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

Re: Rebuttal Comments of City of Irvine in re Test Claim 17-TC-26

In accordance with Section 1183.3 of Title 2 of the California Code of Regulations, this office submits these rebuttal comments on behalf of the City of Irvine ("Claimant") in response to the State Water Resources Control Board ("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 in 17-TC-07 to 17-TC-28 ("Opposition Brief").[1] This Rebuttal also responds to the late-filed opposition comments presented by the Department of Finance ("Department").[2] 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*

[1] Test Claims 17-TC-07 to 17-TC-28 have not been consolidated. Nevertheless, the Commission, Water Boards and Department treat the test claims as if they have been consolidated. Such treatment is improper without consolidation and prejudices claimants in these claims, who moved for consolidation and must file separate briefs in these matters. Claimant urges the Commission to decide the pending motion for consolidation.

[2] The Department's comments address only the issue of whether Claimant has fee authority. On this issue, the Department's comments are substantially similar to the Water Boards' comments and are addressed under the treatment of the Opposition Brief, unless otherwise noted.

(MS4) Claimants Within the Jurisdiction of the Santa Ana Regional Water Quality Control Board (hereafter the "Trash Order").[3]

[3] For ease of reference, when referring to the "Trash Order," this Rebuttal is referring to that document located within the Administrative Record ("AR") provided by the Regional Water Quality Board, Santa Ana Region with the following bates-range AR RB8-00420-432. A copy of the Trash Order is attached to Claimant's original test claim.

REBUTTAL

Contrary to the Water Boards' Opposition Brief, the Trash Order mandated activities (defined in Claimant's Test Claim and below) 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").[4]

I. THE TEST CLAIM CHALLENGES THE REQUIREMENTS OF THE TRASH ORDER NOT THE WATER CODE.

As an initial matter, it must be stated that the Water Boards appear to be purposefully trying to confuse the issue at hand. Through its Test Claim, Claimant is seeking a subvention of funds for the costs incurred as result of the Claimant's implementation of the Water Boards' Trash Order's mandated activities. Specifically, as explained in Claimant's Test Claim, the Trash Order requires Claimant to undertake three activities at issue here, which are 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").[5]

The Water Boards' repeated reliance upon Water Code section 13383 alone as the alleged "program," is both intellectually dishonest, and not supported by the facts. Further, the Water Boards do not otherwise address the merits of Claimant's arguments in regards to the requirements of the Trash Order. As such, the Water Boards have waived these arguments, and the Claimants must prevail.

[4] Cal. Const. art. XIII B, § 6; Gov. Code, § 17556, subd. (d).
[5] Trash Order pp. 3, 5.

II. TRASH ORDER REQUIRES CLAIMANT TO IMPLEMENT A "PROGRAM".

Turning to the merits, the Water Boards have taken the astonishing position that the Trash Order does not require Claimant to implement a "program" because apparently the provision of flood control and pollution control services are not public services and because submitting a letter to the Water Board is not a public service,[6] and because all dischargers are subject to the same or more stringent requirements.[7] All assertions are patently incorrect.

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

> 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.[8]

Thus, a "program" for purposes of Section 6 exists when the mandated activity either: (1) carries out the governmental function of providing services to the public, or (2) imposes unique requirements on local governments pursuant to a statewide law or policy that do not apply generally to all residents and entities in the state.[9]

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

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[6] Opposition Brief at pp. 18-21.

[7] Opposition Brief at pp. 21-25. The Opposition Brief addresses "unique requirements" and "statewide law or policy," in part under the question of whether the Trash Order mandated activities carry out a governmental function of providing services to the public. This Rebuttal addresses the Water Boards' arguments under their appropriate tests.

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

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

1. TRASH ORDER REQUIRES CLAIMANT TO PROVIDE SERVICES TO THE PUBLIC.

Contrary to the Water Boards' arguments, the Trash Order mandated activities require more than submitting a form.[10] Rather, the Trash Order compels Claimant to carry out the governmental function of providing flood control and pollution control services to the public for purposes of Section 6 at a standard compelled by the Water Boards in an exercise of their discretion. Indeed, the Trash Order effectively converts Claimant's flood control program into a pollution prevention program. In doing so, the State also shifts its own obligation to control pollution in water onto Claimant.

A. FLOOD CONTROL AND POLLUTION CONTROL ARE PUBLIC SERVICES.

The Water Boards issued the Trash Order to Claimant as a "Co-Permittee" under a "Phase I MS4 Permit," which by its very terms applies only to ***municipal*** permittees, no other type of entity.[11] Claimant's operation of a municipal separate storm sewer system ("MS4") provides essential public flood control services that protect lives and communities from flooding by conveying stormwater into surface waters.[12]

The Water Boards do not dispute that the provision of flood control services or pollution control services constitute public services. Instead, they argue that Regional Water Board "does not require Claimants to operate an MS4 or discharge to surface waters."[13] This argument is

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[10] Opposition Brief at pp. 18-25.

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

[12] See *House v. Los Angeles County Flood Control District* (1944) 25 Cal.2d 384, 388–389 (describing flood control as an exercise of police power); *see also* Water Code, §§ 8000-8061 (flood control by cities), 8100-8129 (flood control in counties); *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337–338. Pursuant to 2 Cal. Code Regs § 1183.3, authorities cited to in this Rebuttal, which have not been cited in prior submittals have been included here within Attachment 1.

[13] Opposition Brief at p. 21, citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58. Further, as a matter of law, the California Supreme Court has found that all programs imposed under the Water Board's authority to regulate MS4 discharges is not required by federal law, and thus a state mandate, absent the State making certain findings. (*Department of Finance v. Comm'n on State Mandates* ["*Los Angeles DOF Case*"] (2016) 1 Cal.5th 749, 767–768) ["Moreover, the Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard."].) Neither the Water Board or Department of Finance have argued

unfounded and is more properly considered a challenge to whether the state has "mandated" the actions at issue, which of course they did.[14] In any case, the Water Boards' argument is unfounded for three reasons.

First, through its Test Claim, Claimant is currently seeking reimbursement for the costs of implementing the Trash Order, not the costs of operating its MS4 system. Accordingly, this argument is a red herring and may be ignored.

As explained above in Section I, the Trash Order mandated activities require Claimant to provide flood control public services in specific, detailed ways that also control trash generated by society, which are activities unrelated to flood control. In so doing, the Trash Order mandated activities convert the *flood control* program into a *pollution control* program, and require Claimant to perform tasks it otherwise would not be required to perform.[15] For example, the Trash Selection Mandate requires Claimant to plan for the use of its MS4 to control the discharge of trash.[16] Likewise, the Implementation Plan Mandate obligates those MS4s who selected Track 2 to create an implementation plan for controlling trash generated by society.[17] Finally, the Ongoing Implementation Mandate, which is ignored entirely by the Water Boards, requires Claimant to undertake substantive measures to control trash generated by society.[18] Unlike the operation of an elevator by public and private entities alike in *Dept. of Industrial Relations,* provision of flood control services, and the operation and maintenance of an MS4 system are uniquely public services.

In an attempt to argue that the Trash Orders required no program, the Water Boards argue that the Trash Order does not require the provision of a public service because Claimant was

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that either agency made the necessary finding. Accordingly, the Trash Order mandated activities constitute a state mandate as a matter of law.

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

[15] Trash Order pp. 1, 5.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.* as noted below at Section II.B.3, 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 properly before this Commission.

"merely providing information" by submitting a letter identifying Claimant's selected method of compliance.[19] The Water Boards are being disingenuous.

For example, the Water Boards recognize that each of the Trash Order mandated activities is intended to implement the "initial procedural steps" in requiring the Claimant to submit an "implementation plan," and to ultimately demonstrate compliance with Trash Provisions. However, in requiring this selection, the Trash Order recognizes,[20] that it is implementing the Trash Provisions in accordance with Chapter IV.A.5.a(1)(B) of those provisions, which provides as follows:

> (1) Within eighteen (18) months of the effective date of these TRASH PROVISIONS, for each permittee, each PERMITTING AUTHORITY shall either: . . .
>
> > B. Issue an order pursuant to Water Code section 13267 or 13383 requiring the MS4 permittee to submit, within three (3) months from receipt of the order, written notice to the PERMITTING AUTHORITY ***stating whether such MS4 permittee will comply with the prohibition of discharge under Chapter IV.A.3.a.1 (Track 1) or Chapter IV.A.3.a.2 (Track 2)***. For MS4s designated after the effective date of these TRASH PROVISIONS, the order pursuant to Water Code section 13267 or 13383 shall be issued at the time of designation. Within eighteen (18) months of the receipt of the Water Code section 13267 or 13383 order, MS4 permittees that have elected to comply with Track 2 shall submit an implementation plan to the PERMITTING AUTHORITY that describes: (i) the combination of controls selected by the MS4 permittee and the rationale for the selection, (ii) how the combination of controls is designed to achieve FULL CAPTURE SYSTEM EQUIVALENCY, and (iii) how FULL CAPTURE SYSTEM EQUIVALENCY will be demonstrated. The implementation plan is subject to approval by the PERMITTING AUTHORITY.[21]

[19] Opposition Brief at p. 18.
[20] *See* Trash Order, p. 1, n. 4.
[21] AR06215-16.

In other words, by requiring the Claimant to select Track 1, the Trash Order required Claimant to comply with the "prohibition of discharge" within the Trash Provisions by agreeing to commit to "*install, operate, and maintain FULL CAPTURE SYSTEMS for all storm drains that captures runoff from the PRIOR LAND USES in their jurisdictions*."[22] The Water Boards' arguments to the contrary are wholly false.

While the Water Boards may try to confuse the issue, there is no real dispute that to comply with the Trash Order, Claimant must augment its flood control public services by planning for and controlling pollutants generated by society as a whole. These activities constitute a program that provides a public service, and warrants a subvention of funds.

Second, from a practical and legal matter, the provision of flood control services is a public service, because without it, society would collapse. Claimant cannot stop providing public flood control services as a practical matter, because "rain water will run downhill, and not even a law passed by the Congress of the United States can stop that."[23] Should Claimant refuse to perform these services, disaster would be sure to follow. Further, Claimant cannot cease providing flood control services as a constitutional matter.[24] Without Claimant's flood control services, flooding will occur, resulting in the potential taking of private property.[25] Indeed, constitutional takings claims are premised entirely on the *public purpose* behind flood control activities.[26] Under the reasoning in *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.

Third, as set forth in Section II.B, below, *County of Los Angeles,* 43 Cal.3d 46, 58 actually contradicts their position.

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[22] Trash Provisions, Chapter IV.A.3.a.1; AR 06213.
[23] See *Hughey v. JMS Development Corp*. (11th Cir. 1996) 78 F.3d 1523, 1530.
[24] See Cal. Const. art. I, § 19; see also *Locklin*, *supra*, 7 Cal.4th at 337–338 ("a governmental entity may be liable under the principles of inverse condemnation for downstream damage").
[25] See, e.g., *Locklin*, 7 Cal.4th at pp. 337–338.
[26] *Ibid.*

B. THE TRASH ORDER SHIFTS THE WATER BOARDS' POLLUTION CONTROL OBLIGATIONS ONTO CLAIMANT.

Aside from imposing a new program on Claimant, the Trash Order mandated activities also shift to Claimant the Water Boards' own obligation to control pollution in waters of the state. Where a state agency attempts to pass its obligation to a local agency, Section 6 of the California Constitution requires a reimbursement of funds from the state agency to the local agency.[27] The Water Boards, however, assert that the "Trash Orders do not shift any responsibility from the State on to the Claimants[.]"[28] The Water Boards' assertion is unsupported and incorrect.

The Water Boards are statutorily required to regulate pollutant discharges to waters of the state and United States.[29] The Water Boards directly regulate thousands of dischargers through individual and general permits.[30] However, rather than enforcing the requirements of the Trash Provisions on the actual entities that generate pollutants by requiring those who generate trash to actively collect and properly dispose of trash, the Water Boards have passed that responsibility on to Claimant through the Trash Order by compelling Claimant to exercise its police power and land use authority to regulate trash generating activities.

For example, the Trash Order requires Claimant to retrofit existing flood control infrastructure with full capture devices or to implement equivalent measures to capture trash generated by the public generally.[31] The public's improper disposal of trash may or may not be a

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[27] *Los Angeles DOF Case*, 1 Cal.5th at 763 ("The purpose of section 6 is to prevent '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.' . . . Thus, with certain exceptions, section 6 '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."'"; citations omitted)

[28] Opposition Brief at pp. 22, 27 (arguing that the 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.

[29] 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.)

[30] See, e.g., Opposition Brief at p. 7 (noting issuance of Industrial General Permit and Construction General Permit).

[31] See Trash Order at p. 2 (requiring Claimant to "install, operate, and maintain Full Capture Systems(FN) for all storm drains that capture runoff from the Priority Land Uses in their jurisdictions").

direct violation of the Trash Provisions,[32] however, the Trash Order requires ***Claimant*** to clean up and prevent such improperly discarded trash from entering waters of the State – not the third party responsible for the alleged violation.[33] Claimant may also be liable for failing to implement such protective measures, even though Claimant does not generate the trash at issue.

Even though the Water Boards are obligated to control pollution in waters of the state, and to otherwise implement the Trash Provisions themselves, it used the Trash Order to require Claimant to modify its flood control programs to control trash created by the public. The Trash Order mandated activities thus require quintessential public services for purposes of Section 6.

2. TRASH ORDER IMPOSES UNIQUE REQUIREMENTS ON LOCAL GOVERNMENTS.

There is no need to address the second test in *County of Los Angeles*, because the Trash Order requires Claimant to carry out the governmental function of providing services to the public.[34] Nevertheless, the Water Boards also 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 the "outright prohibition" on trash discharges in the Trash Provisions;[35] and (2) the Trash Order imposes a "less stringent implementation path[.]"[36] The Water Boards also assert that it is "unripe" for Claimant 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.[37] These arguments hold no merit and are addressed in turn.

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[32] Cf. Opposition Brief at p. 7 (asserting the Trash Provisions may be directly enforced through discharge prohibition) with Opposition Brief at p. 25 (asserting the Trash Provisions are not directly enforceable).

[33] See Trash Order at p. 2 (requiring installation of "Full Capture Systems" or their equivalent, designed to capture trash generated by society).

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

[35] Opposition Brief at pp. 18-25.

[36] 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.

[37] Opposition Brief at pp. 19, 25.

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

The Trash Order is the executive order at issue in this Test Claim. Nevertheless, the Water Boards claim that Water Code section 13383 ("Section 13383") requires any entity "that received a [Section] 13383 order … [to] submit information to the Water Boards."[38] The Water Boards' arguments lack merit for two reasons.

First, 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.[39] This admission is dispositive of this alternative standard under *County of Los Angeles* in favor of Claimant.

Second, Section 13383 does not impose the Trash Order mandated activities and is not 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 …[40]

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. Further, 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 does not impose the Trash Order mandated activities on Claimant, is not at issue here, and provides no support for the Water Boards' position.

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[38] Opposition Brief at pp. 18, 21.

[39] See, e.g., Opposition Brief at p 20 (private dischargers subject to the "outright prohibition … did not receive Water Code section 13383 orders requiring them to submit written notification of their selected track or to submit an implementation plan for Track 2.")

[40] Water Code, § 13383, subd. (a).

It bears noting that read to its logical conclusion, the Water Boards' argument would eviscerate the mandate procedure in its entirety. In essence, the Water Boards argue that because they have a general statutory authority and discretion to impose certain regulations on society, a subvention of funds cannot be allowed where the agency uses that authority to impose unique requirements on public agencies, even if the agency does not impose those same requirements on the public generally. Such an interpretation would fly in the face of California's mandates jurisprudence, and make the mandate procedure ineffective.[41]

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

The Water Boards next argue that the Trash Provisions and their "outright prohibition" apply "to all dischargers of trash to surface waters, whether public or private."[42] The Water Boards' reliance on a statewide "outright prohibition" in the Trash Provisions is misplaced for five reasons.

First, in this Test Claim, Claimant challenges specific activities mandated in the Trash Order, not the Trash Provisions themselves (*see*, *supra*, Section I), as the Trash Provisions had no legal effect until the Water Boards imposed the Trash Order. There is no dispute that the Trash Order imposes the Trash Order mandated activities.[43]

Second, even if the outright prohibition was properly at issue in this Test Claim, which it is not, the prohibition applies uniquely to Claimant when compared with its application to private

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[41] *See*, *e.g.*, *Los Angeles DOF Case*, *supra*, 1 Cal.5th at 754 ("Under our state Constitution, if the Legislature or a state agency requires a local government to provide a new program or higher level of service, the local government is entitled to reimbursement from the state for the associated costs."); *see also County of Los Angeles*, *supra*, 43 Cal.3d at 56 ("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 . . ."); *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 907 ("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.'"). [233 Cal.Rptr. 38, 729 P.2d 202]

[42] 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").

[43] Cf. Test Claim, § 5, subsection VI with Opposition Brief at pp. 10-11.

dischargers.[44] Our Supreme Court in *County of Los Angeles*, 43 Cal.3d 46, determined that when a state mandate imposes requirements that are "distinguishable" from those imposed on private entities, the mandate is unique to local government, but if they are "indistinguishable," they are not unique to local government.[45] Here, even the Water Boards recognize that the Trash Provisions treat MS4s, including Claimant, in a manner that is distinguishable from the public generally, by (falsely) claiming that the requirements are "more lenient" or "less stringent" and therefore, as not unique under *County of Los Angeles*.[46] However, the fact of the matter is that the mandates founds in the Trash Order impose requirements on Claimant that are distinguishable from those required of the public generally.

Further, the Water Boards' themselves recognize that both the Trash Provisions and the Trash Order applies to Claimant in a unique manner due to its municipal nature.[47] Indeed, the only reason the Trash Order could be imposed by the Regional Board in the first instance is because of the fact the Claimant has "regulatory authority" over priority land uses. (Trash Order, p. 1.) Based on the foregoing, there is no dispute that the Trash Order (and Trash Provisions) was imposed on Claimant specifically because it is a local governmental agency, because the Trash Order clearly distinguishes Claimant from the public generally and does not require private entities to implement the Trash Order mandated activities.

Third, the cases relied upon by the Water Boards, actually support the conclusion that the Trash Order imposes programs that require the subvention of funds. In *County of Los Angeles*, the court concluded that Labor Code provisions at issue imposed requirements that were

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[44] Cf. *County of Los Angeles, supra,* 43 Cal.3d 46 with Opposition Brief at pp. 19, 24-25; citing C*ity of Sacramento, supra*, 50 Cal.3d at 57, 67-69; *City of Richmond, supra,* 64 Cal.App.4th at pp. 1193, 1197-1199.

[45] *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).

[46] Opposition Brief at pp. 19, 24-25; citing C*ity 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 II*").

[47] *See* Trash Order, p. 1 ("*For Phase I Co-permittees that have regulatory authority over Priority Land Uses, the Trash Provisions require implementation of the prohibition through requirements incorporated into Phase I MS4 Permits and/or through monitoring and reporting orders, by June 2, 2017*" and "*The Trash Provisions require Phase I Co-permittees that have regulatory authority over Priority Land Uses to select either Track 1 or Track 2 as a method of compliance with the trash prohibition. Each method is summarized below. Through this Order, the Santa Ana Regional Board requires each Co-permittee . . .*"); *see also* Trash Provisions, Ch. IV.A.5.a(1)(A), AR06215-16.

"indistinguishable" as applied to public and private employers.[48] 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[.]"[49] 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."[50] Finally, the trial court's decision in *Los Angeles Mandates Case II*[51] has been appealed 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 II*, 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]henever 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."[52]

Furthermore, federal law also recognizes the different treatment provided to public versus private dischargers under the Clean Water Act.[53] Here, private entities do not (and cannot) operate *municipal* separate storm sewer systems and are not required to undertake any of the Trash Order

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[48] *County of Los Angeles, supra,* 43 Cal.3d at p. 58.
[49] *City of Sacramento, supra,* 50 Cal.3d at p. 67.
[50] *City of Richmond, supra,* 64 Cal.App.4th at p. 1199.
[51] *See 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.
[52] *Id.* at pp. 12-13.
[53] See *Los Angeles DOF Case*, *supra*, 1 Cal.5th at 767 ("Moreover, the Regional Board was not required by federal law to impose any specific permit conditions."); *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165 ("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.").

mandated activities. As a result, the Trash Order mandated activities are "distinguishable" and unique to Claimant.

Fourth, while irrelevant to the overall inquiry in light of the foregoing, the Trash Order mandated activities are not "less stringent" or "more lenient" than the outright prohibition in the Trash Provisions. The outright prohibition as applied to the public generally, either through direct enforcement or through separate NPDES permits, requires the entity which generates trash to prevent that trash from being discharged to waters of the State.[54] The Trash Order mandated activities, however, goes a step further and requires 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.[55] Although third parties are required to control their own trash, the Trash Order requires Claimant to control trash generated by third parties who fail to properly control their own trash. Private dischargers, however, are not required to control trash generated by others. The Trash Order mandated activities, therefore, constitute a "distinguishable" and more stringent, not a less stringent, requirement than is imposed on the public generally.

Fifth, the Water Boards also cite to trash control requirements in NPDES permits issued to industrial dischargers and construction site operators as evidence that the "public generally" is subject to more stringent requirements.[56] Industrial and construction dischargers are a small portion of the "public generally." Even if they properly reflected 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.[57] Likewise, even if some of these industrial dischargers were subject to the Trash Order (they are not), that fact would not be dispositive, as public agencies, like Claimant are "overwhelmingly" responsible for operating and maintaining the public MS4 system.[58] Indeed, the Trash Provisions require Claimant to capture trash generated

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[54] AR 6198, 6212.
[55] AR 6200, 6212 (requiring MS4s to capture runoff and trash).
[56] See Opposition Brief at p. 20.
[57] See Opposition Brief at pp. 1-2, 7-9, 20-22.
[58] See *Carmel Valley Fire Prot. Dist.*, *supra*, 190 Cal.App.3d at 537 (rejecting State's argument that executive order was not a unique program because some private fire fighters were also subject to the executive order, where the provision of the service at issue – fire fighting – was "overwhelming[ly]" performed by local agencies).

from priority land uses, which include ***industrial*** properties.[59] 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.[60]

The Trash Order mandated activities obligate Claimant to provide quintessential governmental services in the form of flood control and pollution control services to the public and impose requirements unique to Claimant and distinguishable from the requirements applicable to private dischargers. As such, the Trash Order is a "program" for the purposes of subvention of funds under Section 6.

III. THE WATER BOARDS' RIPENESS ARGUMENT IS UNFOUNDED.

Finally, the Water Boards' ripeness argument is unfounded.[61] As explained above, by requiring the Claimant to select Track 1, the Trash Order required Claimant to immediately comply with the "prohibition of discharge" requirements within the Trash Provisions by agreeing to commit to "*install, operate, and maintain FULL CAPTURE SYSTEMS for all storm drains that captures runoff from the PRIOR LAND USES in their jurisdictions*."[62] Accordingly, the contents of the MS4 permit are irrelevant in this instance, where the Regional Board has attempted to pose substantive requirements via California Water Code section 13383 by adopting the Trash Order.

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[59] 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)).

[60] Claimant does not miss the Water Boards' thinly veiled threat to require MS4 operators to comply with a zero discharge requirement – in effect an "end of pipe" numeric effluent limitation. Opposition Brief at p. 24 ("the state and regional water boards [may be encouraged] to issue orders imposing the same standards on MS4 operators as on other storm water discharges, potentially at greater cost to local governments"). However, by requiring 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 *Los Angeles DOF Case*, *supra*, 1 Cal.5th at 767 ("Moreover, the Regional Board was not required by federal law to impose any specific permit conditions."); *Defenders of Wildlife*, *supra*, 191 F.3d at 1166-1167 (holding that inclusion of numeric limitations in an MS4 permit is discretionary).

[61] Opposition Brief at pp. 19, 25.

[62] Trash Provisions, Chapter IV.A.3.a.1; AR 06213.

Again, through its Test Claim, Claimant is seeking reimbursement from having to comply with the Trash Order mandated activities, not the activities mandated by the MS4 permit.

IV. TRASH ORDER REQUIRES A "NEW" PROGRAM OR HIGHER LEVELS OF SERVICE.

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 indeed before adoption of the Trash Provisions – did not require Claimant to undertake any of the Trash Order mandated activities.[63] Under *San Diego Unified School District*, the California Supreme Court confirmed that a program or services are "new" or "higher" for purposes of Section 6 if "they did not exist prior to the enactment of [the challenged state action]."[64]

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

First, the Water Boards argue that because every MS4 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", the Trash Order imposes no new program or higher level of service on Claimant.[65] However, none of these permits included 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 before it entered the MS4, nor could they. Indeed, the Water Boards are speaking from both sides of their mouth, as they also argue that the requirements of the Trash Order are not yet incorporated into any of the MS4 permits.[66] It is

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[63] See Test Claim, § 5, subsection VI.A.2, B.2, C.2; see also *San Diego Unified School Dist. v. Comm'n on State Mandates* (2004) 33 Cal.4th 859, 878.

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

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

[66] Opposition Brief, p. 3 ("The Trash Orders merely required the Claimants to submit reports to the Santa Ana Water Board. The Trash Orders did not require Claimants to begin implementation of their selected track or other substantive obligations of the Trash Provisions, as the Claimants appear to assert. The substantive implementation of the Trash Provisions will be accomplished through MS4 permits. The Santa Ana Water Board, however, has yet to incorporate the Trash Provisions into the Orange County, Riverside County, or San Bernardino County MS4 permits. The Santa Ana Water Board will add requirements to implement the Trash Provisions, including the implementation of the Claimants' selected tracks, in the next iteration of the MS4 permits. ***To the extent the Claimants are filing these Test***

dishonest to argue that the Trash Order does not impose a new program or a higher level of service because prior MS4 permits required the work, when they also argue that the requirements of the Trash Order are not provided for in the MS4 permit. There is no real dispute that the Trash Order mandated activities are new, and the Water Boards' baseless arguments to the contrary are frivolous.

Second, the Water Boards implicitly argue that there is not, and can never be, any new program or higher level of service because the maximum extent practicable ("MEP") standard has always been the applicable standard. This argument is likewise incorrect as a matter of law. Indeed, the opposite is true. The California Supreme Court has held that the MEP standard imposes no specific requirements in the landmark case of *Department of Finance v. Commission on State Mandates* ("*Los Angeles DOF Case*") (2016) 1 Cal.5th 749.[67] Accordingly, the MEP standard does not impose the Trash Order mandated activities.[68]

Third, the Water Boards argue that the "Trash Orders do not shift any responsibility from the State[.]"[69] As set forth in Section II.A.2, above, 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.[70]

Not only do the Trash Order mandated activities shift the Water Boards' responsibilities to Claimant, the Water Boards' reliance on *County of Los Angeles* is misplaced. In *County of Los Angeles*, the Second District Court of Appeal surveyed cases addressing when a shift of responsibilities from the state to the local government creates a "new" program for purposes of Section 6, and concluded no shift in obligations occurs when the state provides funding to implement certain programs and also requires a portion of the funding to be allocated to a particular

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Claims to also seek reimbursement for substantive implementation of the Trash Provisions that will be required in future permit terms [Claimants refer to this as 'ongoing implementation'], the Test Claims are not ripe.").

[67] *Los Angeles DOF Case*, *supra*, 1 Cal.5th at 767–768 ("Moreover, the Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard.")

[68] *San Diego Mandates*, 18 Cal.App.5th at pp. 683-689 (rejecting the Water Boards' current argument).

[69] Opposition Brief at p. 27, citing *County of Los Angeles*, *supra*, 110 Cal.App.4th at p. 1194.

[70] Cf. Opposition Brief at p. 22 (arguing that the Trash Order mandated activities do not shift responsibility from the Water Boards to Claimant), citing *County of Los Angeles*, 110 Cal.App.4th at pp. 1191, 1194.

activity.[71] 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.

Accordingly, the Trash Order mandated activities constitutes a new program with a higher level of service than what was previously required.

V. SUBVENTION IS REQUIRED BECAUSE CLAIMANT LACKS FEE AUTHORITY.

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"[72] 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."[73] 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" which means the benefits of Claimant's activities under the Trash Order are conferred on ***all*** persons within Claimant's jurisdiction."[74] It follows that 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.

Instead, the Water Boards argue that Claimant has fee authority because Assembly Bill 2403 (2014) ("AB 2403") and Senate Bill 231 (2017) ("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." However, this is incorrect as a matter of law. Perhaps realizing the legal flaw in their analysis, the Water Boards also list five general sources of authority without ever addressing Claimant's inability to structure a levy

[71] 110 Cal.App.4th at pp. 1191-1194.
[72] Cf. Test Claim, § 5, p. 21, (citing *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 866, 874) with Opposition Brief at pp. 27-31.
[73] Cf. Test Claim, § 5, p. 23 (citing Cal. Const. art. XIII C §§ 1(e)(1), (2)) with Opposition Brief at pp. 27-31.
[74] Cf. Test Claim, § 5, p. 23 (citing Trash Order at p. 1) with Opposition Brief at pp. 27-31.

to meet the substantive requirements that would exempt these levies from the definition of tax: "inspection fees,"[75] "regulatory fees,"[76] "fees from developers,"[77] "Health and Safety Code section 5471 and Public Resources Code section 40026, subdivision (a)(1)."[78]

The Department, in its late-filed comments, solely argues that Claimant has fee authority because it can rely on the alleged "clarification" provided by SB 231, and that this statutory "clarification" demonstrates that the Claimant has the authority to increase property related sewer fees.[79]

Each of these assertions is wrong.

1. CLAIMANT LACKS FEE AUTHORITY AS A MATTER OF LAW.

By way of background, 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.[80] Two exemptions are relevant here:

> (a) charges for benefits or privileges, or for a government service or product;[81] and
>
> (b) property-related fees imposed pursuant to California Constitution Article XIII D ("Article XIII D").[82]

To qualify for one of these two exemptions from the definition of "tax" a fee must meet the substantive requirements of Article XIII D.

In regards to charges for benefits, privileges, services, or products, the Water Boards and Department do not dispute that those benefits, privileged, services or products, must be

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[75] 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.
[76] 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.
[77] Opposition Brief at pp. 27-28, citing *Sinclair Paint, supra*, 15 Cal.4th at p. 877.
[78] Opposition Brief at p. 28.
[79] Department's Opposition Brief, pp. 1-2.
[80] Cal. Const. art. XIII C, § 1, subd. (e) (emphasis added).
[81] Cal. Const. art. XIII C, § 1, subds. (e)(1), (2).
[82] Cal. Const. art. XIII C, § 1, subd. (e)(7).

"…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).[83] 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.[84] Any charges for benefits, privileges, services, or products that fail to meet either the exclusive allocation or proportionality requirement is a tax, regardless of the source of authority for the "fee."[85]

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

> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge … shall not exceed the proportional cost of the service attributable to the parcel. …
>
> (4) No fee or charge may be imposed for general governmental services.[86]

In addition to these substantive requirements, Article XIII D also requires all such fees imposed under that section to be subject to voter approval prior to imposition of such a charge. Article XII 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,

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[83] Cal. Const. art. XIII C, §1 subds. (e)(1), (2).

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

[85] Cal. Const. art. XIII D, § 6 and art. XIII C, §§ 1-2.

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

and refuse collection services."[87] These three classes of fees follow a majority protest process, which does not require voter approval, but rather subjects such fees to a "majority protest" procedure.[88] The "[majority] protest procedure implemented by Proposition 218 is not properly construed as a deprivation of fee authority" for purposes of Section 6.[89] Even the legally questionable decision in *Paradise Irrigation District*, which held that majority protest proceedings do no deprive local agencies of fee authority, nevertheless recognized that all other property-related fees, which are subject to voter approval, are taxes for purposes of Section 6, stating, "[majority] *protest* procedures for fees … [are] in contrast to the voter-*approval* requirement imposed by Proposition 218 before ***new taxes*** may be imposed."[90]

Under the voter-approval requirement, 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.[91] 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."[92] 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 specifically relevant here, the California Court of Appeal has held that charges imposed to fund MS4 pollution prevention and elimination programs, exactly the kinds of programs imposed by the Trash Order, are charges subject to the former "voter-approval" requirements, not the majority protest fees at issue in *Paradise Irrigation*. In *Howard Jarvis Taxpayers Ass'n v. City*

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

[88] See Cal. Const. art. XIII D, § 6, subd. (c); Gov. Code § 53753 (providing for "notice, protest, and hearing requirements"); *Paradise Irrigation Dist., supra,* 33 Cal.App.5th at p. 194.

