Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 619-236-6220

DATE: April 22, 2021

TO: Kris McFadden, Director, Transportation & Stormwater Department
Andrew Kleis, Deputy Director, Transportation & Stormwater Department

FROM: City Attorney

SUBJECT: Legal Update to 2012 Memorandum of Law titled "Proposition 218 Impacts to Storm Drain Fees"

INTRODUCTION

In 2012, this Office issued a Memorandum of Law titled "Proposition 218 Impacts to Storm Drain Fees" (2012 Memorandum), which advised that any storm drain fee increase must be approved by the voters because it is a property related fee, and that the exception to that rule for sewer, water, and refuse collection fees would not apply. *See* City Att'y MOL No. 2012-1 (Jan. 11, 2012), attached.

In 2018, the Office of the City Auditor conducted a Performance Audit (Audit) of the City's Stormwater Division's infrastructure deficiencies and funding challenges.[1] One of the Audit's key recommendations is that the Stormwater Division develop a long-term funding strategy. In response to the Audit, the Stormwater Division presented a funding strategy to the San Diego City Council (City Council) in February 2021.[2] By Resolution, the City Council recommended that the Stormwater Division continue to evaluate the viability of a stormwater-related ballot measure or similar dedicated funding mechanism, including an increase in the storm drain fee.[3]

Following the issuance of the 2012 Memorandum, the State legislature issued two bills to clarify and explain the exception to Proposition 218's voter approval requirement for fees and charges relating to "sewer, water, and refuse collection service." Unfortunately, no case law interpreting the recent legislation has emerged, and a court has not overturned the seminal case *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal. App. 4th 1351 (2002), which

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[1] *See* Office of the City Auditor, Performance Audit of The Storm Water Division: The Storm Water Division Can Further Improve the Efficiency of Its Infrastructure Maintenance and Code Enforcement Efforts, but the City Ultimately Needs to Address Significant Storm Water Funding Shortages (June 2018), https://www.sandiego.gov/sites/default/files/18-023_storm_water_division_0.pdf

[2] Stormwater Division Funding Strategy January 2021: In Response to Recommendation #5 of the Performance Audit of the City of San Diego's Stormwater Division, available at https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/Stormwater%20Funding%20Strategy%20Report.pdf?meetingId=4248&documentType=Agenda&itemId=195665&publishId=451393&isSection=false.

[3] San Diego Resolution R-313434 (Feb. 12, 2021).

determined that storm drain fees are property related fees that require voter approval under Proposition 218. As such, the analysis in the 2012 Memorandum remains unchanged: to raise stormwater fees, the City must follow the requirements set forth in Proposition 218.

BACKGROUND

Voters passed Proposition 218 in 1996 to amend the California Constitution to require voter approval for certain assessments, fees, and charges. Specifically, Proposition 218 provides in pertinent part as follows:

> Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

Cal. Const., art. XIII D, §6(c).

After Proposition 218 passed, the State legislature passed the Proposition 218 Omnibus Implementation Act (Implementation Act) "to prescribe specific procedures and parameters for local jurisdictions in complying with Article XIII C and Article XIII D of the California Constitution." Cal. Stats. 1997, ch. 38, Legis. Counsel's Dig. The Implementation Act defined "water" to mean "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water," but did not include in the definition of "water" sewer or refuse collection service. Cal. Gov't Code § 53750(m) (1997).

In the 2012 Memorandum, this Office concluded that any storm drain fee increase is subject to the voter approval requirements of Proposition 218 because it is a property related fee and the exceptions for sewer, water, and refuse collection fees do not apply to the storm drain fee. This conclusion was based upon the case of *City of Salinas*, which determined that storm drain fees are not "sewer" or "water" fees subject to a Proposition 218 exception. The court in *City of Salinas* applied a narrow voter-intent interpretation of "sewer" and "water" fees in ruling that the storm drain fee at issue was a property related fee. Since 2012, the State legislature has adopted bills to clarify water fees and define sewer fees under Proposition 218.

QUESTIONS PRESENTED

1. What are the legal risks should the City exempt storm drain fee increases from the voter approval requirements of Proposition 218 based on its definition of "water"?

2. What are the legal risks should the City exempt storm drain fee increases from the voter approval requirements of Proposition 218 based on its definition of "sewer"?

SHORT ANSWERS

1. The definition of water was clarified by Assembly Bill 2403 to include water "from any source." However, this definition, as amended, most likely does not include infrastructure that discharges water, and there is no case law interpreting this clarified definition in a manner that supports exempting storm drain fee increases from Proposition 218's voter approval requirement. To avoid a legal challenge, the City should follow Proposition 218's voting requirements to increase the storm drain fee.

2. A definition of sewer was added to the Implementation Act by Senate Bill 231, which included stormwater infrastructure. Opponents to the legislation argued that the legislature exceeded its authority and the *City of Salinas* decision takes precedence. There is no case law interpreting this new definition and a reliance on this legislation to exempt storm drain fee increases from Proposition 218's voter approval requirement is untested. To avoid a legal challenge, the City should follow Proposition 218's voting requirement to increase the storm drain fee.

ANALYSIS

I. ASSEMBLY BILL 2403 CLARIFIES AND BROADENS "WATER" IN THE CONTEXT OF PROPOSITION 218.

In 2014, the State legislature passed Assembly Bill 2403 (A.B. 2403) to broaden the definition of "water" in the Implementation Act to include "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water *from any source*." Cal. Gov't Code § 53750(m) (2014) (emphasis added). The legislation was intended to: (1) reinforce the legislature's intent to limit local government revenue and enhance taxpayer consent; (2) emphasize the legislature's desire to avoid the waste or unreasonable use of potable water;[4] and (3) provide that A.B. 2403 is a declaration of existing law. Cal. Stats. 2014,

[4] "This act is in furtherance of the policy contained in Section 2 of Article X of the California Constitution and the policy that the use of potable domestic water for nonpotable uses, including, but not limited to, cemeteries, golf courses, parks, highway landscaped areas, and industrial and irrigation uses, is a waste or an unreasonable use of the water within the meaning of Section 2 of Article X of the California Constitution if recycled water is available." Cal. Stats. 2014, ch. 78 § 1(b).

ch. 78 § 1. Thus, in the context of the legislative findings and declarations, the phrase "from any source" indicates that potable water should not be used for nonpotable water uses when recycled water is available.

A.B. 2403 does not materially affect the analysis of whether a storm drain fee increase is subject to the voter approval requirements of Proposition 218. While A.B. 2403 includes language that recognizes existing law, it does not expand the definition of "water" to include infrastructure that *discharges* water. According to the logic of *City of Salinas* "the average voter would envision 'water service' as the *supply* of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and *discharges* it into the nearby creeks, river, and ocean." *City of Salinas*, 98 Cal. App. 4th at 1358 (emphasis added). *City of Salinas* and A.B. 2403 are not inherently contradictory. For Proposition 218 purposes, "water" service appears to mean the supply of water from any source for personal, household, and commercial use, and would not include the monitoring, carrying away, and discharging of water from any source into the nearby creeks, river, and ocean.

This Office is not aware of any California local government that has successfully relied upon A.B. 2403's amendment to avoid Proposition 218's voter approval requirement when increasing a storm drain fee, and there is no case law interpreting the amended language in that manner. Accordingly, any local government that relies on A.B. 2403 to exempt storm drain fee increases from Proposition 218's voter approval requirement may face legal challenge. Based upon the language and intent of A.B. 2403 and *City of Salinas*, a court would most likely determine that an increase in a storm drain fee is not a water fee and is required to seek voter approval consistent with Proposition 218. In order to avoid a legal challenge, the more conservative approach to increase the storm drain fee would be to follow Proposition 218's voting requirement.

II. SENATE BILL 231 ADDS A DEFINITION OF "SEWER" IN THE CONTEXT OF PROPOSITION 218.

In 2017, the State legislature passed Senate Bill 231 (S.B. 231), which added a definition of "sewer" to the Implementation Act for the purpose of overturning *City of Salinas*. Cal. Stats. 2017, ch. 536, § 2. "Sewer" is given an expansive definition to include storm water infra-structure, as follows:

> (k) "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, *outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of*

> sewage, industrial waste, *or surface or storm waters*. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

Cal. Gov't Code § 53750(k) (2018) (emphasis added).

S.B. 231 is sweeping in its indictment of *City of Salinas*, claiming that it "constrained important tools that local governments need to manage storm water and drainage runoff," failed to follow "then-existing law," and ignored "long-standing principles of statutory construction." Cal. Gov't Code § 53751(c), (e), (f). S.B. 231 lists several pre-Proposition 218 laws and cases that "reject the notion that the term 'sewer' applies only to sanitary sewers and sanitary sewerage." *Id.* at (i).

