. 682, § 12; 1987 Tex. Acts, 70th Leg., 1st C.S., ch. 2, § 4.05, in Tex. Civ. Prac. & Rem. Code Ann., note following § 9.001 (Vernon 1988)), and only one of the statutes - which adopted a several liability rule limited to less culpable governmental defendants - applies to cases "pending on or commenced on or after" the date of the enactment (1986 Minn. Laws, ch. 455, § 95). These varying responses, of course, are relevant to the question before us only inasmuch as they demonstrate that other legislative bodies which enacted statutes in response to the same liability crisis that precipitated Proposition 51 and which consciously focused on the retroactivity question arrived at different conclusions of whether, and to what extent, such a statutory modification should apply to preexisting causes of action. Because the provision before us is silent on the question, the general presumption which dictates a prospective application in the absence of a clear contrary intent must control.

The California decision most closely on point directly supports this conclusion. As noted above, in *Bolen v. Woo*, *supra*, 96 Cal.App.3d 944, 958-959, the Court of Appeal addressed the question whether one of the tort reform provisions of MICRA should apply retroactively to a cause

of action that accrued prior to MICRA's enactment but that was tried after the act went into effect. The defendant in *Bolen*, like defendants in this case, relied heavily on the fact that the preamble of MICRA demonstrated that the measure was adopted in response to a crisis caused by "skyrocketing" liability insurance costs<sup>23</sup> and argued that that purpose established an intent \*1221 to apply the act retroactively. The *Bolen* court rejected the contention, relying on the general principle of prospectivity discussed above and emphasizing that if the Legislature had intended the statute to apply retroactively it "could very easily have inserted such language in the statute itself. It chose not to do so." (96 Cal.App.3d at p. 959.)

In light of *Bolen*, if the proponents of Proposition 51 felt that the liability crisis necessitated a retroactive application of the measure's provisions, it seems evident that they would have included an express retroactivity provision in the proposition.

#### F.

Defendants next argue that, despite the absence of any express retroactivity provision, Proposition 51 should be applied retroactively by analogy to this court's retroactive application of the decisions in *Li v. Yellow Cab*, *supra*, 13 Cal.3d 804, and *American Motorcycle Association v. Superior Court*, *supra*, 20 Cal.3d 578, to at least some cases that were pending at the time those decisions were rendered. (See *Li*, *supra*, 13 Cal.3d 804, 829; *Safeway stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 333-334 [146 Cal.Rptr. 550, 579 P.2d 441].) For a number of reasons, those decisions do not support defendants' claim.

First, both *Li*, *supra*, 13 Cal.3d 804, and *American Motorcycle*, *supra*, 20 Cal.3d 578, involved changes in common law tort doctrine that were made by judicial decision, not statutory enactment. As the earlier quotation from Chief Justice Rehnquist makes clear, as a general rule there is a fundamental difference between the retroactivity of statutes and the retroactivity of judicial decisions: "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. [Citations.]" (*United States v. Security Industrial Bank*, *supra*, 459 U.S. 70, 79 [74 L.Ed.2d 235, 243].) It is because of this difference in the governing legal principles that in most states in which the comparative negligence rule has been adopted through judicial decision - like California - the newly adopted rule has been applied to at least some pending cases (see Schwartz, *Comparative Negligence* (2d ed. 1986) § 8.2,

pp. 140-143), while in those states in which comparative negligence has been established by statute, the change has almost uniformly been applied prospectively. (See *id.*, §§ 8.3, 8.4, pp. 143-149; see also fn. 17, *ante.*) Thus, the fact that the \*1222 judicial modifications of tort doctrines in *Li* and *American Motorcycle* were accorded some retroactive application provides no support for defendants' claim that the subsequent legislative modification of a tort doctrine in Proposition 51 should apply retroactively.

Second, defendants' argument overlooks a related, but somewhat more fundamental, point. Because in the *Li*, *supra*, 13 Cal.3d 804, and *American Motorcycle*, *supra*, 20 Cal.3d 578, cases it was the court which made the policy decision that the common law rules at issue in those cases should be changed, the court was the appropriate body to determine whether or not the new rule should be applied retroactively and, if so, how retroactively. (See generally *Gt. Northern Ry. v. Sunburst Co.* (1932) 287 U.S. 358 [77 L.Ed. 360, 53 S.Ct. 145, 85 A.L.R. 254]; *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151-153 [181 Cal.Rptr. 784, 642 P.2d 1305].) In the present case, by contrast, it was the electorate who made the policy decision to implement a change in the traditional common law rule, and thus it was the voters who possessed the authority to decide the policy question of whether the new statute should be applied retroactively. Unlike in *Li* or in *American Motorcycle*, in this case our court has no power to impose its own views as to the wisdom or appropriateness of applying Proposition 51 retroactively. Because, as we have discussed above, the proposition is silent on the retroactivity question, *Civil Code section 3* and well-founded principles of statutory interpretation establish that the statute must be interpreted to apply prospectively.

### G.

Finally, defendants contend that Proposition 51 should be applied retroactively by analogy to a line of California cases, beginning with *Tulley v. Tranor* (1878) 53 Cal. 274, which have applied a number of statutory amendments, which modified the legal measure of damages recoverable in an action for wrongful conversion of personal or real property, to all trials conducted after the effective date of the revised statute. (See also *Feckenscher v. Gamble* (1938) 12 Cal.2d 482 [85 P.2d 885]; *Stout v. Turney* (1978) 22 Cal.3d 718, 727 [150 Cal.Rptr. 637, 586 P.2d 1228].)<sup>24</sup> \*1223

To begin with, we believe defendants clearly overstate the scope of the *Tulley* line of cases in suggesting that those

decisions establish a broad rule that in California any statutory provision which affects the amount of damages which an injured person may recover is presumptively retroactive. As we have seen, the seminal decision in *Aetna Cas. & Surety Co.*, *supra*, 30 Cal.2d 388 - decided long after *Tulley*, *supra*, 53 Cal. 274 - applied the general presumption of prospective application to a statutory provision which increased the damages or benefits recoverable in a workers' compensation action. Similarly, the two relatively recent MICRA cases noted above (*Bolen v. Woo*, *supra*, 96 Cal.App.3d 944; *Robinson v. Pediatrics Affiliates Medical Group, Inc.*, *supra*, 98 Cal.App.3d 907) applied the traditional principle of prospective application to a provision of MICRA which affected the damages which a plaintiff could recover in a medical malpractice action. (*Civ. Code*, § 3333.1 [modification of collateral source rule].) Indeed, in our even more recent decision in *White v. Western Title Ins. Co.*, *supra*, 40 Cal.3d 870, 884, this court, after noting that "[i]t is a general rule of construction ... that, unless the intention to make it retrospective clearly appears from the act itself, a statute will not be construed to have that effect" [citations], "went on to observe that "[t]his rule is particularly applicable to a statute which *diminishes* or extinguishes an existing cause of action." (Italics added.) (*Ibid.*) Thus, it is not accurate to suggest that the ordinary presumption of prospectivity is inapplicable to any statute which modifies damages; after all, *Civil Code section 3*, which codifies the common law presumption of prospectivity with respect to provisions of the Civil Code, contains no exception for statutes relating to damages.

Instead, *Tulley*, *supra*, 53 Cal. 274, and its progeny were primarily concerned with an entirely separate issue. In *Aetna Cas. & Surety Co.*, *supra*, 30 Cal.2d 388, our court, in discussing *Feckenscher v. Gamble*, *supra*, 12 Cal.2d 482 - one of the cases in the *Tulley* line - observed that in *Feckenscher* the court had found that the language of the statute in question showed that the Legislature intended the measure to be applied retroactively, and that "the court was concerned mainly with the question of whether the Legislature has power to give those laws such retroactive effect. " (30 Cal.2d at p. 393.) The *Tulley* decision, too - after finding that the statutory \*1224 language left "no reasonable doubt that the amendment was intended to be applicable to a case in which the conversion had occurred prior to its passage" (53 Cal. at p. 278)<sup>25</sup> - focused primarily on the question of whether the Legislature had the constitutional authority to apply a new measure of damages to causes of action which accrued prior to the enactment of the new statute but which came

to trial after the enactment, concluding that the Legislature did have such authority. (See 53 Cal. at pp. 279-280.) Thus, while *Tulley* and its progeny do provide support for the claim that it is not necessarily unconstitutional for the Legislature to alter the measure of damages with respect to preexisting causes of action, those decisions do not purport to reject the ordinary presumption of prospectivity or to adopt a new legal standard for determining whether the Legislature intended a statute to be retroactive or prospective; the decisions simply found that the language of the statutes at issue in those cases demonstrated that the measures were intended to apply retroactively.

As we have noted above, of course, the question whether Proposition 51 may constitutionally be applied retroactively is quite distinct from the question whether the proposition should be properly interpreted as retroactive or prospective as a matter of statutory interpretation. (12) The *Aetna Cas. & Surety Co.* decision makes it clear that the *Tulley* line of cases cannot properly be interpreted as displacing ordinary principles of statutory interpretation with regard to the question of retroactivity. (See *Aetna Cas. & Surety Co.*, *supra*, 30 Cal.2d at pp. 393-394.) Other jurisdictions have also generally applied the traditional presumption of prospective application to statutes which modify the amount of damages recoverable in tort actions. (See generally Annot. (1964) 98 A.L.R.2d 1105; Annot. (1977) 80 A.L.R.3d 583, 601-602.)

In any event, Proposition 51 is quite unlike the statutory provisions at issue in *Tulley*, *supra*, 53 Cal. 274, or its progeny in a number of important respects. First of all, unlike the statutes in those cases, Proposition 51 does not purport to alter either the measure or the total amount of damages that a plaintiff may recover for a particular tort. Although Proposition 51 does affect the amount of noneconomic damages a particular tortfeasor may be required to pay when more than one tortfeasor is responsible for an injury, and may have the effect of reducing a plaintiff's ultimate recovery if one or more tortfeasors are insolvent, nothing in the measure evidence a legislative \*1225 objective of denying a plaintiff the opportunity to obtain full recovery for both economic and noneconomic damages by joining all responsible tortfeasors and collecting the appropriate proportion of noneconomic damages from each tortfeasor. As we have discussed above, however, retroactive application of the measure would often have the effect of placing plaintiffs in pending actions in a worse position than plaintiffs in future actions, since plaintiffs in pending actions may no longer have the ability to join all potentially liable tortfeasors because of the statute

of limitations. Thus, whereas application of the statutory provisions at issue in the *Tulley* line of cases to both pending and future actions at least accorded like treatment to current and future plaintiffs, retroactive application in this case would not have an equalizing effect, but would impose a unique detriment on one class of plaintiffs. Accordingly, it is more difficult to assume in this case, than it was in the *Tulley* cases, that retroactive application was intended.

Second, given the nature of the statutory revision at issue in the *Tulley* line of cases, it was unlikely that the parties in pending actions had taken any irreversible actions or changed their position in reliance on the preexisting measure of damages. By contrast, as discussed above, many plaintiffs and defendants in pending actions undoubtedly relied on the preexisting joint and several liability rule in conducting their litigation prior to enactment of Proposition 51. On this ground, too, there is more reason in this case than in the *Tulley* decisions to question whether a retroactive application of the statute was intended.

Finally, it is impossible to ignore that the statutory change at issue here, modifying a long-standing common law doctrine applicable to all negligence actions, represents a much more substantial and significant change in the law than the narrow statutory modifications at issue in the *Tulley* cases. Because of the widespread impact of retroactive application of Proposition 51, the need for an express statement of legislative intent becomes all the more essential.

Accordingly, the *Tulley* line of cases does not support the retroactive application of Proposition 51. <sup>26</sup> \*1226

## H.

Having reviewed defendants' numerous arguments, we think it may be useful, in conclusion, to take a last look at one particularly instructive precedent. In *Winfree v. Nor. Pac. Ry. Co.* (1913) 227 U.S. 296 [57 L.Ed. 518, 33 S.Ct. 273], the United States Supreme Court was faced with a question of statutory interpretation very similar to the question which is before us today. In 1908, the Federal Employers Liability Act - which granted railroad workers who had been injured in the course of their employment the right to bring a negligence action in federal court against the employer - had been amended to replace the doctrine of contributory negligence with comparative negligence. In *Winfree*, the plaintiff claimed that although the injury in that case had preceded the 1908 act, the comparative negligence doctrine should nonetheless be

applied because the matter had not gone to trial until after the act had gone into effect. The plaintiff maintained that because even before the 1908 enactment the defendant railroad should have known that it could be held liable if its negligence resulted in a worker's injury, there was no reason to deny the plaintiff the benefit of the new comparative negligence rule.

In *Winfree*, the Supreme Court rejected the plaintiff's contention and held that the statute could not properly be applied to preexisting causes of action. In reaching its conclusion, the court relied on "the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required." (227 U.S. at p.301 [57 L.Ed. at p. 520].) Because the 1908 amendment "introduced a new policy and quite radically changed the existing law," the court emphasized that it was particularly the kind of statute that "should not be construed as retrospective." ( *Id.* at p. 302 [57 L.Ed. at p. 520].)

As we have explained, precisely the same principle is applicable here. (6f) Proposition 51 "introduced a new policy" which will have a \*1227 broad effect on most tort actions in California. Under [Civil Code section 3](#) and the general principles of statutory interpretation, if the measure was intended to be applied retroactively, a provision directing retroactive application should have been included. In the absence of such an express declaration of retroactivity, we conclude that the proposition must be interpreted as prospective.

## V.

Because we have concluded that the Court of Appeal erred in finding that Proposition 51 applies retroactively to this case, there is no need to reach the additional issues, relating to the interpretation and application of various portions of the proposition, which were discussed by the Court of Appeal.

The decision of the Court of Appeal is affirmed insofar as it upholds the constitutionality of Proposition 51, but is reversed insofar as it holds that Proposition 51 applies to causes of action that accrued prior to the effective date of the initiative measure.

Each party shall bear its own costs in these proceedings.

Mosk, Acting C. J., Broussard, J., and Panelli, J., concurred.

## KAUFMAN, J.

I concur in the majority's holding that Proposition 51, the Fair Responsibility Act of 1986 (hereafter Proposition 51 or the Act) violates neither the due process nor the equal protection guarantees of the state or federal Constitutions. I respectfully dissent, however, from its holding that Proposition 51 does not apply to causes of action which accrued before the measure's effective date. I conclude, as did the Court of Appeal, that the Act was designed to apply to all cases yet to be tried, including the instant one. Therefore, I would affirm the judgment of the Court of Appeal in its entirety.

### Discussion

Because "nothing in the language of Proposition 51 ... expressly indicates that the statute is to apply retroactively," the majority concludes that it must apply prospectively. (Majority opn. at p. 1209.) Hence, the majority holds that the modified rule of joint and several liability enacted by the electorate shall not apply to any "cause of action" that *accrued* prior to the Act's effective date even if suit had not been filed before Proposition 51's enactment. \*1228

The majority grounds its holding on three fundamental assumptions: 1) that [section 3 of the Civil Code](#) requires an express statement of retroactive intent, 2) that if the drafters of the Act had intended a retroactive application, they would have said so in the proposition, and 3) that a retroactive intent may not legitimately be inferred from sources other than the proposition itself. Each of these assumptions, as I shall explain, is legally incorrect and inconsistent with prior decisions of this court.

Aside from these three erroneous legal assumptions, the majority justifies its holding on two additional practical considerations. Application of the Act to all cases untried on its effective date, the majority asserts, would result in: 1) unfairness to plaintiffs who may have relied on the former rule of joint and several liability in making such tactical litigation decisions as whom to sue, and with whom and for how much to settle, and 2) an unwarranted "windfall" to insurance companies which computed their pre-Proposition 51 premiums on the basis of the former law. As will appear from the discussion which follows, these asserted practical

considerations are for the most part incorrect factually and in any event are unsound as a basis for decision.

The presumption of prospectivity said to be codified in [Civil Code section 3](#) does not require an express statement of retroactive intent, nor does the absence of such a statement in the Act indicate that its drafters must have intended that the presumption should apply. The paramount consideration here, as in any other matter of statutory construction, is to ascertain the intent of the enacting body so as to effectuate the purpose of the law.

A wide variety of factors may be relevant to the determination of whether the enacting body intended a new statute to be given retroactive effect. As more fully explained below, two factors of particular relevance here are the Act's history and its express remedial purposes. When these are considered in light of the relevant facts and decisional law, the conclusion becomes nearly inescapable that the Act's purposes can be fully served only if it is applied to all cases not tried prior to its effective date.

As to the practical ramifications of an application of the Act to cases not tried before its effective date, a dispassionate analysis reveals the majority's concerns to be largely groundless. Indeed the majority implicitly concedes as much by holding that the Act shall not apply to any *cause of action* that accrued prior to its effective date *regardless* of whether the plaintiff has taken any steps which could even arguably be construed as "reliance" on the former law.

I conclude, finally, by noting the strange logic that would attempt to justify a retrospective application of the radical restructuring of tort liability \*1229 which this court effected in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], yet condemn as "unfair" a retrospective application of the relatively limited reform enacted by the electorate through Proposition 51. The inconsistency does little credit to this court, or to the principle and appearance of judicial impartiality.

### 1. Legislative Purpose and the Presumption of Prospectivity

The first and essentially the only real point of the majority opinion - intoned, however, with the drumbeat regularity of a Hindu mantra - is that the "presumption of prospectivity" is dispositive absent an express statement of legislative intent to the contrary. No matter how often repeated, however, the point is profoundly mistaken. This court has held that the

presumption of prospectivity codified in [Civil Code section 3](#) is relevant "only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (Italics added, *In re Estrada* (1965) 63 Cal.2d 740, 746 [48 Cal.Rptr. 172, 408 P.2d 948]; accord *Fox v. Alexis* (1985) 38 Cal.3d 621, 629 [214 Cal.Rptr. 132, 699 P.2d 309]; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587 [128 Cal.Rptr. 427, 546 P.2d 1371]; *Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 686-687 [91 Cal.Rptr. 585, 478 P.2d 17].) As *Estrada* counseled, "That rule of construction ... is not a straightjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent." (63 Cal.2d at p. 746; accord *In re Marriage of Bouquet, supra*, 16 Cal.3d at p. 587; *Mannheim v. Superior Court, supra*, 3 Cal.3d at pp. 686-687.) This has long been the rule. (See, e.g., *Estate of Frees* (1921) 187 Cal. 150, 156 [201 P. 112] [retroactive operation may be "inferred ... from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment ...." (Italics added.)].) And as this court has recently reaffirmed, "An express declaration that the Legislature intended the law to be applied retroactively is not necessarily required." (*Fox v. Alexis, supra*, 38 Cal.3d at p. 629.)

The majority attempts to distinguish our holdings in *Mannheim, supra*, 3 Cal.3d 678 and *Marriage of Bouquet, supra*, 16 Cal.3d 583, on the ground that there is no evidence in this case to show "the retroactivity question was *actually consciously considered* during the enactment process." (Majority opn. at p. 1211, italics added.) None of our prior decisions, however, has ever suggested that [Civil Code section 3](#) requires proof of a "conscious" legislative decision that a statute or initiative should operate retroactively. On the contrary, *Estrada, Mannheim, Marriage of Bouquet* and *Fox, supra*, 38 Cal.3d 621, all emphatically reaffirm the traditional rule that legislative intent may - indeed *must* - in the absence of an express declaration be \*1230 "deduced" from a "wide variety" of "pertinent factors," including the "context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction ...." (*Fox v. Alexis, supra*, 38 Cal.3d at p. 629; *In re Marriage of Bouquet, supra*, 16 Cal.3d at p. 591; *Mannheim v. Superior Court, supra*, 3 Cal.3d at pp. 686-687; *In re Estrada, supra*, 63 Cal.2d at p. 746.)

The majority's fundamental misunderstanding of these basic principles leads it into other errors. Thus, the majority assumes that "the drafters of Proposition 51 would have included a specific provision providing for retroactive application of the initiative measure if such retroactive application had been intended." (Majority opn. at p. 1212.) That is a false assumption. As we have seen, where the language of the statute is silent, the courts may *not* automatically assume that the enacting body must have intended that the law should apply prospectively. On the contrary, the presumption of prospectivity " [i]s to be applied only *after*, considering *all* pertinent factors, it is determined that it is *impossible* to ascertain the legislative intent." ( *In re Estrada*, *supra*, 63 Cal.2d at p. 746, italics added.)

Indeed, if we properly assume that the proponents of Proposition 51 were aware of the relevant law when they chose to remain silent, it is not unlikely that they assumed the Act would apply to all cases not yet tried, and thus had no reason to expressly so provide. As the majority notes, statutes which modify the recoverability of damages have frequently been held by this court to be applicable to cases not yet tried. (See, e.g. *Tulley v. Tranor* (1878) 53 Cal. 274; *Feckenscher v. Gamble* (1938) 12 Cal.2d 482 [85 P.2d 885]; *Stout v. Turney* (1978) 22 Cal.3d 718 [150 Cal.Rptr. 637, 586 P.2d 1228].)<sup>1</sup> Contrary to the majority's assumption, therefore, if anything may reasonably be inferred from the Act's silence (which I do not strongly advocate, inasmuch as the evidence of *intent* is controlling) it is that the Act should apply retrospectively to all cases not yet tried.

Nor does *Bolen v. Woo* (1979) 96 Cal.App.3d 944 [158 Cal.Rptr. 454], the "decision most closely on point" according to the majority, suggest otherwise. The issue in that case was whether an amendment to the Civil Code (§ 3333.1) which abrogated the "collateral source" rule in actions against health care providers applied retroactively. The *Bolen* court noted that prior to passage of the legislation, the Legislative Counsel rendered an opinion which counseled that the statute "would fall within the proscription \*1231 against retroactive application ...." (96 Cal.App.3d at p. 958.) Thus, "[a]rmed ... with ... counsel's opinion on retroactivity ..., " the *Bolen* court concluded, the Legislature's silence could be considered sufficient *proof of its intent* that the statute should apply prospectively. (*Id.* at p. 959.) The majority's reliance on *Bolen* for the proposition that mere legislative silence triggers the presumption of prospectivity is clearly misplaced.

## 2. Retroactive Intent and Remedial Purpose

Based on the mistaken notion that the presumption of prospectivity governs absent an express declaration to the contrary, the majority concludes that a retroactive intent may not validly be inferred from other sources. However, the law is precisely to the contrary. We have consistently held that the presumption applies "only after, considering *all pertinent factors*, it is determined that it is impossible to ascertain the legislative intent." ( *In re Estrada*, *supra*, 63 Cal.2d at p. 746, italics added.) As we recently reaffirmed in *Fox v. Alexis*, *supra*, 38 Cal.3d 621, a "wide variety of factors may be relevant to our effort to determine whether the Legislature intended a new statute to be given retroactive intent. The context of the legislation, its objective, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction may all indicate the legislative purpose." ( *Id.* at p. 629.) Two factors of particular relevance here are the "history of the times" and the perceived "evils to be remedied" by the Act.

The majority laudably prefaces its discussion of Proposition 51 with a "brief historical perspective." (Majority opn. at pp. 1196-1199.) The perspective provided, however, consists almost entirely of prior decision of this court. There is, curiously, almost no mention of the dramatic context in which Proposition 51 was conceived and adopted, of the so-called "liability crisis " or the pitched battle among government agencies, business interests, insurers, and consumer advocates over the origins of the perceived crisis or the efficacy of Proposition 51 to alleviate it; no mention of the increasingly common multimillion dollar tort judgments or the alleged inequities of the " deep-pocket" rule that saddled public agencies and other institutions with damages far beyond their proportion of fault; no mention of the prohibitive insurance premiums that had forced numerous persons and entities from doctors to day-care centers, municipal corporations to corporate giants, to either go " bare" or go out of business; and no mention, finally, of the electorate's overwhelming approval, by a vote of 62 percent to 38 percent, of the tort-reform measure designed to mitigate this crisis, the Fair Responsibility Act of 1986, or Proposition 51.

An awareness of historical context illuminates more than merely the spirit of the Act; it clarifies the letter of the law, as well. The text of the Act \*1232 begins with an unusually forthright statement of "Findings and Declaration of Purpose." The Act sets forth three specific findings: "(a)

The legal doctrine of joint and several liability, also known as the 'deep pocket rule', has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers. [¶] (b) ... Under joint and several liability, if ['deep pocket defendants'] are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People - taxpayers and consumers alike - ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums. [¶] (c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums."

In light of these express findings, the Act explicitly declares that its purpose is "to remedy these inequities" by holding defendants "liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." The Act "further declare[s] that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses."

Thus, it is clear from the plain language of the Act as well as from the context in which it was adopted, that Proposition 51 was conceived in crisis, and dedicated to the proposition that the "deep pocket rule" has resulted in a system of *inequity and injustice*." Its express goals were no less than to avert "financial bankruptcy," to "avoid catastrophic economic consequences," to stave off "higher taxes" and "higher prices," and to preserve "essential" public services.

In light of these express remedial purposes, the inference is virtually inescapable that the electorate intended Proposition 51 to apply as soon and as broadly as possible. When the electorate voted to reform a system perceived as "inequitable and unjust," they obviously voted to change that system *now*, not in five or ten years when causes of action that accrued prior to Proposition 51 finally come to trial. When they voted to avert "financial bankruptcy" and "catastrophic economic consequences," to stave off "higher prices ... and higher taxes," and to preserve essential public "services," they clearly voted for *immediate* relief, not gradual reform five or ten years down the line. A crisis does not call for *future* action. It calls for action *now*, action across the board, action as broad and as comprehensive as the Constitution will allow.

It is clear that the purposes of Proposition 51 will be \*1233 fully served only if it is applied to all cases not tried prior to its effective date.

The law not only permits, but compels such an inference. When legislation seeks to remedy an existing inequity or to impose a less severe penalty than under the former law, the courts of this state have long held that the enacting body must have intended that the statute should apply to matters that occurred prior to its enactment. This concept found classic expression in *In re Estrada, supra*, 63 Cal.2d 740, where we held, notwithstanding the statutory presumption against retroactivity, that when an amendatory statute lessening punishment becomes effective prior to the final date of judgment, the amendment applies rather than the statute in effect when the prohibited act occurred. (*Id.* at pp. 744-745.) The amendment in question had indicated a legislative determination that the former punishment was too severe. Therefore, we reasoned, the Legislature must have intended that the new statute should apply to every case to which it constitutionally could apply, for "to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance," an objective contrary to civilized standards of justice. (*Id.* at p. 745; accord *People v. Durbin* (1966) 64 Cal.2d 474, 479 [50 Cal.Rptr. 657, 413 P.2d 433]; *Holder v. Superior Court* (1969) 269 Cal.App.2d 314, 316-317 [74 Cal.Rptr. 853].)

The courts have applied similar reasoning to statutes designed to remedy inequities in the civil law. "In the construction of remedial statutes ... regard must always be had for the evident purpose for which the statute was enacted, and if the *reason* of the statute extends to past transactions, as well as to those in the future, then it will be so applied ...." (*Abrams v. Stone* (1957) 154 Cal.App.2d 33, 42 [315 P.2d 453], italics added; accord *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 595 [97 Cal.Rptr. 30].)

For example, In *Harrison v. Workmen's Comp. Appeals Bd.* (1974) 44 Cal.App.3d 197 [118 Cal.Rptr. 508], the court held that an amendment to the Labor Code which provided a cutoff date of five years for employer exposure to claims of occupational injury applied retrospectively to injuries incurred prior to the amendment's effective date. After reviewing the "procedural morass," delays and expense attendant upon the former law, the court concluded that the remedial purpose of the law required a retrospective application notwithstanding the absence of language in the statute manifesting such an intent: "[T]he amended legislation



was designed and introduced for the purpose of ameliorating the procedural morass which has faced the board in multiple defendant cases. Thus, it is clear that the *purpose of the amendment was to remedy an immediate situation which was imposing undue delay and expense upon litigants and hardship upon disabled employees ... [T]he object of that legislation will not be effectuated unless* \*1234 *the board is permitted to apply the amendment retrospectively as well as prospectively.* We conclude that it was the intent of the Legislature that it be so applied.“ (*Id.* at pp. 205-206, italics added.)

Like reasoning also supported the decision in *City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550 [90 Cal.Rptr. 843], where the court held that an amendment to the Government Code which relaxed the procedural standards governing local zoning proceedings applied retroactively. “It reasonably appears that the Legislature enacted section 65801 as a *curative statute* for the purpose of terminating recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions. [Citations.] *This legislative purpose would be fully served only if the section were applied ... regardless of whether the offending procedural omission occurred before or after the section's enactment.*“ (*Id.* at pp. 557-558, italics added.)

In *Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041 [192 Cal.Rptr. 341], the issue was whether an amendment that repealed the statutory right to appeal from an extraordinary writ proceeding in the superior court challenging an action in the municipal court, applied to appeals filed before the effective date of the legislation. Though the language of the amendment was silent as to intent, the court concluded that the “obvious goal of the amendment ... suggests the logic of retroactive application.“ (*Id.* at p. 1046, italics added.) The former statute, the court noted, provided broader appellate review of relatively trivial matters in the municipal court than was accorded an accused in the superior court. Therefore, “[t]o deny retroactive application to the amendment,” the court concluded, “is to subscribe to the notion that the Legislature desired to postpone the demise of a procedural loophole which was inequitable to defendants accused of more serious offenses, [and] placed unnecessary and redundant burdens on the appellate courts. ... We find that proposition absurd.“ (*Id.* at p. 1047, italics added.)

It is, therefore, a fairly prosaic rule which holds that a retrospective intent may be inferred from a specific and compelling remedial purpose. The question before us is

whether such an inference is justified in this case. As noted earlier, Proposition 51 was designed with the express intent to “remedy ... inequities“ in the existing rule of joint and several liability, inequities which threatened grave and imminent harm to the public weal. Indeed, such reform was “necessary,” the Act declared, “to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.“ (Italics added.) If this was not language evocative of “the logic of retroactive application“ (*Andrus v. Municipal Court, supra*, 143 Cal.App.3d at p. 1046), then nothing is. \*1235

To deny retroactive application to the Act would infer an intent to postpone the repeal of a rule which its drafters expressly condemned as inequitable and unjust. Indeed, it would infer an intent to perpetuate that rule in potentially thousands of actions that accrued prior to the Act's effective date. Instead of a fair and *uniform* system of liability, it would infer that the drafters intended a *dual* system of justice, where the courts would apply a reformed rule of joint and several liability to one set of defendants, and a discredited, inequitable rule to another. I find that proposition patently untenable as well as unjust.

Nevertheless, the majority insists that a retroactive intent may not be inferred from a clear and compelling statement of remedial purpose. The reason, according to the majority, is that “[m]ost statutory changes are ... intended to ... bring about a fairer state of affairs“ and therefore “almost all statutory provisions and initiative measures would apply retroactively rather than prospectively.“ (Majority opn. at p. 1213.) Furthermore, the majority asserts, this court rejected a similar argument nearly 40 years ago in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 [182 P.2d 159]. Neither of these contentions withstands scrutiny.

*Aetna* concerned the retroactivity of an amendment to the Labor Code that increased workers' compensation benefits. In support of a retrospective application of the law, the injured workers relied on the statutory mandate that provisions of the Workers' Compensation Act are to be “liberally construed “ to extend their benefits to injured workers. (Lab. Code, § 3203.) We rejected the workers' argument, however, holding that a retrospective intent could not be “implied from the mere fact that the statute is remedial and subject to the rule of liberal construction.“ (30 Cal.2d at p. 395.) The doctrine of “liberal construction“ and the presumption of prospectivity, we noted, were merely two canons of construction, and “[i]t would be a most peculiar judicial reasoning,” we observed,

”which would allow one such doctrine to be invoked for the purpose of destroying the other.“ (30 Cal.2d at p. 395.)

*Aetna* therefore stands for the simple proposition that one general canon of construction (that workers' compensation provisions are to be ”liberally “ construed) does not supersede another (that statutes are presumed to apply prospectively). The case at bar bears no resemblance to *Aetna*. Here the evidence relating to remedial intent consists not of abstract principles unrelated to the statute at issue, but of clear and unmistakable statements of particular remedial purposes in the Act itself, and of similar indications implicit in the history of the Act. The cases and authorities previously cited not only permit, but *demand* that we examine these expressions of remedial purpose for whatever clues they may provide on the question of retroactivity, and nothing in *Aetna*, *supra*, 30 Cal.3d 388, indicates otherwise. \*1236

There is equally little merit to the majority's assertion that the Act's remedial purposes are irrelevant because many statutes could be described as ” remedial.“ The argument suggests that courts are powerless to weigh the probative value of the evidence of remedial purpose in each case, and decide whether an inference of retrospective intent reasonably and logically follows. Indeed, that is precisely the sort of function which courts perform daily.

Moreover, the purpose here was not merely remedial; it was to remedy a *crisis*. The question before us is whether, from that purpose, it may reasonably be inferred that the Act should apply to all cases not tried prior to its effective date. The evidence and our prior decisions overwhelmingly demonstrate that the answer to that question is ”yes.“

### 3. The Fairness Issue

#### A. The Insurance ”Windfall“

I am greatly troubled by the majority's apparent concern that application of the Act to cases untried on the Act's effective date would result in an unwarranted ”windfall“ to insurance companies because they computed their pre-Proposition 51 premiums on the basis of the former rule of unlimited joint and several liability. A little perspective here is in order. In *Li v. Yellow Cab*, *supra*, 13 Cal.3d 804, this court abrogated the traditional all-or-nothing doctrine of contributory negligence and adopted in its place a rule of comparative negligence. A few years later, in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578 [146 Cal.Rptr. 182, 578 P.2d 899], we applied similar comparative fault principles to multiple

tortfeasors, but retained the traditional rule of joint and several liability. In each case, we held that the new rule ”shall be applicable to *all cases in which trial has not begun* before the date this decision becomes final ....“ (Italics added, *Li v. Yellow Cab Co.*, *supra*, 13 Cal.3d at p. 829; *Safeway Stores, Inc. v. NestKart* (1978) 21 Cal.3d 322, 334 [146 Cal.Rptr. 550, 579 P.2d 441] [applying retroactively the rule adopted in *American Motorcycle*].)

By thus retrospectively eliminating the existing complete defense of contributory negligence and yet retaining joint and several liability, this court imposed substantially *increased* liability upon insurance companies under policies the premiums for which had been calculated on the basis of the preexisting law. Yet we expressed no concern in those decisions that insurance companies were thereby compelled to pay greatly increased sums with respect to risks they could not have anticipated and for which they were not compensated. Nor did we decline to apply our abrupt change in the law retrospectively because to do so would have been ”unfair.“ On the contrary, we applied our rulings as broadly as constitutionally permissible, notwithstanding \*1237 strenuous objections that such a radical alteration of existing law required legislative rather than judicial action, because we were ”persuaded that logic, practical experience, and *fundamental justice* counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery ....“ ( *Li v. Yellow Cab Co.*, *supra*, 13 Cal.3d at pp. 812-813, italics added.)

Consistency and impartiality would appear to demand, at the very least, that this court view the fiscal consequences to insurance companies of a retrospective application of Proposition 51, with the same cool detachment it manifested in *Li* and *American Motorcycle*. Proposition 51, after all, was also designed to remedy certain perceived *injustices* in the existing tort liability system. If a retrospective application results in a ”windfall“ to insurers, what of it? Where the logic and justice of a retroactive application is otherwise compelling, I perceive no principled basis for holding to the contrary simply because the insurance industry might benefit.

Indeed, if the majority's assertion that a retroactive application will result in savings to insurers is correct (the contention is premised on speculation, not on any hard evidence), it would appear to militate in favor rather than against retroactivity. As previously discussed, one of the goals of Proposition 51 was to slow the insurance-premium spiral by holding defendants liable for noneconomic damages only in proportion to their

percentage of fault. As set forth in the Act's findings, the so-called insurance crisis "threatened financial bankruptcy of local governments ... higher prices for goods and services to the public and higher taxes to taxpayers." To the extent that the Act results in less exposure and smaller payouts than insurance companies might otherwise have anticipated, it only serves to *further* these goals.

The majority's inflated concern with insurance "windfalls" is thus largely misguided. That concern does, however, expose the unstated bias underlying the majority's opinion. Implicit in the majority's analysis is the assumption that Proposition 51 was essentially a private-interest bill designed to offer aid and comfort to corporate defendants; the broader its scope, therefore, the greater the prejudice to plaintiffs. However, if we were to judge the question before us strictly on a standard of fairness to *plaintiffs*, there is no doubt that the balance would fall squarely on the side of retroactivity. The Act's statement of findings makes clear that its purpose was not exclusively or even principally to aid insurance companies. Ultimately, it is plaintiffs, not insurers, who suffer when tortfeasors lack insurance to pay judgments. It is the community as a whole, not the insurance industry, which suffers when day-care centers must close because they cannot afford insurance. Parochial interests, to be sure, supported the Act, but the People enacted it. \*1238 Their decision deserves an application equal to the pressing social and economic concerns which inspired it.

### B. The "Reliance" Issue

Of course, in response to all of the arguments that militate in favor of retroactivity, one may justly recall that one party's gain is another party's loss. Proposition 51 purported to remedy an "inequity" in the existing joint-and-several doctrine by abrogating the rule as it applied to noneconomic damages. Though the Act placed no limit on the amount of noneconomic damages that plaintiffs could be awarded, it restricted plaintiffs' right to full recovery of such damages in some instances by allowing recovery as to those damages from defendants only in proportion to their fault.

Courts may properly consider whether the retrospective application of a statute would affect substantial rights, or substantially alter rules on which the parties have detrimentally relied. (*Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].)<sup>2</sup> The question presented, therefore, is whether an application of the Act to all cases not tried prior to its effective date

would, as the majority asserts, unfairly deprive plaintiffs of "a legal doctrine on which [they] may have reasonably relied in conducting their legal affairs prior to the new enactment." (Majority opn. at p. 1194.)

The majority concludes that an application of the Act to cases not tried before its effective date would place persons who "acted in reliance on the old law in a worse position than litigants under the new law." (Majority opn. at p. 1215.) Two examples of such detrimental reliance are suggested. First, the majority opines that plaintiffs whose causes of action arose before Proposition 51 "will often have reasonably relied on the preexisting joint and several liability doctrine in deciding which potential tortfeasors to sue and which not to sue." (Majority opn. at p. 1215.) Thus, the majority suggests that in reliance on the old joint and several rule, plaintiffs' attorneys "often" refrained from filing suit against *potentially liable defendants* in order to save their clients the "added expense" of service of process. (Majority opn. at p. 1215.)

#### \*1239

There is no evidence that this occurred in any substantial number of cases. On the contrary, general experience teaches that plaintiffs usually sue *everyone* who might be liable for damages. Indeed, in most cases the former rule of joint and several liability encouraged plaintiffs to name as many defendants as possible because the entire judgment could be recovered from any one defendant, no matter how minimally liable. In the unlikely event, however, that a potentially liable defendant was actually omitted from a complaint in reliance on the former rule, it obviously constituted a tactical decision by the plaintiff to take advantage of a part of the old rule that was entirely unfair to marginally liable, deep-pocket defendants, a part of the very unfairness Proposition 51 was intended to remedy.

The other "reliance" factor cited by the majority concerns settlements. The majority suggests that plaintiffs in pre-Proposition 51 cases "may frequently have settled with some defendants for a lesser sum than they would have accepted if they were aware that the remaining defendants would only be severally liable for noneconomic damages." (Majority opn. at p. 1216.) A moment's thought reveals that this contention, like the first, contains far less than meets the eye.

First, the argument again runs counter to common experience. In a case with multiple defendants of varying degrees of solvency, plaintiffs rarely settle first with the "deep-pocket" defendants in order to pursue the defendants who

are effectively judgment-proof. Where the "deep pocket" defendant does settle first, however, it is not likely to be for substantially less than the case is worth, since there is little likelihood of substantial recovery from the remaining defendants.

Second, it is well to recall exactly what Proposition 51 provides. It repeals the joint and several rule only as applied to *noneconomic* damages, i.e. pain and suffering, emotional distress, loss of consortium and the like. (Civ. Code, § 1431.2, subd. (b)(2).) It has no effect whatsoever on the joint and several rule as applied to the more common tort damages - medical expenses, loss of earnings, loss of property, costs of repair or replacement, and loss of employment or business opportunities. (Civ. Code, § 1431.2, subd. (b)(1).) Thus, whatever reliance a settling plaintiff may have placed on the former rule of joint and several liability, that reliance *remains largely undisturbed by the enactment of Proposition 51*.

Finally, it is clear that with or without the former joint and several rule, a good faith settlement (at least since our decision in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 [213 Cal.Rptr. 256, 698 P.2d 159]) must fall within a reasonable range of the settlor's proportionate share of liability. (*Id.* at p. 499.) As this court further recognized in *Tech-Bilt*, every settlement involves a multitude of factors which could reasonably \*1240 impel a plaintiff to settle for less than the settling defendant's proportionate share of fault. For example, "a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor." (*Id.* at p. 499, quoting from *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 238 [132 Cal.Rptr. 843].) Other factors include the "recognition that a settlor should pay less in settlement than he would if he were found liable after a trial," as well as the obvious avoidance of the risk, costs and inconvenience of trial. (*Ibid.*)

We do not mean to suggest by this that the former "deep pockets" rule may not have influenced some plaintiffs to settle for less than a defendant's proportionate share of noneconomic damages. To the extent any such settlement was for *substantially* less than the settling defendant's estimated range of liability, however, it was unfair to nonsettling defendants and should not have been sanctioned by the trial court in the first place. (*Tech-Bilt, supra*, 38 Cal.3d at p. 499.) Moreover, when the former rule is viewed as only one out of a *myriad* of factors that *may* have legitimately influenced plaintiffs' decisions to settle for less than a

defendant's proportionate share of liability, the question of reliance becomes rather hopelessly speculative. The role that the former joint-and-several rule may have played in the overall decisionmaking process is certainly far less significant than the majority implies.

In light of the foregoing, it is no surprise that the majority itself studiously ignored the "reliance" argument when formulating its holding in this matter. For the majority broadly holds that the Act shall not apply to any "cause of action" that accrued prior to its effective date, regardless of whether plaintiffs have manifested even the slightest potential reliance on the former law. If the "reliance" argument had any merit, the majority surely would have tailored its decision to hold, at a minimum, that the Act would be inapplicable only to cases *filed* prior to its effective date. Its failure to do so reveals the makeweight nature of its "reliance" and "unfairness" arguments.

In sum, I am not persuaded by the majority's assertion that a retrospective application of Proposition 51 would result in a significant diminution of plaintiffs' rights or expectations under the former law.<sup>3</sup> On the contrary, it is clear that the purposes of the Act and the interests of the public as a whole would be served only by an application of the Act to all cases not yet tried prior to its effective date.

I would note, finally, that our earlier discussion of *Li v. Yellow Cab Co., supra*, 13 Cal.3d 804 and *American Motorcycle Assn. v. Superior Court*, \*1241 *supra*, 20 Cal.3d 578, also bears directly on the issue of fairness to parties who might have relied on the preexisting law. As the majority acknowledges, our decision to apply the principles of *Li* and *American Motorcycle* retrospectively affected *substantial* rights and expectations arising out of transactions that occurred before those decisions. The relatively limited reform effected by Proposition 51 pales in comparison. Yet the same court that unhesitatingly determined to apply retroactively the sweeping changes effected by *Li*, now purports to be offended when the same broad application is urged for the limited reform contained in Proposition 51. It is a puzzlement.

It is an irony, as well. For although, as the majority notes, *Li, supra*, 13 Cal.3d 804, "served to reduce much of the harshness of the original all-or-nothing common law rules, the retention of the common law joint and several liability doctrine" in *American Motorcycle, supra*, 20 Cal.3d 578, nevertheless perpetuated other inequities. Proposition 51 "was addressed," the majority observes, to these remaining problems. (Majority

opn. at pp. 1197-1198.) If the inequities in the rule of contributory negligence compelled a retrospective application of *Li*, notwithstanding its impact on settled expectations, surely the injustice inherent in the unlimited rule of joint and several liability compels an equally broad application of Proposition 51.

The majority, however, concludes otherwise, arguing that because *Li, supra*, 13 Cal.3d 804, was a judicial decision "the court was the appropriate body to determine whether or not the new rule should be applied retroactively ...." (Majority opn. at p. 1222.) No one suggests otherwise. The point, however, concerns the fairness of the court's decision to apply *Li* retroactively, not its power to do so.

The majority also attempts to distinguish *Li* on the ground that "statutes operate ... prospectively, while judicial decisions operate retrospectively." (Majority opn. at p. 1221.) This not only misstates the general rule as applied to statutes (the *intent* of the enacting body governs the interpretation of statutes, not the presumption of prospectivity), but distorts the rule as to judicial decisions, as well. For judicial decisions are not automatically governed by a mindless "presumption" of retroactivity any more than statutes are governed by a presumption of prospectivity. As this court carefully explained in *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 152 [181 Cal.Rptr. 784, 642 P.2d 1305], "[T]he question of retroactivity [of judicial decisions] depends upon considerations of fairness and public policy." (*Id.* at p. 152; accord *Safeway Stores, Inc. v. Nest-Kart, supra*, 21 Cal.3d at p. 333; *In re Marriage of Brown* (1976) 15 Cal.3d 838, 850 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164].) As we further explained, the issue comprehends such considerations as the "extent of the public reliance upon \*1242 the former rule," the "purpose to be served by the new rule," and the "effect on the administration of justice of a retroactive application." (*Id.* at pp. 152-153; see also *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 74-75 [145 Cal.Rptr. 368, 577 P.2d 188]; *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 193 [98 Cal.Rptr. 837, 491 P.2d 421].)

If considerations of fairness, public policy and the purposes of the new rule announced in *Li, supra*, 13 Cal.3d 804, compelled its retroactive application, notwithstanding the extensive reliance placed by insurers and others upon the former rule, surely the same broad application of Proposition 51 is compelled here. It is a strange logic indeed which can justify the retrospective application of a virtual revolution in the common law of civil liability, yet later deny similar scope

to an enactment of the electorate designed to redress certain lingering inequities in that selfsame revolution. Perhaps the commentators will be able to reconcile these differing results. I cannot.

For the foregoing reasons, I would affirm the decision of the Court of Appeal in its entirety.<sup>4</sup>

Eagleson, J., and Anderson (Carl W.), J., \* concurred.  
The petition of real party in interest Van Waters & Rogers, Inc., for a rehearing was denied June 23, 1988. \*1243

## 51. Multiple Defendants Tort Damage Liability: Initiative Statute

### Official Title and Summary Prepared by the Attorney General

MULTIPLE DEFENDANTS TORT DAMAGE LIABILITY: INITIATIVE STATUTE. Under existing law, tort damages awarded a plaintiff in court against multiple defendants may all be collected from one defendant. A defendant paying all the damages may seek equitable reimbursement from other defendants. Under this amendment, this rule continues to apply to "economic damages," defined as objectively verifiable monetary losses, including medical expenses, earnings loss, and others specified; however, for "non-economic damages," defined as subjective, non-monetary losses, including pain, suffering, and others specified, each defendant's responsibility to pay plaintiff's damages would be limited in direct proportion to that defendant's percentage of fault. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: Under current law, governments often pay non-economic damages that exceed their shares of fault. Approval of this measure would result in substantial savings to state and local governments. Savings could amount to several millions of dollars in any one year, although they would vary significantly from year to year.

### Analysis by the Legislative Analyst

#### Background

When someone is injured or killed, or suffers property damage, the injured party (or his or her survivors) may try to make the person (or business or government) who is responsible for the loss pay damages. When a lawsuit is filed,

the courts decide what the damages are, who caused them, and how much the responsible party should pay. If the court finds that the injured party was partly responsible for the injury, the responsibility of the other party is reduced accordingly.

In some cases, the court decides that more than one other party is responsible for the loss. In such cases, *all* of the other parties causing the loss are responsible for paying the damages, and the injured party can collect the damages from any of them. If the other responsible parties are not able to pay their shares, a party whose relative fault is, for example, 25 percent may have to pay 100 percent of the damages awarded by the court.

These damages could be for two types of losses: "economic" and "non-economic." Economic losses are damages such as lost wages and medical costs. Non-economic losses are damages such as pain and suffering or injury to one's reputation.

#### Proposal

This measure changes the rules governing who must pay for *non-economic damages*. It limits the liability of each responsible party in a lawsuit to that portion of non-economic damages that is equal to the responsible party's share of fault. The courts still could require one person to pay the *full* cost of *economic damages*, if the other responsible parties are not able to pay their shares.

#### Fiscal Effect

Under current law, governments often have to pay non-economic damages that exceed their shares of fault. Thus, approval of this measure would result in substantial savings to the state and local governments. The savings could amount to several millions of dollars in any one year, although they would vary significantly from year to year.

**Voter Turnout. Just one of the changes California is making!**

**Karen Alarcon, San Martin \*1244**

#### Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of [Article II, Section 8 of the Constitution](#).

This initiative measure amends and adds sections to the Civil Code; therefore, existing sections proposed to be deleted are printed in and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

### PROPOSED LAW

SECTION 1. This shall be known as the "Fair Responsibility Act of 1986."

SECTION 2. [Section 1431 of the Civil Code](#) is amended to read:

#### *§ 1431 Joint Liability*

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, *except as provided in Section 1431.2, and except in the special cases mentioned in the title on the interpretation of contracts*. This presumption, in the case of a right, can be overcome only by express words to the contrary.

SECTION 3. [Section 1431.1](#) is added to the Civil Code to read:

#### *§ 1431.1 Findings and Declaration of Purpose*

*The People of the State of California find and declare as follows:*

*a) The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.*

*b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People-taxpayers and consumers alike ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.*

*c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.*

*Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.*

*The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.*

**SECTION 4.** Section 1431.2 is added to the Civil Code to read:

§ 1431.2 Several Liability for Non-economic Damages

*(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.*

*(b) (1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.*

*(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.*

**SECTION 5.** Section 1431.3 is added to the Civil Code to read:

*§ 1431.3 Nothing contained in this measure is intended, in any way, to alter the law of immunity.*

**SECTION 6.** Section 1431.4 is added to the Civil Code to read:

§ 1431.4. Amendment or Repeal of Measure.

*This measure may be amended or repealed by either of the procedures set forth in this section. If any portion of subsection (a) is declared invalid, then subsection (b) shall be the exclusive means of amending or repealing this measure.*

*(a) This measure may be amended to further its purposes by statute, passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring and signed by the Governor; if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Secretary of State for distribution to the news media.*

*(b) This measure may be amended or repealed by a statute that becomes effective only when approved by the electors.*

**SECTION 7.** Section 1431.5 is added to the Civil Code to read:

§ 1431.5 Severability.

*If any provision of this measure, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this measure to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this measure are severable. \*1245*

**51. Multiple Defendants Tort  
Damage Liability: Initiative Statute**

**Argument in Favor of Proposition 51**

Nothing is more unfair than forcing someone-be it a city, a county or the state, a school, a business firm or a person-to pay for damages that are someone else's fault.

That's what California's "deep pocket" law is doing-at a cost of tens of millions of dollars annually. And that's why we need Proposition 51-the Fair Responsibility Act.

Regardless of whether it is a city, county or private enterprise that is hit with huge "deep pocket" court awards or out-of-court settlements, the *TAXPAYER AND CONSUMER ULTIMATELY PAY THE COSTS* through high

taxes, increased costs of goods and services, and reduced governmental services.

How does the "deep pocket" law work? Here's an illustration:

A drunk driver speeds through a red light, hits another car, injures a passenger. The drunk driver has no assets or insurance.

The injured passenger's trial lawyer sues the driver *AND THE CITY* because the city has a very "deep pocket"-the city treasury or insurance. He claims the stop light was faulty.

The jury finds the drunk driver 95% at fault, the city only 5%. It awards the injured passenger \$500,000 in economic damages (medical costs, lost earnings, property damage) and \$1,000,000 in non-economic damages (emotional distress, pain and suffering, etc.).

Because the driver can't pay anything, THE CITY PAYS IT ALL-\$1,500,000.

*THAT'S THE "DEEP POCKET" LAW AND ITS UNFAIR!*

Under Proposition 51, the city could still pay all the victim's economic damages but only its 5% portion of the non-economic. Total: \$550,000-that's \$950,000 less!

Everyone agrees the injured passenger should be reimbursed. But there are *TWO VICTIMS*-the *ACCIDENT VICTIM* and the *TAXPAYER* who foots the bill.

Proposition 51 is a *GOOD COMPROMISE*-it takes care of both victims!

With the passage of Proposition 51:

Liability insurance, now virtually impossible to obtain, would again be available to cities and counties.

Private sector liability insurance premiums could drop 10% to 15%.

The glut of lawsuits with dubious merit would be significantly reduced.

Every California county-and virtually all its cities-are *IN FAVOR OF PROPOSITION 51*.

One of the largest coalitions of school, governmental, law enforcement, small and large business, professional, labor and non-profit organizations in history urges you to *VOTE YES ON PROPOSITION 51*.

This initiative proposition was put on the ballot by hundreds of thousands of voters because repeated attempts in the Legislature to reform the unfair "deep pocket" law were thwarted by the intense lobbying of the California Trial Lawyers Association.

The trial lawyers' organization last year was the *LARGEST GIVER* of *SPECIAL INTEREST CAMPAIGN MONEY* to state legislators and is the major organized opposition to the Fair Responsibility Act.

Under the present "deep pocket" law:

The party most at fault often doesn't pay-*THAT'S NOT FAIR!*

You-the taxpayer and consumer-ultimately pay the "deep pocket" awards and settlements-*THAT'S NOT FAIR!*

Under Proposition 51:

Victims and taxpayers alike are protected-*THAT'S FAIR!*

Don't let 5,400 trial lawyers hold 26 million Californians hostage. *VOTE YES ON PROPOSITION 51!*

**RICHARD SIMPSON**

*California Taxpayers' Association*

**DONNETTA SPINK**

*President, California State Parent-Teacher Association*

**ELWIN E. (TED) COOKE**

*President, California Police Chiefs Association*

**Rebuttal to Argument in Favor of Proposition 51**

Proposition 51 will *NOT* lower taxes, will *NOT* lower insurance rates and will *NOT* make insurance more available.

Proposition 51 is a fraud promoted by the insurance industry, chemical manufacturers, and local government officials.



*Insurance companies back Proposition 51* because they want to increase their profits-they don't want to pay the claims they owe.

*Toxic chemical producers back Proposition 51* because they want to increase their profits-they don't want to be held responsible for the cancer their toxic waste dumps cause.

*Local government officials back Proposition 51* because they don't want to do the job we taxpayers elected them to do-protecting the people by maintaining efficient police and fire services and safe roads.

*Proposition 51 will NOT reduce taxes.* This insurance company windfall won't go to you.

If Proposition 51 passes, *our welfare rolls will increase.* People who must spend their life in a wheelchair or on a respirator will NOT be compensated by those who caused their injuries-they will be forced to go on welfare.

The insurance crisis is caused by a greedy insurance industry that is exempted from federal antitrust laws. There is no rate competition and thus no need to pass savings on to us.

Ralph Nader says,

“The insurance industry is using its current massive premium gouging and arbitrary cancellations as a political battering ram to further bloat profits.”

When was the last time your insurance company lowered your rates?

NO on Proposition 51-Protect your rights.

**PAT CODY**

*DES Action*

**JAMES E. VERMEULEN**

*Founder and Executive Director*

*Asbestos Victims of America*

**34** Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency P86 \*1246

**51. Multiple Defendants Tort  
Damage Liability: Initiative Statute**

**Argument Against Proposition 51**

If you or a member of your family is paralyzed for life by a drunk driver California law now protects your right to full and fair compensation for your injuries. This initiative removes that protection.

Proposition 51 is an attempt by big insurance companies to avoid paying victims for the injuries they suffer. *Passage of this initiative does nothing to guarantee that your insurance rates will be lower or that insurance will be more available than it is today.*

Our present system of justice has developed over hundreds of years to achieve the twin goals of *(one)* full compensation if you are injured because of someone else's fault and *(two)* encouraging safe and responsible practices and products. Every day, juries made up of taxpayers and consumers just like you carry out these goals. They decide who is at fault and put the responsibility where it belongs: not on innocent victims, but on drunk drivers, manufacturers of dangerous products or toxic waste and unsafe roads and highways. Where juries have been clearly wrong, appellate courts have overturned the jury awards.

*But insurance companies never tell you that.*

*The current system works and it's fair:* Those who caused the injuries pay the victims. Though juries assign a percentage of fault to those responsible, it is the involvement of everyone found guilty that caused the accident to occur. It is *not* fair to make innocent victims-who are not at fault-bear the cost, while the guilty walk away.

The insurance companies want the present system scrapped. Insurance companies have manufactured a crisis by refusing to issue policies, even in cases where they have no claims and no losses. They point to large jury awards as the root of the problem. You should know that juries give nothing-not one dollar-in 50% of the medical malpractice and product liability cases they hear.

*But the insurance companies never tell you that either.*

Insurance companies refuse to promise that insurance rates will be lower or policies more available if this initiative

passes. In fact, Kansas and Ohio have measures similar to this proposition, yet they are also faced with insurance “crises.” Proposition 51 solves *nothing*. The only guarantee it offers is that you lose your legal rights to full and fair compensation.

The battle over Proposition 51 is more than a mud fight between insurance companies and lawyers. Every Californian has a stake in assuring that businesses and local governments behave in a safe, responsible manner, and that innocent people who are injured by dangerous products or unsafe conditions are fully and fairly compensated. These values should not be sacrificed in favor of insurance industry profits.

Don't be fooled by slick ads. Don't be tricked by big corporations into voting away your legal rights. If you want to assure your access to justice and your ability to be compensated when injured by reckless and unethical behavior, join us in voting NO on Proposition 51 on June 3rd.

**DON'T GIVE AWAY YOUR RIGHTS. VOTE NO!**

**HARRY M. SNYDER**

*Regional Director, California Consumers Union of U.S., Inc.*

**Rebuttal to Argument Against Proposition 51**

California *TAXPAYERS ARE THE VICTIMS* of the unfair “deep pocket” law-*TRIAL LAWYERS ARE THE REAL BENEFICIARIES*.

PROPOSITION 51 PROTECTS BOTH INJURED VICTIMS AND TAXPAYERS.

Injured victims will be FULLY COMPENSATED for ALL actual damages-present and future-medical bills, lost earnings and property damage. *VICTIMS' FAMILIES WILL NOT SUFFER FINANCIAL LOSS*.

Under Proposition 51:

Liability insurance, now virtually impossible to obtain, could again be made available to cities and counties.

Private sector commercial liability insurance premiums could drop 10- 15%, according to D. Michael Enfield, managing director of the world's largest insurance brokerage.

IT'S A FAIR COMPROMISE. That's why one of the largest coalitions ever is supporting Proposition 51, including:

County Supervisors Association of California

League of California Cities

California Taxpayers' Association

California State PTA

California Chamber of Commerce

California Police Chiefs Association

California Community College Trustees

California Peace Officers Association

California School Boards Association

California State Sheriffs' Association

Consumer Alert

California Medical Association

Service Employees International Union, Joint Council # 2

California Manufacturers Association

California Farm Bureau Federation

National Federation of Independent Business

California Dental Association

California District Attorneys Association

California Women for Agriculture

Zoological Society/San Diego

California Association of Recreation and Park Districts

Sierra Ski Areas Association

California Defense Counsel

Association for California Tort Reform

California Hospital Association

Associated General Contractors

California Restaurant Association

California Institute of Architects

Association of California School Administrators

Western United States Lifesaving Association

California Association of 4WD Clubs

All 58 COUNTIES, virtually EVERY CITY, and MANY MORE ORGANIZATIONS

(Legal limits prohibit a complete list.)

**KIRK WEST**

*President, California Chamber of Commerce*

**PAT RUSSELL**

*President, League of California Cities*

**LESLIE BROWN**

*President, County Supervisors Association of California*

*Supervisor, Kings County*

P86 Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency 35 \*1247

#### Footnotes

- \* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.
- 1 The complete text of Proposition 51 and all relevant portions of the election pamphlet, including the Legislative Analyst's analysis and the arguments of the proponents and opponents, are set forth in an appendix to this opinion.
- 2 Under article II, section 10, subdivision (a) of the California Constitution, the measure went into effect on June 4, 1986, the day after the election.
- 3 The Contribution Act of 1957 ([Code Civ. Proc., §§ 875-880](#)) ameliorated the situation somewhat by permitting a pro rata division of damages when the plaintiff sued more than one defendant and a joint judgment was entered against the defendants. That act only applied, however, in instances in which a judgment had been entered against multiple defendants, and, if a plaintiff chose not to join a principally culpable tortfeasor in the action, the defendant or defendants who had been singled out for suit had no right to contribution.
- 4 [Civil Code section 1431.2](#), which constitutes the heart of Proposition 51, provides in full: "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount. [¶] (b) (1) For purposes of this section, the term 'economic damages' means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. [¶] (2) For the purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."
- 5 At least five states apply a "pure" several liability rule. (See, e.g., [Kan.Stat. Ann. § 60-258a\(d\) \(1983\)](#); [Vt.Stat. Ann. tit. 12, § 1036 \(Supp. 1987\)](#); [Ohio Rev.Code Ann. § 2315.19 \(Page 1981\)](#); [Utah Code Ann. §§ 78-27-38, 78-27-40 \(1987\)](#); [Colo.Rev.Stat. § 13-21-111.5 \(1987\)](#). See also [Wash.Rev. Code Ann. § 4.22.070 \(West Supp. 1987\)](#) [adopting several liability as a general rule, but retaining joint and several liability in several, specified areas]; [Nev.Rev.Stat. Ann. § 41.141 \(Supp. 1987\)](#) [same].)
- 6 At least four states have adopted such an approach. (See, e.g., [Iowa Code Ann. § 668.4 \(West 1987\)](#) [joint and several liability does not apply to defendants who bear less than 50 percent of fault]; [Minn.Stat. Ann. § 604.02\(1\) \(West Supp.](#)

**1988**) [if state or municipal defendant's fault is less than 35 percent, "it is jointly and severally liable for an amount no greater than twice the amount of fault"]; *Mo. Ann. Stat. § 538.230* (Vernon Supp. 1987) [in medical malpractice cases "any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant"]; *Tex. Civ. Prac. & Rem. Code Ann. § 33.013* (Vernon **1988**) [defendant severally liable unless percentage of fault is greater than 20 percent, or, in specified actions, defendant's fault is greater than plaintiff's].)

- 7 At least four states, in addition to California, have embraced such a rule. (See, e.g., *N.Y. Civ. Prac. L. & R. § 1601* (*McKinney Supp. 1987*) [when defendant's liability is less than 50 percent, defendant's liability for plaintiff's noneconomic loss shall not exceed that of defendant's equitable share; numerous categories of cases excepted]; *Fla. Stat. Ann. § 768.81(3)* (*West Supp. 1987*) [joint and several liability abolished, except where a defendant's percentage of fault equals or exceeds that of a particular claimant, the defendant is jointly and severally liable for the claimant's economic damage]; *Ore. Rev. Stat. § 18.485* (**1983**) [defendants severally liable for noneconomic damages, and jointly and severally liable for economic damages unless defendant is less at fault than plaintiff or less than 15 percent at fault in which case defendant only severally liable for economic damages]; Ill. Ann. Stat. ch. 110, paras. 2-1117, 2-1118 (*Smith-Hurd Supp. 1987*) [all defendants jointly and severally liable for medical expenses, defendants who are less than 25 percent at fault severally liable for all other damages, defendants who are more than 25 percent at fault jointly and severally liable for all other damages].)
- 8 Plaintiff's petition for review lists the following allegedly unanswered questions as to the proposition's application:
- "1. Does it retroactively apply to this case?
  - "2. Does it apply if the jury finds Gregory 0% at fault?
  - "3. Does it apply if the jury finds Van Waters & Rodgers liable based on strict products liability?
  - "4. [Does it] apply if the jury finds Student Science acted *intentionally*?
  - "5. If the jury finds Gregory more than 0% at fault how is his recovery adjusted?
  - "6. Who bears the burden of naming and serving other parties?
  - "7. Can the special verdict form contain a catch-all 'other' box or must such parties or non-parties be specified and limited to the evidence adduced at trial?"
- 9 Although plaintiff also suggests that the proposition's classifications should be evaluated under a more stringent, "strict scrutiny" standard, the controlling decisions make it clear that the traditional "rational relationship" equal protection standard is applicable here. (See, e.g., *American Bank & Trust Co.*, *supra*, 36 Cal.3d 359, 373, fn. 12; *Fein v. Permanente Medical Group* (**1985**) 38 Cal.3d 137, 161-164 [211 Cal.Rptr. 368, 695 P.2d 665].)
- 10 In *Fein*, the court pointed out that legal commentators had long questioned whether sound public policy supported the comparable treatment of economic and noneconomic damages, explaining that "[t]houghtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence [citation], no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." (Footnote omitted.) (38 Cal.3d at pp. 159-160.)
- 11 In *In re Marriage of Bouquet* (**1976**) 16 Cal.3d 583, 587, footnote 3 [128 Cal.Rptr. 427, 546 P.2d 1371], the court specifically recognized that "[s]ection 3 of the Civil Code embodies the common law presumption against retroactivity," and numerous decisions of this court have recognized that comparable provisions in other codes represent legislative embodiments of this general legal principle. (See, e.g., *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d 388, 395 [Lab. Code]; *In re Estrada* (**1965**) 63 Cal.2d 740, 746 [48 Cal.Rptr. 172, 408 P.2d 948] [Pen. Code]. See also *DiGenova v. State Board of Education* (**1962**) 57 Cal.2d 167, 172-173 [18 Cal.Rptr. 369, 367 P.2d 865].) To the extent that dictum in a footnote in the Court of Appeal decision in *Andrus v. Municipal Court* (**1983**) 143 Cal.App.3d 1041, 1045-1046, footnote 1 [192 Cal.Rptr. 341], discussing a similar provision of the Code of Civil Procedure, suggests that such a provision has no application to amendments to such codes and applies only to the original provisions of the codes, that dictum is contrary to the numerous Supreme Court decisions noted above and must be disapproved. (See also *Estate of Frees* (**1921**) 187 Cal. 150, 155-156 [201 P. 112] and cases cited.)
- 12 The full text of Proposition 51 is set out in the appendix to this opinion.
- 13 Plaintiff, taking his cue in part from a portion of the Court of Appeal decision in *Russell v. Superior Court*, *supra*, 185 Cal.App.3d 810, 818-819, suggests that the use of the word "shall" in various passages in the statute indicates that the

drafters intended only a future operation. As defendants contend, however, in context we think it is more likely that the use of “shall” was intended to reflect the mandatory nature of the provision, rather than to refer to its temporal operation. Defendants, in turn, rely on the initial clause of [Civil Code section 1431.2](#), which states simply that the provision is to apply “[i]n any action. ...” That familiar language, however, merely negates any implication that the new several liability rule was to apply only to a specific category of tort cases - like the earlier medical malpractice tort legislation - and provides no indication that a retroactive application was contemplated. Similar broad, general language in other statutory provisions has not been considered sufficient to indicate a legislative intent that the statute is to be applied retroactively. (See, e.g., [United States v. Security Industrial Bank](#), *supra*, 459 U.S. 70, 82, fn. 12 [74 L.Ed.2d 235, 245] [“[a] few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy,” excepting as a different purpose is plainly shown.” [Citation]”]; [Un. Pac. R.R. v. Laramie Stock Yards](#) (1913) 231 U.S. 190, 199-202 [58 L.Ed. 179, 182-183, 34 S.Ct. 101].)

14 [Civil Code section 1431.1](#), the introductory section of Proposition 51 which sets forth various “findings” and a “declaration of purpose,” provides in full: “The People of the State of California find and declare as follows: [¶] (a) The legal doctrine of joint and several liability, also known as ‘the deep pocket rule’, has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers. [¶] (b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People - taxpayers and consumers alike - ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums. [¶] (c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums. Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable. [¶] The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.”

15 In [In re Estrada](#), *supra*, 63 Cal.2d 740, the court also held that a statutory enactment should be applied retroactively despite the absence of an express retroactivity clause, but that case involved considerations quite distinct from the ordinary statutory retroactivity question. In [Estrada](#), the Legislature had amended a criminal statute to reduce the punishment to be imposed on violators; the amendment mitigating punishment was enacted after the defendant in [Estrada](#) had committed the prohibited act but before his conviction was final. Following the rule applied by the United States Supreme Court and a majority of states (see 63 Cal.2d at p. 748), the [Estrada](#) court concluded that the defendant should receive the benefit of the mitigated punishment “because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.” (63 Cal.2d at p. 745.)

Although some of the broad language in [Estrada](#) was subsequently invoked in the civil context in the [Mannheim](#), *supra*, 3 Cal.3d 678, and [Marriage of Bouquet](#), *supra*, 16 Cal.3d 583, decisions, the rationale for the [Estrada](#) ruling bears little relationship to the determination of the retroactivity of most nonpenal statutes, and, as noted below, other jurisdictions have not applied the special rule applicable to ameliorative penal provisions in determining the retroactivity of a general tort reform measure like Proposition 51. We similarly conclude that the [Estrada](#) decision provides no guidance for the resolution of this case.

16 The Association for California Tort Reform (ACTR) is one of numerous organizations that have filed amici curiae briefs in this case. In its brief, ACTR states that it sponsored the legislation that was “the precursor to and model for Proposition 51” and that its chairman “was the official proponent who filed Proposition 51 with the California Attorney General requesting preparation of a title and summary for placement on the ballot.” ACTR participated as an amicus in many of the leading MICRA cases. (E.g., [American Bank & Trust Co. v. Community Hospital](#), *supra*, 36 Cal.3d 359; [Fein v. Permanente Medical Group](#), *supra*, 38 Cal.3d 137.)

17 Justice Gibson’s opinion in [Aetna Cas. & Surety Co.](#), *supra*, clearly demonstrates the untenability of defendants’ claim that the remedial nature of a statute is sufficient to support an inference that the statute was intended to apply retroactively. As noted above, in [Aetna](#) the question before the court was whether a statute which increased workers’ compensation benefits should be applied to workers who had sustained work-related injuries prior to the enactment of the new law but who were not awarded benefits until after the new statute took effect. In that case, unlike the present matter, of course, it was the injured parties who sought retroactive application of the statute; the workers argued that in light of the remedial

nature of the increased benefits and the statutory mandate that provisions of the workers' compensation law be liberally construed to extend benefits to injured workers (Lab. Code, § 3202), the court should infer an intent on the part of the Legislature to apply the act retroactively even though the act contained no express provision to that effect.

In rejecting the argument, the *Aetna* court observed: "No authority is cited for the novel doctrine which would require the court to ignore the rule against retroactive operation with respect to statutes increasing benefits to persons favored by remedial legislation. The rule of liberal construction and the rule that statutes should ordinarily be construed to operate prospectively are neither inconsistent nor mutually exclusive. ... It would be a most peculiar judicial reasoning which would allow one such doctrine to be invoked for the purpose of destroying the other. *It seems clear, therefore, that the legislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction.*" (Italics added.) (*Aetna Cas. & Surety Co., supra*, 30 Cal.2d at p. 395.)

18 See, e.g., *Winfree v. Nor. Pac. Ry. Co., supra*, 227 U.S. 296; *Brewster v. Ludtke* (1933) 211 Wis. 344 [247 N.W. 449, 450]; *Edwards v. Walker* (1973) 95 Idaho 289 [507 P.2d 486, 488]; *Dunham v. Southside National Bank* (1976) 169 Mont. 466 [548 P.2d 1383]; *Rice v. Wadkins* (1976) 92 Nev. 631 [555 P.2d 1232, 1233]; *Smith v. Shreeve* (Utah 1976) 551 P.2d 1261, 1262, footnote 2; *Scammon v. City of Saco* (Me. 1968) 247 A.2d 108, 110; *Costa v. Lair* (1976) 241 Pa.Super. 517 [363 A.2d 1313, 1314-1315]; *Viers v. Dunlap* (1982) 1 Ohio St.3d 173 [438 N.E.2d 881]; contra, *Godfrey v. State* (1975) 84 Wash.2d 959 [530 P.2d 630].

Many of the recent comparative negligence statutes are not silent on the point, but specifically address the prospective/retroactive question. (See generally Schwartz, *Comparative Negligence* (2d ed. 1986) §§ 8.3-8.5, pp. 143-152.) Of the numerous statutes which expressly speak to the issue, all but two specifically provide for prospective operation. (*Ibid.*) The Uniform Comparative Fault Act, drafted by the National Conference of Commissioners on Uniform State Laws as a model for state laws on the subject, similarly contains a provision which mandates prospective application, declaring that "[t]his Act applies to all [claims for relief] [causes of action] which accrue after its effective date." (§ 10.)

19 Although in the present case we do not know the additional parties plaintiff may have chosen to sue if Proposition 51 had been in effect at the outset of the litigation, defendants - in connection with their post-Proposition 51 filings - have suggested that some responsibility for the accident may lie either with some of plaintiff's friends or with plaintiff's parents. The statute of limitations on any cause of action plaintiff may have had against such individuals has, of course, long since run.

20 The dissenting opinion asserts that in light of the remedial purposes of Proposition 51, "the inference is virtually inescapable' that the electorate intended the proposition to apply to all trials conducted after the effective date of the measure. (See, *post*, at pp. 1232-1233.) The dissenting opinion apparently overlooks the fact, however, that most states which enacted tort reform measures similar to Proposition 51 in response to the same liability crisis which precipitated Proposition 51, and which specifically addressed the retroactivity issue in their statutes, did *not* provide for retroactive application of the newly enacted reforms to all cases tried after the new enactment. (See, *post*, at pp. 1219-1220.) In light of these other enactments, it is difficult to understand how the dissent can find it "inescapable" from the context and purpose of the enactment that such a retroactive application must have been intended.

21 The dissenting opinion discusses a number of cases which it suggests support the proposition that remedial statutes are generally intended to apply retroactively. (See *post*, pp. 1233-1235.) The cases discussed by the dissent, however, did not involve general tort reform statutes, like Proposition 51, but rather concerned statutory enactments implementing procedural changes in circumstances in which it was unlikely that retroactive application would defeat a party's reasonable reliance on the displaced procedural rule.

In its discussion of the proper interpretation of remedial statutes, the dissent makes no mention of the numerous decisions of both the United States Supreme Court and of state courts throughout the country which have overwhelmingly concluded that a tort reform statute, which is silent on the retroactivity question, should be applied prospectively to causes of action accruing after the effective date of the new statute. (See fn. 18, *ante*, p. 1215.)

22 The preambles of a number of the 1986 and 1987 statutes closely track the "Findings and Declaration of Purpose" in Proposition 51. (See, e.g., 1986 Wash. Laws, ch. 305, § 100; Tex. Acts 1987, 70th Leg., 1st C.S., ch. 2, § 1.01, in Tex.Civ.Prac. & Rem. Code Ann., note following § 9.001 (Vernon 1988).)

23 The preamble to MICRA read in part: "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide

an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future.” (Stats. 1975, 2d Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007.)

24 In *Tulley*, *supra*, 53 Cal. 274, the question at issue was the application of the amended version of [Civil Code section 3336](#), setting forth the measure of damages for wrongful conversion of personal property. At the time the cause of action in *Tulley* arose, [section 3336](#) provided, inter alia, that “[t]he detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party ...” (italics added); prior to the trial of the action, the section was amended to delete the emphasized portion of the statute.

In *Feckenscher*, *supra*, 12 Cal.2d 482, the statutory change at issue involved a revision of [Civil Code section 3343](#), pertaining to the measure of damages in a real estate fraud action. Although the opinion does not quote the version of [section 3343](#) in effect at the time the action arose, it appears that at that point the statute permitted a defrauded plaintiff to recover a sum equal to the difference between defendant's representation as to the value of the property which plaintiff received and the actual value of that property; as revised, [section 3343](#) permitted recovery of “the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received ...”

*Stout*, *supra*, 22 Cal.3d 718, like *Feckenscher*, *supra*, 12 Cal.2d 482, dealt with a revision of [Civil Code section 3343](#), setting forth the measure of damages in a real estate fraud action.

25 In reaching its conclusion on the statutory interpretation issue, the *Tulley* court relied on the fact that the section in question provided that “[t]he detriment caused by the wrongful conversion of personal property is presumed to be ...” (italics added), reasoning that “[t]he expression ‘is presumed to be’ indicates that it was intended to establish a legal presumption to operate, and which could only operate, at the trial of the cause ....” (53 Cal. at pp. 278-279.)

26 Although defendants in this case have not embraced the argument, several amici contend that Proposition 51 should be applied retroactively on the ground that the measure is “procedural” rather than “substantive.” The Court of Appeal, while concluding that retroactive application was warranted, nonetheless expressly rejected this argument, reasoning that because the provision could have a substantial effect on a defendant's liability or a plaintiff's recovery, “its substantive effect is evident.”

We agree with the Court of Appeal that retroactive application cannot be supported by characterizing Proposition 51 as merely a “procedural” statute. In addressing the question whether the retroactivity question may be resolved by denominating a statute as “substantive” or “procedural,” the court in *Aetna Cas. & Surety*, *supra*, 30 Cal.2d 388, 394, explained: “In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.” As explained above, retroactive application of Proposition 51 to preexisting causes of action would have a very definite substantive effect on both plaintiffs and defendants who, during the pending litigation, took irreversible actions in reasonable reliance on the then-existing state of the law. (See also 3 Harper et al., *Law of Torts* (2d ed. 1986) § 10.1, p. 7 [“The joint and several liability imposed on joint tortfeasors or independent concurrent tortfeasors producing an indivisible injury is a ‘substantive liability’ to pay entire damages. This differs from what might be described as a ‘procedural liability’ to be joined with other tortfeasors as defendants in a single action.”].)

1 Proposition 51, of course, does not actually change the amount of damages that plaintiffs may be awarded, but merely modifies the allocation of noneconomic damages among tortfeasors. Thus, it constitutes less of a change than a modification of the measure of damages so as to reduce the amount recoverable.

2 Indeed, courts have long attempted to distinguish statutes that affect “substantive” rights from those that affect merely “procedural” rights in determining the propriety of retrospective operation. (See, e.g. *Abrams v. Stone*, *supra*, 154 Cal.App.2d 33 at p. 41; *Coast Bank v. Holmes*, *supra*, 19 Cal.App.3d at pp. 593-594.) Some courts have even suggested that statutes which affect only “procedural” matters should not be defined as “retroactive” when applied to events that occurred prior to their effective date. (See, e.g. *Coast Bank v. Holmes*, *supra*, 19 Cal.App.3d at pp. 593-594; *Morris v. Pacific Electric Ry. Co.* (1935) 2 Cal.2d 764, 768 [43 P.2d 276].) As the majority correctly observes, however, this court has long since rejected such a distinction. (See *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d at pp. 394-395.) The critical issue is not the form of the statute but its “effects.” ( *Id.* at p. 394.)

3 Needless to say, we find no merit in plaintiffs' related contention that a retrospective application of the Act would result in an unconstitutional deprivation of vested rights.

- 4 Because of its conclusion that Proposition 51 does not apply to the case at bar, the majority does not reach the additional issues decided by the Court of Appeal and briefed by the parties, relating to the apportionment of damages to nonjoined defendants, and the meaning of "economic" damages under Proposition 51. I would affirm the Court of Appeal's well reasoned holding that under Proposition 51, damages must be apportioned among the "universe" of tortfeasors, as well as its holding that "economic" damages include future medical expenses and future loss of earnings.
- \* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

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Declined to Extend by [Boatworks, LLC v. City of Alameda](#), Cal.App. 1 Dist., May 15, 2019

185 Cal.App.4th 554

Court of Appeal, Fifth District, California.

HOMEBUILDERS ASSOCIATION OF TULARE/  
KINGS COUNTIES, INC., Plaintiff and Appellant,

v.

CITY OF LEMOORE et al.,  
Defendants and Respondents.

No. F057671.

June 9, 2010.

As Modified on Denial of Rehearing July 8, 2010.

Review Denied Sept. 22, 2010.

**Synopsis**

**Background:** Developers' association petitioned for writ of mandate challenging city's development impact fees. The Superior Court, Kings County, No. 07C0185, [James T. LaPorte](#), J., upheld the majority of the disputed fees. Association appealed.

**Holdings:** The Court of Appeal, [Levy](#), J., held that:

- [1] city adequately identified facilities to be paid for with community/recreation facility impact fee under city ordinance;
- [2] city adequately identified facilities to be paid for with community/recreation facility impact fee under Mitigation Fee Act;
- [3] existence of carryover balance did not render community/recreation facility impact fee invalid;
- [4] community/recreation facility impact fee was not preempted by the Quimby Act;
- [5] park land impact fee resolutions were not preempted by Quimby Act;

- [6] park land impact fee resolution was not inconsistent with city general plan;
- [7] there was adequate nexus between police impact fee and burden caused by development;
- [8] initial capital costs of police vehicles and equipment were properly included in calculating police impact fee;
- [9] city adequately identified public facilities to be paid for with police impact fee;
- [10] there was adequate nexus between municipal facilities impact fee and burden caused by development;
- [11] city adequately identified public facilities to be paid for with municipal facilities impact fee; but
- [12] there was no nexus between fire protection impact fee and burden caused by development in service area where facilities were already in place; but
- [13] there was adequate nexus between fire protection impact fee and burden caused by development in service area where new fire station would be required;
- [14] initial capital costs of vehicles and equipment were properly included in calculating garbage collection impact fee;
- [15] segregating funds by facility category rather than by project was proper; and
- [16] city was not required to identify improvements that fees would be used to finance when they were collected.

Affirmed in part and reversed in part.

Ardaiz, P.J., filed opinion concurring in the result.

West Headnotes (32)

- [1] **Zoning and Planning** 🔑 [Permits, certificates, and approvals in general](#)  
City's adoption of development impact fees under the Mitigation Fee Act was reviewed under

the narrower standards of ordinary mandate, since the city's action involved a quasi-legislative action. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[4 Cases that cite this headnote](#)

- [2] **Zoning and Planning** 🔑 Permits, certificates, and approvals

**Zoning and Planning** 🔑 Permits, certificates, and approvals

Judicial review of city's adoption of development impact fees under the Mitigation Fee Act by petition for writ of ordinary mandate was limited to an examination of the proceedings before the city to determine whether its action was arbitrary, capricious, or entirely lacking in evidentiary support. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[4 Cases that cite this headnote](#)

- [3] **Zoning and Planning** 🔑 Permits, certificates, and approvals

If a development impact fee under the Mitigation Fee Act is challenged, the local agency has the burden of producing evidence in support of its determination. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[2 Cases that cite this headnote](#)

- [4] **Zoning and Planning** 🔑 Fees, bonds and in lieu payments

For a local agency to meet its burden of producing evidence in support of its determination imposing a challenged development impact fee under the Mitigation Fee Act, the local agency must show that a valid method was used for imposing the fee, one that established a reasonable relationship between the fee charged and the burden posed by the development. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[4 Cases that cite this headnote](#)

- [5] **Zoning and Planning** 🔑 Permits, certificates, and approvals

A local agency's burden of producing evidence in support of its determination imposing a challenged development impact fee under the Mitigation Fee Act is not equivalent to the burden of proof, and does not operate to shift the burden of proof. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[1 Cases that cite this headnote](#)

- [6] **Zoning and Planning** 🔑 Permits, certificates, and approvals

A plaintiff challenging a Mitigation Fee Act impact fee has the burden of proof with respect to all facts essential to its claim, and therefore the plaintiff must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[1 Cases that cite this headnote](#)

- [7] **Municipal Corporations** 🔑 Scope of inquiry and powers of court

**Zoning and Planning** 🔑 Permits, certificates, and approvals in general

In general, the imposition of various monetary exactions, such as special assessments, user fees, and impact fees, is accorded substantial judicial deference.

- [8] **Zoning and Planning** 🔑 Fees, bonds and in lieu payments

In the absence of a legislative shifting of the burden of proof, a plaintiff challenging a Mitigation Fee Act impact fee has to show that the record before the local agency clearly did not support the underlying determinations regarding the reasonableness of the relationship between the fee and the development. *West's Ann.Cal.Gov.Code* § 66000 et seq.