[89] *Paradise Irrigation Dist., supra,* 33 Cal.App.5th at p. 194.

[90] *Id.* at p. 192 (emphasis in original; bold/italics added). While Claimant concurs with the Court of Appeals' holding that a local agency lacks fee authority where the Claimant must seek to impose a charge requiring "voter-approval" under Proposition 218, Claimant reserves the right to supplement its briefing pending the Supreme Court's review of *Paradise Irrigation Dist. v. Comm'n on State Mandates* (2019) 33 Cal.App.5th 174.

[91] Cal. Const. art. XIII D, § 6 subd. (a)(2).

[92] Cal. Const. art. XIII D, § 6 subd. (c); see also *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1356-1358.

of Salinas ("*Salinas*") (2002) 98 Cal.App.4th 1351, the City of Salinas adopted a "Storm Water Management Utility fee" that would be imposed on every developed parcel of land within the City. Via a reverse validation action, plaintiffs argued that the fee was invalidly adopted as it 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.[93]

The City argued that the fee was exempt from the "majority approval" requirements as a storm sewer fee, and thus subject to the majority-protest procedure. The Court of Appeal disagreed, and found that a storm sewer fee does not qualify under the narrow exception of Article XIII D for property-related fees pertaining to sewer or water services, finding as follows:

> 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 by local governments without taxpayer consent. (Proposition 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.[94]

Accordingly, as a matter of law, and based upon a judicial interpretation of the California Constitution, not upon statutory interpretation, fees imposed to fund and maintain an MS4 system are subject to the more burdensome voter-approval requirements, not the majority protest procedure reserved for sanitary sewer (e.g., wastewater and sewage) services.

Paradise Irrigation District does not change this conclusion.[95] In *Paradise Irrigation District*, the Third Appellate District Court determined that the majority protest requirements applicable to fees for "sewer, water and refuse collection services" did not divest the water and irrigation districts of their fee authority.[96] Instead, the court reasoned "the ***majority protest***

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[93] *Id.* at 1353-54.
[94] *Salinas*, 98 Cal.App.4th at 1357-58.
[95] See Opposition Brief at pp. 30-31, citing *Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 194-195.
[96] *Paradise Irrigation Dist.*, 33 Cal.App.5th at p. 193.

procedures are properly construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority."[97] *Paradise Irrigation District* did not consider whether the voter approval requirements of Proposition 218 divest local agencies of their fee authority for purposes of Section 6.[98]

Here, the facts are distinguishable from those presented in the *Paradise Irrigation District* case—falling squarely within the circumstances where an election is required per *Salinas*. As set forth immediately above, fees imposed to pay the costs of the Trash Order mandated activities—which are clearly pollution control measures akin to those stormwater pollution control activities that were to be funded with the challenged stormwater charges in *Salinas*—do not qualify as fees for "sewer, water, and refuse collection service" subject only to the majority-protest procedures, and, as a result, are subject to the voter-approval requirements. Because *Paradise Irrigation District* did not consider fees subject to the voter-approval requirement of Proposition 218, that decision does not affect the stormwater fees in this case, which are subject to voter-approval per *Salinas*.[99] Rather, *Salinas* and this Commission's own precedent continues to control in this instance, meaning that the Claimant lacks fee authority as a matter of law.[100] Indeed, in simple terms, how could Claimant be deemed to have fee authority, when the very ability to impose a future fee or charge is entirely contingent upon Claimant obtaining the vote of two-thirds of voters in a future election. Under such a scenario, only a super-majority of voters have the authority to levy a stormwater charge ***on themselves*** via a future election, but the matter is entirely outside the hands of Claimant.

Indeed, Commission's own precedent in the matter of "*Discharge of Stormwater Runoff – Order No. R9-2007-0001"* (March 26, 2010) contradicts much of what the Water Boards and

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[97] *Id.* at p. 182.

[98] *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.").

[99] See *City of Anaheim, supra*, 33 Cal.4th at p. 343.

[100] See Commission on State Mandates, Statement of Decision, "*Discharge of Stormwater Runoff – Order No. R9-2007-0001*" (March 26, 2010), at pp. 105-107; *see also Paradise Irrigation Dist., supra,* 33 Cal.App.5th at p. 192 ("[majority] *protest* procedures for fees … [are] in contrast to the voter-*approval* requirement imposed by Proposition 218 before ***new taxes*** may be imposed."); emph. added; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 219 ("At least as to fees and charges that are property related, section 6 of California Constitution article XIII D would appear to embody the electorate's intent as to when voter-approval should be required, or not required, before existing fees may be increased or new fees imposed, and the electorate chose not to impose a voter-approval requirement for increases in water service charges.").

Department now appear to argues. In *Order No. R9-2007-0001*, this Commission assessed whether a clamant had sufficient fee authority to recover for the costs of stormwater pollution control measures such as the ones at issue with the Trash Order. In light of the voter-approval requirement in Article XIIIC Section 2 and Article XIIID Section 6 of the California Constitution, the Commission found as follows:

> ***The Commission finds that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners.*** The plain language of subdivision (d) of this section prohibits the Commission from finding that the permit imposes "costs mandated by the state" 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." [Emphasis added.] ***Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.***[101]

The Commission's decision in this case is dispositive, consistent with the requirements of *Salinas*, and directly on point. Accordingly, because the fees necessary to implement the Trash Order mandated activities related to the maintenance and operation of Claimant's MS4 system, the fees would be subject to the voter approval requirement, meaning that Claimant lacks fee authority in this instance.[102]

In an attempt to try and work around the clear law and the Commission's own precedent on the subject, the Water Boards assert that AB 2403 and SB 231, and the statutes adopted as a

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[101] *See* Commission on State Mandates, Statement of Decision, "*Discharge of Stormwater Runoff – Order No. R9-2007-0001*" (March 26, 2010), at pp. 105-107.

[102] The Department's reliance on *Clovis Unified School Dist. v. Chiang*, (2010) 188 Cal.App.4th 794, is misplaced. In that case, the State Controller adopted a program by which the school districts reimbursement for a state mandate claims would automatically be reduced "by the amount the districts are statutorily authorized to charge students for health fees, even when a district chooses not to charge its students those fees." (*Id.* at p. 810.) Accordingly, the Court found that this auditing rule was not invalid, because it found that the districts were authorized, but refused to impose such fee. That is not the case in this instance, where Claimant has no independent statutory authority to impose a fee absent authorization from their voters. (Commission on State Mandates, Statement of Decision, "*Discharge of Stormwater Runoff – Order No. R9-2007-0001*" (March 26, 2010), at pp. 105-107 ["Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in Connell, but a legal and constitutional one. ***Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program***."; emph. added (citing and quoting *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401)].)

result thereof, limit the viability of *City of Salinas* and "confirm that Claimants have authority to raise fees, without voter approval, for costs related to their storm sewer systems."[103] This is incorrect for at least three reasons.

By way of background, SB 231 was enacted in 2019, as an attempt by the California Legislature to override the Constitution of the State of California, as decided by the California Court of Appeal in *Salinas*, and its binding interpretation of Proposition 218 and Section 6.[104] However, neither the Water Board, the Department, the Commission, or for that matter, the Legislature, have the authority to pass laws that contradict or seek to overrule the judicial interpretation of constitutionally based voter approval requirements interpreted by the court in *City of Salinas*.[105] SB 231, passed for the sole purpose of seeking to overrule, legislatively a court decision premised upon the California Constitution, is itself legally suspect. The Legislature also does not have the authority to adopt statutes that contradict the legal restrictions on government imposed by the California Constitution, as the Legislature has no authority to interpret or change the Constitution, nor to overrule the judicial branch's interpretation of constitutional provisions.[106] Only courts have authority to interpret voter intent in approving constitutional amendments via the initiative process.[107]

Indeed, in a prior mandates case, the Legislature attempted to exempt permits issued by the Water Boards from the definition of an "executive order" subject to Section 6, in an attempt to circumvent the requirements of the California Constitution.[108] Then, as now, the Water Boards argued that the exemption was appropriate "because the Water Boards regulate water pollution with an even hand[,] [w]hether the pollution originates from a local public agency or a private industrial source[.]"[109] The Second District Court of Appeal, rejected this argument, finding that this argument contravened by "the clear, unequivocal intent of … [S]ection 6 that subvention of funds is required '[w]henever...any state agency mandates a new program or higher level of service

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[103] Opposition Brief at pp. 28-39.
[104] See Opposition Brief at pp. 28-31.
[105] *San Buenaventura*, 3 Cal.5th at p. 1209 fn. 6; *County of Los Angeles*, 150 Cal.App.4th at p. 921.
[106] See *San Buenaventura*, 3 Cal.5th at p. 1209 fn. 6; see also *County of Los Angeles, supra*, 150 Cal.App.4th at p. 921.
[107] *County of Los Angeles*, 43 Cal.3d at p. 56.
[108] *County of Los Angeles, supra*, 150 Cal.App.4th at p. 904.
[109] *Id.* at p. 919.

on any local government.'"[110] Then, as now, the Legislature had no authority to change the Constitution to allow the Water Boards to elude the intent of the voters.[111]

The Commission is bound to follow the judicial interpretation of MS4 fees set out in *City of Salinas*, as it is bound to follow judicial pronouncements regarding the meaning of constitutional provisions, not legislative pronouncements.[112]

Despite acknowledging that the Court of Appeal has previously found that the interpretation provided in SB 231 as unconstitutional, Water Boards seemingly argue that the Commission should ignore *Salinas* and the Commission's prior precedent and enforce legislation specifically designed to circumvent the legal process mandated in Proposition 218 by citing to California Constitution Article 3, Section 3.5, and *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1094.[113] The Water Boards' argument flips the doctrine of separation of powers on its head.

California Constitution Article 3, Section 3.5 provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations

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[110] *Id.* at p. 920.

[111] *Id.* at p. 921.

[112] *Salinas, supra*, 98 Cal.App.4th at pp. 1356-1359; *San Buenaventura*, 3 Cal.5th at p. 1209 fn. 6 ("the ultimate constitutional interpretation must rest, of course, with the judiciary"); see also *County of Los Angeles, supra*, 150 Cal.App.4th at 921 ("a statute cannot trump the constitution"); see also *Bighorn-Desert, supra*, 39 Cal.4th 205 at 212 ("When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.' . . . When, as here, the voters enacted the provision, their intent governs. . . . To determine the voters' intent, 'we begin by examining the constitutional text, giving the words their ordinary meanings.'").

[113] *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 is inapposite as it does not discuss whether an agency may refuse to apply a Court of Appeal decision that has already found a statute is unconstitutional, as is the case here.

> prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In this instance, Article II, Section 3.5(a) and (c) are applicable, as a Court of Appeal has already found that the interpretation proposed by SB 231 are legally incorrect, and also unconstitutional to the extent they contravene the holding in *Salinas*.[114] Accordingly, the Commission not only has the authority, but also the duty, to refuse to enforce a statute where the interpretation found in such a statute has previously been declared unconstitutional by the Court of Appeal.

Second, SB 231 did not become effective until after all costs for the Track Selection Mandate were already incurred. Legislative provisions are presumed to "operate prospectively, and … should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.'"[115] Here, SB 231 contains no express language and no clear or unavoidable implication to negate its prospective operation. As a result, the Commission is not authorized to apply SB 231 retroactively.

Third, AB 2403 merely modified the definition of "water" to mean water from any source. AB 2403 was intended to codify *Griffith v. Pajaro Valley Water Management Agency* in order to support local government authority to adopt fees for water *supply* purposes.[116] AB 2403 does not address a situation, such as here, where the mandated activities do not capture stormwater for water supply uses. As a result, this bill did not affect Claimant's 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 Ongoing Implementation Mandate. The Water Board provides no basis for concluding otherwise.

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[114] *Salinas*, 98 Cal.App.4th at 1357-58.

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

[116] *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586; *see also* Attachment 5, Assem. Floor Analysis, Concurrence in Senate Amendments, Assem. Bill. No. 2403 (2013-2014 Reg. Sess.) June 16, 2014 ("This bill would put the new *Griffith* … decision into statute and allow public agencies to apply the simpler protest process to their approval of stormwater management fees, where the management programs address both *water supply* and water quality.") (emphasis added).

Finally, if the position asserted by the Water Boards regarding fee authority and subvention of funds is accepted here, the entire process analyzed by the Commission and courts for many years to address unfunded mandates under Section 6 would be entirely meaningless. If a requirement to hold an election and obtain a super-majority of the electorate does not deprive a local government of fee authority so as to be eligible for subvention of state funds, then what requirement would? The answer appears to be nothing—which would mean the Water Boards could impose any state mandate, no matter how costly or divorced from federal law, and the local government would have no redress—since under the Water Boards approach there is no executive order it could impose that a local government could not recoup through a future tax increase . Such an approach, if accepted in court, would render the entire test claim process, the Commission on State Mandates itself, and most importantly Section 6 of the California Constitution as legal nullities, since there is no scenario involving the Water Boards that could ever result in a Regional Board having to pay for an unfunded mandate. This is an absurd result that could not have been what the voters intended when they approved Proposition 218 and Section 6 of the California Constitution requiring the State to reimburse local governments for costs imposed on such local governments by state fiat.

2. EVERY SOURCE OF AUTHORITY IDENTIFIED BY THE WATER BOARDS IS A TAX IF 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.[117] None of the general sources of authority identified by the Water Boards[118] 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 substantive requirements for an exemption for "tax."[119] As such, every funding source identified by the Water Boards would be

[117] Test Claim, § 5, subsection VIII; see also Cal. Const. art. XIII C, § 1, subds. (e)(1), (2), (7).
[118] Opposition Brief at pp. 27-31.
[119] Gov. Code, § 17556, subd. (d).

considered a tax if imposed to fund the Trash Order mandated activities, and thus cannot be considered fee authority for the purposes of denying reimbursement.

A. INSPECTION AND REGULATORY FEES DO NOT MEET REQUIREMENTS FOR AN EXEMPTION FROM TAXES.

For all the uncontested reasons set forth in the Test Claim, Claimant cannot impose "inspection" fees or "regulatory" fees for the costs of any Trash Order mandated activities.[120] 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."[121] 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 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 County* does not provide any authority to impose residential inspection fees. Indeed, this case stands for the opposite. *Apartment Ass'n* addressed an inspection fee imposed on owners of residential *rental* properties "by virtue of their ownership of a business."[122] The court rightly notes that an inspection fee imposed on residential properties absent a business would be a property-related fee subject to voter approval.[123]

It is undisputed that an inspection fee must meet both the exclusive allocation and proportionality requirements. An inspection fee on residential properties as suggested by the Water Boards would violate the exclusive allocation and proportionality requirements because it would be charged to individuals who would not receive an inspection. Further, as set forth in *Apartment Ass'n of Los Angeles*, such a charge would constitute a property-related fee subject to voter approval and would not qualify as sufficient fee authority under Section 6.

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[120] Test Claim, § 5, subsection VIII.B.

[121] 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 (the "levy is regulatory [as this inspection fee clearly is]").

[122] *Apartment Ass'n of Los Angeles County, supra,* 24 Cal.4th at p. 842.

[123] *Id.* at p. 838.

B. DEVELOPER AND REGULATORY FEES DO NOT MEET REQUIREMENTS FOR AN EXEMPTION FROM TAXES.

For all the uncontested reasons set forth in the Test Claim, Claimant cannot impose "regulatory" or "development" fees to fund the costs of the Trash Order mandated activities.[124] The Water Boards do not specify who or what would be subject to a regulatory fee, but state only that "[t]he California Supreme Court has also validated the adoption of regulatory fees, providing they are not levied for unrelated revenue purposes."[125] The Water Boards do not specify who or what would be subject to a "development" fee, but state that it "is reasonable to collect fees from developers for the costs associated with implementing certain provisions to control trash, particularly where trash from land development has been identified as high trash generating."[126] 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.[127] These assertions are inaccurate for three 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.[128] As apparently conceived by the Water Boards, however, a regulatory fee would be levied against *undeveloped* property for the costs of addressing issues purportedly created by all properties, including *already developed* property. Such a fee would benefit the owners of developed properties without charging the owners of developed property, contrary to the exclusive allocation requirement.[129]

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[124] Test Claim, § 5, subsection VIII.B.

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

[126] Opposition Brief at pp. 27-28, citing *Sinclair Paint Co., supra,* 15 Cal.4th at p. 877.

[127] 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.4th at pp. 876-877; *Cal. Farm Bur. Fed., supra,* 51 Cal.at pp. 437-438; *Cal. Ass'n of Prof. Scientists, supra,* 79 Cal.App.4th at p. 945; *Schmeer, supra,* 213 Cal.App.4th at p. 1326.

[128] See AR 6221 (defining "Priority Land Uses" in part as "Those *developed* sites, facilities and land uses …") (emphasis added); see also AR 6208 (same).

[129] 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

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.[130] 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."[131] Here, however, the costs of the Trash Order mandated activities cannot be recovered in a prospective manner consistent with *City of Lemoore*. Claimant necessarily incurred the cost the Track Selection Mandate and the Implementation Plan Mandate to address demands created by *already-developed* property. The Ongoing Implementation Mandate does not include costs associated with future development. Costs associated with future development can be recouped through the development entitlement process. Instead, the Ongoing Implementation Mandate includes costs associated with *existing* development, such as retrofitting existing infrastructure with full trash capture devices.[132] In accordance with *City of Lemoore*, fees cannot be imposed on *undeveloped* property to pay costs of the Trash Order mandated activities, which were necessitated by *developed* property.

Second, a regulatory fee imposed on undeveloped property cannot satisfy the exclusive allocation and proportionality requirements.[133] 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.[134] Charging undeveloped property for the costs of the Trash Order mandated activities would violate the exclusive allocation requirements, because such a charge would be imposed to address issues created by already-developed properties, and would result in a situation where the first properties to undergo development would pay a disproportionate share of the cost and eventually revenues

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requirement because the amounts individually assessed were not based on the special benefits the undergrounding project would confer on each assessed parcel).

130 See Gov. Code, §§ 66000, subd. (a), 66001, subds. (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' Assn. v. State Water Resources Control Bd.* (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").

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

132 See Test Claim, § 6, Declaration ¶ 8.

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

134 *Isaac*, *supra*, 66 Cal.App.4th at p. 596.

would outpace costs. As a result, new development would eventually pay more than the cost of the Trash Order mandated activities contrary to the proportionality requirement. Such a charge would, therefore, fall within the definition of "tax."[135]

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 current 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 measures to "clean up," in a health or environmental sense, the harm caused by the regulated industry. *Undeveloped* properties did not cause the harms at issue here: trash generated from developed land. As noted above, if a property will be developed, it can be expected to bear the cost of mitigating its future trash contributions. *Sinclair Paint*, however, does not authorize a fee on undeveloped property to mitigate the environmental issues created by already-developed properties.

Further, the *Sinclair Paint* decision was largely superseded in 2010 by Proposition 26. Proposition 26 prohibits fees that do not provide benefits directly to the entity paying the fee in a way that is separate and distinct from benefits to those not charged.[136] Indeed, now fees and charges that directly benefit a payor may still violate Proposition 26 if the service provided in exchange for those fees also benefits those not charged a fee.[137] Because the fee in *Sinclair Paint* benefitted victims rather than payors, it would be prohibited as a tax under Proposition 26. The Water Boards have not disputed that "the benefits of Claimant's activities under the Trash Order are conferred on all persons within Claimant's jurisdiction"[138] The Water Boards have not disputed that "the costs associated with implementing the mandates in the Trash Order cannot be tied to a direct benefit or service experienced by any individual businesses, property owners, or residents."[139] In light of the undisputed requirements of Proposition 26 and the undisputed benefits provided by the Trash Order mandated activities, it follows that Claimant cannot charge any particular activity or any undeveloped properties for the costs of the Trash Order mandated

[135] Cal. Const. art. XIII C, § 1, subds. (e)(1), (2) & (3).
[136] Cal. Const. Art. XIII C, § 1, subds. (e)(1), (2) & (3).
[137] *Ibid.*
[138] Test Claim, § 5, subsection VIII.B.1.
[139] *Ibid.*

activities because these costs provide a benefit to all of society (all residents, all businesses, all visitors, and all property owners) who rely on the MS4, not just future developers.

In *California Farm Bureau*, the State Water Resources Control Board imposed a fee on water appropriation permit and license holders pursuant to Water Code section 1525.[140] The fee was intended to fund "the Division[of Water Rights]'s operations[.]"[141] Thus, the State Board had explicit authorization to impose those fees. Conversely, in this case, Water Code section 1525 does not authorize ***Claimant*** to impose fees. Further, it is undisputed that any fee imposed by Claimant must meet the exclusive allocation and proportionality requirements. The Water Boards make no claim that a permit or licensing program exists for the use of the MS4s through which a fee may be imposed.[142] As a matter of law, no such program can be established due to the mandatory nature of Claimant's provision of flood control services through the MS4.[143]

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.[144] The fee funded costs incurred by the department to conduct environmental reviews of the proposed development.[145] Fish and Game section 711.4 does not authorize Claimant to impose fees. Further, it is undisputed that any fee imposed by Claimant must meet the exclusive allocation and proportionality requirements. For all the reasons set forth above, *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.[146] The 10-cent charge was determined not to be a tax because it was "payable to and retained by the retail store and [wa]s not remitted to the county."[147] This case provides no support for the Water Boards'

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[140] See Opposition Brief at p. 27; *Cal. Farm Bureau, supra,* 51 Cal.4th at pp. 434-435.
[141] *Id.* at p. 432.
[142] Cf. Opposition Brief at pp. 27-28.
[143] See Section II.A.1 above.
[144] See Opposition Brief at p. 27; *Cal. Assn. of Prof. Scientists, supra,* 79 Cal.App.4th at p. 939.
[145] *Cal. Assn. of Prof. Scientists, supra,* 79 Cal.App.4th at p. 940.
[146] *Schmeer, supra,* 213 Cal.App.4th at p. 1326.
[147] *Ibid.*

position. Any charge levied to pay for the costs of the Trash Order mandated activities would be paid to Claimant in its role as a governmental agency, and would not be retained by a private party. Under the rationale in *Schmeer*, such a fee would be a tax.[148]

In short, none of the foregoing cases are applicable in this case, as they are clearly distinguishable due to the existent of independent statutory authorization or facts that are simply not applicable to this case.

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

For all the uncontested reasons set forth in the Test Claim, 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.[149]

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

[148] 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").
[149] Opposition Brief at p. 29.

> 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 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.[150] These activities are not "solid waste handling" for purposes of Public Resources Code section 40059.[151] Similarly, these activities do not qualify as storm drainage operation or maintenance for purposes of Health & Safety Code section 5471.[152]

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.[153] It is undisputed that under *City of Salinas*, a fee imposed under either Health & Safety Code section 5471 or Public Resources Code section 40059 to fund a general stormwater program

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[150] Trash Order § 6, Declaration at ¶¶ 8.a-8.c.

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

[152] *Id.* at pp. 117-119.

[153] Cal. Const. art. XIII C, § 1, subd. (e), § 2; see also *Discharge of Stormwater Runoff – Order No. R9-2001-0001*, at pp. 114-119.

is a property-related fee subject to voter approval.[154] As set forth in Claimant's Test Claim and in the foregoing section, AB 2403 and SB 231 do not provide the Commission with any authority to conclude otherwise.[155]

3. WATER BOARDS' EXAMPLES OF "FEES" ARE ALL "TAXES".

Lastly, the Water Boards also improperly claim that *taxes* adopted by various cities and local agencies in California provide evidence of Claimant's *fee* authority.[156] This is patently incorrect.

Both cases cited by the Water Boards recognize that Section 6 is expressly intended to protect Claimant's tax revenues from the limitations on local government authority imposed by voter approval requirements.[157] Assuming, without admitting, that the materials attached to the Opposition Brief constitute proper evidence, these materials all demonstrate that local taxes are currently being used to fund state mandated programs, such as the Trash Order mandated activities. The materials regarding San Clemente's funding mechanism indicates the charge at issue was subject to voter approval.[158]

Materials regarding "Measure E" do not themselves indicate which city proposed the funding source at issue or provide any evidence of a funding mechanism.[159] However, Chapter 3.14 of the City of Santa Cruz Municipal Code sets out the "Clean River, Beaches and

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[154] See *Salinas, supra*, 98 Cal.App.4th at 1356-1358; *see also Discharge of Stormwater Runoff – Order No. R9-2001-0001*, at pp. 114-119; Cf. Test Claim § 5, subsection VIII.B with Opposition Brief at pp. 27-31.

[155] *See* Test Claim, § 5, subsection VIII.C.

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

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

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

[159] Opposition Brief at pp. F-18 – F-53.

Ocean ***Tax*** Ordinance" (emph. added) which was approved as a parcel tax in the November 2008 election.[160] If true, Measure E was a tax measure, not a fee.

Materials associated with Palo Alto indicate a funding mechanism approved by way of the two step process required by Proposition 218: "If there is no majority opposition, then the city will conduct a mail ballot election[.]"[161]

Materials regarding San Jose reference Resolution 75857, June 14, 2011. Although not included in the materials attached to the Opposition Brief, Resolution No. 75857 appears to continue fees in place since 1960 and 1991, both pre-dating Proposition 218, and therefore not subject to the voter approval requirements imposed by Proposition 218.[162]

Materials regarding Alameda appear to be dated February 6, 2017.[163] These materials do not indicate how the funding mechanism was approved. Materials available online, however, indicate that Alameda's "fee" was approved by voters as recently as 2019.[164]

Materials regarding Culver City reference a special election requiring voter approval of the funding measure.[165] Finally, the Los Angeles County materials reference a "ballot measure" requiring two-thirds voter approval prior to imposing the funding measure.[166]

As these examples demonstrate, Claimant lacks authority to impose a fee to fund the Trash Order mandated activities. Any "fee" cannot meet the substantive requirements for an exclusion

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[160] See Attachment 2: Santa Cruz Municipal Code, § 3.14.030, subd. (b) ("The ordinance codified in this chapter was approved by the voters of the city at the consolidated state general election held on November 4, 2008, by the following vote: Yes: 76.25% No: 23.75%.").

[161] Opposition Brief at p. F-54 – F-55.

[162] Attachment 3: Draft City of San Jose Resolution No. 75857, June 14, 2011 available at <http://www3.sanjoseca.gov/clerk/Agenda/20110802/20110802_0304res.pdf> (last accessed March 31, 2020); Minutes of June 14, 2011 meeting available:<http://www3.sanjoseca.gov/clerk/Agenda/20110614/20110614min.pdf (last accessed March 31, 2020).

[163] Opposition Brief at p. F-58.

[164] See Attachment 4: City of Alameda Official Ballot Information Guide available at <https://www.alamedaca.gov/files/sharedassets/public/alameda/city-manager/stormwater-ballot-guide.pdf> (last accessed March 31, 2020).

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

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

from the definition of tax, which the Water Boards do not dispute. As a result, subvention is required under Section 6.

VI. THE DEPARTMENT OF FINANCE'S UNTIMELY RESPONSE SHOULD BE REJECTED.

Section 1183.2 of the Commission's regulations provides that written comments concerning a test claim "shall be certified, filed and served within 30 days from the date the test claim...is issued for comment."[167] 2 Cal. Code Regs. section 1187.9 also provides that any party or interested party may request an extension of time by filing a request with the executive director before the date set for filing of comments.[168] After receiving extensions, the Department's comments were due January 28, 2019, but it ultimately failed to request an additional extension of time. Accordingly, the Department filed its comments late on March 6, 2018.[169] For this reason, the Department's late-filed comments should not be considered in these proceedings as they were filed untimely.

Further, it should also be noted that the Department's late-filed comments also fail to comply with the certification requirement of 2 Cal. Code Regs. section 1183.2, and should be ignored for that reason as well.

VII. CONCLUSION

Although only one of the standards for "program" under Section 6 must be met, the Trash Order mandated activities constitute a "program" under both standards. The Trash Order mandated activities are "new" programs or higher levels of service pursuant to Section 6. Finally, 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. For all these reasons, the Test Claim constitutes a statute mandate that requires subvention under Section 6.

[167] 2 Cal. Code Regs. § 1183.2(a).
[168] 2 Cal. Code Regs. § 1187.9.
[169] Department of Finance's Response to Test Claim, dated March 6, 2019.

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 in official court records, on the State Water Resources Control Board's publicly available website, Westlaw website, or on the California Legislative Information public website.

RUTAN & TUCKER, LLP

Jeffrey T. Melching
City of Irvine Representative

ATTACHMENT 1

Index of Authorities

Index No.	Title
1.	California Constitution, Article 3, Section 3.5
2.	California Government Code §§ 66000 and 66001
3.	California Water Code §§ 8000-80061
4.	*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191
5.	*Department of Finance v. Comm'n on State Mandates* (Case No. 34-2010-80000504), Order After Hearing On Cross-Petitions For Writ of Mandate (Feb. 6 2020) (Trial Court Decision)
6.	*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188
7.	*Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Leemore* (2010) 185 Cal.App.4th 554
8.	*House v. Los Angeles County Flood Control Dist.* (1944) 25 Cal.2d 384
9.	*Hughey v. JMS Development Corp.* (11th Cir. 1996)78 F.3d 1523
10.	*In re E.J.* (2010) 47 Cal.4th 1258
11.	*Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586
12.	*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327
13.	*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335
14.	*San Francisco Baykeeper v. Levin Enterprises, Inc.*, (N.D Cal. 2013) 12 F.Supp.3d 1208
15.	*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459
16.	*Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057

ATTACHMENT 1-A

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

West's Ann.Cal.Const. Art. 3, § 3.5

§ 3.5. Administrative agencies; prohibition against declaring statute unenforceable or unconstitutional; exceptions

Currentness

Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Credits
(Added June 6, 1978.)

Notes of Decisions (35)

West's Ann. Cal. Const. Art. 3, § 3.5, CA CONST Art. 3, § 3.5
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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ATTACHMENT 1-B

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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West's Annotated California Codes
Government Code (Refs & Annos)
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Division 1. Planning and Zoning (Refs & Annos)
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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ATTACHMENT 1-C

West's Ann.Cal.Water Code D. 5, Pt. 1, Ch. 1, Art. 1, Refs & Annos
Currentness

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<Article 1 was added by Stats.1943, c. 369, p. 1896.>

West's Ann. Cal. Water Code D. 5, Pt. 1, Ch. 1, Art. 1, Refs & Annos, CA WATER D. 5, Pt. 1, Ch. 1, Art. 1, Refs & Annos
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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
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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

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

End of Document

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

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

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

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

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

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West's Ann.Cal.Water Code D. 5, Pt. 1, Ch. 1, Art. 2, Refs & Annos
Currentness

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<Article 2 was added by Stats.1943, c. 369, p. 1896.>

West's Ann. Cal. Water Code D. 5, Pt. 1, Ch. 1, Art. 2, Refs & Annos, CA WATER D. 5, Pt. 1, Ch. 1, Art. 2, Refs & Annos
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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
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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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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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 D. 5, Pt. 1, Ch. 1, Art. 3, Refs & Annos
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<Article 3 was added by Stats.1943, c. 369, p. 1896.>

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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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Article 3. Election (Refs & Annos)

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

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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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West's Ann.Cal.Water Code D. 5, Pt. 1, Ch. 1, Art. 4, Refs & Annos
Currentness

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<Article 4 was added by Stats.1943, c. 369, p. 1896.>

West's Ann. Cal. Water Code D. 5, Pt. 1, Ch. 1, Art. 4, Refs & Annos, CA WATER D. 5, Pt. 1, Ch. 1, Art. 4, Refs & Annos
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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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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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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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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
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)
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Chapter 1. Flood Control by Cities (Refs & Annos)
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
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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

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Article 4. Bonds (Refs & Annos)

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

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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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West's Ann.Cal.Water Code D. 5, Pt. 1, Ch. 1, Art. 5, Refs & Annos
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<Article 5 was added by Stats.1943, c. 369, p. 1896.>

West's Ann. Cal. Water Code D. 5, Pt. 1, Ch. 1, Art. 5, Refs & Annos, CA WATER D. 5, Pt. 1, Ch. 1, Art. 5, Refs & Annos
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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
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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

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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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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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West's Ann.Cal.Water Code D. 5, Pt. 1, Ch. 1, Art. 6, Refs & Annos
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<Article 6 was added by Stats.1943, c. 369, p. 1896.>

West's Ann. Cal. Water Code D. 5, Pt. 1, Ch. 1, Art. 6, Refs & Annos, CA WATER D. 5, Pt. 1, Ch. 1, Art. 6, Refs & Annos
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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
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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Chapter 1. Flood Control by Cities (Refs & Annos)
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
Current with urgency legislation through Ch. 3 of 2020 Reg.Sess

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ATTACHMENT 1-D

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
|
Filed 12/4/2017
|
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:

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

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.

