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REPORT TO THE LAND USE & HOUSING COMMITTEE

**PROPOSED AMENDMENTS TO THE SAN DIEGO MUNICIPAL CODE RELATING TO
EXCAVATIONS IN THE PUBLIC RIGHT-OF-WAY.**

INTRODUCTION

The proposed Street Preservation Ordinance under consideration by the San Diego City Council's Land Use & Housing Committee (Committee) expands the existing Excavation Fee to require all excavators of the public right-of-way, including City public utilities¹, to pay a renamed Street Damage Fee and to warrant their trenches for a period of fifteen years. These changes will create fiscal impacts to both the City and other excavators of public streets. This memo is intended to address legal issues, including those related to Proposition 26, that have been raised by the proposed ordinance.

BACKGROUND

In response to the ongoing deterioration of the City's streets the Office of the City Auditor² and San Diego County Grand Jury³ identified a series of problems with how the City managed the excavation of the City's streets by both public and private utilities. These issues included how excavations to perform utility work were coordinated with City street maintenance, how excavation fees were collected, and how accountability for failed trenches was apportioned. Both the Auditor's report and Grand Jury report included recommendations to improve the City's management of the public's streets.

The City introduced a requirement that public utilities pay an Excavation Fee prior to obtaining a permit to Excavate in the Public Right-of-Way⁴ in 2003. This provision included a number of grounds under which an excavator may avoid paying the fee. The current proposal requires all excavators pay a Street Damage Fee⁵. This fee will replace the existing Excavation

¹ City public utilities include both water and sewer utilities. There may also be implications of these proposed amendments on the City Stormwater Division.

² Office of the City Auditor, Audit Report, Street Maintenance: City Needs to Improve Planning, Coordination, and Oversight to Effectively Manage Transportation Assets. OCA-11-009, November 2010.

³ San Diego County Grand Jury Report, San Diego City Street Repair, Funding, and Reforms. Filed April 26, 2012.

⁴ San Diego Municipal Code §62.1205 Excavation Fees, added September 22, 2003 by Ordinance O-19215.

⁵ San Diego Gas & Electric operates under a California Public Utilities Commission (CPUC) approved local franchise agreement originally adopted by Ordinance O-10466 on December 17, 1970. This agreement was subsequently amended on January 28, 2002 by Ordinance O-19030. The 2002 amendment to the franchise agreement provides that any fee the City should subsequently impose for the inspection, trenching, cutting, or

Fee. The City has required excavators to warrant the condition of their facilities. The current proposal will clarify how excavators must maintain their trenches and will apply equally to all excavators.

QUESTIONS PRESENTED

1. Is the proposed trench warranty tax requiring voter approval under Proposition 26?
2. Is the proposed Street Damage Fee a tax requiring voter approval under Proposition 26?
3. If the proposed Street Damage Fee is adopted, are there restrictions on the expenditure of such fees?

SHORT ANSWER

1. No. The trench warranty is not a tax requiring voter approval under Proposition 26 as it is not a levy, charge, or exaction. The trench warranty is merely a requirement that excavators repair their facility to a condition consistent with City specifications should their facility experience structural failure.
2. No. The Street Damage Fee is not a tax requiring voter approval under Proposition 26 as it is being imposed in return for the specific benefit of being permitted to excavate in the public right-of-way. The fee provides a mechanism to recover the reasonable increased asphalt resurfacing costs incurred by the City to maintain streets damaged by excavation. In addition, the fee is being levied against all excavators of the public rights-of-way, including City public utilities.
3. Street Damage Fees may be used to fund the increased resurfacing costs necessary to compensate for the overall damage to the structural integrity of the street caused by the excavation. Street Damage Fees may not be used to fund activities such as unrelated resurfacing, trench maintenance, or trench repair. Street Damage Fees need not fund future asphalt resurfacing projects specific to the excavation for which a fee was collected, and may be used collectively as part of a citywide program.

ANALYSIS

I. THE TRENCH WARRANTY IS NOT A TAX REQUIRING VOTER APPROVAL UNDER PROPOSITION 26.

The proposed ordinance would require all underground facility owners, including City public utilities, to warrant their trenches for a period of fifteen years from the acceptance of their

deterioration of the public right-of-way be credited against franchise revenues received by the City. This franchise agreement will expire on January 17, 2021.

permitted excavation. This warranty is designed to ensure that expenses incurred to repair failed trenches are borne by the facility owner and to incentivize excavators to use best construction practices in installing facilities within the public right-of-way.

Proposition 26 requires that the imposition of all local taxes be subject to voter approval. Proposition 26 defines a tax as “any levy, charge, or exaction of any kind imposed by a local government” unless one of seven exceptions apply. Cal. Const. art. XIII C, §1(e)⁶. While the obligation of a facility owner to repair its facility might result in an expense to the facility owner, this trench warranty is not a “levy, charge, or exaction” as it does not result in payment to the City. The trench warranty merely requires the facility owner to repair its facility back to a condition consistent with City specifications. Therefore, the trench warranty is not a tax and does not require voter approval.

II. THE STREET DAMAGE FEE IS NOT A TAX REQUIRING VOTER APPROVAL UNDER PROPOSITION 26.

In addition to the trench warranty, the proposed ordinance to be collected from all excavators of the public right-of-way⁷ seeks to increase an existing fee. Unlike the trench warranty, the proposed Street Damage Fee is a levy, charge, or exaction because, if adopted, monies would be collected by the City from all who excavate in the public right-of-way. Therefore, the Street Damage Fee could be a special tax subject to the voter approval provisions of article XIII C, section 2 of the California Constitution unless it falls under one of the listed exceptions.