Opponents to S.B. 231 have argued that the *City of Salinas* already defined "sewer" for purposes of Proposition 218, and that the legislature exceeded its authority because the judiciary has the authority to interpret the terms of Proposition 218. Specifically, Proposition 218 renders unconstitutional contradictory procedures leading to the adoption or assessments or fees. *See, e.g., Barratt American, Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 818 (2004) ("Proposition 218 thus conflicts with and renders unconstitutional contradictory procedures or process leading to the *adoption or levy* of an assessment falling within its ambit."). It is the role of the judiciary, not the legislature, to decide the constitutionality of a citizens' initiative and the initiative's implementing legislation. *See City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal. 5th 1191, 1209 n.6 (2017) ("In any event, whatever the Legislature's intent may have been, 'the ultimate constitutional interpretation must rest, of course, with the judiciary.' The Legislature is, of course, free to impose additional requirements by statute.") (citations omitted).

Supporters of S.B. 231 would argue that the *City of Salinas* court did not have the benefit of "a considered legislative judgment as to the appropriate reach of the constitutional provision" when the case was decided. *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 180 (1981). Such focused legislative judgment "enjoys significant weight and deference by the courts." *Id.* Furthermore, the purpose of S.B. 231 is to explain the terms used in Proposition 218, and not to expand Proposition 218.

Despite the intent of S.B. 231 to overturn *City of Salinas* and classify storm drains as equivalent to sewer systems for the purposes of Proposition 218, it is risky to rely on S.B. 231 in that manner. This Office is not aware of any California local government that has successfully relied on S.B. 231 to increase storm drain fees without voter approval. Additionally, no court has interpreted S.B. 231's definition of sewer or overturned the *City of Salinas* decision. Unless and until that happens, any local government that seeks to rely on S.B. 231 to exempt storm drain fee increases from Proposition 218's voter approval requirement runs the risk of litigation that the fee increase is unconstitutional. While this litigation may potentially serve as a "test case," the

result of such legislation is unclear.[5] To avoid a legal challenge, the City should increase the storm drain fee by following Proposition 218's voting requirement.

CONCLUSION

The 2012 Memorandum, which analyzed the 2002 case *City of Salinas*, concluded that storm drain fees are not "sewer" or "water" fees subject to a Proposition 218 exception. The passage of two State legislative bills (A.B. 2403 and S.B. 231) amending the definitions of water and sewer does not change this conclusion, nor do these statutory changes impact the process used to increase water and sewer fees.

MARA E. ELLIOTT, CITY ATTORNEY

By */s/ David L. Krypel*
David L. Krypel
Deputy City Attorney

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Attachment

[5] According to the California Stormwater Quality Association, a professional member association that advances sustainable stormwater management protective of California water resources, the first jurisdiction to rely on S.B. 231 to avoid Proposition 218's voter requirement will likely be a test case. California Stormwater Quality Association, Overview and Background, https://www.casqa.org/resources/funding-resources/overview-and-background (visited February 26, 2021).

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

HEATHER L. STROUD
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: January 11, 2012

TO: Garth K. Sturdevan, Interim Director, Transportation & Storm Water Department
Kris McFadden, Deputy Director, Storm Water Division

FROM: City Attorney

SUBJECT: Proposition 218 Impacts to Storm Drain Fees

INTRODUCTION

This memorandum of law addresses the applicability of Proposition 218 to the City of San Diego's (City's) fee for storm sewer services (Storm Drain Fee). Proposition 218 amended the California Constitution by adding articles XIII C and XIII D. Article XIII D, section 6 of the California Constitution sets forth requirements for imposing or increasing property related fees, and includes limitations on the use of revenue collected by those fees.

QUESTIONS PRESENTED

1. How does Proposition 218 affect the City's ability to increase the existing Storm Drain Fee?

2. What process must be followed to ensure compliance with the requirements of Proposition 218?

SHORT ANSWERS

1. Any Storm Drain Fee increase is subject to the voter approval requirements of Proposition 218 because it is a property related fee.

2. The procedural requirements for increasing a property related fee are set forth in article XIII D, section 6 of the California Constitution and California Government Code section 53755. The Storm Drain Fee, when and if increased, cannot be increased beyond the proportional cost of service attributable to the affected property. Any Storm Drain Fee increase

requires notice to affected property owners, a public hearing with an opportunity to file a protest of the fee increase, and if no majority protest is filed, voter approval either by a majority of property owners or two-thirds of the general electorate.

BACKGROUND

The Storm Drain Fee is paid by the owner or occupant of any parcel connected to the City's sewer or water system. San Diego Municipal Code §§ 64.0404(b), 64.0408. The ordinance authorizing the Storm Drain Fee was adopted in 1990, and the first Storm Drain Fee was established by San Diego Resolution R-275093 (Feb. 1990). In 1996, the Storm Drain Fee was increased by San Diego Resolution R-287688 to its current level. The Storm Drain Fee is based on a flat rate of ninety-five cents per month for single-family residential water and sewer customers, and approximately six and one-half cents per hundred cubic feet (HCF) of water used by industrial, commercial, and multi-family water and sewer customers. The City uses these fees to pay for a portion of the capital facilities, operations, and maintenance of the City's storm sewer system.

The City has not increased its Storm Drain Fee since Proposition 218 passed in 1996. In the meantime, the Municipal Separate Storm Sewer System permit (MS4 Permit) that sets forth the City's obligation to regulate storm water discharge under the Clean Water Act has become increasingly stringent, raising the City's cost of compliance. Additionally, the City is subject to several current and pending Total Maximum Daily Load (TMDL) orders that impose strict numeric water quality standards requiring costly planning of pollutant control measures, monitoring, and probably major modifications to the City's storm sewer system. The result is that the City's actual cost to provide these services far exceeds the revenue collected from the Storm Drain Fee. For example, in fiscal year 2011, the Storm Drain Fee generated approximately $5.7 million in revenue while the City spent over $35 million on regulatory compliance. City of San Diego Storm Water Division, Budget and Actual, Fiscal Year 2011-2012 (2011). Raising the Storm Drain Fee is one way to offset the increasing cost of flood control and water quality protection to maintain compliance with state and federal law,[1] which otherwise comes out of the City's general fund.

ANALYSIS

I. AN INCREASE IN THE STORM DRAIN FEE REQUIRES PRIOR VOTER APPROVAL

In 1996, voters passed Proposition 218 to amend the California Constitution to require voter approval for certain kinds of assessments and fees. In relevant part, article XIII D, section 6(c) of the

[1] Besides increasing the Storm Drain Fee, other revenue recovery options include a development fee to compensate for the impacts of new development on flood control and water quality, a regulatory fee to recover the City's storm water permitting and inspection costs, a regulatory or user-based fee under California Water Code section 16103 to fund the preparation and implementation of a watershed improvement plan, and the creation of special assessment districts for priority flood control and water quality areas within the City. Each of these options has its own legal constraints and procedural requirements, a discussion of which is beyond the scope of this memorandum.

California Constitution provides that the voter approval requirement applies to an increase[2] in any "property related fee or charge" except for sewer, water, and refuse collection:

> 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.

A "fee" under article XIII D is a levy imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." Cal. Const. art. XIII D, § 2(e). A "property related service" is defined as "a public service having a direct relationship to property ownership." *Id.* § 2(h).

In a Memorandum of Law dated July 31, 2001, the Office of the City Attorney concluded the voter approval requirements of Proposition 218 must be followed to increase the Storm Drain Fee. (Attachment 1.) The advice in that memorandum regarding the Storm Drain Fee remains generally valid, as recent developments in case law have confirmed the memorandum's conclusion. Specifically, an appellate court confirmed storm drainage fees are property related fees that require voter approval under Proposition 218[3] because storm drainage fees are not included in the exceptions for sewer and water fees, and because storm drainage fees charged to developed parcels are property related fees, even if the fee is calculated based on the amount of storm drainage service provided to the ratepayer. *Howard Jarvis Taxpayers Ass'n v. City of Salinas,* 98 Cal. App. 4th 1351 (2002).

A. The Exceptions for Sewer, Water, and Refuse Collection Fees Do Not Apply to the Storm Drain Fee

The voter approval requirements of Proposition 218 apply to all property related fees "[e]xcept for fees or charges for sewer, water, and refuse collection services." Cal. Const. art. XIII D, § 6(c). Storm drainage fees are not "sewer" or "water" fees subject to an exception. *City of Salinas,* 98 Cal. App. 4th at 1358. In *City of Salinas*, the court rejected the city's argument that storm drains are a type of sewer or water service subject to an exemption from Proposition 218's voter approval requirements. *Id.* The court reasoned the exceptions must be interpreted narrowly given "the voters'

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[2] For the purposes of Proposition 218, a fee "increase[]" is broadly defined as "a decision by the agency" that either (A) "[i]ncreases any applicable rate used to calculate the tax, assessment, fee or charge"; or (B) "[r]evises the methodology by which the tax, assessment, fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel." Cal. Gov't Code § 53750(h)(1)(A)-(B).