****734** *****52** Ct.App. 2/6 B251810, Santa Barbara County, Super. Ct. Nos. VENCI 00401714, VENCI 1414739

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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. [1]

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.)

*****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.) [2] 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.

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.)

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, " 'buttresse[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.[3] 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).)

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)).

****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.

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.

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).)[4] A " '[p]roperty-related service,' " in turn, is defined as a "public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).)

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.)

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).)

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"].) [5]

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.)

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."

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** 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. [6]

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, subds. (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.

*****64 **744 III.**

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"].) [7]

[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.

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.*)[8] 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."

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.)

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"].)

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. [9]

[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.

***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–Sakauye, C. J.

Chin, J.

Corrigan, J.

*****69** Cuéllar, J.

Irion, J. [*], concurred.

[*] 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.

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

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ATTACHMENT 1-E

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

STATE OF CALIFORNIA
DEPARTMENT OF FINANCE, et al.,

Petitioners,

v.

COMMISSION ON STATE MANDATES,

Respondent,

COUNTY OF SAN DIEGO et al.,

Real Parties in Interest.

Case No.: 34-2010-80000604

ORDER AFTER HEARING ON CROSS-PETITIONS FOR WRIT OF MANDATE

On December 6, 2019, hearing was held on the Court's tentative ruling tentative ruling on cross-petitions for writ of mandate. Petitioners and Cross-Real Parties in Interest were represented by Nelson R. Richards. Cross-Petitioners and Real Parties in Interest were represented by Shawn D. Hagerty and Christina Snider. Following the hearing, the Court requested additional briefing on certain issues. (See Jan. 2, 2020, Order.) Having considered all of the parties' papers and arguments, the Court now issues the following final ruling and statement of decision.

INTRODUCTION AND BACKGROUND

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.) In other words, "local government costs mandated by the state must be funded by the state." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 49.) There are exceptions. Two are relevant here.

First, costs are *not* deemed mandated by the state "if the state imposes a requirement that is mandated by the federal government, unless the state order mandates costs that exceed those incurred under the federal mandate." (*Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 667; see also Gov. Code § 17556, subd. (c).) Thus, the state is only required to reimburse local entities for "*state*-mandates costs, not *federally* mandated costs." (*San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 880, italics in original.)

Second, costs are not deemed mandated by the state, and reimbursement is not required, if the local entity "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (Gov. Code § 17556, subd. (d).)

The Commission on State Mandates hears and determines claims for reimbursement filed by local governments. Our Supreme Court has explained the process as follows:

> The first reimbursement claim filed with the Commission is called a test claim. (Gov. Code, § 17521.) The Commission must hold a public hearing, at which the Department of Finance . . . , the claimant, and any other affected department or agency may present evidence. (Gov. Code, §§ 17551, 17553.) The Commission then determines whether a state mandate exists and, if so, the amount to be reimbursed. [Citation.] The Commission's decision is reviewable by writ of mandate. (Gov. Code, § 17559.)[1]

(*Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 759, internal quotes omitted.)

This case began in 2007, when the Regional Water Quality Control Board, San Diego Region ("Regional Board") renewed a permit allowing San Diego County and the cities located within the county (hereafter "Permittees") to discharge storm water runoff from a "municipal

[1] Section 17559 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." (Gov. Code § 17559, subd. (b).)

separate storm sewer system" or "MS4."[2] The permit, which is known as a National Pollutant Discharge Elimination System (or "NPDES") permit, was issued pursuant to California's Porter-Cologne Water Quality Control Act and the federal Clean Water Act.[3] The permit requires the Permittees to implement various programs and take various actions to manage their storm water runoff.

The Permittees filed a timely test claim with the Commission asserting that many of the programs and activities required by the permit constituted reimbursable state mandates.

In 2010, the Commission issued a lengthy statement of decision finding that the following eight programs and/or activities were state mandates:

1. Street sweeping, MS4 cleaning, and reporting thereon (permit parts D.3.a.(3) , D.3.a.(5), J.3.a.(3)(c)(iv)-(viii), and J.3.a.(3)(c)x-xv).
2. Public education (permit parts D.5.a.(1)-(2) and D.5.b.(1)(c)-(d) and D.5.(b)(3)).
3. Watershed activities and collaboration in the Watershed Urban Runoff Management Program (permit parts E.2.f and E.2.g).
4. Regional Urban Runoff Management Program (permit parts F.1, F.2, and F.3).
5. Program effectiveness assessment (permit parts I.1, I.2, and I.5).
6. All permittee collaboration (permit part L.1.a.(3)-(6)).
7. Hydromodification management plan (permit part D.1.g).
8. Low-impact development (permit parts D.1.d.(7) and D.1.d.(8)).

The Court generally refers to these eight programs and activities as the challenged permit requirements. In reaching its conclusion that these eight requirements were state mandates, the Commission found they (1) were *not* federal mandates and/or required by federal law, and (2) were new programs or higher levels of service in existing programs. The Commission also found the first six programs or activities were reimburseable by the state, but that the last two were not because the Permittees had authority to levy fees sufficient to cover their costs.

The Department of Finance, the State Water Resources Control Board, and the Regional Board (collectively "the State") filed a petition for writ of mandate challenging the

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[2] The permit was first issued in 1990, and was renewed in 2001. This action concerns only the 2007 permit, which is found at pages 249 through 369 of the administrative record ("AR").

[3] This Court's prior decision granting the State's petition and the Court of Appeal's decision in this case contain a more detailed description of the relevant law and the NPDES permitting process. (See Final Statement of Decision, pp. 3-6; *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 668-70.) That description is not repeated here.

Commission's decision. The State's primary contention was that the permit requirements were not *state* mandates because they were required by *federal* law. The State also contended (1) that the requirements did not constitute a new program or higher level of service within the meaning of the California Constitution, and (2) that reimbursement was not required because the Permittees had authority to levy fees to pay for all eight activities, not just two.

Permittees filed a cross-petition for writ of mandate challenging the Commission's determination that two of the permit requirements were not reimbursable because they had authority to levy fees to pay for the costs.

The Court granted the State's petition in part, concluding the Commission "applied the wrong legal standard" when it determined the permit conditions were not federal mandates. (Final Statement of Decision, p. 10.) The Court thus remanded the case to the Commission for further proceedings. The Court also held, "Given this determination, it is unnecessary to address the other issued raised by the petition and cross-petition." (*Id.*, p. 10; see also p. 16 ["it is unnecessary to review the Commission's other findings at this time, including those raised in the cross-petition."].) In particular, the Court did not address (1) whether the permit requirements impose new programs or higher levels of service, and (2) whether the Permittees had sufficient fee authority to recover the costs of the requirements. (*Id.*, pp. 9-10.)

The Permittees appealed, and the Court of Appeal reversed based on an intervening California Supreme Court decision – *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 – that held permit conditions imposed on a different stormwater permit issued by a different Regional Board were state rather than federal mandates. (*Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661.) Based on this new authority, the Court of Appeal held the Commission applied the correct legal standard and the permit requirements at issue in this case are *state* mandates. (*Id.* at 667.) The Court of Appeal also remanded the case back to this Court with instruction to "consider other issues the parties raised in their pleadings but the court did not address." (*Id.* at 668.)

On remand, the State asks now the Court to address the following issues raised in its petition, but not yet decided: (1) whether the challenged permit requirements "mandate a new program or higher level of service" within the meaning of the California Constitution; and (2) whether Permittees have fee authority to cover the costs of *all* of the requirements. Permittees renew their argument that the Commission erred in determining they have adequate fee authority

to pay for two of the challenged permit requirements.

THE STATE'S PETITION

The Court addresses the State's petition first.

1. Mandated New Program or Higher Level of Service

As noted above, the California Constitution requires reimbursement only if the permit "mandates a new program or higher level of service" in an existing program. (Cal. Const., art. XIII B, sec. 6; see also *County of Los Angeles, supra*, 43 Cal.3d at 56 ["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.'"].) There are three questions that must be answered in the affirmative in order to receive reimbursement for any permit requirement: *Is it a **program**? Is it **new**?* And *Is it **mandated**?*

Our Supreme Court has held the term "program" means "[1] programs that carry out the governmental function of providing services to the public, or [2] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles, supra*, 43 Cal.3d at 56, internal quotes omitted, bracketed numbers added.) The term "program" thus has "two alternative meanings," and "only one of these [alternatives] is necessary to trigger reimbursement." (*Carmel Valley Fire Protection Dist. v. State of California* (19787) 190 Cal.App.3d 521, 537.) Both alternatives recognize that the purpose of requiring reimbursement for state mandated programs is to prevent the state from transferring to local governments "the fiscal responsibility for providing services which the state believed should be extended to the public. . . . [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." (*County of Los Angeles, supra*, 43 Cal.3d at 56-57.) "Since the purpose of . . . 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." (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.)

"A program is 'new' if the local governmental entity had not previously been required to institute it." (*County of Los Angeles, supra*, 110 Cal.App.4th at 1189.)

Finally, a program is "mandated" if it is required or compelled by the state. In *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727 (hereafter "*Kern High School District*"), our Supreme Court distinguished between actions that were *mandated* by the state and actions that were *optional* or *discretionary*: "[A]ctivities 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 obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice*." (*Id.* at 742, emphasis added.)

The State argues the permit requirements at issue here: (1) do not meet either alternative definition of a *program*; (2) were undertaken as a result of Permittees' discretionary choices and thus are not *mandated* by the State; and (3) are not *new*. Before considering the merits of these arguments, the Court discusses Permittees' threshold argument that they have already been decided by the Court of Appeal, or were forfeited because the State did not raise them in its *initial* opening brief.

A. Are the State's Arguments Cognizable?

Permittees argue the Court of Appeal has already determined that all of the challenged permit requirements are state mandates and are subject to reimbursement, and it accuses the State of attempted to "relitigate" issues "that were already rejected by the Court of Appeal." (Opp. at 9:1-2.) To support this argument, Permittees point to statements like the following in the Court of Appeal's decision:

- "We conclude the Commission applied the correct standard and the permit requirements are state mandates." (18 Cal.App.5th at 667.)
- The permit requirements "are subject to subvention under Section 6." (*Id.* at 676.)
- The requirements regarding street sweeping and cleaning stormwater conveyances "are not federal mandates and must be compensated under section 6." (*Id.* at 684.)

- The low impact development requirements, the educational program requirements, the regional and watershed urban runoff management programs, and the program effectiveness assessment requirements "are state mandates subject to section 6." (*Id.* at 685-88.)
- "In short, there is no federal law, regulation, or administrative case authority that expressly mandated the San Diego Regional Board to impose any of the challenged requirements discussed above. As a result, their imposition are state mandates, and section 6 requires the State to provide subvention to reimburse the Permittees for the costs of complying with the requirements." (*Id.* at 689.)

According to Petitioners, "Necessary to and implicit in the [Court of Appeal's] holding is a determination that *all* elements of a state mandate are also satisfied, including that the Challenged Permit Conditions carry out a government function of providing a public service or impose unique requirements on Co-Permittees, and the mandates are new." (Opp. at 16:10-13, emphasis added.) In other words, Permittees contend the Court of Appeal has already determined that the challenged requirements (1) meet the definition of a program, (2) were mandated by the State, and (3) are new. Permittees thus argue that, "[u]nder the law of the case, the State cannot seek reconsideration of whether the Challenged Permit Conditions constitute a state mandate, because the Court of Appeal already decided that issue as an essential part of its decision." (Opp. at 16:15-17.)

The Court disagrees. As noted above, when it issued its first decision in this case, the Court found the Commission applied the wrong legal standard in determining whether the permit conditions exceeded federal requirements. The Court of Appeal reversed, holding the Commission applied the correct standard, and that the requirements were not federal mandates. It phrased the issues it had to decide as follows:

> [O]ur task is twofold. We must determine first whether the [federal Clean Water Act], its regulations and guidelines, and any other evidence of federal mandate such as similar permits issued by the EPA, required each condition. If they did, we conclude the requirement is a federal mandate and not entitled to subvention under section 6. Second, if the condition was not "expressly required" by federal law but was instead imposed pursuant to the State's discretion, we conclude the requirement is not federally mandated and subvention is required. The State has the burden to establish the requirements were imposed by federal law. It has not met its burden here.

(18 Cal.App.5th at 680.) The only issue determined by the Court of Appeal was thus whether the challenged permit requirements were *federal* mandates, and it determined they were *not*. It is in

this context that the Court of Appeal held they were *state* mandates subject to subvention under section 6. In so holding, the Court of Appeal never considered or addressed whether the requirements met the definition of a *program*, were *mandated* by the state, or were *new*. Because the Court of Appeal did not consider or address any of the arguments the State now makes on remand, the law of the case doctrine does not apply. (See *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 302 [doctrine does not apply to any issue "that was not considered on the prior appeal"]; *People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273 [doctrine "applies only if the issue was actually presented to and determined by the appellate court."].)

When the Court of Appeal reversed the Court's first decision, it remanded the case with instruction to "consider other issues the parties raised in their pleadings but the court did not address." (18 Cal.App.5th at 668.) One of the issues the Court did not address in the first decision was the State's argument that "the permit does not impose a new program or higher level of service under an existing program." (Final Statement of Decision, p. 9 [describing State's arguments].) As instructed by the Court of Appeal, the Court thus considers that argument now, in all of its iterations.

Permittees also argue the State cannot now raise any arguments that it did not raise in its *initial* opening brief filed in 2011. In particular, Permittees contend that the State did not argue in its initial opening brief that the permit requirements do not meet the definition of a program, and that the Court thus should not consider those arguments now. Again, the Court disagrees.

To support their argument, Permittees cite the general rule that courts will refuse to consider issues that are not raised in the briefs, or that are raised for the first time in a reply brief. (See *Title Guarantee & Trust Co. v. Fraternal Finance Co.* (1934) 220 Cal. 362, 363 ["Appellate courts will notice only those assignments pointed out in the brief of an appellant, all others are deemed to have been waived or abandoned."]; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 835 ["Generally, we will not consider points raised for the first time in an appellant's reply brief"].) They cite no authority for the much more specific proposition that, following reversal and remand by the Court of Appeal, this Court may not consider arguments that the State did not raise in its initial opening brief. The reason for the general rule has been described as follows: "Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an

additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 335, fn.8.) The reason for the rule has no applicability here, where Permittees have been given a full and fair opportunity to respond to *all* of the arguments the State made in its current opening brief.

Permittees also cite authority for the proposition that "a reviewing [i.e., appellate] court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Again, this authority provides no support for Permittees much more specific assertion that the State may not make an argument on remand unless it also made that argument in its initial opening brief.

Finally, and perhaps most importantly, the Court notes that the Court of Appeal remanded this case with directions to "consider other issues the parties raised in their pleadings but the court did not address." (18 Cal.App.5th at 668.) In the petition, the State asserted the permit requirements do not impose a new program because they do not "force [Permittees] to carry out any public service peculiar to governments and impose[] no requirements unique to [Permittees]." (Pet., ¶ 30a.) In other words, in its petition, the State raised the issue of whether the permit requirements meet either alternative definition of a program.[4] (See *County of Los Angeles, supra*, 43 Cal.3d at 56 [term "program" means "programs that carry out the governmental function of providing services to the public, or laws which . . . impose unique requirements on local governments"].) As directed by the Court of Appeal, the Court will thus consider that issue.

[4] Arguably, the State also raised this argument in its initial opening brief, when it noted the Commission's finding that the permit requirements were a program because they were only imposed on the County of San Diego, and it cited a case (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537) that outline the two alternative definitions of a "program." (State's Opening Brief filed Jul. 8, 2011, pp. 45-46.) The State then argued the Commission's focus was too "narrow," and it noted the permit requirements were "imposed on *all* entities that own or operate a municipal storm sewer system." (*Id.*, p. 46, emphasis added.)

B. Is it a *Program*?[5]

As noted above, the term "program" has two alternative, albeit related, meanings: (1) something "which carries out the governmental function of providing services to the public," or (2) something "which . . . impose[s] unique requirements on local governments and do[es] not apply generally to all residents and entities in the state." (*County of Los Angeles, supra,* 110 Cal.App.4th at 1189.) The State argues the permit requirements do not meet either definition of the term "program."

The Commission found the permit requirements meet both definitions of the term "program." It found the requirements "provide[] a service to the public by preventing or abating pollution in waterways and beaches in San Diego County." (AR 3858.) It also found the requirements "are limited to the local governmental entities specified in the permit" and "impose[] unique requirements on local agencies in San Diego County . . . that do not apply generally to all residents and entities in the state." (AR 3858-59.) The State challenges both findings, although its arguments are related.

According to the State, the permit was issued pursuant to the Clean Water Act and the Porter-Cologne Act, which are laws of general applicability that prohibit everyone from discharging pollutants without a permit. Also according to the State, the permit and its requirements merely enforce these two laws of general applicability, and the fact that the permit enforces those laws against entities that happened to be local governments is irrelevant. The State thus argues the permit does not mandate a "program" because it does not impose unique requirements on local governments that do not apply generally to all state residents or entities. (*County of Los Angeles, supra,* 43 Cal.3d at 50.) The Court disagrees.

The State does not seriously argue that pollution prevention or abatement is not a public service. Indeed, it implicitly acknowledges that one of the permit requirements – to sweep streets at specified intervals – provides a public service. (Opening at 15:17-19.) Instead, it argues that the permit requirements were imposed "to prevent pollution . . . rather than provide a service to the public." (Opening at 14:27-15:1.) This argument is circular, and fails to establish that the Commission erred in holding the permit requirements provide a service to the public by

[5] At the beginning of the hearing, the State asserted it took issue with this portion of the Court's tentative ruling. However, the State thereafter never mentioned this portion of the ruling and proffered no arguments thereon.

preventing or abating pollution.

Moreover, the permit in this case is required because Permittees operate a *municipal* separate storm sewer system, or MS4. As the name implies, a municipal separate storm sewer is a system that is owned or operated "by a State, city, town, borough, county, parish, district, association, or other public body". (40 C.F.R. § 122.26, subd. (b)(8).) By definition, an MS4 is thus a government entity. These government entities are subject to special rules, and are regulated differently than other entities that discharge storm water. (Compare 40 C.F.R. § 122.26, subd. (c) ["requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity"] with subd. (d) ["requirements for large and medium municipal separate storm sewer discharges].) As the court noted in *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, when "Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for storm sewer discharges" it "distinguished between *industrial* and *municipal* storm water discharges." (*Id.* at 874, italics added.) For example, "[p]ermits for discharges associated with *industrial activities* shall meet all applicable provisions of" section 301 of the Clean Water Act. (33 U.S.C. § 1342, subd. (p)(3)(A), emphasis added.) Section 301, in turn, generally mandates "effluent limitations," which are "restriction[s] on the amount of pollutants that may be discharged at a point source." (*Building Industry Assn., supra,* 124 Cal.App.4th at 873-4.) MS4 permits, in contrast, "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 or the State determines appropriate for the control of such pollutants." (33 U.S.C. § 1342, subd. (p)(3)(B)(iii).) The challenged permit requirements were all imposed in order "to reduce the discharge of pollutants in urban runoff to the maximum extent practicable" – a standard which applies exclusively to government entities and does not apply to all state residents or entities. (AR 255.)

The State's arguments notwithstanding, the Court finds this case is distinguishable from *City of Sacramento v. State of California* (1990) 50 Cal.3d 51. There, our Supreme Court held that a new law extending mandatory unemployment insurance coverage to local government employees did not constitute a "program" because it did not impose unique requirements 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 . . . merely makes the local agencies indistinguishable in this respect from private employers." (*Id.* at 67; see also *County of Los Angeles, supra*, 43 Cal.3d at 58 [holding law increasing workers' compensation benefits was not a "program" because "[a]lthough local agencies must provide [increased] benefits to their employees . . . they are indistinguishable in this respect from private employers."].) Here, in contrast, the permit and the laws it implements *do* impose unique requirements on government entities that are not imposed on industrial storm water dischargers.

This case is also distinguishable from *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538. There, the court held that new elevator safety regulations promulgated by the California Occupational Safety and Health Administration did not constitute a "program" that required the state to reimburse local governments for the costs of compliance because they applied to all elevators, whether publically or privately owned, and thus "d[id] not impose a 'unique requirement' on local governments." (*Id.* at 1545.) Again, the permit in this case and the laws it implements impose unique requirements on government entities that are not imposed on other storm water dischargers.

The State also faults the Commission for focusing on the requirements imposed by the permit (which it tacitly acknowledges apply only to government entities) rather than the requirements imposed by the Clean Water Act and the Porter Cologne Act (which it claims are generally applicable) when determining whether the requirements constitute a program. As noted above, however, 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]henever 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*

constitutes a state mandate necessitating subvention[.]" (*Id.* at 919, emphasis added; see also AR 3858 [Commission's Statement of Decision, citing same quote from *County of Los Angeles, supra.*) This supports the Commission's focus on the specific obligations imposed by the particular permit in this case, rather than the obligations imposed on all public and private dischargers by the Clean Water Act and/or the Porter Cologne Act.

C. Is it *Mandated*?

Reimbursement is only required when the state "mandates" a new program or higher level of service. (Cal. Const., art. XIII B, § 6.) Participation in the program thus must be "required" or "commanded" or "legally compelled." (*Kern High School Districts, supra,* 30 Cal.4th at 741.) "[A]ctivities 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 742.)

According to the State, MS4 permittees may be regulated under either a "management permit" or a "numeric end-of-pipe permit." An end of pipe-permit requires permittees to meet specific effluent limitations measured at the point of discharge. A management permit, in contrast, requires permittees to reduce the discharge of pollutants through best management practices. The State argues Permittees exercised their discretion to apply for a management permit rather than a numeric end-of-pipe permit, and that they also proposed all of management practices for which they now seek reimbursement. The State thus argues all of the challenged permit requirements were imposed as a result of Permittees discretionary decision to request a management permit. As a result, they are not mandated by the state and are thus not reimbursable.

Permittees disagree. They have the better argument.

As Permittees note, in *Department of Finance, supra,* our Supreme Court held that while MS4 operators "were required to include a description of practices and procedures in their permit application, the [Regional Board] has discretion whether to make those practices conditions of the permit." (5 Cal.5th at 771.) This supports Permittees argument that the challenged permit requirements were mandated by the Regional Board.

Permittees are also legally required to submit an application for a permit. (See 40 C.F.R. § 122.21, subd. (a); Water Code § 13376.) Thus, the Commission correctly found that submitting the application "is not discretionary." (AR 3856.) Moreover, the law required Permittees to include the following in their permit application:

> A proposed management program [that] 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.*

(40 C.F.R. § 122.26, subd. (d)(2)(iv), italics added.) As the italicized language demonstrates (and as held by our Supreme Court in *Department of Finance*), it is ultimately the Regional Board that determines which conditions or requirements to include in the permit. Thus, the challenged permit requirements are not activities undertaken at Permittees' option or discretion – they are activities undertaken at the command of the Regional Board.

Moreover, Permittees are legally required to obtain a permit and to comply with all conditions therein. This case is thus distinguishable from *Kern High School Districts*. There, two school districts sought reimbursement for certain administrative costs they were forced to incur in order to participate in various school-related educational programs. Our Supreme Court held that reimbursement was not necessary because the school districts were not required to participate in the underlying educational programs. (*Kern High School Districts*, *supra*, 30 Cal.4th at 743.) In so holding, it noted the "proper focus" in a case like this is on whether participation in the underlying program is required, and not on whether the underlying program imposes certain requirements on participants. Here, and in contrast to the school districts, Permittees cannot simply decide to forgo an NPDES permit and thereby avoid incurring the costs of complying with the permit.

Finally, Permittees state they did not actually request any of the challenged permit

conditions and in fact objected to them – and the State cites no evidence to the contrary.

D. Is it *New*?

The State argues the challenged requirements are not new. It fails to convince.

"A program is 'new' if the local governmental entity had not previously been required to institute it." (*County of Los Angeles, supra*, 110 Cal.App.4th at 1189.) The Commission went through each of the challenged requirements imposed by the 2007 permit and compared it to the requirements imposed by the prior permit (i.e., the 2001 permit). (See AR 3871 [Commission described its method analysis as "measure[ing] the 2007 permit against the 2001 permit to determine which provisions are a new program or higher level of service."].) The Commission's comparative approach finds support in the case law. (See *San Diego Unified School Dist., supra*, 33 Cal.4th at 878 [whether requirement is new is judged "in comparison with the preexisting scheme"].) For each of the challenged requirements, the Commission concluded it was not required by the 2001 permit and was thus a new program or a higher level of service. (AR 3871-72 [hydromodification management plan requirements]; 3875 [low impact development/standard urban storm water mitigation plan requirements]; 3878-79 [street sweeping and reporting requirements]; 3882-84 [conveyance system cleaning and reporting requirements]; 3888-93 [educational component requirements]; 3898-3900 [watershed urban runoff management program requirements]; 3902, 3905 [regional urban runoff management program requirements]; 3911-13, 3915 [program effectiveness assessment requirements]; 3917-19 [all permittee collaboration requirements].)

The Commission's analysis of the 'newness' issue was both thorough and detailed, and it did not find that every requirement imposed by the 2007 permit was new. To give just one example, the 2007 permit requires Permittees to implement an educational program. Among other things, it specifies particular topics on which Permittees must educate staff and the public. (See AR 3885-88.) The Commission reviewed these requirements and concluded "nearly all of the educational topics in part D.5.a. [of the 2007 permit] are the same as those in the 2001 permit." (AR 3889.) It then listed and described four such topics. Finally, it held, "Because the requirements to educate the target communities on these topics was in the 2001 permit, as well as the 2007 permit, the Commission finds that doing so . . is not a *new* program or higher level of service." (AR 3889, emphasis added.) Thus, the costs of complying with these particular

requirements are not reimbursable.

The State does not challenge any of the Commission's factual findings that the challenged requirements were not required by the 2001 permit. (See *Von Durjais v. Board of Trustees* (1978) 83 Cal.App.3d 681, 687 [any finding which is not specifically attacked is to be accepted as true].) Instead, it makes what is essentially a legal argument. It notes that Permittees received their first permit in 1990, and that permit was renewed in 2001. The 2007 permit at issue in this case is thus Permittees' third permit. According to the State, *all* three permits have required Permittees to reduce their discharge of pollutants to the "maximum extent practicable," which is the standard imposed by the Clean Water Act. (33 U.S.C. § 1342, subd. (p)(3)(B)(iii).) Although the State tacitly acknowledges that the 2007 permit imposes certain requirements that were not in prior permits, it argues that fact does not demonstrate those requirements are new. Instead, it simply demonstrates that the "maximum extent practicable" standard may change in light of things like new technologies, a better understanding of storm water pollution, and lessons learned from prior programs. In effect, the State argues the "maximum extent practicable" standard is the *only* relevant requirement, and that requirement is not new. It cites no legal authority to support this argument and the Court is not aware of any such authority. The State thus fails to convince that the Commission erred when it determined the challenged permit requirements are "new" by comparing them to the requirements in the 2001 permit.

2. Permittees' Fee Authority

Section 17556 of the Government Code provides the Commission "shall not find costs mandated by the state" if "[t]he local agency . . . has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (Gov. Code § 17556, subd. (d).) This provision recognizes that fact that the Constitutional reimbursement requirement "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 . . . 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, emphasis added.) Section 17556 "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 [because] the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes." (*Id.*)

Thus, even if the state mandates a new program or higher level of service, reimbursement is not required if the local government has authority to levy charges or fees sufficient to pay for the new program or higher level of service. The term "authority" refers to "statutory" or "legal" authority, and not to "practical ability in light of surrounding economic circumstances." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 182, 188-89.) Whether an entity has authority to levy charges or fees sufficient to pay for the mandated program is thus a question of law, not a question of fact. (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at 195 ["the inquiry into fee authority constitutes an issue of law rather than a question of fact."]; *Connell, supra*, 59 Cal.App.4th at 402 [authority to levy fees is "a question of law"].)

Here, the Commission determined that Permittees *lack* authority to levy fees sufficient to pay for *six* of the challenged requirements, and that reimbursement is thus required.[6] The Commission reached this determination via a two-step process.

First, the Commission found Permittees *did* have "regulatory fee authority" under the "police power" to impose fees to cover the costs of six of the challenged requirements. (AR 3925, 3927.) If the Commission had stopped there, reimbursement would *not* be required.

The Commission did not stop there, however. Instead, it went on to conclude that Permittees' authority to impose fees was effectively nullified because, under Proposition 218, such fees are subject to voter approval. (AR 3928.) Proposition 218 was a voter initiative passed in November 1996 that added Article XIII D to the California Constitution. (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1203.) Among other things, it places certain substantive and procedural requirements on property-related assessments, fees or charges. As relevant here, it provides, "*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 to and approved by a majority vote of the property

[6] The Commission also found Permittees have authority to levy fees sufficient to pay for two of the challenged requirements (the hydromodification plan and the low-impact development activities), and that reimbursement is thus not required for those two requirements. That portion of the Commission's decision is the subject of Permittees cross-petition, and is discussed below.

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." (*Id.*, § 6, subd. (c), emphasis added.) Citing *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, the Commission held a fee imposed by Permittees in the circumstances of this case would *not* be for sewer or water services within the meaning of Article XIII D, and that voter approval thus was required. (AR 3928.)

The State challenges the Commission's conclusions about Permittees' fee authority on two grounds. First, it argues that MS4-related fees are fees for sewer and water service and are thus exempt from Proposition 218's voter approval requirements. Second, it argues that, even if such fees are not exempt, voter approval requirements do not nullify an agency's authority to levy fees.

A. Fees for "Sewer" and "Water" Service – *Howard Jarvis* and SB 231

Howard Jarvis involved a challenge to a "storm drainage fee" imposed by the City of Salinas in order to fund its efforts "to reduce or eliminate pollutants contained in storm water, which was channeled into a drainage system separate from the sanitary and industrial waste systems," as required by the Clean Water Act. (*Howard Jarvis*, *supra*, 98 Cal.App.4th at 1353.) The fee was imposed on owners of developed parcels of property, and the amount "was to be calculated according to the degree to which the property contributed to runoff to the City's draining facilities," which, in turn, was measured by the amount of the property's "impervious area." (*Id.*) Although the case does not use the term, the drainage system it describes appears to be an MS4, and the fees imposed by the City in *Howard Jarvis* thus appear to be precisely the type of fees Permittees might impose in this case.

Plaintiff taxpayers challenged the imposition of the fee, arguing it was subject to voter approval under Proposition 218. The City argued the fee was exempt from those voter approval requirements because it was for "sewer" or "water" services. The court disagreed. It construed the term "sewer" narrowly, and held it referred solely to "sanitary sewerage" (i.e., the system that carries "putrescible waste" from residences and businesses), and did not encompass a sewer system designed to carry only storm water.[7] (*Id.* at 1357-58.) It also held the term "water

[7] Its analysis was rather cursory, and it acknowledged that some dictionaries and statutes defined the term "sewer" in ways that would include storm drainage systems. (*Id.* at 1356 fn.5 [citing

services" meant "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." (*Id.* at 1358.)