[3 Cases that cite this headnote](#)

- [9] **Zoning and Planning** 🔑 Fees, bonds and in lieu payments

**Zoning and Planning** 🔑 Permits, certificates, and approvals

When a plaintiff challenges a Mitigation Fee Act impact fee, the local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that establishes a reasonable relationship between the fee charged and the burden posed by the development, and if the local agency does not produce evidence sufficient to avoid a ruling against it on the validity of the fee, the plaintiff challenging the fee will prevail, but if the local agency's evidence is sufficient, the plaintiff must establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, e.g., that the fee's use and the need for the public facility are not reasonably related to the development project on which the fee is imposed or the amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development. [West's Ann.Cal.Gov.Code § 66000 et seq.](#)

6 Cases that cite this headnote

- [10] **Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City adequately identified the public facilities to be paid for by a community/recreation facility impact fee under city ordinances requiring that impact fee resolutions shall be adopted in accordance with the provisions of the Mitigation Fee Act and requiring the city council to “list the specific public improvements to be financed,” in using the standard-based method of dividing the ratio of the value of existing facilities by the current population to arrive at the per capita fee imposed on developers, and identifying examples of future facilities including a municipal aquatic center, a municipal gymnasium and fitness center, and a naval air museum, even though specific construction plans were not in place. [West's Ann.Cal.Gov.Code §§ 66000\(b\), 66001\(a\)\(1, 2\).](#)

- [11] **Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City adequately identified the public facilities to be paid for by a community/recreation facility impact fee under the Mitigation Fee Act, in using the standard-based method of dividing the ratio of the value of existing facilities by the current population to arrive at the per capita fee imposed on developers, and identifying examples of future facilities including a municipal aquatic center, a municipal gymnasium and fitness center, and a naval air museum, even though specific construction plans were not in place; city was not required to use a plan-based method to determine the fee. [West's Ann.Cal.Gov.Code §§ 66000\(b\), 66001\(a\)\(1, 2\).](#)

- [12] **Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

The existence of a carryover balance of approximately \$1,486,000 in city's recreation capital impact fee fund did not render a community/recreation facility impact fee imposed on new development under the Mitigation Fee Act invalid as in excess of the reasonable cost of the public facilities for which the fees are imposed, as a general revenue fee, or as a violation of the reasonable relationship requirement, where the carryover balance must be used to pay for facilities that served existing development, and if the carryover balance was not expended on the public improvements for which the fees were collected, the unexpended fees were to be refunded pro rata to the owners of the lots of the development project that paid the fees. [West's Ann.Cal.Gov.Code §§ 66000\(b\), 66001\(a\)\(1, 2\), 66008.](#)

1 Cases that cite this headnote

- [13] **Zoning and Planning** 🔑 Maps, plats, or plans; subdivisions

City's Mitigation Fee Act community/recreation facility impact fee imposed on new development was not preempted by the Quimby Act, where the impact fees were to be used to build unique facilities intended to serve the entire

population of the city. [West's Ann.Cal.Gov.Code §§ 66000\(b\), 66002\(c\)\(7\), 66477.](#)

[West's Ann.Cal.Gov.Code §§ 65030.1, 66477\(a\)\(2\).](#)

2 Cases that cite this headnote

**[14] Zoning and Planning** 🔑 Fees, bonds and in lieu payments

The Mitigation Fee Act authorizes fees for recreation facilities independent of the Quimby Act. [West's Ann.Cal.Gov.Code §§ 66000\(b\), 66002\(c\)\(7\), 66477.](#)

**[15] Zoning and Planning** 🔑 Maps, plats, or plans; subdivisions

City's park land impact fee resolution, setting fees in lieu of park land dedication under the Quimby Act, was not preempted by the Quimby Act, because it was adopted pursuant to that act. [West's Ann.Cal.Gov.Code § 66477.](#)

**[16] Zoning and Planning** 🔑 Maps, plats, or plans; subdivisions

City's park land impact fee resolution, setting fees in lieu of park land dedication for residential development not involving a subdivision of land, was not preempted by the Quimby Act, because such development was not subject to the Quimby Act. [West's Ann.Cal.Gov.Code § 66477.](#)

**[17] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City acted within its discretion in finding city's park land impact fee resolution, setting fees at the proportionate amount necessary to provide five acres of park per 1,000 residents of the subdivision as authorized by the Quimby act, was not inconsistent with the city general plan establishing a standard of three acres as the basis for requiring land dedications and/or fees as authorized by the Subdivision Map Act, where city's general plan reflected city's commitment as a matter of policy and priority to parks and recreation for its citizens, and the plan expressly recognized that circumstances could change.

**[18] Zoning and Planning** 🔑 Permits, certificates, and approvals

**Zoning and Planning** 🔑 Permits, certificates, and approvals

City's conclusion that its park land impact fee resolution, setting fees at the proportionate amount necessary to provide five acres of park per 1,000 residents of the subdivision as authorized by the Quimby act, was consistent with city's general plan, carried a strong presumption of regularity that could only be overcome by a showing of abuse of discretion. [West's Ann.Cal.Gov.Code § 66477\(a\)\(2\).](#)

**[19] Zoning and Planning** 🔑 Permits, certificates, and approvals

**Zoning and Planning** 🔑 Permits, certificates, and approvals

An abuse of discretion is established in a city's conclusion that its park land impact fee resolution is consistent with its general plan only if the city council has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence.

**[20] Zoning and Planning** 🔑 Permits, certificates, and approvals in general

Appellate review of a city's conclusion that its park land impact fee resolution is consistent with its general plan is highly deferential to the local agency, recognizing that the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity.

**[21] Zoning and Planning** 🔑 Conformity of regulations to comprehensive or general plan

A city's action is consistent with the city's general plan if, considering all of its aspects, it will further the objectives and policies of the general plan.

**[22] Zoning and Planning** 🔑 Conformity of regulations to comprehensive or general plan

State law does not require perfect conformity between a city's action and the city's general plan; rather, to be consistent, the action simply must be compatible with the objectives, policies, general land uses and programs specified in the general plan.

**[23] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City's police impact fee on new development was supported by an adequate nexus between the development that paid the fee and the burden on the police department caused by that development under Mitigation Fee Act, where increased population due to new development would place additional demands on the police department, the department would need to be expanded to maintain the current level of service, and the fee calculation standard classified the cost of service by development type. *West's Ann.Cal.Gov.Code* § 66001(a)(3, 4).

**[24] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

The initial capital costs of police vehicles and equipment were properly included in calculating a police impact fee on new development under the Mitigation Fee Act, since vehicles and officer safety equipment were necessary to provide the public service of police protection, which was within the Act's definition of "public facilities." *West's Ann.Cal.Gov.Code* § 66000(d).

**[25] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City adequately identified the public facilities to be paid for by police impact fee under the

Mitigation Fee Act, where city's report relied upon in setting the fees referred to expanding the current police headquarters, constructing a substation, and adding the necessary police vehicles and officer safety equipment. *West's Ann.Cal.Gov.Code* § 66001(a)(1, 2).

**[26] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City's municipal facilities impact fee on new development was supported by an adequate nexus between the development that paid the fee and the burden on municipal facilities caused by that development under Mitigation Fee Act, where increased population due to new development would place additional demands on the existing complement of municipal facilities, vehicles and equipment, the complement would need to be expanded to maintain the current level of service, and the fee calculation allocated costs between residential and nonresidential development because some city services were impacted only indirectly by residential development. *West's Ann.Cal.Gov.Code* § 66001(a)(3, 4).

1 Cases that cite this headnote

**[27] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City adequately identified the public facilities to be paid for by municipal facilities impact fee on new development under the Mitigation Fee Act, even though city's report acknowledged that specific plans for future municipal facilities and equipment were not currently available, where the report noted that it was likely that some of city's future space needs would be accommodated by finishing additional space in the existing municipal complex, and that other space might be acquired or developed downtown. *West's Ann.Cal.Gov.Code* § 66001(a)(1, 2).

**[28] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

There was no nexus between the burden posed by new housing and city's fire protection impact fees for a service area where the facilities and equipment needed to serve future development were already in place, and thus the fees were invalid under the Mitigation Fee Act, where city proposed to use the fees to reimburse the city for its prior general fund money investments to pay for the facilities in the service area; such a fee would constitute general revenue to the city. *West's Ann.Cal.Gov.Code* §§ 66001(a)(3, 4), 66008.

*See Cal. Jur. 3d, Zoning And Other Land Controls*, §§ 120, 250; *Cal. Civil Practice (Thomson Reuters 2010) Real Property Litigation*, § 14:77; 9 *Miller & Starr, Cal. Real Estate (3d ed. 2001)* § 25:45.

**[29] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

City's fire protection impact fees for a service area where a new fire station would be required to serve future development was supported by an adequate nexus between the development that paid the fee and the burden on fire protection facilities caused by that development under Mitigation Fee Act, even though the city's calculation of the cost per capita of the new fire station included the forecasted population of a 476 acre area that might be annexed to the city in the future, where there was no indication that, without the potential annexation, additional fire protection facilities would be unnecessary to serve new development. *West's Ann.Cal.Gov.Code* § 66001(a)(3, 4).

**[30] Zoning and Planning** 🔑 Maps, plats, and plans; subdivisions

The initial capital costs of refuse vehicles and containers were properly included in calculating refuse vehicle and container impact fees on new development under the Mitigation Fee Act, since refuse vehicles and containers were necessary to provide the public service of garbage collection, which was within the Act's definition of

“public facilities.” *West's Ann.Cal.Gov.Code* § 66000(d).

**[31] Zoning and Planning** 🔑 Fees, bonds and in lieu payments

City's act of segregating funds from impact fees imposed on new development by facility category, rather than by a specifically identified project, did not violate the Mitigation Fee Act. *West's Ann.Cal.Gov.Code* §§ 66000, 66006(a).

**[32] Zoning and Planning** 🔑 Fees, bonds and in lieu payments

Developers' association failed to establish that city violated the Mitigation Fee Act provision requiring that “at the time the local agency imposes a fee for public improvements on a specific development project, it shall identify the public improvement that the fee will be used to finance,” absent evidence that a development fee had been imposed directly on association or one of its members. *West's Ann.Cal.Gov.Code* § 66006(f).

1 Cases that cite this headnote

### Attorneys and Law Firms

**\*\*13** Law Offices of Walter P. McNeill and [Walter P. McNeill](#), Redding, for Plaintiff and Appellant.

Dowling, Aaron & Keeler and [Daniel O. Jamison](#), Fresno, for Defendants and Respondents.

### OPINION

LEVY, J.

**\*559** In late 2005, respondents, the City of Lemoore and the Lemoore City Council (City), engaged Colgan Consulting Corporation and Joseph Colgan (Colgan) to conduct a development fee impact study and prepare a report (Colgan Report). In late 2006 and early 2007 the City adopted various development impact fees based on the

Colgan Report. Appellant, Home Builders Association of Tulare/Kings Counties, Inc. (HBA), challenged certain of these fees as being invalid under the Mitigation Fee Act (Gov.Code<sup>1</sup>, § 66000, et seq.).

The trial court upheld the majority of the disputed impact fees. HBA contends the trial court erred in that it applied an incorrect and excessively deferential “quantum of proof.” HBA further argues that the various fees violate certain Mitigation Fee Act requirements. HBA also contends that some of these fees are preempted by the fees imposed for neighborhood and community parks that serve a subdivision under the Quimby Act (§ 66477).

As discussed below, the fire protection impact fee for the east side of the City is invalid in that it is not reasonably related to the burden created by the development project. However, the balance of the judgment upholding the remaining disputed fees will be affirmed.

## BACKGROUND

Between October and December 2006, the City received Colgan's findings on the development impact fee study. Based on this report, the City held public hearings on the adoption of various impact fees. In December 2006 and January and February 2007, the City adopted 13 impact fees for new housing in Lemoore.

In May 2007, HBA filed and served its first amended petition for writ of mandate and complaint. HBA challenged 7 of the impact fees adopted \*560 pursuant to the Colgan Report. According to HBA, the Colgan Report incorporated and applied a variety of accounting methods that are unlawful under the Mitigation Fee Act. Specifically, HBA objected to development impact fees for law enforcement, park land acquisition and improvement, refuse vehicles and containers, fire protection, general municipal facilities, and community/recreational facilities. HBA also challenged the process by which the City accounts for and spends the impact fees collected.

The City initially demurred to the first amended petition/complaint and moved to strike all allegations that the fees were special taxes or proceeds of taxes, were excessive as such, and violated the California Constitution. The trial court overruled the demurrer but granted the motion to strike. HBA did not amend. Accordingly, all constitutional issues were

removed and the case proceeded on the statutory claims raised by HBA as to the City's alleged noncompliance with the Mitigation Fee Act.

Thereafter, the City moved for summary judgment/summary adjudication. The trial court granted summary adjudication in the City's favor on the causes of action \*\*14 regarding the fire protection impact fees, police impact fees, municipal facilities impact fees, and the administration of the impact fees. The court concluded that the City had adequately demonstrated that it complied with the Mitigation Fee Act and that its determination of the amount of these disputed fees was neither arbitrary nor capricious. However, the court found that triable issues of material fact existed with respect to the causes of action regarding the park land acquisition, park land improvement, community/recreation, and refuse vehicles and containers impact fees.

Following a trial on the remaining causes of action, the trial court ruled in favor of the City on the validity of those fees with one exception. The court invalidated the park land improvement impact fee as applied to subdivisions subject to the Quimby Act.

## DISCUSSION

### 1. *The Mitigation Fee Act.*

At issue in this appeal is whether, in adopting the disputed impact fees, the City complied with the Mitigation Fee Act. This act embodies a statutory standard against which monetary exactions by local governments subject to its provisions are measured. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, 50 Cal.Rptr.2d 242, 911 P.2d 429.) It was passed by the Legislature “ ‘in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects.’ ” (*Id.* at p. 864, 50 Cal.Rptr.2d 242, 911 P.2d 429.)

\*561 The Mitigation Fee Act requires the local agency to identify the purpose of the fee and the use to which the fee will be put. (§ 66001, subd. (a)(1) and (2).) The local agency must also determine that both “the fee's use” and “the need for the public facility” are reasonably related to the type of development project on which the fee is imposed. (§ 66001, subd. (a)(3) and (4).) In addition, the local agency must “determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or

portion of the public facility attributable to the development on which the fee is imposed.” (§ 66001, subd. (b).) “Public facilities” are defined as including “public improvements, public services, and community amenities.” (§ 66000, subd. (d).)

## 2. The standard of review and burden of proof.

[1] [2] The City's adoption of the development impact fees under the Mitigation Fee Act involved a quasi-legislative action. (Cf. *Warmington Old Town Associates v. Tustin Unified School Dist.* (2002) 101 Cal.App.4th 840, 849, 124 Cal.Rptr.2d 744.) Thus, the City's action is reviewed under the narrower standards of ordinary mandate. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 328, 4 Cal.Rptr.2d 897.) Accordingly, judicial review is limited to an examination of the proceedings before the City to determine whether its action was arbitrary, capricious, or entirely lacking in evidentiary support. (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667, 42 Cal.Rptr.3d 868, 133 P.3d 1028.) The action will be upheld if the City adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 232, 1 Cal.Rptr.2d 818.) This issue is a question of law. (*Id.* at p. 233, 1 Cal.Rptr.2d 818.)

\*\*15 [3] [4] As noted above, before imposing a fee under the Mitigation Fee Act, the local agency is charged with determining that the amount of the fee and the need for the public facility are reasonably related to the burden created by the development project. If such a fee is challenged, the local agency has the burden of producing evidence in support of its determination. (*Garrick Development Co. v. Hayward Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 329, 4 Cal.Rptr.2d 897.) The local agency must show that a valid method was used for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development. (*Shapell Industries, Inc. v. Governing Board*, *supra*, 1 Cal.App.4th at p. 235, 1 Cal.Rptr.2d 818.)

[5] [6] \*562 However, this burden of producing evidence is not equivalent to the burden of proof. “Attorneys, judges, and commentators often have confused these terms and the concepts they represent. As the United States Supreme Court observed, ‘For many years the term “burden of proof” was ambiguous because the term was used to describe two distinct

concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production—a party's obligation to come forward with evidence to support its claim.’ [Citations.]” (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1666–1667, 3 Cal.Rptr.3d 279.) Thus, the local agency has the obligation to produce evidence sufficient to avoid a ruling against it on the issue. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346, 13 Cal.Rptr.2d 819.) However, this burden of producing evidence does not operate to shift the burden of proof. The plaintiff has the burden of proof with respect to all facts essential to its claim for relief and that burden remains. (*Ibid.*) Therefore, the plaintiff must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief. (*Sargent Fletcher, Inc. v. Able Corp.*, *supra*, 110 Cal.App.4th at p. 1667, 3 Cal.Rptr.3d 279.)

[7] [8] In general, the imposition of various monetary exactions, such as special assessments, user fees, and impact fees, is accorded substantial judicial deference. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671, 117 Cal.Rptr.2d 269, 41 P.3d 87.) In the absence of a legislative shifting of the burden of proof, a plaintiff challenging an impact fee has to show that the record before the local agency clearly did not support the underlying determinations regarding the reasonableness of the relationship between the fee and the development. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

[9] Accordingly, the local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development. If the local agency does not produce evidence sufficient to avoid a ruling against it on the validity of the fee, the plaintiff challenging the fee will prevail. However, if the local agency's evidence is sufficient, the plaintiff must establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, e.g., that the fee's use and the need for the public facility are not reasonably related to the development project on which the fee is imposed or the \*\*16 amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development. (Cf. *Sinclair Paint*



*Co. v. \*563 State Bd. of Equalization* (1997) 15 Cal.4th 866, 881, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)

There have been occasional comments from courts of appeal that the burden of proof in a fee case falls on the local agency. These cases cite *Beaumont Investors v. Beaumont–Cherry Valley Water Dist.* (1983) 165 Cal.App.3d 227, 211 Cal.Rptr. 567 as support for this shift. However, in *Beaumont Investors*, the local agency failed to produce any evidence to support its calculation of the disputed fee. Thus, it was a failure to meet the burden of production, not the burden of proof. In ruling that the facilities fee was invalid because the local agency failed to develop a record from which costs reasonably related to the development could be determined, *Beaumont Investors* conflated the two concepts. In contrast here, the City produced a record to support the disputed fees. Thus, *Beaumont Investors* and its progeny are distinguishable.

Here, the standard applicable to ordinary mandate applies and there is no basis for shifting the parties' burdens. Thus, the City had the initial burden of producing evidence of the reasonableness of the relationship between the fee charged and the burden posed by the development. However, HBA had the burden of proving that the record before the City did not support the City's underlying determinations.

### **3. Community/Recreation Facility Impact Fee (Resolution No. 2007–1).**

The City relied on the Colgan Report in adopting the various development impact fees. Colgan proposed the community/recreation facility impact fee to fund the cost of adding community and recreation facilities that will be needed to maintain the current level of service as the City grows. Colgan calculated these fees based on the existing ratio of community and recreation facility asset value to population, the rationale being that the need for such facilities is based on the size of the population to be served. Colgan determined that the City had invested \$5,477,160 in existing community recreational facilities and then divided that number by the current population to arrive at the per capita cost. That cost was then multiplied times the population per unit of development type to arrive at the fee per unit. This calculation is known as the standard-based method.

Regarding future needs, Colgan noted that the existing community and recreation facilities are unique and will not be duplicated. These facilities \*564 include the civic auditorium, a youth plaza skate park, a teen center, the train depot complex, and a golf course. Rather, the City intends

to expand the range of recreational choices by constructing other types of facilities including a municipal aquatic center, a municipal gymnasium and fitness center, and a naval air museum. These facilities are expected to cost in excess of \$5 million while the impact fee is projected to yield approximately \$3.2 million.

HBA objects to the community/recreation facility impact fee on two grounds. HBA argues that the fee violates the Mitigation Fee Act's requirement that the public facilities be identified and that the fee is preempted by the Quimby Act.

#### **a. The City adequately identified the public facilities.**

[10] Section 66001, subdivisions (a)(1) and (2), requires the City to “[i]dentify the purpose of the fee” and “[i]dentify the use to which the fee is to be put.” If the use is financing public facilities, the facilities must be identified. However, the statute \*\*17 provides flexibility regarding how that identification may be made. It may, *but need not*, “be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.” (§ 66001, subd. (a)(2).) Similarly, Lemoore City Code section 8–10–3 requires that impact fee resolutions shall be adopted in accordance with the provisions of the Mitigation Fee Act. Regarding the content of such resolutions, Lemoore City Code section 8–10–2 requires the city council to “list the specific public improvements to be financed.”

[11] HBA contends the City disregarded these provisions in establishing the community/recreation facility impact fee in that no specific public improvements were identified. Rather, reference was made to examples of future facilities without any actual plan or commitment. The crux of HBA's complaint is the City's use of the standard-based method to calculate the fees to maintain the current level of service, i.e., the ratio of the value of existing facilities divided by the current population to arrive at the per capita cost. HBA argues the Mitigation Fee Act requires the identification of a specific improvement plan and its attendant costs, not simply a type or category of future public facilities. In other words, the City must use a plan-based approach.

Contrary to HBA's position, section 66001 is not so limiting. Rather, it is acceptable for the local agency to identify the facilities via *general* plan requirements. In fact, a “fee” may be “established for a broad class of projects by legislation of

general applicability.” (§ 66000, subd. (b).) It would \*565 be unreasonable to demand the specificity urged by HBA and require local agencies to make a concrete showing of all projected construction when initially adopting a resolution. Such a resolution might be in effect for decades. (Cf. *Garrick Development Co. v. Hayward Unified School Dist.*, supra, 3 Cal.App.4th at p. 332, 4 Cal.Rptr.2d 897.)

Moreover, HBA's concern that the standard-based fee “is a spinning turnstile for the collection of money” is unwarranted. Section 66001, subdivisions (c) through (e) require that collected fees be kept segregated from other funds; unexpended funds be accounted for yearly; and if a use for the collected fees cannot be shown, they must be refunded pro rata with interest. (*Garrick Development Co. v. Hayward Unified School Dist.*, supra, 3 Cal.App.4th at p. 332, 4 Cal.Rptr.2d 897.) Thus, there is a mechanism in place to guard against unjustified fee retention. (*Ibid.*)

Further, the standard-based method of calculating fees does not prevent there being a reasonable relationship between the fee charged and the burden posed by the development. There is no question that increased population due to new development will place additional burdens on the city-wide community and recreation facilities. Thus, to maintain a similar level of service to the population, new facilities will be required. It is logical to not duplicate the existing facilities, but rather, to expand the recreational opportunities. To this end, the City intends to construct an aquatic center, a gymnasium and fitness center, and a naval air museum. Since the facilities are intended for city-wide use, it is reasonable to base the fee on the existing ratio of community and recreation facility asset value to population. The fact that specific construction plans are not in place does not render the fee unreasonable. The public improvements are generally identified. The record, here the Colgan Report, need only \*\*18 provide a reasonable basis overall for the City's action. (*Garrick Development Co. v. Hayward Unified School Dist.*, supra, 3 Cal.App.4th at p. 333, 4 Cal.Rptr.2d 897.)

The community/recreation facility impact fee also meets the identification requirements of the Lemoore City Code. Under section 8–10–3, the Mitigation Fee Act controls the adoption of such fees.

[12] HBA additionally argues that the existence of a carryover balance of approximately \$1,486,000 in the City's recreation capital impact fee fund invalidates the community/recreation facility impact fee. According to HBA, the failure

of the City to credit that carryover balance to the calculation of the new development impact fee causes the resulting fees to: be in excess of the reasonable cost of the public facilities for which the fees are imposed; causes the fees to be levied, collected and imposed for general revenue purposes; and fails the reasonable relationship requirement.

\*566 However, as explained by Colgan, the development that paid those fees and created the balance is now existing development and those funds must be used to pay for facilities that serve that existing development. Colgan further noted that if, as suggested by HBA, the City were credited with that account balance as existing facilities, the impact fees would be higher. Moreover, under section 66001, subdivision (e), if the carryover balance is not expended on the public improvements for which the fees were collected, the unexpended fees are to be refunded pro rata to the owners of the lots of the development project that paid the fees. Thus, it would be contrary to the statute to credit refunds that are due to existing development to new development.

In sum, the City adequately considered all relevant factors and demonstrated a rational connection between those factors and the community/recreation facility impact fee. (*Shapell Industries, Inc. v. Governing Board*, supra, 1 Cal.App.4th at p. 232, 1 Cal.Rptr.2d 818.) The City's action was not arbitrary, capricious, or entirely lacking in evidentiary support. (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco*, supra, 38 Cal.4th at p. 667, 42 Cal.Rptr.3d 868, 133 P.3d 1028.)<sup>2</sup>

***b. The community/recreation facility impact fee is not preempted by the Quimby Act.***

[13] Section 66477 (the Quimby Act) permits a city or county to enact an ordinance requiring the dedication of land, or the payment of fees in lieu thereof, for park and recreational purposes as a condition of the approval of a subdivision so long as certain requirements are met. The ordinance must include definite standards for determining the proportion of a subdivision to be dedicated and the amount of any fee to be paid in lieu thereof. However, this dedication or payment cannot “exceed the proportionate amount necessary to provide three acres of park area per 1,000 persons residing within a subdivision subject to this section, unless the amount of existing neighborhood and community park area ... exceeds that limit, in which case the legislative body may adopt the calculated amount as a higher standard \*\*19 not to exceed five acres per 1,000 persons residing within a subdivision

subject to this section.” (§ 66477, subd. (a)(2).) Further, “[t]he land, fees, or combination thereof are to be used only for the purpose of developing new or rehabilitating existing *neighborhood or community* park or recreational facilities *to serve the subdivision.*” (§ 66477, subd. (a)(3), emphasis added.) Also, \*567 “[t]he amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities *by the future inhabitants of the subdivision.*” (§ 66477, subd. (a)(5), emphasis added.)

HBA contends that, because the community/recreation facility impact fee and the Quimby Act both pertain to “recreation,” the Quimby Act preempts the community/recreation facility impact fee. According to HBA, any impact fee imposed on subdivisions for recreational facilities would overlap and duplicate exactions for recreational facilities imposed under the local Quimby Act ordinance, causing builders to pay twice for such recreational facilities.

However, the Quimby Act is designed to maintain and preserve open space for the recreational use of the residents of new subdivisions, not the city at large. (*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 637, 94 Cal.Rptr. 630, 484 P.2d 606.) Accordingly, under this scheme, the park must be in sufficient proximity to the subdivision to serve those future residents. (*Ibid.*) The statute specifically states that the land or fees are to be used for *neighborhood or community* parks or recreation facilities. Although non subdivision residents are not excluded, the recreation facilities required by the Quimby Act ordinance are for the new residents whose presence creates the need for additional park land near the subdivision, as distinguished from a more general or diffuse need for area wide services. (*Id.* at p. 642, 94 Cal.Rptr. 630, 484 P.2d 606.)

In contrast, the community/recreation facility impact fees are to be used to build unique facilities intended to serve the entire population of the City. Thus, there is no duplication of fees. Rather, the Quimby Act fees and the community/recreation facility impact fees pertain to entirely separate categories of “recreation.”

[14] Moreover, the Mitigation Fee Act authorizes fees for recreation facilities independent of the Quimby Act. Quimby Act fees are expressly excluded from the fees authorized to be collected under the Mitigation Fee Act. (§ 66000, subd. (b).) Nevertheless, the Mitigation Fee Act permits fees to be

adopted for “[p]arks and recreation facilities.” (§ 66002, subd. (c)(7).)

In sum, the community/recreation facility impact fees address needs other than “neighborhood or community park or recreational facilities to serve the subdivision.” Accordingly, those fees are not preempted by the Quimby Act.

#### 4. Park Land Impact Fee.

[15] [16] The City adopted two separate park land impact fee resolutions. Resolution No. 2007–04 set fees in lieu of park land dedication under the Quimby Act.

\*568 Resolution No. 2006–46 set such fees for residential development not involving a subdivision of land, i.e., development not subject to the Quimby Act.

HBA contends the Resolution No. 2007–04 park land impact fee is invalid for three reasons. According to HBA, this impact fee is preempted by the Quimby Act, is calculated using the invalid “standard-based method,” and is inconsistent with the City's general plan. In support of the \*\*20 first two reasons, HBA merely references its arguments regarding the community/recreation facility impact fee. However, this parkland impact fee cannot be preempted by the Quimby Act because it was adopted pursuant to that act. If HBA meant this argument to pertain to Resolution No. 2006–46 parkland fees, it is also without merit because those fees are expressly limited to residential development outside of the Quimby Act. HBA's contention that the fees are invalid due to the use of the standard-based calculation method is also unavailing for the reasons stated above.

##### *a. The park land impact fee standard is not inconsistent with the City's general plan.*

[17] The Quimby Act provides that the dedication of land, or the payment of fees, or both, shall not exceed the proportionate amount necessary to provide three acres of park per 1,000 residents of the subdivision. However, if the amount of existing neighborhood and community park area exceeds that limit, the legislative body may adopt the calculated amount as a higher standard not to exceed five acres per 1,000 residents. (§ 66477, subd. (a)(2).)

The Colgan Report calculated the ratio of existing park acreage to population as exceeding five acres per 1,000 persons. Accordingly, the City adopted the five acre standard as authorized by the Quimby Act.

HBA argues that this standard of five acres per 1000 residents is inconsistent with the City's general plan. The 1990 general plan, relied on by HBA, established a standard of three acres as the basis for requiring land dedications and/or fees as authorized by the State Subdivision Map Act.

[18] [19] [20] In enacting the parkland fee ordinance and resolutions, the City concluded that the standard of five acres per 1000 residents was consistent with the City's general plan. This conclusion carries a strong presumption of regularity that can only be overcome by a showing of abuse of discretion. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816, 65 Cal.Rptr.3d 251.) “ ‘An abuse of discretion is established only if the city council has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence.’ ” (*Ibid.*) Appellate review is highly deferential to the local agency, “ ‘recognizing that “the body which adopted the general plan policies in its \*569 legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.]’ ” (*Ibid.*)

[21] [22] An action is consistent with the general plan if, considering all of its aspects, it will further the objectives and policies of the general plan. (*Corona–Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994, 21 Cal.Rptr.2d 803.) State law does not require perfect conformity between the action and the general plan. (*Friends of Lagoon Valley v. City of Vacaville, supra*, 154 Cal.App.4th at p. 817, 65 Cal.Rptr.3d 251.) Rather, to be consistent, the action simply must be compatible with the objectives, policies, general land uses and programs specified in the general plan. (*Ibid.*)

Here, the City's general plan reflects the City's commitment as a matter of policy and priority to parks and recreation for its citizens. The plan proposes the acreage standards as “policies” and expressly recognizes that circumstances could change. The reference to the acreage standard being as authorized by the Subdivision Map Act indicates that the general plan was intended to be consistent with that act.

\*\*21 Under these circumstances, it must be concluded that the City did not abuse its discretion in finding that the five acre standard was not inconsistent with the general plan. The general plan references the Subdivision Map Act, which authorizes the five acre standard in section 66477, i.e., the Quimby Act. This is an officially approved statewide goal

that the Legislature intended the City to be guided by in its planning process. (§ 65030.1.) Moreover, this standard furthers the objectives and policies of the general plan to promote access to parks and recreation. In sum, the five acre standard is compatible with the general plan.

### 5. Police Impact Fee (Resolution No. 2006–46).

The City adopted the police impact fee to maintain its current level of service for police facilities, vehicles, and equipment as the City grows. The Colgan Report calculated the impact fees based on the cost of maintaining existing ratios of facilities, vehicles, and officer safety equipment to calls for service. Colgan used a random sample of all calls logged for 2005 classified by development type, i.e., single family residential, multi-family residential, etc., and the number of existing units per development type to arrive at the average police calls per existing unit of development type. Colgan then used the estimated replacement cost of existing facilities and assets divided by the total number of service calls to arrive at an average cost per call. To arrive at the capital cost per unit of development type, Colgan multiplied the calls per unit of development type times the cost per call. The Colgan Report also found that the existing police headquarters building was nearing capacity and additional space would be needed to accommodate the City's growth.

\*570 HBA again objects to the City's use of a standard-based method to arrive at the impact fee. According to HBA, this standard has no nexus to new housing that pays the fees and fails to identify public facilities required to serve new development. HBA additionally argues that the standard improperly includes operational expenses that are not “public facilities” such as radios, weapons, protective clothing, and vehicles.

[23] Contrary to HBA's position, the Colgan Report provides a reasonable basis overall for the police impact fee. There is no question that increased population due to new development will place additional demands on the police department. To maintain the current level of service, the department will need to be expanded. Since the fee calculation standard classifies the cost of service by development type, there is a nexus between the development that pays the fee and the burden on the police department caused by that development.

[24] HBA's objection to the fee calculation including the capital cost of police vehicles and equipment is also without merit. Section 66000, subdivision (d), defines “public

facilities” as including public improvements and public services. Vehicles and officer safety equipment are necessary to provide the public service of police protection. The fees are to be used for the initial capital costs of these items, not for the costs of operation and maintenance.

[25] Finally, the public facilities to be financed by the police impact fees are adequately identified. The Colgan Report refers to expanding the current headquarters, constructing a substation, and adding the necessary police vehicles and officer safety equipment.

**\*\*22** In sum, the police impact fee is valid. The City adequately considered all relevant factors and demonstrated a rational connection between those factors and the fee. (*Shapell Industries, Inc. v. Governing Board, supra*, 1 Cal.App.4th at p. 232, 1 Cal.Rptr.2d 818.)

#### **6. Municipal Facilities Impact Fee (Resolution No. 2006–49).**

The City adopted the municipal facilities impact fee to maintain the City's existing level of service for municipal facilities, vehicles and equipment as the City grows. To calculate this fee, Colgan valued the existing municipal facilities, vehicles and equipment and calculated a per capita cost based on the current relationship between municipal facility costs and functional population.

As with the community/recreation facility impact fee and the police impact fee, HBA objects to the City's use of a standard-based method to **\*571** arrive at this fee. According to HBA, this standard has no nexus to new housing that pays the fees and fails to identify public facilities required to serve new development.

[26] Contrary to HBA's position, the Colgan Report provides a reasonable basis overall for the municipal facilities impact fee. Increased population due to new development will place additional demands on the existing complement of municipal facilities, vehicles and equipment. To maintain the current level of service, this complement will inevitably need to be expanded. Colgan noted that some city services are impacted only indirectly by residential development and thus allocated costs between residential and nonresidential development. This specific allocation of costs among different types of development provides a nexus between the development that pays the fee and the burden on municipal facilities posed by that development.

[27] The Colgan Report acknowledges that specific plans for future municipal facilities and equipment are not currently available. The report further notes that “[t]he existing municipal complex contains large areas that are currently unfinished and unused. It is likely that some of the City's future space needs will be accommodated by finishing additional space in that building, which currently houses offices, maintenance facilities, and storage. Other space may be acquired or developed downtown.”

Nevertheless, as discussed above, it is acceptable for the local agency to identify the facilities via general plan requirements. Moreover, contrary to HBA's position, Colgan considered the capacity of the existing facilities noting that such areas could be finished to provide for future municipal needs. Further, the section 66001, subdivisions (c) through (e) requirements that the collected fees be segregated, accounted for yearly, and refunded if a use cannot be shown guard against unjustified fee retention. (*Garrick Development Co. v. Hayward Unified School Dist., supra*, 3 Cal.App.4th at p. 332, 4 Cal.Rptr.2d 897.)

The City adequately considered all relevant factors and demonstrated a rational connection between those factors and the municipal facilities impact fee. (*Shapell Industries, Inc. v. Governing Board, supra*, 1 Cal.App.4th at p. 232, 1 Cal.Rptr.2d 818.) The City's action was not arbitrary, capricious, or entirely lacking in evidentiary support. (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco, supra*, 38 Cal.4th at p. 667, 42 Cal.Rptr.3d 868, 133 P.3d 1028.) Accordingly, this fee is valid.

#### **\*\*23 7. Fire Protection Impact Fee (Resolution No. 2006–49).**

For purposes of calculating fire protection impact fees, the Colgan Report divided the City into two service areas, the older, established east side and the newer west side. Regarding the east side, the Colgan Report states that “the facilities and equipment needed to serve future development are already in place, so impact fees for that area are intended to recover new development's **\*572** proportionate share of the cost of the fire protection assets serving the area. The revenue from those fees will be used to offset a portion of the City's recent investments in facility improvements and new equipment, which were funded in part with general fund money.” In contrast, the west side will need a new fire station and equipment to serve that area as it develops.

***a. The east side impact fees are invalid.***

As discussed above, the Mitigation Fee Act requires the local agency to determine that the amount of the fee and the need for the public facility are reasonably related to the burden created by the development project. Further, the local agency must identify the facilities to be financed by the fee.

[28] HBA objects to the east side fees on the ground that they are being imposed for general revenue purposes. Since there is no need for additional fire protection facilities in that part of the City to serve new development, HBA contends that no nexus exists between the fees and the burden posed by new housing.

HBA is correct. While a fee may be imposed to cover costs attributable to increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan (§ 66001, subd. (g)), the existing east side fire protection facilities are already adequate to continue to provide the same level of service. In other words, the new development will not burden the current facilities. The Colgan Report's proposal to reimburse the City for its prior general fund money investments is not authorized by the Mitigation Fee Act. Rather, such a fee would constitute general revenue to the City in violation of section 66008, and therefore is invalid.

***b. The west side impact fees are valid.***

[29] The Colgan Report concludes that, due to the barrier created by Highway 41 between the east side and the west side of the City, a new fire station will be required to serve the west side as it develops. In calculating the cost per capita for the west side, Colgan included the forecasted population of a 476 acre area that may be annexed to the City in the future. This addition resulted in reducing the west side fire protection impact fees by approximately 28 percent.

HBA objects to the calculation including this potential annexation area as opposed to using the existing legal boundaries of the City. HBA posits that a new fire station might not be needed if the hypothetical annexation does not occur.

Contrary to HBA's position, the Colgan Report provides a reasonable basis for the City's adoption of the west side impact fee. There is no indication \*573 that, without

the potential annexation, additional fire protection facilities would be unnecessary to serve new development. Rather, it can be inferred from the relatively low percentage of fee reduction, i.e., 28 percent, that fire protection facilities would be required with or without the annexation. The City considered \*\*24 the potential population to be served for the purpose of reducing the fee that would otherwise be charged and spreading the costs more equitably. This action was not arbitrary or capricious.

***8. Refuse Vehicle and Container Impact Fees (Resolution No. 2006-46).***

To calculate the refuse vehicle impact fees for single family residences, Colgan used the existing relationship between the number of side-loading trucks and the number of dwelling units in the City. These fees are intended to provide for additional vehicles as the number of customers increases. The analysis assumes the need for additional vehicles will increase in proportion to the number of additional dwelling units. The impact fee calculated for refuse containers is based on the cost of the three containers provided to each new single family residence.

[30] HBA contends this standard improperly includes operational expenses in violation of section 65913.8. According to HBA, the refuse containers and rapidly depreciating refuse vehicles are not public facilities that may be funded by development impact fees. Rather, HBA argues, the containers and replacement vehicles should be paid for by the monthly garbage collection service fees.

Section 66000, subdivision (d), defines "public facilities" as including public improvements and public services. Refuse vehicles and containers are necessary to provide the public service of garbage collection. The fees are to be used for the initial capital costs of these items, not for the costs of operation and maintenance. Accordingly, these fees are valid.

***9. City's collection and administration practices comply with the Mitigation Fee Act.***

Fees collected under the Mitigation Fee Act must be administered pursuant to the Act's statutory requirements. In general, the local agency must deposit the fee collected "with the other fees for the improvement in a separate capital facilities account or fund in a manner to avoid any commingling of the fees with other revenues and funds of the local agency..." (§ 66006, subd. (a).) Thereafter, within 180 days of the end of each fiscal year, the local agency

must provide certain information to the public for each \*574 separate account or fund. This information includes: a brief description of the type of fee; the amount of the fee; the beginning and ending balance; the amount of the fees collected and interest earned; an identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement; and an approximate date by which the construction of the public improvement will commence if the local agency determines that sufficient funds have been collected. (§ 66006, subd. (b).)

A fee may be established for a broad class of projects by legislation of general applicability or be imposed on a specific project on an ad hoc basis. (§ 66000, subd. (b).) At the time the local agency imposes a fee for public improvements on a specific development project, it must identify the public improvement that the fee will be used to finance (§ 66006, subd. (f)) and must expend the fee solely and exclusively for the purpose or purposes so identified (§ 66008).

HBA objects to the City's administration of the development fees on the ground that the City did not adequately identify the public facilities and improvements to be financed as part of enacting the fee resolutions. HBA further argues that the City's annual reporting does not identify each public improvement on which funds were \*\*25 expended and does not show the total percentage of the cost of public improvement that was funded by fees as required by section 66006, subdivision (b)(1)(E). HBA additionally contends that, when the City imposes and collects a fee payment, it does not identify the public improvements that the fee will be used to finance in violation of section 66006, subdivision (f).

As discussed above, the City adequately identified the public facilities and improvements when it enacted the development impact fees.

[31] Further, the City's annual reporting meets the statutory requirements. HBA objects to the City segregating the funds by facility category, rather than by a specifically identified project. However, fees may be established, as they were here, for a broad class of projects as opposed a specific improvement. (§ 66000, subd. (b).) Moreover, under section 66006, subdivision (a), all that is required is that the fees be deposited into “a separate capital facilities account” to avoid commingling with the local agency's other revenues and funds. Further, contrary to HBA's position, the City's annual accountings for fiscal year 2006–2007 do identify the specific projects on which the fees were expended and the percentage

of the cost that was funded by the fees in compliance with section 66006, subdivision (b).

[32] HBA's claim that the City violated section 66006, subdivision (f), is also without merit. That section pertains to imposition of “a fee for public \*575 improvements on a *specific development project*.” (Italics added.) As noted by the trial court, HBA has neither alleged nor shown that a development fee has been imposed directly on it or one of its members. Accordingly, section 66006, subdivision (f), cannot provide HBA with a basis for relief.

## DISPOSITION

The portion of the judgment upholding the fire protection impact fee for the east side of the City is reversed. In all other respects, the judgment is affirmed. Each party will bear its own costs on appeal.

I CONCUR: DAWSON, J.

ARDAIZ, P.J.

I concur in the result. I write separately to express my view regarding the assessment of a Community/Recreation Facility Impact Fee. In the instant case, City imposed a fee pursuant to section 66000 *et seq.*, regarding a category of desired potential municipal improvements *such as* a municipal aquatic center, a municipal gymnasium and fitness center and a naval air museum. Appellant objects that the specific facility is not clearly identified and therefore complains that it must be specifically identified. As noted in the majority opinion “reference was made to examples of future facilities without any actual plan or commitment.” (Maj. opn., p. 17.)

I agree with the majority that a class of projects may be identified as opposed to a specific project. However, that resolution does not address my concern regarding the nature of the class of projects in terms of relationship to the specific development. Section 66000 specifically provides within its definition of a “fee” that it is a monetary exaction “imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities *related to the development project, ....*” (§ 66000, subd. (b), italics added.)

[Section 66001](#) addresses the duties of the local agency in regard to the fee and provides in pertinent part, “Determine how there is a *reasonable relationship* \*\*26 between the fee's use and the type of development project on which the fee is imposed.” (§ 66001, subd. (a)(3), italics added.)

Specifically, my concern is the category of municipal improvements designated as justification for the fee in question. Using general rules of construction, there are two that have bearing here. *Noscitur a sociis*, it is known from its associates, means that a word may be defined by an accompanying word. *Ejusdem generis*, of the same kind, means that general words are construed to \*576 embrace only objects similar in nature to those objects enumerated by the specific word. (2A Sutherland, Statutes & Statutory (7th ed. 2007) Construction, §§ 47:16–47:17). In the context of this case, I would conclude that the specific facilities identified such as a municipal aquatic center and a naval air museum identify the class of projects referred to. Or, to be specific, the class of projects referred to would be reasonably identified as community wide projects, which is precisely how they were described.

This brings me to the specific concern that I raise. [Section 66000](#) and [66001](#) refer to a fee related to the development project. The term “related” would in its normal usage mean associated with or having a close connection to. (Webster's New World Dict. (2d college ed. 1982) p. 1198.) I would infer from this that the proposed specific project or class of projects must be a consequence of or have a direct relationship to the proposed development.

I have no argument that the proposed class of municipal projects herein is not desirable or beneficial. However, I have great difficulty concluding that their desirability or need are a consequence of or have a direct relationship to the proposed project herein. That a community may be desirous of celebrating its military heritage is laudable. However, it is a community benefit that springs from an expression of the nature of the community atmosphere and culture. Likewise, an aquatic center is a desirable and useful thing but it is difficult to infer how its need springs from the project herein.

Clearly as population expands or shifts, more and different infrastructure facilities are required. New population centers require building new elementary schools and new roads, etc. However, there is a significant difference between building a new elementary school or a new high school that may service more than just the development and a facility that

services the entire community. That a community grows and the nature of the population changes relates to policy decisions that fall upon the entire community as opposed to one aspect of the community. In other words, the fact that a new development may increase traffic on a central roadway does not mean that the new development should be responsible for building a freeway. Such responsibilities should fall equally within the community and, in my view to link it to a specific development is a tenuous thread. Utilizing that type of reasoning justifies a development fee for almost anything and I do not glean that type of result from the words of this statute.

Appellant argues, as it did before the trial court, that failure to identify a specific project violates the provision of [section 66001, subdivision \(a\)\(2\)](#) that the “facilities shall be identified;” likewise the provisions of [section 66006, subdivision \(b\)\(1\)\(E\)](#) requiring \*577 “[a]n identification of each public improvement” as well as related statutes with similar language. While I do not read the statute so narrowly, I would contend that the failure to identify a specific project could deprive the developer of any reasonable ability to determine if the specific project is reasonably related to \*\*27 the proposed fee. On the other hand, a listing of projects that clearly would relate to the development such as increased sewage, schools, water, et cetera does define projects that on the surface do bear a reasonable relationship to the normal infrastructure facilities generated by a new development.

The impact of allowing general community municipal improvements without any realistic showing as to how they bear a direct or reasonable relationship to the proposed development raises serious issues as to whether the statute herein does justify the fees imposed for the proposed improvements. I do not accept that simply concluding a particular general municipal improvement benefits the community as a whole and necessarily a specific development within that community somehow supports the conclusion that it is related to a specific development.

The majority concludes by footnote that the specific nature of the facility was not argued as opposed to the contention that the specific identity of the project must be specified, in other words, that the specific issue was not preserved for appeal. (See maj. opn., fn. 2, p. 18.) In my view the issue is at best ambiguous as to whether the general argument subsumes the specific but I do agree that the specific argument directed toward my concern was not raised. I write separately to ensure no implication that inferentially I accept the conclusion that



the projects indicated herein are justified under the statute. In my view, absent some showing of a more direct and specific relationship between the municipal improvement and the proposed development, such fees are seriously subject to question.

**All Citations**

185 Cal.App.4th 554, 112 Cal.Rptr.3d 7

**Footnotes**

- 1 All further statutory references are to the Government Code.
- 2 The concurring opinion questions the validity of this community/recreation facility impact fee on the ground that the proposed city-wide municipal projects are not adequately related to the specific development project. The concurring justice opines that the relationship between the development and the need for the improvement must be direct to be reasonable. However, HBA did not argue, either in the trial court or on appeal, that this reasonable relationship requirement was not met. Rather, HBA limited its argument to the specificity requirement. Accordingly, we express no opinion on this issue.



KeyCite Yellow Flag - Negative Treatment

Called into Doubt by [Southern California Gas Co. v. City of Los Angeles](#), Cal., August 29, 1958

25 Cal.2d 384, 153 P.2d 950

LILLIAN CANDACE HOUSE, Appellant,

v.

LOS ANGELES COUNTY FLOOD  
CONTROL DISTRICT, Respondent.

L. A. No. 18968.

Supreme Court of California

Dec. 5, 1944.

### HEADNOTES

(1)

Eminent Domain § 3--Police Power Distinguished.

While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. \*385 When it passes beyond proper bounds in its invasion of property rights, it comes within the purview of the law of eminent domain and its exercise requires compensation.

See 10 **Cal.Jur.** 283; 18 **Am.Jur.** 639.

(2a, 2b, 2c)

Waters § 593--Flood Control Districts--Liability for Flood Damage.

A flood control district may not escape liability for flood damage on any theory of exercising a riparian right if it has removed safe and secure protection immediately adjacent to the owner's land and substituted therefor an unsafe, careless and negligently planned bank or wall, resulting in the overflow, inundating and washing away of her property; and a complaint so alleging states a cause of action within Const., art I, § 14.

(3)

Eminent Domain § 3--Police Power Distinguished.

A governmental agency proceeding with work on a public improvement, undertaken in the exercise of the police power, may not needlessly inflict injury on private property without being liable to make compensation therefor. This principle accords with the general object of the constitutional guaranties in protection of property rights, and places on a

reciprocal basis the individual's damage in relation to the public benefit.

(4)

Eminent Domain § 3--Police Power Distinguished.

Under the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation, and in such cases the emergency constitutes full justification for the measures taken to control the menacing condition.

See 18 **Am.Jur.** 778.

(5)

Waters § 593--Flood Control Districts--Liability--Damage from Construction of Improvement.

While mere errors of judgment in planning and constructing a public work, such as flood control work, may be consistent with reasonable care, a procedure so grossly incompetent and contrary to "good engineering practices" as to constitute negligence may give the injured property owner just cause for complaint on the ground that the governmental agency responsible for the project has transgressed the limits of the police power. Such conclusion does not make the public agency an insurer against all possible damage which thereby might be inflicted on private property, but merely requires that the damage to the individual not exceed the necessities of the particular case.

(6)

Eminent Domain § 3--Police Power Distinguished.

In view of the organic rights to acquire, possess and protect property, and to due process and equal protection of the laws, the principles of nonliability and *damnum absque injuria* are not applicable \*386 when, in the exercise of the police power, personal and property rights are interfered with or impaired in a manner or to an extent that is not reasonably necessary to serve a public purpose for the general welfare.

### SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank G. Swain, Judge. Reversed.

Action against flood control district for damages for injuries to land as a result of flooding. Judgment of dismissal after

sustaining demurrer to complaint without leave to amend, reversed.

## COUNSEL

Henry M. Lee for Appellant.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Assistant County Counsel, for Respondent.

CURTIN, J.

This is an appeal from a judgment of dismissal entered after the trial court had sustained a demurrer to the plaintiff's first amended complaint without leave to amend.

The plaintiff, as the owner of certain land in Los Angeles County adjacent to the Los Angeles River, undertakes to state a cause of action based upon damages to her property by reason of the negligence of the defendant district in its planning, construction and maintenance of certain flood control channel work in said river. She rests her right of recovery upon article I, section 14, of the state Constitution, which provides that private property shall not be taken or damaged for public use without just compensation to the owner. The trial court erred in failing to sustain the constitutional basis of the plaintiff's claim under the distinguishable concept of her pleading.

As appears from the amended complaint, the gist of the plaintiff's case is as follows: In pursuance of its plan for flood control, the Los Angeles County Flood Control District removed permeable dikes, piling, wire mesh and groins that bordered the Los Angeles River adjacent to the plaintiff's land and replaced these installations with levees. The effect of the dikes and other obstructions had been to reduce the high velocity of the river waters in flood season by permitting them to spread over an extensive overflow area, leaving a deposit \*387 of silt thereon. Upon the removal of these protective structures and the substitution of the levees along the river banks, the regimen of the stream was completely changed in that there was no provision for overflow spread on adjoining lands, with the result that the waters were confined to a smaller area and their velocity was greatly increased. The plaintiff charges the defendant district with negligence in these principal particulars in the planning and erection of the newly installed flood control works: (1) in failing to make the artificial river channel of sufficient size to accommodate the augmented volume of waters in flood season; and (2) in building the levees of improper materials-sand and gravel upon which were piled small stone blocks of inadequate size, without being bonded together with cement, grout or other

substance-so that they were unable to withstand the erosive force of the river waters. The plaintiff then alleges that as the proximate result of these negligent acts, the storm waters flowing in the Los Angeles River on March 2, 3 and 4, 1938, broke through the levees and burst with great violence upon her adjacent land, denuding it of its soil to a depth of from six to ten feet and washing away all the improvements situate thereon, to her damage in the sum of \$30,663. The plaintiff further avers that the defendant district's undertaking of such public improvement work was not occasioned by such imminent peril or emergency in relation to the general welfare as would excuse it from taking proper measures in the course of construction-during the years of 1935, 1936 and 1937-to safeguard her property from the danger attendant upon its pursuit of a flood control plan contrary to good engineering practices, and its installation and maintenance of defective structures following the removal of the protective agencies that had theretofore existed along the river banks. In this connection the plaintiff alleges that she suffered no damage to her property during the great flood of the Los Angeles River in January, 1934.

It would serve no useful purpose to engage here in a detailed discussion of the opposing arguments as to whether under the above mentioned constitutional provision a public agency in the installation of river channel improvements is generally liable to the property owner for overflow damage incident to the exercise of such governmental function. The divergent views on that unqualified proposition were fully \*388 reviewed by this court recently in the cases of *Archer v. City of Los Angeles* (1941), 19 Cal.2d 19 [119 P.2d 1] and *O'Hara v. Los Angeles County Flood Control Dist.* (1941), 19 Cal.2d 61 [119 P.2d 23]. While the latter case involved the same flood control project as is now subject of complaint and under the prevailing view there, the varying claims of damage were held to be noncompensable upon distinguishable theories, the liability feature here arises under a different aspect. By her pleading the plaintiff advances, in the nature of a limitation upon a public agency's performance of its governmental function, the charge of *negligence*, an added feature which did not enter into the O'Hara decision. Accepting the premise of argument of the parties here that a levee improvement made in the channel of a stream for the general welfare is referable to the police power, the propriety of its exercise must still be considered under the distinct circumstances presented. (1) While the police power is very broad in concept, it is not without restriction in relation to the taking of damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the

purview of the law of eminent domain and its exercise requires compensation. (*Varney & Green v. Williams*, 155 Cal. 318 [100 P. 867, 132 Am.St.Rep. 88, 21 L.R.A.N.S. 741]; *Pacific Telephone etc. Co. v. Eshleman*, 166 Cal. 640 [137 P. 1119, Ann.Cas. 1915C 822, 50 L.R.A.N.S. 652].) In fact, on the point of a governmental agency's liability for damages arising in connection with its undertaking construction work, the prevailing opinion in the Archer case, *supra*, does not purport to dispute the settled principle that public necessity limits the right to exact uncompensated submission from the property owner if his property be either damaged, taken or destroyed. Rather it is expressly stated there in the prevailing opinion (19 Cal.2d 23-24): "The state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety or morals. [citing authorities.] *In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner.* [citing authorities.]" (Italics added.) Thus there is recognized the incontestable proposition that the exercise of the police power, though an essential attribute of sovereignty for the public welfare \*389 and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property.

A case closely in point here is *Pacific Seaside Home v. Newbert P. District*, 190 Cal. 544 [213 P. 967], where the sufficiency of the plaintiff's pleading was likewise under attack. There this court said at pages 545-546: "... The defendant was a public corporation ... entitled to maintain and defend actions in law and in equity ... and would be liable for the *negligent* diversion of storm waters upon the plaintiff's property. (*Elliott v. County of Los Angeles*, 183 Cal. 472, 475 [191 P. 899].) The gist of the plaintiff's complaint is that the defendant *constructed channels for the water of the Santa Ana River so defectively and negligently that they would not carry the waters of the stream.* Plaintiff alleges that 'had the defendant not changed the natural course of the Santa Ana River, or in anywise interfered with its natural flow, the waters of the Santa Ana River would have flowed on into Newport Bay and no damage would have accrued to the plaintiff had the said river been permitted to flow as it naturally would had not the defendant constructed its channel to divert the same. ...' It is further alleged in effect that the injury occurred to the plaintiff by reason of the fact that the defendant *negligently turned the waters of the Santa Ana River in a channel which was too small, and which was*

*negligently constructed and maintained, and that by reason thereof it was damaged.*

"These facts sufficiently state a cause of action." (Italics added.)

The Elliott and Pacific Seaside Home cases were cited as the basis for upholding the sufficiency of the plaintiffs' complaint against a general demurrer in the first appellate consideration of the damage claim presented in *Archer v. City of Los Angeles*, 15 Cal.App.2d 520 [59 P.2d 605]. The pleading was described by the District Court of Appeal as follows at pages 521-522: "The gist of [the] ... complaint ... is that respondent constructed and built an artificial drainage system so defectively, carelessly and negligently that it would not carry the storm waters to the Pacific Ocean as designed and intended" and "that the injury to the appellants occurred by reason of the fact that respondent negligently turned the storm waters into La Ballona lagoon, which was too small to \*390 conduct the water turned into it by and through the drainage system constructed, operated and maintained by respondent. ..." Subsequently, the Archer damage action was before this court for decision upon the appeal from the judgment of nonsuit entered at the close of the plaintiffs' evidence at the trial. (*Archer v. City of Los Angeles, supra*, 19 Cal.2d 19.) In the prevailing opinion affirming the judgment, the following distinction, after quotation of the above portion of the decision of the District Court of Appeal on demurrer, was made at page 29: "According to the allegations of the complaint, the damage resulted because defendants negligently diverted water out of its natural channel, and obstructed the channel of the creek. Plaintiffs' evidence, however, fails to substantiate such allegations. The decision of the District Court of Appeal on demurrer is therefore not binding on this court in passing on the *sufficiency of the evidence to support the allegations.*" (Italics added.) Measured by its own limitation, such language, denoting the deficiency in the plaintiffs' establishment of their case, does not mean that a governmental agency in the installation of stream improvements may escape liability under the constitutional compensation requirement where the property owner sustaining damage from such work *proves, in accordance with his allegations, negligence* in the construction and maintenance of the public project. Under the accepted circumstances there, the prevailing opinion in the Archer case applied the doctrine of *damnum absque injuria* by declaring that the governmental agency was exercising a riparian right so that it would be no more liable to a lower property owner damaged thereby than would a private person

inflicting a like injury in protection of his upper lands. (*Archer v. City of Los Angeles, supra*, at p. 24; cf. *O'Hara v. Los Angeles County Flood Control Dist., supra*, at p. 63.)

(2a) In the present case the defendant district may not escape liability on any theory of exercising a riparian right, for the plaintiff does not correlate her damage claim with any such principle. Rather she makes the direct charge that the defendant district removed a safe and secure protection to her land immediately adjacent thereto and substituted therefor an unsafe, carelessly and negligently planned bank or wall, resulting in the overflow, inundating and washing away of her property, which had theretofore never been visited by the \*391 river waters. ( 3) It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen. Upon this premise the plaintiff relies on the *unnecessary* damage to her property as the result of the defendant district's negligence in the planning, construction and maintenance of the flood channel work to sustain the constitutional basis of her claim. In other words, it is her position that damage suffered by a property owner as the result of a public improvement undertaken in the exercise of the police power must have some reasonable relation to the purpose to be accomplished under the prevailing circumstances, and that the governmental agency proceeding with such work may not needlessly inflict injury upon private property without being liable to make compensation therefor. This accords with the general object of the constitutional guaranties in protection of property rights and but places upon a reciprocal basis the individual's damage in relation to the public benefit. *Unnecessary* damage to his property is of no benefit to the public; rather it only entails unwarranted sacrifice and loss on the individual's part, which should be compensable damage.

(4) Unquestionably, under the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation. Instances of this character are the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized. In such cases calling for immediate action the emergency constitutes full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it

deems appropriate for the protection of the public health or safety. (18 Am.Jur. 778; 29 C.J.S. 784.) ( 2b) But the present case does not appear to be one of such emergency character as would preclude the defendant district from being held liable for *unnecessary* damage resulting from the alleged inadequate and negligent planning, construction and maintenance of its flood channel project. According to the plaintiff's pleading, the defendant district, with time to exercise a deliberate choice of action in the manner of its installation \*392 of the river improvements, followed a plan "inherently wrong" and thereby caused needless damage to her property. ( 5) While mere errors of judgment in planning and constructing a public work may be consistent with reasonable care, procedure so grossly incompetent and contrary to "good engineering practices" as to constitute negligence may well give the injured property owner just cause for complaint upon the ground that the governmental agency responsible for the project has transgressed the limits of the police power. (*Kaufman v. Tomich*, 208 Cal. 19 [280 P. 130].) Such conclusion does not make the public agency, in undertaking its flood control program, an insurer against all possible damage which thereby might be inflicted on private property (cf. *United States v. Spontenbarger*, 308 U.S. 256 [60 S.Ct. 225, 84 L.Ed. 230], but it merely requires that the damage to the individual, on whom the sovereign power justifiably makes demands in the public interest, not exceed the necessities of the particular case due to a failure to use reasonable care and diligence. ( 6) In view of the organic rights to acquire, possess and protect property and to due process and equal protection of the laws, the principles of nonliability and *damnum absque injuria* are not applicable when, in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare. (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 [43 S.Ct. 158, 67 L.Ed. 322]; cited with approval in *Archer v. City of Los Angeles, supra*, at p. 24.)

(2c) For the foregoing reasons the defendant district's exercise of the police power does not of itself furnish complete justification for the infliction of damage upon the plaintiff's property without liability for compensation. Under the theory of her pleading, the plaintiff has alleged facts sufficient to constitute a cause of action within the scope of article I, section 14, of the state Constitution, and it was error for the trial court to rule otherwise. The judgment of dismissal is therefore reversed.

Gibson, C. J., and Shenk, J., concurred.

SCHAUER, J.

I concur in the foregoing judgment and opinion. The distinction made in the opinion between this \*393 case and the cases of *Archer v. City of Los Angeles* (1941), 19 Cal.2d 19 [119 P.2d 1], and *O'Hara v. Los Angeles County Flood Control Dist.* (1941), 19 Cal.2d 61 [119 P.2d 23], seems tenable, but by my concurrence herein I do not imply accord with the majority views expressed in those cases.

TRAYNOR, J.

I concur in the judgment. Since this is an appeal from a judgment following an order sustaining a demurrer, the following allegations of the first amended complaint must be regarded as true. The Los Angeles River, which becomes a menace to the neighboring property during the rainy season because of its violent floods, overflowed plaintiff's land during a storm in the first days of March, 1938, washed out the land to a depth of approximately six to ten feet, and destroyed buildings, other improvements, and personal property. The injury was caused by a system of flood control installed by defendant in the period between December, 1935, and the storm. The plaintiff's property would have been protected from the flood, as it was in January, 1934, during an even greater flood, had the defendant not replaced the former system of flood control, installed by defendant between 1917 and 1930, with new structures that were inadequate for the purpose. The former installations consisted of permeable dikes of piling and wire mesh along the margin of the river bed through which the waters could freely flow into an overflow area on both sides of the river channel. These structures and the riparian vegetation reduced the velocity of the flood waters, rendering them less dangerous to neighboring property. Groins installed transversely to the overflow area accomplished the restoration and maintenance of the natural condition of the river by causing a regrowth of vegetation in the overflow area and the building up of that area with silt deposited by the water. The new construction work, mainly excavation of the river channel and installation of levees along its banks, necessitated removal of the shrubs and trees along the river. The channel was narrowed and its capacity to carry water lowered, while the velocity of the water through the channel was increased. Since the levees lacked adequate openings to permit the drainage waters to flow into the river, the danger to the adjacent land from overflowing water was intensified. The levees were built several feet above the level

of the riparian area and were thus exposed to great pressure by the water compressed \*394 into the narrowed channel. They were constructed of sand and gravel upon which small stone blocks were laid on the inner slopes not bound together with cement or other material. As a consequence of this defective construction of the levees, upon which the adjacent land depended for its protection, the water could flow through the holes between the stone blocks and percolate through the levees. Thus, the invasion of plaintiff's land by the flood water was caused by the defectiveness of defendant's structures, which diverted the water out of its natural channel onto the plaintiff's land. For the damages sustained, plaintiff seeks compensation from defendant under article I, section 14 of the California Constitution, providing that private property shall "not be taken or damaged for public use" without just compensation.

Defendant contends that plaintiff is seeking to revive an issue settled in *Archer v. City of Los Angeles*, 19 Cal.2d 19 [119 P.2d 1], and in *O'Hara v. Los Angeles County Flood Control Dist.*, 19 Cal.2d 61 [119 P.2d 23]. The Archer case involved the question whether a governmental agency is liable under article I, section 14, when improvements constructed by it along the natural course of a stream accelerate the flow of the water, and lower lands are flooded because of the inadequacy, known to the governmental agency, of the outlet to accommodate the increased flow. It was held that the governmental agency was not liable, since there is no liability under the constitutional provision if the property owner would have no cause of action were a private person to inflict the damage, and there would have been no cause of action against a private person for installing improvements in the stream accelerating the flow of the water but not diverting it out of its channel. (*San Gabriel Valley Country Club v. County of Los Angeles*, 182 Cal. 392 [188 P. 554, 9 A.L.R. 1200].) The O'Hara case involved the same question as the Archer case as well as the question whether a governmental agency is liable under the constitutional provision to a property owner whose property was damaged by the obstruction of the flow of surface water not running in a natural channel resulting from an embankment that prevented the drainage of surface waters into the river. In reliance on *Corcoran v. City of Benicia*, 96 Cal. 1 [30 P. 798, 31 Am.St.Rep. 171]; *Conniff v. San Francisco*, 67 Cal. 45 [7 P. 41] *Jefferis v. City of Monterey Park*, 14 Cal.App.2d 113 [57 P.2d 1347]; and \*395 *Lampe v. San Francisco*, 124 Cal. 546 [57 P. 461, 1001], it was held that in constructing the improvement, the governmental agency could validly exercise its police power to obstruct the flow of surface waters not running in a natural channel without

making compensation for the resulting damage. The present case differs from the Archer and O'Hara cases. In the former there was no evidence that defendants negligently diverted water out of its natural channel, and in the latter there was no allegation of such diversion. Here plaintiff's allegations that the damages to her property were caused by diversion of the water of a river out of its natural channel onto her land by means of defective levees causing and allowing the water to burst out of its channel onto her land must be regarded as true.

Defendant contends that article I, section 14, is inapplicable upon the grounds that defendant did not deliberately take or damage plaintiff's property and did not utilize it for the purposes of its public improvements, and that therefore the damages were not sustained for "public use," and were too remote in point of time and foreseeability to be incident to defendant's public undertaking.

Defendant is a public corporation created by an act of the Legislature, known as the "Los Angeles Flood Control Act" (Stats. 1915, p. 1502, as amended; Deering's Gen. Laws, Act 4463), to protect lands, including harbors and public highways from flood waters and to conserve the flood waters for useful purposes. (§ 2 of the act; *Los Angeles County Flood Control Dist. v. Hamilton*, 177 Cal. 119, 126 [169 P. 1028].) These purposes are essentially public although beneficial to many private individuals (see *Los Angeles v. Los Angeles County Flood Control Dist.*, 11 Cal.2d 395, 404 [80 P.2d 479]; *Los Angeles County Flood Control Dist. v. Hamilton*, *supra*, p. 124; *Chesboro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 465 [59 S.Ct. 622, 83 L.Ed. 921]; see 29 C.J.S. 852; 70 A.L.R. 1274), and the Legislature properly vested defendant with the power of eminent domain. (§§ 2(6), 16, 16 1/2 of the act.) Property taken or damaged for defendant's purposes is therefore "taken or damaged for public use" in the sense of the constitutional provision. In the absence of contract the right to discharge water onto another's property may be based on property law or on the police power of the state. (*Archer v. City of Los Angeles*, *supra*, at p. 24.) If the discharging of water incident to the construction of a public \*396 improvement cannot be sustained as the exercise of a right, it is a taking or damaging within the meaning of the constitutional provision of the property injured. (*Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 126 [119 P.2d 717]; *Pacific Seaside Home v. Newbert P. Dist.*, 190 Cal. 544 [213 P. 967]; *Elliott v. County of Los Angeles*, 183 Cal. 472, 475 [191 P. 899]; *Smith v. City of Los Angeles*, 66 Cal.App.2d 562 [153 P.2d 69]; *Conniff v. San Francisco*, 67 Cal. 45, 48 [7 P. 41]; *Jacobs v. United States*, 290 U.S. 13,

16 [54 S.Ct. 26, 78 L.Ed. 142]; *United States v. Cress*, 243 U.S. 316, 327 [31 S.Ct. 380, 61 L.Ed. 746]; *United States v. Lynah*, 188 U.S. 445, 470 [23 S.Ct. 349, 47 L.Ed. 539]; *Hurley v. Kincaid*, 285 U.S. 95, 104 [52 S.Ct. 267, 76 L.Ed. 637]; *Pumpelly v. Green Bay etc. Co.*, 13 Wall. 166, 177 [20 L.Ed. 557]; *Eaton v. Boston etc. Railroad*, 51 N.H. 504 [12 Am.Rep. 147]; see *Franklin v. United States*, 101 F.2d 459; 128 A.L.R. 1195.) The destruction or damaging of property is sufficiently connected with "public use" as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. In erecting a structure that is inherently dangerous to private property, the state or its agency undertakes by virtue of the constitutional provision to compensate property owners for injury to their property arising from the inherent dangers of the public improvement or originating "from the wrongful plan or character of the work." (*Perkins v. Blauth*, 163 Cal. 782, 789 [127 P. 50]; *Kaufman v. Tomich*, 208 Cal. 19, 25 [280 P. 130]; *Powers Farms v. Consolidated Irr. Dist.*, *supra*, p. 127; *Reardon v. San Francisco*, 66 Cal. 492, 505 [6 P. 317, 56 Am.Rep. 109].) This liability is independent of intention or negligence on the part of the governmental agency. (*Reardon v. San Francisco*, *supra*, at p. 505; *Tormey v. Anderson-Cottonwood Irr. Dist.*, 53 Cal.App. 559 [200 P. 814], opinion of Supreme Court denying a hearing, p. 568; *Powers Farms v. Consolidated Irr. Dist.*, *supra*, p. 126; *Mitchell v. City of Santa Barbara*, 48 Cal.App.2d 568, 572 [120 P.2d 131]; *Morrison v. Clackamas County*, 141 Ore. 564 [18 P.2d 814]; *Hooker v. Farmers' Irr. Dist.*, 272 F. 600; see 10 Cal.Jur. 337; 69 A.L.R. 1231.) The decisive consideration \*397 is the effect of the public improvement on the property and whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner. (*Rose v. State of California*, 19 Cal.2d 713, 737 [123 P.2d 505]; *City of Stockton v. Vote*, 76 Cal.App. 369, 404 [244 P. 609]; *Santa Ana v. Harlin*, 99 Cal. 538, 542 [34 P. 224]; *City of Redding v. Diestelhorst*, 15 Cal.App.2d 184, 193 [59 P.2d 177]; *City of Pasadena v. Union Trust Co.*, 138 Cal.App. 21, 25 [31 P.2d 463]; *Temescal Water Co. v. Marvin*, 121 Cal.App. 512, 521 [9 P.2d 335]; see 18 Am.Jur., Eminent Domain § 240 et seq.) Defendant, therefore, cannot rely on the fact that the injury to the property

was caused, not by a deliberate appropriation thereof, but by a collapse of defendant's structures. It is of no avail to defendant that the invasion of plaintiff's property in the manner in which it happened was not foreseeable. The provision in article I, section 14, that the compensation for the taking or damaging of property shall be paid in advance protects the interests of the property-owner where advance payment is feasible under the circumstances; liability is not avoided simply because such payment is not feasible. The public purpose was not the mere construction of the improvement but the protection that it would afford against floods. The dangers inherent in the improvement would cause injury only when storms put the flood control system to a test. The injury sustained by plaintiff was therefore not too remote.


According to the complaint the injury to plaintiff's land was caused by direct invasion thereof by water bursting through defendant's levees. Compensation for that injury is called for under article I, section 14, if the flood waters would not have injured her property but for the directing of the water out of its channel onto the plaintiff's property because of the defectiveness of the levees. By allowing the water to leave its channel and to burst onto the plaintiff's land, the levees diverted the water out of its natural channel. Barring situations of immediate emergency, neither the property law nor the police power of the state entitles a governmental agency to divert water out of its natural channel onto \*398 private property. (*Larrabee v. Cloverdale*, 131 Cal. 96, 98 [63 P. 143]; *Los Angeles Cem. Assn. v. Los Angeles*, 103 Cal. 461, 467 [37 P. 375]; *Conniff v. San Francisco*, *supra*, at p. 49, see 7 So.Cal.L.Rev. 295.)

Edmonds, J., concurred.

CARTER, J.

I concur in the judgment of reversal but I do not agree with that portion of the majority opinion which attempts to distinguish this case from the cases of *Archer v. City of Los Angeles*, 19 Cal.2d 19 [119 P.2d 1]; and *O'Hara v. Los Angeles County Flood Control Dist.*, 19 Cal.2d 61 [119 P.2d 23]. These last mentioned cases are not distinguishable from the case at bar, and in my opinion, the only sound basis upon which the case at bar can be reversed is that stated in my dissenting opinions in the above cited cases. In these dissenting opinions I pointed out the patent fallacy of the theory upon which the majority opinions in those cases was based, and Mr. Justice Curtis concurred in those dissenting opinions. My opinion in regard to those cases has not changed because the views expressed in my dissenting opinions therein were and are absolutely sound. It now appears that a majority of this court are not satisfied with the conclusion reached in the majority opinions in the Archer and O'Hara cases, but instead of overruling these cases, they have attempted to distinguish them from the case at bar. I do not approve of this practice as it merely adds to the confusion which already exists. However, by limiting the application of the doctrine announced in those cases, the majority opinion in the case at bar has taken a commendable step, and I trust that the time will come in the not distant future when a majority of this court will have the wisdom, foresight and courage to take the further step and expressly overrule the Archer and O'Hara cases and thus remove the injustice and confusion which those decisions have brought to the law of this state. \*399



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Cal.App. 6 Dist., October 15, 2013

98 Cal.App.4th 1351, 121 Cal.Rptr.2d 228, 02 Cal.  
Daily Op. Serv. 4853, 2002 Daily Journal D.A.R. 6161

HOWARD JARVIS TAXPAYERS  
ASSOCIATION et al., Plaintiffs and Appellants,  
v.  
CITY OF SALINAS et al.,  
Defendants and Respondents.

No. H022665.  
Court of Appeal, Sixth District, California.  
June 3, 2002.

### SUMMARY

A taxpayers association filed an action against a city alleging that a storm drainage fee, which was imposed by the city for the management of storm water runoff from the impervious areas of each parcel in the city, was a property-related fee that required voter approval under Prop. 218 ([Cal. Const., art. XIII D, § 6](#), subd. (c)). The trial court entered judgment for the city, finding that the fee was not property related and that it was exempt from the voter-approval requirement because it was related to sewer and water services. (Superior Court of Monterey County, No. M45873, Richard M. Silver, Judge.)

The Court of Appeal reversed. The court held that the fee was property related and subject to the voter approval requirement. The resolution made the fee applicable to each and every developed parcel of land within the city. It was not a charge directly based on or measured by use so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property-related. (Opinion by Elia, J., with Premo, Acting P. J., and Mihara, J., concurring.)

### HEADNOTES

(1a, 1b)

Drains and Sewers § 3--Fees and Assessments--Storm Drain Fee-- Application of Voter Approval Requirement for Property-related Fees:Property Taxes § 7.8--Special Taxes.  
A storm water management fee resolution established a property-related fee for a property-related service, the

management of storm water runoff from the impervious areas of each parcel in the city, and thus required voter approval under Prop. 218 ([Cal. Const., art. XIII D, § 6](#), subd. (c)). The resolution made the fee applicable to each and every developed parcel \*1352 of land within the city. It was not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, so as to be exempt from the voter requirement. A proportional reduction clause did not alter the nature of the fee as property related. The fee did not come within the exception related to sewer and water services. Giving the constitutional provision the required liberal construction, and applying the principle that exceptions to a general rule of an enactment must be strictly construed, "sewer services" must be given its narrower, more common meaning applicable to sanitary sewerage, thus excluding storm drainage. Also, the average voter would envision "water service" as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants and discharges it.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 109C; West's Key Number Digest, Municipal Corporations 956(4).]

(2)

Constitutional Law § 12--Construction--Ordinary Language--Amendments.

Courts are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers in a manner that effectuates their purpose in adopting the law.

### COUNSEL

Timothy J. Morgan; Jonathan M. Coupal and Timothy A. Bittle for Plaintiffs and Appellants.

James C. Sanchez, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick K. Bobko for Defendants and Respondents.

### ELIA, J.

In this "reverse validation" action, plaintiff taxpayers challenged a storm drainage fee imposed by the City of Salinas. Plaintiffs contended that the fee was a "property-related" fee requiring voter approval, pursuant to California Constitution, article XIII D, [section 6](#), subdivision (c), which was added by the passage of Proposition 218. The trial court ruled that the fee did not violate this provision because (1) it was not a property-related fee \*1353 and (2) it met the

exemption for fees for sewer and water services. We disagree with the trial court's conclusion and therefore reverse the order.

### *Background*

In an effort to comply with the 1987 amendments to the federal Clean Water Act (33 U.S.C. § 1251 et seq.; 40 C.F.R. § 122.26(a) et seq. (2001)), the Salinas City Council took measures to reduce or eliminate pollutants contained in storm water, which was channeled in a drainage system separate from the sanitary and industrial waste systems. On June 1, 1999, the city council enacted two ordinances to fund and maintain the compliance program. These measures, ordinance Nos. 2350 and 2351, added former chapters 29 and 29A, respectively, to the Salinas City Code. Former section 29A-3 allowed the city council to adopt a resolution imposing a "Storm Water Management Utility fee" to finance the improvement of storm and surface water management facilities. The fee would be imposed on "users of the storm water drainage system."

On July 20, 1999, the city council adopted resolution No. 17019, which established rates for the storm and surface water management system. The resolution specifically states: "There is hereby imposed on each and every developed parcel of land within the City, and the owners and occupiers thereof, jointly and severally, a storm drainage fee." The fee was to be paid annually to the City "by the owner or occupier of each and every developed parcel in the City who shall be presumed to be the primary utility rate payer ...." The amount of the fee was to be calculated according to the degree to which the property contributed runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of "impervious area"<sup>1</sup> on that parcel.

Undeveloped parcels—those that had not been altered from their natural state—were not subject to the storm drainage fee. In addition, developed parcels that maintained their own storm water management facilities or only partially contributed storm or surface water to the City's storm drainage facilities were required to pay in proportion to the amount they did contribute runoff or used the City's treatment services. \*1354

On September 15, 1999, plaintiffs filed a complaint under Code of Civil Procedure section 863 to determine the validity of the fee.<sup>2</sup> Plaintiffs alleged that this was a property-related fee that violated article XIII D, section 6, subdivision (c), of

the California Constitution because it had not been approved by a majority vote of the affected property owners or a two-thirds vote of the residents in the affected area. The trial court, however, found this provision to be inapplicable on two grounds: (1) the fee was not "property related" and (2) it was exempt from the voter-approval requirement because it was "related to" sewer and water services.

### *Discussion*

Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act. Section 6 of article XIII D<sup>3</sup> requires notice of a proposed property-related fee or charge and a public hearing. If a majority of the affected owners submit written protests, the fee may not be imposed. (§ 6, subd. (a)(2).) The provision at issue is section 6, subdivision (c) (hereafter section 6(c)), which states, in relevant part: "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."

Section 2 defines a "fee" under this article as a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (§ 2, subd. (e).) A "property-related service" is "a public service having a direct relationship to property ownership." (§ 2, subd. (h).) (1a) The City maintains that the storm drainage fee is not a property-related fee, but a "user fee" which the property owner can avoid simply by maintaining a storm water management facility on the property. Because it is possible to own property without being subject to the fee, the City argues this is not a fee imposed "as an incident of property ownership" or "for a property-related service" within the meaning of section 2.

We cannot agree with the City's position. Resolution No. 17019 plainly established a property-related fee for a property-related service, the management of storm water runoff from the "impervious" areas of each parcel in the \*1355 City. The resolution expressly stated that "each owner and occupier of a developed lot or parcel of real property within the City, is served by the City's storm drainage facilities" and burdens the system to a greater extent than if the property were undeveloped. Those owners and

occupiers of developed property “should therefore pay for the improvement, operation and maintenance of such facilities.” Accordingly, the resolution makes the fee applicable to “*each and every developed parcel* of land within the City.” (Italics added.) This is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business, as the City suggests. (See *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838 [102 Cal.Rptr.2d 719, 14 P.3d 930] [art. XIII D inapplicable to inspection fee imposed on private landlords; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79 [101 Cal.Rptr.2d 905] [water usage rates are not within the scope of art. XIII D].)

The “Proportional Reduction” clause on which the City relies does not alter the nature of the fee as property related.<sup>4</sup> A property owner's operation of a private storm drain system reduces the amount owed to the City to the extent that runoff into the City's system is reduced. The fee nonetheless is a fee for a public service having a direct relationship to the ownership of developed property. The City's characterization of the proportional reduction as a simple “opt-out” arrangement is misleading, as it suggests the property owner can avoid the fee altogether by declining the service. Furthermore, the reduction is not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel. Thus, a parcel with a large “impervious area” (driveway, patio, roof) would be charged more than one consisting of mostly rain-absorbing soil. Single-family residences are assumed to contain, on average, a certain amount of impervious area and are charged \$18.66 based on that assumption.

Proposition 218 specifically stated that “[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” (Prop. 218, § 5; reprinted at Historical Notes, 2A West's Ann. Cal.Const. (2002 supp.) foll. art. XIII C, p. 38 [hereafter Historical Notes].) (2) We are obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers—in this case, the voters of California—in a manner that effectuates their purpose in adopting the law. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 244-245 [149 Cal.Rptr. 239, 583 P.2d 1281]; *Arden Carmichael, Inc. v. County of Sacramento* (2000) 93 Cal.App.4th 507, 514-515 [113 Cal.Rptr.2d 248]; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 863 \*1356 [167 Cal.Rptr. 820, 616 P.2d 802].) (1b) To interpret the storm

drainage fee as a use-based charge would contravene one of the stated objectives of Proposition 218 by “frustrat[ing] the purposes of voter approval for tax increases.” (Prop. 218, § 2.) We must conclude, therefore, that the storm drainage fee “burden[s] landowners *as landowners*,” and is therefore subject to the voter-approval requirements of article XIII D unless an exception applies. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, *supra*, 24 Cal.4th at p. 842.)

#### Exception for “Sewer” or “Water” Service

As an alternative ground for its decision, the trial court found that the storm drainage fee was “clearly a fee related to 'sewer' and 'water' services.” The exception in section 6(c) applies to fees “for sewer, water, and refuse collection services.” Thus, the question we must next address is whether the storm drainage fee was a charge *for* sewer service or water service.

The parties diverge in their views as to whether the reach of California Constitution, article XIII D, section 6(c) extends to a storm drainage system as well as a sanitary or industrial waste sewer system. The City urges that we rely on the “commonly accepted” meaning of “sewer,” noting the broad dictionary definition of this word.<sup>5</sup> The City also points to *Public Utilities Code section 230.5* and the Salinas City Code, which describe storm drains as a type of sewer.<sup>6</sup>

Plaintiffs “do not disagree that storm water is carried off in storm sewers,” but they argue that we must look beyond mere definitions of “sewer” to examine the legal meaning in context. Plaintiffs note that the storm water management system here is distinct from the sanitary sewer system and the industrial waste management system. Plaintiffs' position echoes that of the \*1357 Attorney General, who observed that several California statutes differentiate between management of storm drainage and sewerage systems.<sup>7</sup> (81 Ops.Cal.Atty.Gen. 104, 106 (1998).) Relying extensively on the Attorney General's opinion, plaintiffs urge application of a different rule of construction than the plain-meaning rule; they invoke the maxim that “if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted.” (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827 [46 Cal.Rptr.2d 198].) Thus, while section 5, which addresses assessment procedures, refers to exceptions specifically for “sewers, water, flood control, [and] *drainage systems*” (italics added), the exceptions listed in section 6(c) pertain only to

“sewer, water, and refuse collection services.” Consequently, in plaintiffs' view, the voters must have intended to exclude drainage systems from the list of exceptions to the voter-approval requirement.

The statutory construction principles invoked by both parties do not assist us. The maxim proffered by plaintiffs, “although useful at times, is no more than a rule of reasonable inference” and cannot control over the lawmakers' intent. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 350 [45 Cal.Rptr.2d 279, 902 P.2d 297]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 991 [73 Cal.Rptr.2d 682, 953 P.2d 858].) On the other hand, invoking the plain-meaning rule only begs the question of whether the term “sewer services” was intended to encompass the more specific sewerage with which most voters would be expected to be familiar, or all types of systems that use sewers, including storm drainage and industrial waste. The popular, nontechnical sense of sewer service, particularly when placed next to “water” and “refuse collection” services, suggests the service familiar to most households and businesses, the sanitary sewerage system.

We conclude that the term “sewer services” is ambiguous in the context of both [section 6\(c\)](#) and Proposition 218 as a whole. We must keep in mind, however, the voters' intent that the constitutional provision be construed liberally to curb the rise in “excessive” taxes, assessments, and fees exacted **\*1358** by local governments without taxpayer consent. (Prop. 218, §§ 2, 5; reprinted at Historical Notes, *supra*, p. 38.) Accordingly, we are compelled to resort to the principle that exceptions to a general rule of an enactment must be strictly construed, thereby giving “sewer services” its narrower, more common meaning applicable to sanitary sewerage.<sup>8</sup> (Cf. *Estate of Banerjee* (1978) 21 Cal.3d 527, 540 [147 Cal.Rptr. 157, 580 P.2d 657]; *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005 [20 Cal.Rptr.2d 658].)

The City itself treats storm drainage differently from its other sewer systems. The stated purpose of ordinance No. 2350 was to comply with federal law by reducing the amount of pollutants discharged into the storm water, and by preventing

the discharge of “non-storm water” into the storm drainage system, which channels storm water into state waterways. According to John Fair, the public works director, the City's storm drainage fee was to be used not just to provide drainage service to property owners, but to monitor and control pollutants that might enter the storm water before it is discharged into natural bodies of water.<sup>9</sup> The Salinas City Code contains requirements addressed specifically to the management of storm water runoff.<sup>10</sup> (See, e.g., Salinas City Code, §§ 31-802.2, 29-15.)

For similar reasons we cannot subscribe to the City's suggestion that the storm drainage fee is “for ... water services.” [Government Code section 53750](#), enacted to explain some of the terms used in articles XIII C and XIII D, defines “[w]ater” as “any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water.” ([Gov. Code, § 53750](#), subd. (m).) The average voter would envision “water service” as the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean.