[3] In 2010, voters passed Proposition 26 to further amend article XIII C of the California Constitution. Proposition 26 extends voter approval requirements to any "tax," which is broadly defined as "any levy, charge, or exaction of any kind imposed by a local government" unless one of the stated exception applies. Cal. Const. art. XIII C, § 1(e). Assessments and property-related fees already subject to Proposition 218 are excluded from the definition of "tax" in Proposition 26. *Id.* § 1(e)(7). Thus, Proposition 26 does not affect the analysis in this memorandum.

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." *Id.* at 1357-58 (citing Proposition 218, §§ 2, 5). Although there is no case law on point, a court is not likely to find storm drainage fees qualify as fees for "refuse collection" because narrowly construed, this exception covers only traditional curbside trash collection. *Cf.* Minan, J., *Municipal Storm Water Permitting in California*, 40 San Diego L. Rev. 245, 283 (2003) (suggesting that relying on the refuse collection exemption is a "possibility" because "[s]torm water regulation is premised on controlling the waste in storm water" but noting "this argument may be difficult to sustain").

B. The Storm Drain Fee Is a Property Related Fee Under *City of Salinas*

A storm drainage fee is a "property related fee" under article XIII D, section 6(c) of the California Constitution. *City of Salinas,* 98 Cal. App. 4th at 1358-59. The storm drainage fee at issue in *City of Salinas* was imposed only on developed parcels, payable by the owner or occupier of each parcel. *Id.* at 1353. The amount of the fee for a given parcel was calculated according to the impervious area of the parcel to approximate the degree to which that parcel contributed to the runoff entering the City's storm drainage system. *Id.* Single-family residences were assumed to contain a certain amount of impervious area and were charged a flat fee of $18.66 based on that assumption. *Id.* at 1355. A partial exemption from the fee was available for developed parcels that maintained their own storm water management facilities. *Id.* at 1353.

The court rejected Salinas's argument that its storm drainage fee was not a property related fee. *Id.* at 1354. Salinas argued its storm drainage fee was a usage fee for sending runoff into the city's storm drain system, as property owners could avoid the fee by choosing either to leave their property undeveloped or by maintaining their own storm water management facility on-site. *Id.* at 1354. The court disagreed and reasoned the fee was based on impervious area, which is one of the "physical properties of the parcel." *Id.* at 1355. The court distinguished the storm drainage fee from a water consumption fee that had been held outside the scope of article XIII D of the California Constitution. *Id.* at 1355 (citing *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 85 Cal. App. 4th 79 (2000)). The court concluded the fee is not a use-based charge, but instead "burdens landowners as landowners" and therefore is subject to the voter approval requirements of Proposition 218. *Id.* at 1356.

The City's Storm Drain Fee is not distinguishable from the City of Salinas's storm drainage fee in any meaningful way that would exempt it from Proposition 218. Like the fee in *City of Salinas*, the City's fee on single-family residential parcels is set at a flat rate that tends to suggest the fee is imposed as an incident of property ownership. Similarly, the City's fee on commercial, industrial, and multi-family residential parcels is not correlated to the parcel's actual demands on the City's storm sewer system, but instead, is based on metered water consumption, which likely has little relationship to the amount of runoff generated. Thus, the Storm Drain Fee is a property related fee subject to Proposition 218.

C. Under *Bighorn*, the Storm Drain Fee Cannot Be Restructured to Avoid Voter Approval Requirements

The 2001 memorandum from this Office suggested Proposition 218 might be avoided by restructuring the Storm Drain Fee to base it on the amount of storm sewer service provided to the ratepayer. (Attachment 1 at 23-25.) At that time, consumption-based fees were not considered to be property related fees subject to Proposition 218. *E.g., Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 85 Cal. App. 4th 79, 83 (2000), *disapproved of by Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205 (2006). Unfortunately, restructuring the Storm Drain Fee in this way is no longer a viable option after the 2006 *Bighorn* decision.

In *Bighorn*, the California Supreme Court held a water charge based on consumption is still a property related fee within the meaning of Proposition 218. 39 Cal. 4th at 216. The Court explained "all charges for water delivery incurred [after the initial connection fee] 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 217. Several consumption-based fees have been invalidated following *Bighorn*. *See City of Palmdale v. Palmdale Water Dist.*, 198 Cal. App. 4th 926 (2011) (assuming a consumption-based water charge is a property related fee subject to Proposition 218); *Pajaro Valley Water Management Agency v. Amrhein*, 150 Cal. App. 4th 1364 (2007) (invalidating a consumption-based groundwater augmentation fee increase imposed on all extractors of groundwater because the agency did not comply with the voter approval requirements of Proposition 218). Therefore, the Storm Drain Fee is a property related fee irrespective of how the fee is calculated, and it cannot be restructured to avoid Proposition 218.

II. PROCEDURAL REQUIREMENTS OF PROPOSITION 218

The procedures for increasing a fee subject to Proposition 218 are set forth in Article XIII D, section 6 of Article XIII D of the California Constitution and in the Proposition 218 Omnibus Implementation Act, California Government Code sections 53750 through 53756. Proposition 218 limits the amount of a property related fee to the benefit conferred on the property subject to the fee, and also limits the activities that may be funded by the fee. Cal. Const. art. XIII D, § 6(b).

A proposed increase in the Storm Drain Fee is subject to voter approval at two stages. First, the City must notify record owners of parcels for which the fee increase is proposed, and if a majority of record owners file a written protest, then the fee cannot be increased. *Id.* § 6(a). Second, if no majority protest of owners occurs, then the City must submit the fee increase either to the voters for approval by two-thirds of the electorate, or for approval by a majority of the affected property owners. *Id.* § 6(c).

A. Proposition 218 Limits the Amount of Any Storm Fee Increase and the Activities It May Fund

Proposition 218 includes limitations on both the amount of property related fees and the activities they may be used to fund. Thus, before the Storm Drain Fee increase is submitted for voter

approval, the City must calculate the appropriate fee level and identify the services that will be funded by the fee's proceeds.

1. The Storm Drain Fee Cannot Exceed the Cost of Service and Must Be Fairly Apportioned Among Affected Property Owners

There are two related, but independent, limits on the amount of the Storm Drain Fee. First, the total amount of revenue collected through the Storm Drain Fee cannot exceed the funds required to provide the "property related service." Cal. Const. art. XIII D, § 6(b)(1). Second, the amount of the Storm Drain Fee charged to each parcel cannot exceed "the proportional cost of the service attributable to the parcel." *Id.* § 6(b)(3). In other words, the Storm Drain Fee cannot exceed the cost of service, and property owners cannot be required to subsidize one another.

The "property related service" funded by the Storm Drain Fee is flood control and water quality protection to maintain compliance with state and federal law. In order to calculate the maximum fee that would comply with Proposition 218, a current cost of service study should be prepared to determine how much of these services are consumed by the properties subject to the fee. The cost of service may be based on an estimate of storm water runoff and pollutant loads from each property, the costs for disposing of the runoff, and the cost for monitoring, controlling, and remediating pollutants from that runoff. Instead of calculating runoff and pollutant loads for individual parcels, which would be prohibitively costly, determining the cost of service for classes of properties by factors such as parcel size, impervious area, and type of use appears to be the standard practice and arguably is defensible, although the courts have not decided a challenge based on a storm drainage fee structure to date.[4] The City should engage qualified engineers to assist with the cost of service study to ensure that any proposed fee increase has a reasonable basis.

Of course, a proposed fee need not cover the entire cost of service. An ordinance or resolution presented for voter approval may state a range of fees, and if the fee is approved, then the agency may impose the fee within that range without resubmitting increases to the voters for approval, provided the upper end of the range does not exceed the cost of service. Cal. Gov't Code § 53739(a). Similarly, if the voters approve a formula for inflation adjustment, the agency may make the adjustment without another vote. *Id.* § 53739(b).

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[4] The City of Salinas based its storm drainage fee on impervious surface and exempted undeveloped parcels. *City of Salinas*, 98 Cal. App. 4th at 1353. The court did not consider whether that fee structure complies with Proposition 218 because the plaintiff only challenged the fee's imposition without a prior vote. *Id.* at 1354. The Marin County Flood Control District, on the other hand, based its storm drainage fee on the size and type of parcel. *Greene v. Marin County Flood Control and Water Conservation Dist.*, 49 Cal. 4th 277, 281 (2010). As in *City of Salinas*, the court did not consider whether the amount of the fee was permissible because the plaintiff challenged the fee only on procedural grounds. *Id.* at 283.