Howard Jarvis was decided in 2002, and the Commission's decision was issued eight years later in 2010. The State argues that subsequent legislation has effectively overturned *Howard Jarvis*. In 2014, the Legislature passed Assembly Bill 2043, which amended the definition of "water" for purposes of Article XIII D to mean "water from any source." (Gov. Code § 53750, subds. (k), (n).) More importantly for this case, in 2017, the Legislature enacted Senate Bill 231, which defined the term "sewer" for purposes of Article XIII D as including systems that "facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters." (Gov. Code § 53750, subd. (k), emphasis added.) The Legislature's lengthy findings and declarations make it clear that it enacted SB 231 to overturn *Howard Jarvis* because it thought the case was wrongly decided. (Gov. Code § 53751.) The State argues SB 231 has rendered the Commission's reliance on Howard Jarvis "mistaken." (Opening at 23:13.)

Even if the Court assumes that the State is correct, and that SB 231 has overturned *Howard Jarvis*, it finds nothing "mistaken" about the Commission's reliance on that case when it issued its decision. The Commission issued its decision in 2010, and it was not free to disregard relevant case law – including *Howard Jarvis* – on the theory that the Legislature might change that law in the future. SB 231 was enacted in 2017, and went into effect January 1, 2018. How can a law that went into effect in 2018 retroactively invalidate a decision issued in 2010? The State never addresses this question, and the short answer is that it cannot.

In its supplemental brief, the State briefly attempts to argue that SB 231 is retroactive. (Supp. Br. at 3:22 to 4:3.) Its eight lines of argument on the issue are insufficient to rebut the presumption that "statutes operate prospectively only," absent clear evidence that the Legislature intended them to operate retroactively. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840; see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-94, 1207-09.) This is particularly true where, as here, the State's opening brief is devoid of *any* reference

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Webster's Third New International Dictionary and the American Heritage Dictionary], fn6 [citing Public Utilities Code section 230.5].)

to retroactivity. In its reply brief, the State responds to an argument made by Permittees on a different issue by referring to its opposition to Permittees' cross-petition. (See State Reply. at 12:3-5.) In that opposition, the State argued an initiative enacted in seven months after the Commission's decision in this case "cannot retroactively apply to invalidate the Commission's decision," and "cannot form the basis for a writ reversing the Commission's decision." (State Opp. at 15:10-15 and fn.6.) The Court reaches the same conclusion regarding the applicability of SB 231: it cannot retroactively apply to invalidate the Commission's decision and cannot form the basis for a writ reversing that decision. The State therefore fails to convince the Court that the Commission erred in holding a fee imposed by Permittees in the circumstances would be subject to Proposition 218's voter approval requirements.

B. Voter Approval

The State also challenges the Commission's conclusion that local agencies do not have fee authority within the meaning of Government Code section 17556 if the fee is subject to a voter approval requirement. The Commission held:

> Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556, subdivision (d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle . . . but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program.

(AR 3929, internal quotes omitted.) The State challenges that conclusion. It fails to convince the Commission erred in its conclusion.

The State's argument is based primarily on *Connell v. Superior Court*, *supra*, which held "authority" meant "right or power" and was not concerned with a local government's "practical ability" to levy fees "in light of surrounding economic circumstances." (*Connell*, *supra*, 59 Cal.App.4th at 401.) Although not entirely clear, it appears the State contends that, under *Connell*, Permittees had to at least try to obtain voter approval before reimbursement would be required. (See Opening at 24:15-21.) A similar (albeit not identical) contention, however, was recently rejected in *Paradise Irrigation District*, *supra*, 33 Cal.App.5th at 195 ["fee authority is not controlled by whether the Water and Irrigation Districts have 'tried and failed' to levy

fees."].)[8]

To the extent the State argues that a voter approval requirement is more akin to a practical hurdle than a legal hurdle, it fails to convince. As the Commission found, where voter approval is required, a local agency lacks the legal authority to levy fees without that approval. Although not directly addressed by *Paradise Irrigation District*, that case provides support for the Commission's conclusion because it distinguished between "majority *protest* procedures" that occur "***after***" fees are imposed, and "voter-*approval* requirements" which must be met "***before***" fees are imposed. (*Paradise Irrigation District, supra*, 33 Cal.App.5th at 192, italics in original, bold italics added.)

PERMITTEES' CROSS-PETITION

The Commission found Permittees have authority to levy fees sufficient to pay for *two* of the challenged permit requirements: (1) development of a hydromodification management plan (HMP); and (2) development of low impact development (LID) standards and best management practices. (AR 3930-32.) Like the parties, the Court will generally refer to these as the HMP and LID requirements.

Hydromodification refers to "the change in the natural watershed hydrologic process and runoff characteristics . . . caused by urbanization or other land use changes that result in increased stream flows and sediment transport." (AR 3864.) Permittees are required to collaboratively develop and implement a hydromodification management plan to "manage increases in runoff discharge rates and durations from Priority Development Projects, where such rates and durations are likely to cause increased erosion of channel beds and banks, sediment

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[8] *Paradise Irrigation District* was decided after this case was fully briefed, and both sides were given the opportunity to submit additional briefs to discuss its applicability, if any. The issue in *Paradise Irrigation District* was whether Proposition 218's majority protest procedures negated a local agency's authority to levy fees. The court held they did not. Instead, the majority protest procedures simply instituted a "power-sharing arrangement" between water districts and property owners affected by water fees, but that arrangement "does not constitute a revocation of the [districts'] fee authority" in the first instance. *(Paradise Irrigation Dist., supra*, 33 Cal.App.5th at 194-95.)

Paradise Irrigation only addressed Proposition 218's majority protest procedures, and the State does not claim its holding would also apply to Proposition 218's voter approval requirements. Instead, it renews its argument (discussed above) that any fees in this case would *not* be subject to Proposition 218's voter approval requirements because, following the passage of SB 231, they are clearly fees for sewer services.

pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force." (*Id.*) Priority Development Projects include most new development projects and redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on already developed sites. (AR 267-68; 3863-64.) Low impact development refers to "[a] storm water management and land-use development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions." (AR 3838.) Permittees are required to review and update their Standard Urban Storm Water Mitigation Plans (SUSMPs) and add low impact development best management practices for Priority Development Projects. The HMP and LID requirements thus both relate to development and seek to prevent or mitigate the increased runoff (and concomitant water pollution) such development can cause.

The Commission identified three sources of Permittees' authority to levy fees to pay for the HMP and LID requirements: (1) the Mitigation Fee Act; (2) the police power; and (3) "potentially" the Watershed Improvement Act of 2009. Permittees argue none of these three sources give them authority to levy fees sufficient to pay for the HMP and LID requirements. At the hearing, Permittees and the State agreed the Court need not reach the Watershed Improvement Act issue. Accordingly, the Court does not reach it.

A. Mitigation Fee Act

The Mitigation Fee Act, Government Code § 66000 et seq., authorizes local agencies to impose development fees if certain requirements are met. As defined by the Act, a development fee is:

> *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 for processing applications for governmental regulatory actions or approvals[.]

(Gov. Code § 66000, subd. (b), emphasis added.) "[A] fee does not become a 'development fee' simply because it is made in connection with a development project. Rather, approval of the development project must be conditioned on payment of the fee." (*California Building Industry*

Assn. v. San Joaquin Valley Air Pollution Control Dist. (2009) 178 Cal.App.4th 120, 130, internal quotes and cites omitted.)

The Commission found: "Because local agencies may make development of [P]riority [D]evelopment [P]rojects conditional on the payment of a fee, the Commission finds that [Permittees] have fee authority, governed by the Mitigation Fee Act, that is sufficient . . . to pay for the hydromodification management plan and low-impact development activities." (AR 3934.) In other words, (1) Priority Development Projects may increase storm water runoff and the pollution such runoff can cause, (2) the HMP and LID requirements are meant to mitigate this increased runoff and pollution, (3) Permittees may charge a fee to developers who want to develop such runoff- and pollution-causing Projects as a condition of approving such Projects, and (4) this fee may be used to defray the costs of the HMP and LID requirements. Permittees challenge this finding.

As noted above, a development fee under the Act is one that is imposed to "defray[] all or a portion of the cost of *public facilities* related to the development project." (Gov. Code § 66000, subd. (b), emphasis added.) "'Public facilities' includes public improvements, public services, and community amenities." (*Id.*, subd. (d).) Permittees argue "[t]his definition is limited to *physical assets* such as public works or equipment." (Opening at 15:12-13, emphasis added.) According to Permittees, the HMP and LID requirements require them to establish a regulatory program, which is not a physical asset. They argue the Act does not authorize them to impose development fees "to pay for regulation writing" or to pay for the cost "of writing land use plans such as the HMP and LID." (Opening at 17:8; Reply at 14:21.) Presumably, Permittees believe development fees may only be used to defray the costs of things like building a new sewer system or making improvements to an existing sewer system, because a sewer system is a physical asset.

The Court finds the term "public facilities" is not limited to physical assets. The Act's definition of "public facilities" does not mention physical assets, and, more importantly, *it expressly includes "public services."* (Gov. Code § 66000, subd. (d).) Public services are not physical assets. Permittees' argument effectively reads the phrase "public services" out of the Act – a construction which is to be avoided. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-87 [statutes should be construed to "accord[] significance, if possible, to every word" and "[a] construction making some words surplussage is

to be avoided."].) The Commission found the purpose of the permit in general and the HMP and LID requirements in particular "is to prevent or abate pollution in waterways and beaches in San Diego County." (AR 3934.) The Commission also found pollution prevention or abatement provides a public service, which falls within the Act's definition of a public facility. (AR 3935.) Permittees fail to convince the Court that the Commission erred in so finding.

Permittees cite *County of San Luis Obispo v. Abalone Alliance* (1978) 178 Cal.App.3d 848 for the proposition that "absent state legislation, local governments cannot recover the costs of providing public services." (Opening at 15:26-27.) A fair reading of that case, however, shows that it stands for the much narrower proposition that, absent state legislation, local governments cannot recover the costs of police, fire, and emergency services from a tortfeasor whose negligence created the need for such services. (*County of San Luis Obispo*, *supra*, 178 Cal.App.3d at 858-59.) *County of San Luis Obispo* thus appears irrelevant. Moreover, and as just discussed, the Act expressly authorizes local governments to charge fees to defray the costs of "public facilities," which is defined to include "public services." (Gov. Code § 66000, subd. (d).)

Permittees also note the Act requires it to determine "how there is a reasonable relationship between the fee's use and the type of development project for which the fee is imposed." (Gov. Code § 66001, subd. (a).) They argue any development fee they might impose to defray the costs of the HMP and LID requirements will violate these "nexus requirements . . . because they will place the full fee of the program onto future development even though these developments do not trigger the need for meeting these requirements, and future development will bear the full burden of the cost, and so the fee will not be roughly proportionate. As a result, such a fee would exceed the cost of providing a service or be levied for general revenue purposes and would be a tax. (Cal. Const. art. XIII C, § 1, subd. (e); *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th at 597." (Opening at 14:14-19.) That is the extent of their argument on this issue. Because Permittees do not clearly explain how either Article XIII C of the California Constitution or *Isaac* are relevant here, the Court disregards this argument.[9] (See, e.g., *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["citing cases without any discussion of their

[9] Article XIII C, section 1, subdivision (e) defines the word "tax," and *Isaac* hold that "fees can become special taxes subject to the two-thirds vote requirement of Proposition 13 . . . if . . . the fee exceeds the reasonable cost of providing the service or the regulatory activity[.]". (*Isaac*, *supra*, 66 Cal.App.4th at 597.)

application to the present case results in forfeiture."]; *Woods v. Horton* (2008) 167 Cal.App.4th 658, 677 ["A court need not consider an issue where reasoned, substantial argument and citation to supporting authorities are lacking."].) The Court also notes that *Isaac* did not involve the Mitigation Fee Act.

Permittees also argue the Act does not allow them to impose development fees for general revenue purposes. This is true, (see Gov. Code § 66008), but Permittees fail to convince that any fees imposed in this case would be for general revenue purposes.

B. Regulatory Fee Authority/Police Powers

The Commission found Permittees have "regulatory fee authority" under the "police power" to impose fees on developers to cover the costs of the HMP and LID requirements. (AR 3924-27, 3932.) As explained by the court in *California Building Industry Association v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 130:

> [W]hen a fee is charged for the associated costs of regulatory activities and does not exceed the reasonable cost of carrying out the purposes and provisions of the regulation, it falls within the category of a *regulatory fee*. [Citation.] Regulatory fees are not dependent on government-conferred benefits or privileges and are *imposed under the police power*.

(Emphasis added; see also *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 661 ["the power to impose valid regulatory fees is not dependent on any legislatively authorized taxing powers but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."]; Cal. Const., art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."].) The California Supreme Court's decision in *Sinclair Paint v. State Board of Equalization* (1997) 15 Cal.4th 886 – which the Commission cited several times – is instructive.

Sinclair Paint involved a challenge to a fee imposed pursuant to the Childhood Lead Poisoning Prevention Act ("the Act"). The Act provided evaluation, screening, and medically necessary follow-up services for children who were deemed potential victims of lead poisoning. The services provided by the Act were entirely supported by "fees" assessed on manufacturers and other persons contributing to environmental lead contamination. The issue in *Sinclair Paints* was whether the *fee* was actually a *tax* enacted for the purpose of increasing revenues within the

meaning of Proposition 13.[10] The court held it was not a tax.

The court began its analysis by noting, "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." (*Sinclair Paint*, *supra*, 15 Cal.4th at 874.) The court then noted a long line of cases holding that "regulatory fees, imposed under the police power" are *not* taxes. (*Id.* at 874.) Finally, the court held that the Act imposed a bona fide regulatory fee rather than a tax:

> [W]e believe that [the Act] 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.

(*Id.* at 877, italics added.) The Commission found Permittees could impose something akin to a "mitigating effects" fee here – i.e., a regulatory fee imposed on developers "to help to prevent or mitigate [water] pollution" caused by development. (AR 3925.) Permittees fail to convince the Commission erred in so finding.

Permittees argue that *Sinclair Paint* "was largely superseded in 2010 by Proposition 26." (Opening at 17:24; see also 18:21-23.) Because they do not explain why or provide any citation to authority, the Court does not consider this argument.[11] (See, e.g., *Woods v. Horton* (2008) 167

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[10] It if was a tax it was invalid because the Act was not passed by a two-thirds majority. (*Sinclair Paint*, *supra*, 15 Cal.4th at 872-73.)

[11] In a footnote, Permittees state they will discuss the impact of Proposition 26 on this case. (Opening at 13, fn.4.) They fail to meaningfully do so. On pages 17 and 18 of the opening brief, they state *Sinclair Paint* was "largely superseded" by, or "limited" by, Proposition 26, but they do not explain or discuss what Proposition 26 actually did or said, or how it effects this case. On page 22, they note that Proposition 26 added section 1(e) to article XIII C of the California Constitution, they briefly describe section 1(e), and they state subsection (2) of section 1(e)

Cal.App.4th 658, 677 ["The mere assertion of a statutory or constitutional violation, followed by simply a citation to the statute or constitutional provision, does not merit a judicial response."].) They also fail to explain how a voter initiative that was enacted eight months *after* the Commission issued its decision and that is not retroactive would nonetheless affect the merits of that decision, which provides another reason to disregard this argument. (See *Brooktrails Township Community Services District v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 205-07 [holding Proposition 26 took effect the day after it was approved by the voters (i.e., on November 3, 2010), and does not apply retroactively].)

Alternatively, Permittees argue that even if *Sinclair Paint* is still good law, it does not provide them with authority to impose regulatory fees to cover the costs of the HMP and LID requirements. They acknowledge that, under *Sinclair Paint*, they have authority to impose a regulatory fee to cover "the cost of environmental damages" caused by those on whom the fee is imposed, or to "'clean up,' in a health or environmental sense, the harm caused by the regulated industry." (Opening at 17:25-26, 18:13-14.) They claim, however, that imposing a fee to pay for pollution abatement is fundamentally different than imposing a fee to pay for establishing a regulatory program whose purpose is to abate pollution. Or as they put it in their reply, they "cannot impose a regulatory fee to pay for writing the HMP and LID standards[.]" (Reply at 11:27.) They cite no authority to support this contention.

In their reply, Permittees note that a valid regulatory fee must meet two requirements. It must be 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," which Permittees refer to as the "allocation requirement." (*Sinclair Paint, supra*, 15 Cal.4th at 878; see also Reply at 12:2-12.) And it must "not exceed the reasonable cost of providing services . . . for which the fee is charged," which Permittees refer to as the "aggregate cost requirement." (*San Diego Gas & Electric, supra*, 203 Cal.App.3d at 1146; see also Reply at 12:2-12.) Permittees argue any fee imposed to pay for the cost of the HMP and LID requirements could not meet the allocation requirement because there is no established set of payors and no "unit-based means" for allocating costs on an ongoing basis. They also argue a fee cannot meet the aggregate cost requirement because if the fee is imposed on all developers, at some point, the fees collected will

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"prohibits charging a fee for a service that is also of benefit to other who are not charged; and in a footnote. That is the extent of Permittees' discussion of Proposition 26.

exceed the costs of the HMP and LID requirements. (See generally, Reply at 12.) The Court sees no mention of the allocation or aggregate cost requirements in Permittees' opening brief. Permittees also fail to cite where in its decision the Commission addressed this issue. The Court thus declines to consider this argument.

CONCLUSION

For the reasons stated above, the petition and the cross-petition are both denied.

Counsel for both parties are directed to jointly prepare a formal judgment, incorporating this order as an exhibit, and submit it to the Court for signature and entry of judgment.

Dated: 2-06, 2020

Laurie M. Earl
Judge of the Superior Court of California,
County of Sacramento

ATTACHMENT 1-F

44 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.)

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

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.[1] 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. [2] Defendants contested both arguments.

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.

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 retroactivity 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). [3]

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.

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 liablity 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 liablity 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.[4] 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.

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."

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 liablity 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,[5] 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,[6] 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.[7] 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.

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 that 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].)

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.[8] 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.

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?"

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 ambigious 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.[9] 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.

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].)

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,[10] 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.

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.)

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.) [11] 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.)

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.)

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.[12] Although each party in this case attempts to stretch the language of isolated portions of the statute to support the position each favors,[13] 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.

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].)

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. [14] (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.) [15]

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.

(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, [16] 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.

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.)

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 liablity 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.) [17]

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.)

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. [18]

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.)

(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.[19] 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.

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.

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. [20] ***1218**

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.

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. [21]

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.)

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, [22] 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 liablity 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.

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).)

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 [23] 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.)

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.)

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].)[24] ***1223**

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.

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) [25] - 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.

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.)

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, their 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 signficant 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.[26] ***1226**

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.“].)

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].) [1] 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.

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.

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].)[2] 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.)

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.)

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.[3] 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.

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.

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. [4]

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.

Eagleson, J., and Anderson (Carl W.), J., [*] concurred.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Acting Chairperson of the Judicial Council.

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

President, Los Angeles City Council

LESLIE BROWN
President, County Supervisors Association of California

Supervisor, Kings County

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ATTACHMENT 1-G

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:

city adequately identified facilities to be paid for with community/recreation facility impact fee under city ordinance;

city adequately identified facilities to be paid for with community/recreation facility impact fee under Mitigation Fee Act;

existence of carryover balance did not render community/recreation facility impact fee invalid;

community/recreation facility impact fee was not preempted by the Quimby Act;

park land impact fee resolutions were not preempted by Quimby Act;

park land impact fee resolution was not inconsistent with city general plan;

there was adequate nexus between police impact fee and burden caused by development;

initial capital costs of police vehicles and equipment were properly included in calculating police impact fee;

city adequately identified public facilities to be paid for with police impact fee;

there was adequate nexus between municipal facilities impact fee and burden caused by development;

city adequately identified public facilities to be paid for with municipal facilities impact fee; but

there was no nexus between fire protection impact fee and burden caused by development in service area where facilities were already in place; but

there was adequate nexus between fire protection impact fee and burden caused by development in service area where new fire station would be required;

initial capital costs of vehicles and equipment were properly included in calculating garbage collection impact fee;

segregating funds by facility category rather than by project was proper; and

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.

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 [1], § 66000, et seq.).

1 All further statutory references are to the Government Code.

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.*

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** 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.)

***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.)

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.)

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.

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."

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.

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.) [2]

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.

b. The community/recreation facility impact fee is not preempted by the Quimby Act.

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."

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.*

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.

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.

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.*)

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.

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.

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.

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.

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.

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.

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.

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.

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.

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).

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

ATTACHMENT 1-H

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 allgees 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 exercis 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. Sponenbarger,* 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; *Cheseboro 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 forseeable. 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**

ATTACHMENT 1-I

78 F.3d 1523
United States Court of Appeals,
Eleventh Circuit.

Terence 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.
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April 1, 1996.
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Rehearing and Suggestion for Rehearing En 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.

***1524** Appeals from the United States District Court for the Northern District of Georgia.

Attorneys and Law Firms

Ralph Leland Taylor, III, Webb Tanner & Powell, Anthony O.L. Powell, Robert Jackson Wilson, Steven A. Pickens, Lawrenceville, GA, for appellants.

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.

[*] Honorable Wilbur D. Owens, Jr., U.S. District Judge for the Middle District of Georgia, sitting by designation.

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.[1] 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.

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).

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"[2] 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.*

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.

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.[3] 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.

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).

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,[4] 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.

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.

Hughey's factual allegations were that JMS's activities caused two watercourses to become muddied during rainfall events.[5] The first of these watercourses is a small stream[6] 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.

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.

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.[7] JMS then answered the complaint ***1528** denying liability under the CWA and demanding a jury trial.

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.

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.[8] Defendant in that order was instructed not to

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.

> 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.[9] 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).

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).

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.[10] JMS has not objected, however, to the fact that it did not receive a jury trial on the question of liability.

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.

IV. STANDARD OF REVIEW

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.

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).

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 SESCA. 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 permitees 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).

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).[11] "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).

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.

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).

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. [12]

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.

C. Award of Attorney Fees and Costs

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. [13]

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.

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 Envtl. L. Rep. 20,924

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ATTACHMENT 1-J

47 Cal.4th 1258
Supreme Court of California

In re E.J. on Habeas Corpus.
In re S.P. on Habeas Corpus.
In re J.S. on Habeas Corpus.
In re K.T. on Habeas Corpus.

Nos. S156933, S157631, S157633, S157634.
|
Feb. 1, 2010.

Synopsis

Background: Registered sex offenders who were on parole for nonsex offenses filed petitions for writ of habeas corpus challenging parole condition forbidding them from residing within 2000 feet of any school or park where children regularly gather.

Holdings: The Supreme Court, Baxter, J., held that:

parole condition did not violate statute providing that Penal Code provisions are not retroactive unless expressly so declared;

parole condition did not violate ex post facto provisions; and

offenders' as-applied constitutional claims were not sufficiently established by offenders' declarations and materials for the Supreme Court to resolve.

Petitions denied in part and transferred in part with directions.

Werdegar, J., filed concurring opinion.

Moreno, J., filed dissenting opinion, in which Kennard, J., joined.

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Opinion

BAXTER, J.

*1263 **34 On November 7, 2006, the voters enacted Proposition 83, the Sexual Predator Punishment and Control Act: Jessica's Law (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006); hereafter Proposition 83 or Jessica's Law). Proposition 83 was a wide-ranging initiative intended to "help Californians better protect themselves, their children, and their communities" (*id.,* § 2, subd. (f)) from problems posed by sex offenders by "strengthen[ing] and improv[ing] the laws that punish and control sexual offenders" (*id.,* § 31).

Among other revisions to the Penal Code,[1] Proposition 83 amended section 3003.5, a statute setting forth restrictions on where certain sex offenders subject to the lifetime registration requirement of section 290[2] may reside. New subdivision (b), added to section 3003.5, provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b) (section 3003.5(b)).) The new residency restrictions took effect on November 8, 2006, the effective date of Proposition 83.

1 All further undesignated statutory references are to the Penal Code.

2 Section 290 imposes upon individuals convicted of certain sex offenses a lifetime requirement that they register with law enforcement in the communities in which they reside.

Subsequent to Proposition 83's enactment, the California Department of Corrections and Rehabilitation (CDCR) sought to enforce section 3003.5(b) as a statutory parole condition by serving notice on registered sex offenders released on parole after November 8, 2006, including these petitioners, ***1264** requiring them to comply with the mandatory residency restrictions or face revocation of parole and reincarceration.

The unified petition for writ of habeas corpus here before us was filed by four registered sex offender parolees subject to the new mandatory residency restrictions. In each case, the petitioner was convicted of a sex offense or offenses, for which lifetime registration was required pursuant to section 290, well before the passage of Proposition 83. In each case, the petitioner was released from custody on his current parole after November 8, 2006, the effective date of the new law.

At the threshold, petitioners contend that enforcement of section 3003.5(b)'s residency restrictions as to them constitutes an impermissible retroactive application of the statute, in contravention of the general statutory presumption that Penal Code provisions operate prospectively (§ 3), because it attaches new legal consequences to their convictions of registrable sex offenses suffered prior to the passage of Proposition 83. In a closely related argument, petitioners contend that such retroactive enforcement of section 3003.5(b) further violates the ex post facto clauses of the United States and California Constitutions insofar as it " 'makes more burdensome the punishment for a crime, after its commission.' " *****169** (*Collins v. Youngblood* (1990) 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30.) Petitioners also contend section 3003.5(b) is an unreasonable, vague, and overbroad parole condition that infringes on various federal and state constitutional rights, including their privacy rights, property rights, right to intrastate travel, and substantive due process rights under the federal Constitution.

We issued orders to show cause with respect to each petitioner's claims, making them returnable before this court. We stayed enforcement of section 3003.5(b) as to these four named petitioners and consolidated their actions for purposes of briefing and oral argument in this court.

We have determined that petitioners' retroactivity and ex post facto claims, common to all four petitioners, can be addressed on the record currently before us. We conclude they lack merit and must be denied.

Petitioners' remaining claims—that section 3003.5(b) is an unreasonable, vague and overbroad parole condition that infringes on a ****35** number of their fundamental constitutional rights—present considerably more complex "as applied" challenges to the enforcement of the new residency restrictions ***1265** in the respective jurisdictions to which each petitioner has been paroled. Petitioners are not all similarly situated with regard to their paroles. They have been paroled to different cities and counties within the state, and the extent of housing in compliance with section 3003.5(b) available to them during their terms of parole—a matter critical to deciding the merits of their "as applied" constitutional challenges—is not factually established on the declarations and materials appended to their petition and traverse. With regard to petitioners' remaining constitutional claims, evidentiary hearings will therefore have to be conducted to establish the relevant facts necessary to decide each claim.

The trial courts of the counties to which petitioners have been paroled are in the best position to conduct such hearings and find the relevant facts necessary to decide the remaining claims in their respective jurisdictions. These would include, but are not necessarily limited to, establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest "public or private school, or park where children regularly gather" (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities

to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in those particular jurisdictions; and a complete record of the protocol CDCR is currently following to enforce section 3003.5(b) in those jurisdictions consistent with its statutory obligation to "assist parolees in the transition between imprisonment and discharge." (§§ 3000, subd. (a)(1), 3074.)

Accordingly, the petition for writ of habeas corpus and orders to show cause previously issued with regard to each petitioner's remaining claims shall be ordered transferred to the appropriate Courts of Appeal with directions that each matter be transferred to the trial court in the county to which the petitioner has been paroled, for further proceedings consistent with the views expressed herein.

I. STATEMENT OF THE CASE

A. Proposition 83 and CDCR's enforcement of section 3003.5(b)

Proposition 83 was submitted to the voters on the November 7, 2006 ballot. The *****170** purpose of the initiative was described in section 2, which explains that "[s]ex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon," that they "prey on the most innocent members of our society," and that "[m]ore than two-thirds of the victims of rape and sexual assault are under the age of 18." (Prop. 83, § 2, ***1266** subd. (b).) Section 2 further declares that "Californians have a right to know about the presence of sex offenders in their communities, near their schools, and around their children" (*id.,* subd.(g)), and that "California must also take additional steps to monitor sex offenders, to protect the public from them, and to provide adequate penalties for and safeguards against sex offenders, particularly those who prey on children." (*Id.,* subd. (h).) Section 2 also states, "It is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses." (*Id.,* subd. (f).)

As explained in the official ballot pamphlet, Proposition 83 sought to achieve its proponents' goal of creating "predator free zones around schools and parks to prevent sex offenders from living near where our children learn and play" through the enactment of mandatory residency restrictions in the form of an amendment to section 3003.5, a statute setting forth restrictions on where certain sex offenders subject to the lifetime registration requirement of section 290 may reside. (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) argument in favor of Prop. 83, p. 46 (Voter Information Guide).) As noted, the initiative added new subdivision (b) to section 3003.5, making it "unlawful for any person for whom registration is required ****36** pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5(b), added by Prop. 83, § 21.)

On August 17, 2007, the Division of Adult Parole Operations (DAPO) of CDCR issued Policy No. 07–36, pertaining to the enforcement of section 3003.5(b) upon parolees. (CDCR, Policy No. 07–36: Implementation of Prop. 83, aka Jessica's Law (Aug. 17, 2007) (Policy No. 07–36).) Under that policy, section 2616 of title 15 of the California Code of Regulations, setting forth grounds for revocation of parole, was revised to add "[v]iolation of the residency restrictions set forth in Penal Code Section 3003.5 for parolees required to register as provided in Penal Code Section 290," as a reportable ground for revocation of parole. (Policy No. 07–36, *supra,* p. 1; see Cal.Code Regs., tit. 15, § 2616, subd. (a)(15).) The revised policy was applicable to "all parolees required to register as sex offenders pursuant to PC Section 290, **released from custody on or after November 8, 2006,**" including the following parolee categories: "Initial [r]eleases," "Parole [v]iolators [w]ith a [n]ew [t]erm," "Parolees released after having ***1267** served a period of revocation," and "Parolees released from any other jurisdiction's custody...."[3] (Policy No. 07–36, at p. 1.)

3 On October 11, 2007, the CDCR issued a revised policy for the implementation of section 3003.5(b), requiring noncompliant parolees to either "immediately provide a compliant residence or declare themselves transient." (CDCR, Policy No. 07–48: Revised

Procedures for Jessica's Law Notice to Comply (Oct. 11, 2007) [amending Policy No. 07–36].)

Parole units were provided with two lists of registered sex offenders released on parole after November 8, 2006: those who were in compliance, and those who appeared to be out of compliance with the residency restrictions of section 3003.5(b). ***171 (Policy No. 07–36, *supra,* at p. 2.) Each parolee whose residence appeared to be out of compliance was to be served with a "Modified Condition of Parole Addendum" giving him 45 days within which to come into compliance with the residency restrictions or be subject to arrest and reincarceration for violating his parole. (*Id.,* at pp. 5, 9.)

B. Petitioners

Petitioners are four registered sex offender parolees subject to the new mandatory parole residency restrictions.[4] As noted, in each case the petitioner was convicted of a sex offense or offenses for which lifetime registration was required pursuant to section 290 well before the passage of Proposition 83. In each case, the petitioner was released from prison on his current parole (after serving his latest term in prison custody for a nonsex offense) after November 8, 2006, the effective date of section 3003.5(b). Each petitioner was thereafter served with a 45–day letter imposing the residency restrictions as an additional statutory condition of parole.

4 Petitioners requested that we permit their supporting declarations to be filed under seal and to otherwise not disclose their identities given the particular subject matter of these proceedings. In a departure from our usual practice (see Cal. Style Manual (4th ed.2000) § 5:9, pp. 179–180), we granted their request. Upon transfer of the petition and orders to show cause previously issued on all remaining claims to the lower courts, those courts are free to reevaluate the necessity of conducting further proceedings under seal and not disclosing the identities of petitioners.