We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of **\*1359** the affected area. The trial court therefore erred in ruling that ordinance Nos. 2350 and 2351 and Resolution No. 17019 were valid exercises of authority by the city council.

### *Disposition*

The judgment is reversed. Costs on appeal are awarded to plaintiffs.

Premo, Acting P. J., and Mihara, J., concurred.

A petition for a rehearing was denied July 2, **2002**, and respondents' petition for review by the Supreme Court was denied August 28, **2002**. **\*1360**

### Footnotes

- 1 “Impervious Area,” according to resolution No. 17019, is “any part of any developed parcel of land that has been modified by the action of persons to reduce the land's natural ability to absorb and hold rainfall. This includes any hard surface area which either prevents or retards the entry of water into the soil mantle as it entered under natural conditions pre-

existent to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions pre-existent to development.”

2 Plaintiffs are the Howard Jarvis Taxpayers Association, the Monterey Peninsula Taxpayers Association, and two resident property owners.

3 All further unspecified section references are to [article XIII D](#) of the California Constitution.

4 According to the public works director, proportional reductions were not anticipated to apply to a large number of people.

5 Webster's Third New International Dictionary, for example, defines “sewer” as “1: a ditch or surface drain 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works).” (Webster's 3d New Internat. Dict. (1993) p. 2081.) The American Heritage Dictionary also denotes the function of “carrying off sewage or rainwater.” (American Heritage College Dict. (3d ed. 1997) p. 1248.) On the other hand, the Random House Dictionary of the English Language (2d ed. 1987) page 1754, does not mention storm or rainwater in defining “sewer” as “an artificial conduit, usually underground, for carrying off waste water and refuse, as in a town or city.”

6 [Public Utilities Code section 230.5](#) defines “Sewer system” to encompass all property connected with “sewage collection, treatment, or disposition for sanitary or drainage purposes, including ... all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters.” Salinas City Code section 36-2, subdivision (31) defines “storm drain” as “a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water.”

7 For example, [Government Code section 63010](#) specifies “storm sewers” in delimiting the scope of “ '[d]rainage,' ” while separately identifying the facilities and equipment used for “ '[s]ewage collection and treatment.' ” ([Gov. Code, § 63010](#), subd. (q)(3), (10).) [Government Code section 53750](#), part of the Proposition 218 Omnibus Implementation Act, explains that for purposes of articles XIII C and article XIII D “ '[d]rainage system' ” means “any system of public improvements that is intended to provide for erosion control, landslide abatement, or for other types of water drainage.” [Health and Safety Code section 5471](#) sets forth government power to collect fees for “services and facilities ... in connection with its water, sanitation, storm drainage, or sewerage system.”

8 Sanitary sewerage carries “putrescible waste” from residences and businesses and discharges it into the sanitary sewer line for treatment by the Monterey Regional Water Pollution Control Agency. (Salinas City Code, § 36-2, subd. (26).)

9 Resolution No. 17019 defined “Storm Drainage Facilities” as “the storm and surface water sewer drainage systems comprised [*sic*] of storm water control facilities and any other natural features [*that*] store, control, treat and/or convey surface and storm water. The Storm Drainage Facilities shall include all natural and man-made elements used to convey storm water from the first point of impact with the surface of the earth to a suitable receiving body of water or location internal or external to the boundaries of the City... .” The “storm drainage system” was defined to include pipes, culverts, streets and gutters, “storm water sewers,” ditches, streams, and ponds. (See also Salinas City Code, former § 29-3, subd. (l) [defining “storm drainage system”].)

10 Storm water under ordinance No. 2350 includes “stormwater runoff, snowmelt runoff, and surface runoff and drainage.” (Salinas City Code, former § 29-3, subd. (dd).)



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66 Cal.App.4th 586, 77 Cal.Rptr.2d 752, 98 Cal.

Daily Op. Serv. 6568, 98 Daily Journal D.A.R. 9076

WILLIAM G. ISAAC et al.,  
Plaintiffs and Respondents,  
v.  
CITY OF LOS ANGELES et al.,  
Defendants and Appellants.

No. B109234.

Court of Appeal, Second District, California.

Aug. 21, 1998.

### SUMMARY

Owners and lenders of record of residential real properties with master utility meters brought an action against a city and county seeking a refund of special assessments levied by the city against plaintiffs' master-metered real properties on account of delinquent utility bills. The trial court ruled in favor of plaintiffs, finding that the city ordinance that empowered the city to make assessments and record a super-priority lien on plaintiffs' real properties violated the California and federal constitutions and state statutes governing the priority of liens. (Superior Court of Los Angeles County, No. BC090601, Paul G. Flynn, Judge.)

The Court of Appeal affirmed. The court initially held that the utility lien was neither a special tax, a special assessment, nor a regulatory or development fee, and therefore it did not implicate the special tax limitations of Cal. Const., art. XIII A. However, since the lien was neither a valid special assessment nor a special tax giving the city authority to impose a lien to secure payment of the lien on that basis, the city could not impose the lien unless there were other legal grounds supporting its imposition. As there was no evidence that the parties agreed to the imposition of the lien in the event of unpaid utility charges, the city could only obtain a lien after it obtained a judgment on an action to collect the unpaid utility charges. The ordinance, however, attempted to circumvent the statutory provisions providing for the creation of judgment liens by ipso facto declaring the city already had a lien. The ordinance was therefore invalid. The court further held that the ordinance was invalid since it gave the utility lien priority over other recorded liens, thereby disrupting the statewide statutory scheme of lien priority and was therefore not a valid

exercise of municipal authority under [Cal. Const., art. XI, § 5](#), subd. (a). (Opinion by Johnson, Acting P. J., with Woods and Neal, JJ., concurring.) \*587

### HEADNOTES

#### Classified to California Digest of Official Reports

(1)

Summary Judgment § 26--Appellate Review--Scope of Review.

A trial court's grant of summary judgment is reviewed de novo for error, and the appellate court reviews the trial court's ruling, not its rationale, and will uphold the judgment if it is correct on any theory. In addition, although the appellate court conducts an independent review, it uses the same standard for summary judgment as the trial court.

(2a, 2b, 2c)

Public Utilities § 5--Regulation by Municipalities-- Lien Imposed by City Ordinance for Unpaid Utility Charges-- Validity:Liens § 5-- Utility Liens.

A city was not entitled to impose a utility lien on residential real property with master utility meters for unpaid utility charges pursuant to a city ordinance. The utility customers' agreement to pay a certain rate for a certain usage of utilities was a contractual obligation and was far removed from the revenue raising devices of assessments and taxes. Similarly, the charges levied at the master-metered apartments did not amount to special taxes, since there was no evidence the funds collected were earmarked for a special purpose. Nor did the charges represent fees imposed for a regulatory or developmental purpose. Rather, at most the lien created by the ordinance was a user fee: payment for a specific commodity purchased. Thus, the lien did not implicate the special tax limitations of Cal. Const., art. XIII A. However, since the lien was neither a valid special assessment nor a special tax giving the city authority to impose a lien to secure payment of the lien on that basis, the city could not impose the lien unless there were other legal grounds supporting its imposition. As there was no evidence that the parties agreed to the imposition of the lien in the event of unpaid utility charges, the city could only obtain a lien after it obtained a judgment on an action to collect the unpaid utility charges. The ordinance, however, attempted to circumvent the statutory provisions providing for the creation of judgment liens by ipso facto declaring the city already had a lien. The ordinance was therefore invalid.

(3)

Property Taxes § 3--Definitions and Distinctions--Governmental Levies-- Special Assessments.

Governmental levies against real property generally fall into three categories: (1) taxes, (2) special assessments, and (3) developmental and regulatory fees or "user charges." Each class of charge has particular characteristics, limitations, and purposes. Special assessments are made for the purpose of completing a specific public improvement in a designated district; \*588 they are compulsory charges and are placed upon specific real property. They are made under express legislative authority for the purpose of defraying the cost of the proposed local public improvement. Because the local improvement will benefit only certain properties, the general public is not required to subsidize it through a general tax levy. Thus, strictly speaking, a special assessment is not really a tax but a benefit to specific property that is financed through the public credit. In contrast, although special taxes are also taxes levied for a specific purpose, they need not be earmarked to benefit particular property. Special taxes are prohibited by Cal. Const., art. XIII A, § 4, unless approved by a two-thirds vote of the qualified electors of the entity (city, county, or special district) seeking to impose the tax. Special assessments are exempt from limitations on special taxes because Cal. Const., art. XIII A, was aimed at general government tax levies and overspending. The amount of a special assessment may not exceed the benefit accruing to the affected property. Thus, if the property assessed receives no special benefit, the levy is a prohibited special tax.

(4)

Property Taxes § 2--Definitions and Distinctions--Governmental Levies-- Fees--Special Taxes.

In addition to special assessments, property may be charged with different types of fees, which include (1) regulatory fees imposed under the government's police power, (2) developmental fees exacted in return for permits or other governmental privileges, and (3) user fees. Development fees are usually imposed in connection with the development of real property and are not considered special taxes if the fee bears a reasonable relation to the development's probable cost to the community and the benefits derived from the community by the development. Similarly, regulatory fees must not exceed the reasonable cost of the services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation; they may not be levied for unrelated purposes. Finally, user fees are those that are charged only to the person actually using the service, and the

amount of the charge is generally related to the actual goods or services provided. A usage fee for an ongoing service is a monthly charge rather than a one-time payment. User fees are thus distinguishable from special assessments as well as special taxes. However, if payments are exacted solely for the purpose of carrying on business with no further conditions, they are taxes. Thus, fees can become special taxes subject to the two-thirds vote requirement of Cal. Const., art. XIII A, § 4, only if the two conditions set out in Gov. Code, § 50076, exist: (1) the fee exceeds the reasonable cost of providing the service or the regulatory activity, or (2) the fee is levied for general revenue purposes. Similarly, special assessments may in reality be \*589 special taxes if the property assessed receives no special benefit beyond that received by the general public.

(5)

Liens § 3--Creation.

Liens are created in two ways: (1) by operation of law, and (2) by contract (Civ. Code, § 2881). Liens arise by operation of law where there is a statute providing for the creation of a lien in a certain situation, as for example tax liens. An equitable lien may be imposed upon real property where the parties intend the property to operate as security for the obligation. A lien to enforce a simple contractual obligation, however, cannot be created unless the party has reduced the obligation to a judgment and an abstract of judgment is filed in the county recorder's office (Code Civ. Proc., § 697.310 et seq.).

(6a, 6b, 6c)

Municipalities § 56--Ordinances, Bylaws, and Resolutions--Validity--Conflict With Statutes--City Ordinance Giving Utility Lien Priority Over Other Liens:Liens § 9--Priorities.

A city ordinance that permitted the city to impose a utility lien on residential real property with master utility meters for unpaid utility charges, and that gave the utility lien priority over other recorded liens, was invalid, since it disrupted the statewide statutory scheme of lien priority, and was therefore not a valid exercise of municipal authority under Cal. Const., art. XI, § 5, subd. (a). Lien priorities on real property are a matter of statewide concern since uniformity in lien priority is essential. Moreover, lien priority is a sufficiently defined field for purposes of preemptive analysis since the subject has been extensively covered by legislation. For example, under Pub. Util. Code, §§ 16469 and 16470, a private utility may obtain a lien for unpaid utility bills, and this utility lien has the same priority as a judgment lien. While these sections were inapplicable to the city, they demonstrated a legislative intent

to accord utility liens a lesser priority than tax liens consistent with the state's statutory scheme. The statutory scheme of lien priority giving priority to certain liens, such as tax liens and purchase money mortgages, reflects a legislative intent to favor certain types of charges against real property. The utility lien at issue disrupted this balance by giving what was essentially a judgment lien priority normally accorded only to tax liens.

(7)

Municipalities § 56--Ordinances, Bylaws, and Resolutions--Validity-- Conflict With Statutes or Charter--Test for Preemption--Home Rule--Municipal Affairs.

Under home rule, the state Legislature's authority to intrude into matters of local concern is curtailed. The benefits of home rule are numerous, because cities are familiar with their own local problems and can often act more promptly to address problems than the state Legislature. Therefore, cities are only precluded from enacting laws on nonlocal matters if it is the intent of the Legislature to occupy the field to the exclusion of municipal regulation. Whether a city ordinance is valid therefore requires a determination of whether (1) the local regulation or ordinance is a "municipal affair," upon which the municipality has the exclusive authority to regulate, or (2) whether the subject is a matter of statewide concern such that state legislation preempts any municipal attempt at lawmaking. Because the California Constitution does not define "municipal affairs," it is a question to be decided on the facts of each case, as the concept of a municipal affair changes over time as local issues become issues of statewide concern. Although the state Legislature may have attempted to deal with a particular field, this does not automatically ordain preemption. The Legislature may also express its intent to permit local legislation in the field, or the statutory scheme may recognize local regulations.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 799 et seq.]

(8)

Municipalities § 56--Ordinances, Bylaws, and Resolutions--Validity-- Conflict With Statutes or Charter--Test for Preemption--Statewide Concern.

Whether a particular matter is of "statewide concern" is another way of stating that the matter is preempted and conflicting local legislation is prohibited. There is a three-part test to infer a legislative intent to preempt conflicting municipal enactments only where (1) the subject matter has been so fully and completely covered by general law as to

clearly indicate it has become exclusively a matter of state concern, (2) the subject matter has been partially covered by general law stated in such terms as to indicate clearly a matter of paramount state concern which will not tolerate further or additional local action, and (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance outweighs the possible benefit of the law to the municipality.

(9)

Municipalities § 56--Ordinances, Bylaws, and Resolutions--Validity-- Conflict With Statutes or Charter--Test for Preemption--Determination Whether Field Is Fully Occupied.

In determining whether a field of law is fully occupied, expressly or impliedly, by general law such that a municipality may not enact conflicting laws, a court first must determine whether the "field" is sufficiently defined. A "field" of legislation is one that is sufficiently logically related so that a court or a local legislative body could ascertain a cohesive approach to the subject.

#### COUNSEL

James K. Hahn, City Attorney, Thomas C. Hokinson, Chief Assistant City Attorney, Renee J. Laurents, Deputy City Attorney, William A. Kerr, Pircher, Nichols & Meeks, Michael D. Berk, Arter & Hadden and Aaron M. Peck for Defendants and Appellants.

Engstrom, Lipscomb & Lack, Walter J. Lack, Cynthia J. Emry and Leanne J. Fisher for Plaintiffs and Respondents.

#### JOHNSON, Acting P. J.

The City of Los Angeles (City) appeals from a judgment entered in favor of plaintiffs William G. Isaac et al., on their complaints seeking a refund of special assessments levied by the City against plaintiffs' master-metered real properties on account of delinquent utility bills. The trial court held the ordinance empowering the City to make the assessments and record a super-priority lien on plaintiffs' real properties violated the California and federal Constitutions and state statutes governing the priority of liens. On appeal, the City contends the trial court improperly granted summary judgment because the ordinance is constitutional and material issues of fact exist.

#### Factual Background and Procedural History

In May 1987, the City Council of the City of Los Angeles adopted an ordinance providing for the imposition of special assessment liens on master-metered apartment buildings for



the collection of past due and estimated future billings for water and electric power.<sup>1</sup> (L.A. City Admin. Code, § 6.500 et seq., eff. July 23, 1987.)<sup>2</sup> The Ordinance permits the City to levy the assessments and record a lien securing such assessment against the subject real property. The Ordinance also provides such liens have priority \*592 over previously recorded deeds of trust and other liens and encumbrances against the property. Essentially, the purpose of the Ordinance is to provide a mechanism for collecting unpaid utility bills on master-metered apartment buildings.

The Ordinance states it is based upon the city council's finding the provision of essential public utilities (water and electricity) to residential real properties is essential to the health and welfare of the residents of such properties. The city council further found the failure to provide such essential utilities jeopardizes the health and welfare of the residents and renders the premises not only uninhabitable as a matter of law (Civ. Code, § 1941) but creates a public nuisance (L.A. Mun. Code, § 91.8902). The city council further found the tenants of master-metered apartment buildings pay rent with the expectation the property owner would pay for essential utilities. The Ordinance also declares the provision of essential public utilities constituted a "special benefit" to master-metered real properties and the owners thereof. (Ord., § 6.500.)

The Ordinance provides a lien may be assessed for an unpaid utility service charge that is more than 75 days past due. The Ordinance sets forth the procedure by which a lien is assessed: An application for assessment is filed with the city clerk and forwarded to the city engineer, who advises the city council an application had been made. The city engineer prepares an assessment roll listing. (Ord., § 6.503.) A hearing on assessment applications is conducted before an officer or panel of officers selected by the Board of Public Works, and notice of any hearing is given by mail and publication no later than 15 days before the hearing to the property owner, each person last billed for utility services (if different from the owner), and each lender of record.<sup>3</sup> (Ord., §§ 6.504, 6.505.)

Upon confirmation of the assessment, the city engineer records a lien with the county recorder "in such forms as to give suitable notice of the assessment lien to any potential buyer." (Ord., § 6.507.) The City entered into an agreement with the County of Los Angeles (County) for the collection of this assessment by the recordation of this assessment lien against the subject real properties, which is then collected with the property taxes. The assessment lien thus becomes

a lien for real property taxes, and upon collection by the County was turned over to the city engineer for the City. The assessment accrues interest and penalties "to the same extent and on the same conditions as ad valorem taxes bear interest and carry penalties." (Ord., §§ 6.508-6.510.) Finally, the assessment lien is given priority over all other encumbrances and liens on the subject property except for liens of special assessments separately billed, and as to such assessments it enjoys equal parity. \*593 The utility lien thus acquires the same priority as a lien for property taxes, and has priority over even previously recorded deeds of trust on the property. (Ord., § 6.513.)

Pursuant to the Ordinance, the City began to assess the owners of master-metered residential real property in the City the cost of providing essential public utility services when the owners of such properties were either unwilling or unable to pay for such utilities. Some of the liens were for past due or overdue utility charges and sewer costs; some of the liens were for future water and electricity billings.

The plaintiffs in this action were all the owners or lenders of record of master-metered property upon which the City caused an assessment lien to be recorded.<sup>4</sup> Due to the recordation of the liens, title to the subject properties was clouded. The plaintiffs were required upon a transfer of the property to pay off the liens in order to remove the cloud on title the liens created. The effect of the Ordinance in some cases was to place the burden of paying the utility charges on nonowners of the property or persons who were not responsible for incurring the indebtedness. Pursuant to the terms of the Ordinance, holders of deeds of trust, such as plaintiff Great Western Bank, were not given notice of the assessment or recordation of the lien.<sup>5</sup>

After the plaintiffs were forced to pay off these liens in order to clear up title to their property, they filed claims with the City, which were denied. The plaintiffs then commenced seven separate lawsuits against the City and County<sup>6</sup> seeking a refund of the payments made and a declaration the ordinance was invalid on state and federal constitutional grounds and on the grounds it impermissibly created a "super-priority" lien. These actions were consolidated and the plaintiffs filed separate motions for summary judgment, arguing the Ordinance violated their due process and equal protection rights under the California and United States Constitutions and the Ordinance \*594 violated California statutory law governing lien priority. The City filed a cross-motion for summary judgment, arguing the statute was valid.

The trial court ruled in favor of the plaintiffs, holding (1) the Ordinance, as applied, violated the plaintiffs' due process and equal protection rights because the Ordinance failed to achieve a reasonable degree of equality between the plaintiffs and other similarly situated persons; (2) the Ordinance violated [Revenue and Taxation Code section 2192.1](#) because it conferred “super-priority” status to the assessment lien over prior recorded deeds of trust; (3) the Ordinance violated the California Constitution because the special assessments constituted a “special property tax” prohibited by [article XIII, section 1](#) and [article XIII A, sections 1, 2](#), subdivision (a); (4) the Ordinance violated procedural due process because no prior actual notice was given to the plaintiffs of the imposition of the assessments, and (5) the City wrongfully included in the assessment charges not authorized by the ordinance, such as sewer charges.<sup>7</sup> Appellant timely appeals.

### Discussion

At issue in this appeal is whether the trial court improperly granted summary judgment finding the Ordinance invalid on the grounds it (1) violated due process and equal protection under both the California and federal constitutions ([Cal. Const., art. I, § 19](#); [U.S. Const., Amend. XIV](#)), (2) violated California statutory law establishing the priority of liens (see, e.g., [Rev. & Tax. Code, § 2192.1](#)), and (3) violated the California Constitution's prohibition against special taxes ([Cal. Const., art. XIII A, §§ 1, 2](#), subd. (a).) The City also contends factual issues exist with respect to the issue of whether proper notice of the assessment liens was given.

We hold the Ordinance is invalid on the grounds it is preempted by the statewide statutory scheme governing the priority of liens upon real property. Because we find the statute invalid on these grounds, we do not address respondents' arguments the Ordinance violates due process or equal protection, or appellant's argument that factual issues exist precluding summary judgment.

#### I. Standard of Review.

(1) A trial court's grant of summary judgment is reviewed de novo for error; we review the trial court's ruling, not its rationale, and will uphold the judgment if it is correct on any theory. (See [Code Civ. Proc., § 437c, \\*595](#) subd. (g); [Sachs v. FSR Brokerage, Inc.](#) (1992) 7 Cal.App.4th 950, 960-961 [9 Cal.Rptr.2d 306].) Thus, in spite of our affirmance, we rely on a different rationale than the trial court in finding the ordinance unconstitutional. ([California Aviation, Inc. v. Leeds](#)

(1991) 233 Cal.App.3d 724, 730-731 [284 Cal.Rptr. 687].) In addition, although we conduct an independent review, we use the same standard for summary judgment as the trial court. ([Szadolci v. Hollywood Park Operating Co.](#) (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].)

#### II. The Lien Imposed by the Ordinance Is Neither a Special Tax Nor a Special Assessment and Therefore Does Not Implicate the Concerns of Article XIII A of the California Constitution.

(2a) The City contends the lien imposed by the Ordinance is a valid “special assessment” exempt from the limitation on special taxes. Respondents argue the lien constitutes a “special tax” prohibited by article XIII A of the California Constitution because the lien seeks to defray expenses other than those actually incurred in serving utilities to the master-metered apartment buildings.<sup>8</sup> We conclude, however, the lien is neither a special assessment nor a special tax and thus article XIII A does not govern. Nevertheless, because we conclude the utility lien secures a purely contractual obligation for commodities provided by the DWP acting as a vendor on behalf of the City, the City's actions in imposing a lien are ultra vires and void.

##### A. The Lien Is Neither a Special Assessment Nor a Special Tax.

A lien is defined as “a charge imposed in some mode other than by a transfer in trust upon specific property which it is made security for the performance of an act.” ([Civ. Code, § 2872.](#)) Liens are created by operation of law or by contract; liens securing taxes and special assessments are created by operation of law. ([Civ. Code, § 2881](#); [Rev. & Tax. Code, §§ 2187, 2192.](#)) Here, the City seeks to secure by a lien the performance of respondents' obligations to pay for utilities, a commodity.

(3) Governmental levies against real property generally fall into three categories: (1) taxes, (2) special assessments, and (3) developmental and regulatory fees or “user charges.” Each class of charge has particular characteristics, limitations, and purposes. Special assessments are made for the purpose of completing a specific public improvement in a designated district; they are compulsory charges and are placed upon specific real property. They are made under express legislative authority for the purpose of defraying the cost of the proposed local public improvement. ([San Marcos Water \\*596 Dist. v. San Marcos Unified School Dist.](#) (1986) 42 Cal.3d 154, 161 [228 Cal.Rptr. 47, 720 P.2d 935].) Because

the local improvement will benefit only certain properties, the general public is not required to subsidize it through a general tax levy. (*Solvang Mun. Improvement Dist. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 552-554 [169 Cal.Rptr. 391].) Thus, strictly speaking, a special assessment is not really a tax but a benefit to specific property that is financed through the public credit. (*Spring Street Co. v. City of Los Angeles* (1915) 170 Cal. 24, 29 [148 P. 217].)

In contrast, although special taxes are also taxes levied for a specific purpose, they need not be earmarked to benefit particular property. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 142 [14 Cal.Rptr.2d 159, 841 P.2d 144].) Special taxes are prohibited by article XIII A, section 4 of the California Constitution unless approved by a two-thirds vote of the qualified electors of the entity (city, county, or special district) seeking to impose the tax.<sup>9</sup> (Cal. Const., art. XIII A, § 4.) Special assessments are exempt from limitations on special taxes because Proposition 13 was aimed at general government tax levies and overspending. (*Solvang Mun. Improvement Dist. v. Board of Supervisors*, *supra*, 112 Cal.App.3d at p. 556.) The amount of a special assessment may not exceed the benefit accruing to the affected property. Thus, if the property assessed receives no special benefit, the levy is a prohibited special tax. (*City of Los Angeles v. Offner* (1961) 55 Cal.2d 103, 109 [10 Cal.Rptr. 470, 358 P.2d 926].)

(4) In addition to special assessments, property may be charged with different types of fees. These include: (a) regulatory fees imposed under the government's police power, (b) developmental fees exacted in return for permits or other governmental privileges, and (c) user fees. Development fees are usually imposed in connection with the development of real property and are not considered special taxes if the fee bears a reasonable relation to the development's probable cost to the community and the benefits derived from the community by the development.<sup>10</sup> (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874-875 [64 Cal.Rptr.2d 447, 937 P.2d 1350].) Similarly, regulatory fees must not exceed the reasonable cost of the services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation; they may not be levied for unrelated purposes. (*Id.* at p. 876.)

Finally, user fees are those which are charged only to the person actually using the service; the amount of the charge is generally related to the actual goods or services provided. A user fee for an ongoing service is a monthly charge rather than a one-time payment. User fees are thus distinguishable from

special assessments as well as special taxes. (*San Marcos Water Dist. v. San Marcos Unified School Dist.*, *supra*, 42 Cal.3d 154, 162.) However, if payments are exacted solely for the purpose of carrying on business with no further conditions, they are taxes. (*Sinclair Paint Co. v. State Bd. of Equalization*, *supra*, 15 Cal.4th at p. 877.) Thus, fees can become special taxes subject to the two-thirds vote requirement of Proposition 13 only if the two conditions set out in Government Code section 50076 exist: (1) the fee exceeds the reasonable cost of providing the service or the regulatory activity, or (2) the fee is levied for general revenue purposes.<sup>11</sup> (*Carlsbad Mun. Water Dist. v. QLC Corp.*, *supra*, 2 Cal.App.4th at p. 485.) Similarly, special assessments may in reality be special taxes if the property assessed receives no special benefit beyond that received by the general public. (*Knox v. City of Oakland*, *supra*, 4 Cal.4th at pp. 142-143.)

(2b) The utility lien created by the Ordinance is neither a special assessment nor a special tax, nor is it a regulatory or development fee. At most it is a user fee: payment for a specific commodity purchased. The lien is not a special assessment because no special benefit is conferred upon the master-metered properties through a physical improvement to the real property. Utility lines to provide service to real property would be an improvement to the property; however, the utilities themselves are a commodity that are provided to customers and they are ephemeral by nature, resulting in no permanent improvement to the property. There is no evidence in the record that any of the funds collected from the utility customers are directly used for capital improvements. Thus, although utility service may be beneficial to the properties by maintaining their habitability, the provision of utilities is not a special benefit beyond that received by the general public meriting a special assessment.

Indeed, the utility customer's agreement to pay a certain rate for a certain usage of utilities is a contractual obligation, and is far removed from the revenue-raising devices of assessments and taxes. Similarly, the charges levied for utility consumption at the master-metered apartments do not amount to special taxes because there is no evidence in the record that the funds collected are earmarked for a special purpose. The utility charges do **\*598** not represent fees imposed for a regulatory or developmental purpose. There is no evidence the charges imposed exceeded the customer's actual or expected use of the utility commodity. Rather, at most the lien is based upon user fees, and represents a security interest in the real properties to secure payment for the

obligation incurred to pay the DWP for utility charges. Thus, the utility lien does not implicate the special tax limitations of California Constitution, article XIII A. We therefore find the City's reliance on *Roberts v. City of Los Angeles* (1936) 7 Cal.2d 477, 490 [61 P.2d 323] misplaced. The City contends *Roberts* holds electric utility service constitutes a permanent improvement to the property and supports the imposition of a special assessment. (*Ibid.*) However, a careful reading of *Roberts* discloses it holds the costs and expenses of supplying electric utility service would support a special assessment; *Roberts* does not authorize a special assessment lien for the cost of the commodity itself. (*Id.* at pp. 490-491.) Indeed, as discussed *post*, the City's expansive reading of *Roberts* would not only give a municipality a means of circumventing the established procedures for obtaining judgments on contract actions, it would disrupt the statewide scheme of lien priority.

#### **B. The City Is Not Entitled to Impose a Lien on Respondents' Properties for Unpaid Utility Charges.**

Because the utility lien is neither a valid special assessment nor a special tax giving the City authority to impose a lien to secure payment of the lien on that basis, the City cannot impose the utility lien unless there are other legal grounds supporting its imposition. (5) Under the Civil Code, liens are created in two ways: (1) by operation of law, and (2) by contract. (Civ. Code, § 2881.) Liens arise by operation of law where there is a statute providing for the creation of a lien in a certain situation, as for example tax liens.<sup>12</sup> An equitable lien may be imposed upon real property where the parties intend the property operate as security for the obligation. (*Jones v. Sacramento Sav. & Loan Assn.* (1967) 248 Cal.App.2d 522, 531 [56 Cal.Rptr. 741]; *California Bank v. Leahy* (1933) 129 Cal.App. 243, 247 [18 P.2d 709] [equitable lien requires a res upon which the obligation can attach itself].) A lien to enforce a simple contractual obligation, however, cannot be created unless the party has reduced the obligation to a judgment and an abstract of judgment is filed in the county recorder's office. (See generally, Code Civ. Proc., § 697.310 et seq.) (2c) As there is no evidence in the record the parties agreed to the imposition of the utility lien in the event of unpaid utility charges, the City can only obtain a lien after it has obtained a judgment on an action to collect the unpaid utility charges. The ordinance, \*599 however, attempts to circumvent the statutory provisions providing for the creation of judgment liens by ipso facto declaring the City already has a lien. The Ordinance is therefore invalid.

#### **III. The Ordinance Violates California Statutory Law and Is Not Exempt Under the Municipal Affairs Doctrine.**

(6a) The City argues because utility service is a municipal affair, it is within the City's exclusive power to legislate with respect to payment of utility charges and the Ordinance is well within the police power of the City. Respondents argue the Ordinance, by giving the utility lien super-priority over all other recorded liens, is invalid because it violates California statutory law relating to the priority of liens.<sup>13</sup> We agree the Ordinance is invalid because it disrupts California's statewide statutory scheme of lien priority and is therefore not a valid exercise of municipal authority under California Constitution, article XI, section 5, subdivision (a).

(7) Every California city may enact and enforce within its limits local ordinances not in conflict with general laws. (Cal. Const., art. XI, § 7.) Chartered cities, such as Los Angeles, are granted exclusive power to legislate their municipal affairs. (Cal. Const., art. XI, § 5; Gov. Code, § 34101.) Under home rule, the state Legislature's authority to intrude into matters of local concern is curtailed. The benefits of home rule are numerous, because cities are familiar with their own local problems and can often act more promptly to address problems than the state Legislature. Therefore, cities are only precluded from enacting laws on nonlocal matters if it is the intent of the Legislature to occupy the field to the exclusion of municipal regulation. (See *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62 [81 Cal.Rptr. 465, 460 P.2d 137].)

Whether a city ordinance is valid therefore requires a determination of whether (1) the local regulation or ordinance is a "municipal affair," upon which the municipality has the exclusive authority to regulate, or (2) whether the subject is a matter of statewide concern such that state legislation preempts any municipal attempt at lawmaking. Because the California Constitution does not define "municipal affairs," it has become a question to be decided on the facts of each case, as the concept of a municipal affair changes over time as local issues become issues of statewide concern. (*Bishop v. City of San Jose*, *supra*, 1 Cal.3d at p. 62; *Century Plaza Hotel Co. v. City of Los Angeles* (1970) 7 Cal.App.3d 616, 620 [87 Cal.Rptr. 166].) Although the state Legislature may have attempted to deal with a particular \*600 field, this does not automatically ordain preemption. The Legislature may also express its intent to permit local legislation in the field, or the statutory scheme may recognize local regulations. (*City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 276 [17 Cal.Rptr.2d 845].)

(8) Whether a particular matter is of “statewide concern” is another way of stating that the matter is preempted and conflicting local legislation is prohibited. *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 [209 Cal.Rptr. 682, 693 P.2d 261] recognized a three-part test to infer a legislative intent to preempt conflicting municipal enactments only where (1) the subject matter has been so fully and completely covered by general law as to clearly indicate it has become exclusively a matter of state concern, (2) the subject matter has been partially covered by general law stated in such terms as to indicate clearly a matter of paramount state concern which will not tolerate further or additional local action, and (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance outweighs the possible benefit of the law to the municipality.<sup>14</sup> (*Fisher, supra*, at p. 708.)

(6b) We find lien priorities on real property a matter of statewide concern because statewide uniformity in lien priority is essential. (9) In determining whether a field is fully occupied (expressly or impliedly) by general law such that a municipality may not enact conflicting laws, we first must determine whether the “field” is sufficiently defined. A “field” of legislation is one which is sufficiently logically related so that a court or a local legislative body could ascertain a cohesive approach to the subject. (*Fisher v. City of Berkeley, supra*, 37 Cal.3d 644, 707-708.) (6c) Lien priority is a sufficiently defined field for purposes of preemptive analysis as the subject has been extensively covered by legislation. Numerous kinds of liens may be imposed on real property—judgment, assessment, tax, and consensual—and each type of lien’s priority in relation to other liens is well defined.

For example, under California’s general rule of lien priority, all other things being equal, liens have priority according to the time of their creation. (*Civ. Code*, § 2897.) Other statutes, including recording statutes, modify this general rule. For example, liens for taxes are paramount to rights created by mortgages and deeds of trust, and liens for special assessments and general taxes stand on equal footing. (*Rev. & Tax. Code*, § 2192.1; *San Mateo \*601 County Bank v. Dupret* (1932) 124 Cal.App. 395, 396 [12 P.2d 669]; *City of Long Beach v. Aistrup* (1958) 164 Cal.App.2d 41, 48, 49 [330 P.2d 282].) The priority of tax liens is a creation of statute, as tax liens are not by their own force superior to private contract and mortgage liens. (*Home Owners’ Loan Corp. v. Hansen* (1940) 38 Cal.App.2d 748, 752 [102 P.2d 417].) Purchase money mortgages are given special

priority, having priority over all other liens subject only to the operation of the recording laws. (*Civ. Code*, § 2898, subd. (a).) Judgment liens are given less priority, such that even a prior recorded judgment lien is subordinate to a previously executed, but unrecorded, purchase money deed of trust. (*Walley v. P.M.C. Inv. Co.* (1968) 262 Cal.App.2d 218, 219-220 [68 Cal.Rptr. 711].) Consistent with this scheme, *Government Code* section 53933 accords special assessments liens “first in time priority” among themselves.

In addition, under *Public Utilities Code* sections 16469 and 16470, a private utility may obtain a lien for unpaid utility bills. This utility lien has the same priority as a judgment lien.<sup>15</sup> Although these sections are inapplicable to the City because municipally owned utilities are not regulated by the Public Utilities Commission on the theory the electoral process is a sufficient check on their functioning, sections 16469 and 16470 are instructive, as they demonstrate a legislative intent to accord utility liens a lesser priority than tax liens consistent with the California’s statutory scheme. (*Los Angeles Met. Transit Authority v. Public Utilities Com.* (1959) 52 Cal.2d 655, 661 [343 P.2d 913]; *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 158-159 [161 Cal.Rptr. 172, 604 P.2d 566].) However, we point out that the absence of any specific statewide legislation permitting municipal utilities to impose a lien does not create a statutory loophole inviting local legislation, because of the pervasive statutory scheme already in place governing lien priority.

Because lien priority is a matter of statewide concern, the City may not enact legislation that conflicts or disables the effectiveness of statutory law. The statutory scheme of lien priority giving priority to certain liens, such as tax liens and purchase money mortgages, reflects a legislative intent to favor certain types of charges against real property. The utility lien at issue disrupts this balance by giving what is essentially a judgment lien priority normally accorded only to tax liens. The potential ramifications of this anomalous lien include the reticence of lenders to underwrite master-metered \*602 apartment buildings and increased information costs relating to properties in the County, as potential lenders or purchasers must undertake additional investigations to determine the existence of such liens.

We sympathize with the City’s plight in not being able to effectively use the utility cutoff threat to collect delinquent bills because those using the utilities generally are not the ones failing to pay. The record contains no explanation why the owners of the master-metered apartment buildings

routinely failed to pay their utility bills, necessitating the enactment of the Ordinance's drastic measures. However, the City will need to find another means by which to recoup payment from these delinquent property owners and at the same time ensure the tenants of the affected properties continue to receive necessary and beneficial utility services

### Disposition

The judgment of the superior court is affirmed. The parties are to bear their own costs on appeal.

Woods, J., and Neal, J., concurred.

A petition for a rehearing was denied September 21, 1998, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied November 18, 1998. \*603

## A

### LOS ANGELES CITY ADMINISTRATIVE CODE

#### Assessments for Essential Public Utilities

##### Sec. 6.500. Findings.

(a) The City Council of the City of Los Angeles hereby finds that the providing of essential public utilities to residential real properties is essential to the health and welfare of the residents occupying the residential real properties, contributes to the usefulness and value of residential real properties and when such essential public utilities are not provided the health, welfare, and the public safety of the residents are placed at risk due to the fact that the failure to provide essential public utilities causes premises to become uninhabitable by law (Civil Code Section 1941 et seq.) as well as hazardous and substandard, causing the creation of a nuisance pursuant to Los Angeles Municipal Code Section 91.8902.

(b) The City Council of the City of Los Angeles further finds that the providing of essential public utilities services to residential real properties constitutes a special benefit to such real properties and to the owners thereof.

(c) The City Council of the City of Los Angeles further finds that tenants of these residential real properties pay rent with the reasonable expectation that the utilities will be paid by

the owner and that when an owner or owners of real property are unwilling to pay the costs of providing essential public utilities services to residential real properties the termination of utilities to these properties would create uninhabitable premises and constitute a direct threat to the health and safety of the residents of the properties. Such a threat would in fact be a nuisance placing the health and welfare of the residents of the properties at risk. In such cases, the cost of providing essential public utilities services, as well as the unpaid cost of such services provided to properties in the past, under the same ownership, should be assessed to such real properties, made a lien upon such properties by the City of Los Angeles pursuant to its authority to abate nuisances, and thereafter paid in the same manner as payment is made for other essential public services furnished to and benefiting real properties.

### SECTION HISTORY

Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.

Amended by: Subsec. (a) and (c),  
Ord. No. 170,164, Eff. 1-19-95 \*604  
Sec. 6.501. Definitions.

“Application for assessment” as used in this chapter means the procedure whereby a department of the City of Los Angeles which provides one or more essential public utilities services requests that an assessment be levied for the cost of providing its service.

“Cost of providing essential public utilities service” as used in this chapter means the established rates for furnishing of water and electric power, together with all lawfully established taxes, surcharges, and fees upon such costs or service and other charges generally collected with utility payments. With respect to trash disposal service, the said “cost” shall be that charged to comparable real properties, considering the size of the improvement and the number of persons residing thereon, in the vicinity of the real property to be assessed by private trash pick-up and disposal services as determined by informal solicitation of written or oral proposals to furnish such services.

“Essential public utilities or utility service” as used in this chapter means the furnishing of water or electricity, where more than one residential unit is served through a single meter and trash disposal services.

“**Overdue**” as used in this chapter means that payment for an essential public utility service was not made when payment was due, and said payment is defined to be “**due**” five days after the placement of the billing for such service in the United States mail. The time periods stated hereafter shall be calculated from said “**due**” date.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162, 3 83, Eff. 7-23-87.**

**Sec. 6.502. Alternative Method of Collection and Severability.**

(a) The procedures of this chapter provide an alternative means of securing and/or obtaining payment for the costs of providing essential public utilities services to residential real properties. Nothing herein shall preclude a department using other methods of securing the payment or obtaining payment for such services, including any other lawful method of placing liens on real property, civil suit and or discontinuance of service.

(b) If any portion of this chapter is found to be invalid or unconstitutional, whether on its face or as applied, such invalidity or inapplicability shall not affect the remaining portions of this chapter or applicability to \*605 other circumstances or persons, it being the intention of the City Council that this chapter be construed and applied to the extent constitutionally permissible notwithstanding it is not fully enforceable.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162, 383, Eff. 7-23-87.**

**Sec. 6.503. Application for Assessment.**

(a) The cost of providing an essential public utility service may be assessed upon the benefiting real property only when it appears that the owner or other person in charge of the real property is unable or unwilling to make payments for such services within a reasonable time following the billing for such services. No assessment shall be levied unless, at the time of application for assessment, payment for the essential public utility service for the property is more than seventy five (75) days overdue, whether or not the present customer of record was the owner during all or any portion of said period. Except as provided elsewhere, said assessment lien shall not be made more than six months after the application

for assessment was filed. If an assessment was levied upon a real property in the previous year, so that the cost of essential public utility service has been paid through collection of assessments on the property tax bill, an application for assessment may be made notwithstanding that delinquencies did not exist during the previous year.

(b) No assessment lien shall be levied more than six months after the application for assessment was filed, unless the property is the subject of litigation in State or Federal Court.

(c) The City shall mail to the owner or owners of record at their respective address as shown on the last equalized tax roll, as well as any lenders of record at their respective last known address, of the property to be assessed by registered mail return receipt requested, a copy of the application for assessment within 45 days after said application for assessment was filed. Failure to receive said notice does not invalidate the herein proceedings.

(d) The application for assessment shall contain:

(1) A resolution of the governing board of the department providing the essential public utility service requesting that the City Council of the City of Los Angeles levy assessments upon real properties to pay for service provided and to be provided to real properties. \*606

(2) A statement (i) that payments are or have been overdue as set forth in Subsection (a) of this Section; (ii) the address, legal description and assessor's parcel number of the real properties proposed to be assessed; (iii) the names of the owner or owners, and their respective addresses as shown on the last equalized assessment roll of the County of Los Angeles; (iv) the names of the recorded lenders at their respective last known addresses; (v) the names of the persons and their respective addresses who were last billed for the public utility service; (vi) an accounting documenting the delinquencies prior to the date of application and the payments and dates of payments made on the account which justifies the application for assessment for each real property; (vii) the amount of past due billings, including all taxes, surcharges, fees, interest and charges thereon, at the time of application; (viii) the estimated total billings for the utility service, including the taxes, surcharges, fees and charges thereon, and including interest which will accrue until payment, during the period of the fiscal year after the date of filing the application, less any amounts not expended from previously made assessments; (ix) the estimated total billings

for the utility service, including all taxes, surcharges, fees and charges thereon and including the net amount of interest which will accrue until payment during the next fiscal year, and (x) an estimate of the reasonable additional cost to the department to make the application for the assessment and collect the assessment, which reasonable cost will be included in the amount of the assessment.

(e) Said application for assessment shall be filed with the City Clerk of the City of Los Angeles and the County Recorder of Los Angeles County within 45 days after the property was more than 75 days overdue. Said application may be for assessments to more than one property. When received, the City Clerk shall forward the applications for assessment to the City Engineer. The City Engineer shall advise the City Council of the making of an application.

(f) The City Engineer shall cause the application to be noted on the records utilized in preparing his report for the Report of Residential Property Records and Pending and Recorded Liens issued pursuant to Division D of Chapter 9 of Article 6 of the Los Angeles Municipal Code, commencing with Section 96.300.

(g) The City Engineer shall process said application for assessment received as follows:

(1) Estimate the total amount of proposed assessment for the department making the applications, including all of the items listed in Subsection (b)(2) of this section and including any estimated costs to \*607 the City in giving notice, holding hearings, and collecting and distributing the assessment when it is paid.

(2) Prepare an Assessment Roll listing:

(i) Each property to be assessed by address and by legal description;

(ii) The name of the owner or owners and the addresses as shown on the last Equalized Assessment Roll, and the names and the addresses of the persons last billed for the utility service, as such names and addresses have been furnished by the department making the application for assessment; and

(iii) The amount of each proposed assessment and the department and utility service for which it is proposed to be levied.

(h) At the request of the City Engineer, the City Attorney is hereby authorized and directed to prepare a draft of an ordinance declaring the Council's intention to levy assessments pursuant to this chapter and to forward the draft of ordinance to the City Engineer for transmittal with the assessment roll to the City Council.

(i) If the City Council in its sole discretion determines to do so, the Council may adopt the ordinance and declare its intention to levy assessments for past due billings for essential utility services and future billings for essential utility services and setting a time, date and place of hearing. The ordinance shall provide that an initial hearing shall be held before a hearing officer or officers designated by the Board of Public Works and that all persons desiring to protest the assessment before the City Council must, prior thereto, appear before the hearing officer or officers.

**SECTION HISTORY Chapter 8 added  
by Ord. No. 162, 383, Eff. 7-23-87.**

**Amended by: Subsecs. (d), (e), and  
(g), Ord. No. 165, 518, Eff. 4-1-90;**

**Subsec. (a) amended, Subsecs. (b)  
through (g) relettered (d) through (i),**

**new Subsecs. (b) and (c) added,  
Subsecs. (d), (e) and first paragraph**

**Subsecs. (g) amended, Ord. No. 170, 164, Eff. 1-19-95.  
Sec. 6.504. Notice**

(a) Notice at the time, date and place of hearing before the City Council shall be given by the City Clerk as follows, with all of said notices being mailed and published no less than 15 days prior to the date of hearing. If the ordinance provides that there must be an appearance before a hearing officer, \*608 hearing commission, or committee of the City Council before protest may be made to the Council, the mailing and notice must be completed prior to 10 days before the earliest date for such appearance.

(b) The notice shall be mailed by first class mail to each owner and, if different from the owner, to each person last billed for utility services as their names and addresses were furnished to the City Engineer by the department making the application, as well as to each lender of record, at their last known address. It shall also state the legal description and address of the property to be assessed, as furnished to the



City Engineer, the amount proposed to be assessed, including all costs and expenses of the department furnishing utility services and costs and expenses of making the assessment, that it is proposed to add the assessment to the next county tax bill, and shall also set forth the time, date and place of hearings as well as a short explanation of the hearing procedure. The notice shall also contain one or more telephone numbers of the department which made the application for assessment and a telephone number in the office of the City Engineer, at which information regarding the billings, proposed assessments, or procedures be obtained.

(c) The City Clerk shall keep a record of the notices, the persons to whom such notices were mailed, the date of mailing, and the person responsible for the mailing. A declaration by the person responsible for such mailing that it was made shall be sufficient evidence that notice was given. Failure of an addressee to receive such notice shall not invalidate a good faith attempt to give actual notice of the proposed assessment.

**SECTION HISTORY Chapter 8 added  
by Ord. No. 162, 383, Eff. 7-23-87.**

**Amended by: Subsec. (b), Ord.  
No. 170, 164, Eff. 1-19-95.**

**Sec. 6.505 Withdrawal of Application.**

(a) At any time before the date set for hearing before the City Council, the department applying for assessment may withdraw its application or may reduce, but not increase, the amount it requests to be assessed. Said withdrawal or reduction request shall be in writing signed by an authorized representative of the department furnishing utility services. The withdrawal or reduction request shall be filed with the City Engineer three days or more prior to the date of the City Council hearing. The City Engineer shall modify the assessment roll accordingly. Payment of past due billings shall not prohibit the City from levying assessments for billings to come due for the balance of the fiscal year and for the next fiscal year unless it is clearly \*609 established that conditions of ownership or operation have changed so that there are reasonable assurances that future billings will be paid when due.

**SECTION HISTORY**

**Chapter 8 added by Ord. No. 162, 383, Eff. 7-23-87.**

**Sec. 6.506 Hearing.**

(a) Whenever possible, hearings shall be held on a quarterly basis.

(b) At the hearing the application for assessment and the assessment roll shall be prima facie evidence of the matters contained therein. The burden of going forward with the evidence to establish the incorrectness of the application or the assessment roll shall be upon the person opposing the proposed assessment.

(c) If there has been a hearing before a hearing officer, hearing commission, or committee of the City Council its written findings or conclusions may be considered by the City Council.

(d) Any person opposing an assessment upon real property which is owned or controlled by such person may submit his protest either in writing, orally or both. The oral hearing may be continued from time-to-time as schedules require. The time allotted for oral presentation may be reasonably limited by order at the time of the oral presentation.

(e) The City Council or the committee of the City Council considering the proposed assessment may refer the matter to the City Engineer for further review prior to making its recommendation or decision. If such referral is made, the City Engineer may consult with whomever he sees fit, and shall make written recommendations and the reasons therefor to the committee or Council. The department making the application for assessment and the owners and persons billed for the utility service shall be given written notice of the date of the committee or Council consideration of the City Engineer's report and recommendations and shall be permitted to comment thereon in writing or orally.

SECTION HISTORY Chapter 8 added by Ord. No. 162, 383, Eff. 7-23-87. Amended by: Subsecs. (a) through (d) relettered (b) through (e) and new Subsecs. (a) added, Ord. No. 170, 164, Eff. 1-19-95.

**Sec. 6.507. Confirmation of Assessment.**

A final Assessment Roll containing the names of each owner and the descriptions of the real properties to be assessed, the purpose of the assessment, and the amount of the assessment, all as determined by the City \*610 Council, must be confirmed by the City Council by a majority vote of all

the members of the Council. Upon confirmation, the City Engineer shall record a Notice of Assessment and Lien with the County Recorder in such forms as to give suitable notice of the assessment and lien to any potential buyer. Upon confirmation, the amount of assessments become a lien upon the real property until such time as the first installment of the property tax bill incorporating the assessment becomes payable. At the time the property tax bill, which includes the assessment, becomes payable, the assessment has the same priority as taxes and other assessments on the property tax bill.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162, 383 Eff. 7-23-87.**

**Amended by: In Entirety, Ord. No. 165, 518, Eff. 4-1-90.  
Sec. 6.508. Collection of Assessment.**

The amount of assessment shall be collected upon the County of Los Angeles property tax bill, and the City Engineer is hereby authorized to enter into an agreement with the County of Los Angeles pursuant to [Section 51800 of the Government Code](#) of the State of California for the collection and enforcement by the County of Los Angeles of the assessments levied pursuant to this chapter. If the assessments are not paid prior to delinquency, then they shall bear interest and carry penalties to the same extent and on the same conditions as ad valorem taxes bear interest and carry penalties.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.  
Sec. 6.509. Deposit in Fund.**

(a) The amount of assessment and any interest or penalties thereon, less any sums charged by the County of Los Angeles to administer and collect the assessments, shall be credited to a fund in the treasury of the City of Los Angeles to be known as the “**Essential Public Utilities Assessment Fund.**”

(b) The Fund shall be divided into separate accounts for each department for which assessments are made.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.  
Sec. 6.510. Payments from Fund.**

(a) When payments of assessments are received the Controller, upon the request of the City Engineer, may draw from the Essential Public Utilities \*611 Assessment Fund and place in the General Fund such reasonable amounts or percentage of the assessments which were included in the assessments as necessary to reimburse the City for its costs and expenses in levying assessments, holding hearings and otherwise administering the procedure established by this chapter. All other funds shall be paid by the Controller, at the request of the City Engineer, to the department which has provided and will provide the essential public utilities service.

(b) The department receiving payment from the Controller shall determine from the records maintained by the County of Los Angeles the real properties for which assessments were made. Such department shall first credit, as of the date of its receipt of payment from the Controller, the unpaid billings, including any interest or penalties thereon, for each real property for which payments were made. Thereafter, it shall deduct from any excess amounts received the billings for services as such billings become payable, until all amounts received from the Controller have been accounted for.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.  
Sec. 6.511. Conventional Billings for Essential Utilities Services.**

Utilization of the procedures set forth in this chapter by a department shall not preclude the department from billing the owner or applicants for services in a conventional manner. If payments are made pursuant to such billings, and at such time as the department is reasonably satisfied that it is no longer necessary that funds be held in order to assure that payments for the utility services shall be made, the department may refund any amounts not yet utilized to pay billings for utilities services to the person or persons entitled thereto.

### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.  
Sec. 6.512. Effective Date of Chapter; Prior Overdue and Unpaid Billings.**

The procedures set forth in this chapter, as amended, shall become effective July 1, 1995. Any overdue and unpaid billings which became “**due**” after July 1, 1993 and prior to

the effective date of this chapter, as amended, may be subject to assessment liens pursuant to this chapter, provided any such assessment lien is assessed within one year after the effective date of this chapter, as amended. \*612

## SECTION HISTORY

**Chapter 8 added by Ord. No. 162, 383, Eff. 7-23-87.**

**Amended by: Title and Sec.,  
Ord. No. 170, 164, Eff. 1-19-95**

**Sec. 6.513. Priority of Assessment.**

The assessment provided for by this chapter shall have the same priority as the lien for real property taxes and shall be prior to and superior to all other encumbrances and liens upon real property except for liens of special assessments separately billed, and as to such special assessments it shall be a parity therewith.

## SECTION HISTORY

**Chapter 8 added by Ord. No., 162,383, Eff. 7-23-87.**

**Sec. 6.514. Trash Disposal Services.**

(a) The provisions of this section shall be applicable to assessments for trash disposal services and shall supersede the procedures set forth in Section 6.503 of this chapter. Only the Board of Public Works of the City of Los Angeles may apply for assessments for trash disposal services.

(b) The provisions of this chapter and section shall not affect the ability of the City to abate a public nuisance resulting from the presence of weeds, rubbish and other materials and to assess the real property on which such nuisance exists for the cost of abatement pursuant to Section 22.325.1 of this Code. This section is intended to supplement Section 22.325.1 and to provide a method for the city to cause collection and removal of trash or rubbish from properties before a nuisance condition exists.

(c) The Board of Public Works at any time may apply to the City Council that an assessment be made for the cost of trash disposal services to residential real properties not eligible for trash pickup by the Bureau of Sanitation. Such application may be made only when the owner or other person in charge of the real property refuses to periodically and as reasonably necessary remove trash and rubbish from trash disposal areas on a real property.

(d) The application for assessment shall contain or incorporate the following data:

(i) The name of the owner or owners and the irrespective [sic] addresses as shown on the last equalized assessment roll of the County of Los Angeles;

(ii) The addresses, legal description, and assessor's parcel number of the property proposed to be assessed as shown on the last equalized assessment roll of the County of Los Angeles; \*613

(iii) The estimated total cost of trash disposal services to remove trash as necessary from the real property for the portion of the fiscal year after the date of filing of the application and the estimated total cost for such services during the next fiscal year and an estimate of the reasonable additional cost to the City to administer the process of the City causing trash to be removed and levying the assessment.

(e) The procedure as specified in Subsections (d) through (f) of Section 6.503 of this chapter shall thereafter be followed.

(f) The procedure of Sections 6.504 through 6.510 and 6.513 shall be applicable to assessments for trash disposal services.

(g) If the assessment is confirmed, the Department of Public Works of the City of Los Angeles shall cause trash disposal services to be furnished either through the facilities of the Bureau of Sanitation of the Department of Public Works or by private trash disposal contractors under contract with the City. If the contract is with a private trash disposal contractor, such contractor shall be selected after request for services and inquiry as to prices have been made to at least three trash disposal services, which inquiries may be made in writing, in person, or by telephone, and a record of such inquiries shall be kept in the Department of Public Works. The contract shall be awarded for a period which will end on June 30 of the next fiscal year to the responsible trash disposal service which has offered to perform such work for the lowest price.

(h) A private trash disposal services contractor shall not be retained to perform such work unless the City Council has, at the time of levying the assessment, also appropriated sufficient funds to pay for such trash disposal services, but the cost thereof shall reimbursed to the City from the Essential Public Utilities Assessment Fund.

(i) If an owner or other person in charge of a real property for which assessment has been made pursuant to this section provides reasonable assurances satisfactory to the Department of Public Works that trash will be disposed of from the real property, the Board shall, as soon as reasonably and legally practical, cause services provided pursuant to Subsection (g) of this section to be terminated and shall cause the Controller to refund to the person entitled thereto all funds held for said real property which are in excess of the amounts needed to pay for services which have been provided.

#### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.**

**Sec. 6.515. Time Extension.**

Notwithstanding the provisions of Section 6.503(e) during the 1987 calendar year the City Engineer may process applications received during the \*614 months of January,

February and March, 1987 and may commence the processing specified in Sections 6.503(e) and (f) up to April 30, 1987.

#### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.**

**Sec. 6.516. Clearing Title.**

The City Engineer is hereby authorized to execute such documents as may be required to clear the title of assessed properties when an assessment is settled, when an assessment is a lien by virtue of the tax bill having been issued or when otherwise appropriate.

#### SECTION HISTORY

**Chapter 8 added by Ord. No. 162,383, Eff. 7-23-87.**

Amended by: In Entirety, Ord. No. 165, 518; Eff. 4-1-90. \*615

#### Footnotes

- 1 The water and electricity vendor in the City of Los Angeles is a municipally run entity, the Los Angeles Department of Water and Power (DWP).
- 2 Los Angeles City Administrative Code section 6.500 et seq. shall be referred to herein as the Ordinance and references to it shall be denominated "Ordinance, Section \_\_\_\_." A copy of the full text of the current Ordinance is attached as appendix A.
- 3 At the time the liens were levied against respondents herein, the Ordinance did not provide for written notice to lenders of record. Paragraph 6.504 of the Ordinance was later amended to provide for such notice.
- 4 Due to the similarity of the factual scenarios involving each of the seven plaintiffs and the numerous properties involved (some plaintiffs own more than one affected parcel), we will not set forth in detail the allegations of each plaintiff relating to their specific properties. However, the utility charges levied against the properties were substantial sums: For example, on one of the properties on which Great Western had a mortgage, the charges (present and future) totaled in excess of \$152,000.
- 5 Although the ordinance provides lienholders of record would be given notice of the application for assessment and of the hearing, apparently Great Western and other lenders did not receive any notice. (Ord., §§ 6.503, 6.504.) Furthermore, the ordinance does not provide for notice of the recordation of the lien to be given. (Ord. § 6.507 [city engineer records notice of assessment lien with county recorder].)
- 6 Pursuant to stipulation, the parties agreed the County, insofar as the only relief sought against it was the refund of moneys held by it, need not participate in the litigation by filing pleadings and other papers. The County has not filed a brief on appeal.
- 7 The trial court actually enumerated six grounds, but we do not see how the sixth specified ground materially differs from the first so have not included it here.
- 8 Respondent Great Western Bank filed the "lead" brief on appeal. The other respondents filed their own briefs and also joined in Great Western's arguments.
- 9 [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, 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."
- 10 Development fees are sometimes called "user fees." (See [Carlsbad Mun. Water Dist. v. QLC Corp. \(1992\) 2 Cal.App.4th 479, 481 \[3 Cal.Rptr.2d 318\]](#).)

- 11 [Government Code section 50076](#) provides: "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."
- 12 A lien for real property taxes arises and attaches every January 1. ([Rev. & Tax. Code, §§ 2187, 2192.](#)) The lien is discharged upon payment of the taxes due. ([Rev. & Tax. Code, § 2194.](#))
- 13 The City's brief does not directly address this issue, although plaintiff Great Western Bank raised the issue in its motion for summary judgment.
- 14 Strictly speaking, the test outlined in *Fisher* is a not the test applied to municipal affairs under [California Constitution article XI, section 5](#), but *Fisher* expressly condoned its application to laws enacted by charter cities. (*Fisher v. City of Berkeley, supra*, 37 Cal.3d at p. 708.)
- 15 [Public Utilities Code section 16469](#) provides in relevant part that "... charges unpaid at the time specified for the fixing of the rate of taxes may be added to and become part of the annual assessment levied upon the land upon which the commodity or service was used if the property [was] owned, controlled, or in the possession of the same person who owned, controlled, or was in possession of it during the time the service charges were incurred...." [Section 16470](#) provides that "[c]harges added to an assessment are a lien on the land ...."



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by *Pacific Bell v. City of San Diego*, Cal.App. 4 Dist., June 13, 2000

7 Cal.4th 327, 867 P.2d 724, 27 Cal.Rptr.2d 613

HARRY LOCKLIN et al., Plaintiffs and Appellants,

v.

CITY OF LAFAYETTE et al.,  
Defendants and Respondents.

No. S030595.

Supreme Court of California

Feb 28, 1994.

**SUMMARY**

Plaintiffs, who owned properties along a creek, filed an action in tort and in inverse condemnation and on other theories against several public entities on the basis that actions defendants took or improvements they made or owned contributed to the increased volume and velocity of water in the creek over that which would have been carried by the creek but for the actions of those defendants, and were a substantial factor in causing damage to plaintiffs' properties. The trial court granted nonsuit and judgment on the pleadings in favor of some defendants, and judgments were ultimately entered in favor of all defendants. (Superior Court of Contra Costa County, No. 251359, Michael J. Phelan, Judge.) The Court of Appeal, First Dist., Div. Two, No. A045324, affirmed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, although the Court of Appeal erred in ruling that the natural watercourse rule insulated defendants from both tort and inverse condemnation liability, a review of the record showed that the Court of Appeal properly found that the watercourse which was the focus of this litigation had not itself become a public improvement at the time the damage of which plaintiffs complained occurred, and that no public improvements in the creekbed contributed to the damage suffered by plaintiffs. The court also held that the evidence did not support a conclusion that the damage to any plaintiff's property was the result of unreasonable conduct by any defendant in the manner in which it discharged surface water runoff into the creek, or establish that there was damage to plaintiffs' properties that could not have been prevented even if they had undertaken reasonable measures to protect their properties.

The court held that *Archer v. City of Los Angeles* (1941) 19 Cal.2d 19 [19 P.2d 1] does not correctly state the principles presently applicable to the liability of riparian landowners, and, to the extent that case held that Cal. Const., art. I, § 19, did not create liability, it has been overruled by subsequent decisions of the Supreme Court. The court held that the correct rule is \*328 that when alterations or improvements on upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume and/or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage, a public entity, as a property owner, may be liable for that damage. The test is whether, under all the circumstances, the upper landowner's conduct was reasonable. This rule of reasonableness applies to both private and public landowners, but it requires reasonable conduct on the part of downstream owners as well. It requires consideration of the purpose for which the improvements were undertaken, the amount of surface water runoff added to the streamflow by the defendant's improvements in relation to that from development of other parts of the watershed, and the cost of mitigating measures available to both upper and downstream owners. Those costs must be balanced against the magnitude of the potential for downstream damage. If both the plaintiff and the defendant have acted reasonably, the natural watercourse rule imposes the burden of stream-caused damage on the downstream property.

The court further held that a governmental entity may be liable under the principles of inverse condemnation for downstream damage caused by an increased volume or velocity of surface waters discharged into a natural watercourse from public works or improvements on publicly owned land. It will be liable if it fails to use reasonably available, less injurious alternatives, or if it has incorporated the watercourse into a public drainage system or otherwise converted the watercourse itself into a public work. Compensation is compelled by the same constitutional principles which mandate compensation in inverse condemnation actions generally. The downstream owner may not be compelled to accept a disproportionate share of the burden of improvements undertaken for the benefit of the public at large. Because downstream riparian property is burdened by the servitude created by the natural watercourse rule, however, consistent with that rule the downstream owner must take reasonable measures to protect his or her property. Liability on an inverse condemnation theory will not be imposed if the owner has not done so. Moreover, because the

development of any property in the watershed of a natural watercourse may add additional runoff to the stream, all of which may contribute to downstream damage, it would be unjust to impose liability on an owner for the damage attributable in part to runoff from property owned by others. Therefore, an owner who is found to have acted unreasonably and to have thereby caused damage to downstream property, is liable only for the proportion of the damage attributable to his or her conduct. Finally, the court held that the trial court erred in ruling that the successful defendants could not recover costs. Neither Cal. Const., art. I, § 19, nor public policy precludes an assessment of cost against a party who \*329 initiates an inverse condemnation action in good faith but is unsuccessful. Although the statutory power of a court to impose costs of litigation on an unsuccessful party in a civil action is limited by Cal. Const., art. I, § 19, that provision comes into play only when the property is taken for public use or damaged by a public entity. It is not enough that the plaintiff believes that eminent domain principles are applicable to the claim. (Opinion by Baxter, J., with Lucas, C. J., Kennard, Arabian, and George, JJ., concurring. Panelli, J., \* concurred in the judgment. Separate concurring opinion by Mosk, J.)

## HEADNOTES

### Classified to California Digest of Official Reports

(1)

Waters § 88--Surface and Flood Waters--Definitions and Distinctions:Words, Phrases, and Maxims--Surface and Floodwaters.

In the arcane area of water law, the rights and liabilities of private property owners for property damage or personal injury are in large part dependent on classification of the water as "surface waters," "flood waters," or "stream waters." Water diffused over the surface of land or contained in depressions therein, and resulting from rain or snow, or which rises to the surface in springs, is known as "surface water." It is thus distinguishable from water flowing in a fixed channel, so as to constitute a watercourse, or water collected in an identifiable body, such as a river or lake. The extraordinary overflow of rivers and streams is known as floodwater.

(2)

Waters § 88--Surface and Flood Waters--Definitions and Distinctions-- Natural Watercourse:Words, Phrases, and Maxims--Natural Watercourse.

A natural watercourse is a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow. It is wholly different from a swale, hollow, or depression through which may pass surface waters in time of storm not collected into a defined stream. A canyon or ravine through which surface water runoff customarily flows in rainy seasons is a natural watercourse. Alterations to a natural watercourse, such as the construction of conduits or other improvements in the bed of the stream, do not affect its status as a natural watercourse. A natural watercourse includes all channels through which, in the existing condition of the country, the water naturally \*330 flows, and may include new channels created in the course of urban development through which waters presently flow. Once surface waters have become part of a stream in a watercourse, they are no longer recognized as surface waters.

(3a, 3c)

Eminent Domain § 139--Inverse Condemnation--Damages--Immunity-- Natural Watercourse Rule:Waters § 93--Protection Against Surface Waters--Public Improvements--Natural Watercourse Rule.

In a tort action by property owners along a creek against several public entities alleging that actions defendants took or improvements made or owned by them contributed to the increased volume and velocity of water in the creek, causing erosion and other damage to plaintiffs' property, the trial court erred in concluding that the natural watercourse rule immunized defendants from tort liability as landowners for damages caused by their discharge of surface water runoff into the creek regardless of the reasonableness of their conduct. The natural watercourse rule states that there is no diversion for which liability exists if, for a reasonable purpose, diffused surface waters are gathered and discharged into a stream that is a natural means of drainage even if the watercourse is inadequate to accommodate the increased flow. An upper riparian landowner therefore may gather surface waters for a reasonable purpose and discharge them into a natural watercourse without liability to a lower owner for damage caused by the increased flow. Today, however, the natural watercourse rule has been modified by engrafting a test of reasonableness with respect to the conduct of both landowners, and plaintiff failed to prove that defendants acted unreasonably in increasing the runoff or that they (plaintiffs) acted reasonably to protect their property.

[Modern status of rules governing interference with drainage of surface waters, note, 93 A.L.R.3d 1193. See also 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 797 et seq.; 5 Miller & Starr, Cal. Real Estate (2d ed. 1988) § 14:23.]

(4)

Waters § 90--Surface and Flood Waters--Discharging Waters on Neighboring Land--Natural Watercourse Rule.

The natural watercourse rule has two aspects. The first permits the riparian landowner to gather surface waters and discharge them into the watercourse at a location other than that at which natural drainage would occur. The second permits the owner to make improvements in the bed of the stream to improve drainage and to protect the land from erosion by constructing dikes or embankments even though the result may be increased flow and velocity which might damage the property of lower riparian owners. Both aspects of the rule have as their purpose \*331 facilitating the development of upstream properties. Not to permit an upper landowner to protect his or her land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy.

(5)

Waters § 89--Surface and Flood Waters--Protection Against Surface Waters--Civil Law Rule--Test of Reasonableness.

The modern rule governing landowner liability for surface water runoff and drainage is no longer simply a rule of property dependent on the existence of rights, servitudes, or easements. The tendency of the civil law rule to limit immunity for damages caused by surface water runoff has been modified so that a landowner's conduct in using or altering the property in a manner which affects the discharge of surface waters onto adjacent property is now subject to a test of reasonableness. Every person must take reasonable care in using his or her property to avoid injury to adjacent property through the flow of surface waters, and failure to exercise reasonable care may result in liability by an upper to a lower landowner. Also, any person threatened with injury to his or her property by the flow of surface waters must take reasonable precautions to avoid or reduce any actual or potential injury. If the actions of both the upper and lower landowners are reasonable, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with the traditional civil law rule. At least with respect to surface water runoff

onto adjacent lands, no party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his or her relations with other landowners and still be immunized from all liability.

(6a, 6b)

Waters § 90--Surface and Flood Waters--Protection Against Surface Waters--Discharging Waters on Neighboring Land--Natural Watercourse Rule--Element of Reasonableness--Public Entities.

The rule of reasonableness-that a landowner's conduct in using or altering the property in a manner affecting the discharge of surface waters onto adjacent property must be reasonable-is applicable to all conduct by landowners in their disposition of surface water runoff, whether the waters are discharged onto the land of an adjoining owner or into a natural watercourse, as well as to the conduct of upper and lower riparian owners who construct improvements in the creek itself. The rule is applicable to public entities. The reasonable use rule is not one of strict liability, but requires consideration of all of the relevant circumstances, and anticipates that both the upstream riparian owner and the downstream owners will act reasonably.

(7)

Easements and Licenses in Real Property § 7--Easements--Nature and Extent of Use--Reasonableness.

Traditional rules of property law forbid overburdening an easement or servitude and unreasonable \*332 conduct in exercising rights under either. The owner of a dominant tenement must use his or her easement and rights in such a way as to impose as slight a burden as possible on the servient tenement. Every easement includes the right to do such things as are necessary for the full enjoyment of the easement itself. But this right is limited, and must be exercised in such reasonable manner as not to injuriously increase the burden on the servient tenement. The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the dominant tenement. The owner cannot commit a trespass on the servient tenement beyond the limits fixed by the grant or use. The extent of an upper landowner's easement for drainage and protection is that which the parties might reasonably expect from the future normal development of the dominant tenement.

(8)



Waters § 90--Surface and Flood Waters--Protection Against Surface Waters--Discharging Waters on Neighboring Land--Reasonableness--Factors Considered.

Under the rule that a landowner's conduct in using or altering the property in a manner which affects the discharge of surface waters onto adjacent property, or into a natural watercourse, is subject to a test of reasonableness, the issue of reasonableness is a question of fact to be determined in each case on a consideration of all the relevant circumstances. These include such factors as the amount of harm caused, the foreseeability of the harm that results, the purpose or motive with which the possessor acted, and all other relevant matters. If both parties act reasonably with respect to draining surface waters onto adjacent property, the upper owner will be liable for damages caused by the alteration of the natural flow of the water. The result will differ in disputes between riparian owners, each of whom acts reasonably. The applicable civil law rule immunizes the upper riparian owner for damages caused by the alteration of the natural discharge of water into a watercourse and by improvements in the stream bed. Therefore, if the upper owner acts reasonably, or if the lower owner has not acted reasonably to protect the property, the lower riparian owner must continue to accept the burden of damage caused by the stream water.

(9)

Waters § 90--Surface and Flood Waters--Protection Against Surface Waters--Discharging Waters on Neighboring Land--Reasonableness--Proportionate Liability of Upper Riparian Landowners.

The reasonableness of a landowner's action in discharging surface water runoff into a natural watercourse or in altering the watercourse itself cannot be determined in isolation. An owner in the lower reaches of a natural watercourse whose conduct has a relatively minor impact \*333 on the stream flow in comparison with the combined effect of actions by owners in the upper reaches may not be found liable for any damage caused by the stream flow beyond the proportion attributable to such conduct. The rules applicable to surface water runoff onto adjacent property or into a natural watercourse have been modified only by limiting the immunity created by the civil and common law rules to conduct that is reasonable.

(10a, 10b)

Eminent Domain § 140--Remedies of Owner--Inverse Condemnation--Damages--What Constitutes--Discharge of Surface Water Runoff Into Natural Watercourse.

In an inverse condemnation action by property owners along a creek against several public entities alleging that actions defendants took or improvements made or owned by them contributed to the increased volume and velocity of water in the creek, causing erosion and other damage to plaintiffs' property, the Court of Appeal erred in holding that a public entity may not be found liable in inverse condemnation for damage to private property caused by the manner in which surface water runoff from its property is discharged into a natural watercourse. Neither a private owner nor a public entity has the right to act unreasonably with respect to other property owners. Neither may disregard the interests of downstream owners, and a public entity may not claim immunity in tort or inverse condemnation actions for such conduct. However, the rule of strict liability generally followed in inverse condemnation is not applicable in this context. A public agency is liable only if its conduct posed an unreasonable risk of harm to the plaintiff, and that unreasonable conduct is a substantial cause of damage to the plaintiff's property.

(11)

Eminent Domain § 132--Remedies of Owner--Inverse Condemnation--Nature and Basis of Action--Constitution.

Under Cal. Const., art. I, § 19, permitting private property to be taken or damaged for public use only when just compensation is paid, when there is incidental damage to private property caused by governmental action, but the government has not reimbursed the owner, a suit in inverse condemnation may be brought to recover monetary damages for any "special injury," i.e., one not shared in common by the general public. Thus, any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable. Not to allow such recovery would compel the owner of the damaged property to contribute more than his or her proper share to the public undertaking.

(12)

Eminent Domain § 140--Inverse Condemnation--Damages--What Constitutes--Drainage of Surface Water Into Natural Watercourse-- Reasonableness.

Because a public agency, like any riparian property owner, engages in a privileged activity when it drains \*334 surface water into a natural watercourse or makes alterations to the watercourse, Cal. Const., art. I, § 19, mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

Reasonableness must be determined on the facts of each case, taking into consideration the public benefit and the private damages in each instance. Factors which may be considered in imposing liability are (1) the damage to the property, if reasonably foreseeable, would have entitled the property owners to compensation; (2) the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote; (3) the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out; (4) the cost of such damage can better be absorbed by the taxpayers as a whole than by the owners of the individual parcels damaged; and (5) the owner of the damaged property if uncompensated would contribute more than his or her proper share to the public undertaking. Reasonableness also considers the responsibility of riparian owners to protect their property from damage caused by the stream flow and to anticipate upstream development that may increase that flow.

## (13a, 13b)

Eminent Domain § 131--Inverse Condemnation--Overflowing Creek as Public Work.

In an inverse condemnation action by property owners along a creek against several public entities alleging that actions defendants took or improvements made or owned by them contributed to the increased volume and velocity of water in the creek, causing erosion and other damage to plaintiffs' property, the trial court properly determined that the creek had not become a public work or improvement or been incorporated into the city's drainage system, but remained a privately owned natural watercourse. Plaintiffs failed to establish that defendants exercised control over the creek or that there was either an express or implied acceptance of drainage easements set out in plaintiffs' subdivision maps. Utilizing an existing natural watercourse for drainage of surface water runoff and requiring other riparian owners to continue to do so did not transform the watercourse into a public storm drainage system. A governmental entity must exert control over and assume responsibility for maintenance of the watercourse if it is to be liable for damage caused by the streamflow on a theory that the watercourse has become a public work.

## (14)

Eminent Domain § 50--Inverse Condemnation--Appeal--Scope of Review-- Standard.

When trial is to the court, [Code Civ. Proc., § 631.8](#), permits the court to grant a motion for a judgment made by the \*335 defendant after the plaintiff has completed presenting evidence. Since the trial court must weigh the evidence and may draw reasonable inferences from that evidence, such rulings are normally reviewed under the substantial evidence standard, with the evidence viewed most favorably to the prevailing party. However, if the facts are undisputed, the reviewing court may make its own conclusions of law based on those facts. It is not bound by the trial court's interpretation. In an inverse condemnation action, because public use is a question of law, when the factual issues on which that question turns have been resolved, it must be decided by the court.

## (15)

Eminent Domain § 144--Inverse Condemnation--Evidence--Water Runoff-- Proportion of Damage Caused by Several Entities.

With respect to apportionment of liability for damage caused by drainage of surface waters by public entities, a plaintiff in inverse condemnation must establish the proportion of damage attributable to the public entity from which recovery is sought.

## (16)

Waters § 99--Surface and Flood Waters--Actions and Remedies-- Evidence--Inverse Condemnation--Reasonableness.

In an inverse condemnation action by property owners along a creek against several public entities alleging that actions defendants took or improvements made or owned by them contributed to the increased volume and velocity of water in the creek causing erosion and other damage to plaintiffs' property, even assuming the evidence was sufficient to establish that increased runoff from the property of either of two defendants was a substantial cause of plaintiffs' damage so as to permit an apportionment, the trial court properly found defendants not liable, where plaintiffs failed to demonstrate that defendants acted unreasonably or that plaintiffs themselves acted reasonably to protect their property. Under [Cal. Const., art. I, § 19](#), defendants would be liable only if the additional surface water runoff created by their improvements, or the manner in which they collected and discharged surface water runoff into the creek, was both unreasonable and a substantial cause of the damage to plaintiffs' property.

(17a, 17b)

Eminent Domain § 121--Cost, Fees, and Expenses--Unsuccessful Inverse Condemnation Plaintiff.

In an inverse condemnation action in which the public entity defendants prevailed, the trial court erred in ruling that the successful defendants could not recover costs. Neither [Cal. Const., art. I, § 19](#), nor public policy precludes an assessment of costs against a party who initiates an inverse condemnation action in good faith but is unsuccessful. Although the statutory [\\*336](#) power of a court to impose costs of litigation on an unsuccessful party in an inverse condemnation action is limited by [Cal. Const., art. I, § 19](#), that provision comes into play only when the property is taken for public use or damaged by a public entity. It is not enough that the plaintiff believes that eminent domain principles are applicable to the claim. A governmental entity is not required to bear the expense of all litigation by property owners who in good faith, but without sufficient evidentiary or legal support, claim damage to their property.

(18)

Eminent Domain § 121--Costs, Fees, and Expenses--Right of Property Owner.

A property owner has a right to the costs of defending an eminent domain action. To require the defendants to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury by a sum equal to that paid by them for such costs. The costs which may be recovered include those associated with unsuccessful defenses if raised in good faith, and even the costs of an unsuccessful appeal from an order awarding the plaintiff a new trial on damages. A plaintiff in inverse condemnation is also entitled to costs on proof that he or she suffered damage, even though offsetting benefits from a public project bar recovery of monetary damages. Costs may not be imposed on an inverse condemnation plaintiff in any case in which the plaintiff demonstrates that the actions of a governmental entity damaged the plaintiff's property.

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**BAXTER, J.**

Is a public entity liable in tort or inverse condemnation for damage to downstream riparian property caused by the discharge of surface waters into a natural watercourse abutting its property? The Court of Appeal held that there could be no liability.

We granted the petition of plaintiffs, owners of damaged properties, to consider whether the “natural watercourse rule” stated in [Archer v. City of Los Angeles \(1941\) 19 Cal.2d 19 \[119 P.2d 1\]](#) (*Archer*), by which the Court of Appeal believed itself bound, was properly applied in this case, and to decide whether [article I, section 19 of the California Constitution](#)<sup>1</sup> compels compensation for damage caused by an increased flow of streamwater that is traceable to surface water runoff from improvements on public property.

We conclude that *Archer* does not correctly state the principles presently applicable to the liability of riparian landowners. To the extent that *Archer* also held that [article I, section 19 of the California Constitution](#) did not create liability, it has been overruled by subsequent decisions of this court.

When alterations or improvements on upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume and/or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage, a public entity, as a property owner, may be liable for that damage. The test is whether, under all the circumstances, the upper landowner's conduct was reasonable. This rule of reasonableness applies to both private and public landowners, but it requires reasonable conduct on the part of downstream owners as well. This test requires consideration of the purpose for which the improvements were undertaken, the amount of surface water runoff added to the streamflow by the defendant's improvements in relation to that from development of other parts of the watershed, and the cost of mitigating measures

available to both upper and downstream owners. Those costs must be balanced against the magnitude of the potential for downstream damage. If both plaintiff and defendant have acted reasonably, the natural watercourse rule imposes the burden of stream-caused damage on the downstream property.

We also conclude that a governmental entity may be liable under the principles of inverse condemnation for downstream damage caused by an \*338 increased volume or velocity of surface waters discharged into a natural watercourse from public works or improvements on publicly owned land. It will be liable if it fails to use reasonably available, less injurious alternatives, or if it has incorporated the watercourse into a public drainage system or otherwise converted the watercourse itself into a public work. Compensation is compelled by the same constitutional principles which mandate compensation in inverse condemnation actions generally. The downstream owner may not be compelled to accept a disproportionate share of the burden of improvements undertaken for the benefit of the public at large. Because downstream riparian property is burdened by the servitude created by the natural watercourse rule, however, consistent with that rule the downstream owner must take reasonable measures to protect his property. Liability on an inverse condemnation theory will not be imposed if the owner has not done so.

Finally, because the development of any property in the watershed of a natural watercourse may add additional runoff to the stream, all of which may contribute to downstream damage, it would be unjust to impose liability on an owner for the damage attributable in part to runoff from property owned by others. Therefore, an owner who is found to have acted unreasonably, and to have thereby caused damage to downstream property, is liable only for the proportion of the damage attributable to his conduct.

Although we conclude that the Court of Appeal erred in holding that the natural watercourse rule insulated defendants from both tort and inverse condemnation liability, we shall affirm the judgment. After a review of the record we are satisfied that the court properly held that Reliez Creek, the watercourse which is the focus of this litigation, had not itself become a public improvement at the time the damage of which plaintiffs complain occurred and that no public improvements in the creekbed contributed to the damage suffered by plaintiffs. That review also satisfies us that the evidence does not support a conclusion that the damage to any plaintiff's property was the result of unreasonable conduct by

any defendant in the manner in which it discharged surface water runoff into Reliez Creek, or establish that there was damage to plaintiffs' properties that could not have been prevented had they undertaken reasonable measures to protect their properties.

## I

### Underlying Facts

Plaintiffs are the owners of property abutting Reliez Creek in Contra Costa County. The ownership interest of each plaintiff extends to the center \*339 of the creek and includes the creekbed and banks along the frontage of his or her property. Reliez Creek is a natural watercourse which drains a watershed of approximately 2,291 acres. It is several miles long, and runs from the hills to a confluence with Las Trampas Creek. Plaintiffs' properties lie on the final 1,500 feet before Reliez Creek joins Las Trampas Creek. Over the last 50 years development in the watershed has transformed an essentially rural environment into one in which 1,294 acres are developed. Public and private improvements in the watershed have prevented or lessened absorption of surface waters. Paving and other treatment has made some ground impervious to water, and the manner in which surface water runoff reaches Reliez Creek has been altered. The result has been an increase in the volume of surface waters discharged into Reliez Creek and in the velocity of the waters in the creek, particularly during times of heavy rains. In recent years the flow has caused scouring, undercutting, and erosion of the banks of the creek on plaintiffs' properties. The area of improvement is not limited to that owned by defendants, however. Development in the City of Walnut Creek, part of which is in the Reliez Creek watershed, and improvement on the grounds of Acalanes High School adjacent to Reliez Creek, as well as private development of other nonriparian property within the watershed, have added surface water runoff to Reliez Creek.

Plaintiffs purchased their respective properties at various times between 1965 and 1978. Many inspected the creek bank at the time they purchased their property. None observed any erosion. Although some erosion of the creek banks occurred subsequently, damage to the creek banks during the winter of 1981-1982, a period of unusually heavy rainfall, was more significant. There was evidence that the increased flow of waters led to failure of the creek banks adjacent to plaintiffs' properties, widening the creek in some locations from a width of 40 feet to a width of 110 feet. There was also evidence that the city and county were aware that the

increased flow of surface waters caused by development was causing and would cause damage to the creek banks. The damage to the creekside property might have been prevented by check dams and dikes, upstream diversion structures, and retention basins. That evidence did not relate the need for such structures to the increased runoff from defendants' properties or demonstrate that it would be reasonable to impose the cost of such structures on the named defendants, whose property comprised a small percentage of the watershed.<sup>2</sup>

In 1983, plaintiffs filed this action to recover for "extensive landslide" damage to their properties adjacent to the Reliez Creek, damage allegedly \*340 caused by defendants' storm drainage system.<sup>3</sup> The failure to maintain the drainage system was alleged to have "extensively eroded Plaintiffs' real property, triggering landslides which have damaged Plaintiffs' real property and which now threaten the stability of the remaining portions of Plaintiffs' real property." They sought to recover damages on theories of inverse condemnation, nuisance, dangerous condition of public property, and trespass to real property, and, in addition, they sought injunctive relief.

Named as defendants were the City of Lafayette (City), the County of Contra Costa (County), the Contra Costa County Flood Control District (District), the California Department of Transportation (CalTrans), the Bay Area Rapid Transit District (BART), and private parties whose involvement is not in issue here.<sup>4</sup> Each public entity was sued on the basis that actions it took or improvements it made or owned contributed to the increased volume and velocity of water in Reliez Creek over that which would have been carried by the creek but for the actions of those defendants, and were a substantial factor in causing the damage to plaintiffs' properties. The time within which property damage occurred for which recovery was sought was the three-year period prior to the filing of the complaint on September 13, 1983.

CalTrans and County were alleged to be developers, designers, builders, owners, and maintainers of Highway 24, Old Tunnel Road, and Pleasant Hill Road. BART was sued as the owner and developer of the rapid transit right-of-way through County. All defendants allegedly created and maintained a storm drainage system which included those portions of Reliez Creek that adjoined plaintiffs' real property.