2. The Storm Drain Fee May Only Be Used to Provide Services to the Property Owners Subject to the Fee

Revenue from a property related fee may be used only for the purpose for which it is imposed. Cal. Const. art. XIII D, § 6(b)(2). Further, the revenue cannot be used to provide a service "available to the public at large in substantially the same manner as it is to property owners." *Id.* § 6(b)(5). Essentially, Proposition 218 provides that property owners cannot be burdened with a fee that funds a service for all citizens generally.

Thus, the Storm Drain Fee must have a strong nexus to the service consumed by the property owners paying the fee. It is possible that the cost of service study will reveal that a portion of the City's storm drainage costs are not recoverable through an increase in the Storm Drain Fee because not all of the City's costs are caused by property owners. In any case, a defensible cost of service study is essential to justify the Storm Drain Fee by showing that it is based on the cost to transport the amount of storm water and to monitor, control, and remediate the regulated pollutants generated from a given class of property.

B. Proposition 218 Requires Notice to Affected Property Owners

The first step in increasing the Storm Drain Fee would be to mail notice to affected property owners. The notice must include the amount of the fee proposed for each parcel, the basis upon which the fee was calculated, the reason for the fee, and the date, time, and location of a public hearing on the proposed fee increase. Cal. Const. art. XIII D, § 6(a)(1). The notice must be mailed to the "record owner" of each affected parcel, which is defined as "the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll." Cal. Gov't Code § 53750(j).[5] Notice of increased fee may be included in the regular billing statement or by a separate mailing to the address to which the City customarily mails the billing statement for the Storm Drain Fee. *Id.* § 53755(a)(1). The notice must also be mailed to the record owner's address shown on the last equalized assessment roll, if that address is different than the billing address, if the agency desires to preserve its authority to record or enforce a lien on the parcel for any unpaid fee. *Id.* § 53755(a)(3).

The notice must be mailed at least forty-five days before the public hearing. Cal. Const. art. XIII D, § 6(a)(2). Notice is deemed complete upon depositing the notice in the U.S. Mail, postage prepaid. Cal. Gov't Code § 53750(i). Additionally, the SDMC requires the City Clerk to post notice of a proposed Storm Drain Fee change at least ten days before the City Council hearing. SDMC § 64.0404(b).

C. Proposition 218 Requires a Public Hearing and Opportunity for Majority Protest

If a majority of record owners submits a written protest to the fee increase, then it may not be implemented. Cal. Const. art. XIII D, § 6(a)(2). Each parcel is entitled to one written protest. Cal.

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[5] Where a parcel is owned by a public entity, "record owner" means "the representative of that public entity at the address of that entity known to the [City]." Cal. Gov't Code § 53750(j).

Gov't Code § 53755(b). The City is required to consider any written protests at a public hearing. Cal. Const. art. XIII D, § 6(a)(2). If there is no majority protest, then City Council would need to pass a resolution to increase the Storm Drain Fee. SDMC § 64.0404(b). The City Council also would need to pass an ordinance to place the Storm Drain Fee increase measure on the ballot because Proposition 218 requires approval by a public vote. *Id.* § 27.0503.

D. Proposition 218 Requires a Vote

If there is no protest by a majority of property owners, then the City must hold a vote on the Storm Drain Fee increase. The election must be conducted not less than forty-five days after the public hearing. Cal. Const. art. XIII D, § 6(c).

The fee increase must be approved by either: (1) a majority of the property owners of the property subject to the Storm Drain Fee; or (2) two-thirds of the electorate residing in the area affected by the Storm Drain Fee. *Id.* § 6(c). The City has discretion to choose either voting method. *Id.* The City may adopt procedures similar to elections to increase assessments. *Id.* The assessment procedures are set forth in article XIII D, § 4 of the California Constitution, and in California Government Code section 53753.

The California Supreme Court recently issued its first decision on the procedures required by Proposition 218 for imposing property related fees, in *Greene v. Marin County Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277 (2010). In *Greene*, the court upheld the District's storm drainage fee election against a challenge that the election violated the ballot secrecy requirements of article II, section 7 of the California Constitution. *Id.* at 281.

The District proposed a storm drainage fee to fund flood control measures and set the measure for a property owner vote pursuant to article XIII D, section 6. *Id.* at 280. The storm drainage fee to be paid by a particular property owner was calculated according to the size and type of the parcel, as set forth in a report prepared by the District. *Id.* at 281. The purpose of the fee was to fund flood control improvements including "removing various constrictions that block the creeks and adding upstream detention basins to hold and release water gradually." *Id.*

The District used a voting procedure in which each parcel received one vote instead of employing weighted voting where larger parcels or parcels subject to a higher fee received more voting power. *Id.* at 293. The fee increase was approved by the required majority of property owners,[6] but one property owner challenged the election, asserting the District violated constitutional ballot secrecy requirements because each ballot contained the name and address of the voter on its face and required the voter's signature. *Id.* at 280.

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[6] The fee passed by a narrow margin: 3,208 "yes" votes; 3,143 "no" votes; and 1,708 invalidated votes. *Id.* at 282. Notably, where the agency elects to hold a majority vote of property owners, only approval of a majority of the affected property owners who *vote* is required. *See id.*

The court held the District properly followed the election procedures for assessments as authorized by article XIII D, section 6(c). *Id.* at 294. The District required the ballots to be identified by the voter's name and parcel. *Id.* at 292 (citing Cal. Const. art. XIII D, § 4(d)). The District also required voters to sign their ballots. *Id.* at 291 (citing Cal. Gov't Code § 53753(e)(4)). As required under the assessment election procedures, the District kept the ballots secret until after they had been tabulated. *Id.* at 294 (citing Cal. Const. art. XIII D, § 4).

If the City elects to conduct a property owner vote instead of a vote of the general electorate, the safest approach would be to follow the model of Proposition 218 for assessments, as was upheld in *Greene*, by requiring voters to list their name, address, and signature on the ballots. While the City generally has substantial freedom to determine the form of the ballots in property-owner voting, the possibility that any Storm Drain Fee increase would be challenged warrants a conservative approach.

E. Unanswered Questions Regarding Proposition 218 Voting Procedure

An outstanding question after *Greene* is whether property-owner ballots may be weighted to reflect the amount of the fee the property owner would pay, the amount of land involved, or some other measure of fairness in an election among large and small property owners, since the court did not decide this issue. *Id.* at 293. Notably, the plaintiff in *Greene* argued weighted voting is not permitted for property related fees. *Id.* at 293. The plaintiff asserted the plain language of article XIII D, section 6 prohibits weighted voting because it requires the fee increase to be "approved by a majority of property owners of the property subject to the fee." *Id.* (quoting Cal. Const. art. XIII D, § 6(c)). While the court noted the requirement of a majority vote does not necessarily preclude weighted voting, it did not decide the issue because the District did not use weighted voting. *Id.*

Another open question is whether ballots from a property owner election can be made public after tabulation. *Id.* at 294. The court noted "it may be the case that some secrecy requirements apply in Section 6 elections even during and after tabulation" because property related fee ballots do not need to be tabulated at a public hearing, unlike assessment ballots. *Id.* at 294 (citing Cal. Gov't Code § 53753(e)). Again, the court did not decide this issue because the District did keep the ballots secret after tabulation. *Id.* To avoid a legal challenge based on these unsettled procedural issues, the conservative approach would be to use a one-property one-vote method and keep votes secret after tabulation.

CONCLUSION

An increase of the Storm Drain Fee requires prior voter approval under Proposition 218. The Storm Drain Fee, when and if increased, cannot be increased beyond the proportional cost of service attributable to the affected property. Any Storm Drain Fee increase requires notice to affected property owners, a public hearing with an opportunity to file a protest of the fee increase, and if no

majority protest is filed, voter approval either by a majority of property owners or two-thirds of the general electorate.