1. E.J.

Petitioner E.J. was convicted of forcible rape (§ 261, subd. (2)) and robbery of an inhabited dwelling (former § 213.5, subd. (2)) in 1985 when he was 16 years old. The forcible rape conviction subjected him to the lifelong registration requirement of section 290. He served four years nine months in the California Youth Authority and was released in October 1989. In 1993, he was convicted of willful cruelty to a child (§ 273a, subd. (b)) and second degree robbery (§ 212.5). He served two years in prison for those offenses. In 2000, he was convicted of battery (§ 242) and possession of drug paraphernalia (Health & Saf.Code, § 11364). In 2004 he was convicted of failing to *1268 register under section 290, sentenced to prison, and paroled once again in August 2005. Thereafter, he suffered numerous additional parole violations and was returned to prison on three separate occasions. He was last released **37 from prison custody on parole in February 2007, after the effective date of section 3003.5(b).

According to his declaration, in September 2007, E.J. lived with his wife and their children in an apartment in San Francisco. He was informed by his parole agent that his residence was not compliant with section 3003.5(b) and that he would have to locate compliant housing by October 2, 2007, or face revocation of parole. Thereafter, because the original notice was defective, he was given an additional 10 days to comply. E.J. claims his parole agent initially told him there was no compliant housing in San Francisco, but subsequently told him there is a "small area near AT & T Park that is not within 2,000 feet of a school or park." He declares, "I cannot afford to live near AT & T Park, as it is one of the most expensive areas in San Francisco. In addition, I do not believe that I would be able to establish a secure residence near AT & T Park because I believe that some law enforcement officials would consider it a park where children regularly gather." At the time, he prepared ***172 his declaration, E.J. was unable to move into compliant housing and was preparing to declare himself homeless.

2. S.P.

In 1998, petitioner S.P., then a minor, was tried as an adult and convicted by guilty plea of rape where the victim (a 15–year–old girl) was prevented from resisting by reason of an intoxicating or controlled substance. (§ 261, subd. (a)(3).) He served three years eight months in prison and was released from custody on parole in August 2001. The rape conviction subjected S.P. to lifetime registration under section

290. In 2002, he was convicted of knowingly receiving or concealing stolen property (§ 496, subd. (a)), served an additional four years eight months in prison, and was paroled in August 2006. In early March 2007, S.P. was taken into custody and charged with a parole violation for driving the wrong way down a one-way street while in possession of an open container of alcohol. He pled no contest and was released from custody on parole to Santa Clara County on March 22, 2007, after the effective date of section 3003.5(b).

According to his declaration, in August 2007 S.P. was informed by his parole agent that he was in violation of the residency restrictions because the apartment where he lived with his mother was within 2,000 feet of a daycare facility. He was told that if he did not move by October 11, 2007, he would face parole revocation and return to prison. He asserts his parole agent told him that "it was my responsibility to find compliant housing and that he ***1269** could not provide me with any assistance." He asked to transfer his parole out of Santa Clara County but was told by his parole agent that the process would take at least 60 days, by which time he would be in violation of the residency restrictions. At the time he filed his habeas corpus petition, S.P. and his mother had been unable to locate compliant housing in Santa Clara County.

3. J.S.

In 1985, petitioner J.S. was convicted of indecent exposure in Texas pursuant to Texas Penal Code section 21.08, subdivision (a), which provides, "A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act." As a result of his conviction, he has been subject to the lifetime registration requirement of section 290 while residing in California. (See Pen.Code, §§ 290, subd. (c), 290.005, subd. (a).)

After coming to California, J.S. was convicted in 1990 of exhibiting or using a deadly weapon (§ 417, subd. (a)(1)); in 1991 of voluntary manslaughter (§ 192, subd. (a)); in 1999 and 2000 of battery against a current or former spouse, fiancée or cohabitant (§ 243, subd. (e)(1)); and in 2000 of willful infliction of corporal injury on a spouse or roommate (§ 273.5, subd. (a)). Following this last conviction and prison term, J.S. was released on parole to San Diego County in March 2006. In February 2007, his parole was revoked for failure to register. He was returned to prison ****38** and again released on parole in May 2007, after the effective date of section 3003.5(b).

According to his declaration, in August 2007 J.S. was informed by his parole agent that he would have to move from his San Diego County residence because it was within 2,000 feet of an elementary school and a park. J.S. asked if he could move to another state; his parole agent initially agreed to help him but thereafter told him the process to transfer his parole out of state could not be completed before he was *****173** required to find housing in compliance with section 3003.5(b), and that if he could not do so he would have to declare himself homeless or face parole revocation and return to prison. He thereafter lost his state funding to pay the rent for his noncompliant housing, could not locate compliant housing, and declared himself homeless in late September 2007.

4. K.T.

In 1990, petitioner K.T. was convicted of forcible rape (§ 261, subd. (2)) and forcible oral copulation (§ 288a, subd. (c)(2)), for which he served a five-year prison term, and which convictions subjected him to the registration ***1270** requirement of section 290. In 2001, he was convicted of felony grand theft (§ 487), returned to prison, and thereafter released on parole in January 2006. In June 2007, his parole was revoked based on his failure to register under section 290. Following his return to prison for the parole revocation, he was again released on parole to San Diego County in August 2007, after the effective date of section 3003.5(b).

According to his declaration, in August 2007, K.T. was served with formal notice that his residence was not in compliance with section 3003.5(b) because it was within 2,000 feet of an elementary school. At the time, K.T. was living with his disabled wife, for whom he provided care, in a house owned by them. At the time he submitted his declaration, K.T. was attempting to find compliant housing. He further indicates he filed an emergency grievance request with CDCR that was denied, with his appeal currently pending.

C. The petition for writ of habeas corpus

On October 4, 2007, E.J., S.P., J.S., and K.T. filed a unified petition for writ of habeas corpus seeking to temporarily and permanently enjoin CDCR from enforcing section 3003.5(b) against them as a statutory condition of their paroles. Petitioners advance a number of challenges to the statute. At the threshold, they contend that enforcement of section 3003.5(b) as to them constitutes an impermissible retroactive application of the statute, in contravention of the general statutory presumption that Penal Code provisions operate prospectively (§ 3), because it attaches new legal consequences to their convictions of registrable sex offenses suffered prior to the passage of Proposition 83. In a closely related argument, petitioners contend that such retroactive enforcement of section 3003.5(b) further violates the ex post facto clauses of the United States Constitution (art. I, § 10) and the California Constitution (art. I, § 9) because it " 'makes more burdensome the punishment for a crime, after its commission.' " (*Collins v. Youngblood, supra,* 497 U.S. at p. 42, 110 S.Ct. 2715.) Petitioners also contend section 3003.5(b) is an unreasonable, vague, and overbroad parole condition that infringes on various state and federal constitutional rights, including their privacy rights, property rights, right to intrastate travel, and their substantive due process rights under the federal Constitution.

On October 10, 2007, we issued an order staying enforcement of section 3003.5(b) as to these four petitioners. On December 12, 2007, we issued orders to show cause with respect to each petitioner, returnable in this court.

*1271 II. ANALYSIS

A. Section 3003.5(b) enforced as a mandatory parole condition

Section 3003.5(b) makes it "unlawful for any person for whom registration is required pursuant to Section 290 to reside ***174 within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5(b).) In the official ballot pamphlet, the proponents of the initiative measure told the voters the intent behind section 3003.5(b) **39 was to create "predator free zones around schools and parks to prevent sex offenders from living near where our children learn and play." (Voter Information Guide, *supra,* argument in favor of Prop. 83, at p. 46.) The Legislative Analyst told the voters that a violation of the new provision would constitute a parole violation for registered sex offenders on parole as well as a misdemeanor offense. (*Id.,* analysis of Prop. 83 by Legis. Analyst, at p. 44.)

Each petitioner before us is a paroled registered sex offender who specifically challenges CDCR's attempts to enforce the new statutory residency restrictions against him as a ground for revocation of his parole. Section 3003.5 of the Penal Code is found in part 3, title 1, chapter 8 (entitled "Length of Term of Imprisonment and Paroles") and, as the section's language reflects, its provisions are obviously intended to apply to "persons released on *parole.*" (§ 3003.5, subd. (a), italics added.) [5]

5 The further question whether section 3003.5(b) also created a separate new misdemeanor offense applicable to all sex offenders subject to the registration requirement of section 290, irrespective of their parole status, is not before us, as there is no allegation or evidence that these petitioners, or any other registered sex offenders, whether on parole or otherwise, have ever been separately charged with such an offense under the new provision.

For purposes of these habeas corpus proceedings initiated by paroled registered sex offenders against CDCR, we therefore view petitioners as a necessarily included subgroup within the statutory phrase "any person[s] for whom registration is required pursuant to Section 290" (§ 3003.5(b)), namely, those persons for whom registration is required pursuant to Section 290 who were released on parole after November 8, 2006, the effective date of Proposition 83.

B. Retroactivity

Petitioners first claim section 3003.5(b)'s residency restrictions are being impermissibly applied retroactively to them. Specifically, petitioners argue that because they committed the underlying sex offenses that gave rise to the requirement that they register for life pursuant to section 290 well before the *1272 voters enacted section 3003.5(b), the new

law retroactively attaches new legal consequences to their prior convictions. Insofar as Jessica's Law fails to explicitly state that any of its provisions are retroactive, petitioners contend that application of the new residency restrictions to them contravenes section 3 of the Penal Code, which provides, as a general matter, that "No part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.)

"[S]ection 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.' [Citation.]" (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, 246 Cal.Rptr. 629, 753 P.2d 585.) "[I]n 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." (*Id.* at p. 1209, 246 Cal.Rptr. 629, 753 P.2d 585.)

We conclude section 3 is not violated here. Each of these four petitioners *****175** was released from custody on his current parole and took up residency in noncompliant housing *after* section 3003.5(b)'s effective date. Under settled principles of law for determining whether a Penal Code provision is being applied prospectively or retroactively, it is clear that the new residency restrictions here in issue are being *prospectively* applied to petitioners.

Under its plain language, subdivision (b) applies to "any person for whom registration is required pursuant to Section 290." (§ 3003.5(b).) A convicted sex offender who becomes subject to the registration requirement of section 290 must register "for the rest of his or her life while residing in California, or while attending school or working in California ...." (§ 290, subd. (b).) Accordingly, under the plain language of section 3003.5(b), any convicted sex offender already subject to the lifetime registration requirement who is released from custody on parole, whether it be after serving a term in custody ****40** for an initial sex offense conviction, a new sex offense conviction, or a new nonsex offense conviction, becomes subject to the new mandatory residency restrictions for the duration of his parole term. Should he take up residency in noncompliant housing after his release from custody, he will then be subject to parole revocation for a violation of section 3003.5(b). It matters not, under a straightforward application of the language of the statute, whether the registered sex offender is being released on his current parole for a sex or nonsex offense. Since he is *already subject to the lifetime registration requirement of section 290,* that status, together with his act of moving into noncompliant housing upon his release from custody on parole after the effective date of Proposition 83, subjects him to the residency restrictions of section 3003.5(b). In contrast, under the dissent's interpretation of section 3003.5(b), all of the many thousands of registered sex offenders who ***1273** achieved that status prior to November 8, 2006, the effective date of Proposition 83, will enjoy a free lifetime pass from section 3003.5(b)'s residency restrictions, irrespective of their parole status.

Each of the four petitioners before us was convicted of one or more sex offenses requiring that he register for life (§ 290, subd. (b)) years before Jessica's Law was passed. However, each petitioner was not released from custody on his current parole until *after* the statute's effective date, and each thereafter took up residency in noncompliant housing, making him subject to a reportable parole violation under CDCR's Policy No. 07–36. CDCR takes the position that the statutory presumption against retroactivity of Penal Code provisions (§ 3) is not implicated where, as here, the new residency restrictions are being applied only to registered sex offenders who were released from prison custody on parole and who secured noncompliant housing *after* the statute's effective date. The relevant case law supports CDCR's position.

The applicable test for determining whether a statute is being applied prospectively or retroactively was explained in *People v. Grant* (1999) 20 Cal.4th 150, 83 Cal.Rptr.2d 295, 973 P.2d 72 (*Grant*). In that case we considered whether conviction of the crime of "continuous sexual abuse of a child" (§ 288.5, subd. (a)) for a course of conduct that included acts of child molestation committed both before and after section 288.5's effective date was a retroactive application of the statute. We first observed: "As the United States Supreme Court has recognized, 'deciding when a statute operates "retroactively" is not always a simple or mechanical task' (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 268, 114

S.Ct. 1483, 128 L.Ed.2d 229) ***176 and 'comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event' (*id.* at p. 270, 114 S.Ct. 1483). In exercising this judgment, 'familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.' (*Ibid.*)" (*Grant,* at p. 157, 83 Cal.Rptr.2d 295, 973 P.2d 72.)

We went on to explain, "In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 269–270 & fn. 23 [, 114 S.Ct. 1483]; see also *Rodriguez v. General Motors Corp.* (9th Cir.1994) 27 F.3d 396, 398; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 291[, 279 Cal.Rptr. 592, 807 P.2d 434]; *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7[, 255 Cal.Rptr. 412, 767 P.2d 679]; *People v. Weidert* (1985) 39 Cal.3d 836, 851[, 218 Cal.Rptr. 57, 705 P.2d 380].) Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. (*Travenol* *1274 *Laboratories, Inc. v. U.S.* (Fed.Cir.1997) 118 F.3d 749, 752; *McAndrews v. Fleet Bank of Massachusetts, N.A.* (1st Cir.1993) 989 F.2d 13, 16.) A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' (*Kizer v. Hanna, supra,* 48 Cal.3d at p. 7[, 255 Cal.Rptr. 412, 767 P.2d 679].)" (*Grant, supra,* 20 Cal.4th at p. 157, 83 Cal.Rptr.2d 295, 973 P.2d 72.)

**41 We concluded in *Grant,* "Here, defendant was convicted of *continuous* sexual abuse, as defined in section 288.5, after the court instructed the jury to return a verdict of guilty only if it found that one of the required minimum of three acts of molestation occurred after section 288. 5's effective date. In other words, defendant could be convicted only if the course of conduct constituting the offense of continuous sexual abuse was completed after the new law became effective. Because the last act necessary to trigger application of section 288.5 was an act of molestation that defendant committed *after* 288.5's effective date, defendant's conviction was not a retroactive application of section 288.5 and therefore not a violation of the statutory prohibition against retroactive application of the Penal Code." (*Grant, supra,* 20 Cal.4th at pp. 157–158, 83 Cal.Rptr.2d 295, 973 P.2d 72.)

Section 3003.5(b) places restrictions on where a paroled sex offender subject to lifetime registration pursuant to section 290 may reside while on parole. For purposes of retroactivity analysis, the pivotal "last act or event" (*Grant, supra,* 20 Cal.4th at p. 157, 83 Cal.Rptr.2d 295, 973 P.2d 72) that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his release from custody on parole. If that "last act or event" occurred subsequent to the effective date of section 3003.5(b), a conclusion that it was a violation of the registrant's parole does not constitute a "retroactive" application of the statute.

The facts and holding in *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142 (*Bourquez*) are particularly instructive here, as they involve the question whether another provision of Jessica's Law enacted by Proposition 83 was being applied prospectively or retroactively.

At issue in *Bourquez* was that portion of Jessica's Law approved by the voters at the November 7, 2006, election that extended ***177 the commitment terms of persons determined to be sexually violent predators under the Sexually Violent Predator Act (SVPA) (Welf. & Inst.Code, § 6600 et seq.) from two years to an indeterminate term. The petitioner in *Bourquez* claimed that to apply the new indeterminate term for sexually violent predators to individuals like himself who had pending recommitment petitions at the time Proposition 83 was enacted would be an impermissible retroactive application of the new statute. The *Bourquez* court explained, "Proposition 83 is entirely silent on the question of retroactivity, so we presume it is intended to operate only *1275 prospectively. *The question is whether applying its provisions to pending petitions to extend commitment is a prospective application.*" (*Bourquez, supra,* 156 Cal.App.4th at p. 1288, 68 Cal.Rptr.3d 142, italics added.)

The *Bourquez* court went on to explain that, "[b]ecause a proceeding to extend commitment under the SVPA focuses on a person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law. [Citation.] Applying Proposition 83 to pending petitions to extend commitment under the SVPA to make any future extended commitment for an indeterminate term is not a retroactive application." (*Bourquez, supra,* 156 Cal.App.4th at p. 1289, 68 Cal.Rptr.3d 142.)

Significantly, the *Bourquez* court did not find the fact of, or dates of, the sex offense convictions that first qualified the defendant as a sexually violent predator to be controlling on his retroactivity claim. Rather, since the relevant provision of Jessica's Law pertained to a sexually violent predator's *current mental state,* the court concluded that to apply the new law to a defendant already under a fixed-term commitment as a sexually violent predator was a *prospective,* and not an impermissible retrospective, application of the statute.

By parity of reasoning, the provisions of Jessica's Law here under scrutiny—section 3003.5(b)'s statutory residency restrictions—are not implicated until a convicted and registered sex offender is released from custody and must take up residency in the community to which he has been paroled. Applying the mandatory residency restrictions to these four petitioners, who were released from prison on parole *after* the effective date of ****42** Jessica's Law, and who thus had ample notice of the necessity of securing housing in compliance with the restrictions at the time they moved into noncompliant housing, is simply not a retroactive application of the new law. (*Bourquez, supra,* 156 Cal.App.4th at p. 1289, 68 Cal.Rptr.3d 142.) [6]

6 To be contrasted with the holding in *Bourquez* is the holding in *People v. Whaley* (2008) 160 Cal.App.4th 779, 73 Cal.Rptr.3d 133. As in *Bourquez,* the provision at issue in *Whaley* was that part of Jessica's Law that extended the commitment terms of sexually violent predators under the SVPA from two years to an indeterminate term. (*Whaley,* at pp. 785–786, 73 Cal.Rptr.3d 133.) Unlike *Bourquez,* however, which involved a recommitment petition already pending at the time Jessica's Law was passed, in *Whaley* the People simply petitioned the court to summarily convert the defendant's *preexisting* two-year fixed-term commitment as a sexually violent predator into an indeterminate term under the new law after the provision had passed.

It may be that if a registered sex offender was released from custody *on his current parole term* prior to November 8, 2006, and secured noncompliant housing prior to that date, in which he currently resides, application of the residency restrictions to him would constitute an impermissible retrospective ***1276** application of the statute. Under those circumstances, *****178** he would not have had notice of the new 2,000–foot "predator free zone" restrictions prior to his release from custody on parole and the securing of his current residence, the conduct to which section 3003.5(b) speaks. (See *Doe v. Schwarzenegger* (E.D.Cal.2007) 476 F.Supp.2d 1178, 1179, fn. 1 [holding that § 3003.5(b) could not be applied retroactively to persons convicted of registrable offenses prior to the effective date of the statute "and who were paroled, given probation, or released from incarceration prior to that date"].) However, all four petitioners here were released from custody on their current parole terms, and then secured their noncompliant housing, *after* the effective date of Jessica's Law. By doing so, they violated a law already in effect, and application of that law to those violations is not "retroactive."

Contrary to petitioners' argument, the fact that they were all convicted of sex offenses giving rise to their *status* as lifetime registrants pursuant to section 290 well prior to the passage of Jessica's Law does not, in itself, establish that the new parole residency restrictions are now being applied retroactively to them. The decision in *People v. Mills* (1992) 6 Cal.App.4th 1278, 8 Cal.Rptr.2d 310 (*Mills*) succinctly explains the point in an analogous context.

The defendant in *Mills* was convicted in 1981 of felony possession of marijuana for sale. At that time, section 12021, subdivision (a) provided, "Any person who has been convicted of a felony under the laws of ... California ... who owns or has in his possession or under his custody or control *any pistol, revolver, or other firearm capable of being concealed upon the person* is guilty of a public offense...." (Italics

added.) Subsequently, section 12021, subdivision (a) was amended, effective January 1, 1990, to provide, "Any person who has been convicted of a felony under the laws of ... California ... who owns or has in his or her possession or under his or her custody or control *any firearm* is guilty of a felony." (Stats.1989, ch. 1044, § 3, italics added.) After the effective date of the amendment, defendant brought a shotgun into a sporting goods store to have it repaired. His status as an ex-felon was discovered and he was arrested, charged, and convicted of being a felon in possession of a firearm in violation of amended section 12021, subdivision (a). The defendant appealed, contending the 1990 amendment to section 12021, subdivision (a) was an unconstitutional ex post facto law being applied to him. (*Mills, supra,* 6 Cal.App.4th at pp. 1281–1282, 8 Cal.Rptr.2d 310.)

The *Mills* court first explained that the question whether a new law is being applied retrospectively is closely intertwined with the question whether it is an unconstitutional ex post facto law, because a finding that the law is being applied retrospectively is a threshold requirement for finding it impermissibly ex post facto. For this principle *Mills* cited the high court's decision ***1277** in *Weaver v. Graham* (1981) 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17, which explained that " 'two critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must ****43** disadvantage the offender affected by it.' " (*Mills, supra,* 6 Cal.App.4th at pp. 1282–1283, 8 Cal.Rptr.2d 310, quoting *Weaver v. Graham, supra,* 450 U.S. at pp. 28–29, 101 S.Ct. 960.) Generally, where a new law "retroactively increase[s] the punishment for [a] crime, it [is] retrospective for purposes of the ex post facto test." (*Mills, supra,* 6 Cal.App.4th at p. 1285, 8 Cal.Rptr.2d 310.) "The clearest example of [an ex post facto] law is one which defines a new crime and applies its definition retroactively to [punish] conduct *****179** which was not criminal at the time it occurred." (*Id.* at p. 1282, 8 Cal.Rptr.2d 310.)

The *Mills* court concluded the defendant's conviction as a felon in possession of a firearm under the amended version of section 12021, subdivision (a) —which broadened the definition of the crime from possession of a *concealable* firearm to possession of *any* firearm—was neither a retroactive application of the new law nor conviction of an ex post facto law. The court explained, "Here defendant was convicted of conduct, his possession of a shotgun, occurring after the effective date of the statute. His conduct was a violation of the new statute, rather than an increase of punishment for the earlier offense of possessing marijuana for sale. Although the statute only applied to him because of his status as a person convicted of a felony, and the felony conviction occurred before the statute became effective, the fact of his prior conviction only places him into a *status* which makes the new law applicable to him. The legal consequences of his past conduct were not changed—only a new law was applied to his future conduct." (*Mills, supra,* 6 Cal.App.4th at p. 1286, 8 Cal.Rptr.2d 310, fn. omitted.)

The *Mills* court emphasized that "defendant knew, or should have known, that it was a crime for him to possess a shotgun after January 1, 1990. He had fair warning of the new law, and he did possess a shotgun after that date. [Citation.] His conviction for doing so was not retrospective. Although the new law applied to him because he had the status of a felony offender, he was not additionally punished for possessing marijuana for sale but rather was punished for committing a new crime, possession of a firearm by a felon, after the amendment to the statute became effective. [Citation.]" (*Mills, supra,* 6 Cal.App.4th at p. 1289, 8 Cal.Rptr.2d 310.)

Here, given that petitioners were released on their current parole terms *after* the effective date of Jessica's Law, petitioners knew, or should have known, that they would be subject to a reportable parole violation if they moved into housing that did not comply with the newly enacted residency restrictions that took effect prior to their release. They are thus presumed to ***1278** have had fair notice of the new restrictions applicable to them prior to their release on parole and their securing of noncompliant housing. To require petitioners to comply with the new residency restrictions or face a parole violation for failing to do so is thus not a retrospective application of the law. Although they fall under the new restrictions by virtue of their *status* as registered sex offenders who have been released on parole, they are not being "additionally punished" for commission of the original sex offenses that gave rise to that status. Rather, petitioners are being subjected

to new restrictions on where they may reside while on their *current parole*—restrictions clearly intended to operate and protect the public *in the present,* not to serve as additional punishment for past crimes.

The dissent argues that, by finding section 3003.5(b) applies prospectively to lifetime sex registrants who were released on parole and moved to noncompliant housing *after* the effective date of Proposition 83, we contravene *Strauss v. Horton* (2009) 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48 (*Strauss*), where we concluded that Proposition 8's state constitutional ban on same-sex marriage cannot be applied retroactively to same-sex couples *who married prior to the initiative's effective date.* The dissent is wrong. As we explained in *Strauss,* the affected same-sex couples took affirmative steps in reliance on this *****180** court's holding in *In re Marriage Cases* (2008) 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 that the California Constitution included a right to same-sex marriage. Thus, we observed, "[w]ere Proposition 8 to be applied to invalidate or to deny recognition to *marriages performed prior to November 5, 2008* [the date Proposition 8 ****44** became effective], rendering such marriages ineffective in the future, such action would take away or impair *vested rights acquired under the prior state of the law* and would constitute a retroactive application of the measure." (*Strauss, supra,* at p. 472, 93 Cal.Rptr.3d 591, 207 P.3d 48, italics added.) In other words, unless the voters clearly provided otherwise, Proposition 8 could alter the *future* right to marry, but it could not *negate* or *undo* permanent legal relationships that were allowed —indeed protected—by the Constitution at the time they were entered into.

Petitioners here took no affirmative action, prior to the effective date of Proposition 83, in reliance on an earlier state of the law that gave them a "vested right" against future statutory restrictions concerning where they might *thereafter* establish residency. Nor does Proposition 83 purport to *undo* any vested rights. As applied to these petitioners, Proposition 83 operates only on actions they took, with fair notice of the new residency restrictions, after the initiative's effective date. That Proposition 83's restrictions on where parolees released *after its effective date* may *thereafter* live derives from their prior status as lifetime sex-offender registrants does not mean the measure is being applied retroactively to them. The dissent's attempt to invoke *Strauss* is thus unpersuasive.

***1279** We therefore conclude petitioners' retroactivity claim must be rejected. Enforcing section 3003.5(b)'s residency restrictions against them is a prospective, not a retrospective, application of that law. [7]

7 CDCR also takes the position that if section 3003.5(b) is being applied retroactively to these petitioners, then the language of the initiative measure itself, as well as statements in the ballot pamphlet submitted to the voters, reflects that the new parole residency restrictions were plainly *intended* to have such retroactive effect. We need not and do not address the contention given our conclusion that section 3003.5(b) is only being applied prospectively to these petitioners.

C. Ex post facto

Petitioners next make the closely related argument that section 3003.5(b) is an unconstitutional ex post facto law if retroactively applied to them. The claim is unavailing given our conclusion that the law is not being applied retroactively to these petitioners.

Both the United States Constitution (art. I, §§ 9 and 10) and the California Constitution (art. I, § 9) prohibit the passage of ex post facto laws. In *Collins v. Youngblood, supra,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30, the high court explained that an impermissible ex post facto law is one which "makes more burdensome the punishment for a crime, after its commission." (*Id.* at p. 42, 110 S.Ct. 2715.) "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. [Citations.] The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. [Citations.] [¶] In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment,* and it must disadvantage *****181** the offender affected by it." (*Weaver v. Graham, supra,* 450 U.S. at pp. 28–29, 101 S.Ct. 960, some italics added, fns. omitted.) This court has observed that there is no significant

difference between the federal and state ex post facto clauses. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295–297, 279 Cal.Rptr. 592, 807 P.2d 434.)

In *In re Ramirez* (1985) 39 Cal.3d 931, 218 Cal.Rptr. 324, 705 P.2d 897, we considered whether, under the state and federal ex post facto clauses, a new statutory plan for awarding prison conduct credits could be applied to prisoners whose crimes occurred before the effective date of the new scheme, but whose prison behavior that could lead to a reduction in credits was committed after the new scheme went into effect. (*Id.* at p. 932, 218 Cal.Rptr. 324, 705 P.2d 897.) We concluded that it may. (*Ibid.*) Applying the test set forth in *Weaver v. Graham, supra,* 450 U.S. at pages 28–29, 101 S.Ct. 960, to determine whether the new sentencing credit scheme was impermissibly retrospective, we explained, ***1280** "For a law to be retrospective, 'it ****45** must apply to events occurring before its enactment.' [Citation.] A retrospective law violates the ex post facto clauses when it 'substantially alters the consequences attached to a crime already completed, and therefore changes "the quantum of punishment." ' [Citation.] [¶] We conclude that the 1982 amendments are not retrospective and therefore do not violate the ex post facto clauses. Petitioner, citing [*In re Paez* (1983) 148 Cal.App.3d 919, 196 Cal.Rptr. 401], contends that the 1982 amendments relate to the original offense, not to the infraction committed in prison. We disagree. It is true that the 1982 amendments apply to petitioner only because he is a prisoner and that he is a prisoner only because of an act committed before the 1982 amendments. Nonetheless, the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective. In other words, the 1982 amendments apply only to events occurring *after* their enactment. If any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison. Accordingly, the 1982 amendments, which change the sanctions for that misconduct, do not relate to petitioner's original crime and are not retrospective under *Weaver* [*v. grahaM*]." (*in re ramirEz, supra,* 39 cal.3d at pp. 936–937, 218 Cal.Rptr. 324, 705 P.2d 897; see also *Mills, supra,* 6 Cal.App.4th at p. 1285, 8 Cal.Rptr.2d 310.)

The rationales of *In re Ramirez, supra,* 39 Cal.3d 931, 218 Cal.Rptr. 324, 705 P.2d 897, and *Mills, supra,* 6 Cal.App.4th at page 1285, 8 Cal.Rptr.2d 310, apply here and support rejection of petitioners' ex post facto claim. True, section 3003.5(b) applies to these petitioners only by virtue of their status as *registered* sex offenders, a status they achieved upon their convictions of qualifying sex offenses prior to the enactment of Jessica's Law and section 3003.5(b). Nevertheless, the new residency restrictions apply to events occurring *after* their effective date—petitioners' acts of taking up residency in noncompliant housing upon their release from custody on parole after the statute's effective date. It follows that section 3003.5(b) is not an ex post facto law if applied to such conduct occurring after its effective date because it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant under section 290. (*Collins v. Youngblood, supra,* 497 U.S. at p. 42, 110 S.Ct. 2715; *Mills, supra,* 6 Cal.App.4th at p. 1285, 8 Cal.Rptr.2d 310.)

D. Petitioners' remaining claims

Petitioners further contend section 3003.5(b) is an unreasonable, vague and *****182** overbroad parole condition that infringes on various state and federal constitutional rights, including their privacy rights, property rights, right to intrastate travel, and their substantive due process rights under the federal Constitution. In support of these claims, petitioners have appended declarations and various materials as exhibits to their petition and traverse in an effort to establish a ***1281** factual basis for each claim. CDCR, in its return, has denied many of the allegations advanced in the petition in reliance on such exhibits.

In contrast with the retroactivity and ex post facto issues we have addressed above, petitioners' remaining constitutional claims present considerably more complex "as applied" challenges to the enforcement of the new residency restrictions as parole violations in the particular jurisdictions to which each petitioner has been paroled. Petitioners are not all similarly situated with regard to their paroles. They have been paroled to different cities and counties within the state, and the supply of housing in compliance with section 3003.5(b) available to them during their terms of parole—a matter critical to

deciding the merits of their as applied constitutional challenges—is not sufficiently established by those declarations and materials to permit this court to decide the claims.

For example, petitioners have appended small maps to the petition (exhibit E), which they argue establish that "nearly *all* of the cities of San Diego, Los Angeles, and San Francisco are off limits [to registered sex offenders released on parole]." But the small maps, comprising almost indiscernible, variably shaded gray areas purporting to ****46** depict the scarcity of section 3003.5(b) compliant housing across the state, contain no dates reflecting when they were prepared, no street names or addresses, no indication of where these petitioners are residing in relation to the maps, no indication of the locations of any schools or "parks where children regularly gather," and no legend adequately explaining how the maps were prepared or precisely what they purport to show. CDCR, in turn, has denied the allegations made by petitioners in reliance on the maps, further noting petitioners have not authenticated the maps on which they purport to rely.