Plaintiffs' inverse condemnation cause of action, brought under the authority of [article I, section 19 of the California](#)

[Constitution](#),<sup>5</sup> alleged that plaintiffs had been singled out to suffer a direct and substantial burden of the \*341 storm drainage system which was a public use. Their theories were: (1) that City, County, CalTrans, District, and BART were liable because dedicated roads, rights-of-way, culverts, storm drains, other public improvements in the watershed, and the discharge of surface waters collected by private owners pursuant to a county ordinance and discharged into the creek increased the volume and flow of water into Reliez Creek, which increase was a substantial factor in causing the downstream damage; and (2) that as a result of this use and public improvements constructed in the creekbed, Reliez Creek had itself become a work of public improvement.<sup>6</sup> They also alleged in support of that theory that as a condition of development permits City and County had required that irrevocable dedication of storm drainage easements on creekside properties be set out in subdivision maps.<sup>7</sup> \*342

The third cause of action, styled as one for a dangerous condition of public property,<sup>8</sup> alleged that unchecked surface water runoff from land and improvements, including roadways and rights-of-way, was channeled into the storm drainage system. In this cause of action plaintiffs claimed that defendants breached their duty of care by permitting the surface waters to be channeled through an inadequate storm drainage system, including Reliez Creek, without remedial action to protect adjacent properties, with the result that erosion, undercutting, destabilization, and landslides occurred on plaintiffs' property. Similar allegations underlay the nuisance and trespass causes of action.

Trial of the liability and damages issues was bifurcated. At the close of plaintiffs' case-in-chief on liability, the trial court granted defendants' motions for judgment on the inverse condemnation cause of action ([Code Civ. Proc., § 631.8](#)) and nonsuit on the tort causes of action ([Code Civ. Proc., § 581c](#)), except insofar as plaintiffs claimed City's liability arose from the maintenance of two structures, the Sizeler outfall and the sheet pile structure within Reliez Creek. Judgment for City was then granted at the close of defendants' evidence when the trial court found that plaintiffs had not proved that either structure was a substantial concurring cause of the damage to any plaintiff's property.<sup>9</sup>

In granting defendants' motions the trial court ruled: (1) there was insufficient evidence to establish that Reliez Creek was a storm drainage public improvement;<sup>10</sup> (2)

the “natural watercourse rule” shielded defendants from liability for damage caused by their collection of natural surface water \*343 drainage and discharge of that water into a natural channel even if the volume and velocity of the water caused the damage; (3) there was insufficient evidence that BART improvements substantially contributed to plaintiffs' damages; (4) there was insufficient evidence that water CalTrans diverted from another watershed to the Reliez Creek watershed substantially contributed to the damage;<sup>11</sup> (5) County had no liability because in 1968 it had relinquished ownership and control over any public improvements that might have contributed to the damage; and (6) there was no evidence that District owned or controlled any public improvement within the watershed that might have contributed to the damage.

## II

### Plaintiffs' Appeal

Plaintiffs' appeal was directed principally to the disposition of their inverse condemnation claim. They argued, however, that the trial court erred in applying the *Archer* natural watercourse rule to give defendants absolute immunity from liability on both the inverse condemnation and the tort claims. With respect to the inverse condemnation claims, plaintiffs also argued that they were entitled to relief under *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550 [253 Cal.Rptr. 693, 764 P.2d 1070], because defendants' conduct was not reasonable;<sup>12</sup> and that the trial court erred in holding that, because plaintiffs had not established the damage caused by each defendant individually, they failed to demonstrate that defendants were jointly and severally liable for the combined damage to their property. They argued that the evidence established, as a matter of law, \*344 that Reliez Creek had been used in such a way that it had become a work of public improvement; that, as a matter of law, City, County, BART, and CalTrans had acted unreasonably; and that City, County, BART, and CalTrans were jointly liable for the damages caused by the water runoff from their roads and paved areas.

The Court of Appeal affirmed the judgment of the trial court in all respects, holding that it was bound by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [20 Cal.Rptr. 321, 369 P.2d 937] to apply the *Archer* natural watercourse rule, which on the facts of this case, immunized defendants from liability for any damage caused by their use of Reliez Creek as a natural drainage channel.

## III

### The *Archer* Decision

The Court of Appeal based its ruling on this court's statement in *Archer* that “there is no diversion [for which liability would exist] if surface waters, flowing in no defined channel, are for a reasonable purpose gathered together and discharged into the stream that is their natural means of drainage even though the stream channel is inadequate to accommodate the increased flow.” (*Archer, supra*, 19 Cal.2d 19, 26.)

The Court of Appeal also concluded that decisions subsequent to *Archer* had reaffirmed, not repudiated, the holding in *Archer* that governmental entities are immune from liability under article I, section 19 of the California Constitution insofar as that holding was applicable to damages for which a private owner would be shielded from liability by the natural watercourse rule. That “*Archer* exception” to inverse condemnation liability held that “[i]f the property owner would have no cause of action were a private person to inflict the damage, he can have no claim for compensation from the state.” (*Archer, supra*, 19 Cal.2d 19, 24.)

To put in perspective our examination of public and private landowner responsibility for damage to downstream property caused by discharge of “surface waters” into a “natural watercourse,” it is therefore appropriate to define these terms and to describe in more detail the *Archer* decision.

#### A. Surface Waters.

(1) In the arcane area of water law under consideration in this case, the rights and liabilities of private property owners for property damage or \*345 personal injury are in large part dependent upon classification of the water as “surface waters,” “flood waters,” or “stream waters.” “Water diffused over the surface of land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs, is known as 'surface water.' It is thus distinguishable from water flowing in a fixed channel, so as to constitute a watercourse, or water collected in an identifiable body, such as a river or lake. The extraordinary overflow of rivers and streams is known as 'flood water.' (Tiffany on Real Property (3d ed.) § 740; 8 Cal.L.Rev. 197.)” (*Keys v. Romley* (1966) 64 Cal.2d 396, 400 [50 Cal.Rptr. 273, 412 P.2d 529].)

#### B. Natural Watercourse.

(2) A natural watercourse “is a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow. It is wholly different from a swale, hollow, or depression through which may pass surface waters in time of storm not collected into a defined stream.” (*San Gabriel V.C. Club v. Los Angeles* (1920) 182 Cal. 392, 397 [188 P. 554, 9 A.L.R. 1200].) A canyon or ravine through which surface water runoff customarily flows in rainy seasons is a natural watercourse. Alterations to a natural watercourse, such as the construction of conduits or other improvements in the bed of the stream, do not affect its status as a “natural” watercourse. (*LeBrun v. Richards* (1930) 210 Cal. 308, 317, 318 [291 P. 825, 72 A.L.R. 336]; *Larrabee v. Cloverdale* (1900) 131 Cal. 96, 99-100 [63 P. 143].) A natural watercourse includes “all channels through which, in the existing condition of the country, the water naturally flows,” and may include new channels created in the course of urban development through which waters presently flow. (*Larrabee v. Cloverdale, supra*, 131 Cal. at p. 100.) Once surface waters have become part of a stream in a watercourse, they are no longer recognized as surface waters. (*San Gabriel V.C. Club v. Los Angeles, supra*, 182 Cal. at p. 398.)

### C. Archer.

*Archer, supra*, 19 Cal.2d 19, was an action brought by nonriparian landowners for damage caused to their property when surface water runoff channeled into a natural watercourse, from which it was discharged into a lagoon, exceeded the capacity of an outlet pipe from the lagoon to the sea, backed up, and caused flooding. Although the injury was to nonriparian landowners, the court applied the rules then governing the liability of upper riparian landowners to lower riparian owners and the decision has since been relied on as establishing immunity for any damage to downstream riparian \*346 property caused by discharge of surface water runoff into a natural watercourse.

The plaintiffs in *Archer* were owners of property near La Ballona Lagoon. La Ballona Creek, a natural watercourse, drained surface waters from an area of about 134 square miles into the lagoon, from which the waters emptied into the Pacific Ocean. As residential and commercial development occurred in the hills at the upper reaches of the creek, surface waters that had not followed a defined course were diverted into ditches and channels which emptied into the creek. Defendants, the City of Los Angeles and the Los Angeles County Flood Control District, straightened, widened and

deepened the creek. They constructed concrete storm drains to improve drainage. As a result of these changes less water was absorbed into the ground and the flow of waters from the creek into the lagoon was accelerated. Defendants did not improve the outlet from the lagoon to the ocean, however, and after a heavy rain the water in the lagoon backed up, flooding plaintiffs' property. They sued on a theory of inverse condemnation under former section 14 (now section 19) of article I of the California Constitution. Nonsuit was granted and plaintiffs appealed.

Under what was then this court's view of article I, section 14, the predecessor to present section 19, the Constitution did not create a cause of action. It did no more than waive the state's sovereign immunity if a cause of action would otherwise exist. Therefore, plaintiffs could recover only if a private landowner would be responsible for the damage suffered by plaintiffs. If a private party had the right to inflict the damage without incurring liability, the governmental defendants would not be liable. The court therefore analyzed the claim as it would one involving the rights of private landowners to drain surface waters from their property into a natural watercourse.

The court stated the applicable rules as:

1. A lower owner may not recover for injury to his land caused by improvements made in the stream for the purpose of draining or protecting the land above, even though the channel is inadequate to accommodate the increased flow of water resulting from the improvements. It is immaterial that the improvements increase the volume and velocity of the water, that the lower owner's burden of protecting his property is increased, or that his land is damaged.
2. Improvements must follow the natural drainage and may not divert water into a different channel, but straightening, widening, and deepening the channel does not constitute a diversion. \*347
3. There is no diversion if, for a reasonable purpose, diffused surface waters are gathered and discharged into a stream that is their natural means of drainage even if the watercourse is inadequate to accommodate the increased flow. An upper riparian landowner may gather surface waters for a reasonable purpose and discharge them into a natural watercourse without liability to a lower owner for damage caused by the increased flow.

Possibly because there was no claim that the defendants had acted unreasonably in their upstream improvements, however, the *Archer* holding omitted reference to an important qualification on the rights of the upper riparian owner implied in *San Gabriel V.C. Club v. Los Angeles*, *supra*, 182 Cal. 392, the case on which *Archer* relied for the rule: i.e., that the purpose for the improvements not only be reasonable, but the improvements must also be constructed in a manner that was no more burdensome to the lower riparian owner than required for that purpose. (182 Cal. at pp. 396, 399-401.)

This qualification was implied repeatedly in *San Gabriel V.C. Club v. Los Angeles*, *supra*, 182 Cal. 392, viz.: “No complaint is made of the manner in which the drains are constructed, or that they are not reasonable improvements for the district they are designed to protect, or that they are unnecessarily injurious to the plaintiff ....” (*Id.*, at pp. 399-400.) “[In the related situation of release of water from a mill] no right of action by a land owner below exists because of the increase of volume and consequent acceleration of flow, provided the use is a reasonable one and exercised in a reasonable manner.” (*Id.*, at p. 401.)

Certainly the *San Gabriel V.C. Club* decision did not hold that any surface water drainage into a natural watercourse was immunized in this state. It implied the contrary, and made it clear that this question was not before the court. “[D]ecisions in other states go further than it is necessary to go in this case, and hold that a riparian owner has no right to complain because the volume of water in the stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained.” (182 Cal. at pp. 401-402.)

Since there was no issue involving unreasonable conduct in draining surface waters into the stream bed in *Archer*, *supra*, 19 Cal.2d 19, that decision also fails to support a conclusion that immunity exists regardless of whether the upstream owner acted reasonably.

Moreover, the principal focus of both *Archer*, *supra*, 19 Cal.2d 19, and *San Gabriel V.C. Club v. Los Angeles*, *supra*, 182 Cal. 392, was on alterations of and improvements in the stream bed itself, and on waters that had \*348 lost their character as surface waters and had become stream waters before they reached the stream bed improvements (drains) constructed by the defendants. Neither case addressed liability for downstream damage caused by the discharge of surface waters into a natural watercourse. Therefore, we do

not assume, as do defendants, that the rule governing surface waters has no application here or that *Archer* established a rule granting immunity to an upstream riparian owner for damages caused as a result of discharges of surface water into a natural watercourse regardless of whether his conduct was reasonable with regard to downstream owners.

## IV

### Rights and Liabilities of Private Property Owners

Defendants are both property owners and governmental entities. Their potential liability as governmental entities for damage caused by discharge of surface waters into a natural watercourse is no longer limited, as it was at the time of *Archer*, *supra*, 19 Cal.2d 19, to the liability a private party would incur. Additionally, since *Archer* we have made it clear that private parties do not enjoy the broad immunity recognized at the time of *Archer* for discharge of surface waters across lower properties. (3a) Therefore, we shall first consider the holding of the Court of Appeal that a private property owner has no liability for damage to downstream riparian owners caused by his discharge of surface waters into a natural watercourse.

#### A. The California Civil Law Rule.

At common law the “common enemy doctrine” gave an owner of land over which surface water flowed from a higher elevation the right to obstruct the flow of that water, turning it back or diverting it onto the land of another owner, without liability for any damage that might result. (*Keys v. Romley*, *supra*, 64 Cal.2d 396, 400-401.)

By contrast, the civil law rule adopted for California more than a century ago (see *Ogburn v. Connor* (1873) 46 Cal. 346) gave the owner of the higher land an easement or servitude over a lower parcel which allowed him to discharge surface waters as they naturally flow from his higher land onto the lower land of the servient owner. (*Los Angeles C. Assn. v. Los Angeles* (1894) 103 Cal. 461, 466 [37 P. 375]; *Gray v. McWilliams* (1853) 98 Cal. 157, 165 [32 P. 976]; *Ogburn v. Connor*, *supra*, 46 Cal. 347, 352-353.) The lower owner had no right to obstruct that flow. In theory, the owner of the lower parcel accepted it with the burden of natural drainage. (*Keys v. Romley*, *supra*, 64 Cal.2d 396, 402.) Nonetheless, the owner of the higher \*349 land was not permitted to gather the surface waters “by artificial means and discharge them on to lower lying land in greater volume or in a different manner



than they would naturally be discharged.” (*San Gabriel V.C. Club v. Los Angeles, supra*, 182 Cal. 392, 398.)<sup>13</sup>

### B. The Natural Watercourse Rule.

The rule differed with respect to discharge of surface waters into a natural watercourse. As we noted in *Archer (supra*, 19 Cal.2d at p. 26), an upper riparian owner had the right, for a reasonable purpose, to discharge surface waters, including those whose volume was increased as a result of development which altered both the absorption of waters by the soil and the drainage pattern, into a natural watercourse. It was immaterial that the watercourse was inadequate to accommodate the increased flow and flooded downstream property. The riparian owner also had the right to improve the channel even if the accelerated flow caused downstream damage. (*Bauer v. County of Ventura (1955) 45 Cal.2d 276, 283 [289 P.2d 1].*)<sup>14</sup>

Thus, a riparian owner might be the ultimate “beneficiary” of the civil law rule subjecting lower parcels of property to the burden of surface water runoff from parcels at a higher elevation. The owner had the right, in turn, however, to discharge the surface waters into a natural watercourse without liability for damage that the addition of these waters to the stream might do to downstream riparian property. The downstream riparian owner is also deemed to take the property subject to an easement or servitude, one burdening the downstream property with accepting the flow of whatever water is thereby carried onto or through it in a natural watercourse. \*350

Moreover, a riparian landowner has had the right to “collect” or “gather” surface waters and discharge them at a location or locations other than those where natural runoff would enter the watercourse. The owner could straighten the stream or improve its bed with paving, drains, or conduits, and, to protect the land, construct dikes or bulkheads even if the result was to increase the volume and velocity of the waters to the injury of lower owners.

“[A] riparian owner has no right to complain because the volume of water in the stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained. Furthermore, this rule is adopted regardless of whether the so-called common-law rule concerning surface waters prevails in the particular jurisdiction or, as here, the civil-law rule, which forbids the gathering together of surface waters and

discharging them as a stream upon adjoining lands. If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added.” (*San Gabriel V.C. Club v. Los Angeles, supra*, 182 Cal. 392, 401-402.) “If a riparian owner cannot complain if surface waters be actually added by artificial drainage above to the volume of the stream, it must certainly be that he cannot complain of a drainage improvement which adds no water to the stream but merely protects the adjoining lands against the water already in it.” (*Id.*, at p. 402.)

The immunity of the upper riparian owner for downstream damage caused by his discharge of surface water runoff into a natural watercourse through improvements was initially for improvements undertaken to drain and/or protect the upper riparian owner's land. “[A]n improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden; and, further ... the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel.” (*San Gabriel V.C. Club v. Los Angeles, supra*, 182 Cal. 392, 406.)

We again recognized that this immunity was for damage to downstream land caused by improvements made in the stream for the purpose of draining or protecting the land above in *Archer. (Supra*, 19 Cal.2d 19, 24-25.) And, in *Archer*, since the drainage improvements in the creekbed were permissible, we declined to impose a requirement that the plan minimize downstream \*351 damage by provision for improving the outlet from the lagoon into which the watercourse drained. (*Id.*, at pp. 25-26.)

The California rules applicable to runoff of surface waters onto adjacent property and into natural watercourses have accommodated progression from a rural, agricultural society to gradual urbanization. Although immunity of upper landowners was limited to “natural” runoff of surface waters, it was broad enough to encompass surface water runoff from fields cultivated in a natural way, even though cultivation altered the runoff from that which occurred from untilled fields. (*Coombs v. Reynolds (1919) 43 Cal.App. 656, 660 [185*

P. 877]. See also *Switzer v. Yunt* (1935) 5 Cal.App.2d 71, 78 [41 P.2d 974.] But immunity did not extend to city lots where “changes and alterations in the surface were essential to the enjoyment of such lots ....” (*Los Angeles C. Assn. v. Los Angeles, supra*, 103 Cal. 461, 467.)

(4) As suggested above, the natural watercourse rule has two aspects. The first permits the riparian landowner to gather surface waters and discharge them into the watercourse at a location other than that at which natural drainage would occur. The second permits the owner to make improvements in the bed of the stream to improve drainage and to protect the land from erosion by constructing dikes or embankments even though the result may be increased flow and velocity which might damage the property of lower riparian owners. Both aspects of the rule have as their purpose facilitating the development of upstream properties. “Not to permit an upper land owner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy.” (*San Gabriel V.C. Club v. Los Angeles, supra*, 182 Cal. 392, 401; see also, *Archer, supra*, 19 Cal.2d at p. 27.)

### C. The Contemporary Rule of Reasonableness.

(5),( 3b) The modern rule governing landowner liability for surface water runoff and drainage is no longer simply a rule of property law dependent upon the existence of rights, servitudes, or easements. The civil law rule was modified more than a quarter of a century ago by the landmark decision in *Keys v. Romley, supra*, 64 Cal.2d 396. There we recognized the tendency of the civil law rule limiting immunity for damages caused by surface water runoff onto an adjacent property to inhibit development of land, since any change in the upper property would affect the natural runoff. (*Id.*, at p. 402.) Today a landowner's conduct in using or altering the property in a manner which affects the discharge of surface waters onto adjacent property is subject to a test of reasonableness. \*352

“It is ... incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.

“If the actions of both the upper and lower landowners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule.” (*Keys v. Romley, supra*, 64 Cal.2d 396, 409.)

At least with respect to surface water runoff onto adjacent lands, the California rule is that stated in *Keys v. Romley, supra*, 64 Cal.2d 396, 409: “No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.”

It has been suggested that with the adoption of the reasonable use test for surface waters “there is no longer any valid reason for distinguishing between surface waters and those that flow through a natural watercourse with respect to the rights and obligations of the respective property owners.” (5 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 14:24, p. 357; see also *Hall v. Wood* (Miss. 1983) 443 So.2d 834, 838 [“As recently as 1978 this Court intimated that there might be a difference in principle between the two types of cases. [Citation.] Upon reflection, that difference escapes us.”].)

(6a) Defendants argue that the natural watercourse rule does not include a reasonableness element and should remain the law. They contend that the rationale on which the rule is based remains valid, and that application of the *Keys v. Romley* rule of reasonableness would create a virtual strict liability for public entities owning streets, storm drains, or other water-impervious improvements. Public entities, they claim, would bear extraordinary liability solely because storm waters falling on their thoroughfares ultimately reach a natural watercourse. The natural watercourse rule, they argue, properly permits the natural and intended usage of the creeks and waterways as a means of discharging the waters which would normally be conveyed therein.

The argument both misstates the issue and exaggerates the potential liability. Draining surface waters from impermeable surfaces and channeling the flow into a waterway in culverts and storm drains is not the manner in which surface water would naturally be discharged into a waterway. Both \*353 the volume and the velocity of the discharge are abnormal, and it is the damage which may be caused by that unnatural method of drainage that is in issue. Our past decisions do not hold that immunity exists under the natural watercourse rule or its analogs for conduct which alters natural drainage

and thereby creates a danger to downstream property owners if that danger is unreasonable in light of the purpose of the upstream action, the manner in which it is carried out, and the alternatives that might avoid or mitigate the potential damage.

Nor is the reasonable use rule one of strict liability. It requires consideration of all of the relevant circumstances, and anticipates that both the upstream riparian owner and the downstream owners will act reasonably. It does not, however, give defendants what they ask—an unqualified right to discharge surface water runoff in a manner that will cause downstream damage, and even destroy downstream property, without attempting reasonable measures to prevent or minimize downstream damage.<sup>15</sup>

Defendants offer no justification for a rule that would distinguish between the discharge of surface waters directly onto another owner's property and the discharge into a natural waterway that ultimately has the same injurious effect. They seek instead absolute immunity for the discharge of surface water runoff into a natural watercourse whether or not they have reduced or eliminated the capacity of the ground to absorb normal rainfall, channeled the runoff into a single destructive outlet, or otherwise altered the volume and velocity of the waters discharged into the watercourse, and regardless of whether the watercourse is capable of carrying the increased flow of waters. In short, they seek to avoid the conclusion of *Keys v. Romley* (*supra*, 64 Cal.2d 396) that both upper and lower landowners must act reasonably with respect to one another. The upper riparian owner, they argue, has a right to engage in unreasonable conduct without regard to the impact of the action on downstream property.

Defendants, who assume that *Keys v. Romley*, *supra*, 64 Cal.2d 396, does not apply to discharge of surface water into a natural watercourse or to improvements in a watercourse, offer no justification, other than the fact that they might incur liability, for recognizing a distinction between the duty of a riparian property owner to avoid injury to downstream property owners, and the duty of an uphill owner to downhill owners. We do not share the \*354 assumption that either a private or public property owner may disregard the impact of its conduct on other properties whether those properties are downstream or downslope.

This court has restated the natural watercourse rule in several cases since *Keys v. Romley*, each of which involved an action against a municipal corporation or other governmental entity. In those cases, however, we have not considered whether

that rule, as applied in this state, does include an element of reasonableness, or whether the rule of *Keys v. Romley*, *supra*, 64 Cal.2d 396, which expressly holds that the upper owner's conduct be reasonable, applies to the manner in which a riparian owner discharges surface waters into a natural watercourse.<sup>16</sup>

Although this court has not considered the latter question, the Court of Appeal has done so in a series of decisions in which the court either assumed that the rule of reasonableness is applicable or expressly held it to be applicable to discharges into natural watercourses or flood control improvements in a watercourse. In *Ektelon v. City of San Diego* (1988) 200 Cal.App.3d 804 [246 Cal.Rptr. 483], nonsuit for a private developer was reversed. The Court of Appeal held that *Keys v. Romley*, *supra*, 64 Cal.2d 396, created a “broad rule of reasonableness to be applied to all factual situations, ...” (200 Cal.App.3d at p. 808.) Therefore, ordinary negligence principles governed the manner in which flood control structures were constructed because “[a]n upstream landowner has no absolute right to protect his land from floodwaters by constructing structures which increase the downstream flow of water into its natural watercourse, but is instead governed by the ordinary principles of negligence.” (*Id.*, at p. 810.)

In *Martinson v. Hughey* (1988) 199 Cal.App.3d 318 [244 Cal.Rptr. 795], the court assumed that the rule of reasonableness applied to the discharge of \*355 irrigation waters and surface waters into a natural watercourse. There a lower owner had blocked a natural watercourse with debris which backed water up onto the upper land. Applying the rule to irrigation waters, the court concluded: “The rule we deduce ... is that the upper owner has the right to discharge reasonable and noninjurious amounts of irrigation water through natural areas of flow onto the lower owner's property. The lower owner has a co-equal burden to receive reasonable and noninjurious amounts of irrigation water through natural flowage channels.” (199 Cal.App.3d 318, 328.)

In *Weaver v. Bishop* (1988) 206 Cal.App.3d 1351 [254 Cal.Rptr. 425], the question was liability for damages for improvements in a natural watercourse constructed for the purpose of protecting the defendants' property. The court held that the reasonable use doctrine articulated in *Keys v. Romley*, *supra*, 64 Cal.2d 396, 408-409, was properly applied in an action predicated on damage caused by the riparian owner's installation of riprap (boulders) along the stream bank to protect the land from erosion. The riprap altered the

flow of the stream sufficiently that erosion occurred on the opposite bank, the owners of which sued. Given an instruction that liability depended on the reasonableness of each party's conduct, the jury found by special verdict that defendants' conduct was reasonable, while that of plaintiffs was not.

The Court of Appeal reasoned in *Weaver v. Bishop* that neither the rule which gave a riparian owner absolute immunity for alteration in stream flow to protect his property, nor the "common enemy doctrine" which permits an owner to protect himself against floodwaters, even by turning them onto another's land, should apply. "The common enemy doctrine is one form of the 'right to inflict damage,' which was traditionally referred to under the [rubric] 'damnum absque injuria' (harm without legal injury). This notion, peculiar to water law, rested on the 'generally perceived reasonableness' of actions taken to protect one's property and on a policy of encouraging the preservation of land resources. [Citation.] However the nearly unanimous trend has been away from per se rules based on categorical judgments of 'generally perceived reasonableness,' and toward fact-based determinations of reasonableness in the particular circumstances of each case." (*Weaver v. Bishop, supra, 206 Cal.App.3d 1351, 1357*, fn. omitted.)

"[A]s *Keys* acknowledges and illustrates, the general trend in water-damage cases is to replace the rigidities of property law with the more flexible, conduct-oriented principles of tort. (See 64 Cal.2d at p. 408.) (7)(See fn. 17.) Under the latter as expressed in the Second Restatement of Torts, defendants' liability would depend on a balancing of reasonableness, \*356 either by analogy to the rules concerning interference with water use, or under the rules of nuisance and trespass." (206 Cal.App.3d at p. 1358.)<sup>17</sup>

(6b) The Court of Appeal in this case reasoned that important policy reasons had initially supported the immunity doctrine and saw no compelling reason to reject it, noting that it was bound in any case to follow the precedent established in *Archer*. The court observed that the *Archer* rule had been followed in *Deckert v. County of Riverside* (1981) 115 Cal.App.3d 885, 895, 896 [171 Cal.Rptr. 865], and elected to join the *Deckert* court, rather than the courts which had concluded that the rule of absolute immunity had been replaced by a rule of reasonableness.

The *Deckert* opinion followed what that court believed to be the rule established in *Archer* and our subsequent decision in *Bauer v. County of Ventura, supra, 45 Cal.2d 276*, without

mention of *Keys v. Romley, supra, 64 Cal.2d 396*, however. It does not support a conclusion that the *Archer* rule does not include a requirement of reasonableness or that, if the *Archer* rule does not, it survived *Keys v. Romley*.

By contrast, *Weaver v. Bishop, supra, 206 Cal.App. 3d 1351, Ektelon v. City of San Diego, supra, 200 Cal.App.3d 804*, and *Martinson v. Hughey, supra, 199 Cal.App.3d 318*, and, of course, *Keys v. Romley, supra, 64 Cal.2d 396*, reflect the nationwide trend toward merger of the rules governing diffused surface water and those governing watercourses. (See Tarlock, Law of Water Rights and Resources (1993) § 305[1], pp. 3-14 to 3-15.)

We need not decide whether the natural watercourse rule applicable at the time of *Archer, supra, 19 Cal.2d 19*, included an element of reasonableness \*357 because we agree with those courts which have held that *Keys v. Romley* states a rule that is applicable to all conduct by landowners in their disposition of surface water runoff whether the waters are discharged onto the land of an adjoining owner or into a natural watercourse, as well as to the conduct of upper and lower riparian owners who construct improvements in the creek itself.

Although *Keys v. Romley* was decided in the context of damage caused to adjacent land by the discharge of surface waters, the reasoning of the court has broader applicability. The decision rests on the broad principle that a landowner may not act "arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability. [¶] It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to [other] property ...." (*Keys v. Romley, supra, 64 Cal.2d at p. 409*.) While the court spoke in terms of the responsibilities of adjacent landowners with respect to surface waters, we did not intend thereby to imply that the obligation to take reasonable care was not one imposed also on upper and lower riparian owners. There is no exception from the rule of reasonableness for riparians. No logic would support such a distinction and we decline to recognize one.

Defendants' argument that *Keys v. Romley* is not and should not be applicable to discharge of surface waters into a natural watercourse overlooks the authority on which *Keys v. Romley* relied for the rule of reasonableness that it enunciated. That rule is derived from *Armstrong v. Francis Corp.* (1956) 20 N.J. 320 [120 A.2d 4, 59 A.L.R.2d 413]. (*Keys v.*

*Romley*, *supra*, 64 Cal.2d at p. 410.) *Armstrong* is a natural watercourse case.

The facts which gave rise to the New Jersey Supreme Court's decision to abandon the common enemy/immunity rule in *Armstrong v. Francis Corp.*, *supra*, 20 N.J. 320 [120 A.2d 4], are not unlike the facts in the case before this court. A housing developer stripped his tract, covered a stream that was a natural watercourse, and built a drainage system which conveyed not only the surface water runoff, but also percolating waters under the surface, into a pipe which discharged these waters into the stream above plaintiffs' property. As a result, the increased volume of water and its accelerated speed tore into the banks of the stream and, at the time of the lawsuit had carried away 10 feet of the plaintiff's creekside property with no end to the erosion in sight. Adopting the rule of reasonableness for that state, the New Jersey Supreme Court concluded: "Social progress and the common wellbeing are in actuality better served by a just and right balancing of the competing interests according to the general principles of fairness and common sense which attend the application of the rule of reason." (120 A.2d at p. 10.) \*358

New Jersey is not alone in abandoning the common enemy/immunity doctrine. A majority of jurisdictions now apply a rule of reasonableness to the discharge of surface waters into a natural watercourse when the discharge will overtax the capacity of the watercourse or drainage channel and cause damage to downstream property. (5 Waters and Water Rights, *supra*, § 59.02(b)(1), p. 503; see, e.g., *Heins Implement Co. v. Hwy. & Transp. Com'n* (Mo. 1993) 859 S.W.2d 681; *Hansen v. Gary Naugle Const. Co.* (Mo. 1990) 801 S.W.2d 71; *Johnson v. NM Farms Bartlett, Inc.* (1987) 226 Neb. 680 [414 N.W.2d 256]; *Martin v. Weckerly* (N.D. 1985) 364 N.W.2d 93; *Peterson v. Town of Oxford* (1983) 189 Conn. 740 [459 A.2d 100]; *County of Clark v. Powers* (1980) 96 Nev. 497 [611 P.2d 1072].)

The suggestion that the court would find the reasoning of *Armstrong v. Francis Corp.*, *supra*, 120 A.2d 4, persuasive, but only insofar as surface water runoff onto adjacent property is concerned and not in the context in which that case was decided, is further undermined by recognition that other cases on which the court relied in *Keys v. Romley*, *supra*, 64 Cal.2d 396, also stated rules of reasonableness applicable to both runoff onto adjacent property and into a natural watercourse. In *Bassett v. Salisbury Manufacturing Company* (1862) 43 N.H. 569, 576, the court discussed both types of drainage and

stated: "[S]o far as a similarity of benefits and injuries exists, there should be a similarity in the rules of law applied." "The rights of each land-owner being similar, and his enjoyment dependant [*sic*] upon the action of the other land-owners, these rights must be valueless unless exercised with reference to each other, and are correlative. The maxim, '*Sic utere*,' &c., [*Sic utere tuo ut alienum non laedas*-use your own property in such a manner as not to injure that of another] therefore applies, and, as in many other cases, restricts each to a reasonable exercise of his own right, a reasonable use of his own property, in view of the similar rights of others. Instances of its similar application in cases of water-courses ... are too numerous and familiar to need more special mention. As in these cases of the water-course, so in the drainage, a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others." (*Id.*, at p. 577.)

In *Swett v. Cutts* (1870) 50 N.H. 439, 446, also relied on by the court in *Keys v. Romley* (*supra*, 64 Cal.2d at p. 404), the same theme of reasonable conduct regardless of the nature of the water right being exercised was again expressed: "The doctrine which we maintain adapts itself to the ever varying circumstances of each particular case,-from that which makes a near approach to a natural watercourse, down by imperceptible gradations to the case of mere percolation, giving to each land owner, while in the reasonable use and improvement of his land, the right to make reasonable modifications \*359 of the flow of such water in and upon his land. [¶] In determining this question all the circumstances of the case would of course be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen." (50 N.H. at p. 446.)

Most recently, the Missouri Supreme Court has brought all types of water within the rule of reasonableness. In *Heins Implement Co. v. Hwy. & Transp. Com'n*, *supra*, 859 S.W.2d 681, 691, the court observed: "The standard we sanction today is in harmony with the most basic tenets of our law. 'Reasonableness is the vital principle of the common law.' [Citation.] Reasonable use concepts already govern the rights of users of our watercourses, subterranean streams, and subterranean percolating waters. [Citations.] To some extent, they have also applied to upper land owners through the modified common enemy doctrine. Their extension to the management of all diffuse surface waters finally 'bring[s] into

one classification all waters over the use of which controversy may arise.' ”

Defendants have offered no persuasive reason to limit the requirement that landowners act reasonably with regard to one another to their treatment of surface water discharge onto adjacent property while permitting unreasonable conduct when the waters are discharged into a natural watercourse. Indeed, defendants appear to overlook the impact on their own interests of a rule which would afford them no recourse if a private developer discharged surface water runoff into a natural watercourse adjoining publicly owned property in a manner which undercut and washed away a portion of that property. We agree with plaintiffs, therefore, that the rule of *Keys v. Romley* applies to this dispute.

(8) Under that rule: “The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. (*Armstrong v. Francis Corp.* (1956) *supra*, 20 N.J. 320.) It is properly a consideration in land development problems whether the utility of the possessor’s use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. [Citation.] The gravity of harm is its seriousness from an objective viewpoint, while the utility of conduct is meritoriousness from the same viewpoint. (*Rest., Torts*, § 826.) If the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and \*360 without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule.” (64 Cal.2d at p. 410.)

As we have shown above, however, the “well-settled civil law rule” dictates a different result for riparian owners than that applicable to upland owners. Under the *Keys v. Romley* rule, if both parties act reasonably with respect to draining surface waters onto adjacent property the upper owner will be liable for damage caused by the alteration of the natural flow of the water. The result will differ in disputes between riparian owners, each of whom acts reasonably. The civil law rule with respect to natural watercourses, unlike that applicable to draining surface waters onto adjacent property, immunizes the

upper riparian owner for damage caused by the alteration of the natural discharge of surface water into a watercourse and by improvements in the stream bed. Therefore, if the upper owner acts reasonably, or if the lower owner has not acted reasonably to protect the property, the lower riparian owner must continue to accept the burden of damage caused by the stream water.

(9) As we noted earlier, however, the reasonableness of a landowner’s action in discharging surface water runoff into a natural watercourse or in altering the watercourse itself cannot be determined in isolation. An owner in the lower reaches of a natural watercourse whose conduct has a relatively minor impact on the stream flow in comparison with the combined effect of actions by owners in the upper reaches of the watercourse may not be held liable for any damage caused by the stream flow beyond the proportion attributable to such conduct. If the rule were otherwise, owners at the lowest reaches of a watercourse could preclude development of upstream property by imposing on a single upstream owner the cost of all damage caused by the addition of surface water runoff if that addition combined with the existing stream flow damaged the lowest properties. The purpose of both the civil law rule creating immunity for damage caused by surface water runoff onto adjacent property and the natural watercourse rule which imposed the burden of damage caused by upstream development on the downstream owner was to ensure that development of property would not be foreclosed by imposition of liability for damage caused by changes in the treatment of surface water occasioned by that development. *Keys v. Romley* and the application of the rule of reasonableness to natural watercourses further that purpose. The rules applicable to surface water runoff onto adjacent property or into a natural watercourse have been modified only by limiting the immunity created by the civil and common law rules to conduct that is reasonable. \*361

(3c) The trial court and the Court of Appeal thus erred in concluding that the natural watercourse rule immunized defendants from tort liability as landowners for damage caused by their discharge of surface water runoff into Reliez Creek regardless of the reasonableness of their conduct. We shall nonetheless affirm the judgment of the Court of Appeal. Even were we to assume that the evidence would support a finding that increased surface water runoff or altered discharge of surface water runoff caused by improvements on any defendant’s property was a substantial cause of the damage to plaintiffs’ properties, plaintiffs have not established that defendants acted unreasonably in the construction of

improvements or alteration of the method of discharge of the runoff; nor have plaintiffs established that they acted reasonably to protect their properties from stream-caused damage.

## V

### Inverse Condemnation

The Court of Appeal held that substantial evidence supported the trial court's conclusion that Reliez Creek was not a public improvement because respondents had not exercised control over the creek, had not erected structures other than the Sizeler outfall and sheet pile structure in it, and had not accepted the dedicated storm drainage easements. Therefore, the court held, notwithstanding the increased runoff into Reliez Creek caused by defendants' streets, roads, and other public works, the natural watercourse rule also immunized respondents from liability in inverse condemnation for the damage to plaintiffs' property. It did so because at common law a governmental entity, like a private party, had a right to collect surface waters on its land and discharge them into a natural watercourse.

Plaintiffs dispute both the conclusion that defendants could not be liable in inverse condemnation even if defendants' use of Reliez Creek to drain their roads and other public works was unreasonable, and the conclusion that defendants' actions with respect to the creek did not cause it to become a public work. Moreover, they argue, the question of public use is one to be decided as a matter of law by the appellate court, and the Court of Appeal erred in applying a substantial evidence standard of review. Finally, they argue that the Court of Appeal erred in holding that there can be no recovery against a public entity whose conduct contributed to the damage unless the plaintiff establishes the proportionate share of damage caused by that entity.

We agree with the Court of Appeal that plaintiffs' evidence did not establish that Reliez Creek had become a public work. We also agree that none of the defendants is liable in inverse condemnation for the damage to \*362 plaintiffs' properties. (10a) We reach that conclusion for reasons which differ from those on which the Court of Appeal relied, however, and hold that a governmental entity may, if it acts unreasonably, be liable in inverse condemnation for damage caused by its discharge of surface water runoff from property which it has improved into a natural watercourse. Again, however, plaintiffs have not established that the damage to

their properties was the result of unreasonable conduct by any of the defendants, individually or collectively.<sup>18</sup>

### A. Conditional Privilege.

(11) Article I, section 19 of the California Constitution permits private property to be “taken or damaged for public use only when just compensation ... has first been paid to, or into court for, the owner.” When there is incidental damage to private property caused by governmental action, but the governmental entity has not reimbursed the owner, a suit in “inverse condemnation” may be brought to recover monetary damages for any “special injury,” i.e., one not shared in common by the general public. When adopted as section 14 of article I of the 1879 Constitution this provision was construed as providing a broader right of recovery against a governmental entity for damage to private property than that available in an action against a private party. It was not necessary to prove negligence or the commission of another tort by the government. (*Reardon v. City & County of San Francisco* (1885) 66 Cal. 492, 505 [6 P. 317].)

In the arcane world of water law, however, the theory prevailed that if a private party had the right to inflict the damage, the government could assert the same immunity. Thus, notwithstanding article I, section 14 (now section 19), there could be no recovery against a governmental agency for damage caused by draining surface water onto adjacent property or into a natural watercourse in circumstances in which a private property owner had the right to do so. If the injury was *damnum absque injuria* as between private parties, \*363 it was so when the government caused it. (*San Gabriel V.C. Club v. Los Angeles, supra*, 182 Cal. 392, 406.)

The injury was also considered *damnum absque injuria* if the governmental entity was acting in the proper exercise of its police powers, as when it acted to prevent future flood damage. “Where the police power is legitimately exercised, uncompensated submission is exacted of the property owner if his property be either damaged, taken, or destroyed. In the exercise of the power of eminent domain, compensated obedience for the taking or damaging of his property is the owner's constitutional right. [¶] ... But while it is unquestionably true that the addition of the word 'damaged' to our constitutional law governing the exercise of the right of eminent domain gives in many instances a right to compensation which did not formerly exist, it did not, touching the exercise of the police power, give a right of action for damages which theretofore were *damnum absque*

*injuria.*” (*Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 640-641 [163 P. 1024].)

This understanding of former section 14 of article I of our Constitution prevailed at the time *Archer* reached this court. There the court invoked the *damnum absque injuria* rule to relieve defendants from liability for the flooding caused by their alterations in the upstream drainage pattern and improvements in the watercourse. The court did so on the ground that a lower owner had no right to recover for damage caused by improvements constructed in a natural watercourse for the purpose of draining and protecting upper lands, and on the ground that defendants' conduct was a proper exercise of the police power. The court unnecessarily and inexplicably also held that former section 14 of article I: “[P]ermits an action against the state, which cannot be sued without its consent. It is designed, not to create new causes of action, but to give a remedy for a cause of action that would otherwise exist.” (*Archer, supra*, 19 Cal.2d 19, 24.)

*Reardon v. City & County of San Francisco, supra*, 66 Cal. 492, was not mentioned by the *Archer* court, which, based on its novel construction of former section 14 of article I, then held that plaintiffs could not recover because the governmental defendants could not be found negligent for doing what they had a right to do even if the damage they caused could have been avoided. (*Archer, supra*, 19 Cal.2d at pp. 25-26.) Thus, under *Archer*, former section 14 of article I mandated compensation only if plaintiffs could have made out a case in negligence against a private owner. That they could not do, since defendants were riparian owners who had a right to drain surface waters into a natural watercourse even if the additional waters exceeded the capacity of the outlet.

**\*364**

The *Reardon* construction of former section 14 of article I was given new life by this court in *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250 [42 Cal.Rptr. 89, 398 P.2d 129] (*Albers*). That case did not invoke any water law principles, however, and for that reason the court concluded that it was not necessary in that case to choose between the extremes of the *Reardon* rule of liability and the *Archer* rule of nonliability. (*Id.*, at p. 261.) Nonetheless, the court did clarify that, “with the exceptions stated in *Gray [v. Reclamation District No. 1500, supra]*, 174 Cal. 622], and *Archer, supra*,<sup>19</sup> any actual physical injury to real property proximately caused by the [public] improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not.” (*Id.*, at pp.

263-264.) Not to allow such recovery, the court recognized, would compel “ ‘the owner of the damaged property ... [to] contribute more than his proper share to the public undertaking.’ ” (*Id.*, at p. 263.)<sup>20</sup>

(10b) The Court of Appeal, and defendants, conclude that *Albers, supra*, 62 Cal.2d 250, and cases subsequently decided in which the *Archer* exception to inverse condemnation liability has been noted, establish the continued viability of the rule that a public agency incurs no liability for damage caused by discharge of surface waters into a natural watercourse regardless of the reasonableness of the manner in which the agency acts or the damage it inflicts on lower riparian properties. That assumption is unwarranted.

The general rule of *Albers* and the policy underlying former section 14 of article I were reaffirmed in *Holtz v. Superior Court, supra*, 3 Cal.3d 296, 303: “As the *Albers* opinion carefully made clear, its general rule of compensability did not derive from statutory or common law tort doctrine, but \*365 instead rested on the construction, ‘as a matter of interpretation and policy’ (62 Cal.2d at p. 262), of our constitutional provision. The relevant ‘policy’ basis of article I, section 14, was succinctly defined in *Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 642 ...: ‘The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.’ In other words, the underlying purpose of our constitutional provision in inverse-as well as ordinary-condemnation is ‘to distribute throughout the community the loss inflicted upon the individual by the making of public improvements’ [citation]: ‘to socialize the burden ... -to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society’ [citation].”

Like *Albers*, *Holtz* did not involve the natural watercourse rule. Therefore, while we noted the recognition in past cases of an exception for exercise of the police power and the *Archer* exception for activities which were *damnum absque injuria* at common law (*Holtz v. Superior Court, supra*, 3 Cal.3d at pp. 305-306), we had no occasion in *Holtz* to consider the application of former section 14 of article I of the California Constitution beyond the facts of the case before us which involved excavations that withdraw lateral support from adjacent property. (3 Cal.3d 296, 304, 307-308.) However, we expressly rejected the argument that a public agency could not be liable if it had a “right” to inflict such damage. That interpretation of the ‘right’ referred to in the



*Archer* exception ... would so expand the exception as to consume the general *Albers* rule.” (*Id.*, at p. 306.) *Holtz*, therefore, does not stand for the proposition that the “common law ‘right to inflict damage,’ emanating from the complex and unique province of water law,” (*ibid.*) continues to protect public agencies.

If anything, *Holtz v. Superior Court*, *supra*, 3 Cal.3d 296, called into question the broad proposition for which defendants argue. “In some ways the language of the ‘right to inflict damage’ projects a misleading concept, because the essential common characteristic of this category of cases is not that they all involve the infliction of injury on others, but rather that they all involve injury resulting from the landowner’s efforts to protect his own property from damage.” (3 Cal.3d at pp. 306-307.) This, of course, is not a case in which defendants’ activities in discharging surface water runoff into Reliez Creek in the manner alleged resulted simply from efforts to protect their own properties from damage. The activities to which the court referred in *Holtz* were in-stream improvements undertaken by riparian owners to protect their land against the stream. (*Id.*, at p. 307, fn. 11.)

More recently we acknowledged the *Archer* exception in *Belair v. Riverside County Flood Control Dist.*, *supra*, 47 Cal.3d 550. There, significantly, \*366 the activity for which plaintiffs sought to hold the public agencies liable in inverse condemnation was the construction of flood control levees on the banks of natural watercourses. The impact of three of the levees was to undermine a fourth, causing that levee to give way, flooding the properties of plaintiffs, not all of whom were riparian owners apparently. Discussing *Albers* and *Holtz* we emphasized again that the “ ‘doctrine of the common law ’right to inflict damage,’ emanating from the complex and unique province of water law, has been employed in only a few restricted situations, generally for the purpose of permitting a landowner to take reasonable action to protect his own property from external hazards such as floodwaters.’ ” (*Belair v. Riverside County Flood Control Dist.*, *supra*, 47 Cal.3d 550, 563-564, italics in original.) We held, moreover, that even such in-stream improvements for flood control purposes should not be cloaked with the same immunity as that which a private owner could claim. If the public agency acted unreasonably in the design, construction, or maintenance of the improvements, it would be liable in inverse condemnation for damage resulting from the failure of the project. (*Id.*, at p. 565.)

*Belair* thus signalled not the continuation of the *Archer* exception, but its demise. It survived only vestigially in the limitation of inverse condemnation liability for public flood control projects in natural watercourses to damage resulting from a public entity’s *unreasonable* conduct. Thereafter, a public agency that acted unreasonably in regard to its use or alteration of a natural watercourse might be liable in inverse condemnation for downstream damage.

Because *Belair* involved only flood control projects, however, and we had acknowledged in *Holtz v. Superior Court*, *supra*, 3 Cal.3d 296, that exceptions to inverse condemnation liability have been recognized for “privileged” activities, some lower courts have continued to apply the *Archer* exception to inverse condemnation liability in other cases in which a public agency invoked the natural watercourse rule.

While we did not decide in *Holtz v. Superior Court*, *supra*, 3 Cal.3d 296, 307, whether the natural watercourse rule was such a privilege, we did note that the *Archer* exception was not necessarily an absolute privilege. We now hold that the privilege to utilize a natural watercourse for drainage of surface waters from improved public property and to make improvements in or alterations to a natural watercourse for the purpose of improving such drainage is a conditional privilege, not an absolute privilege. If an absolute privilege existed, downstream owners could be forced to bear a disproportionate share of the burden of improvements undertaken for the benefit of the public at large. A public agency may not impose on other riparian owners \*367 the burden of avoidable downstream damage if alternative or mitigating measures are available and the agency acts unreasonably in failing to utilize them. The privilege is conditional, however, in recognition that riparian property is subject to the natural watercourse rule as modified by the rule of reasonableness.

The Court of Appeal erred, therefore, in holding that a public entity may not be found liable in inverse condemnation for damage to private property caused by the manner in which surface water runoff from its property is discharged into a natural watercourse. Today neither a private owner nor a public entity has the right to act unreasonably with respect to other property owners. Neither may disregard the interests of downstream property owners, and a public entity may no longer claim immunity in tort or inverse condemnation actions.

This is not to say that public entities incur absolute liability for any damage caused by the runoff of surface water from improvements on its property into a natural watercourse or from public improvements constructed in or on a watercourse. Again, as we held in *Belair v. Riverside County Flood Control Dist.*, *supra*, 47 Cal.3d 550, with respect to flood control projects, the public agency is liable only if its conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff's property. The rule of strict liability generally followed in inverse condemnation (see *Albers*, *supra*, 62 Cal.2d 250, 263-264) is not applicable in this context.

(12) Because a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, [article I, section 19 of the California Constitution](#) mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

#### B. Reasonable Conduct Standards.

The reasonableness of the public agency's conduct must be determined on the facts of each case, taking into consideration the public benefit and the private damages in each instance. (*Keys v. Romley*, *supra*, 64 Cal.2d at pp. 409-410.) We note initially that runoff which would occur regardless of improvements on publicly owned property is not a basis for liability unless by collecting and discharging that runoff in an unreasonable manner, the improvement causes downstream property damage. Inverse condemnation liability ultimately rests on the notion that the private individual should not be required to bear a disproportionate share of the costs of a public improvement. Moreover, whether compensation must be paid for damages caused by \*368 alterations in the flow of a natural watercourse involves a balancing of interests. When the agency has acted unreasonably, compensation "constitutes no more than a reimbursement to the damaged property owners of their contribution of more than their 'proper share [to] the public undertaking.'" (*Belair v. Riverside County Flood Control Dist.*, *supra*, 47 Cal.3d 550, 566.)

The factors which the court identified as important in imposing liability in *Albers*, *supra*, 62 Cal.2d 250, 263, are also important here: "First, the damage to th[e] property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real

property is remote. Third, the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged. Fifth, ... 'the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' "

As in *Belair v. Riverside County Flood Control Dist.*, *supra*, 47 Cal.3d 550, 565-566, however, inverse condemnation liability for damage caused by drainage of surface waters into or alteration of a natural watercourse is limited to situations in which the public entity's unreasonable conduct constitutes a substantial cause of the damage suffered by property owners. As with tort liability discussed above, only damage caused by the improvement must be compensated. Therefore, if the cause of the damage is claimed to be addition of surface water runoff from public improvements such as roads to the stream flow, a public agency is liable only for the proportionate amount of damage caused by its actions. And, because strict liability would discourage construction of needed public improvements which affect surface water drainage, liability exists only if the agency acts unreasonably, with reasonableness determined by balancing the public benefit and private damage in each case.

*Keys v. Romley*, *supra*, 64 Cal.2d 396, identified the basic requirements of reasonable conduct in this context. After that decision standards for balancing the interests of riparian landowners and assessing reasonableness in inverse condemnation actions have been proposed by a leading commentator, Professor Arvo Van Alstyne. (Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431.) Those standards, which amici curiae urge the court to adopt, require consideration of several factors:

(1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) \*369 the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

Reasonableness in this context also considers the historic responsibility of riparian owners to protect their property from damage caused by the stream flow and to anticipate upstream development that may increase that flow. Keeping in mind the purpose of the constitutional right to compensation for damage caused by public works and improvements—that property owners contribute no more than their proper share to the public undertaking—plaintiff must demonstrate that the efforts of the public entity to prevent downstream damage were not reasonable in light of the potential for damage posed by the entity's conduct, the cost to the public entity of reasonable measures to avoid downstream damage, and the availability of and the cost to the downstream owner of means of protecting that property from damage.

## VI

### Liability of Defendants

#### A. Status of Reliez Creek as Public Work.

(13a) Plaintiffs contend that the evidence they presented established that Reliez Creek has itself become a public work and, for that reason, City is liable in inverse condemnation for any damage it inflicts on their property. They argue that the Court of Appeal erred both in analyzing this claim under a substantial evidence standard of review, failing to recognize that public use is a question of law, and in concluding that City had not exercised control over the creek.

(14) When trial is to the court, [Code of Civil Procedure section 631.8](#) permits the court to grant a motion for judgment made by the defendant after plaintiff has completed presenting evidence. Since the trial court must weigh the evidence and may draw reasonable inferences from that evidence, such rulings are normally reviewed under the substantial evidence standard, with the evidence viewed most favorably to the prevailing party. However, if the facts are undisputed the reviewing court may make its own conclusions of law based on those facts. It is not bound by the trial court's interpretation. (*Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308 [282 Cal.Rptr. 354].) Public use is a question of law, however, and, when the factual issues \*370 on which that question turns have been resolved, must be decided by the court.

The Court of Appeal stated the standard as simply one according deference to the findings of the trial court, which are to be upheld if supported by substantial evidence. (13b) Nonetheless, we agree with the conclusion that plaintiffs

did not establish that defendants, or any of them, exercised control over Reliez Creek and thereby transformed it into a public work or improvement. The evidence did not establish either an express or an implied acceptance of the drainage easements.<sup>21</sup> The evidence that on occasion City assisted residents by removing fallen trees from the creekbed, on request of the owners and with permission to cross their property in doing so, would not support an inference that City was exercising control over the watercourse. The contrary is the more reasonable inference. Repair of the Sizeler outfall was not an exercise of authority over the creekbed itself except insofar as City held an easement for the outfall.

The evidence did not establish an exercise of control by any of the remaining defendants. County and District assisted the private riparian owners in obtaining federal financing and in design of the sheet pile structure, but those owners acknowledged responsibility for the structure. The public entities' sponsorship was required to obtain financing, but no intent to exercise control or to incorporate the creek into a unified public drainage system is reflected by that involvement. The evidence that CalTrans constructed a box culvert in the creekbed viewed in light of the purpose for which it was constructed—to support the roadbed for Highway 24, which would otherwise have collapsed into the creekbed—and the effort to dissipate any increase in volume and velocity of the stream water demonstrate an intent to avoid interference with the creek, not to exercise control over it.

Utilizing an existing natural watercourse for drainage of surface water runoff and requiring other riparian owners to continue to do so does not transform the watercourse into a public storm drainage system. A governmental entity must exert control over and assume responsibility for maintenance of the watercourse if it is to be liable for damage caused by the streamflow on a theory that the watercourse has become a public work. (See, e.g., *Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165 [210 Cal.Rptr. 146].) \*371

We conclude, therefore, that regardless of the standard of review the Court of Appeal applied, it correctly upheld the trial court's rejection of plaintiffs' claim that Reliez Creek has become a public work or improvement, or has been incorporated into City's drainage system. It remains a privately owned natural watercourse.

#### B. Liability of City, CalTrans, and BART.

The Court of Appeal held that, assuming the natural watercourse rule did not shield defendants, plaintiffs could not prevail insofar as they sought recovery from CalTrans and BART (which was a defendant only in the inverse condemnation cause of action) because they failed to establish that the facilities of these defendants were a substantial concurring cause of the downstream property damage and did not negate the possibility that urbanization generally would have resulted in the damage suffered by plaintiffs regardless of the actions of these defendants.<sup>22</sup> The facilities owned by CalTrans and BART, the court reasoned, had been completed 14 years before the 1981-1982 storms, at a time when the watershed from which the runoff originated was less developed. Defendants could not be liable for damage occurring subsequently when third parties over whom the defendants had no control added additional runoff to the stream.

The trial court also found, and the Court of Appeal agreed, that plaintiffs' evidence was insufficient to establish that, assuming those defendants could be held liable for damage caused by discharge of surface water runoff into Reliez Creek, either CalTrans or BART was a substantial concurring cause of the damage suffered by plaintiffs.

The evidence showed that BART owns only 3.5 acres in the Reliez Creek watershed. CalTrans occupies 22.4 acres. Together these entities occupy 25.9 acres or 1.1 percent of the watershed, and accounted for approximately 9.2 percent of the increase in surface water runoff over that which would have occurred even absent development or improvement of the property. The combined contribution of BART and CalTrans to the increased runoff due to urbanization in a 100-year storm, however, would be 6.7 percent of the total increase attributable to urbanization, and in a 2-year storm would be 7.2 percent. Those defendants would contribute less than 1 percent of the peak flow in a 100-year storm. The trial court concluded, based on these figures, that BART was responsible for only 0.02 percent of the runoff. \*372

The trial court and the Court of Appeal concluded that the evidence did not support the opinion of plaintiffs' experts that the runoff generated by these defendants' improvements was a substantial cause of plaintiffs' damage. They reasoned that the facilities of these defendants had been in place for 14 years at that time, during which period there had been no creekside damage attributable to those facilities. These defendants had constructed a structure engineered to dissipate the velocity and energy of the water which was channeled

through their culvert above Condit Road. One of plaintiffs' experts inspected the creekbank between Condit Road and the culvert in the mid-1980's and found it to be completely different from the bank below the road with little evidence of bank failure.

The expert was less positive as to whether the damage would have occurred without the contribution of both BART and CalTrans to the stream flow, but plaintiffs also failed to establish the proportion of damage attributable to CalTrans runoff from CalTrans property. Therefore, the Court of Appeal held, even assuming that together the BART/CalTrans runoff caused part of the damage,<sup>23</sup> there was no basis in the evidence for a determination of CalTrans or BART share of liability.

Plaintiffs argue that the failure to apportion responsibility for the damage is irrelevant because defendants are subject to joint and several liability. (15) We have held otherwise, however, with respect to apportionment of liability for damage caused by drainage of surface waters. In *Mehl v. People ex rel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 718 [119 Cal.Rptr. 625, 532 P.2d 489], we held that a plaintiff in inverse condemnation must establish the proportion of damage attributable to the public entity from which recovery was sought. Because the plaintiff did not differentiate the damage allegedly caused by runoff from a state freeway, from that caused by natural flow and by the county's efforts to deal with increased flow, we reversed the judgment stating: "In these circumstances, it [is] essential to differentiate between the responsibility of the state and the county for the overall damage." (*Ibid.*)

(16) Moreover, even were we to assume that the evidence was sufficient to establish that increased runoff from the property of either of these defendants was a substantial cause of plaintiffs' damage and to permit an apportionment, plaintiffs' failure to demonstrate that these defendants acted unreasonably, or that plaintiffs themselves acted reasonably to protect their property, precludes recovery. \*373

City is liable under [section 19 of article I of the California Constitution](#) for the damage suffered by plaintiffs only if the additional surface water runoff created by its improvements, i.e., paved streets and other public areas, or the manner in which it collected and discharged surface water runoff into Reliez Creek was both unreasonable and a substantial cause of the damage to plaintiffs' property. The evidence does not support a finding of liability under those criteria. Plaintiffs

did offer expert testimony that runoff from City streets was a substantial cause of the creekside damage. However, there is no evidence that City acted unreasonably in the construction of its improvements and, significantly, no evidence that plaintiffs themselves took reasonable measures to prevent the erosion of their creek banks. Therefore, assuming that the evidence would support inferences favorable to plaintiffs with regard to the cause of their injury, they cannot prevail on their tort causes of action against City.

That being so, we need not consider here whether a riparian property owner who has altered the natural drainage has a continuing obligation to monitor the impact of the runoff from the property as urbanization occurs, and, if necessary, to take steps to avoid damage if the changed conditions indicate that the runoff may be a substantial cause of future damage.

### C. Liability of County and District.

Plaintiffs claim that the Court of Appeal also erred in upholding the nonsuit granted County and District by the trial court on the ground that neither owned or exercised control over any of the public works that may have contributed to plaintiffs' damage. They note that there was evidence that County maintained at least one road in the watershed that drained into Reliez Creek as late as 1980, and argue further that ownership and control are not essential to their nuisance and trespass causes of action.

There is no error. Since the claim that Reliez Creek was part of a public drainage system fails, plaintiffs' alternative theory that discharge of surface water runoff into Reliez Creek caused their damage must be considered. Plaintiffs point to no evidence that county owned property abutting Reliez Creek at the time plaintiffs suffered damage, however, and District never owned any of the properties which drain into Reliez Creek. These defendants are not liable for damage caused by runoff from property owned by others (see *Preston v. Goldman* (1986) 42 Cal.3d 108, 125-126 [**\*374** 227 Cal.Rptr. 817, 720 P.2d 476]), and if the claim is that county is liable as a nonriparian owner for runoff from its roads which eventually reached Reliez Creek, it also fails. The evidence did not establish that any damage was attributable to that runoff. Neither of these defendants could be found liable for maintaining a dangerous condition on public property, or found to have interfered with plaintiffs' use and enjoyment of their property (Civ. Code, § 3479), or to have interfered with their exclusive possession by contributing to the stream bank erosion.

Therefore, while the Court of Appeal did not refer to the nuisance and trespass causes of action, it did not err in affirming the judgment for County and District. Giving plaintiffs' evidence all the weight to which it is entitled, and drawing all legitimate inferences favorable to plaintiffs from that evidence, it is not sufficiently substantial to support a verdict for plaintiffs on those causes of action. (See *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 395 [143 Cal.Rptr. 13, 572 P.2d 1155].)

The same is true with regard to the theory urged in this court, that by enforcing a City ordinance governing drainage and contracting with City to undertake and/or advise on erosion control, District became responsible for plaintiffs' damage. Plaintiffs direct us to no evidence that tied any act of enforcement or performance of District's contract with City to the damages suffered by plaintiffs in 1981-1982.<sup>24</sup>

We also reject plaintiffs' argument that the Court of Appeal erred in holding that County is not subject to tort liability as a party exercising ownership and control of the creekbed. County's participation in sponsoring the application for federal funding of the sheet pile structure had no effect on ownership of the creekbed for purposes of establishing the tort liability of an owner of real property.

Finally, we note with regard to both tort and inverse condemnation liability that the evidence reflects no efforts by plaintiffs themselves to protect their properties once it became apparent that erosion of the creek bank was occurring. **\*375**

## VII

### Costs

The trial court denied defendants' motion for an award of costs made pursuant to [Code of Civil Procedure section 1032](#)<sup>25</sup> and BART's request for an award of attorney fees under [Code of Civil Procedure section 1038](#). It ruled that under *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 89 [107 Cal.Rptr. 727], costs could not be awarded on the inverse condemnation claim and defendants were unable to allocate their costs between the tort and inverse condemnation aspects of the action.

(17a) The Court of Appeal, relying on cases decided subsequent to *Blau v. City of Los Angeles*, *supra*, 32 Cal.App.3d 77, including *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385 [110 Cal.Rptr. 489, 515 P.2d 585], and

*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 272 [262 Cal.Rptr. 754], held that there is no constitutional bar to assessment of costs against an unsuccessful inverse condemnation plaintiff. Plaintiffs claim that the court erred in this holding and that article I, section 19, and public policy preclude an assessment of costs against a party who initiates an inverse condemnation action in good faith to recover for loss or damage to property.

Plaintiffs reason that, since the right to bring an inverse condemnation action is subsumed within the right to just compensation (*Rose v. State* (1942) 19 Cal.2d 713, 719-724 [123 P.2d 505]), one who is forced to initiate a suit to enforce the right to compensation may not be burdened with the state's costs if the suit, although in good faith, is unsuccessful. Just as a defendant in an action for eminent domain is entitled to costs in defending the action, the plaintiff in inverse condemnation must be free of expenses imposed as a result of exercising rights granted by article I, section 19.

(18) A property owner's right to the costs of defending an eminent domain action is well established. "To require the defendants ... to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs." (*San Francisco v. Collins* (1893) 98 Cal. 259, 262 [33 P. 56].) The costs which may be recovered include those associated with unsuccessful defenses if raised in good faith (*San Joaquin etc. Irr. Co. v. Stevinson* (1913) 165 Cal. 540, 542 [132 P. 1021]), and even the cost of an unsuccessful \*376 appeal from an order awarding the plaintiff a new trial on damages has been recognized as a recoverable expense. (*San Diego Land etc. Co. v. Neale* (1891) 88 Cal. 50, 67-68 [25 P. 977].) A plaintiff in inverse condemnation is also entitled to costs on proof that he suffered damage even though offsetting benefits from a public project bar recovery of monetary damages. (*Collier v. Merced Irr. Dist.* (1931) 213 Cal. 554, 572 [2 P.2d 790].)

More recently this court confirmed the right of a partially successful inverse condemnation plaintiff to costs in *City of Los Angeles v. Ricards, supra*, 10 Cal.3d 385. There for two years the plaintiff was deprived of the use of a bridge which afforded access to plaintiff's property. We reversed a judgment awarding her the full value of the property, but held that plaintiff was nonetheless entitled to costs because there had been some damage, "however minimal." We also stated, in dictum, a rule denying costs to unsuccessful inverse

condemnation plaintiffs: "Property owners are, of course, not constitutionally entitled to costs in inverse condemnation actions if they are unable to prove that there has been a taking or damaging of their property by the defendant governmental entity. (*Crum v. Mt. Shasta Power Corp.* (1932) 124 Cal.App. 90 ....) In such a circumstance the constitutional doctrine of full compensation underlying the award of costs is plainly inapplicable to owners who initiated the unsuccessful litigation." (*Id.*, at p. 391.)

Under the rules established by these cases it is clear that defendants' costs may not be imposed on an inverse condemnation plaintiff in any case in which the plaintiff demonstrates that the actions of a governmental entity damaged the plaintiff's property. (17b) Plaintiffs here do not fall within the rules of *City of Los Angeles v. Ricards, supra*, 10 Cal.3d 385, 391, and *Collier v. Merced Irr. Dist, supra*, 213 Cal. 554, 572, however. Even assuming they proved damage, it was not compensable damage absent proof that the defendants' actions were unreasonable and that plaintiffs themselves acted reasonably to prevent the damage.

Faced with a similar issue, the Court of Appeal applied the rule proposed in *City of Los Angeles v. Ricards, supra*, 10 Cal.3d 385, 391, granting costs to a defendant in an inverse condemnation action in whose favor judgment had been entered. (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297 [262 Cal.Rptr. 754].) The court rejected a contrary holding in *Blau v. City of Los Angeles, supra*, 32 Cal.App.3d 77, and *Drennen v. County of Ventura* (1974) 38 Cal.App.3d 84 [112 Cal.Rptr. 907], concluding that the authority on which they relied did not support a conclusion that there is a constitutional right to be free of costs in litigating the issue of whether action of the governmental entity damaged an inverse condemnation plaintiff's property. \*377

The *Blau* court relied on this court's holding in *In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21 [37 Cal.Rptr. 74, 389 P.2d 538], in which we reaffirmed the right of a property owner to recover costs related to issues that are justifiably raised, but prove unmeritorious. "Public use is, however, one of the issues which owners reluctant to give up their property may justifiably raise in eminent domain proceedings as well as in actions in inverse condemnation or 'in the nature of eminent domain.' Even though they may not prevail on this issue in either the trial court or on appeal, it appears from the most recent expressions of the court that they

are entitled to be free from costs in litigating it.” (61 Cal.2d at p. 71.)

We agree with the conclusion of the Court of Appeal in *Smith v. County of Los Angeles*, *supra*, 214 Cal.App.3d 266, that *In re Redevelopment Plan for Bunker Hill*, *supra*, 61 Cal.2d 21, does not support a conclusion that inverse condemnation plaintiffs are entitled to be free of costs in any case in which their action is brought in good faith. There the parties against whom costs had been assessed were property owners who challenged a redevelopment plan, claiming that the purpose was not a “public use.” They were unsuccessful, with the result that this issue could not be raised in subsequent condemnation proceedings. For that reason we held that the public use aspect of the proceeding was equivalent to an eminent domain proceeding and that no costs could be assessed against the property owners. In that case, as in *City of Los Angeles v. Ricards*, *supra*, 10 Cal.3d 385, and *Collier v. Merced Irr. Dist.*, *supra*, 213 Cal. 554, a compensable taking would have been established had the property owners been successful.

An inverse condemnation plaintiff must establish a compensable taking or damage before [article I, section 19](#) of the California Constitution may be invoked to shield the unsuccessful plaintiff from assessment of costs under [Code of Civil Procedure section 1032](#). Nothing in the constitutional provision or our past cases suggests that a governmental entity must bear the expense of all litigation by property owners who in good faith, but without sufficient evidentiary or legal support, claim damage to their property.

The statutory power of a court to impose costs of litigation on an unsuccessful party in a civil action is limited by [article I, section 19](#) (*San Francisco v. Collins*, *supra*, 98 Cal. 259, 262), but that provision comes into play only when property is taken for public use or damaged by a public entity. It is not enough that the plaintiff believes that eminent domain principles are applicable to the claim. Neither sound public policy nor protection of property owners' rights under [article I, section 19](#) of the California Constitution suggests that public funding of inverse condemnation actions is necessary if the plaintiff fails to establish a compensable taking or damage.

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The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Kennard, J., Arabian, J. and George, J., concurred.

Panelli, J., \* concurred in the judgment.

#### MOSK, J.

I concur in the holding and much of the reasoning of the majority. The majority correctly adopt the requirement that upstream and downstream riparian owners act reasonably, in the same manner in which the reasonableness requirement for the discharge of surface waters was explicitly recognized in *Keys v. Romley* (1966) 64 Cal.2d 396, 409-410 [50 Cal.Rptr. 273, 412 P.2d 529]. I write separately merely to clarify the issue of inverse condemnation liability with respect to the City of Lafayette (City) and the California Department of Transportation (Caltrans).

In this case, plaintiffs offered expert testimony that runoff from City streets, and from Highway 24 operated by Caltrans, was a substantial cause of increased flow of Reliez Creek and of the resultant flooding. Such evidence would ordinarily be significant enough for us to remand the case to the trial court for a full adjudication of the causation issue. However, as the majority rightly conclude, plaintiffs failed to prove the other elements necessary for making their case: that the public entities acted unreasonably, and that plaintiffs took reasonable measures to protect their own property.

The lack of such evidence of reasonableness in this particular case, however, should not mislead public entities. Today's opinion, in adopting a reasonableness requirement for upstream riparian owners, and in reaffirming the cost-spreading rationale behind inverse condemnation liability, clearly puts public entities on notice that they are responsible for monitoring and mitigating the effects of the cumulative development of streets and highways on downstream riparian owners.

According to the principles enunciated by the majority today, downstream property owners would be able to prevail against a public entity in inverse condemnation liability if they are able to show: (1) that runoff from public streets and highways substantially contributed to the damage of the downstream owners' property; (2) that the owners took reasonable measures to protect their own property; and (3) that the public entities responsible for the streets and highways failed to adopt reasonable measures to mitigate the

foreseeable effects of such development. The precise meaning of “reasonable” mitigation measures in this context remains to be delineated on a case-by-case basis. \*379

Nonetheless, the majority claim that they refrain from deciding “whether a riparian property owner who has altered the natural drainage has a continuing obligation to monitor the impact of the runoff from the property as urbanization occurs ...” (Maj. opn., *ante*, at p. 373.) It appears to follow inescapably from the principles of inverse condemnation liability reaffirmed by the majority, however, that when the riparian owner is a public entity, such an obligation to monitor does exist. Otherwise, downstream riparian owners would be compelled to pay a disproportionately high price for the

cost of development of streets and highways in the form of damage to their property, and upstream public entities would be free of liability regardless of whether they could have taken reasonable mitigation measures to prevent foreseeable harm to downstream owners from cumulative development. Such a conclusion would be inconsistent with the cost-spreading rationale of inverse condemnation liability. (See *Holz v. Superior Court* (1970) 3 Cal.3d 296, 303 [90 Cal.Rptr. 345, 475 P.2d 441].) Nothing in the majority opinion should be interpreted to suggest the contrary.

Appellants' petition for a rehearing was denied April 13, 1994. \*380

#### Footnotes

- \* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.
- 1 [Article I, section 19](#): “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner....”  
Plaintiffs have not sought recovery under the Fifth Amendment to the United States Constitution in this action.
- 2 Less than 7 percent of the property in the watershed is owned by defendants. Numerous other public and private entities are owners of riparian property upstream from plaintiffs.  
In support of a claim that defendants were aware that development in the watershed posed a danger to downstream properties, plaintiffs introduced a 1952 study prepared by the Contra Costa County Flood Control and Water Conservation District, a study authorized by the Board of Supervisors of Contra Costa County. The study predicted increased flood hazard as development occurred on floodplains, as well as erosion and scouring of creek banks from increased runoff from developed areas. The study makes no mention of Reliez Creek or of the area in which plaintiffs' properties are located apart from references to “tributaries.” Its primary focus is the Walnut Creek watershed, and in particular: (1) floodplain lands of Walnut, Pine, Grayson, and Galindo Creeks; (2) sedimentation in the Walnut Creek channel and in Grayson Creek; and (3) erosion on watershed slopes, gully erosion, and bank cutting which contribute to sedimentation in Walnut Creek.
- 3 The “storm drainage system in and about the City of Lafayette” was alleged to be comprised of “pipelines, culverts, trenches, sewers, runouts, and waterways, including those portions of Reliez Creek adjoining Plaintiffs' real property.”
- 4 Negligence claims against the private parties were settled before trial.
- 5 [Article I, section 19](#): “Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner....”  
FN6 A 920-foot concrete box culvert had been constructed beneath the BART/CalTrans roadway in place of the original stream bed; a 100-foot long “sheet pile” structure had been placed in the channel in an attempt to control erosion; the “Sizeler outfall” structure, an apron of boulders bound together by concrete, was placed below the outfall of a City-owned storm drain which extended into the creek; and channel armoring had been placed at the location of the Sizeler outfall. Repairs on the Sizeler outfall were performed by a City contractor.  
District acted on behalf of plaintiffs in seeking federal funds from the Soil Conservation Service (SCS) to make repairs to the creek. SCS does not accept applications directly from affected property owners. It requires a local sponsor. District acted as such, and assisted in designing the sheet pile structure, a structure consisting of steel sheet pilings lining both sides of the creek for a distance of 100 feet. SCS funded 80 percent of the cost, the affected homeowners the remaining 20 percent; and City funded a portion of the structure within the right-of-way of Condit Road, a City-owned street. District solicited construction bids, awarded the contract, made all field inspections during construction and performed the final inspection as part of its responsibility to assist County and local entities in planning drainage matters. It did not own the sheet pile structure, however. The homeowners assumed future maintenance responsibility for the structure on their portion of the creek and acknowledged in their agreement with District that the structure did not belong to County or District.



- 7 A city or county must require the dedication of drainage easements as a condition precedent to the approval of either a tentative or a final subdivision map. (Gov. Code, § 66478.5.) Easements on two parcels owned by plaintiffs were dedicated to County on final subdivision maps, but were not accepted by County. City took no action to accept or reject the easements dedicated to it. (See Gov. Code, § 66477.1.) They claim on that basis that those drainage easements are not public property. A storm drainage easement on the property of plaintiff Sizeler was originally accepted by County, which maintained the storm drain on that easement until it passed to City upon incorporation in 1968. City has cleared fallen trees and other obstructions in the creek, actions which plaintiffs argued reflected implied acceptance of the easements through the exercise of control and dominion over the easements and the creek.
- One final subdivision map described the easements it created as follows: “The areas marked SDE, storm drain easement and PUE are storm drain easements and are dedicated to the City of Lafayette or its designee and to the public for public use for storm, flood and surface water drainage, including construction access or maintenance of works, improvements and structures whether covered or open for the clearing of obstructions and vegetation and the exercise of the rights provided for within said storm drain easements areas shall be considered prior in time and paramount to any rights exercised by the homeowners of this subdivision ....”
- 8 See Government Code sections 815, 830, and 810.8. Under the California Tort Claims Act, of which these sections are a part, the tort liability of a governmental entity is statutory. Under these sections liability may exist if the condition of publicly owned property “creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.” (Gov. Code, § 830, subd. (a).) Property damage is an “injury” within the meaning of that section. (Gov. Code, § 810.8.)
- Because plaintiffs failed to comply with the claims requirements of the Governmental Tort Liability Act (see Gov. Code, § 900 et seq.), the trial court ruled that plaintiffs could not pursue this cause of action against BART.
- 9 Trial was to the court on the inverse condemnation cause of action. Special and directed verdicts in favor of City were returned by the jury on the tort causes of action insofar as these structures were involved.
- Plaintiffs did not dispute this ruling on appeal, but did contend that the existence of the structures was evidence relevant to whether Reliez Creek had become a public improvement.
- 10 The court accepted plaintiffs' theory that if a public entity transforms a natural creek channel into a storm drainage system the creek is no longer a natural watercourse, but is an artificial public improvement.
- As to County, the court found that as of 1968 only 28 percent of the watershed had been developed. There were dedicated easements from subdivisions in the area, but those easements had not been formally accepted. The evidence did not establish that County had exerted dominion and control of the creek by maintenance, inspection, approval or issuance of permits, or other activity such as to transform it into a work of public improvement.
- The court conceded that the question was closer with respect to City, but found that the evidence did not establish that City had impliedly accepted easements or exercised dominion and control to the extent that the creek had become a part of a storm drainage system.
- 11 The combined CalTrans and BART contribution to the increased flow into Reliez Creek was 9.2 percent. BART's acreage constituted only .01 percent of the watershed, and its improvements contributed only .02 percent to the increased flow of surface waters into Reliez Creek.
- The expert testimony did not differentiate BART responsibility for plaintiffs' damage from that attributed to CalTrans. The trial court ruled that evidence of the amount of damage each caused was necessary at the liability phase in order to establish that a public entity's actions satisfied the “substantial concurring cause” element of an inverse condemnation cause of action, and for that reason also found the evidence insufficient as to BART and CalTrans.
- 12 While recognizing that the Court of Appeal was bound by *Belair*, plaintiffs also argued that if they were not entitled to recover on grounds that defendants' conduct was unreasonable within the meaning of that decision, *Belair* was incorrectly decided to the extent that it relied on *Archer*. *Archer*, they argued, had been overruled by subsequent cases and conflicted with the language and policy of article I, section 19 of the California Constitution.
- 13 As described in one treatise, “The natural flow rule, or as it is sometimes called, the 'civil law' rule, originated in Louisiana and Pennsylvania. It 'places a natural easement or servitude upon the lower land for the drainage of surface water in its natural course and the natural flow of the water cannot be obstructed by the servient owner.'
- “The way the civil law rule works is that an upper landowner has a right as landowner to the natural drainage of diffused surface waters onto the lower property in the form of a 'natural' servitude. This means the lower owner has a duty to respect that right and if the lower owner interferes, the upper owner has a claim against the lower owner. But, in turn, the upper owner may be a lower owner in relation to someone else. Furthermore, if the scope of the servitude is exceeded,

that is, surcharged, the lower neighbor will have a claim against the upper owner. The fact that flow creates a 'natural' easement refers only to the way in which the 'easement' arose. The treatment of natural flow as a servitude invokes the entire body of easement law and gives the natural flow right stature as an interest in real property; therefore, a legislative body may be more restricted by the constitution in dealing with it." (5 Waters and Water Rights (Beck ed. 1991) § 59.02(b) (2), p. 505, fns. omitted.)

14 We need not decide if this statement of the rule was consistent with the generally applicable civil law rule governing natural watercourses, and with prior California law. That rule, too, may have been limited to discharges which did not increase the volume or accelerate the flow of water in a watercourse beyond that produced by natural runoff of surface waters. (See *LeBrun v. Richards*, *supra*, 210 Cal. 308, 318; *Thomson v. La Fetra* (1919) 180 Cal. 771 [183 P. 152].)

15 Several cities and counties, appearing as amici curiae in support of defendants, also urge retention of the natural watercourse rule. Among their concerns is fear that liability may be imposed for downstream damage that is alleged to be a product of discretionary approval of development. While the issue of liability solely for approving development of private property is not before us in this case, we note that public entities enjoy broad statutory immunity for such acts. (See, e.g., *Gov. Code*, §§ 818.2, 818.4, 821.)

16 Contrary to the argument of defendants, we did not cite *Archer* with approval in *Holtz v. Superior Court* (1970) 3 Cal.3d 296 [90 Cal.Rptr. 345, 475 P.2d 441]. Holtz did not involve surface waters or natural watercourses. *Archer*, *supra*, 19 Cal.2d 19, was among the cases cited in a discussion of the common law concept of the "right to inflict damage." Rather than indicate approval of those cases, all of which predated *Keys v. Romley*, *supra*, 64 Cal.2d 396, we stated that we need not examine their continued validity. (*Holtz v. Superior Court*, *supra*, 3 Cal.3d 296, 307.)

And, far from reaffirming the *Archer* rule in *Belair v. Riverside County Flood Control Dist.*, *supra*, 47 Cal.3d 550, we expressly recognized that the *Keys v. Romley* rule of reasonableness had been applied by the Court of Appeal to actions involving private landowners' treatment of flood and stream waters. (47 Cal.3d at pp. 567-568, fn. 8.) And we applied *Keys v. Romley* in that case. (47 Cal.3d at p. 566.) The only aspect of *Archer* applied in *Belair* was the rule granting immunity for damage caused by measures undertaken to prevent damage by floodwaters. In the context of inverse condemnation, rather than impose strict liability for damage caused by flooding when a public flood control levee failed to contain waters within its design capacity, we held that because the activity was one that was privileged under the *Archer* doctrine, a public agency would be liable only if its conduct posed an unreasonable risk of harm.

17 As we pointed out in *Keys v. Romley*, *supra*, 64 Cal.2d 396, 409, the rule "is not one of strict negligence accountability ... [t]he question is reasonableness of conduct."

One need not abandon concepts of property law to reach the result of *Keys v. Romley*, *supra*, 64 Cal.2d 396, that the upper landowner's conduct must be reasonable. As noted above (see fn. 13), traditional rules of property law forbid overburdening an easement or servitude and unreasonable conduct in exercising rights under either. "[T]he owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement." (*Baker v. Pierce* (1950) 100 Cal.App.2d 224, 226 [223 P.2d 286].) "Every easement includes ... the right to do such things as are necessary for the full enjoyment of the easement itself. But this right is limited, and must be exercised in such reasonable manner as not to injuriously increase the burden on the servient tenement. The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former. The owner cannot commit a trespass upon the servient tenement beyond the limits fixed by the grant or use." (*North Fork Water Co. v. Edwards* (1898) 121 Cal. 662, 665-666 [54 P. 69].)

The extent of the upper landowner's easement for drainage and protection is that which the parties might reasonably expect from the future normal development of the dominant tenement. (*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 866-867 [274 Cal.Rptr. 678, 799 P.2d 758].)

These considerations are relevant to whether a landowner's conduct is reasonable.

18 The Court of Appeal also held that City had statutory immunity under *Government Code section 818.4* for approving permits which allowed upstream development to occur. Plaintiffs argue that the holding overlooks exceptions to that immunity for dangerous conditions on public property. We understand their argument to be that, because upstream development permitted by City has resulted in a dangerous condition of public property, the public entity is not immune for damage caused by that dangerous condition. The Court of Appeal did not hold otherwise. It correctly stated the statutory rule that a public entity is not liable for injury caused by the issuance of a permit.

The Court of Appeal did not address plaintiffs' argument that public roads and surfaces impervious to water, which increased surface water runoff into a natural watercourse, were a "dangerous condition" which contributed to plaintiffs damage. Our conclusion that plaintiffs failed to establish damage caused by unreasonable conduct of defendants in permitting the increased runoff makes it unnecessary to address that argument here.

- 19 [Gray v. Reclamation District No. 1500](#), *supra*, 174 Cal. 622, like *Archer*, held that there was no right to recover in inverse condemnation for damages which were *damnum absque injuria* prior to the addition to former section 14 of article I of a right to compensation for property damage. Thus damages resulting from a proper exercise of the police power, and not the power of eminent domain, were not compensable. (174 Cal. at pp. 640-641.)
- 20 The *Albers* view of former section 14 of article I, and our conclusion here that public entities may be liable for downstream damage under present [section 19](#), are wholly consistent with, and carry out the intent of, the delegates to the 1878-1879 constitutional convention.
- The initial draft of former section 14 did not include the “or damaged” provision. That provision was added by an amendment offered by delegate Hager who, like delegate Estee who spoke in support of the amendment, believed that “a man should not be damaged without compensation.” (3 Debates & Proceedings, Cal. Const. Convention 1878-1879, p. 1190.) The example of damage relied on in support of the amendment was an incident in San Francisco when, pursuant to legislative authorization, Second Street was cut, leaving adjacent homes “high in the air, and wholly inaccessible.” (*Ibid.*) The only argument in opposition to the amendment was that the measure was untried and might be construed to compel compensation of lost profits if a road were moved. There is no suggestion in the debate on the measure that the delegates anticipated that immunity would exist for damage inflicted in any exercise of the police power or that a *damnum absque injuria* doctrine would immunize a governmental entity.
- 21 We question, moreover, whether requiring and/or accepting drainage easements across private property to a privately owned natural watercourse is evidence of an exercise of control over the watercourse itself. The requirement may reflect nothing more than a precaution necessary to ensure that drainage of surface waters into the watercourse is not cut off by the improvements.
- 22 The Court of Appeal reached a similar conclusion with respect to City, County, and District, reasoning that there was no evidence that City maintained any structures which were a substantial concurring cause of the damage.
- 23 This expert testified that in a 100-year storm, the combined CalTrans/BART contribution to the stream flow would be less than 1 percent (.93 percent). Its impact on stream velocity was “small.”
- 24 This conclusion makes it unnecessary to address plaintiffs’ argument that the Court of Appeal failed to consider [Government Code section 895.2](#), which imposes joint and several liability on governmental entities that cause injury for which they would incur liability under any other law while performing under an agreement between or among the governmental entities.
- Furthermore, the relevance, if any, of Government Code section 895.5 was not raised by plaintiffs in the briefs they filed in the Court of Appeal.
- 25 [Code of Civil Procedure section 1032](#), subdivision (b), provides that “[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.”
- \* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

33 Cal.4th 335  
Supreme Court of California

Steven W. NOLAN, Plaintiff and Respondent,  
v.  
CITY OF ANAHEIM, Defendant and Appellant.