By _____
Heather L. Stroud
Deputy City Attorney

HLS:cw
ML-2012-1
Attachment 1: MOL-Proposition 218 Impacts to Storm Drain Fees
Doc. No.: 290519

Attachment 1

(Proposition 218 Impacts to Storm Drain Fees)

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS
KELLY J. SALT
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: July 31, 2001

TO: George Loveland, Senior Deputy City Manager

FROM: City Attorney

SUBJECT: The Application of Article XIIID to Water, Sewer, and Storm Water Fees

INTRODUCTION

On November 6, 1996, California voters approved Proposition 218, which amended the California Constitution by adding articles XIIIC and XIIID. Article XIIID, section 6 of the California Constitution imposed requirements for imposing new, or increasing existing, property-related fees and charges, and also imposed limitations on the use of the revenue collected by such means. After the adoption of Proposition 218, the City imposed increases of its water service fees [Water Fees] and its sewer service fees [Sewer Fees]. Due to the lack of authority interpreting the provisions of article XIIID, the City deemed it prudent to comply with the newly enacted provisions of article XIIID, section 6 for the imposition of the fee increases. The City now proposes to increase its storm sewer service fees [Storm Fees][1] and additional increases of the Water and Sewer Fees. Since the adoption of Proposition 218, there have been a number of opinions issued by public and private entities, and the courts, regarding what fees and charges are property-related fees and charges subject to the provisions of article XIIID, section 6. In light of these opinions, you have asked us to reexamine how the provisions of article XIIID,

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[1] The term "storm sewer" is used throughout this memorandum to refer to the systems utilized to collect, treat, or discharge storm water. As discussed later in this memorandum, the term "storm sewer" is used by the California Regional Water Quality Control Board for the issuance of National Pollutant Discharge Elimination System permits to entities which own and operate systems which discharge urban runoff into United States' waters.

section 6 affect the City regarding the imposition of the proposed increases of its Water, Sewer, and Storm Fees.

QUESTIONS PRESENTED

1. Are the Water Fees property-related fees and charges subject to the provisions of article XIIID, section 6 of the California Constitution, and should the City comply with the provisions of article XIIID, section 6 for an increase of the Water Fees?

2. Are the Sewer Fees property-related fees and charges subject to the provisions of article XIIID, section 6, and should the City comply with the provisions of article XIIID, section 6 for an increase of the Sewer Fees?

3. Are the Storm Fees property-related fees and charges subject to the provisions of article XIIID, section 6, and should the City comply with the provisions of article XIIID, section 6 for an increase of the Storm Fees?

4. Assuming the Sewer and Storm Fees are subject to article XIIID, section 6, are there any alternatives available to the City respecting compliance with the provisions of article XIIID, section 6 for the increase of its Sewer and Storm Fees?

SHORT ANSWERS

1. The Water Fees are not property-related fees and charges subject to the provisions of article XIIID, section 6. The City does not need to comply with the provisions of article XIIID, section 6 to increase its Water Fees.

2. The Sewer Fees are not property-related Fees and charges subject to the provisions of article XIIID, section 6. However, because of the City's outstanding debt and future bond issuances, until there is a published court decision that can be relied upon as definitive authority that consumption-based sewer service fees are not subject to the provisions of article XIIID, section 6, the City should continue to comply with the noticing provisions of article XIIID, section 6(a) respecting any increase of the Sewer Fees.

3. The Storm Fees, as currently structured, are property-related fees and charges subject to the provisions of article XIIID, section 6. Because of time constraints associated with the City's NPDES Permit, the City should comply with the voting requirements of article XIIID, section 6(c) for any increase of its Storm Fees. In order to position itself to successfully argue that the Storm Fees are not property-related fees or charges subject to the provisions of article XIIID, section 6, the City must restructure its current Storm Fees. The fees should be restructured in such a way that the fees are based upon the amount of the storm sewer service provided to the ratepayer.

4. If the City does not want to follow the notice or voting procedures of article XIIID, sections 6 (a) or (c), the City should consider initiating separate declaratory relief or validation actions to have a court definitively determine whether its Sewer Fees and Storm Fees (as revised) are subject to the provisions of article XIIID, section 6.

BACKGROUND

I. Requirements of Article XIIID of the California Constitution

Article XIIID, section 6(a)(1) imposes noticing procedures for imposing a new or increasing an existing property-related fee or charge. This section requires that the public agency proposing to impose a new or increase an existing property-related fee or charge provide written notice by mail to the record owner of each parcel upon which the fee or charge will be imposed. The notice must contain the following information: (1) the amount of the fee or charge; (2) the basis on which the fee or charge was calculated; (3) the reason for the fee or charge; and (4) the date, time, and location the public agency will conduct its public hearing on the proposed fee or charge. Cal. Const. art. XIIID, § 6(a)(1). Article XIIID, section 6(a)(2) further requires that the public hearing be held not less than forty-five days after the mailing of the notice. If at the conclusion of the public hearing the public agency receives written protests against the imposition of the proposed fee or charge from a majority of the affected property owners, the fee or charge may not be imposed. Cal. Const. art. XIIID, § 6(a)(2).

Article XIIID, section 6(b)(3) establishes in the California Constitution certain requirements that fees not exceed the reasonable cost of providing the service for which the fee or charge is imposed. Section 6(b)(3) provides that "[t]he amount of a fee or charge imposed upon a parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel."

Finally, article XIIID, section 6(c) of the California Constitution establishes new voter approval requirements for property-related fees and charges. In accordance with section 6(c), except for fees for water, sewer, and refuse collection services, any new property-related fee or charge or any increase of an existing property-related fee or charge must be submitted for voter approval. The vote must be submitted and approved by either (1) a majority vote of the property owners of the property subject to the fee or charge; or (2) a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than forty-five days after the public hearing conducted in accordance with article XIIID, section 6(a)(2). Cal. Const. art. XIIID, § 6(c).

II. The City's Fee System

The City establishes Water Fees for its water customers based upon the costs incurred by the City to meet customer demand for water. San Diego Municipal Code [SDMC] §§ 67.0502, 67.0508. The City establishes Sewer Fees based upon the costs incurred by the City to transport and treat sewage and to operate and maintain its sewerage system. SDMC § 64.0404(a). The City also establishes separate water and sewer capacity charges for individuals who want to connect to the City's water and sewerage systems and whose connection will cause additional demand to be placed on either the water or sewerage systems. SDMC §§ 67.0513, 64.0410. The capacity charges are imposed as a means of recovering all or a portion of the cost of constructing facilities necessitated by such additional demand. Cal. Gov't Code § 66013(a)(3).

The current Water Fees established for single family residences are composed of two components: a base fee and a commodity charge. The base fee is determined by the size of a customer's meter (approximately $9.23 per month), and is charged to the customer regardless of whether the customer uses water. The base fee is based upon the assumption that the utility incurs certain costs in order to be in a position to serve the commodity to the customer upon demand. Those costs are incurred by the utility regardless of whether the customer uses the commodity or not. They include such costs as the general administrative costs of the utility for billing, payment processing, and account management. The size of the customer's connection provides a relative approximation of the amount of the water the customer conceivably could have delivered to his or her property. The base fee, however, does not fully recover all of the fixed costs associated with the water delivery system. The commodity charge is a three-tiered system for water consumption. The first tier is a rate of $1.27 per hundred cubic feet [HCF] for the first seven HCF consumed; the second tier is at a rate of $1.62 per HCF for the next eight to fourteen HCF consumed; and the third tier is at a rate of $1.79 per HCF over fourteen HCF consumed.

Water Fees established for customers who are classified as multi-family residential, commercial, and industrial users are also based on two components: a base fee and a commodity charge. Similar to residential users, the base fee depends on the size of the customer's water meter (from $9.63, up to $3,989.75 per month), and the commodity charge is set at a rate of $1.49 per HCF of water consumed. This type of rate structure assesses a higher charge per unit of water as the level of consumption increases. *See Brydon v. East Bay Mun. Utility Dist.*, 24 Cal. App. 4th 178, 184 (1994) (court found such a water rate structure to be valid).

In order for a person to be billed by the City for Water Fees, he or she must file an application with the Water Department to have water service initiated. The person initiating the service does not have to be the owner of the property to which the water is delivered. Regardless of what customer class the person falls in, the customer has a meter from which the City measures the amount of the water consumed. The meter is read by the Water Department to calculate the Water Fees to be charged to the customer based on his or her customer class. The

meters may be permanent or temporary. SDMC §§ 67.0202, 67.0218. For example, a temporary meter may be used at a construction site where water service is provided. After the construction is completed, the meter is removed from the construction site. A meter may be temporarily located in an agricultural field for irrigating crops. If the crops are rotated, the meter may be moved to another location or discontinued altogether. The agricultural water meter and the construction meter are read to determine the amount of the water consumed; the person for whom the water connections were made is then billed for that water. SDMC §§ 67.0503, 67.0509.

The Sewer Fees are comprised of two components, a base fee and a usage charge. The base fee is determined on the basis of whether the customer is a single family domestic customer ($8.77 per month) or whether he or she falls within any other customer class ($.51 per month). The base fee is based upon the assumption that there are certain fixed costs associated with the collection of the wastewater away from the customer's property. Those costs are incurred by the utility in order to serve the customer, regardless of whether the customer uses the service or not. As with the water base fee, they include such costs as general administrative costs of the utility for billing, payment processing, and account management. The base fee, however, does not fully recover all of the fixed costs incurred by the utility in providing the collection system necessary to serve the customer.