As another example, petitioners allege in their traverse that section 3003.5(b) "makes entire cities off-limits to sex offenders, including Petitioners," that under the residency restrictions, "[section 290] registrants [are] unable to find a single compliant home in the cities in which they were paroled," and that the restrictions are "so unreasonably broad" as to leave those to whom it applies "with no option but prison or homelessness, as is the case here." But these allegations appear to conflict with certain materials appended to petitioners' traverse, specifically, a report to the Legislature and Governor's office, prepared in January 2008 by the California Sex Offender Management Board (CASOMB),[8] setting forth "An Assessment of Current Management Practices of Adult Sex Offenders in California." (Exhibit O; ***1282** CASOMB Report.) The CASOMB Report indicates, under the subheading "Current Status of Housing Compliance," that "As of December 9, 2007 [13 months after § 3003.5(b) took effect, and two months after the petition for writ of habeas corpus was filed in this court], 3,884 parolees subject to Jessica's Law were under the supervision of a parole agent in California *****183** communities. *3,166 of this population reside in compliant housing,* while 718 have declared themselves transient.... [¶] Although the 3,884 parolees represent[ ] the total number of offenders that remain in the community under parole supervision, *and CDCR enforcement efforts have resulted in near full compliance with the housing challenges of Jessica's* [*s*] *Law,* these offenders represent approximately half of the population subject to Jessica's Law released during this period (7516)." (CASOMB Rep., *supra,* at p. 125, italics added.)

8 CASOMB comprises representatives from the Attorney General's office, CDCR, regional parole administration, the judicial branch, district attorneys' offices, public defenders' offices, probation departments, law enforcement agencies, as well as victims advocates and licensed treatment providers, among others.

The section 3003.5(b) housing compliance statistics reported in the CASOMB Report for the first year the residency restrictions were in effect are difficult to reconcile with petitioners' allegations that compliant housing has been virtually unavailable to them in the various communities to which they have been paroled.

Finally, the matter of whether CDCR and, in particular, DAPO are obligated by law to identify compliant housing for petitioners or otherwise assist them in locating and securing such housing,[9] a matter that may factor into resolution of petitioners' claim that section 3003.5(b) is being enforced against them as an unreasonable parole condition that infringes on a number of their fundamental constitutional rights,[10] also appears ****47** disputed by *****184** the parties. Petitioners point to a statement in CDCR's Policy No. 07–36 that ***1283** cautions: "The responsibility to locate and maintain compliant housing shall ultimately remain with the individual parolee through utilization of available resources" (Policy No. 07–36, *supra,* at p. 2) in support of their allegation that "Respondent has provided little to no assistance to individual parolees attempting to find compliant housing. Petitioners and other noncompliant parolees have not been informed of areas in their counties where compliant housing may be found." CDCR, in turn, "denies the allegation that it provides 'little to no assistance to individual parolees attempting to find compliant housing'; it does provide such assistance."

9 It bears observing that a parole term is a component of the inmate's original sentence, and that parolees remain in the constructive custody of CDCR for the duration of their fixed parole terms and are not formally "discharged" from the department's custody until the expiration of the parole term. (See §§ 3000, subd. (a)(1), 3056.) CDCR has a statutory obligation to "assist parolees in the transition between imprisonment and discharge." (§§ 3000, subd. (a)(1), 3074.) The extent to which such obligation includes assisting sex offender registrant parolees in identifying or securing housing in compliance with section 3003.5(b) in the communities to which they are paroled remains unclear.

10 As emphasized at the outset, petitioners here challenge only the enforcement of section 3003.5(b) as a statutory parole condition setting forth residency restrictions applicable to paroled registered sex offenders like themselves. There is no evidence before us of any attempts, to date, to enforce the statute outside of that limited context. Accordingly, in this case, the inquiry into petitioners' challenge to section 3003.5(b) as an unreasonable statutory parole condition that infringes on their constitutional rights is necessarily circumscribed. The Legislature has given the CDCR and its DAPO expansive authority to establish and enforce rules and regulations governing parole, and to impose any parole conditions deemed proper. (§§ 3052, 3053; see *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 874, 76 Cal.Rptr.2d 841 (*Terhune*).) "These conditions must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action." (*Ibid.*; see also *In re Stevens* (2004) 119 Cal.App.4th 1228, 1234, 15 Cal.Rptr.3d 168; *People v. Thompson* (1967) 252 Cal.App.2d 76, 84, 60 Cal.Rptr. 203.) "Nevertheless, *the conditions may govern a parolee's residence,* his associates or living companions, *his travel,* his use of intoxicants, and other aspects of his life." (*Terhune,* at p. 874, 76 Cal.Rptr.2d 841, italics added; see generally *Morrissey v. Brewer* (1972) 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 [parolees have fewer constitutional rights than do ordinary persons]; *People v. Burgener* (1986) 41 Cal.3d 505, 531–532, 224 Cal.Rptr. 112, 714 P.2d 1251 (*Burgener*), overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 754, 756, 80 Cal.Rptr.2d 734, 968 P.2d 445.)

The dissent suggests that "[w]hen a statutory restriction substantially impinges on a person's constitutional right to intrastate travel and does not further the statute's objective, it must be struck down as to that person." (Dis. opn. of Moreno, J., *post,* 104 Cal.Rptr.3d at p. 195, 223 P.3d at p. 56; *id.*, fn. 3 [suggesting the same result for a violation of the state constitutional right of privacy].) But here, the threshold question common to all of petitioners' remaining as-applied constitutional challenges to section 3003.5(b) is whether the section, *when enforced as a statutory parole condition against registered sex offenders,* constitutes an unreasonable parole condition to the extent it infringes on *such parolees'* fundamental rights. "Although a parolee is no longer confined in prison [,] his custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally." (*Burgener, supra,* 41 Cal.3d at p. 531, 224 Cal.Rptr. 112, 714 P.2d 1251; see *In re Stevens, supra,* 119 Cal.App.4th at p. 1233, 15 Cal.Rptr.3d 168.) Hence, the limited nature of the rights retained by registered sex offenders *while serving out a term of parole,* whether it be with regard to the right to travel, to privacy, or to associate with persons of one's choosing, must inform the inquiry as to whether section 3003.5(b) places reasonable or unreasonable restrictions on the paroles of registered sex offenders.

With regard to petitioners' remaining claims, we therefore conclude that evidentiary hearings will have to be conducted to establish the relevant facts necessary to decide each such claim. The trial courts of the counties to which petitioners have been paroled are manifestly in the best position to conduct such hearings and find the relevant facts necessary to decide the claims with regard to each such jurisdiction. These facts would include, but are not necessarily limited to, establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest "public or private school, or park where children regularly gather" (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and

communities to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently ***1284** being enforced in each particular jurisdiction; and a complete record of the protocol CDCR is currently following to enforce section 3003.5(b) in those respective jurisdictions.

III. DISPOSITION

The claims that section 3003.5(b), construed as a statutory parole condition, is being impermissibly retroactively enforced as to these petitioners and, as thus enforced, constitutes an ex post facto law under the state and federal Constitutions, are denied. For consideration of petitioners' remaining claims, the petition and orders to show cause previously issued are hereby ordered transferred to the Courts of Appeal as follows: *In re E.J. on Habeas Corpus,* S156933, to the First District Court of Appeal; *In re S.P. on Habeas Corpus,* S157631, to the Sixth District Court of Appeal; *In re J.S. on Habeas* ****48** *Corpus,* S157633, and *In re K T. on Habeas Corpus,* S157634, to Division One of the Fourth District Court of Appeal, with directions that each matter be transferred to the trial court in the county to which the petitioner has been paroled for further proceedings consistent with the views expressed herein. (Cal. Rules of Court, rule 10.1000(a).) The order staying enforcement of section 3003.5(b) as to these four petitioners, previously issued on October 10, 2007, shall remain in effect.

WE CONCUR: GEORGE, C.J., CHIN and CORRIGAN, JJ.

*****185** Concurring Opinion by WERDEGAR, J.

Before the court today are four petitioners who were convicted of a sexual offense before passage of Proposition 83 (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006)), who were required by law to register as sex offenders as a result and who have been paroled from prison after passage of Proposition 83. All four petitioners challenge the attempt by the California Department of Corrections and Rehabilitation (CDCR) to enforce against them, as a statutory parole condition, Penal Code section 3003.5, subdivision (b) (hereafter section 3003.5(b)), which was enacted as part of Proposition 83. That new law prohibits sex offender registrants from living "within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5(b).) The majority concludes that enforcing this 2,000–foot residency restriction against petitioners as a parole condition does not constitute an impermissible retroactive application of the law nor violate their right to be free of an ex post facto application of the law. The majority remands the balance of petitioners' constitutional claims to the lower courts to permit petitioners to pursue their "as applied" challenges to enforcement of the new residency restrictions against them.

I concur in the majority's result, but not necessarily its reasoning. Specifically, I agree that for these four petitioners, all of whom were convicted of ***1285** qualifying sex offenses before passage of Proposition 83 and who were paroled from prison after such passage, enforcing the 2,000–foot residency restriction as a condition of their parole involves no impermissible retroactive or ex post facto application of the law. Under the plain meaning of section 3003.5(b), the critical date is not the date of one's conviction for a qualifying sex crime, nor (contrary to the majority) the date of one's parole from prison. The critical date is instead the date one is found living in noncompliant housing.[1] As the CDCR proposes to enforce section 3003.5(b) as a parole condition against all four petitioners for their living conditions *now*—that is, after passage of Proposition 83—I agree with the majority's conclusion that such action by the CDCR does not violate any rights petitioners may possess.

1 Section 3003.5(b) provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

But I emphasize the narrowness of both the issue before the court and my agreement with the majority. As the majority recognizes, the Legislative Analyst's description of Proposition 83 and section 3003.5(b) in the official Voter Information Guide stated: "A violation of this provision *would be a misdemeanor offense,* as well as a parole violation for parolees." (Voter Information Guide, Gen. Elec. (Nov.

7, 2006) analysis of Prop. 83 by Legis. Analyst, p. 44, italics added.) As no petitioner presently before the court is threatened with a misdemeanor prosecution, we address in this case the meaning of section 3003.5(b) only as it relates to a condition of parole, and not whether it is also a misdemeanor crime.

Moreover, now before the court are four parolees who were paroled after passage of Proposition 83. We thus also have no occasion here to address whether the 2,000–foot residency limit might apply to those who completed their paroles before the effective date of Proposition 83 (see, e.g., *Doe v. Schwarzenegger* (E.D.Cal.2007) 476 F.Supp.2d 1178, 1180 ["John Doe II"]); to those whose parole period began before, but is scheduled to terminate after, that date (*id.* at pp. 1179–1180 ["John Doe I"]); or even to the thousands of persons ***186** subject to sex offender **49** registration who, for whatever reason, are not currently on parole.

Finally, like the majority, I express no opinion on petitioners' various other constitutional challenges to section 3003.5(b) and agree that we must remand these cases to the lower courts to permit the parties to litigate the factual issues necessary to the proper resolution of their respective cases.

With those caveats, I concur in the result reached by the majority.

***1286** Dissenting Opinion by MORENO, J.

I.

I respectfully dissent.

Penal Code section 3003.5, subdivision (b) (section 3003.5(b)) [1] cannot be applied to those who suffered their convictions before the date Proposition 83 (Prop. 83, as approved by the voters, Gen. Elec. (Nov. 7, 2006)) was enacted. Nothing in the language of the proposition or in the relevant extrinsic materials supports any other conclusion. Therefore, section 3003.5(b) does not apply to these petitioners and I dissent from the majority opinion's contrary conclusion.

1 All further statutory references are to the Penal Code.

Before I turn to the majority opinion, I begin with a review of "well-established general principles governing the question whether a statutory or constitutional provision should be interpreted to apply prospectively or retroactively." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 470, 93 Cal.Rptr.3d 591, 207 P.3d 48.) There is a statutory presumption against retroactive application of penal laws, articulated in section 3, first enacted in 1872, which states: "No part of [the Penal Code] is retroactive, unless expressly so declared." This presumption is, as we have noted, rooted in federal "constitutional principles" reflected in such provisions as the ex post facto clause, the Fifth Amendment's takings clause, and the due process clause of the United States Constitution. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841, 123 Cal.Rptr.2d 40, 50 P.3d 751.)

A statute is retroactive when it "change[s] the legal consequences of past conduct by imposing new or different liabilities...." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 291, 279 Cal.Rptr. 592, 807 P.2d 434.) "California continues to adhere to the time-honored principle ... 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.*" (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209, 246 Cal.Rptr. 629, 753 P.2d 585, italics added.) As we have repeatedly explained, absent an express declaration of retroactivity, "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." (*Id.* at p. 1209, 246 Cal.Rptr. 629, 753 P.2d 585, italics added.) The key here is clarity: "a statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a *clear and unavoidable* implication that the Legislature [or the voters] intended retroactive application." (*Myers v. Philip Morris Companies, Inc., supra,* 28 Cal.4th at p. 844, 123 Cal.Rptr.2d 40, 50 P.3d 751, second italics added.)

***1287** Ambiguous, vague or inconclusive statements cited as proof of an intention that a statute be applied retroactively are *****187** not sufficient for that purpose. "[A]t least in modern times, we have been cautious not to infer the voters' or the Legislature's intent on the subject of prospective versus retrospective operation from 'vague phrases' [citation] and 'broad, general language' [citation] in statutes, initiative measures and ballot pamphlets." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 229–230, 46 Cal.Rptr.3d 57, 138 P.3d 207.) When a statute is ambiguous regarding retroactivity, it is construed to be prospective. (*Myers v. Philip Morris Companies, Inc., supra,* 28 Cal.4th at p. 841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) Moreover, "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 ****50** 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." (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1213, 246 Cal.Rptr. 629, 753 P.2d 585.)

The question of whether Proposition 83 was intended to apply retroactively has already been recognized, asked, and answered by two decisions of the Court of Appeal and a federal district court judge. They unanimously concluded that Proposition 83 does not contain an express statement of retroactivity. The two Court of Appeal decisions are *People v. Whaley* (2008) 160 Cal.App.4th 779, 73 Cal.Rptr.3d 133 and *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142. The provision of Proposition 83 at issue in both of those cases was the part of the initiative that extended the commitment terms of persons determined to be sexually violent predators under the Sexually Violent Predator Act (SVPA) (Welf. & Inst.Code, § 6600 et seq.) from two years to an indeterminate term. (*People v. Whaley, supra,* 160 Cal.App.4th at pp. 785–786, 73 Cal.Rptr.3d 133; *Bourquez v. Superior Court, supra,* 156 Cal.App.4th at pp. 1279–1280, 68 Cal.Rptr.3d 142.)

In *Bourquez,* the retroactivity question was whether the new indeterminate term for sexually violent predators could be applied to individuals who had pending recommitment petitions at the time Proposition 83 was enacted. As the starting point of its analysis, the court observed: "Proposition 83 is entirely silent on the question of retroactivity, so we presume it is intended to operate only prospectively. The question is whether applying its provisions to pending petitions to extend commitment is a prospective application." (*Bourquez v. Superior Court, supra,* 156 Cal.App.4th at p. 1288, 68 Cal.Rptr.3d 142.) The court ultimately concluded that "[b]ecause a proceeding to extend commitment under the SVPA focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law. [Citation.] Applying Proposition 83 to pending petitions to extend ***1288** commitment under the SVPA to make any future extended commitment for an indeterminate term is not a retroactive application." (*Id.* at p. 1289, 68 Cal.Rptr.3d 142.)

People v. Whaley involved a different twist on the question of whether the change in the law regarding SVPA commitments could be applied retroactively. In *Whaley,* the People sought to amend the defendant's 1999 SVPA commitment, which had been for two years, and convert it into an indeterminate term under Proposition 83. The trial court granted the People's motion. On appeal, the order was reversed on the ground that applying *****188** Proposition 83 to a term of commitment imposed before its enactment constituted an impermissible retroactive application of the initiative. (*People v. Whaley, supra,* 160 Cal.App.4th at pp. 796–803, 73 Cal.Rptr.3d 133.) Like the court in *Bourquez,* the *Whaley* court found that "[t]he language of Proposition 83 does not contain an express statement of retroactivity." (*Whaley,* at p. 796, 73 Cal.Rptr.3d 133.) Furthermore, "[a]lso absent is a clear indication in the statutory language, or in the voter information guide, that the voters intended an indeterminate term to be applied retroactively to completed commitment proceedings." (*Ibid.*)

The court considered and rejected various interpretations of the statutory language and language in the ballot pamphlet advanced by the People to demonstrate an intent for retroactive application. Significantly, the court was not swayed even by

its recognition "that the electorate's intent regarding Proposition 83 was 'to strengthen and improve the laws that punish and control sexual offenders.' (Voter Information Guide, Gen. Elec. [(Nov. 7, 2006)] text of Prop. 83, p. 138.)" (*People v. Whaley, supra,* 160 Cal.App.4th at p. 801, 73 Cal.Rptr.3d 133.)

While neither *Bourquez* nor *Whaley* involved the residency restriction enacted by Proposition 83, *Doe v. Schwarzenegger* (E.D.Cal.2007) 476 F.Supp.2d 1178 did. In *Doe,* the federal district court held that section 3003.5(b) could not be applied retroactively to persons convicted of registrable offenses "prior to the effective date of the statute and who were paroled, given probation, ****51** or released from incarceration prior to that date." (*Doe,* at p. 1179, fn. 1.) At the outset of its analysis, the district court cited the settled rule that "it [was] obligated to adopt the interpretation of the law that best avoids constitutional problems," and expressed its concern that "reading [Prop. 83] retroactively would raise serious ex post facto concerns, and the court is obligated to avoid doing so if it can reasonably construe the statute prospectively." (*Id.* at p. 1181.)

Like the courts deciding *Bourquez* and *Whaley,* the district court noted that Proposition 83 "does not expressly address the issue of retroactivity, but it is well-established in California that statutes operate prospectively unless there is clear evidence of intent to the contrary." ***1289** (*Doe v. Schwarzenegger, supra,* 476 F.Supp.2d at p. 1181.) The court concluded "it is not 'very clear' from extrinsic sources that the intent of the voters was to make [Proposition 83] retroactive." (*Id.* at p. 1182.) The court rejected the state's assertion that language in the ballot pamphlet regarding the number of registered sex offenders in California, and the intent of the initiative to create predator-free zones, evinced a clear intention that the initiative be retroactively applied. "First, the reference to the number of sex offenders in California is a neutral statement of fact, which voters could have reasonably construed as characterizing the scope of the problem and its potential expansion, rather than as purporting to address the problem in its entirety. Second, while the term 'predator free zones' is troubling, it is not 'very clear' that it contemplates retroactive application. Rather, it is the type of sloganeering to be expected of an argument in favor of the law, not to be taken literally. The [initiative] does not, for instance, bar sex offenders from entering the 2,000 feet zone around schools or parks; it only prohibits them from residing there. Accordingly, voters could reasonably interpret the quoted language as creating a goal of establishing 'predator free zones,' which the [initiative] takes one step toward achieving, albeit prospectively." (*Ibid.*)

*****189** In light of this unanimity among the courts that have addressed the retroactivity issue, the majority opinion's conclusion that application of section 3003.5(b) to these petitioners is prospective rather than retroactive is remarkable. The majority opinion reaches this conclusion purportedly by examining the "plain language" of section 3003.5(b) under which, it says, "any convicted sex offender already subject to the lifelong registration requirement who is released from custody on parole, whether it be after service of a term in custody for an initial sex offense conviction, a new sex offense conviction, or a new non-sex-offense conviction, becomes subject to the new mandatory parole residency restrictions for the duration of his parole term. (§ 3003.5(b).)" (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 175, 223 P.3d at pp. 39–40.)

Citing *People v. Grant* (1999) 20 Cal.4th 150, 83 Cal.Rptr.2d 295, 973 P.2d 72, the majority opinion reasons that the crucial date for the retroactivity analysis in this case is not the petitioners' long ago convictions of the registrable offenses but the dates of their release on parole from recent, nonsexual offenses: "Section 3003.5(b) places restrictions on where a paroled sex offender subject to lifetime registration pursuant to section 290 may reside while on parole. For purposes of retroactivity analysis, the pivotal 'last act or event' (*Grant, supra,* 20 Cal.4th at p. 157, 83 Cal.Rptr.2d 295, 973 P.2d 72) that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his release from custody on parole." (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 176, 223 P.3d at pp. 40–41.)

***1290** A plain language reading of the statute does not support the majority opinion's result. The statute says simply: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5(b).) It does not

refer to parole at all, much less bear the weight of interpretation that the majority opinion would give it —e.g., "any convicted sex offender already subject to the lifelong registration requirement who is released from custody on parole, whether it be after service of a term in custody for an initial sex ****52** offense conviction, a new sex offense conviction, or a new non-sex-offense conviction, becomes subject to the new mandatory parole residency restrictions for the duration of his parole term. (§ 3003.5(b).)" (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 175, 223 P.3d at pp. 38–39.)

Indeed, as the majority opinion acknowledges, it is not entirely clear to whom section 3003.5(b) applies —all registered sex offenders or only those released on parole. (See maj. opn., *ante,* 104 Cal.Rptr.3d at pp. 173–174, 223 P.3d at pp. 38–39, & fn. 5.) Enforcement of the residency restriction against parolees is not mandated by the plain language of the statute; it was an administrative decision by the California Department of Corrections and Rehabilitation (CDCR) reached eight months *after* Proposition 83 was enacted. (See CDCR, Policy No. 07–36: Implementation of Prop. 83, aka Jessica's Law (Aug. 17, 2007); Cal.Code Regs., tit. 15, § 2616, subd. (a)(15).) Therefore, nothing in the plain language of the statute supports the majority opinion's assertion that section 3003.5(b) was intended to apply prospectively to parolees upon their release from custody on parole. [2]

2 The fact that it took eight months for someone to decide how and against whom section 3003.5(b) was to be enforced also undermines the repeated assertions by the majority opinion that these petitioners were on notice that the restriction applied to them as soon as they were released on parole and, even less accurately, the implication that, armed with this knowledge, they intentionally moved into noncompliant housing. (Maj. opn., *ante,* 104 Cal.Rptr.3d at pp. 175, 177–179, 223 P.3d at pp. 39–40, 41–43.) If those charged with enforcing the residency restriction did not understand its scope or application until months after it was enacted, how can these petitioners be charged with notice, actual or constructive, that it applied to them at any point before they were served with the 45–day compliance letter? They cannot. How can they have flouted a condition of parole which had not yet been applied to them when they moved into residences later determined to be noncompliant? They did not—they were just going home.

*****190** Moreover, the majority opinion's characterization of what constitutes the pivotal date for purposes of retroactivity analysis in this case is simply wrong. These petitioners did not become subject to the residency restriction when they were released from custody on parole for nonsexual offenses; they were subject to the residency restriction by virtue of their status as registered sex offenders and they acquired that status upon their convictions for their sex offenses. (See *People v. McClellan* (1993) 6 Cal.4th 367, 380, 24 Cal.Rptr.2d 739, 862 P.2d 739 ["the sex offender registration requirement ... ***1291** is ... a statutorily mandated element of punishment for the underlying offense"]; *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 825, 83 Cal.Rptr. 819, 464 P.2d 483 [§ 290 "applies automatically when a person is *convicted* of one of the enumerated offenses" (italics added)].) Indeed, the current registration law in effect requires eligible offenders to register even before they are released from prison. (§ 290.016.) Clearly, the registration requirement is imposed upon *conviction* of the registrable offense as are all ancillary restrictions that flow from that requirement including the residency restriction. Therefore, for purposes of the retroactivity analysis here, the pivotal date is the date of conviction for the registerable offense.

None of the three authorities upon which the majority opinion so heavily relies—*People v. Grant, supra,* 20 Cal.4th 150, 83 Cal.Rptr.2d 295, 973 P.2d 72, *Bourquez v. Superior Court, supra,* 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142, and *People v. Mills* (1992) 6 Cal.App.4th 1278, 8 Cal.Rptr.2d 310—compels a different result because each one is distinguishable.

Grant is factually distinguishable because it involved the violation of a statute—continuous sexual abuse (§ 288.5, subd. (a))—in which some events occurred before the statute's effective date, but others clearly occurred afterwards. (*Grant, supra,* 20 Cal.4th at p. 153, 83 Cal.Rptr.2d 295, 973 P.2d 72.) Additionally, the jury was instructed that it could convict the defendant of the offense only if it found "that one of the required minimum of three acts of molestation occurred after section 288.5's effective date. In other words, defendant could be convicted only if the course of conduct constituting the offense of continuous

sexual abuse was completed *after* the new law became ****53** effective. Because the last act necessary to trigger application of section 288.5 was an act of molestation that defendant committed *after* section 288.5's effective date, defendant's conviction was not a retroactive application of section 288.5 and therefore not a violation of the statutory prohibition against retroactive application of the Penal Code." (*Grant, supra,* 20 Cal.4th at pp. 157–158, 83 Cal.Rptr.2d 295, 973 P.2d 72, first italics added.) In this case, the conduct which is the basis for application of section 3003.5(b) did not straddle the effective date of Proposition 83. That conduct which led to petitioners' convictions and triggered the registration requirement occurred long before passage of Proposition 83.

*****191** *Bourquez* is also inapposite. As the Court of Appeal observed, pending proceedings to extend commitment under the SVPA focus on *current* dangerousness and, therefore, the change in law that extended commitment indefinitely did not attach new legal consequences to *past* conduct. (*Bourquez v. Superior Court, supra,* 156 Cal.App.4th at p. 1289, 68 Cal.Rptr.3d 142.) In contrast, the residency restriction relates back to the original convictions for which the petitioners in this case were required to register as sex offenders—therefore, retroactive ***1292** application of section 3003.5(b) does "change[ ] the legal consequences of past conduct by imposing new or different liabilities" (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 291, 279 Cal.Rptr. 592, 807 P.2d 434) than existed at the time of the convictions.

In *Mills,* the defendant suffered a 1981 felony conviction for being in possession of marijuana for sale. In 1990, he was arrested and charged with being a felon in possession of a firearm—a shotgun. At the time of his 1981 felony conviction, however, the weapons statute proscribed possession of concealed weapons only. It was not until 1989 that the statute was amended to prohibit possession of any firearm, effective in 1990. (*People v. Mills, supra,* 6 Cal.App.4th at p. 1282, 8 Cal.Rptr.2d 310.) The defendant argued that charging him under the amended version of the weapons statute violated the proscription against ex post facto laws because "the 1990 change in the law increases the punishment for his 1981 conviction, and is therefore a prohibited ex post facto law." (*Id.,* at p. 1283, 8 Cal.Rptr.2d 310.)

The Court of Appeal rejected the argument: "Here defendant was convicted of conduct, his possession of a shotgun occurring after the effective date of the statute. His conduct was a violation of the new statute, rather than an increase of punishment for the earlier offense of possessing marijuana for sale. Although the statute only applied to him because of his status as a person convicted of a felony, and the felony conviction occurred before the statute became effective, the fact of his prior conviction only places him into a *status* which makes the new law applicable to him. The legal consequences of his past conduct were not changed—only a new law was applied to his future conduct." (*People v. Mills, supra,* 6 Cal.App.4th at p. 1286, 8 Cal.Rptr.2d 310, fn. omitted.) In reaching this conclusion, the court drew an analogy to habitual offender statutes, noting that "courts have generally held that a statute which increased the punishment of prior offenders is not an ex post facto law if it is applied to events occurring after its effective date." (*Ibid.*)

Analytically, *Mills* is distinguishable from the case before us. Crucial to the court's analysis in *Mills* was the violation by the defendant of a penal statute that was unrelated to the underlying conduct which had led to his earlier conviction for drug possession. In other words, the defendant was initially convicted of, and punished for, possession of a drug for sale. His later conviction was not related to his possession of marijuana but to his possession of a firearm—two entirely separate events. It is true that his earlier conviction gave rise to his felon status which then became an element of the second offense, but he was not being punished for his felon status alone—it was punishment for his status plus conduct that was entirely unrelated to his earlier drug possession. The court's reliance on habitual offender statutes reinforces this point. While conviction for prior felonies may make an offender eligible for enhanced punishment if he commits a new crime, the ***1293** conduct for which the defendant was punished in the earlier conviction ****54** is not the basis for the *****192** enhanced punishment for the subsequent conviction.

In this case, however, the residency restriction applies to petitioners for no other reason than their status as registered sex offenders, which was triggered by the conduct that led to their convictions of the qualifying

sex offenses. The residency restriction has no other object than to increase the legal disabilities imposed upon registered sex offenders *because of their earlier conduct.* This is made abundantly clear by Proposition 83's statement of purpose: "California must also take *additional* steps to monitor sex offenders, to protect the public from them, and to provide adequate penalties for *and safeguards against sex offenders, particularly those who prey on children.*" (Prop. 83, § 2, subd. (h).) The intent of Proposition 83 was to impose further restrictions on registered sex offenders based on the conduct that had led to their qualifying convictions. Thus, the analogy to *Mills* fails.

Stripped of its analytical garb, the majority opinion's analysis is transparently bare. The majority cannot find either in the plain language of section 3003.5(b) or in the ballot pamphlet an explicit statement or a clear and unavoidable implication that the residency restriction was intended to be applied retroactively to individuals like petitioners whose qualifying offenses for registration purposes occurred long before Proposition 83 was enacted. Instead, the majority dismisses the issue by clinging to the fiction that release upon parole is the pivotal date for retroactivity analysis and, therefore, application to these petitioners is prospective.

Ironically, this is the same implausible argument that we unanimously repudiated in *Strauss v. Horton, supra,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48. In *Strauss,* the interveners argued that Proposition 8 —banning same-sex marriages in California—applied to such marriages performed before enactment of the initiative, during the period when same-sex couples were allowed to marry by virtue of our decision in *In re Marriage Cases* (2008) 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384. The argument advanced by the interveners was that, because Proposition 8 banned same-sex marriages after its enactment "the measure is not being applied retroactively but rather prospectively, even if the marriages that are now (or in the future would be) denied recognition were performed prior to the adoption of Proposition 8." (*Strauss, supra,* 46 Cal.4th at p. 471, 93 Cal.Rptr.3d 591, 207 P.3d 48.) We easily saw through this argument: "Were Proposition 8 to be applied to invalidate or to deny recognition to marriages performed prior to November 5, 2008, rendering such marriages ineffective in the future, such action would take away or impair vested rights acquired under the prior state of the law and would constitute a retroactive application of the law." (*Id.* at p. 472, 93 Cal.Rptr.3d 591, 207 P.3d 48.)

***1294** In this case, retroactive application of Proposition 83 would clearly " ' "attach[ ] a new disability, in respect to transactions or considerations already past" ' " (*Myers, supra,* 28 Cal.4th at p. 839, 123 Cal.Rptr.2d 40, 50 P.3d 751; see *Strauss, supra,* 46 Cal.4th at pp. 471–472, 93 Cal.Rptr.3d 591, 207 P.3d 48), thus rendering it retroactive here as application of Proposition 8 would have done in *Strauss*. The majority opinion thereby gives effect to an intent that was nowhere expressed in the initiative or the ballot pamphlet even if, in the process, our carefully developed retroactivity jurisprudence is eviscerated. I cannot join in this plain and unjustified rejection of longstanding retroactivity principles.

II.

Given the majority's conclusion on the retroactivity issue, this case will need to be *****193** remanded for further proceedings. As the majority states, the trial courts on remand must determine the relevant facts necessary to decide petitioners' as-applied challenges, which "would include, but is not necessarily limited to, establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest 'public or private school, or park where children regularly gather' (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities ****55** to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in each particular jurisdiction; and a complete record of the protocol CDCR is currently following to enforce section 3003.5(b) in those respective jurisdictions." (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 184, 223 P.3d at p. 47.)

Also to be considered on remand is the extent to which even moderate safety restrictions may infringe on the constitutional right to intrastate travel. "The

right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) This right has been elaborated in the context of child custody disputes where, it has been said, the right to intrastate travel also embraces "the concomitant right not to travel." (*In re Marriage of McGinnis* (1992) 7 Cal.App.4th 473, 480, 9 Cal.Rptr.2d 182.) "Courts cannot order individuals to move to and live in a community not of their choosing." (*In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575, 1581, 271 Cal.Rptr. 389.)