No. S113359.

July 1, 2004.

Rehearing Denied Sept. 1, 2004.\*

### Synopsis

**Background:** Police officer sought writ of mandamus to require city to grant his application for disability retirement for mental incapacity due to hostility toward him by fellow officers. The Superior Court of Orange County, No. 00CC03056, William F. McDonald, J., entered judgment for officer. City appealed. The Court of Appeal reversed.

**[Holding:]** The Supreme Court granted review, superseding the opinion of the Court of Appeal, and in an opinion by Brown, J., held that for officer to qualify for disability retirement, he would not only have to show he was incapacitated from continuing to perform his usual duties in his former department, but also that he was incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies covered by the Public Employees' Retirement Law (PERL).

Reversed.

Baxter, J., concurred and dissented, with opinion.

Kennard, J., dissented, with opinion, joined by Werdegar, J.

Opinion 128 Cal.Rptr.2d 714, superseded.

West Headnotes (6)

#### [1] Statutes Intent

The objective of statutory interpretation is to ascertain and effectuate legislative intent.

27 Cases that cite this headnote

#### [2] Statutes Plain Language; Plain, Ordinary, or Common Meaning

To determine legislative intent, courts turn first to the words of the statute, giving them their usual and ordinary meaning.

34 Cases that cite this headnote

#### [3] Administrative Law and Procedure Plain, literal, or clear meaning; ambiguity or silence

#### Statutes Extrinsic Aids to Construction

When statutory language is susceptible of more than one reasonable interpretation, courts look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

50 Cases that cite this headnote

#### [4] Municipal Corporations Disability pension or compensation

#### Public Employment Disability pensions and disability retirement in general

In order for police officer to qualify for disability retirement due to hostility toward him by fellow officers, he would not only have to show he was incapacitated from continuing to perform his usual duties in his former department, but also that he was incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies covered by the Public Employees' Retirement Law (PERL). West's Ann.Cal.Gov.Code §§ 20000, 20069, 21156.

See 9 Witkin, Cal. Procedure (4th ed. (1997) Administrative Proceedings, § 149); 2 Witkin, Summary of Cal. Law (9th ed. 1988) Workers' Compensation, § 236.

[10 Cases that cite this headnote](#)

[5] **Courts**  Previous Decisions as Controlling or as Precedents

A decision does not stand for a proposition not considered by the court.

[21 Cases that cite this headnote](#)

[6] **Municipal Corporations**  Disability pension or compensation

**Municipal Corporations**  Evidence

**Public Employment**  Disability pensions and disability retirement in general

If police officer seeking disability retirement showed not only that he was incapacitated from performing his usual duties for prior employer, but also that he was incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies, the burden will shift to his former employer to show not only that officer was capable of performing the usual duties of a patrol officer for other California law enforcement agencies, but also that similar positions with other California law enforcement agencies, with reasonably comparable pay, benefits, and promotional opportunities, were available to him. [West's Ann.Cal.Gov.Code §§ 20000, 20069, 21156](#).

[6 Cases that cite this headnote](#)

#### Attorneys and Law Firms

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[Peter H. Mixon](#), Carol McConnell and [Richard B. Maness](#) for California Public Employees Retirement Association,

Sacramento, as Amicus Curiae on behalf of Plaintiff and Respondent.

#### Opinion

BROWN, J.

Plaintiff Steven W. Nolan was a police officer for the City of Anaheim (Anaheim); his last assignment was as a patrol officer. Pursuant to [Government Code section 21156](#),<sup>1</sup> Mr. Nolan has applied for permanent disability retirement benefits on the ground that threats and harassment by other Anaheim officers have rendered him “incapacitated physically or mentally for the performance of his ... duties *in the state service*.” (Italics added.) The question presented is what, for the purposes of [section 21156](#), is meant by “state service”?

“State service,” Mr. Nolan contends, refers to the applicant's *last employer*. Therefore, Mr. Nolan argues, in order to qualify for disability retirement, he need only show he is incapable of continuing to perform his duties as a patrol officer for Anaheim. We disagree. We conclude that in order to qualify for disability retirement under [section 21156](#), Mr. Nolan will have to show not only that he is incapacitated from performing his usual duties for Anaheim, but also that he is incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies. Assuming Mr. Nolan makes such a prima facie showing, the burden will then shift to Anaheim to show not only that Mr. Nolan *is* capable of performing the usual duties of a patrol officer for other California law enforcement agencies, but also to show that similar positions with other California law enforcement agencies are *available* to Mr. Nolan. By *similar* positions, we mean patrol officer positions with reasonably comparable pay, benefits, and promotional opportunities.

#### \*339 I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Nolan began work as a police officer with Anaheim in 1984. He was number one in his sheriff's academy class and received outstanding ratings early in his career. In 1991, upon transferring to the gang unit, Mr. Nolan reported what he believed to be excessive use of force by fellow officers. As an apparent consequence, Mr. Nolan experienced strained relations with other members of the gang unit, and he voluntarily returned to patrol duty in 1992.

Five months later, after an internal affairs investigation failed to substantiate any misconduct on the part of the other officers, disciplinary charges were brought against Mr. Nolan for violation of department rules. The charges included unbecoming conduct, unsatisfactory performance, misuse of sick time, and improper handling of evidence. Mr. Nolan was fired, and he took the case to arbitration. The arbitrator ordered him reinstated, but suspended for five days.

Shortly after the arbitration, Mr. Nolan received two threatening telephone calls and numerous telephone hang-ups. He believed the calls were placed by Anaheim police officers. One caller warned him to always wear his vest, an apparent allusion to being shot at, and the other said, "Welcome \*\*\*860 back, you're fucking dead." As a consequence, Mr. Nolan filed for disability retirement; he also filed a civil "whistleblower" suit seeking damages for wrongful termination.

In the whistleblower suit, the jury awarded Mr. Nolan \$223,000 for the wrongful termination, but reduced the award by \$63,000 on the ground he could have found comparable employment. In addition, the jury awarded Mr. Nolan \$180,000 for emotional stress.

In this disability matter, the administrative law judge found that Mr. Nolan suffered no mental incapacity and recommended denial of his request. Anaheim adopted the decision, \*\*352 and Mr. Nolan filed this action, seeking a writ of mandamus to compel the city to grant him disability retirement.

The superior court found that Mr. Nolan was permanently incapacitated for the performance of his duties as a police officer for Anaheim. The court based its finding on the testimony of a psychologist retained by Mr. Nolan, concurred in by a psychiatrist retained by the city's insurance carrier, that he was not emotionally and mentally able to work as a police officer due to his fear for his personal safety and the retaliation he had already experienced.<sup>2</sup> \*340 The court further found that Mr. Nolan's fear of retaliation was based, in part, on the likelihood that he could not count on fellow officers for backup in time of need. The court noted that his post termination arbitration proceeding and his civil whistleblower suit had established that the police department did not have sufficient reason to terminate him and that the termination was in retaliation for his informing on fellow officers he believed used illegal force on suspects. The court further

noted that even the psychiatrist retained by the city stated that Mr. Nolan's fears were reasonable.

The Court of Appeal reversed and remanded the cause for reconsideration of the administrative record under what it held to be the appropriate standard, i.e., "whether Mr. Nolan is mentally incapacitated for state service, i.e., perform police services throughout the state...."

We affirm the judgment of the Court of Appeal, which reversed the judgment of the trial court, and we remand the matter for further proceedings consistent with this opinion.

## II. DISCUSSION

[1] [2] [3] The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*People v. Trevino* (2001) 26 Cal.4th 237, 240, 109 Cal.Rptr.2d 567, 27 P.3d 283; *People v. Gardeley* (1996) 14 Cal.4th 605, 621, 59 Cal.Rptr.2d 356, 927 P.2d 713.) To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. (*Trevino*, at p. 241, 109 Cal.Rptr.2d 567, 27 P.3d 283; *Trope v. Katz* (1995) 11 Cal.4th 274, 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible \*\*\*861 objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744, 38 Cal.Rptr.2d 650, 889 P.2d 970; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007–1008, 239 Cal.Rptr. 656, 741 P.2d 154.)

The statutory context of this case was recently summarized in *Pearl, supra*, 26 Cal.4th 189, 109 Cal.Rptr.2d 308, 26 P.3d 1044. "The Legislature enacted the Public Employees' Retirement Law (Gov.Code § 20000 et seq.), 'to effect economy and efficiency in the public service by providing a means whereby employees who become \*341 superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits.' (*Id.* § 20001.) Under its provisions, certain

persons, including police officers, are eligible for special disability retirement benefits if they are ‘incapacitated for the performance of duty as the result of an *industrial disability*.’ (*Id.* § 21151, italics added.) Thus, upon retirement for such a disability, a peace officer ‘shall receive a disability allowance of 50 percent of his or her final compensation plus an annuity purchased with his or her accumulated additional contributions, if any, or, if qualified for service retirement, the member **\*\*353** shall receive his or her service retirement allowance if the allowance, after deducting the annuity, is greater.’ (*Id.* § 21407.) These benefits are free from federal income taxes. (26 U.S.C. § 104(a)(1).)” (*Pearl*, at pp. 193–194, 109 Cal.Rptr.2d 308, 26 P.3d 1044.)

The provision of the Public Employees' Retirement Law (PERL) at issue here is [section 21156](#), which provides for disability retirement for a member who is incapacitated physically or mentally for the performance of his or her duties *in the state service*. [Section 21156](#) provides in pertinent part: “If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member is incapacitated physically or mentally for the performance of his or her duties in the state service and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.”

Again, the question presented is what, for the purposes of [section 21156](#), is meant by “state service”?

Mr. Nolan contends that for a police officer, i.e., “a local safety member,” to demonstrate he or she is “incapacitated physically or mentally for the performance of his or her duties in the state service,” the officer need only show an incapacity to continue functioning in “the contracting agency employing the member.”

[4] We disagree. As the Court of Appeal observed, [section 21156](#) does not refer to the employee's *last employing department*; it refers to *state service*. [Section 20069](#) defines “state service” as “service rendered as an ... officer of the state, the university, a school employer, or a contracting agency, for compensation....” When [sections 21156](#) and [20069](#) are read

**\*342** together, it becomes clear that “state service,” for the purposes of [section 21156](#), means *all forms* of public agency service **\*\*\*862** that render an employee eligible for the benefits of [section 21156](#). Therefore, in order for Mr. Nolan to qualify for disability retirement under [section 21156](#), he will not only have to show he is incapacitated from continuing to perform his usual duties for Anaheim, but also that he is incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies covered by the PERL.

The position taken by Mr. Nolan would lead to results that would clearly be at variance with the fundamental policies that led the Legislature to enact the PERL. As previously stated, the Legislature enacted the PERL “*to effect economy and efficiency in the public service* by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits.” (§ 20001, italics added.) Mr. Nolan asserts that no other law enforcement agency in the state would be willing to hire him because he (1) has accused fellow officers of misconduct, (2) is perceived as a troublemaker for challenging his termination and bringing a whistleblower suit, and (3) has a history of anxiety, depression and fear. However, in response to questions at oral argument, Mr. Nolan's counsel also insisted that Mr. Nolan would be entitled to permanent disability retirement even if several police departments in communities surrounding Anaheim were to offer him positions that were in all relevant respects similar to the position he held in Anaheim, and his psychological disability did not extend to the other departments. We find it inconceivable that the Legislature, in enacting the PERL “to effect economy and efficiency in the public service,” intended to grant an applicant permanent disability retirement benefits under such circumstances.

Mr. Nolan contends, however, that the granting of such a windfall is compelled by the body of case law that has developed in the Courts of Appeal regarding light duty assignments. As Mr. Nolan points out, under **\*\*354** the light duty doctrine, a police officer is not considered to be incapacitated if a permanent light duty position the officer is capable of performing is available *within that department*. (See, e.g., *Barber v. Retirement Board* (1971) 18 Cal.App.3d 273, 95 Cal.Rptr. 657 (*Barber*); *Craver v. City of Los Angeles* (1974) 42 Cal.App.3d 76, 117 Cal.Rptr. 534 (*Craver*

); *O'Toole v. Retirement Board* (1983) 139 Cal.App.3d 600, 188 Cal.Rptr. 853 (*O'Toole* ).)

[5] The light duty cases are distinguishable. The seminal light duty cases involved construction of disability retirement provisions of *city charters*. (*Barber, supra*, 18 Cal.App.3d at pp. 275–276, 95 Cal.Rptr. 657 [San Francisco]; *Craver, supra*, 42 Cal.App.3d at p. 79, 117 Cal.Rptr. 534 [Los Angeles]; \*343 *O'Toole, supra*, 139 Cal.App.3d at p. 603, 188 Cal.Rptr. 853 [San Francisco].) Therefore, the question addressed in each of those cases was whether the applicant was capable of filling a permanent light duty assignment that was available in the applicant's department.<sup>3</sup> Mr. Nolan has not brought to \*\*\*863 our attention, nor has our own research revealed, a light duty case addressing the relevance of the availability of appropriate light duty assignments in other cities. A decision, of course, does not stand for a proposition not considered by the court. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071, 255 Cal.Rptr. 352, 767 P.2d 619.) Therefore, the light duty cases are simply not apposite.

In its brief, *amicus curiae*, the California Public Employees' Retirement System (CalPERS), warns that a standard of the sort we adopt today—that a peace officer seeking permanent disability retirement must show not only that he is incapacitated from performing his usual duties for his last employer, but also that he is incapacitated from performing the usual duties of his last assignment for other California law enforcement agencies—would not be *administrable*. Such a test would be impossible to administer, CalPERS contends, because “it requires assumptions about what services are required at other departments or employers other than at [the] City of Anaheim. While it may be possible to imagine some duties that other police departments require of police officers, uniform circumstances of employment around the state cannot be presumed.”

CalPERS has set up a straw man. Doubtless, the duties required of, for example, patrol officers are not *uniform* throughout the state. However, that is beside the point. The question is: What are the *usual* duties of a patrol officer? (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876–877, 86 Cal.Rptr. 450 (*Mansperger* ).)

In *Mansperger*, the Court of Appeal was called upon to construe former section 21022. (Added by Stats.1945, ch. 123, § 1, p. 599; repealed by Stats.1995, ch. 379, § 1, p.1955.) It provided: “Any patrol or local safety member *incapacitated for the performance of duty* as the result of an

industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.” (Italics added.) The *Mansperger* court held that “incapacitated for the performance of duty,” for the purposes of former \*344 section 21022, meant *the substantial inability of the applicant to perform his usual duties*. (*Mansperger, supra*, 6 Cal.App.3d at p. 876, 86 Cal.Rptr. 450.) The court acknowledged that the applicant, a state fish and game warden, could no longer lift or carry heavy objects, but observed the necessity for doing so was a “remote occurrence” in a fish and game warden's job. (*Id.* at pp. 876–877, 86 Cal.Rptr. 450.) The court also acknowledged that fish and game wardens \*\*355 occasionally need to make physical arrests, but observed that such occasions were “not a common occurrence for a fish and game warden.” (*Id.* at p. 877, 86 Cal.Rptr. 450.) The evidence showed the applicant “could substantially carry out the normal duties of a fish and game warden.” (*Id.* at p. 876, 86 Cal.Rptr. 450.) Therefore, the court held, “the board, and the trial court, properly found that petitioner was not ‘incapacitated for the performance of duty,’ within the meaning of section 21022 of the Government Code and, therefore, that he was not entitled to the disability pension which he sought.” (*Id.* at p. 877, 86 Cal.Rptr. 450, italics omitted.)

With all due respect to the expertise of CalPERS in administering the PERL, determining the usual duties of a patrol officer should not be that difficult. Every \*\*\*864 civil service employer must describe the usual duties of every position.

[6] Finally, while the Legislature, in enacting the PERL, was concerned to “effect economy and efficiency in the public service,” it expressly intended to do so “without hardship or prejudice” to “employees who become superannuated or otherwise incapacitated.” (§ 20001.) To deny Mr. Nolan disability retirement benefits on the ground he is capable of working for other California law enforcement agencies would clearly work a hardship on him if, as he claims, no other law enforcement agency would, in fact, be willing to hire him because he has blown the whistle on misconduct by fellow officers. Therefore, if Mr. Nolan shows not only that he is incapacitated from performing his usual duties for Anaheim, but also that he is incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies, the burden will shift to Anaheim to show not only that Mr. Nolan is capable of performing the usual duties of a patrol officer for other California law enforcement agencies, but also that similar positions with



other California law enforcement agencies are available to him.<sup>4</sup> By **\*345** *similar* positions, we mean patrol officer positions with reasonably comparable pay, benefits, and promotional opportunities.

### III. DISPOSITION

We affirm the judgment of the Court of Appeal reversing the judgment of the trial court; we remand the matter for further proceedings consistent with this decision.

WE CONCUR: [GEORGE](#), C.J., [CHIN](#) and MORENO, JJ.

Concurring and Dissenting Opinion by [BAXTER](#), J.

I agree with the majority opinion insofar as it rejects Mr. Nolan's argument that he can claim disability retirement benefits on the sole basis that he has become physically or psychologically incapacitated to work as a police officer *for the City of Anaheim*. On the contrary, he must show that his job-related physical or psychological condition prevents him from performing the *usual and customary duties* of a police officer *anywhere in the state*. And once he does present such evidence, the city must have an opportunity to rebut it.

But that is the end of the matter. If Mr. Nolan has a general job-related incapacity for police officer duties, he is entitled to a pension. Otherwise, he is not. The majority opinion thus errs in its holding that Mr. Nolan may retire for disability, even if he has **\*\*356** no *general* incapacity, unless the city can show “that similar positions with other California law enforcement agencies are *available* to him.” **\*\*\*865** (Maj. opn., 14 Cal.Rptr.3d at p. 864, 92 P.3d at p. 355, fn. omitted, italics added.)

The majority's effort not to penalize Mr. Nolan for his “whistleblowing” activities is understandable, but it is an example of good intentions gone awry. The statutory scheme specifies that an eligible local safety member may be retired for disability if “the member is incapacitated *physically or mentally* for the performance of his or her duties in the state service” (Gov.Code, § 21156, italics added)<sup>1</sup> “as the result of an industrial disability” (§ 21151, subd. (a)). The statutes nowhere intimate that a disability pension is available to an officer who has a general physical and mental ability to perform, but simply cannot secure a position. Unemployability is not the same thing as incapacity.

The disability retirement system is not an unemployment insurance system.

As sole support for the “available positions” theory it invents, the majority opinion cites section 20001. This statute declares that the purpose of the **\*346** pension system for public employees is to “effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, *without hardship or prejudice*, be replaced by more capable employees....” (Italics added.) The majority opinion posits that to deny Mr. Nolan a pension when no similar positions are available would cause him hardship and prejudice.

But the retirement scheme is intended to ease “hardship or prejudice” only for those eligible employees who are no longer productive because they have become either “superannuated,” or “*incapacitated*” by industrial injury (§ 20001, italics added; see also § 21151, subd. (a)), and “incapacitated” means *physically or mentally unable* to perform *anywhere in the state*, not just for a particular employer. Section 20001 affords no license to carve out a “hardship or prejudice” *exception* to the statutory requirement that a disability retiree be “incapacitated” by job-related injury.

The facts of Mr. Nolan's case may be sympathetic, but the rule proposed by the majority opinion presumably would apply in less compelling circumstances. Law enforcement work is stressful by nature, and serious job-related conflicts may routinely arise. As the Court of Appeal noted, “[p]eace officers and firefighters sometimes put in for a disability retirement based on ‘mental incapacity’ [which] derives fundamentally from the fact that they aren't getting along with their colleagues” and from “fear about the way fellow officers will behave toward them in the future.” The concern arises that an officer whose difficulties with coworkers have made it psychologically impossible to continue *in that agency*, but not elsewhere, could receive lifetime disability benefits simply on evidence that other agencies would not wish to hire him, or that the job market was full. (But cf. [Haywood v. American River Fire Protection Dist.](#) (1998) 67 Cal.App.4th 1292, 1304–1307, 79 Cal.Rptr.2d 749 ([Haywood](#)) [disability retirement not intended for one simply *unwilling* to return to current agency because of personality conflicts after being terminated for nonmedical cause].)

Moreover, if entitlement to a disability pension depends on whether similar suitable employment is unavailable

elsewhere, numerous complications of proof will be presented. If the issue is general unemployability, what evidence on that issue will suffice? If the issue is job availability, how broad an area must the search for \*\*\*866 other openings cover? At what moment, or over what period, must the unavailability exist? Such questions threaten to become the “tail that wags the dog” in proceedings to determine whether a locally, but not generally, incapacitated officer may retire for disability.

Of course, an eligible local safety member may do so if difficulties that arose with a particular employer have produced a *general psychological* \*347 *incapacity* to perform the usual and customary duties of a peace officer, regardless of location. The line between “unable” and merely “unwilling” can be fine. (See \*\*357 *Haywood, supra*, 67 Cal.App.4th 1292, 79 Cal.Rptr.2d 749.) Nonetheless, if Mr. Nolan's Anaheim experience produced a genuine *personal fear*, so severe as to render him dysfunctional, that, wherever he went, his record would follow, and he would face unbearable ostracism, threats, and lack of backup at times of danger, I agree he may secure a disability pension.

Nothing in the Court of Appeal's disposition prevents Mr. Nolan from presenting such evidence on remand. Accordingly, I would affirm the judgment of the Court of Appeal.

Dissenting Opinion by KENNARD, J.

California's Public Employees' Retirement System (PERS) manages the pension benefits provided to more than 1.2 million public employees, retirees, and their families under the Public Employee Retirement Law (PERL). (*Gov.Code*, § 20000 *et seq.*)<sup>1</sup> Steven W. Nolan, a police officer for the City of Anaheim, whose employees are members of PERS, applied for a disability retirement based on a *mental disability*—his depression and anxiety stemming from fear that he would be killed or injured for lack of backup by fellow officers were he to return to duty in the Anaheim Police Department. The majority holds that to qualify for disability retirement Nolan must show not only that he is incapacitated to perform his usual duties for the Anaheim Police Department, but also that his incapacity precludes him “from performing the usual duties of a patrol officer for other California law enforcement agencies.” (Maj. opn., 14 Cal.Rptr.3d at p. 864, 92 P.3d at p. 355.) That holding subverts the clear intent of the Legislature, overrules some 30 years of PERS administrative practice and precedent, as well as court decisional law, and sketches a new

and unworkable test of disability. Therefore, I cannot and do not join the majority.

## I.

After Steven Nolan graduated from the sheriff's academy at the top of his class, the City of Anaheim hired him in 1984. In 1991, he joined the gang investigative unit, but after observing instances of what he believed to be excessive force by fellow officers, in 1992 he sought and received a transfer back to patrol duty. When a department investigation failed to substantiate his allegations of misconduct by the gang unit officers, Nolan himself was charged with and found to have violated certain department rules, leading to his dismissal in 1993.

\*348 In August 1994, an arbitrator reversed the dismissal and ordered Nolan's reinstatement. Soon Nolan began receiving anonymous calls threatening his life; and the President of the Anaheim Police Association warned him in the association's newsletter, “If you want your job back ... it is still here but I won't work with you.” Nolan's work-related depression led him to \*\*\*867 apply for disability retirement in September 1994.

An administrative law judge took evidence, and in October 1999 he denied Nolan's application, finding Nolan had failed to establish “his substantial inability to perform his usual duties” and therefore was not mentally incapacitated. The City of Anaheim adopted that decision.

Nolan petitioned the superior court for a writ of mandate. The court reviewed the administrative record, which included reports from three mental health professionals who had interviewed Nolan. Dr. William Winter, the only one to have seen Nolan repeatedly, concluded after the last interview that Nolan was suffering from anxiety disorder and could not return as a police officer with the City of Anaheim, or “with any other municipality in Southern California,” but might be able to be a police officer in a distant state such as Illinois where “his problems with the City of Anaheim” were unlikely to catch up with him. Dr. Samuel Dey was of the view that Nolan was suffering from depression and as a result “his ability to function in the work setting would be significantly impaired.” In the opinion of Dr. Melvin Schwartz, Nolan did “not have a psychiatric injury,” although his fear of personal harm were he to return to work was “a realistic concern.” The superior court found that Nolan's fears “make it emotionally

and mentally, **\*\*358** although not physically, impossible” for him “to return to law enforcement,” and concluded that Nolan suffered a “permanent psychological disability.” Accordingly, in October 2000 the court issued a writ directing the city to find Nolan “ permanently incapacitated from working for the City of Anaheim,” and thus entitled to disability retirement. The city appealed.

The Court of Appeal reversed, holding that the test was not whether Nolan could perform the duties of a police officer in Anaheim (the test used by the superior court), but whether he was incapacitated “to work in a similar position elsewhere in the state.” It derived that test from language in [section 21156](#) requiring physical or mental incapacity to perform “duties in the state service.” We granted Nolan’s petition for review to resolve the meaning of this statutory language.

## II.

The paramount goal in construing statutes is to ascertain the Legislature’s intent. **\*349** (*Palmer v. G.T.E California, Inc.* (2003) 30 [Cal.4th](#) 1265, 1271, 135 Cal.Rptr.2d 654, 70 P.3d 1067.) Because the words of the statute are the most reliable indication of that intent, the statutory language is the starting point. (*In re J.W.* (2002) 29 [Cal.4th](#) 200, 209, 126 Cal.Rptr.2d 897, 57 P.3d 363; *People v. Gardeley* (1996) 14 [Cal.4th](#) 605, 621, 59 Cal.Rptr.2d 356, 927 P.2d 713.) If that language is clear and unambiguous, no further inquiry is called for. (*Ibid.*)

Here, the statutory language is clear and unambiguous. [Section 20069](#) defines state service as “service rendered as an employee or officer ... of the state, the university, a school employer, or a contracting agency, for compensation, and only while he or she is receiving compensation *from that employer.*” (§ 20069, *subd. (a)*, italics added.) The majority tellingly deletes the final three words from this sentence, thus altering the statutory meaning. (Maj. opn., *ante*, 14 Cal.Rptr.3d at p. 861, 92 P.3d at p. 353.) Read in its entirety, the section provides that an employee renders state service to, and is paid by, a particular employer (“that employer”), whether the employer is the State of California, the University of California, a school employer, or one of various public **\*\*\*868** entities that contract with PERS for employee coverage.

[Section 21156](#), which governs disability retirement, provides: “If the medical examination and other available information show to the satisfaction of the [PERS Board of

Administration], or in the case of a local safety member, other than a school safety member, the governing body of the contracting agency employing the member, that the member is *incapacitated* physically or mentally for the performance of his or her duties in *the* state service and is eligible to retire for disability, the board shall immediately retire him or her for disability.” (§ 21156, italics added.) In plain language, the statute speaks not of incapacity for a job in statewide public service, but more narrowly of incapacity to perform the employee’s “duties in *the* state service,” that is, duties the employee performs for a particular public employer. This means that state service, as applied to an employee of an agency that has contracted for PERS coverage, pertains to the service for which the employee is paid by a particular agency.

The majority, however, construes the statutory term “the state service” to mean “*all forms* of public agency service that render an employee eligible” for disability retirement. (Maj. opn., *ante*, 14 Cal.Rptr.3d at pp. 861–62, 92 P.3d at p. 353.) Thus, it requires Nolan to show that he is incapacitated to perform not just his usual duties as a City of Anaheim patrol officer, but also that he is incapacitated to perform the “usual duties of a patrol officer” (maj. opn., *ante*, 14 Cal.Rptr.3d at p. 864, 92 P.3d at p. 355) for any other California public agency that hires patrol officers. The majority does not suggest how a city police officer such as Nolan could possibly show that he could not perform the usual duties of a patrol officer for the wide array of potential California public employers, including the California Highway **\*350** Patrol, the University of California, numerous school employers, or an even greater number of localities and public agencies, because the usual duties of a patrol officer vary from agency to agency.

## **\*\*359** III.

Courts normally accord great weight to an administrative interpretation of a statute unless it is clearly erroneous. (*City of Huntington Beach v. Board of Administration* (1992) 4 [Cal.4th](#) 462, 470, fn. 7, 14 Cal.Rptr.2d 514, 841 P.2d 1034; *City of Oakland v. Public Employees’ Retirement System* (2002) 95 Cal.App.4th 29, 39, 115 Cal.Rptr.2d 151; *City of Sacramento v. Public Employees’ Retirement System* (1991) 229 Cal.App.3d 1470, 1478, 280 Cal.Rptr. 847; see *Bonnell v. Medical Bd. of California* (2003) 31 [Cal.4th](#) 1255, 1265, 8 Cal.Rptr.3d 532, 82 P.3d 740.) This is especially appropriate when, as here, the agency’s interpretation is a product of its expertise and administrative experience. (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32

**Cal.4th** 910, 929–930, 12 Cal.Rptr.3d 262, 88 P.3d 1; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 **Cal.4th** 1, 22, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Unlike the majority, I would follow PERS's interpretation of the statutory scheme because it is consistent with the Legislature's intent.

PERS, which has filed an amicus curiae brief, is the administrative agency charged with applying the provisions of the PERL. Under the statutory scheme, although the City of Anaheim made the determination of disability for Nolan as a local safety member (§ 21156), it is PERS that must determine disability “for most state employees and local non-safety employees” of contracting local agencies.

PERS has long read the PERL to require it to determine disability based on **\*\*869** whether applicants are incapacitated to perform their actual usual duties. (See *In The Matter of Ruth A. Keck* (2000) Cal. PERS Bd. Admin., Precedential Dec. No. 00–05<sup>2</sup> [“In determining eligibility for disability retirement, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged.”].)

The majority dismisses the concerns of amicus curiae PERS, which will have to apply the majority's test, that a statewide test applicable to all California public employees with PERS coverage is “not administrable” because of the multiplicity of such public employers throughout the state. The majority seemingly has accepted the bland assurance of counsel for the city at **\*351** oral argument that “Everybody knows what a patrol officer does.” But as amicus curiae PERS points out, although it may be possible to presume certain duties that “other police departments require of police officers,” it cannot be presumed that “uniform circumstances of employment” exist in other cities and other public agencies statewide. PERS notes that “job classifications and descriptions from around the state for a certain position title would not describe identical duties.” Thus, under the majority's holding PERS will be required to assume what duties are most frequently assigned to a given position in order to evaluate a particular employee's disability application. Applying such a generalized and speculative standard will result in an administrative nightmare, and, according to PERS, will prevent it from administering its retirement system fairly.

#### IV.

The majority's holding is also contrary to over 30 years of decisions by California courts. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 86 Cal.Rptr. 450, a Court of Appeal decision, the applicant for disability retirement was a Fish and Game warden, that is, an employee of the State of California whose duties were defined in a job description applicable to all state game wardens. (*Id.* at pp. 874–875, 86 Cal.Rptr. 450.) It was therefore relatively easy to determine whether the applicant's physical limitation on lifting heavy objects made him substantially unable to perform his actual usual duties as a State of California Fish and Game warden. (*Id.* at p. 876, 86 Cal.Rptr. 450.) But when, as here, the applicant works for a local agency that has contracted with PERS, the job descriptions for positions with the same title will vary from local employer to local employer.

**\*\*360** In *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 860–861, 143 Cal.Rptr. 760, the Court of Appeal concluded that an applicant's usual duties are not defined exclusively by a job's formal description or its physical requirements, but are determined in light of the actual demands of the job the applicant has been performing. (See *Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, 195 Cal.Rptr. 318 [usual duties test applied to injured trainee who as yet had no actual usual duties].)

Unlike the actual usual duties test, the majority's test is based on generic duties common to similarly titled jobs, and it disregards altogether the actual duties that the applicant was required to perform and for which the applicant may now be incapacitated.

#### **\*\*870 V.**

Here the statutory language is clear. Read together, sections 20069 and 21156 reflect the Legislature's intent that an employee covered by PERS is **\*352** physically or mentally disabled when the employee is substantially unable to perform the actual and usual duties of the position he or she holds for the current employer. If that employer is the State of California, or a statewide entity such as the University of California, the usual duties of the applicant may be properly determined in part by reference to a job description applicable statewide. But if, as here, the employer is a local contracting agency the usual duties of the applicant are those required by the particular employer of the applicant. In either case the applicant's actual usual duties for the current employer are the correct standard for determining incapacity.

The majority, however, ignores the Legislature's intent as captured in the plain language of the statutes at issue. Instead it finds ambiguity where there is none. Even if the statutory language were ambiguous, moreover, a court must resolve any ambiguity in favor of the employee seeking disability retirement. (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 490, 66 Cal.Rptr.2d 304, 940 P.2d 891.) Here, there is no ambiguity in these statutes, apart from that the majority creates by not reading them carefully.

Today's decision is a serious matter for any law enforcement officer working for a local public agency in this state, or anyone considering a career in local law enforcement. It means that, to obtain a disability retirement, it is not enough that an officer is no longer able, because of physical or mental injury, to perform the duties assigned by the employing agency. Rather, a city or other local agency may deny a disability retirement if the officer *might* be able to perform

the duties of a *roughly comparable* position for *some other* public agency *anywhere* in this large state. This result is not compelled by the governing statute, it is contrary to the statute's established administrative construction, and it imposes a heavy burden on injured employees. Our law enforcement officers deserve better.

I would reverse the Court of Appeal's judgment with directions to affirm the superior court's judgment granting petitioner the relief he seeks.

I CONCUR: **WERDEGAR, J.**

#### All Citations

33 Cal.4th 335, 92 P.3d 350, 14 Cal.Rptr.3d 857, 70 Cal. Comp. Cases 9, 04 Cal. Daily Op. Serv. 5935, 2004 Daily Journal D.A.R. 8137

#### Footnotes

\* Kennard and Werdegar, JJ., dissented.

1 Unless otherwise indicated, all statutory references are to the Government Code.

2 No issue is raised in this case as to whether section 21151 covers psychiatric incapacity resulting from conflicts with fellow employees. Previously, we have assumed it does. (See *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 191, 109 Cal.Rptr.2d 308, 26 P.3d 1044 (*Pearl*) [disability claim "alleging cumulative workplace trauma ... including psychiatric injury caused by a series of incidents involving other officers and [applicant's] supervisor".])

3 (See *Barber, supra*, 18 Cal.App.3d at p. 278, 95 Cal.Rptr. 657 [section 171.1.3 of the San Francisco Charter was properly construed as referring to "duties required to be performed in a given permanent assignment within the department"]; *Craver, supra*, 42 Cal.App.3d at p. 80, 117 Cal.Rptr. 534 ["The language of section 182 [of the Los Angeles Charter] indicates that the determination of disability and necessity of retirement is on a departmental basis rather than that of a single job or a particular duty. The section refers to duties 'in such department' and to 'further service in such department'"]; *O'Toole, supra*, 139 Cal.App.3d at p. 602, 188 Cal.Rptr. 853 ["The sole issue is whether there is substantial evidence to support the trial court's finding that there was no 'light duty' assignment in the [San Francisco] [P]olice [D]epartment available to O'Toole".])

4 In his brief in the Court of Appeal, Mr. Nolan's counsel discussed bifurcation of the burden of proof. Mr. Nolan's primary position, of course, is that he should only be required to prove he is incapable of continuing to perform his duties as a patrol officer for Anaheim. However, his fallback position is that once he shows he is incapable of continuing to work as a patrol officer for Anaheim, the burden would shift to Anaheim to prove "the existence of suitable alternate employment opportunities."

At oral argument in this court, counsel for Anaheim was asked his views on the burden of proof. Counsel responded that if Mr. Nolan showed he was incapable of continuing to perform his usual duties for Anaheim, the burden would shift to Anaheim to show Mr. Nolan was not incapacitated from the performance of his usual duties elsewhere in the state. When asked whether Anaheim would have to show that a position elsewhere in the state was actually available to Mr. Nolan, Anaheim's counsel responded no, that the test should be capacity, not employability.

1 All further unlabeled statutory references are to the Government Code.

1 All statutory references, unless otherwise noted, are to the Government Code.

2 This opinion is available at < <http://www.calpers.ca.gov/eip-docs/about/leg-reg-statutes/board-decisions/past/00-05-keck.pdf> > (as of July 1, 2004).

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33 Cal.App.5th 174  
Court of Appeal, Third District, California.

**PARADISE IRRIGATION** DISTRICT  
et al., Plaintiffs and Appellants,  
v.  
**COMMISSION ON STATE MANDATES**,  
Defendant and Respondent;  
Department of Water Resources et al.,  
Real Parties in Interest and Respondents.

Co81929  
|  
Filed 3/20/2019

### Synopsis

**Background:** After Commission on **State Mandates** denied test claims for subvention by water and **irrigation** districts, the Superior Court, Sacramento County, No. 34201580002016, **Timothy M. Frawley, J.**, dismissed districts' petition for writ of **mandate**. Districts appealed.

**[Holding:]** On rehearing, the Court of Appeal, **Hoch, J.**, held that water and **irrigation** districts were not entitled to subvention with regard to costs of complying with Conservation Act requirements.

Affirmed.

Opinion, 238 Cal.Rptr.3d 656, vacated.

West Headnotes (15)

**[1] States** 🔑 State expenses and charges and statutory liabilities

“Subvention” refers to claims by local governments and agencies for reimbursement from the state for costs of complying with **state mandates** for which the **mandate** does not concomitantly provide funds to the local agency.

**[2] Administrative Law and Procedure** 🔑 Review using standard applied below

Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same.

**[3] Administrative Law and Procedure** 🔑 Construction, interpretation, or application of law in general

**Administrative Law and Procedure** 🔑 Review in general

Appellate courts independently review administrative decisions regarding conclusions as to the meaning and effect of constitutional and statutory provisions.

**[4] Administrative Law and Procedure** 🔑 Deference to Agency in General

**Administrative Law and Procedure** 🔑 Circumstances or Time of Construction

Where the meaning and legal effect of a statute is the issue, an agency’s interpretation is one among several tools available to the court; depending on the context, it may be helpful, enlightening, even convincing, and it may sometimes be of little worth.

**[5] Administrative Law and Procedure** 🔑 Deference to Agency in General

Considered alone and apart from the context and circumstances that produce them, agency interpretations of statutes are not binding or necessarily even authoritative.

**[6] Municipal Corporations** 🔑 Limitations as to rate or amount, or property or persons taxable

The purpose of Proposition 13 is to cut local property taxes. Cal. Const. art. XIII A.

- [7] **Municipal Corporations** ⚡ Limitation on use of funds or credit in general

**Municipal Corporations** ⚡ Submission to voters, and levy, assessment, and collection

**States** ⚡ Limitation of amount of indebtedness or expenditure

The Gann Limit, which restricts amounts state and local governments may appropriate and spend each year from proceeds of taxes, does not require voter approval for imposition of special assessments. Cal. Const. art. XIII B.

- [8] **Municipal Corporations** ⚡ Limitation on use of funds or credit in general

**States** ⚡ Limitation of amount of indebtedness or expenditure

A preexisting special assessment is exempt from Gann Limit, which restricts amounts state and local governments may appropriate and spend each year from proceeds of taxes, if it is imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Cal. Const. art. XIII D, § 5.

- [9] **Water Law** ⚡ Necessity of voter approval

**Water Law** ⚡ Levy and assessment

The voter-approval requirement for new taxes imposed by Proposition 218 does not apply to levying fees for water service; instead, constitutional provision regarding new or increased fees expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges. Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 6.

- [10] **Municipal Corporations** ⚡ Limitation on use of funds or credit in general

**Water Law** ⚡ Powers, proceedings and review

**Water Law** ⚡ Levy and assessment

Water and **irrigation** districts were not entitled to subvention with regard to costs of complying with Conservation Act requirements, despite fact that, under Proposition 218, a majority of property owners could protest a fee imposed by districts and prevent its imposition; existence of power-sharing arrangement between districts and voters and the possibility of a protest did not divest districts of authority to levy fees to pay for costs of complying with Conservation Act without prior voter approval. Cal. Const. art. XIII D, § 6; Cal. Gov't Code § 53755; Cal. Water Code §§ 22280, 35470.

- [11] **Municipal Corporations** ⚡ Limitation on use of funds or credit in general

**Taxation** ⚡ Constitutional Requirements and Restrictions

Constitutional provision allowing a subvention of funds to reimburse local governments for the costs of **state-mandates** was not intended to reach beyond taxation. Cal. Const. art. XIII B.

- [12] **Municipal Corporations** ⚡ Nature and scope of power

The inquiry into a local agency's fee authority constitutes an issue of law rather than a question of fact; fee authority is a matter governed by statute rather than by factual considerations of practicality.

- [13] **Water Law** ⚡ Powers, proceedings and review

Statutory authorization to levy fees, rather than practical considerations, conclusively determines whether the Water and **Irrigation** Districts are entitled to subvention.

- [14] **Amicus Curiae** ⚡ Powers, functions, and proceedings



Amicus Curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.

**[15] Evidence**  Legislative proceedings and journals

The Court of Appeal would not take judicial notice of legislative history materials relating to special districts.

**Witkin Library Reference:** 9 Witkin, *Summary of Cal. Law* (11th ed. 2017) Taxation, § 123 [Where Expenses Are Recoverable From Sources Other Than Taxes.]

**\*\*770** APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, Judge. Affirmed. (Super. Ct. No. 34201580002016)

**Attorneys and Law Firms**

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OPINION ON REHEARING

HOCH, J.

**\*180 \*\*771** [1] This appeal focuses on circumstances in which local water and **irrigation** districts may be entitled to subvention for unfunded **state mandates**. “Subvention” refers to claims by local governments and agencies in California for reimbursement from the state for costs of complying with **state mandates** for which the **mandate** does not concomitantly provide funds to the local agency. (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 395, 69 Cal.Rptr.2d 231 (*Connell*)). In the event a local agency believes it is entitled to subvention for a new unfunded **state mandate**, the agency may file a “test claim” with the Commission on **State Mandates** (Commission). The Commission hears the matter and determines whether the statute or executive order constitutes an unfunded **state mandate** for which subvention is required.

Here, the Commission denied consolidated test claims for subvention by appellants **Paradise Irrigation** District (**Paradise**), South Feather Water & **\*181** Power Agency (South Feather), Richvale **Irrigation** District (Richvale), Biggs-West Gridley Water District (Biggs), Oakdale **Irrigation** District (Oakdale), and Glenn-Colusa **Irrigation** District (Glenn-Colusa). We refer to appellants collectively as the Water and **Irrigation** Districts, except when addressing individual appellants’ separate claims. The Commission determined the Water and **Irrigation** Districts have sufficient legal authority to levy fees to pay for any water service improvements **mandated** by the Water Conservation Act of 2009 (Stats. 2009-2010, 7th Ex. Sess., ch. 4, § 1 (Conservation Act)). The trial court agreed and denied a petition for writ of **mandate** brought by the Water and **Irrigation** Districts.

On appeal, the Water and **Irrigation** Districts present a question left open by this court’s decision in *Connell, supra*, 59 Cal.App.4th 382, 69 Cal.Rptr.2d 231. *Connell* addressed the statutory interpretation of **Revenue and Taxation Code section 2253.2** (Stats. 1982, ch. 734, § 10, pp. 2916-2917) that has been recodified in pertinent part without substantive change in **Government Code section 17556** (added by Stats. 1984, ch. 1459, § 1, pp. 5113-5119). (*Connell*, at pp. 397-398 & fn. 16, 69 Cal.Rptr.2d 231.) Based on the statutory language, *Connell* held local water districts are precluded from subvention for **state mandates** to increase **\*\*772** water purity levels insofar as the water districts have legal

authority to recover the costs of the **state-mandated** program. (*Id.* at p. 401, 69 Cal.Rptr.2d 231.) In so holding, *Connell* rejected an argument by the Santa Margarita Water District and three other water districts (collectively Santa Margarita) that they did not have the “practical ability in light of surrounding economic circumstances.” (*Id.* at p. 401, 69 Cal.Rptr.2d 231.) This court reasoned that crediting Santa Margarita’s argument “would create a vague standard not capable of reasonable adjudication. Had the Legislature wanted to adopt the position advanced by [Santa Margarita], it would have used ‘reasonable ability’ in the statute rather than ‘authority.’ ” (*Ibid.*)

In *Connell, supra*, 59 Cal.App.4th 382, 69 Cal.Rptr.2d 231, this court declined to consider a passing comment by Santa Margarita that the then-recent passage of Proposition 218 (as approved by voters Gen. Elec. Nov. 5, 1996, eff. Nov. 6, 1996 <<https://elections.cdn.sos.ca.gov/sov/1996-general/official-declaration.pdf>> [as of March 19, 2019], archived at <<https://perma.cc/F23E-P2KA>>) (Proposition 218) meant that “the authority of local agencies to recover costs for many services [is] impacted by the requirement to secure the approval by majority vote of the property owners voting, to levy or to increase property related fees.” (*Connell, at p. 403, 69 Cal.Rptr.2d 231.*) This appeal addresses that issue by considering whether the passage of Proposition 218 changed the authority of water and **irrigation** districts to recover costs from their ratepayers so that unfunded **state mandates** for water service must now be reimbursed by the state.

\*182 The Water and **Irrigation** Districts argue Proposition 218 removed their prerogative to impose fees because any new fees may be defeated by a majority of their water customers filing written protests. They also challenge the Commission’s ruling it lacked jurisdiction to consider reimbursement claims by Richvale and Biggs because those two districts have not shown they collect any taxes. In support of the Water and **Irrigation** Districts’ position, we have received and considered two amicus curiae briefs: one from the California State Association of Counties and League of California Cities (collectively the Counties and Cities), and one from the California Special Districts Association, Association of California Water Agencies, and California Association of Sanitation Agencies (collectively the Special Districts). We also have received briefing from real parties in interest, the Department of Finance and Department of Water Resources.

We affirm. The Water and **Irrigation** Districts possess statutory authority to collect fees necessary to comply with the Water Conservation Act. Thus, under **Government Code section 17556, subdivision (d)**, subvention is not available to the Water and **Irrigation** Districts. The Commission properly denied the reimbursement claims at issue in this case because the Water and **Irrigation** Districts continue to have legal authority to levy fees even if subject to majority protest of water and **irrigation** district customers. Under the guidance of the California Supreme Court’s decision in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 211, 46 Cal.Rptr.3d 73, 138 P.3d 220 (*Bighorn*), we conclude that majority protest procedures are properly construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority.

## BACKGROUND

### *The Water and Irrigation Districts’ Test Claims*

In 2011, the Water and **Irrigation** Districts filed a joint test claim with the \*\*773 Commission. The Water and **Irrigation** Districts asserted the Conservation Act “imposes unfunded **state mandates** to conserve water and achieve water conservation goals on local public agencies that are ‘urban retail water suppliers’ and/or ‘agricultural water suppliers.’ ” In 2013, Richvale and Biggs filed a second test claim asserting various regulations implementing the Conservation Act also constitute reimbursable **state mandates**. The Commission consolidated the test claims. After consolidating the test claims, the Commission determined Richvale and Biggs did not have standing to bring the second test claim. The Commission reasoned Richvale and Biggs are not “subject to the tax and spend limitations of articles XIII A and \*183 B of the California Constitution”<sup>1</sup> because they are funded solely from service charges, fees, and assessments. Thereafter Oakdale **Irrigation** District and Glenn-Colusa **Irrigation** District substituted in as claimants for the second test claim.

### *The Commission’s Decision*

In December 2014, the Commission denied the consolidated test claims “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.” The decision states that “[t]he Commission finds that the Water Conservation Act of 2009 ..., and the Agricultural Water Measurement regulations promulgated by the Department of Water Resources ... 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.”

The Commission’s decision concludes that, “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](#).” The Commission rejected the Water and **Irrigation** Districts’ arguments that after the enactment of Proposition 218 “they are now ‘authorized to do no more than *propose* a fee increase that can be rejected’ by majority protest.” (Fns. omitted.) The Commission reasoned that “[i]n 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, or provide evidence that a court determined that Proposition 218 represents a constitutional hurdle to fee authority as a matter of law.” The Commission determined it could not make either finding.

**\*184 \*\*774** As to the second test claim, the Commission determined these water and **irrigation** districts “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](#).”

### *Trial Court Proceedings*

In February 2015, the Water and **Irrigation** Districts filed a petition for writ of administrative **mandate** under [Code of Civil Procedure section 1094.5](#) to challenge the Commission’s denial of their test claims. The trial court heard the matter and denied the Water and **Irrigation** Districts’ writ petition.

The trial court’s decision noted that “[w]hile the court agrees with [the Water and **Irrigation** Districts] that the Commission abused its discretion in dismissing the test claims of Richvale and Biggs-West, the court shall deny the petition because [the Water and **Irrigation** Districts] have failed to show how they incurred reimbursable **state-mandated** costs.” Noting the Water and **Irrigation** Districts admitted “that, but for Proposition 218, they would have sufficient authority to establish or increase fees or charges to recover the costs of any new **mandates**,” the trial court determined it was “unwilling to conclude that [the Water and **Irrigation** Districts] lack ‘sufficient’ fee authority based on the speculative and uncertain threat of a majority protest. Thus, in the absence of a showing that [the Water and **Irrigation** Districts] have ‘tried and failed’ to impose or increase the necessary fees, the Commission properly concluded that [the Water and **Irrigation** Districts] have sufficient fee authority to cover the costs of any **mandated** programs.” Continuing with this reasoning, the trial court stated that “[l]ogically, then the limitations period for filing a test claim cannot begin to run until after the agency has ‘tried and failed’ to recover the costs through fees or charges subject to a majority protest requirement.”

The trial court also concluded the Commission abused its discretion in determining Richvale and Biggs are ineligible for subvention because they do not receive ad valorem property tax revenue. However, the trial court declined to make a determination of these districts’ entitlement to reimbursement for lack of an adequate record. In the trial court’s view, “[d]etermining whether Richvale and Biggs-West receive ‘proceeds of taxes’ will require a comprehensive account of the revenues received by them, and a subsequent determination as to whether those revenues constitute ‘taxes’ within the meaning of Article XIII B. No simple feat.” Nonetheless, the trial court determined the ability of Richvale and Biggs to levy fees supported the conclusion they are not eligible for subvention for their test claims.

## \*185 DISCUSSION

## I

*Standard of Review*

[2] [3] As the California Supreme Court has explained, “Courts review a decision of the Commission to determine whether it is supported by substantial evidence. (Gov. Code, § 17559.) Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814, 38 Cal.Rptr.2d 304 (*County of Los Angeles*)). However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810 [53 Cal.Rptr.2d 521].)” ( \*\*775 *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

[4] [5] Even while exercising independent review of statutes and constitutional provisions, we recognize that “[w]here the meaning and legal effect of a statute is the issue, an agency’s interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. (See *Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206 [54 Cal.Rptr.2d 434].) Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission ..., ‘The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.’ (Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81, italics added.)” (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

## II

*Subvention and the Authority to Levy Fees*

The Water and Irrigation Districts contend they no longer have authority to impose fees to pay for state-mandated water upgrades because Proposition 218 provides that any new fees may be defeated by a majority protest by their water customers. We are not persuaded.

## \*186 A.

*Subvention*

The voters’ passage of Proposition 4 in 1979 added a subvention requirement to article XIII B in addition to restricting the amount of taxes state and local governments may appropriate and spend each year.<sup>2</sup> Specifically, article XIII B “requires state reimbursement of resulting local costs whenever, after January 1, 1975, ‘the Legislature or any state agency mandates a new program or higher level of service on any local government ....’ ( [Cal. Const., art. XIII B,] § 6.) Such mandatory state subventions are excluded from the local agency’s spending limit, but included within the state’s. ( [Id.,] § 8, subs. (a), (b).)” (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*)).

To implement the constitutional subvention requirement, the Legislature enacted Government Code section 17551 (Stats. 1984, ch. 1459, § 1, pp. 5113-5119) that provides for the Commission to “hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.” (Gov. Code, § 17551, subd. (a).) The Commission is a quasi-judicial body. (Gov. Code, § 17500.) As this court has previously noted, “all questions concerning state-mandated costs are to be presented to the Commission in the first instance. ( \*\*776 Gov. Code, § 17500 et seq.) This is the exclusive means for pursuing such claims. (Gov. Code, § 17552.)” (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 640, 21 Cal.Rptr.2d 453.)

Government Code section 17514 states that “ ‘[c]osts mandated by the state’ means any increased costs which a local agency or school district is required to incur after

July 1, 1980, as a result of any statute ..., or any executive order implementing any statute ..., which **mandates** a new program or higher level of service of an existing program within the meaning of [Section 6 of Article XIII B of the California Constitution](#).” However, [section 17556](#) provides that “[t]he [Commission] shall not find costs **mandated** by the **state**, as defined in [Section 17514](#), in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following: [¶] ... [¶] (d) The local agency \*187 or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the **mandated** program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.”

In the event the local agency believes it is entitled to subvention for a new unfunded **state mandate**, “[t]he local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute **mandates** a new program or increased level of service. ([Gov. Code, §§ 17521, 17551, 17555](#).) ... If the Commission finds no reimbursable **mandate**, the local agency may challenge this finding by administrative **mandate** proceedings under [section 1094.5 of the Code of Civil Procedure](#). ([Gov. Code, § 17559](#).) [Government Code section 17552](#) declares that these provisions ‘provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs **mandated** by the **state** as required by Section 6 ....’” ([County of San Diego v. State of California](#) (1997) 15 Cal.4th 68, 81-82, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

## B.

### *Connell v. Superior Court*

*Connell* involved a test claim brought by Santa Margarita to seek subvention for a statewide regulation requiring the water districts to increase water purity for reclaimed wastewater when used for certain types of **irrigation**. (*Connell, supra*, 59 Cal.App.4th at p. 385, 69 Cal.Rptr.2d 231.) The state Board of Control (now Commission on **State Mandates**) found the regulation constituted a reimbursable **state mandate**. (*Id.* at p. 387, 69 Cal.Rptr.2d 231.) The trial court affirmed the Board’s decision, from which the State Controller and State Treasurer appealed. (*Id.* at pp. 385-386, 69 Cal.Rptr.2d 231.) The State Controller and State Treasurer argued Santa Margarita had

legal authority to pay for the increased water quality costs and therefore was not entitled to subvention. Relying on a statutory provision now contained in [Government Code section 17556](#), this court agreed. (*Connell, at pp. 386, 397-398, 69 Cal.Rptr.2d 231*.) Then, as now, [Government Code section 17556](#), has provided in pertinent part that the Commission “shall not find costs **mandated** by the **state** ... in any claim submitted by a local agency or school district, if, after a hearing, the [Commission] finds that: [¶] ... [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the **mandated** program or increased level of service.” (Compare \*\*777 *Connell, at p. 398, fn. 16, 69 Cal.Rptr.2d 231*, with [Gov. Code, § 17556](#).)

*Connell* noted the California Supreme Court has held that [Article XIII B, section 6](#), “requires subvention only when the costs in question can be \*188 recovered solely from tax revenues. ( [*County of Fresno v. State of California* (1991) 53 Cal.3d 482,] 487 [280 Cal.Rptr. 92, 808 P.2d 235].) [Government Code section 17556, subdivision \(d\)](#), ‘effectively construes the term “costs” in the constitutional provision as excluding expenses that are recoverable *from sources other than taxes*. Such a construction is altogether sound.’ ” (*Connell, supra*, 59 Cal.App.4th at p. 398, 69 Cal.Rptr.2d 231, quoting *County of Fresno, at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235*, italics added.) Thus, *Connell* examined whether the Santa Margarita Water District had authority to pay for the increase in water quality from sources other than taxes.

This court, in *Connell*, held [Water Code section 35470](#) provided Santa Margarita with authority to recover the costs of increased water quality as **mandated** by the **state** regulation. (59 Cal.App.4th at p. 398, 69 Cal.Rptr.2d 231.) As *Connell* recounts, former [Water Code section 35470](#) (Stats. 1976, ch. 1044, § 1, p. 4664) then provided that “[a]ny 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. The charges may include standby charges to holders of title to land to which water may be made available, whether the water is actually used or not. The 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 district purpose.”<sup>3</sup> (*Connell, supra*, 59 Cal.App.4th at p. 398, 69 Cal.Rptr.2d 231.) Based

on this statutory authority to levy fees, *Connell* held the water districts “have authority, i.e., the right or power, to levy fees sufficient to cover the costs.” (*Id.* at p. 401, 69 Cal.Rptr.2d 231.)

In so holding, *Connell* rejected the Santa Margaritas’ invitation “to construe ‘authority,’ as used in the statute, as a practical ability in light of surrounding \*189 economic circumstances.” (*Connell, supra*, 59 Cal.App.4th at p. 401, 69 Cal.Rptr.2d 231.) Santa Margarita argued the new regulations would make reclaimed water unmarketable – with the result that users would switch to potable water. (*Id.* at pp. 401-402, 69 Cal.Rptr.2d 231.) This court held the economic practicability argument \*\*778 “was irrelevant and injected improper factual questions into the inquiry” that “presented a question of law.” (*Id.* at pp. 401, 402, 69 Cal.Rptr.2d 231.)

Finally, this court noted but did not decide on a passing comment by Santa Margarita that, under Proposition 218, “the authority of local agencies to recover costs for many services [is] impacted by the requirement to secure the approval by majority vote of the property owners voting, to levy or to increase property related fees.” (*Connell, supra*, 59 Cal.App.4th at p. 403, 69 Cal.Rptr.2d 231.) This case takes up where *Connell* left off, namely with the question of whether the passage of Proposition 218 undermined water and **irrigation** districts’ authority to levy fees so that they are entitled to subvention for **state-mandated** regulations requiring water infrastructure upgrades. The Water and **Irrigation** Districts do not argue this court wrongly decided *Connell, supra*, 59 Cal.App.4th 382, 69 Cal.Rptr.2d 231, but only that the rule of decision was superseded by Proposition 218. Consequently, we proceed to examine the effect of Proposition 218 on the continuing applicability of *Connell*.

### C.

#### *Proposition 218*

[6] To determine whether and how Proposition 218 affects the entitlement of the Water and **Irrigation** Districts to subvention of the costs of **state-mandated** water upgrades, we survey the context within which Proposition 218 was passed by California voters. “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.]’ (*County of Los Angeles v. Sasaki* (1994) 23

Cal.App.4th 1442, 1451, 29 Cal.Rptr.2d 103.) Its principal provisions limited ad valorem property taxes to one percent of a property’s assessed valuation and limited increases in the assessed valuation to two 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 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 \*190 vote.” (*Howard Jarvis Taxpayers Ass’n v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-683, 86 Cal.Rptr.2d 592 (*Howard Jarvis Taxpayers Ass’n*)).

“In November 1979, the voters adopted Proposition 4, adding article XIII B to the state Constitution. Article XIII B—the so-called ‘Gann limit’—restricts the amounts state and local governments may appropriate and spend each year from the ‘proceeds of taxes.’ (Art. XIII B,] §§ 1, 3, 8, subds. (a)–(c).)” (*City of Sacramento, supra*, 50 Cal.3d at pp. 58-59, 266 Cal.Rptr. 139, 785 P.2d 522.) The Supreme Court in *City of Sacramento* noted that “Articles XIII A and XIII B work in tandem, together restricting California governments’ power both to levy and to spend for public purposes.” (*Id.* at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.)

The Gann Limit applies to *taxes* rather than *fees*. “Article XIII B of the Constitution was intended to apply to taxation—specifically, to provide ‘permanent protection for taxpayers from excessive taxation’ \*\*779 and ‘a reasonable way to provide discipline in tax spending at state and local levels.’ (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an ‘appropriations limit’ for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h) ) and allows no ‘appropriations subject to limitation’ in excess thereof (*id.*, § 2). (See *County of Placer v. Corin, supra*, 113 Cal.App.3d at p. 446 [170 Cal.Rptr. 232].) It defines the relevant ‘appropriations subject to limitation’ as ‘any authorization to expend during a fiscal year the proceeds of taxes. ...’ (Cal.

Const., art. XIII B, § 8, subd. (b).) It defines ‘proceeds of taxes’ as including ‘all tax revenues and the proceeds to ... government from,’ inter alia, ‘regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably borne by [government] in providing the regulation, product, or service ....’ (Cal. Const., art. XIII B, § 8, subd. (c), emphasis added.) Such ‘excess’ proceeds from ‘licenses,’ ‘charges,’ and ‘fees’ ‘are but taxes’ for purposes here. (*County of Placer v. Corin*, supra, 113 Cal.App.3d at p. 451 [170 Cal.Rptr. 232], italics in original.) [¶] Article XIII B of the Constitution, however, was not intended to reach beyond taxation.” (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487, 280 Cal.Rptr. 92, 808 P.2d 235.)

[7] [8] The Gann Limit does not require voter approval for imposition of special assessments. (*Howard Jarvis Taxpayers Ass’n*, supra, 73 Cal.App.4th at p. 682, 86 Cal.Rptr.2d 592.) The court in *Howard Jarvis Taxpayers Ass’n* recounted that, “[i]n 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 \*191 charge. (Cal. Const., art. XIII D, § 3, subds. (a)(1)-(a)(4); see also Cal. Const., art. XIII D, § 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. [¶] First, Proposition 218 defines an ‘assessment’ as ‘any levy or charge upon real property ... for a special benefit conferred upon the real property.’ (Cal. Const., art. XIII D, § 2, subd. (b).) It defines a ‘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. General enhancement of property value does not constitute “special benefit.” ’ (Cal. Const., art. XIII D, § 2, subd. (i).) Proposition 218 then provides that an assessment may be imposed only if (1) it is supported by an engineer’s report (Cal. Const., art. XIII D, § 4, subd. (b) ), (2) it does not exceed the reasonable cost of the proportionate special benefit conferred on each affected parcel (Cal. Const., art. XIII D, § 4, subds. (a), (f) ), and (3) it receives, by mailed ballot, a vote of at least half of the owners of affected parcels, weighted ‘according to the proportional financial obligation of the affected property.’ (Cal. Const., art. XIII D, § 4, subds. (c)-(e) ). [¶] ... Four specified classes of preexisting assessments, however, are ‘exempt from the procedures and approval process set forth in Section 4.’ (Cal. Const., art. XIII D, § 5.) ... Under article XIII D, section

5, subdivision (a) of the California Constitution (section 5(a) ), a preexisting special assessment is exempt if it is ‘imposed exclusively to finance the capital costs or \*\*780 maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control.’ ” (*Howard Jarvis Taxpayers Ass’n*, supra, at pp. 682-683, 86 Cal.Rptr.2d 592, italics changed.)

#### D.

#### *The Water and Irrigation Districts’ Statutory Authority to Recover Costs from Ratepayers*

In approaching the Water and Irrigation Districts’ argument regarding their statutory authority, or lack thereof, to impose fees for improvements required by the Water Conservation Act, we begin by considering the California Supreme Court’s guidance in *Bighorn*, supra, 39 Cal.4th 205, 46 Cal.Rptr.3d 73, 138 P.3d 220. *Bighorn* involved the question whether local voters could adopt an initiative measure to reduce a local water district’s charges for domestic water and to require the district to receive preapproval from the voters for any future increase. (*Id.* at p. 209, 46 Cal.Rptr.3d 73, 138 P.3d 220.) Although *Bighorn* considered the question in terms of the voters’ initiative powers, the California Supreme Court articulated an approach to understanding how voter powers to affect water district rates affect the ability of the water districts to recover their costs.

\*192 [9] At the heart of *Bighorn* lies the distinction between majority *protest* procedures for fees that may occur after imposition of the fees and assessments in contrast to the voter-approval requirement imposed by Proposition 218 before new taxes may be imposed. The voter-approval requirement of article XIII C, in section 2, subdivision (b), provides 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.’ ” (*Bighorn*, supra, 39 Cal.4th at p. 211, 46 Cal.Rptr.3d 73, 138 P.3d 220.) This voter-approval requirement, however, does not apply to levying fees for water service. Instead, section 6 of article XIII “expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges.” (*Bighorn* at pp. 218-219, 46 Cal.Rptr.3d 73, 138

P.3d 220.) The *Bighorn* court concluded that, “[a]t 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.*” (*Id.* at p. 219, 46 Cal.Rptr.3d 73, 138 P.3d 220, italics added.) In other words, while new taxes require voter consent, the imposition of new water service fees do not require such preapproval.

Equally important for purposes of the issue presented in this case, the *Bighorn* court explored the power-sharing relationship between local agencies and the electorate when noting Proposition 218’s addition of [article XIII C, section 3, to the California Constitution](#) “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 **\*\*781** 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* [ (1995) ] 9 Cal.4th [763,] 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. [ (1995 ed.) ] ch. 112, p. 190), will give appropriate consideration and deference to the voters’ expressed wishes for affordable water service. The notice **\*193** and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency’s board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers’ concerns that the agency’s water delivery charges are excessive.” (*Bighorn, supra*, 39 Cal.4th at pp. 220-221, 46 Cal.Rptr.3d 73, 138 P.3d 220, italics added; fns. omitted.) Here, the Water and **Irrigation** Districts have

statutory authority to impose fees on their customers without need to first secure voter approval.

Biggs is a water district governed by Division 13 of the Water Code, which is known as the California Water District Law. ([Water Code, § 34000 et seq.](#)) Within Division 13, [Water Code section 35470](#) provides that the water districts in this case “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.*” (Italics added.) This portion of [Water Code section 35470](#) remains unchanged since this court’s decision in *Connell, supra*, 59 Cal.App.4th at page 398, 69 Cal.Rptr.2d 231. [Water Code section 35470](#) expressly reflects the Legislature’s determination that water districts may charge the necessary fees for water service to their customers.

We reach the same conclusion with respect to the **irrigation** districts even though they derive their statutory fee authority from elsewhere in the Water Code. **Paradise**, South Feather, Richvale, Oakdale, and Glenn-Colusa are **irrigation** districts governed by Division 11 of the Water Code, which is known as the **Irrigation** District Law. ([Water Code, § 20500 et seq.](#)) Within Division 11, [Water Code section 22280](#) provides in pertinent part: “Any district may in lieu in whole or in part of levying assessments *fix and collect charges for any service furnished* by the district ....” (Italics added.) The italicized portion of [Water Code section 22280](#) provides **Paradise**, South Feather, Richvale, Oakdale, and Glenn-Colusa with statutory authority for imposing fees for implementing the **mandates** of the Conservation Act.

[10] [11] The express statutory authority of the Water and **Irrigation** Districts to impose fees under Divisions 11 and 13 of the Water Code means the costs of complying with the Conservation Act are not subject to subvention because the costs are “recoverable from sources other than taxes” within the meaning of article XIII B. (*County of Fresno, supra*, 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.) As the California Supreme Court has held, “Article XIII B of the Constitution ... was not intended to reach beyond taxation.” (*Ibid.*) Consequently, the Water and **Irrigation** Districts are not entitled to subvention. **\*\*782** [Government Code section 17556, subdivision \(d\)](#), provides that subvention is not available if the local agency “has the authority to levy service charges, fees, or assessments sufficient to pay for the **mandated** program or increased level of service.”



\*194 The Water and **Irrigation** Districts in this case do not dispute that **Water Code** sections 22280 and 35470 provide them with statutory authority to recover the costs necessary to comply with conservation goals imposed by the Conservation Act. Instead, the Water and **Irrigation** Districts deny they have the ability to impose fees because of the existence of protest procedures. For example, **Government Code** section 53755 delineates the procedural requirements for notice and hearing applicable to changes in property-related fees and charges. **Section 53755**, however, does not divest the Water and **Irrigation** Districts of the ability to raise fees for subvention purposes simply because it allows a majority protest procedure. (*Gov. Code*, § 53755, subds. (a)(1) & (b).) Instead, **sections 22280** and **35470** expressly grant the Water and **Irrigation** Districts authority to impose fees and do so without prior voter approval. The existence of a power-sharing arrangement between the Water and **Irrigation** Districts and voters does not undermine the fee authority that the districts have under **sections 22280** and **35470**. (*Bighorn, supra*, 39 Cal.4th at pp. 220-221, 46 Cal.Rptr.3d 73, 138 P.3d 220.)

Proposition 218 also imposes a majority protest procedure but also does not divest the Water and **Irrigation** Districts of their authority to levy fees. (Art. XIII D, § 6, subd. (a) & (c).) Article XIII D, section 6, requires a local agency to identify parcels to be subject to a new fee, calculate the fee amount, and provide notice to affected property owners of the proposed fee. (*Id.*, § 6, subd. (a)(1).) The local agency shall conduct a public hearing and consider all written protests filed by the affected property owners. (*Id.*, § 6, subd. (a)(2).) If a majority of the property owners present written protests against the fee, the fee may not be imposed. (*Ibid.*) As with the statutory protest procedures, the *possibility* of a protest under article XIII D, section 6, does not eviscerate the Water and **Irrigation** Districts' ability to raise fees to comply with the Water Conservation Act.

As a constitutionally sound power-sharing arrangement, the protest procedure implemented by Proposition 218 is not properly construed as a deprivation of fee authority as the Water and **Irrigation** Districts urge. We disagree with the assumption of the Water and **Irrigation** Districts and amici that water customers' ability to file written protests by its very nature deprives local agencies of their ability to raise fees for necessary projects. Consistent with the California Supreme Court's reasoning in *Bighorn*, we presume local voters will give appropriate consideration and deference to **state mandated** requirements relating to water conservation

measures required by statute. (*Bighorn, supra*, 39 Cal.4th at p. 220, 46 Cal.Rptr.3d 73, 138 P.3d 220.) Consequently, we reject the Water and **Irrigation** Districts' proposition that the existence of the majority protest procedure enacted through Proposition 218 represents the evisceration of water and **irrigation** districts' legal authority to levy fees necessary to comport with state water laws. Proposition 218 implemented a power-sharing \*195 arrangement that does not constitute a revocation of the Water and **Irrigation** Districts' fee authority. (*Ibid.*)

[12] We also reject the Water and **Irrigation** Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees. This contention is similar to the argument presented \*\*783 in *Connell* where Santa Margarita asserted the **state mandated** regulation was not economically practicable. (*Connell, supra*, 59 Cal.App.4th at p. 401, 69 Cal.Rptr.2d 231.) We adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact. (*Ibid.*) Fee authority is a matter governed by statute rather than by factual considerations of practicality.

[13] [14] [15] The corollary of our continued adherence to the rule articulated in *Connell, supra*, 59 Cal.App.4th 382, 69 Cal.Rptr.2d 231 is that fee authority is not controlled by whether the Water and **Irrigation** Districts have "tried and failed" to levy fees. We decline to adopt the trial court's try-and-fail approach that suggests the Water and **Irrigation** Districts may become entitled to subvention despite their continuing statutory authority to levy fees upon showing a district's water customers with majority voting power defeated the proposed levy. As noted above, *Bighorn* instructs that we presume voters will give appropriate consideration and deference to proposals of fees by the boards of the Water and **Irrigation** Districts. (*Bighorn, supra*, 39 Cal.4th at pp. 220-221, 46 Cal.Rptr.3d 73, 138 P.3d 220.) Statutory authorization to levy fees – rather than practical considerations – conclusively determines whether the Water and **Irrigation** Districts are entitled to subvention. Thus, the authority conferred by **Water Code** sections 22280 and 35470 supports the decision of the Commission to deny the Water and **Irrigation** Districts' test claims.<sup>4</sup>

\*196 The Water and **Irrigation** Districts contend their argument is supported by "precisely the analysis this court performed in *Manteca Unified Sch. Dist. v. Reclamation Dist. No. 17* [(2017) 10 Cal.App.5th 730, 216 Cal.Rptr.3d 256]."

We disagree. *Manteca Unified Sch. Dist. v. Reclamation Dist. No. 17* (2017) 10 Cal.App.5th 730, 216 Cal.Rptr.3d 256 (*Manteca*) involved the narrow question of whether a school district could claim a categorical exemption from reclamation district fees for levee maintenance and other reclamation work under *Water Code* section 51200 and Proposition 218. (*Id.* at p. 732, 216 Cal.Rptr.3d 256.) *Water Code* section 51200 provides that “[t]he assessments levied by a [reclamation] district shall include all lands and rights of way within the district, owned by the State or by any city, county, public corporation, or utility district formed under the laws of the State *other than public roads, highways, and \*\*784 school districts.*” (§ 51200, italics added; see also *Manteca, supra*, at p. 733, 216 Cal.Rptr.3d 256.) And, as this court noted, “The passage of Proposition 218 in 1996 changed the rules pertaining to exemptions from assessment.” (*Id.* at p. 737, 216 Cal.Rptr.3d 256.)

In *Manteca*, this court concluded that “[a]rticle XIII D, section 4, subdivision (a), which supersedes section 51200 in both time and stature, commands that ‘Parcels within a district that are owned or used by any agency [or] the State of California ... shall not be exempted from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.’ ” (*Manteca, supra*, 10 Cal.App.5th at p. 737, 216 Cal.Rptr.3d 256.) For purposes of this case, however, *Manteca* is inapposite because it concerned only the narrow question of whether school districts are eligible for categorical exemption from fees levied by reclamation districts. *Manteca* did not address the question of whether the existence of a majority protest procedure so undermines a public agency’s ability to raise fees to comply with a **state mandate** that subvention is required.

The Water and **Irrigation** Districts also rely on the inapposite case of *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 186 Cal.Rptr.3d 362. That case did not examine the effect of the majority protest procedure on the ability of government agencies to levy fees. Instead, *Capistrano* involved the issue of how public water agencies may formulate their rate structures for their customers to be in compliance with the proportionality requirements of Proposition 218. (*Id.* at pp. 1498, 1516, 186 Cal.Rptr.3d 362.)

We are also not persuaded by the Water and **Irrigation** Districts’ reliance on *Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 160 Cal.Rptr.3d 524. *Mission*

*Springs* centered on the extent of the initiative power reserved to the people. The *Mission Springs* court held that because water districts did not have the power to set rates so low that they are inadequate to pay the costs of water supply that voters similarly lacked the **\*197** same power through the initiative process. (*Id.* at p. 921, 160 Cal.Rptr.3d 524.) That decision did not consider whether the majority protest procedure had any effect on the Water and **Irrigation** Districts’ power to collect fees.

The Commission has brought to our attention the Legislature’s passage of Senate Bill No. 231 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 536, § 2 (SB 231) ). The Water and **Irrigation** Districts asserted SB 231 was not relevant to the issue in this case. We agree. SB 231 was passed in response to the decision in *Howard Jarvis Taxpayers Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 121 Cal.Rptr.2d 228. *City of Salinas* held storm water drainage fees were a property-related fee requiring voter approval because storm water drains are not “sewers” that are exempt from the voter-approval requirement of article XIII D, section 6, subdivision (c). (*Id.* at p. 1355-1356, 121 Cal.Rptr.2d 228.) SB 231 amended *Government Code* section 53750, subdivision (k), to expand the definition of “sewer” to include storm water systems for purposes of Article XIII C and XIII D. (Stats 2017, ch. 536, § 1.)

In this case, none of the parties argue the costs for upgrading water service that may be required by the Conservation Act are subject to voter approval. Such an argument would be untenable because SB 231 added **\*\*785 Government Code section 53751, subdivision (h)**, to declare that “Proposition 218 exempts sewer and water services from the voter-approval requirement.” (Stats. 2017, ch. 536, § 2.)<sup>5</sup>

### III

#### *Subvention Eligibility for Richvale and Biggs*

Our conclusion that Proposition 218 does not undermine the statutory authority of the Water and **Irrigation** Districts to levy fees to pay for the costs of complying with the Conservation Act, obviates the need to consider whether the Commission erred in dismissing the test claims of Richvale and Biggs on grounds Richvale and Biggs are not eligible for subvention because they do not receive tax revenues. Richvale and Biggs – along with the other **\*198** Water and

**Irrigation** Districts – have statutory authority to impose or increase water fees under **Water Code sections 22280** and **35470** in order to comply with the Conservation Act.

We concur:

**RAYE**, P. J.

**BUTZ**, J.

#### DISPOSITION

The judgment is affirmed. Respondent Commission on **State Mandates** and real parties Department of Finance and Department of Water Resources shall recover their costs, if any, on appeal. (**Cal. Rules of Court, rule 8.278(a)(1) & (2)**.)

#### All Citations

33 Cal.App.5th 174, 244 Cal.Rptr.3d 769, 19 Cal. Daily Op. Serv. 2555, 2019 Daily Journal D.A.R. 2343

#### Footnotes

- 1 Undesignated citations to articles are to the California Constitution.
- 2 Proposition 4 was approved by voters in the Special Election, November 6, 1979, effective November 7, 1979 (<[https://ballotpedia.org/California\\_Proposition\\_4,\\_the\\_%22Gann\\_Limit%22\\_Initiative\\_\(1979\)>](https://ballotpedia.org/California_Proposition_4,_the_%22Gann_Limit%22_Initiative_(1979)>) [as of March 19, 2019], archived at <[>](https://perma.cc/L9EF-Z3CF)) (Proposition 4).
- 3 **Water Code section 35470** currently provides: “Any 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. *Pursuant to the notice, protest, and hearing procedures in Section 53753 of the Government Code*, the charges may include standby charges to holders of title to land to which water may be made available, whether the water is actually used or not. The 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 district purpose.” (Stats. 2007, ch. 27, § 29, p. 116, italics added.) The italicized portion of **Water Code section 35470** was added to comport with the protest provision adopted with Proposition 218. (Legis. Counsel’s Dig., Sen. Bill No. 444, Stats. 2007 (2007-2008 Reg. Sess.) Summary Dig., pp. 96-97 <[>](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0401-0450/sb_444_bill_20070702_chaptered.pdf) [as of March 19, 2019], archived at <[>](https://perma.cc/AQ2N-J8YD).)
- 4 We do not reach the Gann Limit argument tendered by the Counties and Cities amici because the argument was not raised by the Water and **Irrigation** Districts. Moreover, the Water and **Irrigation** Districts did not raise this issue in the trial court. Thus, we have no record to determine whether and to what extent the Water and **Irrigation** Districts even fund their operations from taxes for which they might be subject to the Gann Limit. Rather than speculate whether the Water and **Irrigation** Districts might run afoul of the Gann Limit, we leave that question for a case in which the issue is properly presented.  
We also decline to address the Special Districts amici argument regarding the exclusion of enterprise special districts from the **state mandate** reimbursement. Again, this issue has not been raised by the parties and is not necessary to resolve the gravamen of this appeal. “ ‘Amicus Curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.’ ” (*Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America* (2001) 90 Cal.App.4th 1151, 1161, fn. 6, 109 Cal.Rptr.2d 515, quoting *Eggert v. Pacific States S. & L. Co.* (1943) 57 Cal.App.2d 239, 251, 136 P.2d 822.)  
Finally, we deny the Special Districts amici request for judicial notice of legislative history materials relating to special districts as unnecessary to the determination of the issue presented in this case.
- 5 Because the Commission’s decision on the test claims is based on its conclusion the Water and **Irrigation** Districts had sufficient authority to meet goals imposed by the Conservation Act, the Commission asserts it did not determine the extent to which the water conservation goals constitute unfunded **state mandates**. However, the Water and **Irrigation** Districts assert the Commission did find the Conservation Act to impose unfunded **state mandates**. Because we affirm the Commission’s decision on grounds the Water and **Irrigation** Districts have sufficient authority to recover costs from their ratepayers for water services, we do not need to reach the issue of whether the Conservation Act **mandates** water districts to incur any costs that would be subject to subvention if the Water and **Irrigation** Districts lacked legal authority to levy fees and assessments.

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33 Cal.4th 859  
Supreme Court of California

SAN DIEGO UNIFIED SCHOOL  
DISTRICT, Plaintiff and Respondent,

v.

COMMISSION ON STATE  
MANDATES, Defendant and Appellant;  
California Department of Finance,  
Real Party in Interest and Appellant.

No. S109125.  
|  
Aug. 2, 2004.

**Synopsis**

**Background:** School district petitioned for writ of administrative mandate to require the Commission on State Mandates to approve test claim for costs of mandatory and discretionary expulsion of students. The Superior Court, San Diego County, No. GIC737638, [Linda B. Quinn, J.](#), granted the petition. Commission and Department of Finance appealed. The Court of Appeal affirmed. Review was granted, superseding opinion of Court of Appeal.

**Holdings:** The Supreme Court, [George, C.J.](#), held that:

[1] all hearing costs incurred by district as result of mandatory actions related to expulsions for student's possession of firearm, at time relevant to this proceeding, constituted "higher level of service" within meaning of state constitutional provision, and thus were fully reimbursable, and

[2] hearing costs incurred by district as result of actions related to discretionary expulsions did not constitute "new program or higher level of service," and, in any event, did not trigger right to reimbursement, as costs of procedures exceeding federal due process requirements were de minimis.

Affirmed in part and reversed in part.

Opinion, [122 Cal.Rptr.2d 614](#), superseded.

West Headnotes (2)

[1] **Education** 🔑 **Apportionment and Disbursement**

All hearing costs incurred by school district as result of mandatory actions related to expulsions of students for possession of firearm, at time relevant to mandamus proceeding initiated by district, constituted state-mandated "higher level of service" within meaning of state constitutional provision providing for reimbursement of local government for costs of "new program or higher level of service" imposed on local government by statute or state regulation, and thus were fully reimbursable; providing public schooling clearly constituted governmental function, enhancing safety of those who attended such schools constituted service to public, and mandatory expulsion provision did not implement federal law or regulation then extant. [West's Ann.Cal. Const. Art. 13B, § 6](#); [West's Ann.Cal.Educ.Code §§ 48915\(c, d\), 48918](#); [West's Ann.Cal.Educ.Code § 48915\(b\) \(1994\)](#).

*See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 549.*

8 Cases that cite this headnote

[2] **Education** 🔑 **Apportionment and Disbursement**

Hearing costs incurred by school district as result of actions related to discretionary expulsions did not constitute "new program or higher level of service," triggering right to reimbursement under state constitutional provision mandating reimbursement of local government for costs of "new program or higher level of service" imposed on local government by statute or state regulation, and, in any event, procedures related to discretionary expulsions were adopted to implement federal due process mandate, and thus were nonreimbursable, and costs exceeding federal requirements were de minimis, and so also nonreimbursable. [U.S.C.A. Const.Amend. 14](#); [West's Ann.Cal. Const. Art. 13B, § 6](#);

West's Ann.Cal.Educ.Code §§ 48915(e), 48918;  
West's Ann.Cal.Educ.Code § 48915(c) (1994);  
West's Ann.Cal.Gov.Code §§ 17514, 17556(c),  
17561(a).

8 Cases that cite this headnote

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\*866 Steven M. Woodside, County Counsel (Sonoma) as Amicus Curiae on behalf of Plaintiff and Respondent.

### Opinion

\*\*591 GEORGE, C.J.

Article XIII B, section 6, of the California Constitution provides: “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 program or increased level of service....”<sup>1</sup> (Hereafter [article XIII B, section 6](#).)

Plaintiff San Diego Unified School District (District), like all other public school districts in the state, is, and was at the time relevant in this proceeding, governed by statutes that regulate the expulsion of students. ([Ed.Code, § 48900 et seq.](#)) Whenever an expulsion recommendation is made (and

before a student may be expelled), the District is required by [Education Code section 48918](#) to afford the student a hearing with various procedural protections—including notice of the hearing and the right to representation by \*\*\*468 counsel, preparation of findings of fact, notices related to any expulsion and the right of appeal, and preparation of a hearing record. Providing these procedural protections requires the District to expend funds, for which the District asserts a right to reimbursement from the state pursuant to [article XIII B, section 6](#), and implementing legislation, [Government Code section 17500 et seq.](#)

We granted review to consider two questions: (1) Are the hearing costs incurred as a result of the *mandatory* actions related to expulsions that are compelled by [Education Code section 48915](#) fully reimbursable—or are those hearing costs reimbursable only to the extent such costs are attributable to hearing procedures that exceed the procedures required by federal law? (2) Are any hearing costs incurred in carrying out expulsions that are *discretionary* under [Education Code section 48915](#) reimbursable? After we granted review and filed our decision in *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 [Cal.4th](#) 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203 (*Kern High School Dist.*), we added the following preliminary question to be addressed: Do the Education Code \*867 statutes cited above establish a “new program” or “higher level of service” under [article XIII B, section 6](#)? Finally, we also asked the parties to brief the effect of the decision in *Kern High School Dist., supra*, 30 [Cal.4th](#) 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, on the present case.

We conclude that [Education Code section 48915](#), insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a “higher level of service” under [article XIII B, section 6](#), and imposes a reimbursable state mandate for *all* resulting hearing costs—even those costs attributable to procedures required by federal law. In this respect, we shall affirm the judgment of the Court of Appeal.