The usage charge is based on the characteristics of the sewage (volume of sewage, or flow, and suspended solids, or strength) discharged by each particular sewer user. Inasmuch as sewage discharge is not metered, water sales are used to approximate each customer's sewage flow. Water consumption, particularly during the winter months when external uses of water for irrigation and other purposes are minimized, provides a rough approximation of the volume of wastewater that flows from a property into the sewerage system.[2] Suspended solids are based upon the classification of the user, determined by site inspections and/or analyses as required or requested.

Single-family residential customers are billed based on their winter months water usage (approximately December through March). The average winter months water usage becomes applicable on July 1 of each year, based upon the individual customer's average water consumption during the previous winter months. Once the winter months water usage is applicable, the customer's monthly sewer service charge is fixed until the following July 1.

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[2]The courts have recognized that sewer service charges based upon water consumption, such as is used by the City, are valid. *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 75 Cal. App. 3d 13, 17-18 (1977) (citing *In re City of Philadelphia*, 343 Pa. 47 (1941); *Town of Port Orchard v. Kitsap County*, 19 Wash. 2d 59 (1943); *Boynton v. City of Lakeport Mun. Sewer Dist.*, 28 Cal. App. 3d 91, 96 (1972).

Similar to Water Fees, in order for a person to be billed by the City for the Sewer Fees, he or she must file an application with the City to have his or her service initiated. SDMC § 64.0408. The person initiating the service does not have to be the owner of the property. *Id.*

Certificates of participation, have been issued to fund certain capital improvements for the repair, replacement, and expansion of the City's water system [Water Bonds].[3] Similarly, several series of revenue bonds have been issued for the City's sewer program to fund capital improvements for the repair, replacement, and expansion of the City's sewerage system [Sewer Bonds].[4] In order to both fund capital projects and make the debt service payments on the Water Bonds and the Sewer Bonds, the City raised the Water Fees and the Sewer Fees. Some of these rate increases have occurred subsequent to the adoption of Proposition 218. Although the City has never conceded that the City's Water Fees and Sewer Fees are property-related fees and charges pursuant to article XIIID, section 6 of the California Constitution, it elected to follow the noticing procedures of section 6(a) prior to approving any such rate increases. This decision was made, in part, to avoid any potential challenges to the Water Fees and Sewer Fees that were necessary to make debt service payments on the Water and Sewer Bonds.

In addition to the Water and Sewer Fees, the City also imposes Storm Fees. The Storm Fees are paid by the owner or occupant of any parcel that is connected to the City's sewerage system or water system. SDMC §§ 64.0404(b), 64.0408. The fees are used by the City to pay for a portion of the capital facilities, operations, and maintenance of the City's storm sewer system.

The City, the County of San Diego, the incorporated cities of San Diego County, and the San Diego Unified Port District currently are renewing their National Pollutant Discharge Elimination System permit (Calif. Regional Water Quality Control Board, San Diego Region, Order No. 20001-01, NPDES No. CAS0108758) [NPDES Permit] for their storm sewer

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[3]In 1998, the San Diego Facilities and Equipment Leasing Corporation [Corporation] issued the Water Bonds and is using the proceeds of the issuance to construct water system improvements. Pursuant to a Master Installment Purchase Agreement between the City and the Corporation, the City has agreed to make installment payments to purchase the project components from the Corporation. The installment payments are paid from net water system revenues and are designed to be sufficient to pay the debt service on the certificates. From a financial standpoint, an installment sale agreement payable from enterprise revenues is the functional equivalent of a revenue bond.

[4]In 1993, 1995, 1997, and 1999, the Public Facilities Financing Authority of the City of San Diego [PFFA] issued Sewer Revenue Bonds to fund capital improvements for the City's sewerage system. Pursuant to a Master Installment Purchase Agreement between the City and the PFFA, the City agreed to make installment payments to purchase components of the project funded by the proceeds of the bonds. The installment payments are paid from the sewer revenues and are designed to be sufficient to pay debt service on the bonds.

systems.[5] Each of the agencies [together the Co-permittees] owns or operates a storm sewer system through which it discharges urban runoff into the waters of the United States. The California Regional Water Quality Control Board [Regional Board] has made findings regarding the storm sewer systems of the Co-permittees and, through the proposed NPDES Permit, has imposed conditions on the Co-permittees for the operation and maintenance of their storm sewer systems. For the City, these conditions will require significant expenditures for capital improvements, operations, and maintenance. In order to fund these expenditures, the City has determined that the Storm Fees must be increased or some other revenue generating mechanism must be established. An influx of revenue for the storm sewer program will be needed as soon as February 2002, in order to meet some of the initial requirements set forth in the NPDES Permit.

The Storm Fees are based on a flat rate of ninety-five cents per month for single-family residential water and sewer customers, and approximately six and one-half cents per HCF of water used by industrial, commercial, and multi-family water and sewer customers. The Storm Fees appear on the water and sewer bill as a separate line item. The Storm Fees are charged when a person applies for the initiation of his or her water or sewer service. SDMC § 64.0408.

With this general background regarding the Water, Sewer, and Storm Fees, an analysis of the application of article XIII D follows. This memorandum first reviews the amendments to the California Constitution affecting property-related fees and charges and analyzes the approaches developed by the League of California Cities, the Howard Jarvis Taxpayers Association, the California Attorney General, and the courts in determining whether certain fees and charges are property-related fees and charges subject to article XIIID, section 6. In light of these analyses, the memorandum next discusses whether the Water, Sewer, and Storm Fees are property-related fees and charges and considers the risks associated with not complying with the provisions of article XIIID, section 6 for any increase of the Water, Sewer, and Storm Fees. Finally, the memorandum makes recommendations on how to proceed in raising future Water, Sewer, and Storm Fees.

ANALYSIS

I. What are property-related fees and charges pursuant to article XIIID, section 6?

"Fee" or "charge" is defined in article XIIID, section 2(e) as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." "Property related service" is defined in that section as "a public service having a direct relationship to property ownership." Cal. Const. art. XIIID, § 2(h). Specifically exempted from

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[5] A separate National Pollutant Discharge Elimination System permit is issued to owners and operators of sewerage systems for the collection, treatment, and discharge of wastewater.

the provisions of article XIIID are fees or charges imposed as a condition of property development. Cal. Const. art. XIIID, § 1(b).

The language of Proposition 218 is ambiguous and open to multiple interpretations. Since its adoption, a number of public and private entities have struggled with interpreting whether the newly enacted provisions of the California Constitution affect water, sewer, and storm sewer fees and charges. The League of California Cities, the office of the California Attorney General, the Howard Jarvis Taxpayers Association, and the California courts have all weighed in on this topic and have provided varying interpretations on what fees and charges are subject to the provisions of article XIIID, section 6. The interpretations given by these entities are instructive in determining whether the City's Water, Sewer, and Storm Fees are subject to the provisions of article XIIID, section 6.

A. Analysis by the League of California Cities

The League of California Cities has conducted several seminars and prepared an implementation guide [Implementation Guide] analyzing the constitutional provisions. The seminars and the Implementation Guide include analyses of the impact of article XIIID, section 6 on water, sewer, and storm sewer fees and charges. The Implementation Guide provides a balanced review of the two conflicting positions that have been embraced on whether water, sewer, and storm sewer fees and charges are property-related fees and charges. Additionally, it makes certain recommendations to public agencies charged with implementing the constitutional provisions.

The League of California Cities has been actively involved in submitting amicus briefs in the cases that have gone to the courts of appeal and the California Supreme court on article XIIID challenges. The majority of those cases have been successful in upholding the position articulated by the public agency whose fee or charge has been challenged. A review of the Implementation Guide is therefore useful in understanding the positions that are most often articulated on article XIIID.

1. Commodity Approach Proponents

The first position is referred to as the "commodity approach." Proponents of the commodity approach begin with the definition of "incident," which is defined in Black's Law Dictionary as:

> anything which inseparably belongs to, or is connected with, or inherent in, another thing . . . . Also, less strictly, it denotes

> anything which is usually connected with another, or connected for some purposes, though not inseparably.

Black's Law Dictionary 762 (6th ed. 1990).

Drawing upon this definition, proponents of this approach conclude that the phrase "fees imposed as an incident of property ownership" would apply only to fees inherently paid because a person owns property. The proponents look to the ballot arguments and campaign materials produced by the drafters of Proposition 218 to support this interpretation. They argue that the intent of Proposition 218 was to stop local agencies from using fees to avoid rules regarding the imposition of taxes and assessments, which are clearly imposed as an incident of property ownership.