The Courts of Appeal have struck down various probation conditions because they violated the constitutional right to intrastate travel. In *In re White* (1979) 97 Cal.App.3d 141, 158 Cal.Rptr. 562 the defendant was convicted of prostitution. The trial court imposed a condition of probation that barred ***1295** her from entering areas of the city (Fresno) where there was prostitution activity. The reviewing court struck the condition. The court noted, with respect to the constitutional issues raised by the defendant that "[w]hile White's reasonable expectations regarding association and travel have necessarily been reduced, the restriction should be regarded with skepticism. If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used." (*Id.* at p. 150, 158 Cal.Rptr. 562; see also *People v. Beach* (1983) 147 Cal.App.3d 612, 622–623, 195 Cal.Rptr. 381; *People v. Bauer* (1989) 211 Cal.App.3d 937, 944–945, 260 Cal.Rptr. 62.)

Most recently, in *People v. Smith* (2007) 152 Cal.App.4th 1245, 62 Cal.Rptr.3d 316 (*Smith*), the Court of Appeal struck down a blanket probation condition imposed on all registered sex offenders by the Los Angeles probation department that forbade them from leaving the county for any reason. As the court observed: "Smith has a constitutional right to intrastate travel [citations] which, although not absolute, may be restricted only as reasonably necessary to further a legitimate governmental interest." (*Id.* at p. 1250, 62 Cal.Rptr.3d 316.) The court found no such reasonable necessity in that case, concluding, inter alia, that "the prohibition bears no reasonable relation to the crime." (*Id.* at p. 1252, 62 Cal.Rptr.3d 316.)

We do not consider a probation condition in the present case. But whether section 3003.5(b) is viewed as a parole *****194** condition or a condition imposed by statute that extends beyond parole, the analysis is the same: a restriction on where an ex-offender may live infringes upon that person's right to intrastate travel, which includes as one component the right to choose where to live and not to live. That right is not absolute, but the infringement may be imposed "only as reasonably necessary to further a legitimate governmental interest." (*Smith, supra,* 152 Cal.App.4th at p. 1250, 62 Cal.Rptr.3d 316.)

It is of course true, as the majority points out, that " '[a]lthough a parolee is no longer confined in prison[,] his custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally.' " (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 184, 223 P.3d at p. 47, fn. 10, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 531, 224 Cal.Rptr. 112, 714 P.2d 1251.) As the majority recognizes, however, even if the statute is interpreted to impose no more than parole conditions, such conditions " 'must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action.' " (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 183, 223 P.3d at p. 47, fn. 10, quoting *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 874, 76 Cal.Rptr.2d 841.) ****56** The reasonableness of parole conditions is gauged by the same standard developed in the context of probation conditions ***1296** in *People v. Dominguez* (1967) 256 Cal.App.2d 623, 64 Cal.Rptr. 290, and adopted by this court in *People v. Lent* (1975) 15 Cal.3d 481, 124 Cal.Rptr. 905, 541 P.2d 545 (*Dominguez/lent*). as explained in *dominguEz:* "a condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid." (*Dominguez, supra,* 256 Cal.App.2d at p. 627, 64 Cal.Rptr. 290; *Lent, supra,* 15 Cal.3d at p. 486, 124 Cal.Rptr. 905, 541 P.2d 545.) The *Dominguez/Lent* criteria applies to evaluating the reasonableness of parole conditions.

(*People v. Burgener, supra,* 41 Cal.3d at p. 532, 224 Cal.Rptr. 112, 714 P.2d 1251; *People v. Stevens* (2004) 119 Cal.App.4th 1228, 1233, 15 Cal.Rptr.3d 168; *In re Naito* (1986) 186 Cal.App.3d 1656, 1661, 231 Cal.Rptr. 506.)

Section 3003.5(b)'s residency restrictions apply without exception to those who have committed certain enumerated sex offenses and are required to register as a sex offender. However, in the case of petitioners K.T. and E.J., there is no indication from the record that their sexual offenses involved children, and it is unclear why they should be subject to the statute's residency restrictions, which, as the majority explains, exist for the purpose of protecting children by "creating 'predator free zones around schools and parks to prevent sex offenders from living near where our children learn and play....' " (Maj. opn., *ante,* 104 Cal.Rptr.3d at p. 170, 223 P.3d at p. 35, quoting Voter Information Guide, *supra,* argument in favor of Prop. 83, at p. 46.) The application of the statute to these two petitioners would appear not merely to be not in furtherance of the statute's goal, but actually to be contrary to that goal, since it would divert scarce law enforcement resources toward enforcing a restriction that has no demonstrable effect on increasing child safety. Nor, if viewed strictly as a parole condition, would the statutory restriction appear to bear any relationship to the crimes of which these petitioners were convicted. (See *People v. Stevens, supra,* 119 Cal.App.4th at p. 1233, 15 Cal.Rptr.3d 168.)

On the other hand, petitioner S.P. was convicted of raping a 15–year–old girl when he was 16. Also, it is unclear whether *****195** the Texas sex offense of which petitioner J.S. was convicted, which has as an element the " 'intent to arouse or gratify the sexual desire of any person' " involved a minor as an actual or intended or potential victim. (Maj. opn., *ante,* 104 Cal.Rptr.3d at pp. 172–173, 223 P.3d at pp. 37–38.) As to S.P. and possibly as to J.S., in order to determine whether the right to intrastate travel is violated, the severity of the restriction must be determined as well as whether such severity is justified in furtherance of the statutory goal.

***1297** It is not the function of courts to judge the wisdom of a statute, but it is their function to determine its constitutionality. When a statutory restriction substantially impinges on a person's constitutional right to intrastate travel and does not further the statute's objective, it must be struck down as to that person.[3] Whether such an outcome is appropriate for the as-applied challenges in the present case is a matter to be determined on remand.

3 The restrictions imposed by section 3003.5(b) may also violate the right to privacy found in article I, section 1 of the California Constitution. (See *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213–215, 211 Cal.Rptr. 398, 695 P.2d 695 [the privacy clause's protection of individual autonomy forbids government from requiring individuals receiving public assistance benefits to give up their homes and live in county facilities].)

I CONCUR: KENNARD, J.

All Citations

47 Cal.4th 1258, 223 P.3d 31, 104 Cal.Rptr.3d 165, 10 Cal. Daily Op. Serv. 1418, 2010 Daily Journal D.A.R. 1751

ATTACHMENT 1-K

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 ***590** 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 ***591** "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

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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.[1] (L.A. City Admin. Code, § 6.500 et seq., eff. July 23, 1987.)[2] 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.

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.

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.[3] (Ord., §§ 6.504, 6.505.)

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.

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. [4] 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. [5]

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].)

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 [6] 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.

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.

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. [7] Appellant timely appeals.

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.

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. [8] 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.

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.

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. [9] (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].)

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."

(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. [10] (*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.) ***597**

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].)

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. [11] (*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.)

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."

(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.[12] 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.

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.)

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. [13] 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).

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.

(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. [14] (*Fisher, supra,* at p. 708.)

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.)

(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.[15] 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.

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 ...."

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 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**

ATTACHMENT 1-L

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.)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

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.

COUNSEL
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Stoddard, Lepper, Falco & Schaefer, Abend, Lepper, Jacobson, Schaefer & Hughes, Gary M. Lepper, John H. Tallett, John Pound, James W. Rosenquist, Esther Low, Jospeh A. Montoya, William M. McMillan, Robert J. DeFea, Kenneth G. Nellis, Donald M. Velasco, Lucille Y. Baca, Daniel C. Murphy, Gordon, DeFraga, Watrous & Pezzaglia and Timothy J. Ryan for Defendants and Respondents.
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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 [1] compels compensation for damage caused by an increased flow of streamwater that is traceable to surface water runoff from improvements on public property.

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.

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. [2]

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.

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. [3] 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.

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."

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. [4] 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.

4 Negligence claims against the private parties were settled before trial.

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, [5] 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. [6] 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. [7] ***342**

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...."

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 ...."

The third cause of action, styled as one for a dangerous condition of public property, [8] 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.

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.

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. [9]

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.

In granting defendants' motions the trial court ruled: (l) there was insufficient evidence to establish that Reliez Creek was a storm drainage public improvement; [10] (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; [11] (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.

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.

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; [12] 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.

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.

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.) [13]

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.)

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].) [14]

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].)

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. [15]

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.)

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. [16]

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.

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.) [17]

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.

(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 water-course, 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. [18]

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.

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*, [19] 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.) [20]

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.

(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 vestigally 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.[21] 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.

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.

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.[22] 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.

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.

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, [23] there was no basis in the evidence for a determination of CalTrans or BART share of liability.

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."

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. [24]

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.

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[25] 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.

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."

(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 Constitutition 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 Constitutition suggests that public funding of inverse condemnation actions is necessary if the plaintiff fails to establish a compensable taking or damage. ***378**

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.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

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

FN6 A 920-foot concrete box culvert had been constructed beneath the BART/CalTrans roadway in place of the original stream bed; a l00-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.

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ATTACHMENT 1-M

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. *

* Kennard and Werdegar, JJ., dissented.

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.

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.

Attorneys and Law Firms

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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, [1] 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"?

1 Unless otherwise indicated, all statutory references are to the Government Code.

"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.[2] *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.

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"].)

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

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."

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*).)

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.[3] 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.

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"].)

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.

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. [4] By ***345** *similar* positions, we mean patrol officer positions with reasonably comparable pay, benefits, and promotional opportunities.

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.

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)[1] "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.

1 All further unlabeled statutory references are to the Government Code.

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.)[1] 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.

1 All statutory references, unless otherwise noted, are to the Government Code.

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 [2] ["In determining eligibility for disability retirement, the actual and usual duties of the applicant must be the criteria upon which any impairment is judged."].)

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).

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

ATTACHMENT 1-N

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:

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;

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

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;

intent to sue letter was adequate as to point source discharges; and

genuine issues of material fact regarding operator's permit shield protection precluded summary judgment on storm water discharge claim.

Ordered accordingly.

Attorneys and Law Firms

***1210** Daniel Cooper, Caroline Ann Koch, Lawyers for Clean Water, Inc., Jayni Foley Hein, George Matthew Torgun, Jason Robert Flanders, Sejal Choksi–Chugh, San Francisco Baykeeper, San Francisco, CA, Amanda Rosemary Garcia, Nashville, TN, for Plaintiff.

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 1 (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. *Envt'l 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 handing 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

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

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.

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* *Envtl. Def. Ctr. v. Envtl. 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.

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 Envtl. 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)).

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." *Cmty. 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 alphatic 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.

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 (Envtl. 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 [1] 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.

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.

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 NDPES 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).

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 MPDES 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 basis 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.

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

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

ATTACHMENT 1-O

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.[*])

[*] Retired judge of the Alpine Superior Court sitting under assignment by the Chairperson of the Judicial Council.

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), [1] 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.

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.

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. [2] "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].)

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.*)

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. [3] 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.

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.

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. [4] 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. [5] 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.

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.

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. [6] TKPOA seeks to preclude CTPRA 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.

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 Audubon 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.

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. [7] The trial court denied the request for preliminary injunctive relief and TKPOA appeals.

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.

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), [8] 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.*)

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.)

(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. [9] 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 irremediable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief.

9 TKPOA presented the declaration of Gregory A. Bennallack, 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.

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. [10]

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.

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. [11] 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].)

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.

(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.*) [12]

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.*)

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].) [13] Accordingly, the taking as a condition for the issuance of a land-use permit was invalid. (*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.*)

(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].) [14]

14 This does not mean that any governmental action that appears to fall into one of the first two categories is necessarily invalid unless pensation 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].)

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].) [15]

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.*)

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].)[16] 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].)

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.

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].) [17] 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.

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.

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 the 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. [18] 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.

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."

(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 CTPRA and Lahonton over the reclassification of the Tahoe Keys; that it proposed a mitigation fee as a condition of reclassification; [19] 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. [20]

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 it 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.

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 irremediable 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 irremediable 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 CTPRA resolution said that the fund would be used for onor 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 CTPRA 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.

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**

ATTACHMENT 1-P

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:

undergrounding of utilities provided special benefits which could be funded by special assessment; but

apportioning assessment in zones with different average lot size was unconstitutionally disproportionate, and

failure to include benefited parcels adjacent to the district in the district violated constitutional proportionality requirement.

Reversed and remanded with directions.

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

McGUINESS, 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.[1] Thus, a vacant property would be treated as if it were developed to its highest potential and connected to the system.

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.

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. [2]

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.

***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. [3] 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. [4] The Town directed the engineer of work to prepare a supplemental engineer's report.

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."

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 it 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.[5] The Town's council adopted a resolution approving the revised assessment amounts.

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.

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.[6] Supplemental assessments for the 11 parcels in areas with utilities already placed underground ranged from $4,937.41 to $10,165.79.

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.

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.[7] 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.

7 Two of the appellants, Jimmie D. Bonander and Frank Mulberg, are also parties to the lawsuit seeking to invalidate the Original District.

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

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.)

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. [8] (*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.*)

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.)

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, subds. (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.)

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." [9] (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.*)

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].)

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.

***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. [10]

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.

III. SPECIAL BENEFITS

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.*)

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. [11] (*Id.* at pp. 455–456, 79 Cal.Rptr.3d 312, 187 P.3d 37.)

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.)

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 ****501** 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.[12] 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.

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.

***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]."

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.

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. [13]

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.

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).)

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).)

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.

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.[14] 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.

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.)

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.[15] 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.

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.

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*

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.[16] 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.

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.

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. [17]

17 We deny as moot appellants' request for judicial notice of the legislative history of Government Code section 53753.

*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

ATTACHMENT 1-Q

220 Cal.App.4th 586
Court of Appeal, Sixth District, California.

Harold GRIFFITH, Plaintiff and Appellant,
v.
PAJARO VALLEY WATER MANAGEMENT AGENCY, Defendant and Respondent.
Joseph P. Pendry et al.,
Plaintiffs and Appellants,
v.
Pajaro Valley Water Management Agency, Defendant and Respondent.

H038087
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H038264
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Filed October 15, 2013
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Review Denied January 21, 2014

Synopsis

Background: Taxpayers brought actions against regional water management agency to challenge ordinance that increased groundwater augmentation charges for the operation of wells under the Right to Vote on Taxes Act and the Political Reform Act (PRA). The Superior Court, Santa Cruz County, Nos. CV168936 and CV169080, Timothy Volkmann, J., entered judgments for water management agency. Taxpayers appealed.

Holdings: The Court of Appeal, Premo, J., held that:

ordinance was within water service exemption from Right to Vote on Taxes Act;

debt service costs were within the Pajaro Valley Water Management Agency Act's statutory authorization to levy groundwater augmentation charges;

Pajaro Valley Water Management Agency Act authorized combining water from "recycled water" facility with well water;

groundwater augmentation charges did not improperly exceed proportional cost attributable to taxpayer's parcel;

groundwater augmentation charges were not improperly imposed for general governmental services.

Affirmed.

****246** Santa Cruz County Superior Court, Superior Court Nos. CV168936, CV169080

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Aleshire & Wynder, Patricia J. Quilizapa, Amicus Curiae on behalf of Respondents for Association of California Water Agencies and California State Association of Counties.

Opinion

Premo, J.

***589** After defendant Pajaro Valley Water Management Agency enacted ordinance No. 2010-02 that increased groundwater augmentation ***590** charges for the operation of wells within defendant's jurisdiction, plaintiff Harold Griffith challenged the ordinance on the grounds that the increase (1) was procedurally flawed because it was not approved in an election as required by Proposition 218 (Cal. Const., art. XIII D, § 6),[1] (2) did not conform to certain substantive requirements of Proposition 218, and (3) was to be used for a purpose not authorized by the law under which defendant was formed. Thereafter,

plaintiffs Joseph P. Pendry, James Spain, Yuet-Ming Chu, William J. McGrath, and Henry Schepeler (Pendry) challenged the ordinance on similar grounds and on the ground that it was void because one of the directors who voted for the ordinance had a disqualifying conflict of interest within the meaning of the Political Reform Act of 1974 (PRA) (****247** Gov.Code, § 87100 et seq.).[2] They also challenged an ordinance passed in 2002, which imposed an augmentation charge, and a 1993 management-fee ordinance. The trial court rendered judgments for defendant. Plaintiffs have appealed and reiterate their challenges. We are considering the two appeals together for purposes of briefing, oral argument, and disposition. After conducting an independent review of the record (*Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448, 79 Cal.Rptr.3d 312, 187 P.3d 37 (*Silicon Valley*)), we affirm the judgments.

1 Further unspecified section references are to California Constitution, article XIII D.

2 Plaintiffs also asserted other grounds that they do not advance on appeal.

GENERAL BACKGROUND

We have previously detailed an historical background to this case in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1370–1375, 59 Cal.Rptr.3d 484 (*Amrhein*). We therefore decline to repeat it and will instead begin with the trial court's succinct summary.

"The Pajaro Valley Groundwater Basin supplies most of the water used in the Pajaro Valley. The water is being extracted faster than it is being replenished by natural forces, which leads to saltwater intrusion, especially near the coast. Once the water table drops below sea level, seawater seeps into the groundwater basin. [Defendant] was created [in 1984 by the Pajaro Valley Water Management Agency Act (Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Ann. Wat.—Uncod. Acts (2008) Act 760, p. 681(Act))] to deal with this issue. At present, the strategy is to use recycled wastewater, supplemental wells, captured storm runoff, and a coastal distribution system. The purpose is to reduce the amount of water taken from the groundwater basin (for example, the amount taken from wells), by supplying water to some [coastal] users. The cost of this process is borne by all users, on the theory that even those taking water from [inland] wells benefit from the ***591** delivery of water to [coastal users], as that reduces the amount of groundwater those [coastal users] will extract [from their own wells], thereby keeping the water in [all] wells from becoming too salty."

****248** Ordinance No. 2010-02 describes "three supplemental water projects that work together to provide supplemental water to reduce overdraft, retard seawater intrusion, and improve and protect the groundwater basin supply: (1) Watsonville Recycled Water Project, which provides tertiary treated recycled water for agricultural use and includes inland wells that are used to provide cleaner well water that is blended with the treated water in order to improve the water quality so that it may be used for agricultural purposes; (2) Harkins Slough Project, which diverts excess wet-weather flows from Harkins Slough to a basin that recharges the groundwater, which then is available to be extracted and delivered for agricultural use; and (3) Coastal Distribution System ('CDS'), which consists of pipelines that deliver the blended recycled water and Harkins Slough Project water for agricultural use along the coast."

"The Act specifically empowers [defendant] to adopt ordinances levying 'groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within [defendant's boundaries].' " (*Amrhein, supra,* 150 Cal.App.4th at p. 1372, 59 Cal.Rptr.3d 484; see Stats. 1984, ch. 257, § 1 et seq., p. 798 et seq., Deering's Ann. Wat.— Uncod. Acts, *supra*, Act, 760 (Act), § 1001.)

Ordinance No. 2010-02 states that the augmentation charge is necessary to cover the costs of "supplemental water service" described as follows: "(a) the purchase/ acquisition, capture, storage and distribution of supplemental water through the supplemental water projects [(Watsonville Recycled Water Project, Harkins Slough Project, and CDS] and including the planning, design, financing, construction, operation, maintenance, repair, replacement and management of

these project facilities, and (b) basin management monitoring and planning to manage the existing projects and to identify and determine future supplemental water projects that would further reduce groundwater overdraft and retard seawater intrusion. The cost of the service also includes ongoing debt payments related to the design and construction of the completed supplemental water projects."

PROCEDURAL BACKGROUND

In 2002, defendant approved ordinance No. 2002-02, which established an augmentation charge of $80 per acre-foot. Several citizens challenged the ordinance on the ground that the approval procedure did not comply with the notice, hearing, and voting requirements of Proposition 218. The trial court ***592** dismissed the case on the ground of a special statute of limitations, and the plaintiffs appealed to this court. We reversed the judgment after finding that part of the augmentation charge was not subject to the statute of limitations. (*Scurich v. Pajaro Valley Water Management Agency,*2004 WL 1191948 (May 27, 2004, H025776) [nonpub. opn.] (*Scurich*); see *Eiskamp v. Pajaro Valley Water Management Agency* (2012) 203 Cal.App.4th 97, 100–101, 137 Cal.Rptr.3d 266 (*Eiskamp*).) We remanded the case for trial.

In 2003, defendant approved ordinance No. 2003-01, which increased the augmentation charge to $120 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. But it filed *Amrhein* as a validation proceeding[3] seeking a declaration as to the validity of the ordinance. The trial court declared the ordinance valid, and citizens who had objected appealed to this court.

3 In rem proceeding by public agency against all persons interested in validity of matter determined. (Code Civ. Proc., § 860 et seq.)

In 2004, defendant approved ordinance No. 2004-02, which increased the augmentation charge to $160 per acre-foot. It did not comply with the notice, hearing, and voting requirements of Proposition 218. Griffith challenged the ordinance and a 1993 management-fee ordinance. San Andreas Mutual Water Company and others also challenged the ordinance. The two actions were consolidated with *Scurich*(Consolidated Lawsuits) and the Consolidated Lawsuits were stayed pending our decision in *Amrhein.*

In May 2007, we reversed the judgment in *Amrhein* after holding that "the augmentation fee is a fee or charge 'imposed ... as an incident of property ownership' and thus subject to [the Proposition 218] preconditions for the imposition of such charges." (*Amrhein, supra,* 150 Cal.App.4th at p. 1370, 59 Cal.Rptr.3d 484.)

In October 2007, defendant repealed ordinances Nos. 2003-01 and 2004-02.

"In January 2008, the *Scurich* plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants wanted to resolve all disputes in the Amrhein Lawsuit and the Consolidated Lawsuits. They and [defendant] then entered into a stipulated agreement for entry of judgment ****249** (stipulated agreement). The stipulated agreement provided: 'all matters raised in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation") as to [defendant's] actions shall be resolved by entry of judgment in the Pending Litigation'; [defendant] would pay $1.8 million to the *Scurich* plaintiffs, the San Andreas plaintiffs, Harold Griffith, and the Amrhein defendants for legal fees, costs, and expenses; and the augmentation charges ***593** collected pursuant to ordinance Nos. 2003-01 and 2004-02 would be refunded. It also stated that the 'settlement extinguishes any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including all claims that the parties have made or could have made with respect to the validity of any Augmentation Charge or Management Fee ordinances currently in effect....' The stipulated agreement did not provide for either the repeal of [ordinance No. 2002-02] or the refund of augmentation charges imposed under [that] Ordinance.

"In February 2008, judgment was entered pursuant to the terms of the stipulated agreement." (*Eiskamp, supra,* 203 Cal.App.4th at p. 102, 137 Cal.Rptr.3d 266.)

In May 2010, defendant mailed notice of a public hearing on a proposed three-tier augmentation charge

increase to all parcel owners.[4] At the hearing, defendant tallied 291 written protests from 1,930 eligible parcel owners. Defendant then enacted ordinance No. 2010-02, which imposed the increased augmentation charges.

4 Defendant proposed $195 per acre-foot for metered wells inside the coastal delivered water zone, $162 per acre-foot for metered wells outside the delivered water zone (primarily municipal, industrial, and agricultural users), and $156 per acre-foot for unmetered wells (primarily rural residential). It also proposed $306 per acre-foot for delivered water charges.

In June 2010, defendant began an all-mail election on the ordinance. It mailed ballots to all owners of land parcels served by wells who would be subject to the augmentation charge. Each ballot was accorded weighted votes proportional to the parcel's financial obligation as measured by average annual water use over the prior five years. And each ballot stated its number of votes. The weighted votes approved the ordinance 72 percent to 28 percent. But, if counted one vote per parcel, 324 votes were in favor of the ordinance and 608 votes were against the ordinance.[5] Plaintiffs then filed the instant actions to challenge ordinance No. 2010-02.

5 The parties differ immaterially on the one-for-one vote count.

CHALLENGES TO ORDINANCE NO. 2010–02

"Proposition 218 was passed in 1996 by the electorate to plug certain perceived loopholes in Proposition 13. [Citations.] Specifically, by increasing assessments, fees, and charges, local governments tried to raise revenues without triggering the voter approval requirements in Proposition 13." (*Silicon Valley Taxpayers' Assn. v. Garner* (2013) 216 Cal.App.4th 402, 405–406, 156 Cal.Rptr.3d 703.)

Relevant here is the component of Proposition 218 that undertakes to constrain the imposition by local governments of "assessments, fees and charges." (§ 1.)

***594** Proposition 218 restricts "the power of public agencies to impose a ' "[f]ee" or "charge," ' defined as any 'levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or *upon a person as an incident of* ****250** *property ownership,* including a user fee or charge for a property related service.' [Citation.] The phrase '[p]roperty-related service' is defined to mean 'a public service having a direct relationship to property ownership.' [Citation.] 'Property ownership' is defined to 'include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.' [Citation.]

"Where a proposed fee or charge comes within this definition, [Proposition 218] requires the proposing agency to identify parcels upon which it will be imposed, and to conduct a public hearing. [Citation.] The hearing must be preceded by written notice to affected owners setting forth, among other things, a 'calculat[ion]' of '[t]he amount of the fee or charge proposed to be imposed upon each parcel....' [Citation.] If a majority of affected owners file written protests at the public hearing, 'the agency shall not impose the fee or charge.' [Citation.] Moreover, unless the charge is for 'sewer, water, [or] refuse collection services,' 'no property related fee or charge shall be imposed or increased unless and [it] 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.' " (*Amrhein, supra,* 150 Cal.App.4th at pp. 1384–1385, 59 Cal.Rptr.3d 484.)

As mentioned, we have determined that a groundwater augmentation charge such as the one imposed by ordinance No. 2010-02 "is indeed imposed as an incident of property ownership [and] that it is subject to the restrictions imposed on such charges by [Proposition 218]." (*Amrhein, supra,* 150 Cal.App.4th at p. 1393, 59 Cal.Rptr.3d 484.) We cautioned in *Amrhein,* however, that "We should not be understood to imply that the charge is necessarily subject to *all* of the restrictions imposed by [Proposition 218] on charges incidental to property ownership. [*Amrhein*] presents 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." (*Ibid.* & fn. 21.)

This case, however, presents such an occasion.

Boiled to its essence, plaintiffs' challenge to the election is that the weighted vote was improper. But the challenge necessarily fails if the augmentation charge falls within the express exemption set forth in Proposition 218 for sewer, water, and refuse collection services. (§ 6, subd. (c) [vote ***595** required to impose or increase property-related fee "[e]xcept for ... sewer, water, and refuse collection services."].) [6]

6 According to defendant, the election was unnecessary but held nevertheless in an abundance of caution "because no case has explicitly reached the issue, and because of the near certainty of suit."

Plaintiffs argue that defendant does not provide "water service" as that term is commonly understood. (See *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358, 121 Cal.Rptr.2d 228 *Salinas* ["The average voter would envision 'water service' as the supply of water for personal, household, and commercial use...."]).) They urge that defendant provides " 'groundwater management,' " which may be a service "but that service is not 'water service.' " Plaintiffs, however, make a distinction without a difference.

Domestic water delivery through a pipeline is a property-related water service within the meaning of Proposition 218. ****251** (*Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217, 46 Cal.Rptr.3d 73, 138 P.3d 220.) And we have held that, for purposes of Proposition 218, the augmentation charge at issue here does not differ materially "from a charge on *delivered* water." (*Amrhein, supra,* 150 Cal.App.4th at pp. 1388–1389, 59 Cal.Rptr.3d 484.) If the charges for water delivery and water extraction are akin, then the services behind the charges are akin. Moreover, the Legislature has endorsed the view that water service means more than just supplying water. The Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov.Code, § 53750, subd. (m).) Thus, the entity that produces, stores, supplies, treats, or distributes water necessarily provides water service. Defendant's statutory mandate to purchase, capture, store, and distribute supplemental water therefore describes water service.

Plaintiffs' reliance on *Salinas* is erroneous. In *Salinas,* the question was whether a storm drainage fee was exempt from the voter-approval requirement because it was a water or sewer service fee. Our point about the average voter envisioning water service as meaning the supplying of water was a preface to distinguishing water service from storm drainage rather than a definition of water service. The entire sentence reads "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 [from property], and discharges it into the nearby creeks, river and ocean." (*Salinas, supra,* 98 Cal.App.4th at p. 1358, 121 Cal.Rptr.2d 228.)

***596** We therefore conclude that the augmentation charge at issue here is for water service within the meaning of Proposition 218. As such, it was expressly exempt from the fee/charge voting requirement.

In a second procedural attack, Pendry urges that defendant transgressed Proposition 218 by enacting ordinance No. 2010-02 without giving notice of the protest hearing to tenants and public utility customers who indirectly pay the augmentation charge. There is no merit to the claim.

"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." (§ 6, subd. (a)(1), italics added.)

In short, Proposition 218 requires that notice of the protest hearing be sent to record owners, not tenants or customers. (See Gov.Code, § 53750, subd. (j) ["For purposes of ...Article XIII D of the California Constitution... [¶] ... [¶] (j) 'Record owner' means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of ****252** that public entity at the address of that entity known to the agency."].)

It is true, as Pendry points out, that, in the definitions section of Proposition 218, the term "property ownership" is defined to include "tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question." (§ 2, subd. (g).) And it is true that "when a well [is] shown to be operated by a lessee or other occupant, that person could be billed." (*Amrhein, supra,* 150 Cal.App.4th at p. 1383, 59 Cal.Rptr.3d 484.) But the notice provision of section 6, subdivision (a), requires notice to record owners, not to those having property ownership. (*Silicon Valley, supra,* 44 Cal.4th at p. 444, 79 Cal.Rptr.3d 312, 187 P.3d 37 [" 'The principles of constitutional interpretation are similar to those governing statutory construction.' [Citation.] If the language is clear and unambiguous, the plain meaning governs."].)

***597** "Proposition 218 also imposes substantive limitations, including restrictions on the use of revenues derived from such charges." (*Amrhein, supra,* 150 Cal.App.4th at p. 1385, 59 Cal.Rptr.3d 484.)

"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 [(procedures and requirements for proposed assessments)].

"(5) No fee or charge may be imposed for general governmental services ... where the service is available to the public at large in substantially the same manner as it is to property owners[¶]... 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." (§ 6, subd. (b).)

Plaintiffs argue that the augmentation charge transgresses each of the section 6, subdivision (b), substantive limitations.

Revenues shall not exceed the funds required to provide the property-related service

According to Griffith,[7] the revenues derived from the augmentation charge exceed the funds required to provide supplemental water service because ***598** some of the revenue is used to pay ongoing debt that was "incurred to build a now *abandoned pipeline* to bring water into the Valley."[8] There is no merit to the point.

7 Pendry does not challenge compliance with section 6, subdivision (b)(1).

8 Defendant's Proposition 218 service charge report (Rate Study), in evidence below, explains that a previously recommended import pipeline was no longer feasible "[d]ue to changes in the availability of Central Valley Project water supplies."

****253** As noted above, the Act allows defendant to levy groundwater augmentation charges for the

purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water. Such costs necessarily include debt service incurred to construct facilities to capture, store, and distribute supplemental water.

Revenues shall not be used for any purpose other than that for which the fee or charge was imposed

According to plaintiffs, the revenues derived from the augmentation charge are used for a purpose other than that for which the charge was imposed because some of the revenue is used to pay debt service and defendant's general expenses. Again, the Act allows an augmentation charge to cover debt service. And similar reasoning supports that the costs of purchasing, capturing, storing, and distributing supplemental water necessarily include general expenses to administer the purchasing, capturing, storing, and distributing of supplemental water.

Pendry, however, expands on this theme in a separate, detailed argument to the effect that the augmentation charge is unauthorized by the Act. He contends that ordinance No. 2010-02 is invalid because it allows the augmentation charge to be used for "supplemental water service," a purpose not authorized by the Act. Without specifically referring to the Watsonville Recycled Water Project that blends treated recycled water with well water for agricultural use, he complains that defendant "is using the funds generated by the augmentation charge imposed by Ordinance 2010-02 to extract groundwater from within the watershed and deliver that water to the coast...."

Pendry relies on the Act, which authorizes defendant to levy augmentation charges to pay the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency. From there, Pendry notes that the Act states that " 'Supplemental water' means surface water or groundwater imported from outside the watershed or watersheds of the groundwater basin, flood waters that are conserved and saved within the watershed or watersheds which would otherwise have been lost or would not have reached the groundwater basin, and recycled water." (Act, § 316.) From this, Pendry concludes that the recycle/well blend is not supplemental water ***599** because the well portion of the blend is neither imported water, floodwater, nor recycled water. We disagree with Pendry's analysis.