We also conclude that *no* hearing costs incurred in carrying out those expulsions that are *discretionary* under [Education Code section 48915](#)—including costs related to hearing procedures claimed to exceed the requirements of federal law—are reimbursable. As we shall explain, to the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing *procedures*

set forth in [Education Code section 48918](#) constitute a new program or higher level of service, we conclude that *this* statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. For these reasons, we conclude such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying *federal* mandate and not as a state mandate. Accordingly, we shall reverse the judgment of the Court of Appeal insofar as it compels reimbursement **\*\*592** of any costs incurred pursuant to discretionary expulsions.

## I

### A. [Education Code sections 48918 and 48915](#)

We first describe the relevant provisions of two statutes—[Education Code sections 48918 and 48915](#)—pertaining to the expulsion of students from public schools.

[Education Code section 48918](#) specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must **\*868** follow when conducting **\*\*\*469** such a hearing. (Stats.1990, ch. 1231, § 2, pp. 5136–5139.)<sup>2</sup>

In identifying the right to a hearing, subdivision (a) of this statute declares that a student is “entitled” to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion.<sup>3</sup> *In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.*<sup>4</sup>

In specifying the substantive and procedural requirements for such an expulsion hearing, [Education Code section 48918](#) sets forth rules and procedures, some of which, the parties agree, codify requirements of federal due process and some of which may exceed those requirements.<sup>5</sup> These rules and procedures govern, among other things, notice of a hearing and the right to representation by counsel, preparation of findings of fact, notices related to the expulsion and the right of appeal, and preparation of a hearing record. (See § 48918, subs. (a) through former subd. (j) (currently subd. (k).)

**\*869** The second statute at issue in this matter is [Education Code section 48915](#). Discrete subdivisions of this statute address circumstances in which a principal *must* recommend to the school board that a student be expelled, and circumstances in which a principal *may* recommend that a student be expelled.

First, there is what the parties characterize as the “mandatory expulsion provision,” [Education Code section 48915](#), former subdivision (b). As it read during the time relevant in this proceeding (mid–1993 **\*\*\*470** through mid–1994), this subdivision (1) compelled a school principal to *immediately suspend* any **\*\*593** student found to be in possession of a firearm at school or at a school activity off school grounds, and (2) mandated a *recommendation* to the school district governing board that the student be *expelled*. The provision further required the governing board, upon confirmation of the student’s knowing possession of a firearm, either to expel the student or “refer” him or her to an alternative education program housed at a separate school site.<sup>6</sup> (Compare this former provision with *current* Ed.Code, § 48915, subs. (c) and (d).)<sup>7</sup>

**\*\*\*471** **\*870** This provision, as it read at the time relevant here, did not mandate expulsion per se<sup>8</sup>—but it *did* require immediate suspension followed by a mandatory expulsion recommendation (and it provided that a student found by the governing board to have possessed **\*\*594** a firearm would be removed from the school site by limiting disposition to either expulsion or “referral” to an alternative school). Moreover, as noted above, whenever expulsion is recommended a student has a right to an expulsion hearing. Accordingly, it is appropriate to characterize the former provision as *mandating* immediate suspension, a recommendation of expulsion, and hence, an *expulsion hearing*. For convenience, we accept the parties’ description of this aspect of [Education Code section 48915](#) as constituting a “mandatory expulsion provision.”

The second aspect of [Education Code section 48915](#) relevant here consists of what we shall call the “discretionary expulsion provision.” (*Id.*, former subd. (c), subsequently subd. (d), currently subd. (e).) During the period relevant in this proceeding (as well as currently), this subdivision of [Education Code section 48915](#) recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing school property or private property, using or selling illicit drugs, receiving stolen

property, possessing tobacco or drug paraphernalia, or engaging in disruptive behavior). The former provision (like the current provision) further specified that the school district governing board “may” order a student expelled upon finding that the \*871 student, while at school or at a school activity off school grounds, engaged in such conduct.<sup>9</sup>

\*\*\*472 \*872 \*\*595 B. *Proceedings under Government Code section 17500 et seq.*

Procedures governing the constitutional requirement of reimbursement under article XIII B, section 6, are set forth in Government Code section 17500 et seq. The Commission on State Mandates (Commission) (Gov.Code, § 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov.Code, § 17551.) Government Code section 17561, subdivision (a), provides that the “state shall reimburse each ... school district for all ‘costs mandated by the state,’ as defined in section 17514.” Government Code section 17514, in turn, defines “costs mandated by the state” to mean, in relevant part, “any increased costs which a ... school district is required to incur ... as a result of any statute ... which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.” Finally, Government Code section 17556 sets forth circumstances in which there shall be no reimbursement, including, under subdivision (c), circumstances in which “[t]he statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or \*\*\*473 executive order mandates costs which exceed the mandate in that federal law or regulation.”

In March 1994, the District filed a “test claim” with the Commission, asserting entitlement to reimbursement for the costs of hearings provided with respect to both categories of cases described above—that is, those hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. (See Gov.Code, § 17521; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308.)<sup>10</sup> The District sought reimbursement for costs incurred between July 1, 1993, and June 30, 1994, under statutes effective through the latter date.

In August 1998, after holding hearings on the District's claim (as amended in April 1995, to reflect legislation that became effective in 1994), the Commission issued a “Corrected Statement of Decision” in which it determined that Education Code section 48915's requirement of suspension and a \*873 mandatory recommendation of expulsion for firearm possession constituted a “new program or higher level of service,” and found that because costs related to some of the resulting hearing provisions set forth in Education Code section 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs.<sup>11</sup> As to the vast majority of the remaining \*\*596 hearing procedures triggered by Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession—for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion—the Commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Government Code section 17556, subdivision (c), and \*\*\*474 did not impose a reimbursable state mandate. The Commission further found that with respect to Education Code section 48915's *discretionary* expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not *mandated* by the state, but instead represent a choice by the principal and the school board.

In October 1999, the District brought this proceeding for an administrative writ of mandate challenging the Commission's decision. The trial court issued a writ commanding the Commission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to the limited \*874 extent that required hearing procedures exceed federal due process mandates. The Commission (defendant) and the Department of Finance (real party in interest, hereafter Department) appealed, and the Court of Appeal affirmed the judgment rendered by the trial court.



## II

### A. Costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations

#### 1. “New program or higher level of service”?

We address first the issue that we asked the parties to brief: Does [Education Code section 48915](#), former subdivision (b) (current subs. (c) & (d)), which mandated suspension and an expulsion recommendation for those students who possess a firearm at school or at a school activity off school grounds, and which also required a school board, if it found the charge proved, either to expel or to “refer” such a student to an alternative educational program housed at a separate school site, constitute a “new program or higher level of service” under [article XIII B, section 6 of the state Constitution](#), and under [Government Code section 17514](#)?

We addressed the meaning of the Constitution's phrase “new program or higher level of service” in [County of Los Angeles v. State of California](#) (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202 ([County of Los Angeles](#)). That case concerned whether local governments are entitled to reimbursement for costs incurred in complying with legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide for their employees. We stated:

“Looking at the language of [[article XIII B, section 6](#)] then, it seems clear that by itself the term ‘higher level of service’ is meaningless. It must be read in conjunction with the predecessor phrase ‘new program’ to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing ‘programs.’ But the term ‘program’ itself is not defined in [article XIII B](#). What programs **\*\*597** then did the electorate have in mind when [section 6](#) was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term— [ (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 **\*\*\*475** and entities in the state.” ([County of Los Angeles, supra](#), 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

**\*875** We continued in [County of Los Angeles](#): “The concern which prompted the inclusion of [section 6](#) in [article XIII B](#) 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. In their ballot arguments, the proponents of [article XIII B](#) explained [section 6](#) to the voters: ‘Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.’ (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase ‘to force programs on local governments’ confirms that *the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.*” ([County of Los Angeles, supra](#), 43 Cal.3d 46, 56–57, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.)

It was clear in [County of Los Angeles, supra](#), 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, that the law at issue did not meet the second test for a “program or higher level of service”—it did not implement a state policy by imposing unique requirements upon local governments, but instead applied workers' compensation contribution rules generally to all employers in the state. Nor, we held, did the law requiring local agencies to shoulder a general increase in workers' compensation benefits amount to a reimbursable “program or higher level of service” under the first test described above. (*Id.*, at pp. 57–58, 233 Cal.Rptr. 38, 729 P.2d 202.) The law increased the cost of employing public servants, but it did not in any tangible manner increase the level of service provided by those employees to the public.

We reaffirmed and applied the test set out in [County of Los Angeles, supra](#), 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, in [Lucia Mar Unified School District v. Honig](#) (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318 ([Lucia Mar](#)). The state law at issue in [Lucia Mar](#) required local school districts to pay a portion of the cost of educating pupils in *state* schools for the severely handicapped—costs that the state previously had paid in full.

We determined that the contributions called for under the law were used to fund a “program” within both definitions of that term set forth in [County of Los Angeles, supra](#), ([Lucia Mar, supra](#),

44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318.) We stated: “[T]he education of handicapped children is clearly a governmental function providing a service to the public, and the [state law] imposes requirements on school districts not imposed on all the states residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are \*876 concerned, since at the time [the state law] became effective they were not required to contribute to the education of students from their districts at such schools. [ ] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIII B.... Section 6 was intended to preclude the state from shifting to local \*\*\*476 agencies the financial responsibility for providing public services in view of ... restrictions on the taxing and spending power of the local entities.” (*Lucia Mar, supra*, 44 Cal.3d 830, 835–836, 244 Cal.Rptr. 677, 750 P.2d 318; see also \*\*598 *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 98, 61 Cal.Rptr.2d 134, 931 P.2d 312 [legislation excluding indigents from Medi-Cal coverage transferred obligation for such costs from state to counties, and constituted a reimbursable “new program or higher level of service”].)

We again applied the alternative tests set forth in *County of Los Angeles, supra*, 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*). In that case we considered whether a state law implementing federal “incentives” that encouraged states to extend unemployment insurance coverage to all public employees constituted a program or higher level of service under article XIII B, section 6. We concluded that it did not because, as in *County of Los Angeles*, (1) providing unemployment compensation protection to a city's own employees was not a service to the public; and (2) the statute did not apply uniquely to local governments—indeed, the same requirements previously had been applied to most employers, and extension of the requirement (by eliminating a prior exemption for local governments) merely placed local government employers on the same footing as most private employers. (*City of Sacramento, supra*, 50 Cal.3d at pp. 67–68, 266 Cal.Rptr. 139, 785 P.2d 522.)

Subsequently, the Court of Appeal in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754 (*City of Richmond*), following *County*

*of Los Angeles, supra*, 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, and *City of Sacramento, supra*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, concluded that requiring local governments to provide death benefits to local safety officers, under both the Public Employees Retirement System and the workers' compensation system, did not constitute a higher level of service to the public. The Court of Appeal arrived at that determination even though—as might also have been argued in *County of Los Angeles* and *City of Sacramento*—such benefits may “generate a higher quality of local safety officers” and thereby, in a general and indirect sense, provide the public with a “higher level of service” by its employees. (*City of Richmond, supra*, 64 Cal.App.4th 1190, 1195, 75 Cal.Rptr.2d 754.)

Viewed together, these cases (*County of Los Angeles, supra*, 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, *City of Sacramento, supra*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, and *City of Richmond, supra*, 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting “service to the public” under article XIII B, section 6, and Government Code section 17514.<sup>12</sup>

\*\*\*477 By contrast, Courts of Appeal have found a reimbursable “higher level of service” concerning an existing “program” when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537–538, 234 Cal.Rptr. 795 (*Carmel Valley*), for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public, thereby satisfying the first alternative test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. Similarly, in \*\*599 *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, 275 Cal.Rptr. 449 (*Long Beach*), an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The appellate court held that this constituted a “higher level of service” to the extent the order's requirements

exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under prior governing law.

[1] The District and the Commission assert that the “mandatory” aspect of [Education Code section 48915](#), insofar as it compels suspension and mandates an expulsion recommendation for firearm possession (and thereafter restricts the board's options to expulsion or referral to an off-site alternative school), carries out a governmental function of providing services to the public and hence constitutes an increased or higher level of service concerning an existing program under the first alternative test of *County of Los Angeles, supra*, 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. They argue, in essence, that the present matter is more analogous to the latter cases \*878 (*Carmel Valley, supra*, 190 Cal.App.3d 521, 234 Cal.Rptr. 795, and *Long Beach, supra*, 225 Cal.App.3d 155, 275 Cal.Rptr. 449)—both of which involved measures designed to increase the level of governmental service provided to the public—than to the former cases (*County of Los Angeles, supra*, 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, *City of Sacramento, supra*, 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, and *City of Richmond, supra*, 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754)—in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased. As we shall explain, we agree with the District and the Commission.

The statutory requirements here at issue—immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation upon the ensuing options of the school board (expulsion or referral)—reasonably are viewed as providing a “higher level of service” to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 (Assem. Bill No. 342 (1993–1994 Reg. Sess.) (Assembly Bill No. 342)) and 1256 (Senate Bill \*\*\*478 No. 1198 (1993–1994 Reg. Sess.) (Senate Bill No. 1198)); and (ii) the requirements were intended to provide an enhanced service to the public—*safer schools for the vast majority of students* (that is, those who are not expelled or referred to other school sites). In other words, the legislation was premised upon the idea that by removing potentially violent students from the general school population, the safety of those students who remain thereby is increased. (See, e.g.,

Stats.1993, ch. 1255, § 4, pp. 7285–7286 [“In order to ensure public safety on school campuses ... it is necessary that this act take effect immediately”]; Sen. Com. on Ed. (Apr. 28, 1993), Analysis of Assem. Bill No. 342, p. 2 [noting legislative purpose to enhance public safety]; see also Assem. Com. on Ed. (July 14, 1993), Analysis of Sen. Bill No. 1198, p. 1 [noting legislative purpose to remove those who possess firearms from the general school population by increasing the frequency of expulsion for such conduct].)

In challenging this conclusion, the Department relies upon *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 263 Cal.Rptr. 351 (*Department of Industrial Relations*). In that case, the state enacted enhanced statewide safety regulations that governed all public and private elevators, and thereafter the County of Los Angeles sought reimbursement for the costs of complying with the new regulations. The Court of Appeal found that the regulations constituted neither a new program nor a higher level of service concerning an existing program under either of the two alternative tests set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. The court concluded that the elevator regulations did not meet the first alternative test, because the regulations did not carry out a governmental function of providing services to the public; the court found instead that \*879 “[p]roviding elevators equipped with fire and earthquake \*\*600 safety features simply is not a ‘government function of providing services to the public.’ ” (*Department of Industrial Relations, supra*, 214 Cal.App.3d at p. 1546, 263 Cal.Rptr. 351.) Moreover, the court found, the second (“uniqueness”) test was not met—the regulation applied to all elevators, not only those owned or operated by local governments.

The Department asserts that *Department of Industrial Relations, supra*, 214 Cal.App.3d 1538, 263 Cal.Rptr. 351, is analogous, and argues that the “service” afforded by mandatory suspensions followed by a required expulsion recommendation, etc., is “not qualitatively different from the safety regulations at issue in [*Department of Industrial Relations*]. School districts carrying out such expulsions are not providing a service to the public....” We disagree. Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. Moreover, here, unlike the situation in *Department of Industrial Relations*, the law implementing this state policy applies uniquely to local public schools. We conclude that *Department of Industrial Relations* does not conflict with the conclusion that

the mandatory suspension and expulsion recommendation requirements, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under the constitutional provision and the implementing statutes.

Of course, even if, as we have concluded above, a statute effectuates an increased or higher level of governmental service to the public concerning an existing program, this “does not necessarily lead to the conclusion that the program is a *state* mandate \*\*\*479 under [California Constitution, article XIII B, section 6.](#)” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818, 38 Cal.Rptr.2d 304, italics added (*County of Los Angeles II* ).) We turn to the question whether the hearing costs at issue, flowing from compulsory suspensions and mandatory expulsion recommendations, are mandated by the state.

## 2. Are the hearing costs state mandated?

As noted above, a compulsory suspension and a mandatory recommendation of expulsion under [Education Code section 48915](#) in turn trigger a mandatory expulsion hearing. All parties agree that any such resulting expulsion hearing must comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence. (See *ante*, fn. 5.) But as also noted above, [article XIII B, section 6](#), and the implementing statutes \*880 ([Gov.Code, § 17500 et seq.](#)), by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs. The Commission and the Department assert that this circumstance raises the question: Do all or some of a district's costs in complying with the mandatory expulsion provision of [Education Code section 48915](#) constitute a nonreimbursable *federal* mandate?

In the absence of the operation of [Education Code section 48915](#)'s mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law pursuant to *Goss, supra*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, and related cases, and codified in [Education Code section 48918](#). Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, [Education Code section 48915](#) appears to constitute a state mandate, in that it establishes conditions

under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

The Department and the Commission agree to a point, but argue that a district's costs incurred in complying with this state mandate are reimbursable only if, and to the extent that, hearing procedures set forth in [Education Code section 48918](#) exceed the requirements of federal due process. In support, they rely upon \*\*601 [Government Code section 17556](#), which—in setting forth circumstances in which the Commission shall *not* find costs to be mandated by the state—provides that “[t]he commission shall not find costs mandated by the state, as defined in [Section 17514](#), in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ... (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.”<sup>13</sup>

\*\*\*480 \*881 We agree with the District and the Court of Appeal below that, as applied to the present case, it cannot be said that [Education Code section 48915](#)'s mandatory expulsion provision “*implemented a federal law or regulation.*” (Italics added.) [Education Code section 48915](#), at the time relevant here, did not implement any federal law; as explained below, federal law did not *then* mandate an expulsion recommendation—or expulsion—for firearm possession.<sup>14</sup> Moreover, although the Department argues that in this context [Government Code section 17556, subdivision \(c\)](#)'s phrase “the statute” should be viewed as referring not to [Education Code section 48915](#)'s mandatory expulsion recommendation requirement, but instead to the mandatory due process hearing under [Education Code section 48918](#) that is triggered by such an expulsion recommendation, it still cannot be said that [section 48918](#) itself required the District to incur any costs. As noted above, [Education Code section 48918](#) sets out requirements for expulsion hearings that must be held when a district seeks to expel a student—but neither [section 48918](#) nor federal law requires that any such expulsion recommendation be made in the first place, and hence [section 48918](#) does not implement any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, we conclude that the so-called exception to reimbursement described in [Government Code section 17556, subdivision \(c\)](#), is inapplicable in this context.

Because it is state law ([Education Code section 48915's](#) mandatory expulsion provision), and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of [Education Code section 48915](#), as constituting a federal mandate (and hence being nonreimbursable). We conclude **\*\*602** that under the statutes existing at the time of the test claim in this case (state legislation in effect through **\*\*\*481** mid-1994), *all* such hearing costs—those designed to satisfy the minimum requirements of federal due process, and those that may exceed **\*882** those requirements—are, with respect to the mandatory expulsion provision of [section 48915](#), state mandated costs, fully reimbursable by the state.<sup>15</sup>

Against this conclusion, the Department, in its supplemental briefing, offers a wholly new theory, not advanced in any of the proceedings below, in support of its belated claim that *all* hearing costs triggered by [Education Code section 48915's](#) mandatory expulsion provision are in fact nonreimbursable *federal* mandates, and not, as we have concluded above, reimbursable state mandates. As we shall explain, we reject the Department's contention, as applied to the test case here at issue (involving state statutes in effect through mid-1994).

The Department cites [20 United States Code section 7151](#), part of the federal No Child Left Behind Act of 2001, which provides, as relevant here: “Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.”<sup>16</sup>

The Department further asserts that more than \$2.8 billion in federal funds under the No Child Left Behind Act are included “for local use” in the 2003–04 state budget. (Cal. State Budget, 2003–04, Budget Highlights, p. 4.) The Department argues that in light of the requirements set forth in [20 United States Code section 7151](#), and the amount of federal program funds at issue under the No Child Left Behind Act, the financial consequences to the state and to the school districts

of failing to comply with [20 United States Code section 7151](#) are such that as a practical matter, **\*883** [Education Code section 48915's](#) mandatory expulsion provision in reality constitutes an implementation of federal law, and hence resulting costs are nonreimbursable except to the extent they exceed the requirements of federal law. (See [Govt.Code, § 17556, subd. \(c\)](#); see also *Kern High School Dist.*, *supra*, 30 [Cal.4th](#) 727, 749–751, 134 Cal.Rptr.2d 237, 68 P.3d 1203; *City of Sacramento*, *supra*, 50 Cal.3d 51, 70–76, 266 Cal.Rptr. 139, 785 P.2d 522.) Moreover, the Department asserts, to the extent school districts are **\*\*\*482** compelled by federal law, through [Education Code section 48915's](#) mandatory expulsion provision, to hold hearings pursuant to [section 48918](#) in cases of firearm possession on school grounds, under [20 United States Code section 7164](#) (defining prohibited uses of program funds), *all* costs of such hearings properly may be paid out of federal program funds, and hence we should “view the ... provision of program funding as satisfying, in advance, any reimbursement requirement.” (*Kern High School Dist.*, *supra*, 30 [Cal.4th](#) 727, 747, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

**\*\*603** Although the Department asserts that this federal law and program existed at the time relevant in this matter (that is, through mid-1994), our review of the statutes and relevant history suggests otherwise. [Title 20 of the United States Code, section 7151](#), and the remainder of the No Child Left Behind Act, became effective on January 8, 2002. The predecessor legislation cited by the Department—the Gun-Free Schools Act of 1994 (former [20 U.S.C. § 8921\(a\)](#)), although containing a substantially identical mandatory expulsion provision (*id.*, [§ 8921\(b\)\(1\)](#))<sup>17</sup>—was not effective until July 1, 1995 (108 Stat. 3518, § 3). In turn, the predecessor legislation to *that* Act cited by the Department, the Elementary and Secondary Education Act of 1965 (former [20 U.S.C. § 6301 et seq.](#))—as it existed at the time relevant here (July 1, 1993, through June 30, 1994)—contained no such mandatory expulsion provision. Accordingly, it appears that despite the Department's late discovery of [20 United States Code section 7151](#), at the time relevant here (regarding legislation in effect through mid-1994), neither [20 United States Code section 7151](#), nor either of its predecessors, compelled states to enact a law such as [Education Code section 48915's](#) mandatory expulsion provision. Therefore, we reject the Department's assertion that, during the time period at issue in this case, [Education Code section 48915's](#) mandatory expulsion provision constituted an implementation of a federal, rather than a state, mandate.

Although we conclude that all hearing costs triggered by [Education Code section 48915](#)'s mandatory expulsion provision constitute reimbursable state-mandated expenses under the statutes as they existed during the period **\*884** covered by the District's present test claim, we do not foreclose the possibility that [20 United States Code section 7151](#) or its predecessor, [20 United States Code section 8921](#), may lead to a different conclusion when applied to versions of [Education Code section 48915](#) effective in years 1995 and thereafter. Indeed, we note that at least one subsequent test claim that has been filed with the Commission may raise the federal statutory issue advanced by the Department.<sup>18</sup>

*B. Costs associated with hearings triggered by discretionary expulsion recommendations*

[2] We next consider whether reimbursement is required for the costs associated **\*\*\*483** with hearings triggered under discretionary expulsion provisions. Again, we address first the issue that we asked the parties to brief: Does the discretionary expulsion provision of [Education Code section 48915](#) (former subd. (c), thereafter subd. (d), currently subd. (e)), which, as noted above, recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing property, using or selling illicit drugs, possessing tobacco or drug paraphernalia, etc.), and further specified that the school district governing board “may” order a student expelled upon finding that the student, while at school or at a school activity off school grounds, engaged in such conduct, constitute a “new program or higher level of service” under [article XIII B, section 6 of the state Constitution](#), and under [Government Code section 17514](#)?

We answer this question in the negative. The discretionary expulsion provision of [Education Code section 48915](#) does not constitute a “new” program or higher level of service, because provisions recognizing discretion to suspend or expel were set forth in statutes predating 1975. (See *Educ.Code*, former **\*\*604** § 10601, *Stats.1959*, ch. 2, § 3, p. 860 [providing that a student may be suspended for good cause]; *id.*, former § 10602 (*Stats.1970*, ch. 102, § 102, p. 159 (defining “good cause”)); *id.*, former section 10601.6 (*Stats.1972*, ch. 164, § 2, p. 384 (further defining “good cause”).))<sup>19</sup> Accordingly, the discretionary expulsion provision of [Education Code section 48915](#) is not a “new” program under [article XIII B, section 6](#), and the implementing

statutes, **\*885** nor does it reflect a higher level of service related to an existing program. (*County of Los Angeles, supra*, 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

The District maintains, nevertheless, that once it elects to pursue expulsion, it is obligated to abide by the procedural hearing requirements of [Education Code section 48918](#) and accordingly is mandated by that section to incur costs associated with such compliance. The District asserts that in this respect, [section 48918](#) constitutes a “new program or higher level of service” related to an existing program under [article XIII B, section 6](#) and under [Government Code section 17514](#). We shall assume for analysis that this is so.<sup>20</sup>

The District recognizes, of course, that under [Government Code, section 17556, subdivision \(c\)](#), it is not entitled to reimbursement to the extent [Education Code section 48918](#) merely implements federal due process law, but the District argues that it has a right to reimbursement for its costs of complying with [section 48918](#) to **\*\*\*484** the extent those costs are attributable to hearing procedures that *exceed* federal due process requirements. (See *Govt.Code*, § 17556, *subd. (c)*.) The District asserts that its costs in complying with various notice, right of inspection, and recording requirements (see *ante*, fn. 11) fall into this category and are reimbursable.

The Department and the Commission argue in response that any right to reimbursement for hearing costs triggered by discretionary expulsions—even costs limited to those procedures that assertedly exceed federal due process hearing requirements—is foreclosed by virtue of the circumstance that when a school pursues a discretionary expulsion, it is not acting under compulsion of any law but instead is exercising a choice. In support, the Department and the Commission rely upon *Kern High School Dist., supra*, 30 **Cal.4th** 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, and *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 200 Cal.Rptr. 642 (*City of Merced*).

In *Kern High School Dist., supra*, 30 **Cal.4th** 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, school districts asserted that costs incurred in complying with statutory notice and agenda requirements for committee meetings concerning various state and federally funded educational programs constituted a reimbursable state mandate, because once **\*886** school districts *elected* to participate in the underlying state and federal programs, the districts had no option but to hold program-related committee meetings and abide by the

challenged notice and agenda requirements. (*Id.*, at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) We rejected the school districts' position, reasoning in part that because the districts' participation in the underlying programs was voluntary, the notice and agenda costs incurred as a result of that voluntary participation were not the product of legal compulsion and did not constitute a reimbursable state mandate on that basis.

**\*\*605** (*Id.*, at p. 745, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)<sup>21</sup>

In reaching that conclusion in *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, we discussed *City of Merced*, *supra*, 153 Cal.App.3d 777, 200 Cal.Rptr. 642. In that case, the city wished either to purchase or to condemn, pursuant to its eminent domain authority, certain privately owned real property. The city elected to proceed by eminent domain, under which it was required by then recent legislation (Code Civ. Proc., § 1263.510) to compensate the property owner for loss of “business goodwill.” The city so compensated the property owner and then sought reimbursement from the state, arguing that the new statutory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced*, *supra*, 153 Cal.App.3d at p. 780, 200 Cal.Rptr. 642.) The Court of Appeal concluded that the city's increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*Id.*, at pp. 781–783, 200 Cal.Rptr. 642.) The court reasoned: “[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is \*\*\*485 exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.*” (*Id.*, at p. 783, 200 Cal.Rptr. 642, italics added.)

Summarizing this aspect of *City of Merced*, *supra*, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, in *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, we stated: “[T]he core point articulated by the court in *City of Merced* is that *activities undertaken at the option or discretion of a local government entity* (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) *do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.*” (*Kern High School Dist.*, at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203, italics added.)

The Department and the Commission argue that in the present case the District, like the claimants in *Kern High School Dist.*, errs by focusing upon **\*887** the final result—a school district's legal obligation to comply with statutory hearing procedures—rather than focusing upon whether the school district has been *compelled* to put itself in the position in which such a hearing (with resulting costs) is required.

The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of *City of Merced*, *supra*, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program.<sup>22</sup>

**\*\*606** Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement **\*\*\*486** under **\*888** article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514<sup>23</sup> and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley*, *supra*, 190 Cal.App.3d 521, 234 Cal.Rptr. 795, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537–538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced*, *supra*, 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local

agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted [article XIII B, section 6](#), or the Legislature that adopted [Government Code section 17514](#), intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.

In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced*, because this aspect of the present case can be resolved on an alternative basis. As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that *all* hearing procedures set forth in [Education Code section 48918](#) properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under [article XIII B, section 6](#), and [Government Code section 17557, subdivision \(c\)](#).

In this regard, we find the decision in *County of Los Angeles II, supra*, 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, to be instructive. That case concerned [Penal Code section 987.9](#), which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections—namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable **\*\*607** state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that “even in the **\*889** absence of **\*\*\*487** [[Penal Code](#)] [section 987.9](#), ... counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and under the Sixth Amendment....” (32 Cal.App.4th at p. 815, 38 Cal.Rptr.2d 304.) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute—requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request—were merely incidental to the federal rights codified by the statute, and their “financial impact” was de minimis. (*Id.*, at p. 817, fn. 7, 38 Cal.Rptr.2d 304.) Accordingly, the Court of Appeal concluded, the Penal

Code section, in its entirety—that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds*—constituted an implementation of federal law, and hence those costs were nonreimbursable under [article XIII B, section 6](#).

We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II, supra*, 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under [Government Code, section 17556, subdivision \(c\)](#). We reach the same conclusion here.

Indeed, to proceed otherwise in the context of a reimbursement claim would produce impractical and detrimental consequences. The present case demonstrates the point. The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of [Education Code section 48918](#) exceeded federal due process requirements. That task below was complicated by the circumstance that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain **\*890** respects the various provisions (as observed *ante*, footnote 11, predominantly concerning notice, right of inspection, and recording requirements) “exceeded” the requirements of federal due process.



Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not only from the circumstance that, as noted, the case law \*\*\*488 in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are—and should be — \*\*608 wary of venturing pronouncements (especially concerning matters of constitutional law).

In light of these considerations, we agree with the conclusion reached by the Court of Appeal in *County of Los Angeles II*, *supra*, 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304: for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate.

Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly “excessive due process” aspects of [Education Code section 48918](#) for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions (see *ante*,

footnote 11—primarily, as noted, various notice, right of inspection, and recording rules) fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, all hearing costs incurred under [Education Code section 48918](#), triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under [Government Code section 17556, subdivision \(c\)](#).<sup>24</sup>

### \*891 III

The judgment of the Court of Appeal is affirmed insofar as it provides for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of [Education Code section 48915](#). The judgment of the Court of Appeal is reversed insofar as it provides for reimbursement of any costs related to hearings triggered by the discretionary provision of [section 48915](#). All parties shall bear their own costs on appeal.

WE CONCUR: [KENNARD](#), [BAXTER](#), [WERDEGAR](#), [CHIN](#), [BROWN](#), and [MORENO](#), JJ.

### All Citations

33 Cal.4th 859, 94 P.3d 589, 16 Cal.Rptr.3d 466, 190 Ed. Law Rep. 636, 04 Cal. Daily Op. Serv. 6945, 2004 Daily Journal D.A.R. 9404

### Footnotes

- 1 The provision continues: “except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.” ([Cal. Const., art. XIII B, § 6.](#))
- 2 For purposes of our present inquiry, [section 48918](#), at the time relevant here (mid-1993 through mid-1994) read essentially as it had for the prior decade, and as it has in the ensuing decade. That provision first was enacted in 1975 (see Stats.1975, ch. 1253, § 4, pp. 3277–3278) as Education Code, former section 10608. (This enactment apparently was a response to the United States Supreme Court's decision in *Goss v. Lopez* (1975) 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (*Goss*) [recognizing due process requirements applicable to public school students who are suspended for more than 10 days].) The statute was renumbered as Education Code, former section 48914 in 1976 (Stats.1976, ch. 1010, § 2, pp. 3589–3590) and was substantially augmented in 1977 (Stats.1977, ch. 965, § 24, pp. 2924–2926). After relatively minor amendments in 1978 and 1982, the section in 1983 was substantially restated, further augmented, and renumbered as [Education Code section 48918](#) (Stats.1983, ch. 498, § 91, p. 2118). Amendments adopted in 1984 and 1988 made relatively minor changes, and further similar modifications were made in 1990, reflecting the version of the

statute here at issue. Subsequent amendments in 1995, 1996, 1998, and 1999 made further changes that are irrelevant to the issue presented in the case now before us.

- 3 The provision reads: “The pupil shall be entitled to a hearing to determine whether the pupil should be expelled. An expulsion hearing shall be held within 30 schooldays after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in [Section 48900...](#)” (Ed.Code, § 48918, subd. (a). (Subdivision (b) of § 48900 presently includes—as it did at the time relevant here—the offense of possession of a firearm.)
- 4 Of course, if a student does not invoke his or her entitlement to such a hearing, and instead waives the right to such a hearing, the hearing need not be held.
- 5 See *Goss, supra*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725; *Gonzales v. McEuen* (C.D.Cal.1977) 435 F.Supp. 460, 466–467 (concluding that former [Education Code section 10608](#) [current § 48918] met federal due process requirements pertaining to expulsions from public schools); 7 Witkin, Summary of California Law (9th ed.1988), Constitutional Law, § 549, p. 754 (noting that [Education Code section 48918](#) and related legislation were enacted in response to the decision in *Goss* ).
- 6 An earlier and similar, albeit broader, version of the provision—extending not only to possession of firearms but also to possession of explosives and certain knives—existed briefly and was effective for approximately two and one-half months in late 1993. That initial statute, former [section 48915, subdivision \(b\)](#) (as amended Stats.1993, ch. 1255, § 2, pp. 7284–7285), which was effective only from October 11, 1993 through December 31, 1993, provided: “The principal or the superintendent of schools shall immediately suspend pursuant to Section 48911, and shall recommend to the governing board the expulsion of, any pupil found to be in possession of a firearm, knife of no reasonable use to the pupil, or explosive at school or at a school activity off school grounds. The governing board shall expel that pupil or, as an alternative, refer that pupil to an alternative education program, whenever the principal or the superintendent of schools and the governing board confirm that: [¶] (1) The pupil was in knowing possession of the firearm, knife, or explosive. [¶] (2) Possession of the firearm, knife of no reasonable use to the pupil, or explosive was verified by an employee of the school district. [¶] (3) There was no reasonable cause for the pupil to be in possession of the firearm, knife, or explosive.”  
As subsequently amended by Statutes 1993, chapter 1256, section 2, pages 7286–7287, effective January 1, 1994, [Education Code section 48915](#), former subdivision (b), read: “The principal or the superintendent of schools shall immediately suspend, pursuant to Section 48911, any pupil found to be in possession of a firearm at school or at a school activity off school grounds and shall recommend expulsion of that pupil to the governing board. The governing board shall expel that pupil or refer that pupil to a program of study that is appropriately prepared to accommodate students who exhibit discipline problems and is not provided at a comprehensive middle, junior, or senior high school or housed at the schoolsite attended by the pupil at the time the expulsion was recommended to the school board, whenever the principal or superintendent of schools and the governing board confirm the following: [¶] (1) The pupil was in knowing possession of the firearm. [¶] (2) An employee of the school district verifies the pupil's possession of the firearm.”
- 7 The current subdivisions of [Education Code section 48915](#) set forth a list of mandatory expulsion conduct broader than that set forth in former subdivision (b), and require a school board both to *expel and refer* to other institutions all students found to have committed such conduct. The present subdivisions read: “(c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶] (1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. [¶] (2) Brandishing a knife at another person. [¶] (3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with [Section 11053](#)) of Division 10 of the Health and Safety Code. [¶] (4) Committing or attempting to commit a sexual assault as defined in [subdivision \(n\) of Section 48900](#) or committing a sexual battery as defined in [subdivision \(n\) of Section 48900](#). [¶] (5) Possession of an explosive. [¶] (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c), and shall refer that pupil to a program of study that meets all of the following conditions: [¶] (1) Is appropriately prepared to accommodate pupils who exhibit discipline problems. [¶] (2) Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school. [¶] (3) Is not housed at the schoolsite attended by the pupil at the time of suspension.” (Stats.2001, ch. 116, § 1.)
- 8 As the Department of Finance observed in an August 22, 1994, communication to the Commission in this matter, “nothing in [[Education Code section 48915](#)] ... requires a district governing board or a county board of education to expel a pupil,”

and even “unauthorized and knowing possession of a firearm, does not result in mandated expulsion. [Section 48915 subdivision \(b\)](#) provides for the choice of the governing board to either expel the pupil in possession of a firearm, or refer the pupil to an alternative program of study....”

9 [Education Code, section 48915](#), former subdivision (c) (as amended Stats.1992, ch. 909, § 3, p. 4226; amended and redesignated as former subd. (d) by Stats.1993, ch. 1255, § 2, pp. 7284–7285; further amended Stats.1993, ch. 1256, § 2, p. 7287, and Stats.1994, ch. 1198, § 7, p. 7271) provided, at the time relevant here: “Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to [subdivision \(d\) of Section 48918](#), the governing board *may* order a pupil expelled upon finding that the pupil violated subdivision (f), (g), (h), (i), (j), (k), or (l) of [Section 48900](#), or [Section 48900.2](#) or [48900.3](#), and either of the following: [¶] (1) That other means of correction are not feasible or have repeatedly failed to bring about proper conduct. [¶] (2) That due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.” (Italics added.)

At the time relevant here, subdivisions (f) through (l) of [section 48900](#) (as amended Stats.1992, ch. 909, § 1, pp. 4224–4225; Stats.1994, ch. 1198, § 5, pp. 7269–5270) provided: “A pupil shall *not* be suspended from school or recommended for expulsion *unless* the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has: [¶] ... [¶] (f) Caused or attempted to cause damage to school property or private property. [¶] (g) Stolen or attempted to steal school property or private property. [¶] (h) Possessed or used tobacco, or any products containing tobacco or nicotine products.... However, this section does not prohibit use or possession by a pupil of his or her own prescription products. [¶] (i) Committed an obscene act or engaged in habitual profanity or vulgarity. [¶] (j) Had unlawful possession of, or unlawfully offered, arranged, or negotiated to sell any drug paraphernalia, as defined in [Section 11014.5 of the Health and Safety Code](#). [¶] (k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. [¶] (l) Knowingly received stolen school property or private property.” (Italics added.)

At the time relevant here, [section 48900.2](#) (Stats.1992, ch. 909, § 2, p. 4225) provided: “In addition to the reasons specified in [Section 48900](#), a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in [Section 212.5](#). [¶] For the purposes of this chapter, the conduct described in [Section 212.5](#) must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive.”

[Section 48900.3](#) (Stats.1994, ch. 1198, § 6, p. 7270), at the time relevant here, provided: “In addition to the reasons specified in [Sections 48900](#) and [48900.2](#), a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in subdivision (e) of [former] [Section 33032.5](#) [current section 233].”

In addition, [section 48900.4](#) (Stats.1994, ch. 1017, § 1, p. 6196) provided, at the time relevant here: “In addition to the grounds specified in [Sections 48900](#) and [48900.2](#), a pupil enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against a pupil or group of pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of that pupil or group of pupils by creating an intimidating or hostile educational environment.”

(All of these current provisions—[sections 48915](#), [subdivision \(e\)](#), [48900](#), [48900.2](#), [48900.3](#), and [48900.4](#)—read today substantially the same as they did at the time relevant in the present case.)

10 As observed by amicus curiae California School Boards Association, a “test claim is like a class action—the Commission's decision applies to all school districts in the state. If the district is successful, the Commission goes to the Legislature to fund the statewide costs of the mandate for that year and annually thereafter as long as the statute is in effect.”

11 The Commission concluded that the costs incurred in providing the following state-mandated procedures under [Education Code section 48918](#) exceeded federal due process requirements, and were reimbursable: (i) adoption of rules and regulations pertaining to pupil expulsions ([§ 48918](#), first par. & *passim*); (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing ([§ 48918](#), subd. (b)); (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing ([§ 48918](#), subd. (b)); (iv) sending of written notice concerning (a) any decision to

expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion (§ 48918, former subd. (i), currently subd. (j)); (v) maintenance of a record of each expulsion, including the cause thereof (§ 48918, former subd. (j), currently subd. (k)); and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls) (§ 48918, former subd. (j), currently subd. (k)).

12 Indeed, as the court in *City of Richmond, supra*, 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, observed: “Increasing the cost of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6.... A higher cost to the local government for compensating its employees is not the same as a higher cost of providing [an increased level of] services to the public.” (*Id.*, at p. 1196, 75 Cal.Rptr.2d 754; accord, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484, 235 Cal.Rptr. 101 [temporary increase in PERS benefit to retired employees, resulting in higher contribution rate by local government, does not constitute a higher level of service to the public].)

13 Government Code section 17556 reads in full: “The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] (a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph. [¶] (b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts. [¶] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation. [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. [¶] (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. [¶] (f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election. [¶] (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.”

14 Subsequent amendments to federal law may alter this conclusion with regard to future test claims concerning Education Code section 48915's mandatory expulsion provision—see *post*, 16 Cal.Rptr.3d pages 481–482, 94 P.3d pages 602–603.

15 In Exhibit No. 1 to its claim, the District presented the declaration of a San Diego Unified School District official, estimating that in order to process “350 proposed expulsions” during the period spanning July 1, 1993, to June 30, 1994, the District would incur approximately \$94,200 “in staffing and other costs”—yielding an average estimated cost of approximately \$270 per hearing during the relevant period. It is unclear from the record how many of these 350 hearings would be triggered by Education Code section 48915's mandatory expulsion provision (and constitute state-mandated costs subject to reimbursement under article XIII B, section 6), and how many of these 350 hearings would be triggered by Education Code section 48915's discretionary provision (and, as explained *post*, in part II.B, constitute a nonreimbursable federal mandate).

We note that in the proceedings below, the Commission did not confine reimbursement only to those matters as to which the district on its own initiative would not have sought expulsion in the absence of the statutory requirement that it seek expulsion—and the Department has not raised that point in the trial court or on appeal.

16 “Firearm,” as defined in 18 United States Code section 921, includes guns and explosives.

17 The prior law stated: “Except as provided in paragraph (3), each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.” (Pub.L. No. 103–382, § 14601(b)(1) (Oct. 20, 1994) 108 Stat. 3518.)

18 See Pupil Expulsions II (4th Amendment), CSM No. 01–TC–18 (filed June 3, 2002). This claim, filed by the San Juan Unified School District, asserts reimbursable state mandates with respect to, among numerous other statutes, Education Code section 48915, as amended effective in 2002.

- 19 As the Commission observed in its Corrected Statement of Decision in this matter: “The authorization for governing boards to expel pupils from school for inappropriate behaviors has been in existence since before 1975. The behaviors defined as inappropriate under current law, subdivisions (a) through (l) of [section 48900](#), [48900.2](#), and [48900.3](#), meet prior laws’ definitions of ‘good cause’ and ‘misconduct’ as reasons for expulsion.” (Italics deleted.)
- 20 The requirements of [Education Code section 48918](#) would appear to be “new” for purposes of the reimbursement provisions, in that they did not exist prior to 1975 and were enacted in that year and subsequently. (See *ante*, fn. 2.) The requirements also would appear to meet both alternative tests set forth in *County of Los Angeles, supra*, [43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202](#)—that is, by implementing procedures that direct and guide the process of expulsion from public school, the statute appears to carry out a governmental function of providing services to public school students who face expulsion; or, it would seem, [section 48918](#) constitutes a law that, to implement state policy, imposes unique requirements on local governments.
- 21 We also proceeded to hold that in any event, because the school districts were free to use program funds to pay for the challenged increased costs, the districts had, in practical effect, already been given funds by the Legislature to cover the challenged costs. (*Kern High School Dist., supra*, [30 Cal.4th](#) at pp. 748–754, [134 Cal.Rptr.2d 237, 68 P.3d 1203](#).)
- 22 Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced, supra*, [153 Cal.App.3d 777, 200 Cal.Rptr. 642](#), in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victims’ Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: “All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.” The Court of Appeal below concluded: “In light of a school district’s constitutional obligation to provide a safe educational environment ..., the incurring of [hearing] costs [under [Education Code section 48918](#)] cannot properly be viewed as a nonreimbursable ‘downstream’ consequence of a decision to [seek to] expel a student under [[Education Code section 48915](#)’s discretionary provision] for damaging or stealing school or private property, using or selling illicit drugs, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion.”
- Building upon this theme, amicus curiae on behalf of the District, California School Boards Association, argues that based upon article I, section 28, subdivision (c), of the state Constitution, together with [Education Code section 48200 et seq.](#) and [article IX, section 5 of the state Constitution](#) (establishing and implementing a right of public education), no expulsion recommendation is “truly discretionary.” Indeed, amicus curiae argues, school districts may not, “either as a matter of law or policy, realistically choose to [forgo] expelling [a] student [who commits one of the acts, other than firearm possession, referenced in [Education Code section 48915](#)’s discretionary provision], because doing so would fail to meet that school district’s legal obligations to provide a safe, secure and peaceful learning environment for the other students.”
- 23 As we observed in *Kern High School Dist., supra*, [30 Cal.4th](#) [727, 751–752, 134 Cal.Rptr.2d 237, 68 P.3d 1203](#), “[article XIII B, section 6](#)’s ‘purpose 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.’ ”
- 24 We do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than “incidental” or “de minimis” expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.

213 Cal.App.4th 1310  
Court of Appeal, Second  
District, Division 3, California.

Lee SCHMEER et al., Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES et  
al., Defendants and Respondents.

B240592

Filed February 21, 2013

As Modified March 11, 2013

Review Denied May 15, 2013 \*

Synopsis

**Background:** Petitioners filed combined petition for writ of mandate and complaint challenging county ordinance prohibiting retail stores from providing plastic carryout bags and requiring stores to charge customers 10 cents for each paper carryout bag provided. The Superior Court, Los Angeles County, No. BC470705, James C. Chalfant, J., denied relief, and petitioners appealed.

**[Holding:]** The Court of Appeal, Croskey, Acting P.J. held that paper bag carryout charge was not a “tax” which required voter approval.

Affirmed.

West Headnotes (10)

[1] **Constitutional Law** 🔑 Amendments in general

The court construes provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute.

[2] **Constitutional Law** 🔑 Intent in general

When construing provisions added to the state Constitution by a voter initiative, the court's task is to ascertain the intent of the electorate so as to effectuate the purpose of the law.

2 Cases that cite this headnote

[3] **Constitutional Law** 🔑 Intent in general

When construing provisions added to the state Constitution by a voter initiative, the court first examines the language of the initiative, as the best indicator of the voters' intent.

5 Cases that cite this headnote

[4] **Constitutional Law** 🔑 Plain, ordinary, or common meaning

When construing provisions added to the state Constitution by a voter initiative, the court gives the words of the initiative their ordinary and usual meaning and construes them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect.

[5] **Constitutional Law** 🔑 Existence of ambiguity

**Constitutional Law** 🔑 Extrinsic aids to construction in general

If the language of a provisions added to the state Constitution by a voter initiative is unambiguous and a literal construction would not result in absurd consequences, the court presumes that the voters intended the meaning on the face of the initiative and the plain meaning governs; if the language is ambiguous, the court may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative.

6 Cases that cite this headnote

[6] **Appeal and Error** 🔑 Statutory or legislative law

The construction of statute or an initiative, including the resolution of any ambiguity, is a question of law reviewed de novo.

### 13 Cases that cite this headnote

#### 3 Cases that cite this headnote

- [7] **Taxation** — Distinguishing "tax" and "license" or "fee"

Charge of \$0.10 imposed by county ordinance on retail establishments for each carryout paper bag provided was not a "tax" within meaning of state constitution provision prohibiting any new general or special tax imposed by local government without prior approval by the voters; charge was not remitted to the county, but rather was payable to and retained by the retail store providing the bag, and the store was required to use the funds for specified purposes. Cal. Const. art. 13 C, § 1.

#### 8 Cases that cite this headnote

- [8] **Taxation** — Nature of taxes

The term "tax" in ordinary usage refers to a compulsory payment made to the government or remitted to the government.

#### 4 Cases that cite this headnote

- [9] **Taxation** — Nature of taxes

Taxes ordinarily are imposed to raise revenue for the government, although taxes may be imposed for nonrevenue purposes as well.

#### 7 Cases that cite this headnote

- [10] **Municipal Corporations** — Submission to voters, and levy, assessment, and collection

Language "any levy, charge, or exaction of any kind imposed by a local government" in state constitution provision defining a "tax," for purposes of prohibition against new taxes without prior voter approval, is limited to charges payable to, or for the benefit of, a local government. Cal. Const. art. 13 C, § 1.

See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 136.

**\*\*353** APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC470705)

#### Attorneys and Law Firms

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Frank G. Wells Environmental Law Clinic, Sean B. Hecht and Xiao Y. Zhang for Surfrider Foundation, Heal the Bay, The 5 Gyres Institute, Environment California Research and Policy Center, and Seventh Generation Advisors as Amici Curiae on behalf of Defendants and Respondents.

#### Opinion

CROSKY, Acting P.J.

**\*1313** A Los Angeles County ordinance prohibits retail stores from providing plastic carryout bags and requires stores to charge customers 10 cents for each paper carryout bag provided. Lee Schmeer and others (Petitioners) filed a combined petition for writ of mandate and complaint challenging the ordinance. Petitioners contend the ordinance violates article XIII C of the California Constitution, as amended by Proposition 26, because the 10-cent charge is a tax and was not approved by county voters. We conclude that the paper carryout bag charge is not a tax for purposes of article XIII C because the charge is payable to and retained by **\*1314** the retail store and is not remitted to the county. We therefore will affirm the judgment in favor of the county and other respondents.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. Factual Background*

The Los Angeles County Board of Supervisors enacted ordinance No. 2010–0059 on November 23, 2010. The ordinance prohibits retail stores within unincorporated areas of Los Angeles County from providing plastic carryout bags to customers. The ordinance states that retail stores may provide, for the purpose of carrying goods away from the store, only recyclable paper carryout bags or reusable carryout bags meeting certain requirements (including plastic bags satisfying those requirements). The ordinance also states that retail stores must provide reusable bags to customers, either for sale or free of charge, and encourages retail stores to educate their employees to promote reusable bags and post signs encouraging customers to use reusable bags.

The ordinance further states that retail stores must charge the customer 10 cents for each recyclable paper carryout bag provided and must indicate on the receipt the number of recyclable paper carryout bags provided and the total amount charged for the bags. It states that customers participating in the California Supplemental Food Program for Women, Infants, and Children ([Health & Saf.Code, § 123275](#)) or the Supplemental Food Program ([Welf. & Inst.Code, § 15500 et seq.](#)) are exempt from the charge and must be provided free of charge either reusable bags or recyclable paper carryout bags. The ordinance states that the money received for recyclable paper bags must be retained by the store and used only for (1) the costs of compliance with the ordinance; **\*\*355** (2) the actual costs of providing recyclable paper bags; or (3) the costs of educational materials or other costs of promoting the use of reusable bags, if any.

The ordinance includes a severability provision stating: “If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid.”

The ordinance became effective on July 1, 2011. The ordinance was not submitted to the county electorate for its approval.

### *\*1315 2. Trial Court Proceedings*

Lee Schmeer, Salim Bana, Jeff Wheeler, Chris Wheeler and Hilex Poly Co. LLC (Hilex) filed a combined petition for writ of mandate and complaint in October 2011 against the County of Los Angeles and three county officials. Petitioners allege that the individual petitioners are California taxpayers who have been required to pay the paper carryout bag charge and that Hilex is a manufacturer of plastic bags prohibited by the ordinance.

Petitioners allege that the paper carryout bag charge required under the ordinance is a “tax” as defined in article XIII C of the California Constitution, as amended by Proposition 26. They allege that the charge was imposed by the county in violation of section 2 of article XIII C, which prohibits any new general or special tax imposed by local government without prior approval by the voters. Petitioners allege counts for (1) a writ of mandate to prevent the county from implementing and enforcing the ordinance and (2) a judicial declaration that the paper carryout bag charge violates article XIII C.

The trial court conducted a hearing on the merits of the petition for writ of mandate in March 2012. The court adopted its written tentative decision denying the petition as its final ruling. The court concluded that the paper carryout bag charge is not a general or special tax because the money is retained by the retail stores and is not remitted to the county. The court also concluded that even if the charge fell within the general definition of a tax under Proposition 26, the charge would satisfy an exception to that definition for “[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” ([Cal. Const., art. XIII C, § 1\(e\)\(1\)](#)). The court stated that the county, through retail stores, conferred the benefit of a paper carryout bag only on customers paying the charge, satisfying the first prong of the exception. The court stated that Petitioners waived the argument that the charge did not satisfy the second prong of the exception by failing to assert that argument in their opening brief on the petition. The court stated further that, in any event, substantial evidence shows that the money received by the stores for recyclable paper bags will be used for the purposes required under the ordinance. The court therefore concluded that Petitioners were not entitled to a writ of mandate.



Petitioners' counsel acknowledged that the trial court's ruling on the petition for writ of mandate effectively adjudicated the count for declaratory relief as well. The court entered a judgment in April 2012 denying Petitioners any relief on their \*\*356 combined petition for writ of mandate and complaint. Petitioners timely appealed the judgment.

### \*1316 CONTENTIONS

Petitioners contend (1) the paper carryout bag charge is a special tax imposed by the county without the voters' prior approval and therefore violates article XIII C of the California Constitution; (2) the charge does not satisfy the exception for a charge imposed for a specific benefit conferred or privilege granted, or any other exception under article XIII C; and (3) the challenged provisions of the ordinance are not severable, so the entire ordinance must be invalidated, including the ban on single-use plastic bags.

### DISCUSSION

#### 1. Standard of Review

The trial court's ruling turned on its construction of article XIII C of the California Constitution, as amended by Proposition 26, and its determination that the amount charged did not exceed the reasonable costs. We review the ruling de novo to the extent that the court decided questions of law concerning the construction of constitutional provisions and not turning on any disputed facts. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032, 56 Cal.Rptr.3d 814, 155 P.3d 226 (*Professional Engineers*)). We review the court's factual findings under the substantial evidence standard. (*Ibid.*)

#### 2. Construction of a Voter Initiative

[1] [2] [3] [4] We construe provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute. (*Professional Engineers, supra*, 40 Cal.4th at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226.) Our task is to ascertain the intent of the electorate so as to effectuate the purpose of the law. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, 135 Cal.Rptr.2d 30, 69 P.3d 951.) We first examine the language of the initiative as the best indicator of the voters' intent. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321, 120 Cal.Rptr.3d 741, 246 P.3d 877.) We give the

words of the initiative their ordinary and usual meaning and construe them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect. (*Professional Engineers, supra*, at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226; *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043, 12 Cal.Rptr.3d 343, 88 P.3d 71.)

[5] If the language is unambiguous and a literal construction would not result in absurd consequences, we presume that the voters intended the meaning on the face of the initiative and the plain meaning governs. (*Professional Engineers, supra*, 40 Cal.4th at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226; \*1317 *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, 21 Cal.Rptr.3d 676, 101 P.3d 563.) If the language is ambiguous, we may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative. (*Professional Engineers, supra*, at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226.)

[6] The construction of statute or an initiative, including the resolution of any ambiguity, is a question of law that we review de novo. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724, 122 Cal.Rptr.3d 331, 248 P.3d 1185.)

#### 3. Historical Foundations of Proposition 26

##### a. Proposition 13

California voters adopted Proposition 13 in June 1978, adding \*\*357 article XIII A to the California Constitution. Proposition 13 "impos[ed] important limitations upon the assessment and taxing powers of state and local governments." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 218, 149 Cal.Rptr. 239, 583 P.2d 1281 (*Amador Valley*)). Proposition 13 generally (1) limited the rate of any ad valorem tax on real property to 1 percent; (2) limited increases in the assessed value of real property to 2 percent annually absent a change in ownership; (3) required that " 'any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation' " must be approved by two-thirds of the Legislature; and (4) required that special taxes imposed by cities, counties and special districts must be approved by a two-thirds vote of the electors. (*Amador Valley, supra*, at p.

220, 149 Cal.Rptr. 239, 583 P.2d 1281, quoting former art. XIII A, § 3 as added by Prop. 13.)

The California Supreme Court in *Amador Valley*, *supra*, 22 Cal.3d at page 231, 149 Cal.Rptr. 239, 583 P.2d 1281, stated that the various elements of Proposition 13 formed “an interlocking ‘package’ ” with the purpose of providing effective real property tax relief. *Amador Valley* rejected several constitutional challenges to the initiative. Local governments, however, soon found ways to generate additional revenue without a two-thirds vote of the electors despite Proposition 13. Some of those efforts were approved by the courts.

The California Supreme Court in *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 208, 182 Cal.Rptr. 324, 643 P.2d 941 (*Richmond*), held that a sales tax imposed by the Los Angeles County Transportation Commission and approved by a majority, but less than two-thirds, of county voters was validly adopted. The state Legislature, before the \*1318 passage of Proposition 13, had authorized the local commission to adopt a sales tax to fund public transit projects. Writing for a plurality of three justices, Justice Mosk stated that the term “special districts” in section 4 of article XIII A of the California Constitution was ambiguous. (*Richmond, supra*, at p. 201, 182 Cal.Rptr. 324, 643 P.2d 941 (plur. opn. of Mosk, J.)) Justice Mosk stated that the requirement of a two-thirds vote imposed by the state's voters on local voters was “fundamentally undemocratic” and that the language of section 4 therefore must be strictly construed in favor of allowing local voters to approve special taxes by a majority vote rather than a two-thirds vote. (*Richmond, supra*, at p. 205, 182 Cal.Rptr. 324, 643 P.2d 941 (plur. opn. of Mosk, J.)) Noting that section 4 expressly prohibited cities, counties and special districts from imposing ad valorem taxes on real property or transaction or sales taxes on the sale of real property even with a two-thirds vote, and citing language in the ballot pamphlet, the plurality held that “special districts” under section 4 must be limited to special districts authorized to levy taxes on real property. (*Richmond, supra*, at p. 205, 182 Cal.Rptr. 324, 643 P.2d 941 (plur. opn. of Mosk, J.)) Two justices concurred in the judgment and also concluded that the term “special districts” was limited to special districts authorized to levy taxes on real property. (*Richmond, supra*, at p. 209, 182 Cal.Rptr. 324, 643 P.2d 941 (conc. opn. of Kaus, J.))

Justice Richardson stated in a dissent that the sales tax imposed by the local commission served as a convenient

substitute for an increase in real property taxes. (*Richmond, supra*, 31 Cal.3d at pp. 212–213, 182 Cal.Rptr. 324, 643 P.2d 941 (dis. opn. of Richardson, J.)) The dissent stated that under the holding by the majority, the creation of districts without real property \*\*358 taxing authority provided a means by which local government could readily avoid the restrictions of Proposition 13. (*Id.* at p. 213, 182 Cal.Rptr. 324, 643 P.2d 941.) The dissent concluded that just as the county would be prohibited from imposing the new tax without a two-thirds vote of its voters, the local commission as the county's surrogate should be prohibited from imposing the new tax without the required voter approval. (*Id.* at p. 215, 182 Cal.Rptr. 324, 643 P.2d 941.)

*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 184 Cal.Rptr. 713, 648 P.2d 935 held that a payroll and gross receipts tax imposed on businesses operating within the City and County of San Francisco, but not approved by a two-thirds vote of the voters, was valid. *Farrell* concluded that the requirement in section 4 of article XIII A of the California Constitution that “special taxes” imposed by cities, counties and special districts must be approved by a two-thirds vote of the electors applied only to taxes levied for a specific purpose and did not apply to taxes paid into the general fund to be used for general governmental purposes. (*Farrell, supra*, at p. 57, 184 Cal.Rptr. 713, 648 P.2d 935.)

*Rider v. County of San Diego* (1991) 1 Cal.4th 1, 2 Cal.Rptr.2d 490, 820 P.2d 1000 found invalid a sales tax imposed by the County of San Diego \*1319 for the purpose of financing the construction and operation of criminal detention and courthouse facilities. The tax was enacted without the approval of two-thirds of the voters.<sup>1</sup> Distinguishing *Richmond, supra*, 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941, the *Rider* court held that a local agency that the trial court found was created solely for the purpose of circumventing Proposition 13's two-thirds voter approval requirement was a “special district” (Cal. Const., art. XIII A, § 4) despite its lack of authority to levy taxes on real property. (*Rider, supra*, at pp. 8, 10, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* stated, “To hold otherwise clearly would create a wide loophole in Proposition 13 as feared by the dissent in *Richmond*.” (*Id.* at p. 10, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* noted a proliferation of governmental entities lacking the power to levy real property taxes raising revenues through sales taxes without the approval of two-thirds of the voters following *Richmond, supra*, 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941. (*Rider, supra*, at p. 10, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* stated that the framers of Proposition 13

and the voters who adopted it could not have “intended to adopt a definition [of ‘special districts’] that could so readily permit circumvention of section 4.” (*Rider, supra*, at p. 11, 2 Cal.Rptr.2d 490, 820 P.2d 1000.) *Rider* held that the term “special district” includes “any local taxing agency created to raise funds for city or county purposes to replace revenues lost by reason of the restrictions of Proposition 13.” (*Ibid.*)

*Knox v. City of Orland* (1992) 4 Cal.4th 132, 14 Cal.Rptr.2d 159, 841 P.2d 144 held that a charge levied against real property in the City of Orland for the maintenance of public parks was a “special assessment,” and was not a “special tax” within the meaning of section 4 of article XIII A of the California Constitution. *Knox* stated that a special assessment is a charge levied against real property within a particular district for the purpose of conferring a special benefit on the assessed properties beyond any benefit received by the general public. (*Knox, supra*, at pp. 141–142, 14 Cal.Rptr.2d 159, 841 P.2d 144.) A “special tax,” in contrast, is imposed to provide \*\*359 benefits to the general public. (*Id.* at pp. 142–143, 14 Cal.Rptr.2d 159, 841 P.2d 144.) *Knox* concluded that the park maintenance charge was a special assessment and therefore was not subject to the two-thirds voter approval requirement. (*Id.* at pp. 140–141, 145, 14 Cal.Rptr.2d 159, 841 P.2d 144.)

#### b. Proposition 218

California voters adopted Proposition 218 in November 1992, adding articles XIII C and XIII D to the California Constitution. Proposition 218 imposed additional voting approval requirements on the imposition of taxes by a local government. Proposition 218 also added to Proposition 13’s limitations on ad valorem property taxes and special taxes similar limitations on assessments, fees, and charges relating to real property. ( \*1320 *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 837, 102 Cal.Rptr.2d 719, 14 P.3d 930 ( *Apartment Assn.* ).) The initiative measure’s findings and declaration of purpose stated:

“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. (Nov. 5, 1996) text of Prop. 218, § 2, p. 108, reprinted in Historical Notes, 2A West’s Ann. Cal. Const. (2013 supp.) foll. art. XIII C, § 1, p. 171.)

Section 2, subdivision (a) of article XIII C of the California Constitution, added by Proposition 218, states: “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.” Section 1 of article XIII C defines “[g]eneral tax” as “any tax imposed for general governmental purposes” and defines “[s]pecial tax” as “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.” (*Id.*, subs.(a), (d).) Proposition 218 required that all general taxes imposed by a local government must be approved by a majority vote of the electorate and all special taxes imposed by a local government must be approved by a two-thirds vote of the electorate.<sup>2</sup> (Cal. Const., art. XIII C, § 2, subs. (b), (d).) Proposition 218, however, did not define the term “tax.”

Section 3, subdivision (a) of article XIII D of the California Constitution, added by Proposition 218, states that the only “taxes, assessments, fees, or charges” that a local government may impose “as an incident of property ownership” are ad valorem property taxes, special taxes approved by two-thirds of the voters, “[a]ssessments as provided by this article,” and “[f]ees or charges for property related services as provided by this article.” Proposition 218 restricted local government’s ability to impose real property assessments by (1) tightening the definition of “special benefit” \*\*360 and “proportionality” (Cal. Const., art. XIII D, §§ 2, subd. (i), 4, subd. (a)); (2) establishing strict procedural requirements for the imposition of an assessment (*id.*, § 4, subs.(b)-(e)); and (3) shifting to the public agency the burden of demonstrating the legality of an assessment (*id.*, § 4, subd. (f)). ( \*1321 *Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443–444, 79 Cal.Rptr.3d 312, 187 P.3d 37.) Proposition 218 also established procedural requirements for the imposition of new or increased fees and charges relating to real property and requirements for existing fees and charges. (Cal. Const., art. XIII D, § 6.)

*Apartment Assn., supra*, 24 Cal.4th at page 838, 102 Cal.Rptr.2d 719, 14 P.3d 930, held that article XIII D of the

California Constitution restricted only fees imposed on real property owners in their capacity as owners and therefore did not apply to an inspection fee imposed by the City of Los Angeles on property owners in their capacity as landlords.

*c. Sinclair Paint Co. v. State Board of Equalization*

In *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 64 Cal.Rptr.2d 447, 937 P.2d 1350, the California Supreme Court decided the question whether fees imposed by the Legislature on manufacturers and others contributing to environmental lead contamination were “taxes enacted for the purpose of increasing revenues” under former section 3 of article XIII A of the California Constitution, and therefore subject to the requirement of a two-thirds vote of the Legislature. (*Sinclair Paint, supra*, at p. 873, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* construed the language “ ‘taxes enacted for the purpose of increasing revenues’ ” in former section 3 of article XIII A, which had not been construed in any California appellate opinion, by reference to prior opinions construing the term “special taxes” in section 4 of article XIII A. (*Sinclair Paint, supra*, at pp. 873–881, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated:

“The cases recognize that ‘tax’ has no fixed meaning, and that the distinction between taxes and fees is frequently ‘blurred,’ taking on different meanings in different contexts. [Citations.] In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]....

“The ‘special tax’ cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.” (*Sinclair Paint, supra*, 15 Cal.4th at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)

*Sinclair Paint* stated that the courts had held that special assessments and development fees satisfying certain requirements were not “special taxes” under article XIII A, section 4. (*Sinclair Paint, supra*, 15 Cal.4th at pp. 874–875, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated that regulatory fees that do not exceed the reasonable cost of providing the services for which the \*1322 fees are charged and are not levied for any unrelated revenue purposes also are not “special taxes” subject to the two-

thirds voting requirement of section 4. (*Sinclair Paint, supra*, at p. 876, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* rejected the holding by the Court of Appeal in that case that the fees were not regulatory in nature because the legislation imposing the fees imposed no other conditions \*\*361 on persons subject to the fees. Instead, *Sinclair Paint* concluded that the fees were regulatory because the legislation “requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community.” (*Id.* at p. 877, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated that such “ ‘mitigating effects’ fees” were just as regulatory in nature as fees imposed on polluters or producers of contaminating products for the initial permit or licensing programs, and that such fees in substantial amounts also regulate future conduct by deterring the conduct subject to the fee and by encouraging research and development of alternative products. (*Ibid.*)

*Sinclair Paint* rejected the argument that the state had no authority to impose the fees, stating that the case law “clearly indicates that the police power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impact of the fee payer’s operations, at least where, as here, the measure requires a casual connection or nexus between the product and its adverse effects. [Citations.]” (*Sinclair Paint, supra*, 15 Cal.4th at pp. 877–878, 64 Cal.Rptr.2d 447, 937 P.2d 1350.) *Sinclair Paint* stated that if the primary purpose of a fee is to regulate rather than to raise revenue, the fee is not a tax. (*Id.* at p. 880, 64 Cal.Rptr.2d 447, 937 P.2d 1350.)

4. *Proposition 26*

California voters approved Proposition 26 on November 2, 2010. Proposition 26 expanded the definition of taxes so as to include fees and charges, with specified exceptions; required a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers; and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax. Proposition 26 amended section 3 of article XIII A and section 1 of article XIII C of the California Constitution. The initiative was an effort to close perceived loopholes in Propositions 13 and 218 and was largely a response to *Sinclair Paint, supra*, 15 Cal.4th 866, 64 Cal.Rptr.2d 447, 937 P.2d 1350. Proposition 26’s findings and declaration of purpose stated:

“The people of the State of California find and declare that:

“(a) Since the people overwhelmingly approved Proposition 13 in 1978, the Constitution of the State of California has required that increases in state taxes be adopted by not less than two-thirds of the members elected to each house of the Legislature.

**\*1323** “(b) Since the enactment of Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters.

“(c) Despite these limitations, California taxes have continued to escalate. Rates for state personal income taxes, state and local sales and use taxes, and a myriad of state and local business taxes are at all-time highs. Californians are taxed at one of the highest levels of any state in the nation.

“(d) Recently, the Legislature added another \$12 billion in new taxes to be paid by drivers, shoppers, and anyone who earns an income.

“(e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as ‘fees’ in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as ‘regulatory’ but which **\*\*362** exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.

“(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a ‘tax’ for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as ‘fees.’ ” (Ballot Pamp., Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, p. 114, reprinted in Historical Notes, 2A [West's Ann. Cal. Const. \(2013 supp.\) foll. art. XIII C, § 3](#), pp. 141–142.)

**\*\*363** Proposition 26 amended [section 3 of article XIII A of the California Constitution](#) to read:

“(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 **\*1324** 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.”<sup>3</sup>

Proposition 26 amended [section 1 of article XIII C of the California Constitution](#) to read:

\***1325** “(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.

\***1326** “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.”<sup>4</sup>

Proposition 26, in an effort to curb the perceived problem of a proliferation of regulatory fees imposed by the state without a two-thirds vote of the Legislature or imposed **\*\*364** by local governments without the voters' approval, defined a “tax” to include “any levy, charge, or exaction of any kind imposed by” the state or a local government, with specified exceptions. The question here is whether the paper carryout bag charge constitutes a tax and therefore is subject to one of the two voter approval requirements ([Cal. Const., art. XIII C, § 2, subds. \(b\), \(d\)](#)).

#### 5. The Paper Carryout Bag Charge Is Not a Tax

[7] The county contends the paper carryout bag charge is not a tax because it is payable to and retained by the retail store and is not remitted to the county. We agree.

[8] [9] The term “tax” in ordinary usage refers to a compulsory payment made to the government or remitted to the government. Taxes ordinarily are imposed to raise revenue for the government ([California Farm Bureau Federation v. State Water Resources Control Bd.](#) (2011) 51 Cal.4th 421, 437, 121 Cal.Rptr.3d 37, 247 P.3d 112 ([California Farm](#) ) [“Ordinarily taxes are imposed for revenue purposes and not ‘in return for a specific benefit conferred or privilege granted’ ”]; [Sinclair Paint, supra](#), 15 Cal.4th at p. 874, 64 Cal.Rptr.2d 447, 937 P.2d 1350 [“In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted”]; [Morning Star Co. v. Board of Equalization](#) (2011) 201 Cal.App.4th 737, 750, 135 Cal.Rptr.3d 457), although taxes may be imposed for nonrevenue purposes as well (see [Washington v. Confederated Tribes of Colville Indian Reservation](#) (1980)

447 U.S. 134, 158, 100 S.Ct. 2069, 65 L.Ed.2d 10 [“taxes can be used for distributive or regulatory purposes, as well as for raising revenue”]).

The definition of a “tax” in California Constitution, [article XIII C, section 1](#), subdivision (e) does not explicitly state that the levy, charge or exaction must be payable to a local government, but does state that it must be “imposed by a local government.” In light of the ordinary meaning of a “tax” as a **\*1327** compulsory payment made to the government or remitted to the government, we conclude that subdivision (e) is ambiguous as to whether a levy, charge or exaction must be payable to a local government in order to constitute a tax. Our consideration of other language added to article XIII C by Proposition 26 helps to resolve this ambiguity.

Subdivision (e) of [article XIII C, section 1](#) lists seven exceptions to the rule that “ ‘tax’ means any levy, charge, or exaction of any kind imposed by a local government” (*ibid.*). The exceptions (quoted *ante*) all relate to charges ordinarily payable to the government, including charges imposed in connection with governmental activities or use of government property, fines imposed by the government for a violation of law, development fees and real property assessments. (*Ibid.*)

The first three exceptions, in particular, state that a charge imposed by a local government is not a tax if the charge does not exceed “the reasonable costs to the local government” of conferring a specific benefit or privilege directly to the payor or providing a specific service or product directly to the payor, and also except from the definition of a tax a charge “for the reasonable regulatory costs to a local government for issuing licenses and permits” and related activities. ([Cal. Const., art. XIII C, § 1](#), subd. (e), items (1), (2) & (3).) These exceptions, generally speaking, except from the definition of a “tax” charges not exceeding the reasonable costs to the local government of providing specific benefits or regulatory services. These exceptions do not contemplate the situation where a charge is paid to an entity or **\*\*365** person other than a local government or where such an entity or person incurs reasonable costs. In our view, this suggests an understanding that the language “any levy, charge, or exaction of any kind imposed by a local government” in the first paragraph of [article XIII C, section 1](#), subdivision (e) is limited to charges payable to a local government. This is consistent with the ordinary meaning of the term “tax.”<sup>5</sup>

No reason appears on the face of Proposition 26, or from our consideration of the ballot pamphlet and the historical

foundations of the initiative, **\*1328** to conclude that the voters approving the initiative intended the definition of a “tax” to include both charges payable to a local government and charges payable to a nongovernmental entity or person, while limiting the “reasonable costs” exceptions to charges payable to a local government. In other words, there is no reason to believe that the voters approving Proposition 26 intended to except from the definition of a “tax” and, consequently, from the voter approval requirements, charges payable to a local government not exceeding the reasonable costs of providing specific benefits or regulatory activities, but intended the same charges if made payable to another person or entity in an amount not exceeding the reasonable costs to be considered taxes subject to the voter approval requirements.

The analysis and arguments for and against the initiative in the official ballot pamphlet discussed the impact of the initiative on the ability of local government to raise revenues. The analysis by the Legislative Analyst stated, “Generally, the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other societal or economic concerns.” A chart listed several examples of regulatory fees that could be considered taxes under the measure, stating as to each one that the state or local government “uses the funds” for specified purposes, necessarily implying that the fees were payable to the government. There was no discussion in the ballot pamphlet of any charges or fees payable to a nongovernmental entity or person and nothing to suggest to the voters that Proposition 26 would have any impact on such charges or fees.<sup>6</sup>

**\*\*366** [10] Accordingly, we conclude that the language “any levy, charge, or exaction of any kind imposed by a local government” in the first paragraph of **\*1329** [article XIII C, section 1](#), subdivision (e) is limited to charges payable to, or for the benefit of, a local government.<sup>7</sup>

Petitioners note that Proposition 26 deleted the language “any change in state taxes enacted for the purpose of increasing revenues collected pursuant thereto” in [article XIII A, section 3 of the California Constitution](#) and replaced it with “[a]ny change in state statute which results in any taxpayer paying a higher tax.” Petitioners argue that this amendment indicates an intent to eliminate the prior requirement that a charge must produce revenue for the government to be considered a tax. We disagree. This amendment was to the provision requiring approval by two-thirds of the Legislature for any increase

in state taxes. The provisions requiring voter approval for increases in local taxes ([Cal. Const., art. XIII A, § 4, art. XIII C, § 2](#)), in contrast, never included the language “for the purpose of increasing revenues” or any similar limiting language. The purpose of this amendment to [article XIII A, section 3](#) was to end the Legislature's practice of approving by a simple majority vote so-called “revenue-neutral” laws that increased taxes for some taxpayers but decreased taxes for others. The Legislative Analyst's analysis in the official ballot pamphlet stated:

“*Current Requirement.* The State Constitution currently specifies that laws enacted ‘for the purpose of increasing revenues’ must be approved by two-thirds of each house of the Legislature. Under current practice, a law that increases the amount of taxes charged to some taxpayers but offers an equal (or larger) reduction in taxes for other taxpayers has been viewed as not increasing revenues. As such, it can be approved by a majority vote of the Legislature.

“*New Approval Requirement.* The measure specifies that state laws that result in *any* taxpayer paying a higher tax must be approved by two-thirds of each house of the Legislature.” (Boldface omitted.)

Accordingly, we conclude that the amendment to [article XIII A, section 3](#) does not support Petitioners' position. The paper carryout bag charge is payable to and retained by the retail

store providing the bag, which is required to use the funds for specified purposes. The charge is not remitted to the county. Because the charge is not remitted to the county and raises no revenue for the county, we conclude that the charge is not a “tax” for purposes of article XIII C of the California Constitution. The voter approval requirements of [article XIII C, section 2](#) \*1330 therefore are inapplicable. In light of our conclusion, we need not decide whether, if the charge were otherwise considered a tax, any of the specified exceptions would apply.

### DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

\*\*367 WE CONCUR:

KITCHING, J.

ALDRICH, J.

### All Citations

213 Cal.App.4th 1310, 153 Cal.Rptr.3d 352, 13 Cal. Daily Op. Serv. 2037, 2013 Daily Journal D.A.R. 2393

### Footnotes

\* [Kennard](#) and [Corrigan](#), JJ., are of the opinion the petition should be granted.

1 The tax was approved by 50.8%, a bare majority of the county voters. ([Rider, supra](#), 1 Cal.4th at p. 6, 2 Cal.Rptr.2d 490, 820 P.2d 1000.)

2 [Article XIII C, section 2](#), subdivision (b) states, in relevant part, “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.” Subdivision (d) states, in relevant part, “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.”

3 [Section 3 of article XIII A](#) stated, in its entirety, before the enactment of Proposition 26: “From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation 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.” Proposition 26 amended the first sentence of section 3, designated the first paragraph as subdivision (a), and added subdivisions (b), (c) and (d).

4 Proposition 26 added subdivision (e) of [article XIII C, section 1](#) and left subdivisions (a) through (d) of section 1 unchanged.

5 None of the seven exceptions expressly refers to the reasonable costs to a nongovernmental entity or person or to activities undertaken by or payments typically made to a nongovernmental entity or person. Consideration of the final paragraph of [article XIII C, section 1](#), subdivision (e) supports the view that the exceptions all refer to activities directly undertaken by the local government. The final paragraph states, “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*." (Italics added.) Use of the term "the governmental activity" as a shorthand reference for the activities described in the exceptions suggests that the exceptions all refer to activities undertaken directly by the local government.

- 6 Another part of the Legislative Analyst's analysis provided other examples of regulatory fees, including "fees on the purchase of beverage containers to support recycling programs." The California Beverage Container Recycling and Litter Reduction Law ([Pub. Resources Code, § 14500 et seq.](#)) requires a payment by the distributor to the Department of Resources Recycling and Recovery for each beverage container sold or transferred to a retailer. (*Id.*, § 14574.) The burden of the distributor's payment is passed on to the consumer through a fee charged by the retailer. The payments are deposited into a fund in the state treasury and used for the administration of the recycling program. (*Id.*, §§ 14574, 14580, subd. (a).) Here, in contrast, the paper carryout bag charge is retained by the retailer, and no payment is made into any government fund. Contrary to Petitioners' argument, the charge here is not akin to a beverage container fee, and the reference in the ballot materials to beverage container fees did not suggest to the voters that a charge such as the paper carryout bag charge would be considered a tax.
- 7 A charge payable to a third party creditor to extinguish a debt owed by a local government, for example, would effectively be equivalent to a payment made to the local government.



KeyCite Yellow Flag - Negative Treatment

Superseded by Statute as Stated in [City of San Buenaventura v. United Water Conservation Dist.](#), Cal.App. 2 Dist., March 17, 2015

15 Cal.4th 866, 937 P.2d 1350, 64  
Cal.Rptr.2d 447, 97 Cal. Daily Op. Serv.  
5059, 97 Daily Journal D.A.R. 8242

SINCLAIR PAINT COMPANY,  
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, Defendant  
and Appellant; DEPARTMENT OF HEALTH  
SERVICES et al., Interveners and Appellants.

No. S054115.  
Supreme Court of California  
June 26, 1997.

### SUMMARY

The trial court granted a paint company summary judgment in the company's action against the Board of Equalization for a refund of fees paid pursuant to an assessment under the Childhood Lead Poisoning Prevention Act of 1991 ([Health & Saf. Code, § 105275](#) et seq.). The trial court found that the fees were taxes, and thus they were invalid since the Legislature passed the act by a simple majority, rather than by the two-thirds majority required by [Cal. Const., art. XIII A, § 3](#) (Prop. 13). (Superior Court of Sacramento County, No. CV541310, Joe S. Gray, Judge.) The Court of Appeal, Third Dist., No. C021559, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the Court of Appeal erred in ruling that “fees” assessed on manufacturers or other persons contributing to environmental lead contamination, pursuant to the Childhood Lead Poisoning Prevention Act of 1991, were in legal effect “taxes” required to be enacted by a two-thirds vote of the Legislature under Prop. 13. Rather, the fees imposed were bona fide regulatory fees. The act requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. The shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is a reasonable police power

decision. The fact that the fees were charged after, rather than before, the product's adverse effects were realized was immaterial to the question whether the measure imposed valid regulatory fees rather than taxes. Also, if regulation is the primary purpose of a fee, the mere fact that revenue is also obtained does not make the imposition a tax. (Opinion \*867 by Chin, J., with George, C. J., Mosk, Kennard, Baxter, Werdegar, JJ., and Armstrong, J., \* concurring.)

### HEADNOTES

#### Classified to California Digest of Official Reports

(1)  
Property Taxes § 7.2--Constitutional Provisions--Proposition 13.

The purpose of Prop. 13 was to assure effective real property tax relief by means of an interlocking package consisting of a real property tax rate limitation ([Cal. Const., art. XIII A, § 1](#)), a real property assessment limitation ([Cal. Const., art. XIII A, § 2](#)), a restriction on state taxes ([Cal. Const., art. XIII A, § 3](#)), and a restriction on local taxes ([Cal. Const., art. XIII A, § 4](#)). Since any tax savings resulting from the operation of [Cal. Const., art. XIII A, §§ 1 and 2](#), could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, [Cal. Const., art. XIII A, §§ 3 and 4](#), combine to place restrictions upon the imposition of such taxes.

(2a, 2b, 2c)

Taxation § 2--Validity of Taxation Legislation--Proposition 13--Fees Assessed Under Childhood Lead Poisoning Prevention Act--Applicability of Supermajority Requirement:Property Taxes § 7.8--Proposition 13.

The Court of Appeal erred in ruling that “fees” assessed on manufacturers or other persons contributing to environmental lead contamination, pursuant to the Childhood Lead Poisoning Prevention Act of 1991 ([Health & Saf. Code, § 105275](#) et seq.), which the Legislature had enacted by a simple majority, were in legal effect “taxes” required to be enacted by a two-thirds vote of the Legislature under Prop. 13 ([Cal. Const., art. XIII A, § 3](#)). Rather, the fees imposed were bona fide regulatory fees. The act requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. The shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public

to those persons deemed responsible for that poisoning is a reasonable police power decision. The fact that the fees were charged after, rather than before, the product's adverse effects were realized was immaterial to the question whether the measure imposed valid regulatory fees rather than taxes. Also, if regulation is \*868 the primary purpose of a fee, the mere fact that revenue is also obtained does not make the imposition a tax.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 784.]

(3)

Property Taxes § 7.6--Constitutional Provisions--Proposition 13-- Assessments as Fees or Taxes:Taxation § 3--Construction.

In determining under Prop. 13 (Cal. Const., art. XIII A, § 3), whether impositions are “taxes” or “fees” is a question of law for the appellate courts to decide on independent review of the facts. The term “tax” has no fixed meaning, and the distinction between taxes and fees is frequently blurred, taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. But compulsory fees may be deemed legitimate fees rather than taxes.

(4a, 4b)

Property Taxes § 7.8--Constitutional Provisions--Proposition 13--Special Taxes:Taxation § 3--Construction.

There are three general categories of fees or assessments involved in disputes concerning whether they are in legal effect “special taxes” required to be enacted by a two-thirds vote of the Legislature under Prop. 13 (Cal. Const., art. XIII A, §§ 3 and 4). They are (1) special assessments, based on the value of benefits conferred on property, (2) development fees, exacted in return for permits or other government privileges, and (3) regulatory fees, imposed under the police power. Special assessments on property or similar business charges, in amounts reasonably reflecting the value of the benefits conferred by improvements, are not “special taxes.” Similarly, development fees exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer. Also, fees 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, are not special taxes.

(5)

Property Taxes § 7.8--Constitutional Provisions--Proposition 13-- Assessments as Regulatory Fee:Taxation § 3--Construction.

In order to show that an imposition is a regulatory fee and not a special tax under Prop. 13 (Cal. Const., art. XIII A, § 3), the government should prove (1) the estimated costs of the service or regulatory \*869 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.

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CHIN, J.

In 1991, by simple majority vote, the Legislature enacted the Childhood Lead Poisoning Prevention Act of 1991 (the Act) (Stats. 1991, ch. 799, § 3, amended Stats. 1995, ch. 415, § 5; see [\\*870 Health & Saf. Code, § 105275](#) et seq.).<sup>1</sup> The Act provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The Act's program was entirely supported by “fees” assessed on manufacturers or other persons contributing to environmental lead contamination. (See §§ 105305, 105310.) The question arises whether these fees were in legal effect “taxes” required to be enacted by a two-thirds vote of the Legislature. (See [Cal. Const., art. XIII A, § 3.](#))

Contrary to the trial court and Court of Appeal, we conclude that the Act imposed bona fide regulatory fees, not taxes, because the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and under the Act the amount of the fees must bear a reasonable relationship to those adverse effects. Accordingly, the trial court erred in granting summary judgment to award plaintiff Sinclair Paint Company (Sinclair) a refund of the fees it paid under the Act.