The commodity approach proponents also cite the noticing procedures of article XIIID as an example of how fees that are based on the quantity of service provided are not property-related fees and charges. As an example, they note that article XIIID, section 6(a)(1) requires that the notice which must be mailed to each affected property owner, for the imposition of a new or for the increase of an existing property-related fee or charge, state the amount of the fee or charge proposed to be imposed. This implies, they conclude, that the amount of the fee must be capable of being calculated for each affected property prior to its imposition. However, it is impossible to perform such a calculation where the property owner's conduct determines whether the fee will be charged in the first place and how much the fee will be. In the context of water service, for example, where a person initiates the service and the amount of the fee charged depends on the amount of the water consumed, the agency proposing the fee cannot determine in advance the fee or charge the person will pay for the service.

Another relevant factor in the commodity approach analysis is the reference in article XIIID, section 2(e) to "user fees." Because this section does not provide a definition of "user fees," interpreting the term "user fees" to refer to all revenue devices that have been traditionally characterized as "user fees" extends Proposition 218's reach beyond the legislative purpose intended by its drafters.

Instead, the commodity approach proponents argue that the term "user fees" does not necessarily include fees imposed on a person who voluntarily has initiated a service such as water. The courts, rather, have sometimes interpreted the term "user fees" to mean fees imposed on a person because the person benefits from a government service that is provided without the property owner's consent. *See, e.g., U.S. v. Sperry Corp.*, 493 U.S. 52 (1989). The commodity approach proponents conclude that principles of statutory construction require that voters are presumed to understand the meaning of terms used in ballot measures. Thus, they conclude that voters are presumed to understand "user fees" to mean fees imposed for services that are not voluntarily initiated. In the context of water, sewer, and storm sewer services this would mean fees and charges that are imposed as an incident of property ownership, rather than fees imposed

because a person has requested and actually uses such water, sewer, or storm sewer services at a particular location.

Finally, the commodity approach proponents argue that the term "user fees" in article XIIID is modified by the phrase "for a property related service." Fees for a "property related service" are defined as services that "have a direct relationship to property ownership." Cal. Const. art. XIIID, § 2(h). The use of this qualifying phrase, they conclude, demonstrates that the drafters of Proposition 218 intended to regulate fees for services that benefit property owners because of their status as property owners. Such fees are clearly distinguishable from fees or charges for services that are provided as a result of a request for service or use of a service, and that provide a benefit to the user of the service.

2. Delivery Approach Proponents

The second approach is referred to as the "delivery approach." Delivery approach proponents point to the specific language of article XIIID, section 2(e) which defines "fees" to include "user fees or fees for a property related service"; and article XIIID, section 2(h) which defines "property related service" to mean "a public service having a direct relationship to property ownership." They argue that water fees are charged to provide a public service to property, and therefore are property related.

Delivery approach proponents further point to various California court decisions that have interpreted "user fees" to generally mean a fee that is paid for service received. *See, e.g., San Marcos Water Dist. v San Marcos Unified School Dist.*, 42 Cal. 3d 154, 164 (1986). Referring to the decision in the *San Marcos* case, these proponents conclude that if the service is provided to a property at the request of the property owner then the user fee paid for the service is property related.

Another argument of the delivery approach proponents concerns the provisions of article XIIID, section 3(b), which specifically exclude fees for electrical and gas services from the definition of "fee" imposed as "an incident of property ownership." The explicit exemption of fees for these services suggests that fees for other services, such as water, sewer, and storm services, not specifically identified were not intended to be exempted and therefore are included in the definition of "fees."

Proponents of the delivery approach also take note of the provisions of article XIIID, section 6(c). These provisions specifically exempt water, sewer, and refuse collection fees and charges from the requirement that any increase of an existing or imposition of a new fee or charge be subject to approval by a majority vote of the affected property owners. The proponents argue these fees are usually charged as a result of an election by the property owner to have the particular service provided. The term "incident to property ownership" should be interpreted broadly to include fees that are charged as an incident of electing to use a property-related

service. The availability of such services is essential to the use of one's land. Hence, they conclude, the services are incident to property ownership.

Finally, delivery approach proponents note that article XIIID, section 5 provides that the act should be construed liberally to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.[6] A liberal reading of article XIIID, section 6 would generally result in a broader interpretation being given to what constitutes a "property related fee or charge." The delivery approach is the approach most often articulated by the Howard Jarvis Taxpayers Association in its challenges to fees and charges imposed by public agencies. Inasmuch as the Howard Jarvis Taxpayers Association has been the plaintiff in the majority of the lawsuits challenging alleged property-related fees and charges imposed by public agencies, a discussion of the interpretations the association has given to the provisions of article XIIID is useful.

B. Analysis by the Howard Jarvis Taxpayers Association

In September 1996, the Howard Jarvis Taxpayers Association, the drafters of the initiative, prepared and distributed an annotated draft of Proposition 218 [Annotated Draft] in an attempt to explain the purpose and intent of the proposed constitutional amendments. The first relevant annotation to this discussion appears after article XIIID, section 1(b). This section provides that the provisions of article XIIID do not "affect existing laws relating to the imposition of fees or charges as a condition of property development." Cal. Const. art. XIIID, sect 1(b). The annotation to section 1(b) states that the drafters intended "to leave unaffected any existing law relating to developer fees. . . . [T]he focus of Proposition 218 is on those levies imposed simply by virtue of property ownership. Developer fees, in contrast, are imposed as an incident of the voluntary act of development." Annotated Draft 4 (1996). This distinction raises the issue of whether capacity charges are property-related fees or charges subject to the provisions of article XIIID.

In an annotation following article XIIID, section 6(a)(1) (the noticing procedures for the imposition of a new or the increase of an existing fee or charge), the drafters stated that "[t]his section is applicable to any fee imposed on a parcel basis or for fees which provide a property-related service. It does not affect fees that are not property related such as DMV fees, park fees, or administrative charges imposed by a local government." Annotated Draft 11 (1996). This

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[6]As discussed below, the courts have not accepted this line of argument. Rather they have looked to the plain meaning of the words contained in article XIIID, section 6 for their interpretation of what fees and charges constitute property-related fees and charges. *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830, 844-45 (2001); *Howard Jarvis Taxpayers Ass'n v. City of San Diego*, 72 Cal. App. 4th 230, 237-38 (1999); *Howard Jarvis Taxpayers Ass'n v. City of Riverside*, 73 Cal. App. 4th 679, 687, 689 (1999).

language suggests that if the proposed fee is *not* imposed on a parcel basis or for a property-related service, then these provisions of article XIIID do not apply.

Article XIIID, section 6(b)(5) further refines the intent of the drafters regarding the imposition of new fees or the extension of existing fees. This section provides that "[r]eliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this Article." Cal. Const. art. XIIID, § 6(b)(5). The annotation following this provision states that the purpose of this section is to prohibit levies on parcels regardless of use of the services for which they were collected. Annotated Draft 13 (1996). Consequently, how an agency determines who will be charged a water, sewer, or storm sewer fee or charge may be significant in determining whether the provisions of article XIIID, section 6 are applicable. If an agency does not look to property ownership, but looks to the person who has initiated and is using the water, sewer, or storm sewer services, then an argument can be made that such fees are not imposed as an incident of property ownership and therefore are not property-related fees or charges.

Gas and electric service charges are explicitly excluded from the provisions of article XIIID governing property-related fees and charges. According to the drafters, these charges were excluded because they are generally metered and probably meet the "cost of service" requirements of the article XIIID, section 6. *Id.* at 6. This annotation arguably suggests that services that are metered (e.g., consumption-based water, sewer, and storm sewer fees) may also be exempt from the provisions of article XIIID, section 6.

A later annotation, however, seems to conflict with such an interpretation. The annotation to article XIIID, section 6(b), which governs the extension, imposition, or increase of a property-related fee or charge, provides that the "requirements of [section 6(b)] are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the 'cost of service.'" *Id.* at 12. This annotation suggests that the drafters intended to include all fees, excepting only those that were explicitly identified, i.e., gas and electric service fees.

Article XIIID, section 6(c) provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until such fee or charge is submitted and approved" by a majority of the affected property owners. The annotation to this section states that "exemption for sewer, water and refuse collection is for voter approval *only*. Such fees must meet the five substantive requirements of [section 6(b), e.g., cost of service]. Exemption is based on the philosophy of attempting to reverse the end-runs around Proposition 13. Since water, sewer and refuse collection fees pre-date proposition 13, they were exempted from voter approval." *Id.* at 13 (emphasis added). An argument can be made that this annotation clarifies the drafters' intent that for all other provisions of section 6, including the noticing procedures for new or increased fees and charges contained in section 6(a), water, sewer, and storm sewer fees and charges are *not*

exempt. Alternatively, it can be argued that because the annotation only referenced the five requirements provided in section 6(b), the drafters only intended for these provisions to apply to water, sewer, and refuse collection fees.