The Street Damage Fee falls within the Specific Benefit Exception:

“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 to reasonable costs to the local government of conferring the benefit or granting the privilege.”

Cal. Const. art. XIII C, § 1(e)(1).

The proposed Street Damage Fee would be imposed for the specific benefit and privilege of excavating in a public street. In order for the exception to apply, the specific benefit or privilege provided to those paying the fee must be denied to those not charged. In this case, the fee is being imposed on only those parties who wish to excavate in the public right-of-way, including City public utilities. Therefore, the Street Damage Fee would fall within the specific benefit exception provided that the fee does not exceed the reasonable costs to confer the benefit or privilege of excavating in the public right-of-way.

⁶ For a general discussion on the interpretation of Proposition 26, see Memorandum of Law: Proposition 26 And Its Impact of City Fees and Charges, by Mara Elliott, March 4, 2011. ML-2011-3.

⁷ Presently, private parties seeking a Permit to Excavate the public right-of-way are required to pay Excavation Fees pursuant to the San Diego Municipal Code, Article 2, Division 12, Excavation Fees. This provision of the Municipal Code was adopted on September 22, 2003. City public utilities have not been subject to paying Excavation Fees.

The purpose of the Street Damage Fee is to reimburse the City for increased life cycle costs incurred as a result of excavations necessary for the installation or maintenance of a facility owner's equipment under a public street. Prior to adopting the existing Excavation Fee within the San Diego Municipal Code, the City commissioned a study evaluating the effect of utility cut patching on pavement in the City of San Diego⁸. This study found that each time a street was excavated or cut to allow for the installation of facilities below a public street, that street would be damaged. This damage existed across all trench types and existed, even if the trench cut repair was done under the best conditions and using the best construction practices. The study showed that excavation damage resulted in a permanent degradation of the structural integrity of the street and reduced the life expectancy of the street asset. In order to mitigate this reduction in a street's life expectancy, the study recommended that future resurfacing projects in areas that had been excavated utilize an additional layer of asphalt beyond what would otherwise have been required⁹.

The Excavation Fee, and its proposed replacement, the Street Damage Fee, are set by resolution of the City Council. The amounts of the fees are calculated using factors such as the excavation influence areas, additional resurfacing depth required, and an index of resurfacing costs¹⁰. The proposed increase in the Street Damage Fee is due to an increase in resurfacing costs since the imposition of the original Excavation Fee. The Street Damage Fee appears reasonable in that it does not attempt to recover revenues in excess of the costs incurred by the City to mitigate damage to public streets caused by excavations. Thus, the Street Damage Fee falls within the Proposition 26 specific benefit exception, and is not a tax subject to voter approval.

III. STREET DAMAGE FEES MUST BE USED TO FUND INCREASED LIFE CYCLE COSTS NECESSITATED BY DAMAGE DONE TO THE STREETS BY IN-STREET EXCAVATION.

The Street Damage Fee would not be a tax subject to voter approval, so long as the monies collected via the fee are used only to recover reasonable costs to the City to mitigate damages to public streets that have been excavated. The use of Street Damage Fees to fund unrelated surfacing projects, such as pothole repair, trench maintenance, or trench repair beyond the additional asphalt depths to restore the structural integrity of the pavement structure within the excavations area of influence, would expose the fee to a legal challenge under Proposition 26. The Street Damage Fee is determined with the assumption that the underlying trench structures were properly constructed and well-maintained and is distinguishable from a failed

⁸ Evaluation of Utility Cut Patching on Pavements in the City of San Diego, by Engineering & Research International, Inc. dated June 1999.

⁹ The application of enhanced resurfacing is limited to the cap of the excavator's trench and an area of influence around the excavated trench. The area of influence is a region identified in the Engineering & Research International study. This region is susceptible to subsidence due to subsequent compaction of the trench backfill materials over time.

¹⁰ The current proposal would update the fee to reflect changes in street maintenance costs and change the name to the Street Damage Fee.

trench structure that may require repair under this proposal's trench warranty provision where applicable.

However, the collection of a Street Damage Fee for a permitted excavation need not be used for a future enhanced resurfacing at the site of that particular excavation. The use of a permissible fee must be related to the overall cost of the governmental regulation and need not be finely calibrated to the precise benefit each individual fee payor may derive. *Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 997 (2012). Street Damage Fees may be used collectively to fund enhanced resurfacing in excavated areas citywide.

CONCLUSION

The proposed trench warranty is not a tax subject to voter approval as it is not a levy, charge, or exaction, and results in no collection of money to the City. The trench warranty requires facility owners who have excavated a public street to maintain and repair their facilities, including the trench, in the public streets to City specifications.

The Street Damage Fee is not a tax subject to voter approval. It is a levy, charge, or exaction for which the City will collect revenue. However this fee falls within the specific benefit exception to Proposition 26. The fee is being collected in return for the specific benefit and privilege of excavating within the public right-of-way. The fee is being charged to all excavators, including City public utilities. The fee is also reasonable in that it does not seek to recover costs beyond what is necessary to mitigate the damage done to the City's streets by the excavations.

Street Damage Fees may be used collectively citywide to fund enhanced asphalt resurfacing within the areas of influence of excavations in public streets. Street Damage Fees should not be used to fund unrelated tasks such as trench maintenance and repair.

Respectfully submitted,

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RK:cfq
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