We take the following statement of uncontradicted facts largely from the Court of Appeal opinion in this case. Sinclair paid \$97,825.26 in fees for 1991. After the Board of Equalization (the Board) denied Sinclair's administrative claim for refund, Sinclair filed a complaint for refund, alleging the fees assessed under section 105310 were “actually taxes imposed by the California [L]egislature in violation of Proposition 13, [Article XIII A, Section 3 of the California Constitution.](#)” The court granted the request of the Department of Health Services (the Department) for leave to intervene. It also granted a similar request to intervene by Ray Cochenour and Cardaryl Commodore, representatives of a class of children suffering from lead poisoning, and People United for a Better Oakland, an unincorporated association whose members include the Act's intended beneficiaries (collectively Cochenour).

Sinclair moved for summary judgment, claiming the Act was invalid on its face because it was not passed by the requisite two-thirds majority vote of the Legislature. The court agreed the Act imposed an unconstitutional tax and granted Sinclair's motion.

The Board, the Department, and Cochenour appealed, contending the Act involves a regulatory fee, not a

tax. Appellants also argued the court erred in granting Sinclair summary judgment without compelling it to produce discovery and improperly relied on legislative history in determining the Act's constitutionality. The Court of Appeal affirmed the judgment, concluding that the Act was unconstitutional on its face and rejecting appellants' other claims. We reverse the Court of Appeal's judgment. [\\*871](#)

## Discussion

### *I. The Childhood Lead Poisoning Prevention Act of 1991*

When the Legislature enacted the Act in 1991, it explained the Act's background and purpose in findings that described the numerous health hazards children face when exposed to lead toxicity and declared four state “goals,” namely, (1) evaluating, screening, and providing case management for children at risk of lead poisoning, (2) identifying sources of lead contamination responsible for this poisoning, (3) identifying and utilizing programs providing adequate case management for children found to have lead poisoning, and (4) providing education on lead-poisoning detection and case management to state health care providers. (Stats. 1991, ch. 799, § 1.)

The Act directs the Department to adopt regulations establishing a standard of care for evaluation, screening (i.e., measuring lead concentration in blood), and medically necessary follow-up services for children determined to be at risk of lead poisoning. (§ 105285; see § 105280, subd. (e).) If a child is identified as being at risk of lead poisoning, the Department must ensure “appropriate case management,” i.e., “health care referrals, environmental assessments, and educational activities” needed to reduce the child's exposure to lead and its consequences. (§§ 105280, subd. (a), 105290.) Additionally, the Act requires the Department to collect data and report on the effectiveness of case management efforts. (§ 105295.)

The Department has “broad regulatory authority to fully implement and effectuate the purposes” of the Act. (§ 105300.) This authority “include[s], but is not limited to,” the development of protocols for screening and for appropriate case management; the designation of laboratories qualified to analyze blood specimens for lead concentrations, and the monitoring of those laboratories for accuracy; the development of reporting procedures by laboratories; reimbursement for state-sponsored services related to screening and case management; establishment of lower lead concentrations in whole blood than those specified by the

United States Centers for Disease Control for lead poisoning; notification to parents or guardians of the results of blood-lead testing and environmental assessment; and establishment of a periodicity schedule for evaluating childhood lead poisoning. (§ 105300.)

The Act states that its program of evaluation, screening, and follow-up is supported *entirely* by fees collected under the Act: “Notwithstanding the scope of activity mandated by this chapter, in no event shall this chapter be interpreted to require services necessitating expenditures in any fiscal year in excess of the fees, and earnings therefrom, collected pursuant to Section \*872 105310. This chapter shall be implemented only to the extent fee revenues pursuant to Section 105310 are available for expenditure for purposes of this chapter.” (§ 105305.)

Section 105310 imposes the fees at issue here. In pertinent part, that section imposes fees on manufacturers and other persons formerly and/or presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination. (§ 105310, subd. (a).) The Department must determine fees based on the manufacturer's or other person's past and present responsibility for environmental lead contamination, or its “market share” responsibility for this contamination. (§ 105310, subd. (b).)

Those persons able to show that their industry did not contribute to environmental lead contamination, or that their lead-containing product does not and did not “result in quantifiably persistent environmental lead contamination,” are exempt from paying the fees. (§ 105310, subd. (d).)

The Legislature has authorized the Department to adopt regulations establishing the specific fees to be assessed the parties identified in section 105310, subdivision (a). (§ 105310, subd. (b).) The formula for calculating fees attributable to leaded architectural coatings, including ordinary house paint, is set forth in [California Code of Regulations, title 17, section 33020](#).

## II. Proposition 13

(1) In June 1978, California voters added [article XIII A](#), commonly known as the Jarvis-Gann Property Tax Initiative or Proposition 13 (article XIII A), to the state Constitution. The initiative's purpose was to assure effective real property

tax relief by means of an “interlocking 'package'” consisting of a real property tax rate limitation ([art. XIII A, § 1](#)), a real property assessment limitation ([art. XIII A, § 2](#)), a restriction on state taxes ([art. XIII A, § 3](#)), and a restriction on local taxes ([art. XIII A, § 4](#)). (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 [149 Cal.Rptr. 239, 583 P.2d 1281] (*Amador Valley*); see also *County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1451 [29 Cal.Rptr.2d 103].)

[Section 3 of article XIII A](#) restricts the enactment of changes in state taxes, as follows: “From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods \*873 of computation must be imposed by an Act passed by not less than two-thirds of all members ... 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.”

[Section 4 of article XIII A](#) imposes similar restrictions on local entities: “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.” (Italics added.)

As we explained in *Amador Valley*, “... since any tax savings resulting from the operation of [sections 1 and 2 \[of article XIII A\]](#) could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, [sections 3 and 4](#) combine to place restrictions upon the imposition of such taxes.” (*Amador Valley, supra*, 22 Cal.3d at p. 231.)

## III. Taxes or Fees?

(2a) Are the “fees” section 105310 imposes in legal effect “taxes enacted for the purpose of increasing revenues” under [article XIII A, section 3](#), and therefore subject to a two-thirds majority vote? Although we have found no cases that interpret the language of [section 3](#), several California appellate decisions have considered whether various fees are really “special taxes” under [article XIII A, section 4](#). (See also *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [184 Cal.Rptr. 713, 648 P.2d 935] [“special taxes” are taxes levied for a specific purpose rather than for general governmental purposes]; [Gov. Code, § 50076](#) [excluding from the term “special tax” in [article XIII A, section 4](#), “any fee which does not exceed the reasonable cost

of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes”.) Because of the close, “interlocking” relationship between the various sections of [article XIII A](#) (see [Amador Valley, supra](#), 22 Cal.3d at p. 231), we believe these “special tax” cases may be helpful, though not conclusive, in deciding the case before us. The reasons why particular fees are, or are not, “special taxes” under [article XIII A, section 4](#), may apply equally to [section 3](#) cases.<sup>2</sup>

We first consider certain general guidelines used in determining whether “taxes” are involved in particular situations. (3) The cases agree that \*874 whether impositions are “taxes” or “fees” is a question of law for the appellate courts to decide on independent review of the facts. (*Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1216 [265 Cal.Rptr. 347]; *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 234 [253 Cal.Rptr. 497]; *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504 [246 Cal.Rptr. 21].)

The cases recognize that “tax” has no fixed meaning, and that the distinction between taxes and fees is frequently “blurred,” taking on different meanings in different contexts. (*Russ Bldg. Partnership v. City and County of San Francisco, supra*, 199 Cal.App.3d at p. 1504; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 905 [223 Cal.Rptr. 379]; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 660 [166 Cal.Rptr. 674]; *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 983-984 [156 Cal.Rptr. 777].) In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240 [1 Cal.Rptr.2d 818]; *County of Fresno v. Malmstrom, supra*, 94 Cal.App.3d at p. 983 [“Taxes are raised for the general revenue of the governmental entity to pay for a variety of public services.”].) Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. (*Shapell Industries, Inc. v. Governing Board, supra*, 1 Cal.App.4th at p. 240; *Russ Bldg. Partnership v. City and County of San Francisco, supra*, 199 Cal.App.3d at pp. 1505-1506; see *Terminal Plaza Corp. v. City and County of San Francisco, supra*, 177 Cal.App.3d at p. 907.) But compulsory fees may be deemed legitimate fees rather than taxes. (See *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424 [23 Cal.Rptr.2d 910].)

(4a) The “special tax” cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power. Although these three categories may overlap in a particular case, we consider them separately.

The cases uniformly hold that *special assessments* on property or similar business charges, in amounts reasonably reflecting the value of the benefits conferred by improvements, are not “special taxes” under [article XIII A, section 4](#). (*Evans v. City of San Jose* (1992) 3 Cal.App.4th 728, 735-739 [4 Cal.Rptr.2d 601] [assessments on businesses for downtown promotion]; \*875 *J. W. Jones Companies v. City of San Diego* (1984) 157 Cal.App.3d 745, 750-758 [203 Cal.Rptr. 580] [facilities benefit assessments]; *City Council v. South* (1983) 146 Cal.App.3d 320, 332 [194 Cal.Rptr. 110] [special assessments on real property]; *County of Fresno v. Malmstrom, supra*, 94 Cal.App.3d at pp. 984-985 [special assessments for construction of streets].)

Similarly, *development fees* exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer. (*Shapell Industries, Inc. v. Governing Board, supra*, 1 Cal.App.4th at p. 240 [school facilities fees]; *Bixel Associates v. City of Los Angeles, supra*, 216 Cal.App.3d at pp. 1211, 1218-1219 [fire hydrant fees]; *California Bldg. Industry Assn. v. Governing Bd., supra*, 206 Cal.App.3d at pp. 235-237 [school facilities development fees]; *Russ Bldg. Partnership v. City and County of San Francisco, supra*, 199 Cal.App.3d at pp. 1504-1506 [transit impact fees]; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235-238 [211 Cal.Rptr. 567] [new facilities water hookup fees]; *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325-328 [170 Cal.Rptr. 685] [fees as precondition for building permits]; *Mills v. County of Trinity, supra*, 108 Cal.App.3d at pp. 661-663 [fees for processing subdivision, zoning, and land use applications]; see *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 898 [50 Cal.Rptr.2d 242, 911 P.2d 429] (conc. opn. of Mosk, J.).)

According to Sinclair, because the present fees have been imposed solely to defray the cost of the state's program of evaluation, screening, and follow-up services for children determined to be at risk for lead poisoning, they are not analogous to either special assessments or development fees,

for they neither reimburse the state for special benefits conferred on manufacturers of lead-based products nor compensate the state for governmental privileges granted to those manufacturers. As the Court of Appeal observed, the fees challenged here “do not constitute payment for a government benefit or service. The program described in the Act bears no resemblance to regulatory schemes involving special assessments, developer fees, or efforts to recoup the cost of processing land use applications where the benefit analysis is typically applied. [Citations.] The face of the Act makes clear the funds collected pursuant to section 105310 are used to benefit children exposed to lead, not Sinclair or other manufacturers in the stream of commerce for products containing lead.”

(2b) Appellants argue, however, that the challenged fees fall squarely within a third recognized category not dependent on government-conferred benefits or privileges, namely, *regulatory fees* imposed under the police power, rather than the taxing power. We agree. \*876

(4b) We have acknowledged that the term “special taxes” in article XIII A, section 4, “does not embrace fees 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.” [Citations.]” (*Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [228 Cal.Rptr. 726, 721 P.2d 1111] (*Pennell*), *affd.* on other grounds *sub nom. Pennell v. San Jose* (1988) 485 U.S. 1 [108 S.Ct. 849, 99 L.Ed.2d 1], quoting from *Mills v. County of Trinity*, *supra*, 108 Cal.App.3d at pp. 659-660; see *City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 760-762 [53 Cal.Rptr.2d 120] [upholding regulatory fees charged to alcoholic beverage sale licensees to support pilot project to address public nuisances associated with those sales]; *Kern County Farm Bureau v. County of Kern*, *supra*, 19 Cal.App.4th at pp. 1422-1425 [upholding landfill assessment based on land use to reduce illegal waste disposal]; *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 280-285 [17 Cal.Rptr.2d 845] [upholding waste disposal surcharge imposed on waste haulers]; *Evans v. City of San Jose*, *supra*, 3 Cal.App.4th at p. 737; *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1145-1149 [250 Cal.Rptr. 420] (*SDG&E*) [upholding emissions-based formula for recovering direct and indirect costs of pollution emission permit programs]; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 166-168 [154 Cal.Rptr.

263] (*United Business*) [upholding fees for inspecting and inventorying on-premises advertising signs].)

*Pennell* upheld rental unit fees that a city imposed under its rent control ordinance to assure it recovered the actual costs of providing and administering a rental dispute hearing process. (*Pennell*, *supra*, 42 Cal.3d at p. 375.) We explained in *Pennell* that regulatory fees in amounts necessary to carry out the regulation's purpose are valid despite the absence of any perceived “benefit” accruing to the fee payers. (*Id.* at p. 375, fn. 11; see also *SDG&E*, *supra*, 203 Cal.App.3d at p. 1146, fn. 18; *Mills v. County of Trinity*, *supra*, 108 Cal.App.3d at p. 661.)

We observe that Sinclair, in moving for summary judgment, did not contend that the fees exceed in amount the reasonable cost of providing the protective services for which the fees are charged, or that the fees were levied for any *unrelated* revenue purposes. (See *Pennell*, *supra*, 42 Cal.3d at p. 375.) Moreover, Sinclair has not yet sought to establish that the amount of the fees bears no reasonable relationship to the social or economic “burdens” that Sinclair's operations generated. (See *SDG&E*, *supra*, 203 Cal.App.3d at p. 1146; see also § 105310, subds. (b), (d); *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 421 [ \*877 194 Cal.Rptr. 357, 668 P.2d 664] [persons challenging fees have burden of establishing invalidity].) Sinclair does contend, however, that the Act is not *regulatory* in nature, being primarily aimed at producing revenue.

According to Sinclair, the challenged fees were in effect “taxes” because the compulsory revenue measure that imposed them was not part of a *regulatory* effort. The Court of Appeal agreed, relying on prior cases indicating that where payments are exacted solely for *revenue* purposes and give the right to carry on the business with no further conditions, they are taxes. (E.g., *United Business*, *supra*, 91 Cal.App.3d at p. 165.) The Court of Appeal held that “Placing the factors distinguishing taxes and fees along a continuum, we conclude the monies paid by Sinclair pursuant to the Act are more like taxes than fees. [¶] *There is nothing on the face of the Act to show the fees collected are used to regulate Sinclair.* Apart from mere calculation of the payment, the Department's regulatory authority involves implementation of the program to evaluate, screen, and provide followup services to children at risk for lead poisoning. The Act does not require Sinclair to comply with any other conditions; it merely requires Sinclair to pay what the Department determines to be its share of the program cost.”

Contrary to the Court of Appeal, we believe that section 105310 imposes bona fide regulatory fees. It requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. Viewed as a “mitigating effects” measure, it is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.

From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less “regulatory” in nature than the initial permit or licensing programs that allowed them to operate. Moreover, imposition of “mitigating effects” fees in a substantial amount (Sinclair allegedly paid \$97,825.26 in 1991) also “regulates” future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products. (Cf. *SDG&E*, *supra*, 203 Cal.App.3d at p. 1147, fn. 20 [emissions-based fees provide incentive to use nonpollutant fuels].)

Sinclair disputes the state's authority to impose industry-wide “remediation fees” to compensate for the adverse societal effects generated by an industry's products. To the contrary, the case law previously cited or discussed clearly indicates that the police power is broad enough to include **\*878** mandatory remedial measures to mitigate the *past, present, or future* adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects. (See *City of Oakland v. Superior Court*, *supra*, 45 Cal.App.4th at pp. 760-762; *Kern County Farm Bureau v. County of Kern*, *supra*, 19 Cal.App.4th at pp. 1422-1425; *City of Dublin v. County of Alameda*, *supra*, 14 Cal.App.4th at pp. 284-285; *SDG&E*, *supra*, 203 Cal.App.3d at pp. 1146-1149; *United Business*, *supra*, 91 Cal.App.3d at p. 168; *Russ Bldg. Partnership v. City and County of San Francisco*, *supra*, 199 Cal.App.3d at pp. 1504-1506 [fees to pay for increased transit costs]; *J. W. Jones Companies v. City of San Diego*, *supra*, 157 Cal.App.3d at pp. 755, 758 [fees to defray costs of additional public facilities]; *Trent Meredith, Inc. v. City of Oxnard*, *supra*, 114 Cal.App.3d at p. 325 [fees to reduce growth impact of new subdivision]; see also *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 694 [151 P. 398] [police power authorizes legislation necessary or proper for protection of

legitimate public interest]; *County of Plumas v. Wheeler* (1906) 149 Cal. 758, 761-764 [87 P. 909] [broad legislative discretion to regulate business, including license fees or charges]; 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 784, p. 311 [“police power is simply the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare”]; see generally, 6A McQuillan, The Law of Municipal Corporations (3d rev. ed. 1997) Municipal Police Power and Ordinances, § 24.01 et seq., p. 7 et seq.)

*SDG&E* involved regulatory fees comparable in some respects to the fees challenged here. (*SDG&E*, *supra*, 203 Cal.App.3d 1132.) There, 1982 legislation (see § 42311) empowered local air pollution control districts to apportion the costs of their permit programs among all monitored polluters according to a formula based on the amount of emissions they discharged. (See *SDG&E*, *supra*, 203 Cal.App.3d at p. 1135.) (5) The *SDG&E* court observed that “to show a fee is a regulatory fee and 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.” (*Id.* at p. 1146, fn. omitted; see *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.*, *supra*, 165 Cal.App.3d at pp. 234-235.)

In *SDG&E*, the amount of the regulatory fees was limited to the reasonable costs of each district's program, and the allocation of costs based on emissions “fairly relates to the permit holder's burden on the district's programs.” (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1146.) Accordingly, the **\*879** court concluded that the fees were not “special taxes” under article XIII A, section 4. (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1148.)

As the court observed in *SDG&E*, “Proposition 13's goal of providing effective property tax relief is not subverted by the increase in fees or the emissions-based apportionment formula. A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves ....” (*SDG&E*, *supra*, 203 Cal.App.3d at p. 1148.) (2c) In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of



lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision. (See also *Mills v. County of Trinity, supra*, 108 Cal.App.3d at p. 663; *County of Fresno v. Malmstrom, supra*, 94 Cal.App.3d at p. 985 [special assessments have no impact on government spending].)

The fact that the challenged fees were charged after, rather than before, the product's adverse effects were realized is immaterial to the question whether the measure imposes valid regulatory fees rather than taxes. *City of Oakland v. Superior Court* seems close on point. There, the court upheld city fees imposed on retailers of alcoholic beverages to defray the cost of providing and administering hearings into nuisance problems associated with the prior sale of those beverages. The court first observed that "If a business imposes an unusual burden on city services, a municipality may properly impose fees pursuant to its police powers" to assure that the persons responsible "pay their fair share of the cost of government." (*City of Oakland v. Superior Court, supra*, 45 Cal.App.4th at p. 761.) The court concluded that "The ordinance's primary purpose is regulatory—to create an environment in which nuisance and criminal activities associated with alcoholic beverage retail establishments may be reduced or eliminated. Thus, the fee imposed ... is not a tax imposed to pay general revenue to the local governmental entity, but is a regulatory fee intended to defray the cost of providing and administering the hearing process set out in the ordinance. [Citation.]" (*Id.* at p. 762.)

The court in *United Business* applied the "regulation/revenue" distinction to conclude that sign inventory fees adopted to recover the city's cost of inventorying signs and bringing them into conformance with law were regulatory fees, not revenue-raising taxes. The court observed that, under the police power, municipalities may impose fees for the purpose of legitimate regulation, and not mere revenue-raising, if the fees do not exceed the reasonably necessary expense of the regulatory effort. (\*880 *United Business, supra*, 91 Cal.App.3d at p. 165, and authorities cited.) Quoting with approval from an earlier decision, the court noted that, if revenue is the primary purpose, and regulation is merely incidental, the imposition is a tax, but if regulation is the primary purpose, the mere fact that revenue is also obtained does not make the imposition a tax. (*Ibid.*) Moreover, according to *United Business*, if a fee is exacted for revenue purposes, and its payment gives the right to carry on business without any further conditions, it is a tax. (*Ibid.*; see also *City of Oakland v. Superior Court, supra*, 45 Cal.App.4th at p. 761;

*County of Plumas v. Wheeler, supra*, 149 Cal. at p. 763 [fee in amount greater than reasonably needed to regulate business "cannot stand as an exercise of the police power"]; *Mills v. County of Trinity, supra*, 108 Cal.App.3d at pp. 659-660; *City & County of San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 450-451 [189 P.2d 32].)

The Court of Appeal, citing *United Business*, stressed that the challenged fees were exacted solely for revenue purposes, and their payment gave Sinclair and others the right to carry on the business without any further conditions. We see two flaws in that analysis. First, *all* regulatory fees are necessarily aimed at raising "revenue" to defray the cost of the regulatory program in question, but that fact does not automatically render those fees "taxes." As stated in *United Business*, if regulation is the primary purpose of the fee measure, the mere fact that the measure also generates revenue does not make the imposition a tax. (*United Business, supra*, 91 Cal.App.3d at p. 165; see also *Mills v. County of Trinity, supra*, 108 Cal.App.3d at p. 660 [rejecting broad definition of "tax" as including all fees and charges that exact money for public purposes].)

Second, we find inconclusive the fact that the Act permits Sinclair and other producers to carry on their operations without any further conditions *specified in the Act itself*. As we have indicated, fees can "regulate" business entities without directly licensing them by mitigating their operations' adverse effects. Moreover, as appellants observe, the Act is part of a broader regulatory scheme by which, under various state and federal statutes, the state regulates Sinclair and other manufacturers in the stream of commerce for products containing lead. That being so, Sinclair's payment of the challenged fees did not confer the right to carry on business without any further conditions or regulation.

The Court of Appeal rejected appellants' argument invoking other state and federal regulations: "First, there is nothing on the face of the Act or the accompanying statement of legislative purpose which links the Act's programs for children at risk for lead poisoning with the cited state or federal statutes regulating lead. Second, none of the fees collected pursuant to \*881 section 105310 are used to fund those regulatory efforts." However, it is undisputed that Sinclair and other manufacturers of lead-based products remain subject to government regulation, that payment of the challenged fees therefore does not entitle those manufacturers to operate free of regulation, and that the state must use the funds it collects under section 105310 *exclusively* for

mitigating the adverse effects of lead poisoning of children, and not for general revenue purposes. (§ 105310, subd. (f).)

Under existing case law, we can reasonably characterize the challenged fees as *regulatory fees* rather than as taxes. Accordingly, we conclude the trial court erred in granting Sinclair summary judgment on the constitutional issues. Of course, Sinclair should be permitted to attempt to prove at trial that the amount of fees assessed and paid exceeded the reasonable cost of providing the protective services for which the fees were charged, or that the fees were levied for unrelated revenue purposes. (See *Pennell, supra*, 42 Cal.3d at p. 375.) Additionally, Sinclair will have the opportunity to try to show that no clear nexus exists between its products

and childhood lead poisoning, or that the amount of the fees bore no reasonable relationship to the social or economic “burdens” its operations generated. (*SDG&E, supra*, 203 Cal.App.3d. at p. 1146; see also § 105310, subds. (b), (d).)

### Disposition

The judgment of the Court of Appeal, affirming the trial court's grant of summary judgment in Sinclair's favor, is reversed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Armstrong, J.,\* concurred.

### Footnotes

- \* Associate Justice of the Court of Appeal, Second District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).
- 1 All further statutory references are to the Health and Safety Code unless otherwise noted.
- 2 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.
- \* Associate Justice of the Court of Appeal, Second District, Division Five, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

23 Cal.App.4th 1459, 28 Cal.Rptr.2d 734

TAHOE KEYS PROPERTY OWNERS'  
ASSOCIATION, Plaintiff and Appellant,

v.

STATE WATER RESOURCES CONTROL  
BOARD et al., Defendants and Respondents.

No. C012562.

Court of Appeal, Third District, California.

Mar 30, 1994.

### SUMMARY

A property owners association brought an action against state agencies seeking various forms of relief based upon its assertion that a mitigation fee charged as a condition for obtaining building permits was unlawful. The trial court denied the association's request for a preliminary injunction that would have precluded defendants from collecting further mitigation fees and would have prevented them from making expenditures from the fund created by those fees that were previously collected. (Superior Court of El Dorado County, No. SV91-0164, J. Hilary Cook, Judge. \* )

The Court of Appeal affirmed the order denying the association's request for a preliminary injunction. It held that the association failed to show irreparable harm so as to support its request for the injunction. No property owner was precluded from building, and, should the association ultimately prevail, damages were readily ascertainable and compensable. Further, defendants would suffer harm from the injunction, since they would be unable to perform their task of protecting the environment from degradation caused by development and would have difficulty collecting the fees later should they prevail at trial. The court also held that the association had not established the likelihood that it would prevail on the merits at trial. Since the mitigation fee did not result in either a physical taking or a deprivation of all economic use of property, the regulation was not subject to heightened judicial scrutiny. Also, to establish whether the mitigation fees constituted a regulatory taking involved a complex, case-specific assessment, with the burden of proof on the association, that did not lend itself to the summary nature of a preliminary injunction proceeding. (Opinion by

Sparks, Acting P. J., with Sims, J., concurring. Separate concurring opinion by Scotland, J.) \*1460

### HEADNOTES

#### Classified to California Digest of Official Reports

(1)

Injunctions § 18--Preliminary Injunctions--Hearing and Determination.

A preliminary injunction is a provisional remedy and, except in unusual circumstances, a request for a preliminary injunction does not support a final determination on the merits of the underlying claim. Accordingly, a request for a preliminary injunction does not contemplate a full trial on the merits.

(2)

Injunctions § 21--Preliminary Injunctions--Appeal--Abuse of Discretion.

The decision to grant a preliminary injunction rests in the sound discretion of the trial court. The party challenging an order granting or denying a preliminary injunction has the burden of making a clear showing of an abuse of discretion. An abuse of discretion will be found only where the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence.

(3)

Injunctions § 18--Preliminary Injunctions--Hearing and Determination-- Factors Considered.

In determining whether or not to issue a preliminary injunction, a trial court must evaluate two interrelated factors. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted. In thus balancing the respective equities of the parties, the court must determine whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by it.

(4a, 4b)

Injunctions § 13--Preliminary Injunctions--Grounds--Irreparable Injury--Public Agencies--Property Owners Association's Request to Enjoin Collection and Expenditure of Mitigation Fees:Building Regulations § 6-- Environmental Regulations.

In a property owners association's action against state agencies in which plaintiff alleged that a mitigation fee charged as a condition for obtaining building permits was unlawful, plaintiff failed to show irreparable harm so as to support its request for a preliminary injunction to preclude defendants from collecting further mitigation fees and from making expenditures from the fees previously collected. Plaintiff did not show that defendants' continued collection of the fees precluded individual lot owners from building on their properties, and should plaintiff prevail at trial, damages would be readily ascertainable and compensable. Also, plaintiff showed little evidence of harm if defendants made \*1461 any expenditures from the fees. Further, defendants would have suffered harm from the injunction. They were charged with protecting a scenic area from degradation. Enjoining the collecting and expenditures of the fees pending trial could result in the loss of mitigation projects. Moreover, defendants would have difficulty collecting fees from individual owners later should defendants prevail.

(5)  
Injunctions § 13--Preliminary Injunctions--Grounds--Irreparable Injury--Public Agencies.

The showing of potential harm that a plaintiff must make in support of a request for preliminary injunctive relief may be expressed in various linguistic formulations, such as the inadequacy of legal remedies or the threat of irreparable injury, but whatever the choice of words, the plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits. In general, if the plaintiff may be fully compensated by the payment of damages in the event he or she prevails, then preliminary injunctive relief should be denied. Where the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for this relief the plaintiff must make a significant showing of irreparable injury.

(6a, 6b, 6c)  
Eminent Domain § 62--Condemnation Proceedings--Preliminary Injunction--Establishment of Likelihood of Prevailing at Trial-- Property Owners Association's Request to Enjoin Collection and Expenditure of Mitigation Fees:Building Regulations § 6--Environmental Regulations.

The trial court did not err in denying a property owners association's request for a preliminary injunction in the association's action against state agencies in which the association alleged that a mitigation fee charged as a condition for obtaining building permits was unlawful. The association did not establish the likelihood that it would prevail on the merits so as to justify enjoining defendants' continued collection and expenditure of the fees pending trial. Plaintiff's case fell within the category of cases in which each owner was subjected to regulatory restrictions that resulted neither in a physical invasion of the property nor the deprivation of all economic use of the land. Thus, plaintiff was not entitled to the heightened scrutiny a physical taking entailed, and resolution of plaintiff's challenge required a careful, case-specific factual inquiry. \*1462

(7)  
Eminent Domain § 18--Compensation--Constitutional Provisions--What Constitutes Taking--Land Use Permit:Building Regulations § 3--Permits.

A physical taking of property as a condition for issuance of a land use permit will not per se violate the Constitution, but will instead be subjected to heightened judicial scrutiny. In general, if the government could deny a use permit in the furtherance of a legitimate police power purpose, then it may exact a physical taking to serve that purpose. The government may act to regulate land use to serve a broad range of purposes. But to be valid as a land use regulation, a condition that results in a physical taking must substantially advance some legitimate government purpose connected with the project at issue. This requires that the governmental purpose relate to the project at issue, and that there be a nexus between the condition and the governmental purpose. If the condition utterly fails to further the end advanced as justification, then the condition is not a valid land use regulation and becomes an unconstitutional taking.

[See 8 [Witkin, Summary of Cal. Law \(9th ed. 1988\) Constitutional Law, § 939](#); 7 [Miller & Starr, Cal. Real Estate \(2d ed. 1990\) §§ 23:18, 23:19.](#)]

(8)  
Eminent Domain § 18--Compensation--Constitutional Provisions--What Constitutes Taking--Regulatory Takings.  
The cases involving the takings clause of the 5th Amend. to the U.S. Const. fall into three categories: (1) where the owner is compelled to suffer a permanent physical invasion of his or her property; (2) where the owner is denied all economically beneficial or productive use of the land; and (3) where the

owner is subjected to other regulatory restrictions on the use of the property. The first two categories of regulatory actions have been described by the court as compensable without case-specific inquiry into the public interest advanced in support of the restraint. But most alleged regulatory takings fall into the third category, and in these cases courts have eschewed rigid formulae, preferring instead to engage in ad hoc factual inquiries. In making such inquiries the court will engage in the assumption that through the regulation the state is simply adjusting the benefits and burdens of economic life in an appropriate manner.

(9a, 9b, 9c, 9d, 9e, 9f)

Eminent Domain § 62--Condemnation Proceedings--Preliminary Injunction--Establishment of Likelihood of Prevailing at Trial--Property Owners Association's Request to Enjoin Collection and Expenditure of Mitigation Fees--Challenge as Regulatory Taking:Building Regulations § 6--Environmental Regulations.

A \*1463 property owners association that challenged the imposition of a mitigation fee charged as a condition for obtaining building permits as a regulatory taking did not establish sufficient likelihood of success at trial so as to entitle it to a preliminary injunction preventing defendant state agencies from collecting and spending the fees pending trial. The fees involved an important state interest in ameliorating the effects upon the scenic area caused by development. Since the fees were specifically dedicated to partial mitigation of pollution in the area, there appeared to be a sufficient nexus between the regulation and the governmental objectives. Moreover, although the public at large benefited from the preservation of the area, the property owners in the association benefited specially. Thus, it did not appear unfair to require these owners to shoulder more of the burden of preserving the area. These and other matters required resolution through trial, and the association had not met its burden of showing a likelihood it could invalidate the fee regulation.

(10)

Building Regulations § 6--Environmental Regulations--Propriety of Injunction.

To determine whether an environmental regulation constitutes a regulatory taking necessarily entails complex factual assessments of the purposes and economic effects of governmental actions. Accordingly, these cases do not lend themselves readily to summary disposition without a fully developed factual record. Since in this type of case courts

will generally assume the propriety of the land use regulation, it falls upon the plaintiff to establish its invalidity. Also, although a request for a preliminary injunction does not contemplate a full trial on the merits, the party seeking the injunction must present sufficient evidentiary facts to establish a likelihood that it will prevail.

(11)

Building Regulations § 6--Environmental Regulations--Validity.

In considering a challenge to the validity of an environmental land use regulation, the court must initially consider whether the regulation substantially advances a legitimate state interest. This is a two-pronged question. First, it must appear that the governmental interest set forth as justification for the restriction reasonably relates to the property or project in question, and second, the restriction must reasonably serve that interest. However, it is not necessary that the governmental interest relate solely to the land or project in question, nor is it necessary that the regulation be limited to remedying the specific contribution to the problem that will be attributable to the project in question. Rather, the \*1464 justification for a restriction is not limited to the needs or burdens created only by the proposed project. The government may constitutionally engage in land use regulation to serve a broad range of interests, including the preservation of a unique natural environment.

(12)

Eminent Domain § 15--Compensation--Regulation of Land Use.

Where the government merely regulates the use of property, compensation to the owner is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.

(13)

Eminent Domain § 18--Compensation--Constitutional Provisions--What Constitutes Taking--Land Use Regulations:Building Regulations § 6-- Environmental Regulations.

Land use regulations need not apply across the board to everyone arguably concerned. Rather, the government is permitted to adjust the benefits and burdens of economic life in a manner the secures an average reciprocity of

advantage. Land use regulations often have differing effects on neighboring properties and this fact alone does not invalidate a regulatory scheme. It follows that the fact that the regulatory restrictions imposed on one group are different in kind from the restrictions imposed on others does not in itself establish that the first group has been unfairly singled out to bear the burden of the governmental objective. That question must be answered by reference to such things as danger to the public interest created by the land use aspirations of the different property owners, the extent of the burdens imposed on the different property owners when compared to the burdens imposed on others, and, where applicable, the nature of any special benefits that will accrue to the different property owners by virtue of the regulatory program.

(14)

Zoning and Planning § 9--Content and Validity of Zoning Plans-- Prospective Nature.

A landowner cannot defeat a land use regulation simply by pointing to someone else who by prior use escaped the regulation, for otherwise there could be no land use planning. As a general rule, land use regulation must be prospective in nature because the state is constitutionally limited in the extent to which it may, through land use regulation, affect prior existing uses. Accordingly, preexisting use is a constitutional line of demarcation in land use regulation and prior uses are protected while expectations and \*1465 aspirations are not. In other words, landowners have no vested right in existing or anticipated zoning regulations.

(15)

Zoning and Planning § 9--Content and Validity of Zoning Plans--Effect of Landowner's Acquiescence.

A landowner or his or her successor in title is barred from challenging a condition imposed in a land use regulation if the landowner has acquiesced therein by either specifically agreeing to the condition or by failing to challenge its validity while accepting the benefits afforded.

(16)

Eminent Domain § 62--Condemnation Proceedings--Preliminary Injunction--Establishment of Likelihood of Prevailing at Trial--Property Owners Association's Request to Enjoin Collection and Expenditure of Mitigation Fees--Challenges Not Based on Constitution:Building Regulations § 6--Environmental Regulations.

A property owners association that challenged the imposition of a mitigation fee charged as a condition for obtaining

building permits as a regulatory taking did not establish sufficient likelihood of success at trial so as to entitle it to a preliminary injunction preventing defendant state agencies from collecting and spending the fees pending trial, even though one of the agencies had failed to obtain execution of the memorandum of understanding (MOU) that had been prepared to set forth the mitigation package proposed by plaintiff. In challenging the imposition of a mitigation fee, it is the resolution imposing the fee, not the MOU, that must be attacked. Moreover, the agency's resolution was not contingent on the execution of the MOU. Further, there were no fatal conflicts between the resolutions of different agencies so as to justify the preliminary injunction.

#### COUNSEL

Feldman, Shaw, DeVore, Lewis S. Feldman and Deborah A. Palmer for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens and Walter Wunderlich, Assistant Attorneys General, and Daniel L. Siegel, Deputy Attorney General, for Defendants and Respondents. \*1466

#### SPARKS, Acting P. J.

The plaintiff Tahoe Keys Property Owners' Association (TKPOA) brought an action against defendants State Water Resources Control Board, State of California Regional Water Quality Control Board-Lahonton Region (Lahonton), and State of California Resources Agency (Resources Agency),<sup>1</sup> seeking various forms of relief based upon its contention that a mitigation fee charged as a condition for obtaining building permits is unlawful. TKPOA unsuccessfully sought a preliminary injunction which would have precluded the defendants from collecting further mitigation fees and would have prevented them from making expenditures from the fund created by those fees which were previously collected. TKPOA appeals from the denial of its request for a preliminary injunction. We shall affirm.

#### Factual and Procedural Background

In this appeal we do not have before us a fully developed factual record for two reasons. First, this is an appeal from the denial of a request for a preliminary injunction. (1) A preliminary injunction is a provisional remedy and, except in unusual circumstances, a request for a preliminary injunction would not support a final determination on the merits. (See *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 357 [176 Cal.Rptr. 620].) Accordingly, a request for a

preliminary injunction does not contemplate a full trial on the merits. (*Ibid.*) Second, TKPOA is convinced that the decision of the United States Supreme Court in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [97 L.Ed.2d 677, 107 S.Ct. 3141] compels a decision in its favor and has thus approached this case as though it could be resolved as a question of law. As we shall explain, this case is not controlled by *Nollan* and on the record presented we find no error in the denial of TKPOA's request for preliminary injunctive relief.

Only a brief factual recitation drawn from the parties' submissions, including the verified complaint, is necessary. The area known as the Tahoe Keys consists of 26 subdivisions bordering on Lake Tahoe. The Tahoe Keys is a waterfront development which was created by extensive dredge and fill \*1467 operations in what was formerly the Truckee Marsh. The development consists of individual lots on "arms of land" raised above the lake level by fill operations and surrounded by lagoons that meander through the development so as to give each lot owner access to the lagoons and through the lagoons to the lake. TKPOA is an owners association representing 1,594 members who own property within the Tahoe Keys and that holds title to the common areas in the Tahoe Keys.

The Tahoe Keys development commenced in the spring of 1959 and continued during the 1960's. In 1970 the developer conveyed its interest in the common areas to TKPOA, and in a resolution Lahonton has stated that the modifications to the former stream environment zone (SEZ) were accomplished prior to 1972.

The Tahoe Basin is a unique natural environment.<sup>2</sup> "However, there is good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 485 [96 Cal.Rptr. 553, 487 P.2d 1193].) By the late 1960's California, Nevada and the federal government were becoming increasingly aware of the degradation which was being and would be wrought by uncontrolled development of the region. In 1968 California and Nevada entered into the Tahoe Regional Planning Compact to regulate development. (See *Gov. Code*, §§ 66800-66801; *Nev. Rev. Stat.* §§ 277.190-277.230 (1973).) Congress gave its consent to the compact in 1969. (*Lake Country Estates v. Tahoe Planning Agcy.*, *supra*, 440 U.S. at p. 394 [59 L.Ed.2d at p. 406].) The Tahoe Regional Planning Compact created the Tahoe Regional Planning Agency (TRPA). (*Ibid.*) At the same time our Legislature

created the California Tahoe Regional Planning Agency (CTRPA) to attempt to maintain an equilibrium between the region's natural endowment and its manmade environment. (*Gov. Code*, § 67002.) In creating CTRPA the Legislature provided for its deactivation upon the adoption by TRPA of ordinances, rules and regulations which met the requirements of the regional compact. (*Gov. Code*, § 67131; *California Tahoe Regional Planning Agency v. Day & Night Electric, Inc.* (1985) 163 Cal.App.3d 898, 906 [210 Cal.Rptr. 48].)

Virtually contemporaneous with rising concerns over the degradation of the Tahoe Basin and the creation of TRPA and CTRPA, our Legislature \*1468 enacted a comprehensive revision of our water quality control laws in order to provide for a statewide program for the control of the quality of all of the waters of the state. (Stats. 1969, ch. 482, p. 1045; see *Gov. Code*, § 13000.) The core of this new legislation was the Porter-Cologne Water Quality Control Act. (*Wat. Code*, § 13020 et seq.; see generally, Robie, *Water Pollution: An Affirmative Response by the California Legislature* (1970) 1 Pacific L.J. 2.) The new legislation retained from prior law the concept of enforcement of water quality objectives through nine regional boards, but gave the regional boards and the State Water Resources Control Board greater powers and duties to implement water quality policies. (See Robie, *supra*, 1 Pacific L.J. at p. 4.) Each regional board was required to formulate and adopt water quality control plans for all areas within its region, subject to approval by the state board. (*Wat. Code*, §§ 13240, 13245.) Lahonton is the regional board with jurisdiction over the Tahoe Basin. (*Wat. Code*, § 13200, subd. (h).)

In the early 1980's, at a time when structures had been built upon roughly two-thirds of the lots in the Tahoe Keys, both CTRPA and Lahonton classified the area as a stream environment zone under their respective regulations.<sup>3</sup> Such a classification would effectively preclude owners from obtaining development permits to construct dwellings on their vacant lots. TKPOA, on behalf of its members, asked CTRPA and Lahonton to reclassify the Tahoe Keys to a classification which would enable individual lot owners to obtain building permits. The record on appeal does not include the records of the administrative proceedings which led up to the reclassification of the Tahoe Keys by CTRPA and Lahonton. It does appear, however, that there were extensive scientific studies, negotiations, and hearings conducted by and between CTRPA, Lahonton and TKPOA before reclassification of the Tahoe Keys in 1982.

In 1982, by resolution No. 82-8, Lahonton reclassified the Tahoe Keys as a man-modified stream environment zone. The resolution contains factual findings in support of the reclassification. Included among Lahonton's determinations were findings that the modification of the upper Truckee Marsh resulted in significant reduction of the natural water treatment capacity of the zone and that substantial deterioration of Lake Tahoe had resulted, and that the construction and continuing operation and maintenance of the Tahoe Keys lagoons and peninsulas contributes significant quantities of nutrients to the waters of Lake Tahoe. The resolution imposes requirements for the buildout of the area. The requirement with which we are concerned here is \*1469 that a mitigation fee of \$4,000 be paid for each lot to be developed. The fees thus collected were to be used to establish a mitigation fund which would be used, with the participation of TKPOA, to accomplish projects designed to achieve a net reduction of nutrients entering Lake Tahoe equivalent to that generated by the Tahoe Keys development.

Also in 1982, by resolution No. 82-10, CTRPA reclassified the Tahoe Keys as a substantially altered stream environment zone. The CTRPA resolution included factual findings similar to the Lahonton resolution. CTRPA also imposed a \$4,000 per lot mitigation fee on further construction.<sup>4</sup> The CTRPA resolution refers to a memorandum of understanding (MOU) that had been prepared to set forth the mitigation package proposed by TKPOA, which would include the requirement of a \$4,000 mitigation fee.<sup>5</sup> It states that the mitigation fund thus established would be used to achieve a net reduction of nutrients equivalent to that generated by the Tahoe Keys and that priority would be given to on-site (within the Tahoe Keys) mitigation measures.

From the time of the Lahonton and CTRPA resolutions in 1982 until February 1991, TKPOA did not protest the imposition of mitigation fees and individual lot owners who obtained building permits paid their fees into the mitigation fund. During that time approximately 300 residences were constructed and, with interest, the mitigation fund grew to approximately \$1.5 million.

By letter dated February 15, 1991, TKPOA objected to the past and future imposition of the mitigation fee. It demanded that the mitigation fees which had been collected be refunded and that no such fee be imposed on future construction. Lahonton rejected TKPOA's demand by resolution No. 6-91-47. TKPOA commenced this action in June 1991.<sup>6</sup> TKPOA seeks to preclude CTRPA and Lahonton from

collecting further mitigation fees and to \*1470 require them to pay over to TKPOA the mitigation fund established from the fees previously collected.

TKPOA sought preliminary injunctive relief to restrain CTRPA and Lahonton from collecting any further mitigation fees and from making any expenditures from the mitigation fund pending trial.<sup>7</sup> The trial court denied the request for preliminary injunctive relief and TKPOA appeals.

### Discussion

(2) "The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69 [196 Cal.Rptr. 715, 672 P.2d 121].) The party challenging an order granting or denying a preliminary injunction has the burden of making a clear showing of an abuse of discretion. (*Ibid.*) An abuse of discretion will be found only where the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence. (*Ibid.*)

(3) In determining whether or not to issue a preliminary injunction, a trial court must evaluate two interrelated factors. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm the plaintiff may suffer if the injunction is denied as compared to the \*1471 harm that the defendant may suffer if the injunction is granted. (*IT Corp. v. County of Imperial, supra*, 35 Cal.3d at pp. 69-70.) In thus balancing the respective equities of the parties, the court must determine whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by it. (*Ibid.*)

TKPOA sets forth several legal theories upon which it believes it is entitled to relief. While these legal theories require separate consideration with respect to the likelihood that TKPOA will prevail on the merits, the harm which TKPOA may suffer if provisional relief is denied is a factor which is common to the propriety of preliminary injunctive relief under every theory. (4a) Accordingly, before individually addressing the potential merits of TKPOA's theories, we will first address TKPOA's claim of interim harm by denial of preliminary injunctive relief.

(5) The showing of potential harm that a plaintiff must make in support of a request for preliminary injunctive relief may be expressed in various linguistic formulations, such as the inadequacy of legal remedies or the threat of irreparable injury



(compare *Civ. Code*, § 3422 with *Code Civ. Proc.*, § 526),<sup>8</sup> but whatever the choice of words it is clear that a plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits. (See *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 459 [191 Cal.Rptr. 104]; *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 997 [189 Cal.Rptr. 132]; *Schwartz v. Arata* (1920) 45 Cal.App. 596, 601 [188 P. 313].) In general, if the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied. (*Ibid.*) Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401 [128 Cal.Rptr. 183, 546 P.2d 687]; *Golden Gate S. T., Inc. v. San Francisco* (1937) 21 Cal.App.2d 582, 584-585 [69 P.2d 899].) This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury. (*Ibid.*)

(4b) TKPOA presented little evidence or argument that would support a claim of irreparable injury in the event of the denial of provisional relief. \*1472 There was no evidence to suggest that if defendants continue to collect the mitigation fee individual lot owners would be precluded from building upon or otherwise utilizing their property.<sup>9</sup> In the event TKPOA should prevail legal damages will be readily ascertainable and there was no evidence to suggest that if TKPOA prevails individual lot owners cannot be fully compensated by payment of those damages. In asserting the right to provisional relief TKPOA argued, essentially, that the fee is unconstitutional and if defendants are permitted to collect it pending trial then individual lot owners will be compelled to suffer, at least temporarily, the payment of an unconstitutional fee. To the extent this assertion involves the likelihood that TKPOA will prevail on the merits we will discuss it in a subsequent portion of this opinion. At this point, we will not presume irreparable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief.

With respect to expenditures from the mitigation fund, TKPOA's showing was even more scant. The mitigation fund was established by the payment of fees by individual lot owners who built on their lots in the nine years between

defendants' reclassification of the Tahoe Keys and TKPOA's objection to the fees. Repayment through the assessment of damages, the legal remedy, is the only relief that can be accorded those persons and an order enjoining expenditures from the mitigation fund will neither ameliorate their damages nor hasten their recovery. TKPOA's attempt to establish the potential of harm from a denial of provisional relief was based upon the assertion that in light of the state's budget difficulties it would appear that the state could not respond in damages if TKPOA prevails. We, like the trial court, find that assertion to be entitled to short shrift. Although it is common knowledge that the state has suffered through budgetary difficulties in the last several years (see *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 163 [6 Cal.Rptr.2d 714]), the entire Tahoe Keys mitigation fund amounts to much less than .00003 percent of the state's annual general fund budget and there is no reason to believe that the state would be unable to reimburse any expenditures from the mitigation fund in the event it should be judicially determined that it must do so.

On the other side of the scale we consider the potential harm to defendants if a preliminary injunction is granted. Where, as here, the plaintiff seeks to \*1473 enjoin public officers and agencies in the performance of their duties the public interest must be considered. (*Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588 [39 Cal.Rptr. 708, 394 P.2d 548]; *Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 292 [164 Cal.Rptr. 323].) In this instance the defendants are attempting to perform their legal duties to preserve or at least mitigate the degradation of Lake Tahoe and its environs caused by development. That is a matter of significant public concern and provisional injunctive relief which would deter or delay defendants in the performance of their duties would necessarily entail a significant risk of harm to the public interest. If defendants are enjoined from making expenditures from the mitigation fund pending trial on the merits then they may very well delay or forgo mitigation projects with resulting harm to the public interest.<sup>10</sup>

With respect to TKPOA's request for an injunction against further collection of mitigation fees from individual lot owners, we find significant potential harm to defendants. TKPOA is acting in a representative capacity in seeking to restrain defendants from collecting mitigation fees from individual lot owners pending trial on the merits. No individual lot owner is a party to this action. Accordingly, if the defendants are provisionally restrained but ultimately prevail, the trial court will lack the ability to recompense

defendants for the fees they will have been precluded from collecting in the interim. In that event the defendants will be relegated to the potentially expensive and time-consuming necessity of bringing multiple collection actions against individual lot owners in an effort to recoup their damages. This is a compelling reason for denial of TKPOA's request for provisional relief against the collection of mitigation fees from individual lot owners. (See *Santa Cruz F. B. Assn. v. Grant* (1894) 104 Cal. 306, 308 [37 P. 1034].)

Based upon these factors we find little risk of irreparable harm to TKPOA if provisional relief is denied and significant risk of harm to defendants if such relief is granted.

The next step in our analysis must be consideration of TKPOA's specific theories for relief and the likelihood that it will prevail on the merits. We turn now to those theories.  
\*1474

### 1. *Nollan v. California Coastal Comm'n.*

(6a) TKPOA asserts that the decision in *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. 825 is dispositive and compels the conclusion that the mitigation fee involved here is unconstitutional. We disagree.

In *Nollan*, the plaintiffs were the owners of a beach-front lot on which a small, dilapidated bungalow stood. They desired to demolish the bungalow and replace it with a three-bedroom house consistent with the neighborhood. The Coastal Commission agreed to issue a building permit provided the plaintiffs would agree to record a lateral public easement across the beach-front portion of their property.<sup>11</sup> On review the United States Supreme Court noted that the right to exclude others is an essential attribute of private property and concluded that governmental action which vests outsiders with the permanent and continuous right to pass to and fro across a person's land is a taking of private property. (*Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at pp. 831-832 [97 L.Ed.2d at p. 686].) Since the taking of such an easement outright without compensation would violate the federal Constitution, the question became whether requiring the conveyance of the easement as a condition for issuance of a land-use permit would alter the outcome. (*Id.* at p. 834 [97 L.Ed.2d at p. 687].)

(7) In addressing the redefined question, the high court made it clear that a physical taking of property as a condition for issuance of a land-use permit will not per se violate

the Constitution, but will instead be subjected to heightened scrutiny. (483 U.S. at pp. 836, 841 [97 L.Ed.2d at pp. 689, 692].) In general, if the government could deny a use permit in the furtherance of a legitimate police-power purpose then it may exact a physical taking to serve the same purpose. (*Id.* at p. 836 [97 L.Ed.2d at pp. 688-689].) The government may act to regulate land use to serve a broad range of purposes. (*Id.* at pp. 834-835 [97 L.Ed.2d at pp. 687-688].) But to be valid as a landuse regulation, a condition that results in a physical taking must “ ‘substantially advance[ ]’ ” some legitimate government purpose connected with the project at issue. (*Ibid.*) This requires that the governmental purpose relate to the project at issue, and that there be a nexus between the condition and the governmental purpose. (*Id.* at p. 837 [97 L.Ed.2d at p. 689].) If the condition “ ‘utterly fails to further the end advanced as justification’ ” then the condition \*1475 is not a valid land-use regulation and becomes an unconstitutional taking. (*Ibid.*)<sup>12</sup>

In *Nollan*, the justifications given by the Coastal Commission were essentially specious. Indeed, the Supreme Court found it “impossible to understand” how the condition exacted by the commission furthered the public purposes advanced as justification. (483 U.S. at p. 838 [97 L.Ed.2d at p. 690].)<sup>13</sup> Accordingly, the taking as a condition for the issuance of a land-use permit was invalid. (*Ibid.*)

(6b) TKPOA's assertion that the decision in *Nollan* is dispositive here cannot withstand scrutiny. In *Lucas v. So. Carolina Coastal Council* (1992) 505 U.S. \_\_\_\_\_ [120 L.Ed.2d 798, 112 S.Ct. 2886], the United States Supreme Court noted that the “Takings Clause” reaches beyond a direct appropriation of private property and that while the use of property may be regulated, if the regulation goes too far it will be considered a taking. (505 U.S. at p. \_\_\_\_\_ [120 L.Ed.2d at p. 812].) ( 8) In “Takings Clause” jurisprudence, the cases involving alleged regulatory takings fall into three categories: (1) where the owner is compelled to suffer a permanent physical invasion of his property; (2) where the owner is denied all economically beneficial or productive use of the land; and (3) where the owner is subjected to other regulatory restrictions on the use of the property. (*Id.* at pp. \_\_\_\_\_ - \_\_\_\_\_ [120 L.Ed.2d at pp. 812-813].) The first two categories of regulatory actions have been described by the court “as compensable without case-specific inquiry into the public interest advanced in support of the restraint.” (*Id.* at p. \_\_\_\_\_ [120 L.Ed.2d at p. 812].) But most alleged regulatory takings fall into the \*1476 third category and in such cases the court has eschewed

rigid formulae, preferring instead to engage in ad hoc factual inquiries. (*Ibid.*) In making such inquiries the court will engage in the assumption that through the regulation the state is simply adjusting the benefits and burdens of economic life in an appropriate manner. (*Id.* at p. \_\_\_\_\_ [120 L.Ed.2d at p. 814].) However, as we have noted, in the relatively rare instance in which a case truly falls into one of the first two categories, compensation will be required without case-specific inquiry into the public purpose advanced in support of the regulation. (*Id.* at p. \_\_\_\_\_ [120 L.Ed.2d at p. 812].)<sup>14</sup>

In light of *Lucas* it appears that the first step in a “Takings Clause” analysis is to determine the type of case being considered. In *Lucas*, the regulation at issue forbade the plaintiff from any development of his land and the state court found this regulation deprived him of all economically beneficial or productive use of the land but upheld the restriction because it served a valid state interest. (505 U.S. at p. \_\_\_\_\_ [120 L.Ed.2d at p. 809].) Since the findings of the state court placed *Lucas* squarely into the second category of takings cases, the Supreme Court held that inquiry into the legitimacy of the public purpose could not justify the restriction as a land-use regulation and the matter was remanded for the consideration of other issues. (*Id.* at p. \_\_\_\_\_ [120 L.Ed.2d at pp. 822-823].) In making the remand, however, the high court made it clear that cases of this nature are rare. If any economically beneficial or productive use is left to the landowner then the situation falls into the third rather than the second category. (*Id.* at p. \_\_\_\_\_, especially fn. 8 [120 L.Ed.2d at p. 815].)<sup>15</sup>

In a decision rendered between *Nollan* and *Lucas*, the high court considered the standards for determining whether a case falls into the first category of “Takings Clause” cases, that is, physical takings. In *Yee v. Escondido* (1992) 503 U.S. \_\_\_\_\_ [118 L.Ed.2d 153, 112 S.Ct. 1522], the plaintiffs were owners of a mobilehome park who contended that a local mobilehome \*1477 ordinance, in conjunction with the state's mobilehome residency law, constituted a physical taking of their property. Together the laws restricted rents and rent increases, prohibited the owner from requiring the removal of a mobilehome when it was sold, prohibited the owner from adjusting the rent or charging a transfer fee upon sale of the mobilehome, and prohibited the owner from disapproving a purchaser who could pay the rent. The plaintiffs argued that the statutes and ordinances constituted a taking of their property by denying them the right to exclude others from their property and by transferring some

of the value of the property to mobilehome owner/tenants who would reap the benefit of frozen rents upon selling their mobilehomes. The court rejected the claim that the laws constituted a physical taking, reasoning that (1) there was no compelled physical occupation because the decision to use the property as a mobilehome park in the first instance was voluntary with the owner and, although it would take six to twelve months to do so, the owners could elect to change the use of the land; and (2) virtually all land-use regulation involves a transfer of wealth and a transfer of wealth in itself does not convert regulation into physical invasion. (*Id.* at pp. \_\_\_\_\_ [118 L.Ed.2d at pp. 165-166].)

The decision in *Nollan* must be considered in light of *Yee* and *Lucas*. When we do so we perceive that the analysis in *Nollan* was actually directed to determining whether it would fall into the first or the third category of “Takings Clause” cases, that is, whether or not it was a physical taking case. There the Coastal Commission attempted to avoid the conclusion that a physical taking was involved by asserting that the taking was part of its regulation of land use. However, the court held that where the government accomplishes a permanent physical invasion through its land-use regulations the courts must be “particularly careful” to ensure that the regulations substantially advance a legitimate state interest since there is a heightened risk that the purpose is the avoidance of the compensation requirement rather than the attainment of the stated police power objective. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at p. 841 [97 L.Ed.2d at p. 692].) Stated another way, the physical invasion of one's property, including the impairment of the right to exclude others from the property, “will invite exceedingly close scrutiny under the Takings Clause.” (*Lucas v. So. Carolina Coastal Council, supra*, 505 U.S. at p. \_\_\_\_\_, fn. 8 [120 L.Ed.2d at p. 815].) The court assumed arguendo the legitimacy of the public purposes advanced as justification by the state in *Nollan*, but since the condition exacted utterly failed to advance those purposes it was nothing but an uncompensated physical taking.

(6c) Unlike *Nollan*, this case falls squarely into the third, catch-all category of “Takings Clause” cases. There has been no physical invasion of \*1478 plaintiff's property nor is there any suggestion that landowners have been deprived of all economically beneficial or productive use of the land. This case is not entitled to the heightened scrutiny that a physical taking would entail. Instead, the court will “indulge [in] our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' [citation] in a manner

that secures an 'average reciprocity of advantage' to everyone concerned." (*Lucas v. So. Carolina Coastal Council, supra*, 505 U.S. at p. \_\_\_\_\_ [120 L.Ed.2d at p. 814].) In this type of case, resolution of a challenge to the regulatory measure requires a careful case-specific factual inquiry. In short, the decision in *Nollan* is not dispositive and standing alone that decision does not establish that plaintiff is likely to prevail in this litigation.

## 2. Regulatory Taking.

(9a) As we have noted above, this case cannot be resolved without a case-specific factual inquiry. (See *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 171 [4 Cal.Rptr.2d 114].) ( 10) Alleged regulatory takings of this sort "necessarily entail[ ] complex factual assessments of the purposes and economic effects of government actions." (*Yee v. Escondido, supra*, 503 U.S. at p. \_\_\_\_\_ [118 L.Ed.2d at p. 162].) Accordingly, such cases do not lend themselves readily to summary disposition without a fully developed factual record. (*Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1401 [285 Cal.Rptr. 335].) Since in this type of case courts will generally assume the propriety of the land-use regulation (*Lucas v. So. Carolina Coastal Comm'n, supra*, 505 U.S. at p. \_\_\_\_\_ [120 L.Ed.2d at p. 814]), it falls upon the plaintiff to establish its invalidity. And, although a request for a preliminary injunction does not contemplate a full trial on the merits, the party seeking the injunction must present sufficient evidentiary facts to establish a likelihood that it will prevail. (*IT Corp. v. County of Imperial, supra*, 35 Cal.3d at p. 69; *Camp v. Board of Supervisors, supra*, 123 Cal.App.3d at p. 357.) In view of TKPOA's erroneous belief that the decision in *Nollan* is dispositive, it did not engage in a full factual development of its challenge to the mitigation fee. We are relegated to determining whether, upon the scant factual record and such facts as we may judicially notice, it appears likely that TKPOA will prevail upon a trial on the merits.

(11) In considering challenges to the validity of land-use regulations of this type, we must initially consider whether the regulation substantially advances a legitimate state interest. (*Agins v. Tiburon* (1980) 447 U.S. 255, 260-261 [65 L.Ed.2d 106, 112, 100 S.Ct. 2138].) This is a two-pronged \*1479 question. First, it must appear that the government interest set forth as justification for the restriction reasonably relates to the property and/or project in question and second, the restriction must reasonably serve that interest. However, contrary to TKPOA's assertion, it is not necessary that the governmental interest relate solely to the land or project in

question, nor is it necessary that the regulation be limited to remedying the specific contribution to the problem that will be attributable to the project in question. (See *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638 [94 Cal.Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847]; *Ayers v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 41 [207 P.2d 1, 11 A.L.R.2d 503].) Rather, it is established that the justification for a restriction is not limited to the needs or burdens created only by the proposed project. (*Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628 [209 Cal.Rptr. 628].) The decision in *Nollan* did not cast doubt on this latter point. It specifically stated that the state could consider the effect of the project "alone, or by reason of the cumulative impact produced in conjunction with other construction." (483 U.S. at p. 835 [97 L.Ed.2d at p. 688].) And the decision concluded that the Coastal Commission could have imposed conditions on the Nollans that would have been directed at remedying the cumulative impact of their project and others. (*Id.* at p. 836 [97 L.Ed.2d 689].)<sup>16</sup> The vice in *Nollan* was that the condition imposed utterly failed to further the end advanced as justification and not that it was not confined to the specific effects of the project in question. (*Id.* at p. 837 [97 L.Ed.2d at p. 689].)

The government may constitutionally engage in land-use regulation to serve a broad range of interests. (*Nollan v. California Coastal Comm'n, supra*, 483 U.S. at pp. 834-835 [97 L.Ed.2d at p. 688].) The validity of the governmental interest in preserving the unique natural environment of the Tahoe Basin has been recognized by Congress and the Legislatures of California and Nevada, as well as by state and federal courts. (*Lake Country Estates v. Tahoe Planning Agcy., supra*, 440 U.S. at pp. 393-394 [59 L.Ed.2d at pp. 405-406]; *People ex rel. Younger v. County of El Dorado, supra*, 5 Cal.3d at p. 487.) Pollution of Lake Tahoe by virtue of development of the surrounding land is one of the obvious and primary dangers which led to the \*1480 comprehensive regulation which has occurred. (*People ex rel. Younger v. County of El Dorado, supra*, 5 Cal.3d at p. 486.) (9b) Since the state's justification for the imposition of a mitigation fee upon Tahoe Keys property owners was to ameliorate the effects of pollution from the Tahoe Keys development, there can be no doubt that justification for the regulation at issue here does constitute an important state interest reasonably related to the development and build-out of the Tahoe Keys.

The mitigation fee charged to TKPOA's members was calculated based upon estimates of the quantities of nutrients entering Lake Tahoe as a result of the development and

continuing maintenance and operation of the Tahoe Keys subdivisions and lagoons. And the mitigation fund was specifically dedicated to partial mitigation of the effects of that source of pollution through projects to abate or at least offset the polluting effects of the Tahoe Keys. Thus, on the face of the regulation there appears to be a sufficient nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme. (See *Yee v. Escondido*, *supra*, 503 U.S. at p. \_\_\_\_\_ [118 L.Ed.2d at p. 167]; *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at pp. 834-835 [97 L.Ed.2d at pp. 687-688].)

(12) In these circumstances our focus must turn to the question set forth by the United States Supreme Court in this manner: “[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.” (*Yee v. Escondido*, *supra*, 503 U.S. at p. [118 L.Ed.2d at p. 162]; see also *Nollan v. California Coastal Comm'n*, *supra*, 483 U.S. at p. 835, fn. 4 [97 L.Ed.2d at p. 688].)

(9c) While the public as a whole will doubtlessly benefit generally from the preservation of Lake Tahoe and its environs, we perceive no reason in the record to doubt that landowners in the area, such as TKPOA and its members, will benefit specially. After all, they are not simply transient visitors but plan to live there or at least have a concrete investment in the area. Since preservation of the area will confer benefits upon plaintiff and its members beyond those received by the general public, it is fair that they shoulder more of the burden. (See *White v. County of San Diego* (1980) 26 Cal.3d 897, 904 [163 Cal.Rptr. 640, 608 P.2d 728]; *City of Baldwin Park v. Stoskus* (1972) 8 Cal.3d 563, 568 [ \*1481 105 Cal.Rptr. 325, 503 P.2d 1333, 59 A.L.R.3d 525].)<sup>17</sup> When coupled with the fact that the government can act to preserve the area only through regulation of landowners such as TKPOA and its members, these special benefits convince us that, without more, the challenged regulation does not unfairly single out plaintiff and its members when compared to the general public.

In its argument TKPOA compares its members to a class that is more limited than the general public, namely, other landowners in the Tahoe Basin. It asserts that the \$4,000 mitigation fee applies only to the Tahoe Keys and that

its members are thus singled out for payment of the fee. The scope of this argument is too narrow. (13) Land-use regulations need not apply across the board to everyone arguably concerned. Rather, the government is permitted to adjust the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage. (*Lucas v. So. Carolina Coastal Council*, *supra*, 505 U.S. at p. \_\_\_\_\_ [120 L.Ed.2d at p. 814].) Land-use regulations often have differing effects on neighboring properties and this fact alone does not invalidate a regulatory scheme. (*Yee v. Escondido*, *supra*, 503 U.S. at p. \_\_\_\_\_ [118 L.Ed.2d at pp. 166-167].) It follows that the fact that the regulatory restrictions imposed on one group are different in kind than the restrictions imposed on others does not in itself establish that the first group has been unfairly singled out to bear the burden of the governmental objective. That question must be answered by reference to such things as danger to the public interest created by the land-use aspirations of the different property owners, the extent of the burdens imposed on the different property owners when compared to the burdens imposed on others, and, where applicable, the nature of any special benefits which will accrue to the different property owners by virtue of the regulatory program.

(9d) Governmental efforts to regulate land use in the Tahoe Basin have been of an unusually comprehensive scope, with the basic concept being “to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population within the region's relatively small area without destroying the environment.” (*People ex rel. Younger v. County of El Dorado*, *supra*, 5 Cal.3d at p. 487.) To accomplish this purpose virtually all landowners within the basin have been required to submit to regulation of their land-use aspirations. Many landowners would consider the restrictions upon their aspirations to be draconian when compared to the payment of a substantial, but hardly confiscatory, \*1482 mitigation fee. (See *Viso v. State of California* (1979) 92 Cal.App.3d 15, 19 [144 Cal.Rptr. 776]; *Sierra Terreno v. Tahoe Regional Planning Agency* (1978) 79 Cal.App.3d 439, 443 [144 Cal.Rptr. 776]; *Tahoe-Sierra Preserv. v. Tahoe Reg. Planning Agency* (9th Cir. 1990) 911 F.2d 1331, 1333-1334; *People of California v. Tahoe Regional Plan Agency* (9th Cir. 1985) 766 F.2d 1308, 1313-1314.) For example, as a result of the severe use restrictions imposed on landowners outside of the Tahoe Keys, many such landowners claim to have suffered significant diminution in the value of their properties, both from an economic expectation perspective and from a market value perspective. (*Viso v. State of California*, *supra*, 92

Cal.App.3d at pp. 20-21 [alleged loss of \$4.5 million from the property's value at its highest and best use]; *Sierra-Terreno v. Tahoe Regional Planning Agency*, *supra*, 79 Cal.App.3d at p. 443 [alleged drop in market value to no more than 25 percent of former value]; *Tahoe-Sierra Preserv. v. Tahoe Reg. Planning Agency*, *supra*, 911 F.2d at p. 1333 [claimed loss of all economically feasible uses of the land].)

On the other side of the ledger, we may consider the special benefits which will accrue to the parties. Through comprehensive land-use planning in the Tahoe Basin the natural beauty of the region, and hence of the property of landowners in the basin, may be preserved. However, unlike many landowners, TKPOA's members will not be required to contribute to this end by forgoing their intended use of the land. Since TKPOA's members will be permitted to build residences upon their land, they are in a particularly advantageous position to reap the benefits of the regulatory program. In short, the preservation of the area will preserve the natural beauty that made their property desirable in the first place, that in turn will serve to maintain or enhance the market value of the property, and it is likely that the shortage of similarly situated properties that has been created or enhanced by governmentally enforced use restrictions will exert an upward pressure on market values of the homes in the Tahoe Keys.

When we consider the benefits and burdens of the regulatory program on a basin-wide basis based upon the facts shown in the record and those which we may judicially notice, we cannot conclude that TKPOA has shown a substantial likelihood that it will succeed in establishing that its members have been unfairly singled out to bear the burden of the governmental efforts to preserve the Tahoe Basin.

TKPOA also compares its members who have or will be required to pay the mitigation fee to members who built earlier and thus were not required to pay the fee. According to this argument the damage to Lake Tahoe from the \*1483 Tahoe Keys development was caused by the original developer's dredge and fill operations and the consequent loss of the natural treatment capacity of the Truckee Marsh, most of the individual lot owners in the Tahoe Keys built upon their lots before CTRPA and Lahonton imposed the mitigation fee, and thus the remaining lot owners are forced to pay for all of the damage caused by development from which all lot owners benefited and that was caused by the original developer in any event.

The factual premises of this argument are not established in the record. Although CTRPA and Lahonton cited a loss of natural treatment capacity from the destruction of the Truckee Marsh, in their resolutions both agencies specifically found that continuing operation and maintenance of the Tahoe Keys subdivisions and lagoons contribute significant quantities of nutrients to the waters of Lake Tahoe. A computation of the mitigation fee was an attachment to the Lahonton resolution. Although full explanation of the computation would require testimonial evidence from the parties and probably from experts, on its face the computation appears to refute TKPOA's assertions. Thus, the fee was based upon the total dissolved nitrogen entering the lake as a result of the Tahoe Keys development. Of the 2,920-kilogram total, only 300 kilograms were attributed to lost natural treatment capacity.<sup>18</sup> This was converted to an equivalent suspended sediment load and an equivalent cost of mitigation was determined using the 1981 cost of the last 50 percent of erosion control projects, thus indicating a contributory rather than complete mitigation charge. Of this total, 63 percent was assigned to TKPOA, again indicating a contributory basis for computation of the fee. The resulting sum was used to calculate a per lot mitigation fee for new construction. From this computation we cannot conclude that those lot owners who were or will be required to pay a mitigation fee have been forced to pay for all of the mitigation of all of the pollution entering the lake as a result of the development, nor that the damage they are required to mitigate is entirely, or even largely, attributable to the original developer rather than the continuing operation and maintenance of the Tahoe Keys subdivisions and lagoons.

(14) In any event, a landowner cannot defeat a land-use regulation simply by pointing to someone else who by prior use escaped the regulation, for otherwise there could be no land-use planning. As a general rule, land use regulation must be prospective in nature because the state is constitutionally limited in the extent to which it may, through land use regulation, \*1484 affect prior existing uses. (See *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516 [125 Cal.Rptr. 365, 542 P.2d 237]; *Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 775-776 [90 Cal.Rptr. 88, 43 A.L.R.3d 880].) Accordingly, preexisting use is a constitutional line of demarcation in land-use regulation and prior uses are protected while expectations and aspirations are not. (*Ibid.*) In other words, landowners have no vested right in existing or anticipated zoning regulations. (*Ibid.*) (9e) The alleged disparity between those who built before CTRPA and Lahonton commenced their comprehensive regulation

of development of the Tahoe Basin and those who built or will build later is a matter which may enter into the complex factual assessment required to determine whether the regulation goes too far, but it does not in itself compel invalidation of the regulation.

In addition to these matters, the defendants properly point out that there is substantial doubt that TKPOA will even be allowed to proceed to the merits of its claim. It is significant that TKPOA engaged in extensive negotiations with CTRPA and Lahonton over the reclassification of the Tahoe Keys; that it proposed a mitigation fee as a condition of reclassification;<sup>19</sup> that it agreed to the conditions imposed in the resolutions, including the mitigation fee; that it did not administratively or judicially challenge the resolutions in a timely manner; and that it accepted the benefits of the resolutions for nine years before making any objection to the mitigation fee. (15) A landowner or his successor in title is barred from challenging a condition imposed in a land-use regulation if he has acquiesced therein by either specifically agreeing to the condition or by failing to challenge its validity while accepting the benefits afforded. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511 [138 Cal.Rptr. 472, 564 P.2d 14]; *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 650 [255 P.2d 772]; *J-Marion Co. v. County of Sacramento* (1977) 76 Cal.App.3d 517, 523 [142 Cal.Rptr. 723]; *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78 [137 Cal.Rptr. 804].) (9f) TKPOA has pointed to nothing which would indicate that this rule is not fully applicable to it in this instance.<sup>20</sup>

Upon a consideration of the record, including the procedural hurdles TKPOA must overcome before addressing the merits of its claim and its \*1485 preliminary showing upon the merits, we cannot conclude that TKPOA has established a significant likelihood that it will prevail on the merits after a full trial. In view of TKPOA's scant showing that damages are not an adequate remedy, we find no abuse of discretion in the denial of its request for preliminary injunctive relief on its constitutional claims.

### 3. Non-Constitution-based Claims.

(16) TKPOA's claim of irreparable injury in support of its request for preliminary injunctive relief was based primarily on the argument that its constitutional rights are being violated and that damages cannot be deemed an adequate remedy for constitutional violations. With respect to TKPOA's assertion of claims that are not based upon the Constitution, its showing

of irreparable injury all but disappears. This is a substantial reason for denying provisional relief, at least in the absence of a strong showing of a substantial likelihood that TKPOA will prevail at trial. We find no such showing here and need only briefly discuss the nonconstitutional theories of relief.

TKPOA asserts that CTRPA should be enjoined from collection and expenditure of the mitigation fee and fund because it failed to obtain Lahonton's execution of the MOU reflecting the parties' agreement. We disagree. In challenging the imposition of the mitigation fee it is the resolution imposing the fee and not the MOU that TKPOA must attack. The CTRPA resolution referred to an MOU that had been prepared to set forth the mitigation package proposed by TKPOA, but neither the resolution nor the fee was made contingent upon execution of the MOU. In any event, if TKPOA believed execution of the MOU was essential that was a matter it could have and should have raised at the time. It cannot now challenge the resolution and fee on this basis. (See *Edmonds v. County of Los Angeles*, *supra*, 40 Cal.2d at p. 653.) \*1486

TKPOA asserts that Lahonton should be enjoined from making expenditures from the mitigation fund because it failed to execute the MOU. The Lahonton resolution was not contingent upon execution of the MOU. In fact, it did not refer to the MOU at all, although it did empower its executive officer to enter into any agreements necessary to ensure proper administration of the mitigation fund. As with the CTRPA resolution, if TKPOA believed that execution of the MOU was essential to the reclassification of the Tahoe Keys by Lahonton, that is a matter that could have and should have been raised at the time. (*Edmonds v. County of Los Angeles*, *supra*, 40 Cal.2d at p. 653.)

TKPOA asserts that collection and expenditure of the mitigation fees should be enjoined based upon conflicts between the CTRPA and Lahonton resolutions. We perceive no fatal conflicts. The MOU prepared to reflect TKPOA's proposal stated that it was the intent of parties that the mitigation fund be utilized for on-site mitigation if such mitigation is best effective. The CTRPA resolution said that the fund would be used for on or off-site mitigation measures, but said that priority would be given to on-site measures. It also provided that expenditure of the fund would be determined jointly between it, TKPOA, and Lahonton. The Lahonton resolution provided for mitigation measures within the Tahoe Basin, but clearly contemplated that approval of projects would be a joint endeavor between it and any other

affected agency with the active participation of TKPOA. Under these circumstances expenditures under the CTRPA resolution and expenditures under the Lahonton resolution will not inevitably conflict. In the absence of a concrete proposed off-site project endorsed by Lahonton but rejected by CTRPA and TKPOA, there is no basis for judicial intervention.

TKPOA asserts that unless expenditure of the mitigation fund is enjoined, the defendants may make expenditures in violation of its right to participate in the determination of how the fund should be spent. We have noted that both resolutions contemplated the active participation of TKPOA in the decisionmaking process. On the record it appears that TKPOA did actively participate in discussion and negotiations concerning expenditure of the fund until it adopted the position that the mitigation fee was invalid and began proceedings to challenge the fee. TKPOA's right to participate in the decisionmaking process is satisfied if it is given the opportunity to do so; its refusal to participate as a litigation tactic cannot serve as the basis for enjoining CTRPA and Lahonton in the performance of their legal duties. \*1487

#### Disposition

The order denying TKPOA's request for a preliminary injunction is affirmed.

Sims, J., concurred.

#### SCOTLAND, J.

I concur in the result but write separately because I believe it is unnecessary for this court to consider the question whether plaintiff is likely to prevail on the merits at trial.

#### Footnotes

- \* Retired judge of the Alpine Superior Court sitting under assignment by the Chairperson of the Judicial Council.
- 1 The official actions of which TKPOA complains were taken, in part, by the California Tahoe Regional Planning Agency (CTRPA). CTRPA has been statutorily deactivated and the secretary of the Resources Agency has been designated as successor of CTRPA for litigation purposes. (*Gov. Code, § 67132.*) Defendants point out that the secretary of the Resources Agency rather than the agency should have been the named defendant, but they do not object to consideration of the issues on this ground. Since we are concerned here with a land-use regulation imposed by CTRPA, we will refer to CTRPA in the body of this opinion, although it is the secretary of the Resources Agency who now represents those state interests.

In determining whether to grant or deny a request for a preliminary injunction, the trial court must consider the likelihood that the plaintiff will prevail on the merits at trial and must weigh the interim harm to the plaintiff if the injunction is denied against the interim harm to the defendant if the injunction is granted. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 287 [219 Cal.Rptr. 467, 707 P.2d 840].) Thus, the respective equities of the parties must be balanced to determine whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right it claims. (*Ibid.*) "When a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to satisfy either or both of the 'interim harm' and 'likelihood of prevailing on the merits' factors. On appeal, the question becomes whether the trial court abused its discretion in ruling on *both* factors." (*Id.*, at pp. 286-287, italics in original.) "Even if the appellate court finds that the trial court abused its discretion as to one of the factors, *it nevertheless may affirm the trial court's order if it finds no abuse of discretion as to the other.*" (*Id.*, at p. 287, italics added.)

I agree with the majority's conclusion that the record shows little risk of irreparable harm to plaintiff if provisional relief is denied and significant risk of harm to defendants if such relief is granted. Therefore, the trial court did not abuse its discretion in denying the preliminary injunction. (*Cohen v. Board of Supervisors, supra*, 40 Cal.3d at pp. 286-287.)

Because the trial court's order may be affirmed on the interim harm analysis alone, I decline to consider whether plaintiff has shown it is likely to prevail at trial on its claim that the mitigation fee charged as a condition for obtaining building permits is unlawful.

Appellant's petition for review by the Supreme Court was denied June 16, 1994. \*1488



- 2 Lake Tahoe is renowned for its clarity and it has been said that only two other sizable lakes in the world are of comparable clarity—Crater Lake in Oregon and Lake Baikal in what was formerly the Soviet Union. (See *Lake Country Estates v. Tahoe Planning Agcy.* (1979) 440 U.S. 391, 393, fn. 2 [59 L.Ed.2d 401, 405, 99 S.Ct. 1171].) Only Lake Tahoe, because it is not protected as part of a national park and is readily accessible from large metropolitan centers, is so vulnerable to excessive urban development. (*Ibid.*)
- 3 TKPOA states that the Tahoe Keys was designed to accommodate 335 townhouse units and 1,249 single-family residences. By 1981, before the actions at issue here, all of the townhouses and approximately 800 of the residences had been constructed.
- 4 The mitigation fee imposed by CTRPA is not in addition to the fee imposed by Lahonton; rather, it is the same fee. It also appears that the fee includes a \$750 fee imposed by TRPA. No issue is presented here with respect to any portion of the fee required by TRPA.
- 5 TKPOA attached a copy of the MOU to its complaint. The MOU recites that it is an agreement between TKPOA, CTRPA, and Lahonton. The CTRPA resolution by which the Tahoe Keys was reclassified refers to the MOU. The Lahonton resolution does not refer to the MOU, but does reflect that TKPOA was to be an active participant in determining how the mitigation fund would be used. TKPOA asserts that the MOU was never formally executed by Lahonton.
- 6 TKPOA states that following Lahonton's rejection of its demand it commenced a proceeding for administrative review by the State Water Resources Control Board pursuant to [Water Code section 13320](#), subdivision (a). TKPOA concedes that it has not exhausted that remedy. However, citing *National Audobon Society v. Superior Court* (1983) 33 Cal.3d 419, at pages 450-451 [189 Cal.Rptr. 346, 658 P.2d 709], TKPOA asserts that the courts have concurrent jurisdiction over water issues. TKPOA asked the trial court to exercise its jurisdiction and to restrain further administrative proceedings pending resolution of the litigation. *National Audubon Society* is not squarely on point, since that case was concerned with water rights rather than water quality under the Porter-Cologne Water Quality Control Act. However, the defendants have not complained that TKPOA has failed to exhaust its administrative remedies and in view of our conclusion in this appeal that is not a question we must consider.
- 7 TKPOA asserts that no expenditure was made from the mitigation fund until this litigation was commenced, at which time Lahonton began to take action on proposed expenditures. Although it appears uncontroverted that no expenditure had been made before this litigation, it does not appear that Lahonton engaged in a sudden rush to spend the fund in light of the litigation. In fact, for several years the parties, with the active participation of TKPOA, had been engaged in negotiations, studies, and workshops with respect to proposed mitigation projects. One project proposed by TKPOA had become the focus of the discussions. That project involved the circulation of Tahoe Keys water to the Pope Marsh as a means of filtering the water before it entered Lake Tahoe. The proposal required the participation and approval of the United States Forest Service, which suggested an initial pilot project to test the efficacy of the proposal before a decision on full implementation. Shortly after this litigation commenced Lahonton was scheduled to consider funding the pilot project from the mitigation fund. However, the project required the participation of TKPOA and in light of its demand for repayment of the mitigation fund it informed Lahonton that it would not participate if the pilot project would be funded through the mitigation fund. That effectively prevented implementation of the pilot project and it does not appear that approval of any other expenditure from the fund was imminent.
- 8 The Civil Code refers to inadequacy of legal remedies rather than irreparable injury, but the Civil Code provisions with respect to injunctive relief govern only final injunctions and not preliminary injunctions. ([Civ. Code, § 3421.](#)) The Code of Civil Procedure, which governs both final and provisional relief, refers to irreparable injury. ([Code Civ. Proc., § 526.](#))
- 9 TKPOA presented the declaration of Gregory A. Bennalack, an owner of an unimproved parcel within Tahoe Keys. He believes the mitigation fee is unconstitutional and unfair. He asserted the obvious, that if defendants are allowed to continue collecting the fee he will be unable to build upon his land without paying the fee. He did not suggest that continued collection of the fee would prevent or dissuade him from building upon his land and said nothing which would suggest that he could not be fully compensated by repayment of the fee in the event TKPOA prevails.
- 10 Even in the absence of a provisional injunction the litigation itself is likely to have a chilling effect on defendants' use of the mitigation fund, since they will have to make their decisions with an awareness that if TKPOA prevails the mitigation fund will have to be repaid. However, that is a matter the defendants will have to consider in the exercise of their administrative discretion; it is a different matter to assert that they should be judicially enjoined from exercising that discretion.
- 11 The public easement sought by the Coastal Commission was "lateral" because it was not an access easement from the public road to the beach, but crossed the back or beach side of the plaintiffs' property from one private property to another.
- 12 Governments are vested with the power of eminent domain which enables them to take private property to serve any legitimate public interest, provided that the property owner is compensated for the taking. Accordingly, the mere

assertion that a taking serves a public interest is not sufficient to support an uncompensated taking, since the Constitution specifically requires that compensation be paid in such circumstances. While the government may engage in legitimate land-use regulation, it cannot be permitted to use the occasion of an application for a land-use permit as an excuse to extort private property from its owner where the taking would otherwise require compensation. Accordingly, to support an uncompensated taking it must appear both that the public purpose have a relationship to the property or the project at issue and that the taking advances that public purpose rather than some purpose unrelated to the property or the project at issue. (*Ibid.*)

13 The Coastal Commission asserted that the Nollans' new house would interfere with visual access to the beach, would somehow create a "psychological barrier" to beach use by interfering with the public's desire to use public beaches, and, somewhat inconsistently, would increase the use of public beaches thus creating the need for more beach access. The court accepted visual access as a legitimate public interest but noted that a lateral easement across the back of the Nollans' property could not alleviate that concern. The court appeared incredulous about the other justifications but did not specifically consider whether they were sufficient to constitute a legitimate public interest because a lateral easement could not advance those interests. (*Ibid.*)

14 This does not mean that any governmental action that appears to fall into one of the first two categories is necessarily invalid unless compensation is paid to the property owner. For example, the state may enforce its statutes against public and private nuisances even if doing so deprives an owner of all economic use of the land. (*Id.* at p. \_\_\_\_\_ [120 L.Ed.2d at p. 821].) And the state may assert a public right of way that was a preexisting limitation upon the landowner's title. (*Ibid.*) The question in these instances is whether the use interests asserted by the landowner were part of his title to begin with, that is, whether they were part of the bundle of rights obtained with the title. (*Id.* at p. \_\_\_\_\_ [120 L.Ed.2d at p. 820].)