Defendant's Rate Study (*ante,* fn. 8) explains that "The [Watsonville Recycled Water Facility] produces recycled water with salinity (Total Dissolved Solids or TDS concentration) between approximately 700 and 900 mg/L. The concentration of TDS varies seasonally as a result of the source water flowing into the Waste Water Treatment Plant. In order to reduce salinity and use the recycled water for irrigation purposes, the recycled water must be blended with higher quality (lower TDS) water. Therefore, the recycled water project includes the construction, operation, and maintenance of blend water from supplemental groundwater wells. The supplemental wells are described in the BMP [(Basin Management Plan)] as part of the recycled water project. The wells are a necessary component of the recycled water project, which reduces coastal pumping and thus increases the sustainable yield of the overall groundwater basin. These wells also off-set and reduce the adverse water quality wells located closer to the coast."

" 'Recycled water' means water which, as a result of treatment of waste, is suitable ****254** for a direct beneficial use or a controlled use that would not otherwise occur and is therefor considered a valuable resource." (Wat.Code, § 13050, subd. (n).)

Given this definition, it is apparent that the Watsonville Recycled Water Facility does not produce recycled water because the water it produces is not suitable for the beneficial use of coastal agriculture.[9] The water only becomes recycled water when blended with the well water. Thus, the recycle/well blend water delivered to the coast is supplemental water.

9 "Agricultural uses shall have priority over other uses under this act within the constraints of state law." (Act, § 102, subd. (d).)

We are constrained to add that the Act unquestionably allows defendant to extract groundwater for the purpose of capturing recycled water. The Act generally provides that defendant "should, in an efficient and economically feasible manner, utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future

needs of the basin." (Act, § 102, subd. (g).) It specifically provides that defendant, "in order to improve and protect the quality of water supplies may treat, inject, extract, or otherwise control water, including, but not limited to, control of extractions, and construction of wells and drainage facilities." (*Id.*, § 711.) And it also provides that defendant "shall have the power to take all affirmative steps necessary to replenish and augment the water supply within its territory." (*Id.*, § 714.)

***600** *The amount imposed as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel*

According to Griffith, the amount imposed on his parcel was disproportionate because he uses no services. But this overlooks that "the management of the water resources ... for agricultural, municipal, industrial, and other beneficial uses is in the public interest..." and defendant was created to manage the resources "for the common benefit of all water users." (Act, § 101.) It also overlooks that the augmentation charge pays for "the activities required to prepare or implement any groundwater management program." (*Id.* § 1002, subd. (a).)

Pendry similarly grounds his argument on the erroneous premise that "The only property owners receiving § 6(b) services from [defendant] are the coastal landowners receiving delivered water."

Pendry specifically complains that defendant "established the augmentation charge by calculating the amount needed for its project, and then subtracting its sources of revenue other than the augmentation charge, with the remainder being the amount of the augmentation charge." He urges that defendant improperly "worked backwards." According to Pendry, "the proportional cost of service must be calculated ... before setting the rate for the augmentation charge."

Defendant indeed established its augmentation charge based on a revenue-requirement model that budgeted the rates by (1) taking the total costs of chargeable activities, (2) deducting the revenue expected from other sources, and (3) apportioning the revenue requirement among the users. The American Water Works Association Manual of Water Supply Practices: Principles of Water Rates, Fees, and Charges, in evidence below and relied on by defendant's ratemaking consultant, recommends this methodology ("The total annual cost of providing water service is the ****255** annual revenue requirements that apply to the particular utility...."). Pendry does not explain why this approach offends Proposition 218 proportionality. He cites *Silicon Valley, supra,* 44 Cal.4th at page 457, 79 Cal.Rptr.3d 312, 187 P.3d 37 (" 'an assessment calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual spending budget based thereon, does not comply with the law governing assessments...' "). Unlike *Silicon Valley,* however, this case neither involves an assessment nor a what-will-the-market-bear methodology. Pendry also cites *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153]. But that case says nothing more than that costs should be determined and apportioned ("Together, subdivision (b)(1) and (3) of article XIII D, section 6, makes it necessary—if Fresno wishes to recover all of its utilities costs from user ***601** fees—that it reasonably determine [citation] the unbudgeted costs of utilities enterprises and that those costs be recovered through rates proportional to the cost of providing service to each parcel."). (*Ibid.*)

Pendry acknowledges that defendant apportioned the augmentation charge among different categories of users (metered wells, unmetered wells, and wells within the delivered water zone). But he argues that *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 131 Cal.Rptr.3d 373 (*Palmdale*), holds that Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis. We disagree with Pendry.

In *Palmdale,* the court reversed a judgment that had upheld tiered categories of water rates. It held that the water district had failed to carry its burden to justify disparate treatment of the customer classes. The case did not hold that parcel-by-parcel analysis was required. It held that the water district charged categories disproportionately "without a corresponding showing in the record that such impact is justified under [Proposition 218]." (*Palmdale, supra,* 198 Cal.App.4th at p. 937, 131 Cal.Rptr.3d 373.)

Apportionment is not a determination that lends itself to precise calculation. (*White v. County of San Diego* (1980) 26 Cal.3d 897, 903, 163 Cal.Rptr. 640, 608 P.2d 728.) In the context of determining the validity of a fee imposed upon water appropriators by the State Water Resources Control Board, the Supreme Court has recently held that "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." (*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.)

Given that Proposition 218 prescribes no particular method for apportioning a fee or charge other than that the amount shall not exceed the proportional cost of the service attributable to the parcel, defendant's method of grouping similar users together for the same augmentation rate and charging the users according to usage is a reasonable way to apportion the cost of service. That there may be other methods favored by plaintiffs does not render defendant's method unconstitutional. Proposition 218 does not require a more finely calibrated apportion.

No fee or charge may be imposed unless it is immediately available and not for future services

Plaintiffs argue that the augmentation charge will be used for future services because ordinance No. 2010-02 states that the charge will be used "to identify and determine future supplemental water projects...." There is no merit to the point.

****256** ***602** Defendant's water service consists of more than just delivering water. As mentioned, the Act authorizes defendant to levy groundwater augmentation charges to pay for purchasing, capturing, storing, and distributing supplemental water. Since one cannot rationally purchase supplemental water without identifying and determining one's needs, identifying and determining future supplemental water projects is part of defendant's present-day water service.

Pendry also complains that delivered water is one of the services and delivered water is not immediately available except to coastal properties within the delivered water zone. But, again, Pendry's complaint stems from his erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water and his failure to acknowledge that the augmentation charge pays for the activities required to prepare or implement the groundwater management program for the common benefit of all water users.

Revenues may not be imposed for general governmental services where the service is available to the public at large in substantially the same manner as it is to property owners

Plaintiffs reason that, since everyone is a water user, everyone benefits from the services charged to property owners via the augmentation charge. They conclude that the augmentation charge is imposed for general governmental services. We disagree with plaintiffs' analysis.

The language of article XIII D, section 6, subdivision (b)(5), concerns the purpose of fees and charges. (*Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 434, fn. 17, 130 Cal.Rptr.3d 865.) "The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service." (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 648, 119 Cal.Rptr.2d 91.) Defendant is not using money from the augmentation charge for "general governmental services." (§ 6, subd. (b)(5).) Rather, it is using the money to pay for the water service provided.

CONFLICT OF INTEREST

Pendry contends that defendant's board member Michael Dobler, who voted for ordinance No. 2010-02, had a disqualifying financial interest in the decision, and that his participation renders the ordinance void under the PRA. He points out that defendant's board of directors consists of seven members (Act, § 402) and ordinances must pass by "the affirmative vote of the majority of the members of the board" (*id.,* § 410). He notes that the vote count to pass ordinance No. 2010-02 was four to one and, thus, insufficient ***603** without Dobler's vote. He complains that Dobler has an interest in entities that farm in the delivered water zone. We disagree with Pendry's contention.

The PRA was enacted by initiative in June 1974. It prohibits any public official from participating in a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code, § 87100.) It allows a person to sue for injunctive relief and, "If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void." (*Id.*, § 91003, subd. (b).) It also established the Fair Political Practices Commission (*id.*, § 83100), which is authorized to adopt regulations to carry out the purposes and provisions of the PRA (Gov. Code, § 83112).

****257** "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official...." (Gov.Code, § 87103.)

"The financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if ...: [¶] ... [¶] (c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (Cal.Code Regs., tit. 2, § 18707.2, subd. (c) (regulation).)

Here, there is no serious question that (1) defendant is a water, irrigation, or similar district, and (2) the decision effected an adjustment to charges or rates.

Pendry disputes that the ordinance applies the charges proportionally and across the board to persons receiving services from defendant. He urges that the augmentation charge is imposed upon approximately 2,400 parcels located within defendant's boundaries, but only a handful of those properties receive the delivered water service (Dobler included) and can expect to benefit from the greater service, reliability, and improved water quality from the delivered water supply. This, however, is merely another variant of Pendry's erroneous premise that the only property owners receiving services from defendant are the coastal landowners receiving delivered water.

The augmentation charge affects those on whom it is imposed by burdening them with an expense they will bear proportionately to the amount of ***604** groundwater they extract at a rate depending on which of three rate classes applies. It is imposed "across-the-board" on all water extractors. All persons extracting water—including any coastal users who choose to do so—will pay an augmentation charge per acre-foot extracted. All persons extracting water and paying the charge will benefit in the continued availability of usable groundwater. That there is a separate charge for delivered water has no tendency to establish that the augmentation charge is applied to the interests of extractors in a manner that is anything other than proportional and across-the-board. It is plain that the ordinance satisfies the terms of regulation section 18707.2, subdivision (c), such that the "public generally" exception in the PRA applies to Dobler's vote.[10] (See *Amrhein, supra,* 150 Cal.App.4th at pp. 1395–1396, 59 Cal.Rptr.3d 484 (conc. opn. of Bamattre-Manoukian, J.).)

10 Pendry claims that the trial court did not find that the "public generally" exception applies in this case. It is true that the trial court's reasoning is ambiguous. The trial court's statement of decision finds against "a conflict of interest which could support the voiding of the subject Ordinance." The finding could be construed to mean that (1) Dobler had no disqualifying financial interest, (2) the "public generally" exception applied to Dobler's financial interest, or (3) Dobler's financial interest did not justify the discretionary remedy to void the ordinance. Pendry's point is of no moment. The parties argued the "public generally" exception to the trial court. The salient facts are undisputed. And Pendry urges us to review the PRA issue de novo because it involves statutory interpretation on undisputed facts.

ORDINANCE NO. 2002–02 AND 1993 MANAGEMENT FEE

In *Eiskamp,* the plaintiff challenged ordinance No. 2002-02 on the ****258** ground that it was invalid because defendant did not comply "with the notice, hearing, and voting requirements of [Proposition 218]." (*Eiskamp, supra,* 203 Cal.App.4th at p. 102, 137 Cal.Rptr.3d 266.) We concluded that the challenge was barred by the doctrine of res judicata because the 2008 stipulated judgment in the pending litigation resolved the issue against all persons. We specifically held that "Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was 'binding and conclusive ... against [defendant] and against all other persons' (Code Civ. Proc., § 870, subd. (a)), including Eiskamp." (*Id.* at p. 106, 137 Cal.Rptr.3d 266.) Since Pendry raises the same claim as the plaintiff in *Eiskamp,* [11] his challenge is also barred.

11 The plaintiff in *Eiskamp* did not challenge the 1993 management-fee ordinance as does Pendry, but the management-fee ordinance stands on the same footing as the augmentation-charge ordinance since it was part of the stipulated judgment.

Pendry disagrees. He asserts that *Eiskamp* was wrongly decided because "the in pro per plaintiff in *Eiskamp* did not properly present the correct facts or law to this Court." According to Pendry, the Consolidated Lawsuits were not in rem validation proceedings insofar as ordinance No. 2002-02 was concerned because, in *Scurich* (the case that challenged that ordinance via a ***605** reverse validation action), our reversal upheld the trial court's dismissal of the in rem validation cause of action and remanded for trial an in personam declaratory-relief cause of action. From this, Pendry reasons that ordinance No. 2002-02 was "not under attack" such that there was in rem jurisdiction in the Consolidated Lawsuits. Pendry concludes that the stipulated judgment only binds parties to the stipulated agreement and, since he was not a party, [12] he is free to relitigate. Pendry's analysis is erroneous.

12 Plaintiff McGrath was a party to the stipulated agreement but he excepted himself from the causes of action herein that challenge ordinance No. 2002-02 and the management-fee ordinance.

The settlement agreement served to resolve " '*all matters raised* in the Consolidated Lawsuits and the Amrhein Lawsuit (collectively the "Pending Litigation")." " (*Eiskamp, supra,* 203 Cal.App.4th at p. 102, 137 Cal.Rptr.3d 266, italics added.) Specifically, the parties extinguished " 'any and all claims arising out of the Pending Litigation all issues, transactions and/or related claims or actions including *all claims that the parties have made* or could have made with respect to the validity of *any Augmentation Charge or Management Fee ordinances currently in effect* ....' " (*Ibid.* italics added.)

In the pending litigation, the "judgment was entered pursuant to the terms of the stipulated agreement." (*Eiskamp, supra,* 203 Cal.App.4th at p. 102, 137 Cal.Rptr.3d 266.) Since the Amrhein lawsuit was a validation proceeding and part of the pending litigation, all persons are bound by the judgment. (Code Civ. Proc., § 870, subd. (a).) And since the judgment extinguished all claims that the parties, which includes all persons given that validation character of *Amrhein,* had made concerning any augmentation charge or management fee then in effect, Pendry cannot relitigate the claims here. Pendry concedes as much by recognizing that "the plaintiffs and defendants in *Scurich* and *Amrhein* [(all persons)] stipulated in private settlement discussions to accept money in exchange for foregoing their individual right to attack Ordinance 2002-02 in the future." That ordinance No. 2002-02 was not technically under attack at the time of ****259** the judgment does not detract from that the pending litigation was a validation proceeding that comprehensively extinguished all claims that had been made, or could have been made about the validity of any augmentation charge or management fee then in effect. This necessarily includes claims against ordinance No. 2002-02 and the 1993 management fee. [13]

13 Defendant's request to take judicial notice of three letters requesting depublication of *Eiskamp* and four letters supporting a petition for review of *Eiskamp* is denied.

Pendry claims that applying res judicata against him transgresses due process. However, his argument is premised on the trial court's conclusion that res judicata applied because he was in privity with the parties in the ***606** pending litigation. Our conclusion is that

res judicata applies because, by virtue of the validation character of the pending litigation, he was a party to the pending litigation.

DISPOSITION

The judgment in H038087 (Super. Ct. Santa Cruz County No. CV168936-Griffith) is affirmed.

The judgment in H038264 (Super. Ct. Santa Cruz County No. CV169080-Pendry) is affirmed.

WE CONCUR:

Rushing, P.J.

Elia, J.

All Citations

220 Cal.App.4th 586, 163 Cal.Rptr.3d 243, 13 Cal. Daily Op. Serv. 11,420, 2013 Daily Journal D.A.R. 13,757

ATTACHMENT 2

Santa Cruz Municipal Code Chapter 3.14 as accessed on March 31, 2020 at: https://www.codepublishing.com/CA/SantaCruz/#!/SantaCruz03/SantaCruz0314.html#3.14

Chapter 3.14
CLEAN RIVER, BEACHES AND OCEAN TAX ORDINANCE

Sections:

3.14.010 TITLE AND PURPOSE.

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

(Ord. 2008-21 § 1 (part), 2008).

ATTACHMENT 3

Draft City of San Jose Resolution No. 75857, June 14, 2011, as accessed March 31, 2020 at: http://www3.sanjoseca.gov/clerk/Agenda/20110802/20110802_0304res.pdf

RESOLUTION NO.

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

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

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

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

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

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

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

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

1. The 2011-2012 annual Sanitary Sewer Service and Use Charge and Storm Sewer Service Charge Report of the Director of Finance is hereby approved.

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

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

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED
Mayor

ATTEST:

DENNIS HAWKINS, CMC
City Clerk

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

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 Westminister Bank, PLC, Natixis Funding Corp., Natixis S.A.,

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 Walesh, 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, 011 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 Revitilization 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 Balermino Park, Tamien Park, and Del Monte Park Phase I projects were exempted from the City Council Policy set forth in Resolution No. 75638 which was adopted on November 16, 2010. (11-0.)

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

(a) Remove any reference to "trail" from the policy.

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

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

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

Mayor Reed provided meeting disclosures.

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

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

TRANSPORTATION & AVIATION SERVICES

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

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

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

ENVIRONMENTAL & UTILITY SERVICES

7.1 (a) Accept the Plant's odor assessment status report and direct staff to continue with the development of a regional odor assessment study:
- **(1) Develop a stakeholder process including the other possible odor generating facilities and the Plant's tributary agencies.**
- **(2) Develop a funding plan to include a portion of the funding from sources other than the Sewer Service and Use Charges.**
- **(3) Complete development of a scope and engage consultant services.**
- **(4) Provide a status report in the fall of 2011 on progress made.**

(b) Accept the analysis of the feasibility of implementing odor control projects in three to seven years and direct staff to continue to explore the possibility of accelerating biosolids projects and deliver a status report in fall 2011.

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

Action: Deferred to June 21, 2011 per Administration.

7.2 (a) Conduct a Public Hearing to allow community input regarding the implementation plan for complying with the requirements of Senate Bill X7-7 (SB 7), Water Conservation Bill of 2009.

(b) Conduct a Public Hearing to allow community input regarding the draft Urban Water Management Plan prior to its adoption.

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

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

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

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

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

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

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

ADJOURNMENT

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

RECESS/RECONVENE

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

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

Absent: Council Members - All Present.

INVOCATION

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

PLEDGE OF ALLEGIANCE

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

JOINT COUNCIL/REDEVELOPMENT AGENCY

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

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

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

9.1 Documents Filed: (Cont'd.)

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

Mayor Reed presented introductory comments.

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

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

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

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

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

9.1 (Cont'd.)

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

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

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

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

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

Extensive Council discussion ensued.

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

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

9.1 (Cont'd.)

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

COMMUNITY & ECONOMIC DEVELOPMENT

4.1 Adopt a resolution to:

(a) Approve a request to allow the assignment and assumption of an outstanding loan in the original amount of $4,851,000 ("Townhomes Loan"), made to San Carlos Town Homes, LLC for the San Carlos Townhomes Project ("Townhomes Project") to San Carlos Willard Associates, L.P., or its designated affiliate, in the form of new construction/permanent loan documents, to fund the development costs for the 95-unit San Carlos Senior Apartments project ("Senior Project") located at 1523-1533 West San Carlos Street.

(b) ***Approve a waiver of the requirement that Agency supplemental housing funds be used solely to fund extremely low income units to allow a change in affordability mix for the senior project from 99 affordable unit serving households*** **earning up to 30% Area Median Income ("AMI") to 94 affordable units with 29 units serving households earning up to 30% AMI, 31 units serving households earning up to 40% AMI and, 34 units serving households earning up to 50% AMI, and one unrestricted manager's unit.**

4.1 (c) Extending the term of the existing loans on the Townhomes Project/Senior Project loans.

(d) Authorize the Director of Housing to negotiate and execute all documents to effectuate these transactions and to extend the term of the loans as appropriate.

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

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

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

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

Director of Housing Leslye Corsiglia responded to Council questions.

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

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

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

4.2 (a) Public hearing on and consideration of adoption of a resolution to designate the "Curtis House" located at 96 South 17th Street as a landmark of special historic, architectural, aesthetic or engineering interest, or value of a historic nature.

(b) Public hearing on and consideration of adoption of a resolution to approve a Historic Property Contract (California Mills Act) between the City of San José and the property owner for the preservation of the Curtis House (City Landmark No. HL10-196), located at 96 South 17th Street.

4.2 (Cont'd.)

The Historic Landmarks Commission (4-0-2, Commissioners Jackson and Colombe absent) recommends the City Council adopt the resolution designating the Curtis House located at 96 South 17th Street as Historic Landmark HL10-196 and recommends that the City Council approve a Historic Property Contract for the Curtis House (City Landmark No. HL10-196) with modifications to Exhibit C Preservation Plan of the Contract to remove or reduce the amount of landscaping work, remove the kitchen remodel, and add in work associated with façade improvements and replacing the roof with tile (Norwita & Preston Powell, Owners). SNI: University. CEQA: Exempt.
HL10-196/MA11-003 – District 3

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

Mayor Reed opened the public hearing.

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

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

4.3 Public hearing on and consideration of adoption of a resolution to approve a Historic Property Contract (California Mills Act) between the City of San José and the property owner for the preservation of the Ashworth-Remillard House, located at 755 Story Road for the property known as the Ashworth-Remillard House (Sue Cucuzza, owner). The Historic Landmarks Commission (4-0-2, Commissioners Jackson and Colombe absent) recommends that the City Council approve a historic property contract for the Ashworth-Remillard House – City Historic Landmark No. HS-92-62. CEQA: Exempt.
MA11-001 – District 7

4.3 (Cont'd.)

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

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

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

PUBLIC SAFETY SERVICES

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

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

Fire Chief William McDonald responded to Council questions.

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

OPEN FORUM

Mark Trout presented his own observations on Child Protective Services.

ADJOURNMENT

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

RECESS/RECONVENE

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

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

Absent: Council Members - All Present.

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

CEREMONIAL ITEMS

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

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

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

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

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

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

STRATEGIC SUPPORT SERVICES

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

(b) Adopt a resolution:

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

Category	2011-2012 Monthly Rates
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:

Category	2011-2012 Monthly Rates
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 Stufflebean, dated May 23, 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 7, 2011 in response to the Public Notices mailed to the property owners.

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

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

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

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

3.6 (b) Adopt a resolution to amend the current Recycle Plus rate resolution, as follows:

(1) Increase rates for multi-family households by 9%, effective July 1, 2011.

(2) Increase rates for single-family households by 9%, effective August 1, 2011.

(3) Effective August 1, 2011, cap enrollments in the single-family Low Income Rate Assistance program to ensure funding is available to cover costs of current program participants.

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

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

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

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

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

3.7 (a) Adopt a resolution approving the Operating Budget for 2011-2012 for the City of San José, the Capital Budget for 2011-2012 for the City of San José, and the Five Year Capital Improvement Program for 2012-2016 for the City of San José as revised by the Mayor's Budget Message and directing the City Manager to prepare final documents for adoption.

(b) Adopt a resolution establishing the Schedule of Fees and Charges for 2011-2012.

(c) Item 3.7(c) was deferred to June 21, 2011 per Orders of the Day.

(d) Adopt a resolution declaring the 0.23 acres of City-owned real property and building (old Fire Station 25) located at 1590 Gold Street surplus to the needs of the City.

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

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

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

(c) City Council adoption of a resolution to repeal Resolution No. 75686 and set forth the Master Parking Rate Schedule, with rates effective July 1, 2011, unless noted otherwise to:

(1) Implement the following parking rate and validation program changes at the Fourth Street Garage, the Market/San Pedro Square Garage, the Second/San Carlos Garage, and the Third Street Garage:

(a) Increase the daytime incremental parking rate from $0.75 to $1 every 20 minutes.

(b) Increase the maximum incremental daily parking rate from $15 to $20.

(c) Increase the evening flat rate from $4 to $5 effective January 1, 2012.

(d) Establish a $4 flat daily rate Saturdays, Sundays and major holidays, with an increase to $5 effective January 1, 2012.

3.7 (c) (1) (e) Modify the Downtown Parking Validation Program to provide for unlimited parking between 6 p.m. to 6 a.m., Monday through Friday and all day on Saturday, Sunday and major holidays, with a two hour validation coupon.

(2) Increase the daytime incremental parking rate from $0.75 to $1 every 20 minutes and increase the maximum incremental daily parking rate from $15 to $20 at the City Hall Garage.

(3) Eliminate the one hour of free parking after 6:00 PM at the Fourth Street Garage.

(4) Modify the Free and 50% Discounted Parking Incentive programs to allow a building owner or property manager to enter into a parking lease agreement with the City on behalf of their tenants, for up to two years of free or 50% discounted parking for eligible businesses and under the same terms and conditions of the existing programs.

(5) Incorporate other changes as described in this memorandum to include the Japantown Lot and previously owned Redevelopment Agency parking facilities transferred to the City and other new facilities now owned, controlled, or operated by the City, improve operations of the parking facilities and associated programs, modify eligibility for the Clean Air Vehicle Program and Downtown Validation Program, and clarify the Director of Transportation's authority relative to establishing parking rates. (Transportation)

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

3.8 (a) Accept the Report on Request for Proposal for Graffiti Abatement Services.

(b) Adopt a resolution authorizing the Director of Finance, subject to the appropriation of funds, to:

(1) Negotiate and execute an agreement with Graffiti Protective Coatings, Inc. (Los Angeles, CA) to provide Citywide Graffiti Abatement Services for an initial five-year term of June 27, 2011 through June 30, 2016, with a maximum compensation amount not to exceed $3,159,503 for the initial five year term of the agreement.

(2) Execute two (2) two-year options to renew the agreement.

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

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

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

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

Council discussion ensued.

3.8 (Cont'd.)

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

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

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

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

Action: Deferred to August 9, 2011 per Administration.

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

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

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

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

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

3.11 (Cont'd.)

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

TRANSPORTATION & AVIATION SERVICES

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

(a) Establishing speed limits on nine roadways; including portions of Bailey Avenue, Bernal Road/Silicon Valley Blvd., Blossom Hill Road, Charcot Avenue, Farnsworth Drive, Junction Avenue, Skyport Drive, Tasman Drive, and Yerba Buena Road.

(b) Re-establishing speed limits with changes to seven roadways; including portions of Almaden Road, Great Oaks Blvd., O'Toole Avenue, Race Street, Seventh Street, and Tenth Street.

(c) Recognizing speed limits established by the State of California for a portion of State Route 82 on San Carlos Street, and re-establishing speed limits on portions of Almaden Expressway and Capitol Expressway.

(d) Adopting the speed limit established by the City of Santa Clara for Winchester Blvd. between Newhall Street and Stevens Creek Blvd for the segment within the jurisdiction of San José.

(e) Making administrative corrections to the speed limit resolution as described in this memorandum.

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

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

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

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

6.1 (Cont'd.)

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

PUBLIC HEARINGS

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

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

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

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

11.3 (Cont'd.)

Mayor Reed opened the public hearing.

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

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

Mayor Reed closed the public hearing.

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

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

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

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

OPEN FORUM

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

ADJOURNMENT

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

Minutes Recorded, Prepared and Respectfully Submitted by,

City Clerk Dennis D. Hawkins, CMC

/smd 06-14-11 MIN

ATTACHMENT 4

City of Alameda Official Ballot Information Guide: https://www.alamedaca.gov/files/sharedassets/public/alameda/city-manager/stormwater-ballot-guide.pdf (as accessed March 31, 2020)

Please Complete Your Ballot And Mail It Back Promptly

Method Of Voting

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

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

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

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

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

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

Public Accountability

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

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

Ballot Tabulation

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

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

Additional Information

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

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

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.

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

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

How Much Is The Proposed Fee?

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

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

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

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

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

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

How Was The Fee Determined?

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

Properties Subject To The Fee

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

Will The Fee Increase In The Future?

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

Don't My Property Taxes Already Pay for This?

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

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

Clean Water Program Elements

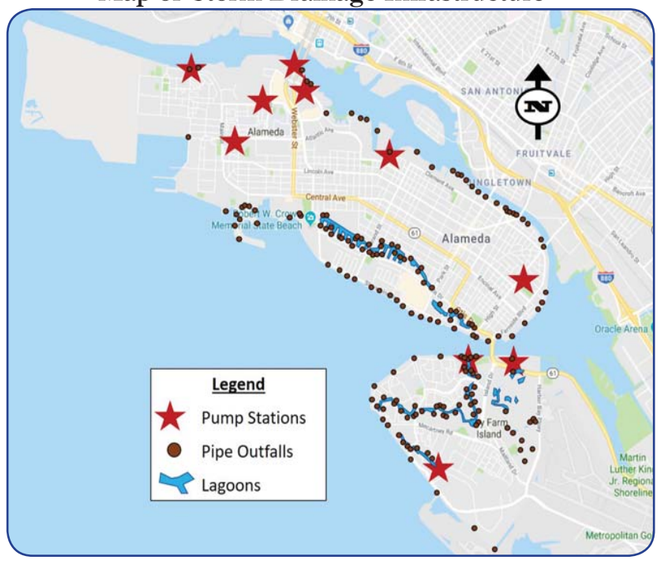
Operations & Maintenance (O&M): Storm response, street sweeping, lagoon maintenance & monitoring, storm drain inspection & cleaning

Water Quality (WQ): Trash reduction, green infrastructure planning, shoreline/ beach clean-ups, pollution prevention, illegal discharge inspections, development oversight, public education

Drainage Improvements (DI): Retrofit or upsize pump stations, pipe, culvert and catch basin replacement, lagoon dredging, green infrastructure & trash capture devices

Coastal Flooding & Sea Level Rise Protection (CF&SLR): Climate change planning, improved and increased capacity pump stations & pipes, perimeter levee infrastructure, shoreline improvements

Map of Storm Drainage Infrastructure



If The Initiative Fails ...

A Depleted Fund Means Cuts to Services:

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

Higher Risk of Catastrophic Failures

Inability to Adapt to Climate Change

High Priority Capital Improvement Projects

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

Visit www.alamedaca.gov/cleanwater For More Information

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

ATTACHMENT 5

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

CONCURRENCE IN SENATE AMENDMENTS
AB 2403 (Rendon and Mullin)
As Amended June 2, 2014
Majority vote

ASSEMBLY: 74-1 (May 19, 2014) SENATE: 35-0 (June 16, 2014)

Original Committee Reference: L. GOV.

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

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

EXISTING LAW:

1) Defines, for purposes of the California Constitution Article XIII C and Article XIII D and the Proposition 218 Omnibus Implementation Act, "water" to mean "any system of public improvement intended to provide for the production, storage, supply, treatment, or distribution of water".

2) "Recycled water" means, pursuant to the Water Code, "water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource."

3) Provides notice, protest, hearing, and election procedures for the levying of new or increased assessments or property-related fees or charges by local government agencies pursuant to Proposition 218 Omnibus Implementation Act.

AS PASSED BY THE ASSEMBLY, this bill:

1) Made changes to the Proposition 218 Omnibus Implementation Act to add "from any source" to the current definition of "water."

2) Found and declared that this act is declaratory of existing law, including the decision of the Sixth District Court of Appeal in *Griffith v. Pajaro Valley Water Management Agency* and *Howard Jarvis Taxpayers Association v. City of Salinas*.

3) Made other technical and conforming changes.

4) Found and declared that the provisions of the Proposition 218 Omnibus Implementation Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

FISCAL EFFECT: None

COMMENTS:

1) *Current law and purpose of this bill*. The Proposition 218 Omnibus Implementation Act, currently defines "water" to mean "any system of public improvement intended to provide for the production, storage, supply, treatment, or distribution of water." Under this bill the definition of water is "any system of public improvement intended to provide for the production, storage, supply, treatment or distribution of water from any source." This bill is author-sponsored.

2) *Author's statement*. According to the author, "This bill would put the new *Griffith [v. Pajaro Valley Water Management Agency*] decision into statute and allow public agencies to apply the simpler protest process to their approval of stormwater management fees, where the management programs address both water supply and water quality.

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

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

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

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

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

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

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

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

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

5) *Arguments in support*. Supporters argue that while California's drought and efforts to provide a continued, safe, reliable supply of water presents many challenges, that the clarifying language in this bill provides an opportunity to remove any confusion that may exist and will enable all of our communities to get one step closer to attaining a sustainable water future.

6) *Arguments in opposition*. None on file.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On 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 Irvine, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017, 17-TC-26
  City of Irvine, 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-26

Matter: Water Code Section 13383(a) Phase I MS4 Trash Order Issued to City of Irvine, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017

Claimant: City of Irvine

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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