15 In the ad hoc factual inquiry required for the third category of cases the extent to which a landowner is restricted in the use of the property is relevant in determining whether the regulation goes too far, but even where almost all of the economically beneficial or productive use of the property is prohibited a case-specific factual inquiry is still required. In short, whether a case falls into the second category is an "all-or-nothing" matter. (*Ibid.*)

16 In *Nollan*, the Coastal Commission asserted, among other things, that the plaintiffs' project in conjunction with prior development would create a visual barrier to the shoreline. The court said that to remedy that problem the commission could have compelled the Nollans to grant a permanent easement for viewing purposes as a condition for issuance of a building permit. The compelled dedication of such a "viewing spot" would obviously have addressed the cumulative impacts of beach-front construction but would have fallen upon the Nollans alone, yet the court saw no constitutional obstacle sufficient to invalidate such a condition without a case-specific factual inquiry.

17 The cited cases were concerned with the establishment of special assessment districts under California law. However, the legal standard for determining the validity of a special assessment district and that for determining the validity of a land-use regulation as stated in *Yee, supra*, are strikingly similar and we find special assessment cases persuasive on this question.

18 The figure for lost treatment capacity was "30% of 1000 kg/yr," apparently indicating that only 30 percent of the actual lost treatment capacity was used in the computation. This was added to 2,620 kilograms per year that was "contributed by current Tahoe Keys Development."

19 In its initial request to CTPRA and Lahonton for reclassification of the Tahoe Keys, TKPOA proposed the creation of a mitigation fund to support offsite mitigation measures to be funded by the assessment of \$1,000 against new construction. Through negotiations the suggestion was altered in some respects, such as the amount of the fee, the manner of its collection, and the establishment of a priority for onsite mitigation projects. However, it does appear that the suggestion that a mitigation fee be imposed originated with TKPOA.

20 Even if we were to assume that this rule does not serve as a complete bar to TKPOA's claims, it still appears that TKPOA will be precluded from obtaining all of the relief it seeks. For example, it is regarded as fundamental that a landowner who obtains a building permit and complies with its conditions waives the right to assert the invalidity of the condition and thus TKPOA's members who paid the fee without protest will be precluded from pursuing a claim for refund. (*Pfeiffer v. City of La Mesa, supra*, 69 Cal.App.3d at p. 78.) And those members of TKPOA who paid the mitigation fee beyond the applicable statute of limitations will be time-barred from obtaining refunds. It also appears that TKPOA will be precluded from litigating some of the factual issues it asserts. For example, in connection with the request for reclassification CTPRA commissioned scientific studies to evaluate the impact of further development within the Tahoe Keys. TKPOA retained an expert to advise it with respect to the studies. Although TKPOA indicated that it was not in agreement with the results of the studies, it specifically elected not to dispute the studies for purposes of its request for reclassification. That was

a waiver of the right to contest the factual basis of the mitigation fee and even if TKPOA is permitted to challenge the reasonableness of the fee it will not be permitted to dispute the factual premise upon which the fee was imposed.

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180 Cal.App.4th 1057

Court of Appeal, First District, Division 3, California.

**TOWN OF TIBURON**, et al., Plaintiffs,  
Cross–Defendants, and Respondents,

v.

Jimmie D. BONANDER, et al., Defendants,  
Cross–Complainants, and Appellants.

No. A119918.

Dec. 31, 2009.

**Synopsis**

**Background:** Town brought validation action regarding formation of supplemental special assessment district for undergrounding of power lines. Landowners answered complaint, petitioned for writ of mandate, and cross-complained for nullification of election approving the district, for invalidation of resolution adopting formation of the district, and for declaratory relief. The Superior Court, Marin County, No. CV062153, [James R. Ritchie, J.](#), denied landowners' petition and granted summary adjudication for town. Landowners dismissed their remaining declaratory judgment claim with prejudice and appealed.

**Holdings:** The Court of Appeal, [McGuiness, P.J.](#), held that:

[1] undergrounding of utilities provided special benefits which could be funded by special assessment; but

[2] apportioning assessment in zones with different average lot size was unconstitutionally disproportionate, and

[3] failure to include benefited parcels adjacent to the district in the district violated constitutional proportionality requirement.

Reversed and remanded with directions.

West Headnotes (19)

[1] **Municipal Corporations** ← General or special

Essential feature of the special assessment is that the public improvement financed through it confers a special benefit on the property assessed beyond that conferred generally.

[2] **Taxation** ← Nature of taxes

Unlike a special assessment, a tax may be levied without regard to whether the property or person subject to the tax receives a particular benefit.

2 Cases that cite this headnote

[3] **Evidence** ← Elections and appointments to office

In determining whether a special assessment satisfied the constitutional proportionality requirement imposed by the Right to Vote on Taxes Act, the Court of Appeal would take judicial notice of the ballot pamphlet materials associated with the initiative that added the Act to the state constitution, including the summary prepared by the Attorney General, the Legislative Analyst's analysis, and the ballot arguments for and against the initiative. [West's Ann.Cal. Const. Art. 13D, § 4.](#)

1 Cases that cite this headnote

[4] **Municipal Corporations** ← Determination and effect thereof

Trial court's application of the incorrect standard of review, in determining whether a special assessment satisfied the constitutional proportionality requirement imposed by the Right to Vote on Taxes Act, did not require remand for the trial court to apply the correct independent review standard, since no purpose would be served by such remand, where the Court of Appeal's review was de novo and afforded no deference to the trial court's determinations in any event. [West's Ann.Cal. Const. Art. 13D, § 4\(f\).](#)

[5] **Municipal Corporations** ← Extent of review

As a reviewing court the Court of Appeal exercises de novo review of local agency

decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of the Right to Vote on Taxes Act. West's Ann.Cal. Const. Art. 13D.

[4 Cases that cite this headnote](#)

[6] **Mandamus**  [Scope and extent in general](#)  
**Municipal Corporations**  [Scope and contents of record](#)

In exercising its independent judgment in administrative mandate proceeding to determine whether town's supplemental special assessment satisfied the constitutional proportionality requirement imposed by the Right to Vote on Taxes Act, the Court of Appeal would consider evidence in the administrative record regarding the original special assessment district to the extent it related to special benefit and proportionality determinations relied upon by the town in creating the supplemental district, where the supplemental district concerned the same project as did the original district and employed the same special benefit formulas, boundaries, zones, and methodology. West's Ann.Cal. Const. Art. 13D; West's Ann.Cal.C.C.P. § 1094.5(e).

[7] **Administrative Law and Procedure**  [Review limited to administrative record in general](#)

Ordinarily, when the Court of Appeal reviews the decision of a public agency under the substantial evidence standard, it confines its review to the administrative record of the agency's action.

[8] **Mandamus**  [Scope and extent in general](#)

Court of Appeal is not constrained to confine its review to the administrative record of the agency's action, when it exercises independent judgment in reviewing the action of a public agency in administrative mandate proceedings. West's Ann.Cal.C.C.P. § 1094.5(e).

[9] **Municipal Corporations**  [General or special](#)

The benefits to residents' properties of aesthetics, increased safety, and improved service reliability from the undergrounding of power lines were special benefits over and above the benefits conferred on the public at large, as required for formation of supplemental special assessment district to fund the undergrounding under the Right to Vote on Taxes Act, absent evidence that properties not adjacent to poles and overhead wires were treated as receiving a benefit for aesthetics; the benefits were tied to individual properties based on proximity to existing overhead utility lines. West's Ann.Cal. Const. Art. 13D, §§ 2(i), 4(f).

[1 Cases that cite this headnote](#)

[10] **Municipal Corporations**  [General or special](#)

A project confers a "special benefit," as may constitutionally be funded by special assessment, when the affected property receives a direct advantage from the improvement funded by the assessment. West's Ann.Cal. Const. Art. 13D, § 2(i).

[11] **Municipal Corporations**  [General or special](#)

"General benefits," which may not constitutionally be funded by special assessment, are derivative and indirect. West's Ann.Cal. Const. Art. 13D, § 2(i).

[12] **Municipal Corporations**  [General or special](#)

General enhancement of property value is a general benefit and thus not assessable under the Right to Vote on Taxes Act. West's Ann.Cal. Const. Art. 13D, §§ 2(i), 4(f).

[13] **Municipal Corporations**  [General or special](#)

The Right to Vote on Taxes Act prohibition against basing special assessments on general property value enhancements does not mean any benefit that enhances property values is a general benefit which may not constitutionally be funded by assessment. *West's Ann.Cal. Const. Art. 13D, § 4(f)*.

**[14] Municipal Corporations** 🔑 General or special

Undergrounding of power lines funded by special assessment did not improperly yield quantifiable general benefits for the community at large or the parcels within the assessment district, thus supporting formation of special assessment district under the Right to Vote on Taxes Act. *West's Ann.Cal. Const. Art. 13D, § 4(f)*.

1 Cases that cite this headnote

**[15] Municipal Corporations** 🔑 Benefit to property in general

Under the Right to Vote on Taxes Act, an assessment reflects costs allocated according to relative benefit received, not the precise amount of special benefits enjoyed by the assessed property. *West's Ann.Cal. Const. Art. 13D, § 4(f)*.

1 Cases that cite this headnote

**[16] Municipal Corporations** 🔑 Benefit to property in general

Under the Right to Vote on Taxes Act, the “reasonable cost of the proportional special benefit,” which an assessment may not exceed, simply reflects an assessed property's proportionate share of total assessable costs as measured by relative special benefits. *West's Ann.Cal. Const. Art. 13D, § 4(a)*.

3 Cases that cite this headnote

**[17] Municipal Corporations** 🔑 Apportionment of Benefits and Expenses of Improvement

An apportionment method for a special assessment for the undergrounding of power

lines, which calculated construction costs in each of three “benefit zones” with different average density and apportioned the cost of construction in each zone to properties within the zone in proportion to the number of “benefit points” assigned to each property for anticipated improvements in aesthetics, safety, and service reliability, unconstitutionally relied on the relative cost of constructing the capital improvement rather than the proportional special benefit conferred on each property, where many lots in the intermediate-cost zone were larger than lots in the highest-cost zone, and absent evidence that lot density was a proper determinant of proportional special benefit; it was purportedly more costly to place utilities underground in “benefit zones” where lot sizes were generally larger. *West's Ann.Cal. Const. Art. 13D, § 4(a, f)*.

*See Cal. Jur. 3d, Public Improvements, §§ 18, 59; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 141.*

1 Cases that cite this headnote

**[18] Municipal Corporations** 🔑 Benefit to property in general

Under the Right to Vote on Taxes Act, properties in a special assessment district that receive the same proportionate special benefit pay the same assessment, without regard to variations in the cost of construction among the properties. *West's Ann.Cal. Const. Art. 13D, § 4(f)*.

3 Cases that cite this headnote

**[19] Municipal Corporations** 🔑 Boundaries and property included

A town's failure to include parcels with underground utility lines in an adjacent special assessment district for the undergrounding of power lines violated the proportionality requirement of the Right to Vote on Taxes Act, where the parcels received their utility service through a street in the district, the parcels' only ingress and egress was through the district, and other parcels with underground utilities which were completely surrounded by the district were

included in the district; improved safety and service reliability were both treated as special benefits in apportioning the assessment among parcels within the district, and properties within the district effectively subsidized such benefits for the parcels adjacent to the district. [West's Ann.Cal. Const. Art. 13D, § 4\(a\)](#).

[2 Cases that cite this headnote](#)

### Attorneys and Law Firms

**\*\*488** [Frank Mulberg](#), Mill Valley, and [Brett D. Mulberg](#), for Defendants, Cross-Complainants, and Appellants.

McDonough Holland & Allen PC, [Thomas R. Curry](#) and [Andrea S. Visveshwara](#), Oakland; [Ann R. Danforth](#), Town Attorney, Tiburon, for Plaintiffs, Cross-Defendants and Respondents.

### Opinion

[McGUINNESS](#), P.J.

**\*1063** The Town of Tiburon (the Town) formed a special assessment district for the purpose of placing overhead utility lines underground within the district. When original estimates of the project's cost proved to be too low, the Town sought to impose a supplemental assessment to cover the increased costs. After the Town filed an action to validate the supplemental assessment, a group of affected property owners (appellants) filed a cross-complaint challenging the supplemental assessment on a variety of grounds. On appeal from a judgment in favor of the Town, appellants argue the trial court erred in denying their petition for writ of mandate seeking to invalidate the supplemental assessment.

After conducting an independent review of the record, we conclude the supplemental assessment fails to satisfy the proportionality requirement imposed by article XIII D of the California Constitution (article XIII D), which mandates that no assessment shall exceed the reasonable cost of the proportional special benefit conferred on a parcel. ([Art. XIII D, § 4, subd. \(a\)](#).) Accordingly, we reverse the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

Appellants own real property located within the boundaries of the Del Mar Valley Utility Undergrounding Assessment District (Original District) and the Del Mar Valley Utility Undergrounding Supplemental **\*\*489** Assessment District (Supplemental District). The Original District and the Supplemental District share the same boundaries and include the same parcels. Both districts employ the same approach for assigning special benefits and apportioning costs among the parcels within the district. Thus, although this appeal concerns the Supplemental District, we consider the events giving rise to the Original District in order to give context to our consideration of the Supplemental District.

**\*1064** In May 2003, two property owners who live in a neighborhood of the Town commonly referred to as the Del Mar Valley area presented a petition of 116 homeowners to the Town to urge the creation of the Original District in order to finance the replacement of overhead utility wires with underground lines carrying electricity, telephone signals, and cable services. The property owners who signed the petition represented approximately 62 percent of the 187 homes in the proposed district. The petition satisfied the requirements of the Town's policy and procedures for the formation of utility undergrounding assessment districts in that it reflected the support of at least 60 percent of all the parcels in the proposed district. As indicated in the petition, it was understood that each owner would pay the assessment based upon "an equal payment," and it was estimated the project would cost \$16,000 to \$20,000 per parcel, exclusive of incidental costs, in addition to costs of \$650 to \$3,000 per parcel to cover the cost of undergrounding the lateral connection from the street to a residence.

After receiving the property owners' petition, the Town's council adopted a resolution of intention in June 2003 to form the Original District pursuant to the Municipal Improvement Act of 1913 ([Sts. & Hy.Code, § 10000 et seq.](#)). In July 2003, the Town approved expanding the Original District to include 18 parcels in a "special zone" referred to as the "West Hawthorne Drive Area." Although several properties in the West Hawthorne Drive Area border properties in the Original District as initially proposed, the administrative record reflects that the special zone receives its electrical utilities from a different grid than the rest of the Original District. The Town received petitions from 11 of the 18 parcel owners in the West Hawthorne Drive Area (or approximately 61 percent) favoring inclusion in the Original District.

The Original District is located on the Tiburon Peninsula, which extends into San Francisco Bay in Marin County. The boundaries of the district extend from Tiburon Boulevard, which runs along or near the bay, up to Hacienda Drive, which is roughly parallel to Tiburon Boulevard. Parcels within the district's boundaries near Tiburon Boulevard are generally smaller than parcels located closer to Hacienda Drive. A public school in the district occupies 10 parcels near Tiburon Boulevard. As reflected by comments in the public record, some of the parcels in the Original District are hillside properties with bay views, whereas some of the parcels, such as those closer to Tiburon Boulevard and the school, are generally situated at a lower elevation and lack bay views. Some properties in the Del Mar Valley have views toward Sausalito and the Golden Gate Bridge.

The Town engaged a civil engineer, designated the “engineer of work,” to prepare a report analyzing the proposed project. On March 10, 2005, the engineer of work submitted a preliminary engineer's report, which the **\*1065** Town's council approved on March 16, 2005. The report explained that the utilities to be placed underground provided direct service to the properties within the Original District. The report stated that the proposed underground utility facilities **\*\*490** would confer a special benefit on the 221 parcels located in the proposed district as a result of aesthetic, service reliability, and safety benefits associated with the improvements. The engineer of work opined that the general benefits, if any, enjoyed by the surrounding community and the public in general as a result of the undergrounding of the local overhead utilities within the Original District were intangible and therefore not quantifiable. Therefore, the engineer of work concluded that 100 percent of the proposed improvements were of direct and special benefit to the properties located within the Original District.

In determining the special benefit conferred on each parcel within the Original District, the engineer of work assigned each parcel “benefit points” based on three categories: (1) aesthetic benefit from removal of unsightly poles and overhead wires, (2) improved safety because of the reduced risk of downed poles and wires, and (3) greater service reliability attributable to new wiring and equipment as well as the reduced risk of downed power lines. The engineer of work assigned benefit points according to the highest and best use of each property.<sup>1</sup> Thus, a vacant property would be treated as if it were developed to its highest potential and connected to the system.

The engineer of work assigned one benefit point for aesthetics to each parcel that is adjacent to existing overhead utility lines, irrespective of the particular view the property enjoys. Likewise, with respect to the safety benefit, each parcel adjacent to existing overhead utility lines received one benefit point. By contrast, the reliability benefit was dependent upon the nature of the property's use, with parcels containing a single family residence (designated “single family residential”) assigned one benefit point for service reliability. Parcels other than those designated single family residential, such as parcels containing multiple dwellings and those on which the school is situated, were assigned benefit points for service reliability according to a formula contingent upon relative peak energy use. Therefore, a parcel containing a single family residence could receive a total of three benefit points—one for aesthetics, one for safety, and one for reliability.

Because almost all of the parcels within the Original District are considered single family residential, almost all of the parcels were assigned exactly three benefit points. Of the 221 parcels in the Original District, all but 23, or a total of 198, received three benefit points. Two parcels containing multiple **\*1066** dwelling units received 3.4 benefit points each, and the ten parcels on which the school is situated received a total of 17.3 benefit points.

The remaining 11 parcels are in areas that had previously placed their overhead utilities underground. These 11 parcels are located in two different areas, with seven of the parcels located on Noche Vista Lane, a private drive, and four of the parcels on Geldert Court, a cul-de-sac extending off of Geldert Lane. Nine of the 11 properties have no frontage along roadways with poles and overhead wires. These properties received no benefit points for aesthetics. However, with respect to two of the properties determined to have frontage along roadways with poles and overhead wires, the engineer of work assigned one-half of an aesthetic benefit point to each parcel, even though the parcels already received their utilities from an underground network. The report assigned **\*\*491** one-half of a safety benefit point and one-half of a reliability benefit point to each of the 11 properties in the previously undergrounded areas. The engineer of work reasoned that “[t]hese properties are considered to receive half the benefit from service reliability, as their small systems are completely surrounded by and dependent on the larger overall system that is to be undergrounded, and half the benefit from improved safety, as ingress and egress from their property is directly affected by overhead lines and poles.” Accordingly, of the



11 parcels in previously undergrounded areas, nine received one total benefit point each and two received 1.5 total benefit points each.

The Original District was split into three “zones of benefit” described as the Del Mar Valley Area, the West Hawthorne Drive Area, and the Hacienda Drive Area. The engineer of work calculated the construction costs separately for each of these zones. The West Hawthorne Drive Area consists of the 18 parcels that had petitioned to be included in the Original District but that receive their utilities from a separate system of overhead utility lines. The Del Mar Valley Area comprises the largest zone within the Original District, consisting of 164 parcels. The Hacienda Drive Area consists of 39 parcels on or near Hacienda Drive, on the northeastern border of the Original District. Although the engineer of work's report does not state why the Hacienda Drive Area was created as a separate zone for purposes of calculating construction costs, elsewhere in the administrative record it is explained that the area contains lower density development (i.e., larger parcels), thus making it more costly per parcel to place utilities underground.

Total costs for the assessment were estimated to be \$4,720,000, of which \$3,900,611 were construction costs. Construction costs in each of the three benefit zones were calculated separately and apportioned to properties within \*1067 that zone in proportion to the number of benefit points assigned to each property. The remaining project costs, including incidental expenses and financial costs, were allocated to each zone in the same proportion as construction costs among the zones. As a consequence, a parcel in a zone with a higher construction cost per parcel would also have a correspondingly higher allocated cost for incidental expenses and financial costs.

Because the engineer of work determined construction costs separately for each of the three benefit zones, a parcel assigned three benefit points in one zone had a different proposed assessment than a parcel assigned the same number of benefit points in another zone. Thus, the proposed assessment for a single family residential parcel receiving three benefit points was \$12,528.19 in the West Hawthorne Drive Area, \$21,717.04 in the Del Mar Valley Area, and \$31,146.62 in the Hacienda Drive Area. Proposed assessments for the 11 parcels in areas with utilities already placed underground ranged from \$7,239.02 to \$15,573.51.

Owners of parcels in the Original District voted in favor of the assessment. The vote was 71 percent in favor and 29 percent opposed, with individual parcel votes weighted according to each parcel's proposed assessment. On May 18, 2005, the Town's council voted unanimously to approve the engineer of work's final report, to order the improvements, to establish the Original District, and to confirm the proposed individual assessments. On May 27, 2005, assessment notices were sent to property owners within the Original District.

Two couples who had previously objected to inclusion of their parcels in the Original \*\*492 District filed suit in June 2005 against the Town and its council. (See *Bonander v. Town of Tiburon* (2009) 46 Cal.4th 646, 650, 94 Cal.Rptr.3d 403, 208 P.3d 146.) That lawsuit, which remains pending, is not the subject of this appeal.<sup>2</sup>

\*1068 In January 2006, while the legal challenge to the Original District was on appeal, property owners in the Original District received notice that projected construction costs were significantly higher than previously estimated. Construction costs had risen significantly since the summer of 2005, with the price of asphalt alone increasing 73 percent from July to October 2005. The engineer of work estimated that actual construction costs would exceed previous cost estimates by over \$2 million.

At a meeting held on February 1, 2006, the Town's council considered a number of options in response to the increased cost estimates, including cancelling the project or pursuing the process for implementing a supplemental assessment to cover the increased costs. The Town's council chose to pursue the supplemental assessment process to allow affected property owners to determine for themselves whether to continue the project. Accordingly, the Town's council adopted a resolution of intention at the February 2006 meeting to form the Supplemental District pursuant to the Municipal Improvement Act of 1913.<sup>3</sup> The Town's resolution of intention indicated that the Supplemental District was to be established pursuant to [section 10426 of the Streets and Highways Code](#).<sup>4</sup> The Town directed the engineer of work to prepare a supplemental engineer's report.

At a meeting held March 20, 2006, the Town's council considered a preliminary report for the Supplemental District prepared by the engineer of work. The engineer of work estimated that the net construction costs to be funded by the Supplemental District were \$2,860,488, which represented the amount by which revised construction costs for the

project \*\*493 exceeded construction funds available from the Original District assessment. Overall, taking into account incidental expenses and financing costs, there was a shortfall of \$3,180,000 that would have to be covered by a supplemental assessment.

The engineer's report for the Supplemental District employed the same method of assessment as the Original District. The Supplemental District included the same 221 parcels as the Original District. The special benefit \*1069 determinations and apportionment methodology were unchanged from the Original District. As with the Original District, it was determined that 100 percent of the proposed improvements specially benefited the properties within the Supplemental District. Benefit points were assigned for aesthetics, safety, and reliability. Each parcel in the Supplemental District received the same number of total benefit points as it had received in the Original District. The engineer of work again determined construction costs separately for the three zones of benefit—Del Mar Valley Area, West Hawthorne Drive Area, and Hacienda Drive Area. Thus, as reflected in the preliminary report for the Supplemental District, the methodology for the Supplemental District assessment was identical to the methodology used for the Original District assessment.

At a March 2006 meeting, the Town's council considered whether to revise the proposed boundaries of the Supplemental District, and specifically considered whether to exclude the Hacienda Drive Area from the district. The engineer of work explained that the Town could modify the boundaries of the proposed Supplemental District. The construction costs attributable to any removed properties would be deleted from the total construction costs, but any incidental costs would generally be unaffected, causing the costs to be spread among fewer properties. Following the public comment period, the Town's council adopted a resolution approving the preliminary engineer's report and finalizing the external boundaries for the Supplemental District as proposed by the engineer of work. The Town's resolution set a public hearing for May 8, 2006, for the ultimate decision on whether to form the Supplemental District. The Town was directed to mail notices and ballots to affected property owners, along with envelopes for returning the ballots to the Town's clerk, not less than 45 days before the date of the public hearing.

The Town mailed notices, ballots, and return envelopes to property owners within the proposed Supplemental District

on March 24, 2006. Property owners could return their ballots to the Town's clerk at any time before the close of the public hearing on May 8, 2006. The ballots were weighted according to each parcel's proposed assessment.

On the evening of May 8, 2006, the Town's council held a public hearing to hear and consider public testimony, tally the property owner votes, and, if the property owners voted in favor of the Supplemental District, to vote on whether to establish the district. The final engineer's report for the Supplemental District contained one change from the preliminary report. Specifically, the engineer of work had determined that a parcel located at 1 Tanfield Road, which is not within the Supplemental District, would receive a special benefit from the undergrounding project. Although the parcel takes its utility service from Tanfield Road, a cul-de-sac off of Hacienda Drive that is not \*1070 part of the undergrounding project, it was determined the property has a secondary utility access point on Hacienda Drive and also has some overhead wires crossing a corner of the property that would be \*\*494 removed. Thus, the engineer of work assigned the property half a benefit point for aesthetics and half a benefit point for safety. The property received a total of one special benefit point, which was equivalent to \$6,778 in special benefits. Because the property was not included in the Supplemental District (or the Original District), this special benefit amount of \$6,778 was deducted from the total amount to be assessed. Proposed assessment amounts in the Hacienda Drive Area were reduced accordingly.<sup>5</sup> The Town's council adopted a resolution approving the revised assessment amounts.

The votes were tallied at the close of the public hearing. Property owners voted in favor of forming the Supplemental District by a margin of 56 percent to 44 percent. Although the overall vote totals favored creation of the Supplemental District, the vote was not so favorable within the Hacienda Drive Area. Among property owners in the Hacienda Drive Area, 12 parcels voted for the Supplemental District while 23 parcels voted against its formation. The vote as weighted by assessment amounts in the Hacienda Drive Area was \$246,332.16 for and \$379,762.08 against, equating to roughly 61 percent opposition to formation of the Supplemental District. All of the property owners on Noche Vista Lane, which was in an area with its utilities already located underground, voted against the Supplemental District.

Following tabulation of the vote, the Town's council adopted a resolution to create the Supplemental District. The approved

supplemental assessments for single family residential parcels receiving three benefit points were \$7,740.00 in the West Hawthorne Drive Area, \$14,812.21 in the Del Mar Valley Area, and \$20,331.24 in the Hacienda Drive Area.<sup>6</sup> Supplemental assessments for the 11 parcels in areas with utilities already placed underground ranged from \$4,937.41 to \$10,165.79.

On May 18, 2006, the Town filed a complaint in the Marin County Superior Court seeking to validate the Supplemental District pursuant to [section 860 et seq. of the Code of Civil Procedure](#). The Town sought a **\*1071** judgment declaring that it had the authority to collect the assessments authorized by the resolution creating the Supplemental District and that it could use the assessments as security for the issuance of bonds. It further sought a judgment that the Supplemental District was formed in conformity with all applicable provisions of law, including the Municipal Improvement Act of 1913 and article XIII D.

Appellants are 21 individuals who own property within the Supplemental District.<sup>7</sup> Appellants answered the Town's complaint and filed a cross-complaint against the Town, the Town's council, Doe defendants, and "All Persons Interested in the Validity of the Del Mar Valley Utility **\*\*495** Undergrounding Supplemental Assessment District." The cross-complaint contains seven causes of action. The first cause of action seeks to nullify the election approving the Supplemental District on the ground the Town violated property owner voting procedures. The second cause of action seeks to invalidate the resolution adopting the formation of the Supplemental District on the ground the district was not lawfully formed. The third cause of action seeks declaratory relief with respect to two distinct allegations—that the Town unfairly affected the vote by misleading property owners into believing the supplemental assessments would qualify as an income tax deduction, and that it was unfair for the Town to reach a settlement with the school district in which the Town agreed to pay for the school's proposed assessment in exchange for the school district abstaining from voting its 10 parcels against the Supplemental District. The fourth through sixth causes of action seek a writ of mandate directing the Town to set aside its resolution creating the Supplemental District. Among other things, appellants allege the Town violated article XIII D by creating an assessment district in which assessments on parcels exceed the reasonable cost of the proportional special benefit conferred on the parcel. The seventh cause of action seeks a declaration regarding the

validity of the Supplemental District but contains no new factual allegations.

On September 12, 2006, appellants filed their opening brief in support of their petition for writ of mandate. On October 26, 2006, the Town moved for judgment on the pleadings on the ground that appellants had not raised any viable affirmative defenses in their answer. In an order dated January 3, 2007, the trial court denied appellants' petition for writ of mandate as well as the Town's motion for judgment on the pleadings. In denying the writ claims, the court determined that the Town did not abuse its discretion in determining benefits and proportional assessments for the Supplemental District. The court found there was nothing " 'plainly arbitrary' " in the Town's determinations. The court also concluded that the Town was justified in relying upon the final **\*1072** engineer's report and that the method of assessment described in the report was sufficient to support the determination of benefits and proportional assessments.

The Town filed a motion for summary judgment and/or summary adjudication on January 5, 2007, in which it sought to dispose of the remaining three causes of action in the cross-complaint. In an order dated April 24, 2007, the trial court granted summary adjudication as to the first and second causes of action but denied summary adjudication as to the third cause of action, at least in part. The trial court determined that the third cause of action contained two separate and distinct claims. The court granted summary adjudication as to the issue of whether the Town had misrepresented the tax deductibility of assessments but denied summary adjudication as to the issue of the propriety of the Town's settlement agreement with the school district.

Appellants agreed to dismiss, with prejudice, the remaining claim in the cross-complaint's third cause of action in order to fully resolve the matter and allow the trial court to enter final judgment in the case. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 399–403, 87 Cal.Rptr.2d 453, 981 P.2d 79.) Accordingly, on October 4, 2007, the trial court entered an order of dismissal that was intended to fully resolve the action and act as a final judgment from which an appeal could be taken. This appeal followed.

#### **\*\*496 DISCUSSION**

Appellants contend the trial court erred in denying their petition for writ of mandate, asserting that the

Supplemental District assessments violate the special benefit and proportionality requirements imposed by article XIII D. They also claim the trial court erred in granting summary adjudication on claims that (1) the Town unlawfully formed the Supplemental District, (2) the vote approving the Supplemental District is a nullity because the Town gave district proponents improper access to ballot envelopes during the voting period, and (3) the Town misrepresented the income tax deductibility of the assessments. Because the assessments violate the proportionality requirement of article XIII D, we agree with appellants that they are entitled to a writ of mandate invalidating the assessments and vacating the Town's resolution creating the Supplemental District.

### I. OVERVIEW OF ARTICLE XIII D AND LAW GOVERNING SPECIAL ASSESSMENTS

[1] [2] We begin with an overview of special assessments and Proposition 218, the 1996 initiative that added article XIII D to the California Constitution. The Supreme Court explained the nature of a special assessment in \*1073 *Knox v. City of Orland* (1992) 4 Cal.4th 132, 14 Cal.Rptr.2d 159, 841 P.2d 144, a pre-Proposition 218 case. “[A] special assessment is ‘levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement.’ [Citation.]” (*Id.* at p. 142, 14 Cal.Rptr.2d 159, 841 P.2d 144.) “[T]he essential feature of the special assessment is that the public improvement financed through it confers a special benefit on the property assessed beyond that conferred generally. [Citations.]” (*Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654, 661, 3 Cal.Rptr.2d 843, 822 P.2d 875.) A tax is different from a special assessment. Unlike a special assessment, a tax may be levied without regard to whether the property or person subject to the tax receives a particular benefit. (*Knox v. City of Orland, supra*, 4 Cal.4th at p. 142, 14 Cal.Rptr.2d 159, 841 P.2d 144.)

The voters approved Proposition 218, the Right to Vote on Taxes Act, in November 1996. (*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.) Proposition 218 can best be understood as the progeny of Proposition 13, the landmark initiative measure adopted in 1978 with the purpose of cutting local property taxes. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681, 86 Cal.Rptr.2d 592.) One of the principal provisions of Proposition 13 “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. [Citation.] [¶] 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. [Citations.]” (*Howard Jarvis Taxpayers Assn. v. City of Riverside, supra*, 73 Cal.App.4th at pp. 681–682, 86 Cal.Rptr.2d 592.)

[3] Local governments found a way to get around Proposition 13's limitations, owing in part to a determination that a “special assessment” was not a “special tax” within the meaning of Proposition 13. (See *Knox v. City of Orland, supra*, 4 Cal.4th at p. 141, 14 Cal.Rptr.2d 159, 841 P.2d 144.) As a consequence, a special assessment could be imposed without the two-thirds vote required by Proposition 13. (*Howard Jarvis Taxpayers Assn. v. City \*\*497 of Riverside, supra*, 73 Cal.App.4th at p. 682, 86 Cal.Rptr.2d 592.) The ballot arguments in favor of Proposition 218 declared that politicians had exploited this loophole by calling taxes “assessments” and “fees” that could be enacted without the consent of the voters.<sup>8</sup> (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 24 Cal.4th at p. 839, 102 Cal.Rptr.2d 719, 14 P.3d 930.) Proponents of Proposition 218 claimed that “[s]pecial districts [had] \*1074 increased assessments by over 2400% over 15 years” (*ibid.*), and they argued assessments were unfair, with “[t]he poor pay[ing] the same assessments as the rich.” (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), argument in favor of Prop. 218, p. 76.) The argument in favor of the initiative claimed that under then-existing law, “[a]n elderly widow pays exactly the same on her modest home as a tycoon with a mansion.” (*Ibid.*)

To address these concerns, the electorate approved Proposition 218, adding articles XIII C and XIII D to the California Constitution. (*Howard Jarvis Taxpayers Assn. v. City of Riverside, supra*, 73 Cal.App.4th at p. 682, 86 Cal.Rptr.2d 592.) “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. [Citations.] It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges.” (*Ibid.*)

Article XIII D imposes both procedural and substantive limitations on a public agency's ability to impose assessments. A public agency must comply with certain notice and hearing requirements before it may adopt a special assessment. (Art. XIII D, § 4, subs. (c), (d) & (e).) Also, an assessment may

only be imposed if it is supported by an engineer's report and receives a vote of at least half of the owners of affected parcels, weighted "according to the proportional financial obligation of the affected property." (Art. XIII D, § 4, subds. (b) & (e).)

A valid assessment under Proposition 218 must also satisfy the substantive requirements of section 4, subdivision (a) of article XIII D. In particular, article XIII D "tightens the definition of the two key findings necessary to support an assessment: special benefit and proportionality." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 443, 79 Cal.Rptr.3d 312, 187 P.3d 37 (*Silicon Valley*)). "An assessment can be imposed *only* for a 'special benefit' conferred on a particular property. (Art. XIII D, §§ 2, subd. (b), 4, subd. (a).) A special benefit is 'a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large.' (Art. XIII D, § 2, subd. (i).) ... Further, an assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: 'No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel.' (Art. XIII D, § 4, subd. (a).)" (*Silicon Valley, supra*, 44 Cal.4th at p. 443, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

## II. STANDARD AND SCOPE OF REVIEW

"Before Proposition 218 was passed, courts reviewed quasi-legislative acts of \*\*498 local governmental agencies, such as the formation of an assessment \*1075 district, under a deferential abuse of discretion standard. [Citations.]" (*Silicon Valley, supra*, 44 Cal.4th at pp. 443–444, 79 Cal.Rptr.3d 312, 187 P.3d 37.) "[C]ourts presumed an assessment was valid, and a plaintiff challenging it had to show that the record before the legislative body 'clearly' did not support the underlying determinations of benefit and proportionality. [Citation.]" (*Id.* at p. 444, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

"The drafters of Proposition 218 specifically targeted this deferential standard of review for change. Article XIII D, section 4, subdivision (f), provides: '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.' " (*Silicon Valley, supra*, 44 Cal.4th at p. 444, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

[4] [5] In *Silicon Valley, supra*, 44 Cal.4th at p. 450, 79 Cal.Rptr.3d 312, 187 P.3d 37, our Supreme Court held that "courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIII D."<sup>9</sup> (Fn. omitted.) This standard of review applies because "after Proposition 218 passed, an assessment's validity, including the substantive requirements, is now a constitutional question." (*Silicon Valley, at p. 448, 79 Cal.Rptr.3d 312, 187 P.3d 37.*) Thus, as a reviewing court we exercise de novo review of "local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218. [Citations.]" (*Ibid.*)

[6] The litigants dispute whether our independent review may extend beyond the administrative record of the Town's creation of the Supplemental District. Specifically, they disagree about whether we may consider matters contained in the administrative record associated with the Original District. The trial court limited its review to the administrative record associated with the Supplemental District. We took judicial notice of the Original District administrative record but deferred consideration of the relevance or materiality of that record.

[7] [8] \*1076 Ordinarily, when we review the decision of a public agency under the substantial evidence standard, we confine our review to the administrative record of the agency's action. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) However, we are not so constrained \*\*499 when we exercise independent judgment in reviewing the action of a public agency. As set forth in Code of Civil Procedure section 1094.5, subdivision (e), a court authorized to exercise independent judgment may admit and consider extra-record evidence in administrative mandate proceedings if the evidence was improperly excluded by the public agency or could not have been produced through the exercise of reasonable diligence at the time of the hearing. Although the Town acknowledges this rule, it contends that appellants have made no showing as to why the Original District administrative record was not presented to the Town's council or was improperly excluded from consideration.

The more salient point, in our view, is that the Supplemental District concerns the same project as did the Original District and employs the same special benefit formulas, boundaries, zones, and methodology. Evidence concerning

special benefit determinations and proportionality analyses in the Original District administrative record bears directly upon the validity of the Supplemental District, which is merely an extension of the Original District. The administrative record of the Original District cannot be characterized as evidence that was never proffered to or considered by the Town's council, which approved the formation of the Original District less than a year before it initiated proceedings to impose a supplemental assessment. Under the circumstances, we conclude it is proper to consider evidence in the Original District administrative record to the extent it relates to special benefit and proportionality determinations relied upon by the Town in creating the Supplemental District.<sup>10</sup>

### III. SPECIAL BENEFITS

[9] Appellants contend the Town failed to meet its burden under [article XIII D, section 4](#), subdivision (f) to demonstrate that the properties in question receive a special benefit over and above the benefits conferred on the public at large. We are not persuaded.

**\*1077** Only special benefits are assessable under Proposition 218. ([Art. XIII D, § 4](#), subd. (a).) “If a proposed project will provide both general benefits to the community and special benefits to particular properties, the agency can impose an assessment based only on the special benefits. It must separate the general benefits from the special benefits and must secure other funding for the general benefits. [Citations.]” ([Silicon Valley, supra](#), 44 Cal.4th at p. 450, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

The state Constitution defines the term “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.” ([Art. XIII D, § 2](#), subd. (i).) “General enhancement of property value does not constitute ‘special benefit.’ ” ([Ibid.](#))

[10] [11] A project confers a special benefit when the affected property receives a “direct advantage” from the improvement **\*\*500** funded by the assessment. ([Silicon Valley, supra](#), 44 Cal.4th at p. 452, fn. 8, 79 Cal.Rptr.3d 312, 187 P.3d 37.) By contrast, general benefits are “derivative and indirect.” ([Id.](#) at p. 453, 79 Cal.Rptr.3d 312, 187 P.3d 37.) The key is whether the asserted special benefits can be tied to particular parcels based on proximity or other relevant factors that reflect a direct advantage enjoyed by the parcel.<sup>11</sup> ([Id.](#) at pp. 455–456, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

The Supreme Court applied these principles in the seminal case of [Silicon Valley, supra](#), 44 Cal.4th 431, 79 Cal.Rptr.3d 312, 187 P.3d 37. There, the court considered whether an assessment district created by Santa Clara County for the purpose of acquiring and preserving open space satisfied article XIII D. The assessment district covered a vast area, including “approximately 314,000 parcels and over 800 square miles containing over 1 million people.” ([Silicon Valley, supra](#), at p. 439, 79 Cal.Rptr.3d 312, 187 P.3d 37.) The engineer's report set the amount of the assessment at \$20 for a single-family home and provided a formula for estimating the proportionate special benefit that other properties would receive. ([Ibid.](#)) The engineer's report enumerated seven special benefits the assessment would confer on all residents and property owners in the district, including protection of views and enhanced recreational activities, among others. ([Id.](#) at p. 453, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

The [Silicon Valley](#) court concluded that properties in the open space assessment district received no particular and distinct benefits beyond those shared by the district's property in general or by the public at large. ([Silicon Valley, supra](#), 44 Cal.4th at p. 456, 79 Cal.Rptr.3d 312, 187 P.3d 37.) The assessment district demonstrated “no distinct benefits to particular properties above those which the general public using and enjoying open space receives.” ([Id.](#) at p. 455, 79 Cal.Rptr.3d 312, 187 P.3d 37.) Any special benefits **\*1078** that might have arisen would likely have resulted from “factors such as proximity, expanded or improved access to the open space, or views of the open space. [Citation.]” ([Ibid.](#)) However, because the open space assessment district had “not identified any specific open space acquisition or planned acquisition, it [could not] show any specific benefits to assessed parcels through their direct relationship to the ‘locality of the improvement.’ ” ([Id.](#) at pp. 455–456, 79 Cal.Rptr.3d 312, 187 P.3d 37.) No attempt was made to tie benefits to particular parcels. ([Id.](#) at p. 454, 79 Cal.Rptr.3d 312, 187 P.3d 37.) As a consequence, the court concluded the assessment failed to satisfy the special benefit requirement of article XIII D. ([Id.](#) at p. 456, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

The Supplemental District bears little relation to the defective assessment district in [Silicon Valley](#). The Town's engineer of work identified three special benefits—improved aesthetics, increased safety, and improved service reliability. Each of these benefits is tied to individual properties based on proximity to existing overhead utility lines. The benefits are

neither indirect nor derivative but instead are direct and relate to specific properties.

Appellants contend the Town failed to demonstrate that the aesthetics special benefit applies to *each* property in the Supplemental District, arguing that the engineer's report makes no attempt to tie the aesthetic benefit point to specific properties. They also argue that special benefits for safety and reliability do not pass constitutional muster. In essence, they claim there is nothing to indicate that placing overhead utility lines underground would improve safety or service reliability, asserting there have been no extraordinary safety or service reliability issues in the neighborhood. Appellants' claims lack merit.

A property received an aesthetics benefit point only if it is adjacent to visible overhead utility lines. Those properties in the Supplemental District that are not adjacent to overhead utility lines received no benefit points for aesthetics.<sup>12</sup> Appellants' primary complaint with regard to the aesthetics benefit appears to be that the engineer of work assigned an equivalent aesthetics benefit to all parcels adjacent to overhead utility lines regardless of the degree to which the view from a parcel will be improved. However, the mere fact a particular benefit is conferred equally on most or all properties in an assessment district does not compel the conclusion the benefit is not tied to particular properties. The engineer of work explained that the key aesthetics criterion was proximity to overhead utility lines, without regard to subjective assessments of relative improvements in views.

**\*1079** As for appellants' contentions regarding safety and service reliability benefits, they have offered no support for their contention that the neighborhood has been free of service reliability and safety issues. Further, it requires no independent research to support the self-evident conclusion that placing overhead utility wires underground will reduce the risk of weather-related power outages as well as the safety risk posed by downed utility poles and lines. These benefits are plainly tied to specific properties located adjacent to utility poles and lines.

Appellants further contend the Town improperly treats the general enhancement of property value as a special benefit. They cite the engineer of work's conclusion that the undergrounding project will confer specific benefits because the improvements will "specifically enhance the values of the properties within the [Supplemental] District." Appellants assert that "[p]roperty value enhancement from

undergrounding of overhead utility wires is not a permissible consideration in a special assessment under [article XIII D]."

[12] [13] General enhancement of property value is a general benefit and thus not assessable under article XIII D. (*Silicon Valley, supra*, 44 Cal.4th at p. 454, 79 Cal.Rptr.3d 312, 187 P.3d 37.) In other words, the mere fact that a project or service has the effect of enhancing property values in a community does not necessarily mean those properties enjoy a special benefit. On the other hand, the prohibition against basing assessments on *general* property value enhancements does not mean any benefit that enhances property values is a general benefit. Nearly every assessment that confers a particular and distinct advantage on a specific parcel will also enhance the overall value of that property in some respect. Such an effect does not transform a special benefit into a general benefit. An increase in property value attributable to a project that provides a direct advantage to a particular **\*502** property—instead of an indirect or derivative benefit—is a specific rather than a general enhancement in property value. Here, any enhancement in property values arises from specific benefits conferred on parcels in the Supplemental District.

[14] Appellants complain that the engineer's report is flawed because it determined that the undergrounding project would yield no quantifiable general benefits for the community at large or the parcels within the Supplemental District. When determining whether benefits are general or special, we must be mindful of the rationale for making the distinction. The purpose of limiting assessments to special benefits conferred on particular properties is to avoid having property owners in an assessment district pay for general benefits enjoyed by the public at large. Conversely, if a project confers particular and distinct benefits upon specific properties in an assessment district, it would be unfair to have taxpayers outside the assessment district pay for those benefits that specifically benefit only property owners **\*1080** within the district. In this case, there is little reason to believe the undergrounding project will confer derivative and indirect benefits upon property owners or others outside the Supplemental District.<sup>13</sup>

Furthermore, the mere fact that properties throughout the Supplemental District share the same special benefit does not render that benefit "general" and therefore an improper subject of an assessment. Section 2, subdivision (i) of article XIII D specifies that a special benefit is a "particular and distinct benefit over and above general benefits conferred on real property located in the district...." As the court in *Silicon*

*Valley* observed, in a properly drawn district—“limited to only parcels receiving special benefits from the improvement—every parcel within that district receives a shared special benefit.” (*Silicon Valley, supra*, 44 Cal.4th at p. 452, fn. 8, 79 Cal.Rptr.3d 312, 187 P.3d 37.) One might be tempted to characterize these shared special benefits as “general” because they are not “particular and distinct” or “over and above” the benefits conferred on other properties in the district. However, the Supreme Court stated it did not “believe that the voters intended to invalidate an assessment district that is narrowly drawn to include only properties directly benefitting from an improvement.” (*Ibid.*) As the court explained: “[I]f an assessment district is narrowly drawn, the fact that a benefit is conferred throughout the district does not make it general rather than special. In that circumstance, the characterization of a benefit may depend on whether the parcel receives a direct advantage from the improvement (e.g., proximity to a park) or receives an indirect, derivative advantage resulting from the overall public benefits of the improvement (e.g., general enhancement of the district’s property values).” (*Ibid.*)

We conclude the Town has met its burden to establish that properties in the Supplemental District receive a particular and distinct benefit not shared by the district in general or the public at large within the meaning of article XIII D.

#### IV. PROPORTIONALITY

Appellants assert that the Town failed to meet its burden under article XIII D, section 4, subdivision (f) to demonstrate that the amounts of the contested assessments **\*\*503** are proportional to, and no greater than, the benefits conferred on the properties in question. We agree. As we explain, the assessment scheme suffers from two infirmities that result in assessments that are disproportionate to special benefits. First, the Town’s apportionment method is largely based on cost considerations rather than proportional **\*1081** special benefits. Second, properties within the Supplemental District are required to pay for special benefits conferred upon parcels that were *excluded* from the Supplemental District.

##### A. Apportionment Based Upon Cost Rather than Benefit

Under article XIII D, “[f]or an assessment to be valid, the properties must be assessed in proportion to the special benefits received....” (*Silicon Valley, supra*, 44 Cal.4th at p. 456, 79 Cal.Rptr.3d 312, 187 P.3d 37.) The public agency bears the burden of demonstrating that the amount of any

contested assessment is proportional to the benefits conferred on the property. (Art. XIII D, § 4, subd. (f).)

[15] [16] For the sake of clarity, it must be emphasized that an assessment is not measured by the precise amount of special benefits enjoyed by the assessed property. (*White v. County of San Diego* (1980) 26 Cal.3d 897, 905, 163 Cal.Rptr. 640, 608 P.2d 728.) Instead, an assessment reflects costs allocated according to relative benefit received. As a general matter, an assessment represents the entirety of the cost of the improvement or property-related service, less any amounts attributable to general benefits (which may not be assessed), allocated to individual properties in proportion to the relative special benefit conferred on the property. (*Ibid.*; Art. XIII D, § 4, subd. (a).) Proportional special benefit is the “‘equitable, nondiscriminatory basis’” upon which a project’s assessable costs are spread among benefited properties. (*White v. County of San Diego, supra*, at p. 905, 163 Cal.Rptr. 640, 608 P.2d 728.) Thus, the “reasonable cost of the proportional special benefit,” which an assessment may not exceed, simply reflects an assessed property’s proportionate share of total assessable costs as measured by relative special benefits. (See Art. XIII D, § 4, subd. (a).)

[17] Here, the primary determinant of the assessment amount is the relative cost of constructing the capital improvement, not the proportional special benefit conferred on a property. As a consequence of this cost-based apportionment scheme, properties that receive identical special benefits pay vastly different assessments. In the case of single family residential parcels that received a total of three benefit points for aesthetics, safety, and service reliability, the different assessments for the three “benefit zones” are as follows:

West Hawthorne Drive Area: \$7,740

Del Mar Valley Area: \$14,812.21

Hacienda Drive Area: \$20,331.24

As the numbers make clear, the assessment for a property in the Hacienda Drive Area is nearly three times the assessment for a property in the West **\*1082** Hawthorne Drive Area receiving the same proportional benefit. This result violates the proportionality requirement of article XIII D.

The disproportionate assessments result directly from the engineer of work’s creation of three “benefit zones” for which construction costs were determined—and apportioned



—separately. The benefit zones have nothing to do with differential benefits among the three zones but instead are better characterized as “cost zones,” as counsel for the Town acknowledged at oral argument. In other words, the engineer did not justify the zones based upon any differential benefit enjoyed by parcels within the different zones. Instead, the **\*\*504** only justification for the different zones appears to be variances in cost per parcel of placing overhead utilities underground in the various areas of the Supplemental District. It is purportedly more costly to place utilities underground in the Hacienda Drive Area, where lot sizes are generally larger.

As a result of the manner in which the Town has allocated costs and determined benefits, almost all of the differential in assessments is based on cost rather than benefit. All but 23 of the 221 parcels in the Supplemental District are assigned three benefit points under the engineer of work's analysis. Thus, but for cost differentials, 198 of the 221 parcels would have identical assessments, if total project costs were divided among all parcels in proportion to special benefits. There are three different assessment amounts among those 198 parcels only because the engineer of work chose to determine and allocate costs separately in each of the three zones of benefit.

The Town acknowledges that the engineer of work allocated the cost of undergrounding based on varying construction costs throughout the Supplemental District. It claims that if construction costs were not determined and allocated zone-by-zone, then smaller properties in more dense areas, such as the West Hawthorne Drive Area, would subsidize undergrounding in less dense areas with larger lot sizes, such as the Hacienda Drive Area. The Town asserts that this result is prohibited by article XIII D.

The Town's approach has a certain appeal. After all, an apportionment method that determines assessments based upon the actual cost of constructing the improvement on each property, or within a particular neighborhood, would appear to be equitable. However, there are a variety of problems with the Town's approach.

[18] Among other things, the Town's apportionment method violates the express terms of article XIII D, which specifies that the “proportionate special benefit derived by each identified parcel shall be determined in relationship to **\*1083** the *entirety of the capital cost of a public improvement ...*” (Art. XIII D, § 4, subd. (a), italics added.) Thus, article XIII D expressly contemplates that proportionate special benefit is a function of the total cost of a project, not costs

determined on a property-by-property or a neighborhood-by-neighborhood basis.<sup>14</sup> Further, **subdivision (f) of section 4 of article XIII D** states that it is the public agency's burden to demonstrate that the “amount of any contested assessment is proportional to, and no greater than, the *benefits* conferred on the property or properties in question.” (Italics added.) The critical inquiry, therefore, concerns the special benefits conferred on the property. Properties that receive the same proportionate special benefit pay the same assessment, without **\*\*505** regard to variations in the cost of construction among the properties.

There may be cases in which the relative cost of an improvement is a reliable measure of relative benefit conferred. This relationship does not always hold true, however. For example, one could envision an undergrounding project in which all properties receive an identical benefit—e.g., all the benefited properties sit on level ground, are the same size, have exactly the same street frontage, and have essentially the same view of overhead utility lines that will be removed. Assume for purposes of this hypothetical that it is substantially more expensive to place utilities underground in front of a particular group of properties because of the condition of the ground on which the homes sit (e.g., they are situated on top of solid rock that makes it difficult to dig trenches). Under the Town's logic, those properties should be assessed more to avoid having neighboring properties subsidize the properties' greater costs, even though it is acknowledged the project confers the same proportionate special benefit on all properties.

The fallacy in this approach is that it assumes the costs associated with particular properties—or a particular neighborhood—can be considered in isolation. To the contrary, the costs of an improvement project must be considered as a whole. A public improvement such as a utility undergrounding project is either undertaken in an entire district or not at all. In the hypothetical involving certain properties with higher construction costs, the **\*1084** neighboring properties enjoy the benefits of the undergrounding project *only* because the project was pursued in the entire assessment district, which necessarily includes the properties with higher construction costs.<sup>15</sup> It is for this reason that the individual assessments for benefited properties must be apportioned in relation to the *entirety* of the project's assessable costs, as article XIII D requires. (Art. XIII D, § 4, subd. (a).) To reiterate, proportionate special benefit is the basis upon which a project's total assessable costs are apportioned among parcels within an assessment district. This

method ensures that each property owner pays an equitable share of the overall assessable cost as measured by the relative special benefit conferred on the property.

We do not suggest the Town should have applied equal assessments to each of the properties in the Supplemental District. It may be that lot size, length of street frontage with overhead wires, and/or some combination of similar factors are proper considerations in determining each property's relative special benefit. For example, in *Dahms v. Downtown Pomona Property & Business Improvement Dist.* (2009) 174 Cal.App.4th 708, 720–721, 96 Cal.Rptr.3d 10 (*Dahms*), the Court of Appeal determined that an assessment for a downtown business district was properly apportioned based on building size, street frontage, and lot size. The apportionment formula (40 percent front footage, 40 percent building size, and 20 percent lot size) \*\*506 reflected that larger businesses would receive proportionally greater benefits from the business district than would businesses in smaller buildings on smaller lots. (*Id.* at p. 721, 96 Cal.Rptr.3d 10.) Here, the Town did not establish or even suggest that lot density was a proper determinant of proportional special benefit.

During oral argument in this matter, the Town's counsel suggested the recently decided case of *Dahms* supports the proposition that properties may be assessed in proportion to the cost of providing an improvement, as opposed to the special benefit conferred by the improvement. The case stands for no such principle. The court in *Dahms* stated that the formula for determining special benefit turned upon lot size and street frontage because some properties received “more special benefit than others.” (*Dahms, supra*, 174 Cal.App.4th at p. 720, 96 Cal.Rptr.3d 10.) Specifically rejecting an argument that the \*1085 apportionment formula should have been based on the total length of streets bordering all sides of a business instead of the business's front street footage, the court explained that “[i]t makes sense to use front footage rather than total street length to determine the *proportional special benefit* that a parcel will derive from the services of the [business district] (e.g., increased security, litter removal, and graffiti removal). For example, a clean and safe front entrance to a commercial parcel is more likely to constitute a *special benefit* to that parcel than a clean and safe side or rear, where there may or may not be any entrance at all. At the same time, the City's formula also takes into account other measures (namely, building size and lot size) of each parcel's size and consequent *proportional special benefit*, and those other measures should compensate for any disproportionality

that might have resulted from exclusive reliance on front footage.” (*Id.* at p. 721, 96 Cal.Rptr.3d 10, italics added.) The apportionment formula in *Dahms* turned on special benefits and not upon costs.

Even if it were proper to divide the Supplemental District into different zones based upon special benefits conferred on properties in each of the zones, the approach followed by the Town nevertheless lacks adequate support in the record. As the map of the Supplemental District reflects, lots in the West Hawthorne Area are smaller, as are lots in the lower portion of the Del Mar Valley Area. Lots in the Hacienda Drive Area are larger, but so too are lots in the upper areas of the Del Mar Valley Area. Thus, if lot density were a determinant of special benefit conferred on a parcel, the division of zones selected by the engineer of work is illogical. The upper parts of the Del Mar Valley Area should be treated no differently than the Hacienda Drive Area; the lot sizes appear to be no different. In fact, many of the lots in the upper Del Mar Valley Area appear to be larger than lots in the Hacienda Drive Area, so it would appear that, under the Town's logic, the Hacienda Drive Area is actually subsidizing the upper reaches of the Del Mar Valley Area. In short, the manner in which the engineer of work divided the Supplemental District into three zones of benefit appears to be arbitrary, even assuming lot density has some bearing on proportionate special benefit. The engineer provided an inadequate justification for the particular boundaries delineating the benefit zones.

### ***B. Specially Benefited Properties Excluded from the Supplemental District***

[19] Section 4, subdivision (a) of article XIII D provides that an agency proposing to “levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an \*\*507 assessment will be imposed.” As contemplated by this constitutional provision, the boundaries of an assessment district are dictated by a determination of which properties \*1086 receive special benefits. If a property receiving a special benefit is excluded from the assessment district, then the assessments on properties included in the district will necessarily exceed the proportional special benefit conferred on those properties. In such a case, the properties in the assessment district effectively subsidize the special benefit enjoyed by properties outside the district that pay no assessment.

Here, the Town excluded certain properties from the Supplemental District even though they receive special benefits. Specifically, the engineer of work saw fit to exclude

two streets from the Supplemental District—Tanfield Road and Acacia Court. These streets are cul-de-sacs that extend off of Hacienda Drive. Tanfield Road has overhead utility lines and is not part of the undergrounding project. Acacia Court already has its utility lines placed underground and is also not part of the project. Based on maps contained in the record on appeal, it appears that nine parcels are located on Tanfield Road, while seven parcels are located on Acacia Court. There appears to be no dispute that both Tanfield Road and Acacia Court receive their electrical, telephone, and cable utilities from Hacienda Drive.

Initially, the engineer of work assigned no benefit points to the Tanfield Road and Acacia Court properties. However, in the final engineer's report, the engineer of work identified a parcel at 1 Tanfield Road, located at the corner of Tanfield Road and Hacienda Drive, that receives a special benefit from the proposed undergrounding project. The engineer determined that the property has a "secondary access point" on Hacienda Drive and that overhead wires crossing a corner of the property are slated to be removed during the undergrounding project. The engineer's report assigned the property half the benefit for aesthetics and half the benefit for safety, resulting in one full benefit point. Because the property was not included in the Supplemental District, the assessment that would have otherwise been applied to the property was deducted and "not assessed to the rest of the properties in the [Supplemental] District." In other words, the engineer of work deducted the cost of the proportional special benefit conferred on 1 Tanfield Road in order to prevent the properties in the Supplemental District from subsidizing that property's special benefit and paying correspondingly higher assessments as a result.

Our independent review indicates that all of the properties on Tanfield Road and Acacia Court should have been assigned special benefits, if the engineer of work's methodology had been applied consistently. Those properties are situated no differently than the properties on Noche Vista Lane and Geldert Court which, as previously discussed, are in areas where the utilities have already been placed underground. In the case of Noche Vista Lane, a cul-de-sac off of Hacienda Drive, and Geldert Court, a cul-de-sac off of \*1087 Geldert Drive, the engineer of work determined the properties in those areas received half the benefit from service reliability and half the benefit from improved safety. The engineer reasoned that "their small systems are completely surrounded by and dependent on the larger overall system that is to be undergrounded." As a result, the properties benefit from

increased service reliability. With respect to the safety benefit, the engineer reasoned that "ingress and egress from their property is directly affected by overhead lines and poles."

**\*\*508** This reasoning applies equally to the excluded Tanfield Road and Acacia Court properties. The properties on Acacia Court, in particular, share the same reliability and safety benefits as the properties on Noche Vista Lane and Geldert Court.<sup>16</sup> Although the utilities on Acacia Court are already placed underground, its system is completely dependent upon the larger system that is being undergrounded. Further, ingress and egress from the property is through Hacienda Drive and is therefore directly affected by overhead lines and poles. If the engineer of work's methodology had been consistently applied, the seven parcels on Acacia Court should have received one benefit point each, composed of one-half of the reliability benefit and one-half of the service benefit. The same reasoning should also apply to the nine or so parcels on Tanfield Road, even though they will not have their utilities placed underground. They will enjoy increased service reliability because their system is completely dependent upon the larger overall system that is being undergrounded. There is less chance that downed power lines in the Supplemental District will cause a service interruption in their neighborhood. Moreover, they enjoy a safety benefit because ingress and egress to their cul-de-sac is through areas where overhead utilities will be placed underground.

Property owners in the Supplemental District are effectively subsidizing special benefits received by properties on Tanfield Road and Acacia Court. **\*1088** The exclusion of those areas from the Supplemental District causes the assessments to exceed the proportionate special benefit conferred on each parcel. This outcome violates the proportionality requirement of [article XIII D, section 4, subdivision \(a\)](#).

At oral argument, counsel for the Town acknowledged there may be imperfections in the way the Supplemental District is drawn, such as the exclusion of Tanfield Road and Acacia Court. Counsel nonetheless urged that we uphold the validity of the Supplemental District in spite of its imperfections, reasoning in effect that no special assessment district could survive scrutiny if courts expected rigorous mathematical precision in the calculation and apportionment of assessments. We agree with the Town in principle. Any attempt to classify special benefits conferred on particular properties and to assign relative weights to those benefits

will necessarily involve some degree of imprecision. For example, in this case the engineer assigned equal weight to the three special benefits— aesthetics, service reliability, and safety. While this formula may be a legally **\*\*509** justifiable approach to measuring and apportioning special benefits, it is not necessarily the only valid approach. Whichever approach is taken to measuring and apportioning special benefits, however, it must be both defensible and consistently applied.

Here, the analysis adopted by the engineer was applied inconsistently. The result is that parcels on Noche Vista Lane were assessed for the Supplemental District while parcels on Acacia Court—which should have been treated the same as those on Noche Vista Lane—were not assessed at all. This disparity is not the product of excusable imprecision but instead reflects an inconsistent approach to imposing assessments. Taken together with the fact that assessments amounts are based on relative cost instead of proportionate special benefit, the flaws in the Supplemental District are simply too great to disregard as mere “imperfections.”

In summary, because differences in assessments are primarily driven by *cost* differentials, the assessments are disproportionate, with parcels receiving the same special benefits assigned substantially different assessment amounts. Additionally, because certain parcels that receive a special benefit were excluded from the Supplemental District,

the assessments exceed the proportional special benefit conferred on each parcel in the Supplemental District. Accordingly, we conclude the Supplemental District violates the proportionality requirement of article XIII D. In light of this conclusion, we need not reach the other arguments appellants raise.<sup>17</sup>

#### \*1089 DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to enter a new judgment granting appellants' petition for writ of mandate. The trial court shall issue a writ vacating the Town of Tiburon's Resolution No. 24–2006 and invalidating the assessments imposed by the Del Mar Valley Utility Undergrounding Supplemental Assessment District. Appellants shall recover their costs on appeal.

We concur: [SIGGINS](#), and [JENKINS](#), JJ.

#### All Citations

180 Cal.App.4th 1057, 103 Cal.Rptr.3d 485, 10 Cal. Daily Op. Serv. 80, 2010 Daily Journal D.A.R. 43

#### Footnotes

- 1 Certain parcels with no potential for development were considered exempt from the assessment, such as parcels too small to be developed or those designated as open space.
- 2 The plaintiff property owners sought to invalidate the resolution establishing the Original District on a number of grounds, including that the assessment violated article XIII D. (*Bonander v. Town of Tiburon*, *supra*, 46 Cal.4th at p. 650, 94 Cal.Rptr.3d 403, 208 P.3d 146.) The trial court dismissed the complaint on procedural grounds, concluding that the plaintiffs had failed to comply with requirements applicable to validation actions (*Code Civ. Proc.*, § 860 *et seq.*). (*Bonander v. Town of Tiburon*, *supra*, at p. 652, 94 Cal.Rptr.3d 403, 208 P.3d 146.) After this court affirmed the dismissal, the Supreme Court accepted review of the matter. (*Ibid.*) The Supreme Court ultimately held that a property owner who contests an individual assessment levied under the Municipal Improvement Act of 1913 is not required to comply with procedural requirements applicable to validation actions. (*Bonander v. Town of Tiburon*, *supra*, at p. 659, 94 Cal.Rptr.3d 403, 208 P.3d 146.) Accordingly, the trial court's judgment of dismissal was reversed and the plaintiffs were allowed to proceed with their challenge to the Original District. The record before this court does not disclose whether the trial court in that action has ruled on the challenge to the Original District or, if so, how the court ruled.
- 3 The Town adopted the resolution of intention without requiring petitions of support from at least 60 percent of the parcels in the proposed Supplemental District. The Town reasons that the 70 percent favorable vote on the Original District obviated the need for a separate petition to demonstrate support among property owners for pursuing the project.
- 4 [Streets and Highways Code section 10426](#) provides: “The supplemental assessment shall be made and collected in the same manner, as nearly as may be, as the first assessment. [¶] Subsequent supplemental assessments may be made, if necessary, to pay for the improvement. At the hearing the legislative body may confirm, modify, or correct the supplemental assessment. The decision of the legislative body thereon is final.”

- 5 For a parcel designated single family residential in the Hacienda Drive Area that received three benefit points, the proposed total assessment for the Supplemental District declined from \$20,527.68 to \$20,331.24, or a reduction of \$196.44. Because the engineer of work's assessment methodology considered each benefit zone separately for purposes of allocating costs and calculating special benefits, the proposed assessments in the Del Mar Valley Area and the West Hawthorne Drive area were unaffected.
- 6 The combined assessment from the Original District and the Supplemental District for a single family residential parcel receiving three benefit points was \$20,268.19 in the West Hawthorne Drive Area, \$36,529.25 in the Del Mar Valley Area, and \$51,477.86 in the Hacienda Drive Area.
- 7 Two of the appellants, Jimmie D. Bonander and Frank Mulberg, are also parties to the lawsuit seeking to invalidate the Original District.
- 8 On the court's own motion, we take judicial notice of the 1996 ballot pamphlet materials associated with Proposition 218, including the summary prepared by the Attorney General, the Legislative Analyst's analysis, and the ballot arguments for and against the initiative. (See *PG & E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1204, fn. 25, 13 Cal.Rptr.3d 630.)
- 9 Because the trial court ruled on appellants' writ claims before the Supreme Court decided *Silicon Valley*, the lower court did not independently review whether the Supplemental District satisfies article XIII D. Instead, the trial court applied a deferential standard of review, relying on case law later expressly disapproved by the Supreme Court in *Silicon Valley*. (*Silicon Valley, supra*, 44 Cal.4th at p. 450, fn. 6, 79 Cal.Rptr.3d 312, 187 P.3d 37.) Although the trial court applied what turned out to be an improper standard of review to appellants' writ claims, no purpose would be served by remanding the matter to the trial court for reconsideration under the appropriate standard because our review is de novo and affords no deference to the trial court's determinations in any event. (But see *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 659–660, 53 Cal.Rptr.2d 4 [reversal required where trial court failed to exercise independent judgment and appellate review limited to whether substantial evidence supports trial court's conclusions].)
- 10 We do not suggest that our consideration of the Original District administrative record permits us to entertain a challenge to the validity of the Original District in this appeal, which is limited to a consideration of whether the Supplemental District complies with article XIII D and other applicable law. The Original District administrative record is relevant only insofar as it supports or undermines a claim that the Supplemental District satisfies the substantive benefit and proportionality requirements of article XIII D. Nevertheless, we acknowledge that this appeal may have a bearing on the separate lawsuit challenging the Original District to the extent that litigation remains pending and raises the proportionality issue that is dispositive in this appeal.
- 11 The analysis prepared by the Legislative Analyst for Proposition 218 included as examples of “[t]ypical assessments that provide general benefits” “fire, park, ambulance, and mosquito control assessments.” (Ballot Pamp., Gen. Elec., *supra*, analysis of Prop. 218 by legislative analyst, p. 73.)
- 12 Appellants assert—without support—that some properties in the Supplemental District that are not adjacent to poles and overhead wires still received a benefit point for aesthetics. Because appellants have not pointed to any evidence in the record to support this assertion, we disregard it.
- 13 As explained below in section IV.B, we agree with appellants that some specially benefited parcels were not included in the Supplemental District. That problem—excluding specially benefited parcels from an assessment district—is distinct from the issue of distinguishing between general and special benefits.
- 14 We are aware that the ballot materials for Proposition 218 explained that one purpose of the measure was to ensure that “no property owner's assessment is greater than the cost to provide the improvement or service to the owner's property.” (Ballot Pamp., Gen. Elec., *supra*, analysis of Prop. 218 by legislative analyst, p. 74.) We do not read this statement to suggest that individual assessments may be determined based on the actual construction cost associated with a particular property. Instead, the “cost to provide the improvement” to a particular property necessarily takes into account the project's costs as a whole, apportioned to that property in an equitable manner according to special benefit. This interpretation is consistent with the express terms of article XIII D as well as other statements in the ballot materials, where it was clarified that “[a]ssessments are limited to the special benefit conferred.” (Ballot Pamp., Gen. Elec., *supra*, Attorney General's summary of Prop. 218, p. 72.)
- 15 The Town complains that aggregating costs for an entire improvement project causes low-cost areas to subsidize high-cost areas. This is not necessarily so. It may be that the proportional special benefit conferred on properties in the area with lower construction costs is less than that conferred on properties in the area with higher construction costs, resulting in proportionally larger assessments in the high-cost area. In any event, because the low-cost properties cannot enjoy

the benefits of the improvement project without inclusion of the high-cost properties in the district, it is only fair that the entirety of the assessable construction cost is spread among all properties in proportion to special benefits.

- 16 Although the final engineer's report purports to justify the exclusion of Acacia Court from the Supplemental District on the ground its utility poles and lines have already been placed underground, the report contains no explanation as to why that street is treated differently from Noche Vista Lane or Geldert Court, which have also had utility lines and poles placed underground. One possible explanation for the differential treatment is that Noche Vista Lane is completely surrounded by the Supplemental District, whereas Tanfield Road and Acacia Court are not surrounded by the Supplemental District but instead are situated at its border. This explanation fails to justify the differential treatment, however, because the safety and service reliability benefits do not turn on whether a property is "surrounded" by other properties included in the district. Instead, the relevant criteria in assigning these benefits are (1) the source of the utilities supplying electrical, cable, and telephone services to the area, and (2) whether ingress and egress to the property is through areas that will have their utilities placed underground. For all practical purposes, Tanfield Road and Acacia Court are "surrounded" by the Supplemental District because they receive their utilities from the Supplemental District and ingress and egress is through the Supplemental District.
- 17 We deny as moot appellants' request for judicial notice of [Government Code section 53753](#).

# **III. MISCELLANEOUS**





## **Chapter 3.14 CLEAN RIVER, BEACHES AND OCEAN TAX ORDINANCE**

Sections:

- 3.14.010 Title and purpose.**
- 3.14.020 Definitions.**
- 3.14.030 Necessity, authority, and purpose.**
- 3.14.040 Tax levy.**
- 3.14.050 Purposes and uses of tax.**
- 3.14.060 Exemptions.**
- 3.14.070 Computation and collection of tax – Interest and penalties.**
- 3.14.080 Accountability – Citizen’s oversight committee.**
- 3.14.090 Examination of books and records and annual audit.**
- 3.14.100 Property tax.**
- 3.14.110 Refund of tax, penalty, or interest paid more than once, or erroneously or illegally collected.**
- 3.14.120 Savings clause.**
- 3.14.130 Regulations.**
- 3.14.140 Increase appropriations limit.**

### **3.14.010 TITLE AND PURPOSE.**

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.020 DEFINITIONS.**

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

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.030 NECESSITY, AUTHORITY, AND PURPOSE.**

(a) The city council of the city of Santa Cruz hereby finds:

(1) That the reduction of pollution, trash, toxics and dangerous bacteria in our streams, river, bay, ocean and on our beaches is necessary to protect public health and safety, to protect fish and wildlife habitat, to protect the environment, and to protect the quality of life and economic vitality of the city;

(2) That the city is mandated, under federal and state law, to protect water quality and reduce water pollution associated with runoff from streets and properties in the city;

(3) That the cost for programs and projects necessary to reduce and prevent water pollution at the level required exceeds the amount of revenues available from other sources;

(4) That additional revenues are needed to fund improved management practices for protection of watersheds and water quality; maintenance, capital improvements, environmental restoration, and upgrades to stormwater collection, conveyance, management and treatment systems; implementation of stormwater best management practices; and public education and outreach activities to prevent and reduce pollution;

(5) That the levy of a city-wide special tax as hereinafter provided is necessary to fund the foregoing municipal improvements and services.

(b) The ordinance codified in this chapter was approved by the voters of the city at the consolidated state general election held on November 4, 2008, by the following vote:

Yes: 76.25%      No: 23.75%

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.040 TAX LEVY.**

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

(a) For each parcel which is a single-family dwelling, the annual tax rate shall be twenty-eight dollars.

(b) For each developed parcel that is not a single-family dwelling, the annual tax rate shall be ninety-four dollars.

(c) For each undeveloped or park parcel that is not a single-family dwelling, the annual tax rate shall be ten dollars.

(d) The tax imposed by this chapter shall be assessed to the owner unless the owner is by law exempt from taxation, in which case the tax imposed shall be assessed to the holder of the possessory interest in such parcel, unless such holder is also by law exempt from taxation.

(e) For the purposes specified in Section [3.14.050](#), the tax shall be levied so long as it is necessary to pay for any financing of capital improvements, and so long as necessary for services as specified in Section [3.14.050](#).

(f) The tax is levied pursuant to California Government Code Section [50075](#) et seq. and is a tax upon each parcel of property.

(g) The amount of the tax is not measured by the value of the parcel.

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.050 PURPOSES AND USES OF TAX.**

(a) There is hereby established a special segregated fund entitled “Clean River, Beaches and Ocean Parcel Tax Fund” to be maintained and administered by the city.

(b) Proceeds of the tax, together with any interest and penalties thereon (collectively, the “tax proceeds”), shall be collected each fiscal year and deposited in said special fund, and shall be used exclusively for the purpose of reducing and preventing water pollution and managing stormwater runoff, including but not limited to improved management practices for protection of watersheds and water quality; maintenance, capital improvements, environmental restoration, and upgrades to stormwater collection, conveyance, management and treatment systems; implementation of stormwater best management practices; and public education and outreach activities to prevent and reduce water pollution; as well as complying with local, state, and federal stormwater regulations and paying for, or securing the payment of, any indebtedness incurred for these purposes, and any and all other purposes as more fully discussed therein.

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.060 EXEMPTIONS.**

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.070 COMPUTATION AND COLLECTION OF TAX – INTEREST AND PENALTIES.**

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

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

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.080 ACCOUNTABILITY – CITIZEN'S OVERSIGHT COMMITTEE.**

(a) Pursuant to Sections [50075.1](#) and [50075.3](#) of the California Government Code, the specific purposes of the tax and the requirement that the tax proceeds be applied to such purposes and the establishment of a special fund

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

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.090 EXAMINATION OF BOOKS AND RECORDS AND ANNUAL AUDIT.**

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

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.100 PROPERTY TAX.**

This special parcel tax is a property tax and qualified property owners and renters shall be entitled to the benefits of the Gonsalves-Deukmejian-Petris

Senior Citizen's Property Tax Assistance Law (California Revenue and Taxation Code Section 20501 et seq.) and the Senior Citizens and Disabled Property Tax Postponement Law (California Revenue and Taxation Code Section 20581 et seq.).

(Ord. 2008-21 § 1 (part), 2008).

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

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.120 SAVINGS CLAUSE.**

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



(Ord. 2008-21 § 1 (part), 2008).

### **3.14.130 REGULATIONS.**

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

(Ord. 2008-21 § 1 (part), 2008).

### **3.14.140 INCREASE APPROPRIATIONS LIMIT.**

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

(Ord. 2008-21 § 1 (part), 2008).

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The Santa Cruz Municipal Code is current through Ordinance 2019-27, passed December 10, 2019.

Disclaimer: The city clerk's office has the official version of the Santa Cruz Municipal Code. Users should contact the city clerk's office for ordinances passed subsequent to the ordinance cited above.

City Website: <http://www.cityofsantacruz.com/>

City Telephone: (831) 420-5030

[Code Publishing Company](#)

RESOLUTION NO.

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

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

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

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

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

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

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

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

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

RD:MD1  
7/21/2011

ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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CHUCK REED  
Mayor

ATTEST:

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DENNIS HAWKINS, CMC  
City Clerk

## MINUTES OF THE CITY COUNCIL

SAN JOSE, CALIFORNIA

TUESDAY, JUNE 14, 2011

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

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

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

### STRATEGIC SUPPORT SERVICES

#### 3.2 (a) Accept Labor Negotiations Update.

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

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

### CLOSED SESSION

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

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

## **CLOSED SESSION (Cont'd.)**

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

## **CLOSED SESSION (Cont'd.)**

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

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

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

Absent: Council Members - All Present.

## **ORDERS OF THE DAY**

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

## **CLOSED SESSION REPORT**

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

### **A. Authority to Initiate Litigation:**

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

## CLOSED SESSION REPORT (Cont'd.)

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

Noes: Campos, Kalra.

Abstention: None.

Absent: None.

## STRATEGIC SUPPORT SERVICES

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

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

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

## CONSENT CALENDAR

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

- 2.1 Approval of Minutes.**

Action: There were none.

- 2.2 Final adoption of ordinances.**

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

Action: Deferred to August 9, 2011 per Administration.



**2.3 Approval of Council Committee Reports.**

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

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

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

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

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

**2.4 Mayor and Council Excused Absence Requests.**

Action: There were none.

**2.5 City Council Travel Reports.**

Action: There were none.

**2.6 Report from the Council Liaison to the Retirement Boards.**

Action: There were none.

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

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

**2.7 (Cont'd.)**

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

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

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

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

**2.9 Adopt a resolution to:**

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

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

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

Mayor Reed presented comments about Tesla Motors, Inc.

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

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

Action: Deferred to June 21, 2011 per Administration.

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

Action: Deferred to June 21, 2011 per Administration.

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

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

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

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

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

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

## 2.13 (Cont'd.)

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

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

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

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

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

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

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

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

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

**2.15 (Cont'd.)**

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2.19 (Cont'd.)

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

## 2.20 Adopt a resolution to:

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

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

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

Mayor Reed thanked the Downtown property owners.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

## **END OF CONSENT CALENDAR**

### **STRATEGIC SUPPORT SERVICES**

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

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

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

Director of Employee Relations Alex Gurza provided the report.

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

### 3.10 (Cont'd.)

Council discussion and comments followed.

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

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

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

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

## COMMUNITY AND ECONOMIC DEVELOPMENT

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

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

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

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

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

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

#### 4.5 (Cont'd.)

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

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

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

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

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

(Mayor)

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

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

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

Mayor Reed and Council Member Chu provided meeting disclosures.

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

## NEIGHBORHOOD SERVICES

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

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

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

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

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

**5.1 (Cont'd.)**

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

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

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

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

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

Mayor Reed provided meeting disclosures.

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

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

## TRANSPORTATION & AVIATION SERVICES

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

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

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

## ENVIRONMENTAL & UTILITY SERVICES

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

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

Action: Deferred to June 21, 2011 per Administration.

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

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

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

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

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

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

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

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

## **ADJOURNMENT**

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

## **RECESS/RECONVENE**

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

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

Absent: Council Members - All Present.

## **INVOCATION**

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

## **PLEDGE OF ALLEGIANCE**

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

## **JOINT COUNCIL/REDEVELOPMENT AGENCY**

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

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

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



## 9.1 Documents Filed: (Cont'd.)

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

Mayor Reed presented introductory comments.

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

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

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

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

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

## 9.1 (Cont'd.)

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

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

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

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

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

Extensive Council discussion ensued.

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

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

## 9.1 (Cont'd.)

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

## COMMUNITY & ECONOMIC DEVELOPMENT

### 4.1 Adopt a resolution to:

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

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

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

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

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

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

Director of Housing Leslye Corsiglia responded to Council questions.

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

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

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

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

## 4.2 (Cont'd.)

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

### **HL10-196/MA11-003 – District 3**

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

Mayor Reed opened the public hearing.

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

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

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

### **MA11-001 – District 7**

### 4.3 (Cont'd.)

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

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

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

## PUBLIC SAFETY SERVICES

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

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

Fire Chief William McDonald responded to Council questions.

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

## OPEN FORUM

Mark Trout presented his own observations on Child Protective Services.

## ADJOURNMENT

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

## **RECESS/RECONVENE**

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

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

Absent: Council Members - All Present.

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

## **CEREMONIAL ITEMS**

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

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

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

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

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

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

**STRATEGIC SUPPORT SERVICES**

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

(b) Adopt a resolution:

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

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

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

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

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

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

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



### 3.4 (Cont'd.)

Mayor Reed opened the public hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Council discussion ensued.

### 3.8 (Cont'd.)

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

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

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

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

Action: Deferred to August 9, 2011 per Administration.

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

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

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

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

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

### 3.11 (Cont'd.)

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

## TRANSPORTATION & AVIATION SERVICES

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

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

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

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

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

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

## 6.1 (Cont'd.)

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

## PUBLIC HEARINGS

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

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

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

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

### 11.3 (Cont'd.)

Mayor Reed opened the public hearing.

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

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

Mayor Reed closed the public hearing.

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

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

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

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



## **OPEN FORUM**

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

## **ADJOURNMENT**

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

Minutes Recorded, Prepared and Respectfully Submitted by,

City Clerk Dennis D. Hawkins, CMC

/smd 06-14-11 MIN

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

## Please Complete Your Ballot And Mail It Back Promptly

### Method Of Voting

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

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

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

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

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



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

### Public Accountability

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



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

### Ballot Tabulation

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



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

### Additional Information

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



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

### Why Did You Receive This Ballot?

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

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

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

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

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



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

### What Would This Fee Provide?

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

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

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

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

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

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



# City of Alameda

## Water Quality & Flood Protection Initiative

### Official Ballot Information Guide

#### How Much Is The Proposed Fee?

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

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

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

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

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

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

#### How Was The Fee Determined?

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

#### Properties Subject To The Fee

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

#### Will The Fee Increase In The Future?

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

#### Don't My Property Taxes Already Pay for This?

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



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

#### Clean Water Program Elements

##### Operations & Maintenance (O&M):

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

##### Water Quality (WQ):

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

##### Drainage Improvements (DI):

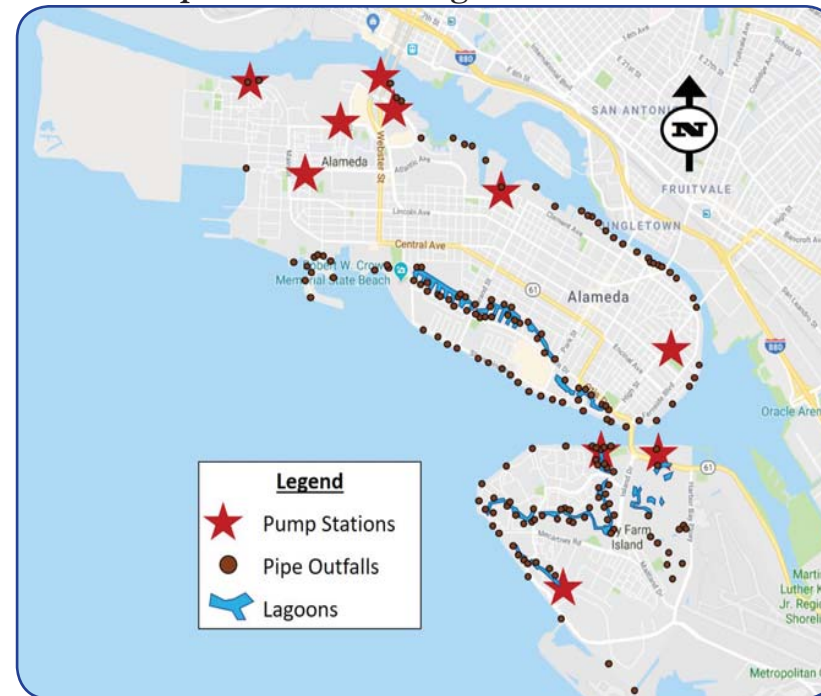
Retrofit or upsize pump stations, pipe, culvert and catch basin replacement, lagoon dredging, green infrastructure & trash capture devices

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

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



#### Map of Storm Drainage Infrastructure



#### If The Initiative Fails ...

**A Depleted Fund Means Cuts to Services:**

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

**Higher Risk of Catastrophic Failures**

**Inability to Adapt to Climate Change**

#### High Priority Capital Improvement Projects

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

Visit [www.alamedaca.gov/cleanwater](http://www.alamedaca.gov/cleanwater) For More Information

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

**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 May 5, 2020, I served the:

- **Claimant's Rebuttal Comments filed May 4, 2020**

*Water Code Section 13383(a) Phase I MS4 Trash Order Issued to City of Grand Terrace, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017, 17-TC-25*  
City of Grand Terrace, 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 May 5, 2020 at Sacramento, California.

*Lorenzo Duran*

---

Lorenzo Duran  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814  
(916) 323-3562

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 4/22/20

**Claim Number:** 17-TC-25

**Matter:** Water Code Section 13383(a) Phase I MS4 Trash Order Issued to City of Grand Terrace, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017

**Claimant:** City of Grand Terrace

### 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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