From the foregoing, it is evident that the drafters' annotations may be useful in analyzing what fees and charges the Howard Jarvis Taxpayers Association consider to be property-related fees and charges subject to the provisions of article XIIID. As discussed below, however, the California Supreme Court and a number of California Courts of Appeal have rejected arguments based upon the Annotated Draft. Instead, the courts rely on the plain meaning of the words contained in the constitutional amendments. Rather than resorting to an interpretation provided by the drafters, the courts to look at the ordinary and common meaning of the words as they would have been understood by the voters.

C. Analysis by the California Attorney General

In addition to the analysis undertaken by the League of California Cities, and the Howard Jarvis Taxpayers Association, the California Attorney General's office has issued two opinions regarding which fees and charges are subject to article XIIID. In one opinion, the Attorney General concludes that a water service fee that is based on water consumption is not a property-related fee or charge subject to the provisions of article XIIID, section 6. 80 Op. Cal. Att'y Gen. 183 (1997). In the second opinion, the Attorney General concludes that a storm sewer system monthly user fee that is charged only to persons who are connected to the sewer system is a property-related fee or charge and is subject to article XIIID, section 6. 81 Op. Cal. Att'y Gen. 104 (1998).

1. Water Fees

The first Attorney General Opinion focuses on general principles of constitutional interpretation. Constitutional enactments must be given a practical, common sense construction; "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language." 80 Op. Cal. Att'y Gen. 183, 185 (1997) (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 244-246 (1978)). With these principles in mind, the opinion concludes that "[a] water charge that is based upon the ownership of land and calculated based upon the amount of land involved must be said to have a 'direct relationship to property ownership.'" As an example, the opinion cites California Water Code section 71630, which authorizes a municipal water district to impose a water standby assessment or availability charge which is calculated on the basis of acreage owned.

Water charges that are imposed whether or not the water customer is the owner of property are distinguishable from such property-related fees and charges, the opinion concludes. For example, California Water Code section 71610 permits water charges for water provided to

fill tanks for construction site operations. This section is cited as an example of such non-property related fees and charges. The opinion notes that these water charges clearly would not have a *direct* relationship to property ownership. 80 Op. Cal. Att'y Gen. 183, 185 (1997).

To support this position, the opinion looks to the voters' pamphlet supplied to the electorate regarding Proposition 218. The opinion concludes that "[w]hile the proponents indicate that 'taxes imposed on . . . water . . . bills' would come under the requirements of Proposition 218, such language suggests that the water charges themselves would not be subject to the proposition's requirements. [They] believe that each water fee or charge must be examined individually in light of the constitutional mandate." *Id.* at 186.

With the forgoing in mind, the opinion analyzes the particular water rate structure presented to the Attorney General for review. That water rate structure is tiered, based on the amount of water consumed by the customer. A rate mechanism that is consumption-based contrasts sharply with a rate mechanism that is established on a parcel or per acre basis. Thus, the opinion concludes, "fees for water that are based on metered amounts used are not 'imposed . . . as an incident of property ownership' and do not have 'a direct relationship to property ownership.' Consequently, such fees would not be governed by article XIIID of the California Constitution." *Id.* (footnote omitted).

2. Storm Fees

The Attorney General's opinion regarding storm sewer fees differs in its assessment. In this opinion, the Attorney General's office analyzes: (1) whether the monthly user fees charged for the operation and maintenance of a sanitation district's storm sewer system met the requirements of article XIIID; and (2) whether voter approval is required for any increase in the district's storm sewer fees.

In that matter, the sanitation district operates a sanitation sewer system and a storm sewer system. The two systems are operated separately. The sewer system connects to a water treatment plant and the storm sewer system transports water directly into San Francisco Bay. 81 Op. Cal. Att'y Gen. 104, 105 (1998). The customers of the district are charged separately for maintaining the two systems. Only persons who connect their property to the district's sewer system, however, are charged to maintain the storm sewer system. "Hence, owners of parcels used for storage facilities, parking lots, or other uses that do not require a sewer connection escape the fees." *Id.*

The opinion first concludes that the existing fees violate article XIIID, section 6(b) because the sewer customers pay for all storm sewer services even though properties not connected to the sewer also benefit from the storm sewer system. "Therefore, those who *are* charged the fees must pay more than the proportional cost of the services attributable to their own parcels." *Id.* at *106.*

The opinion goes on to address proposed increases of the storm sewer fees. The district proposed to revise its storm sewer fees. The proposed fee was "to be based upon the proportional cost of [storm sewer] services provided to each parcel, a schedule that will take into account the amount of impervious area of each developed parcel." *Id.*

The opinion concludes that the proposed revised fees are property-related fees because "the [storm sewer] system is intended to serve directly the property within the drainage area." *Id.* at *107* (citing Cal. Gov't Code § 53750(d) and (f)). The fees therefore must be approved in accordance with the voting procedures of article XIIID, section 6(c). According to the opinion, the proposed fees are neither "water" nor "sewer" fees within the meaning of article XIIID, section 6(c), and therefore are not exempt from the voting requirements for the imposition of new or the increase of existing fees. Article XIII, section 5(a) makes an exception to certain requirements for the levy of assessments for a number of listed services, including water, sewer, and flood control. The Attorney General reasoned that because flood control appears in article XIIID, section 5(a), but does not appear in section 6(c), the drafters must have purposefully intended to omit flood control from section 6(c). Thus, the opinion concludes, the omission of the term "flood control" from the section 6(c) voting exemption "evidences an intent to require prior voter approval of new or additional [storm sewer] system fees." *Id.* at 108.[7]

D. Court Decisions

1. *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*

In *Apartment Ass'n of Los Angeles, Inc. v. City of Los Angeles,* 24 Cal. 4th 830 (2001) [*Apartment Association*], the California Supreme court issued its first ruling in a case analyzing the provisions of article XIIID, section 6. In this case, Plaintiffs, landlords and their association, challenged a fee imposed upon them by the City of Los Angeles for inspections of residential apartment rentals. The City of Los Angeles imposed the inspection fee without complying with the noticing or voting requirements of article XIIID, section 6. The plaintiffs challenged the fee, claiming that it was a property-related fee or charge under the provisions of article XIIID, section 6. The fee, they alleged, is unenforceable because the city failed to submit the proposed fee to a vote of the affected property owners or the electorate in accordance with article XIIID, section 6(c).

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[7]As discussed below, the California Supreme Court has rejected a broad interpretation of article XIIID, and instead looks to the plain meaning of the words. *Apartment Ass'n of Los Angles County, Inc. v. City Los Angeles*, 24 Cal. 4th 830, 844-845 (2001).

The California Supreme Court adopted a very narrow construction of the term taxes and fees imposed as "incident of property ownership." The court found that the fee provisions of article XIIID apply only to fees imposed on property owners in their capacity as such:

> [T]he mere fact that a levy is regulatory (as this inspection fee clearly is) or touches on business activities (as it clearly does) is not enough, by itself, to remove it from article XIII D's scope. But the city is correct that article XIII D only restricts fees imposed directly on property owners in their capacity as such. The inspection fee is not imposed solely because a person owns property. Rather, it is imposed because the property is being rented. It ceases along with the business operation, whether or not ownership remains in the same hands. For that reason, the city must prevail.

Apartment Ass'n, 24 Cal. 4th at 838.

The court further analyzed the language of article XIIID, section 2(e), which defines "fee" 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, including user fees or charges for a property related service." The court reasoned 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.
>
> [T]he constitutional provision does not refer to fees imposed *on* an incident of property ownership, but on a parcel or person *as* an incident of property ownership. [T]he distinction is crucial.
>
> Were the principal words *parcel* and *person* missing, and were *as* replaced with *on*, so that article XIII D restricted the city's ability to impose fees "on an incident of property ownership," plaintiff's argument might have merit.
>
> . . . .

> Accordingly, *if* article XIII D restricted the city's ability to impose a "tax, assessment, fee, or charge on an incident property ownership," plaintiff's argument might be persuasive. The business of renting apartments is an incident of owning them, an activity necessarily dependent on that ownership but not vice versa. One can own apartments without renting them, but no one can rent them without owning them.

Id. at 839-41 (footnotes and citations omitted).

From the foregoing, the court concluded that taxes, assessments, fees, and charges "are subject to the constitutional strictures when they burden landowners as *landowners.*" *Id.* at 842. The court applied a plain meaning to the provisions of article XIII D; it "applies only to exactions levied solely by virtue of property ownership." *Id.* For support of this strict construction, the court looked to the subordinate clauses in article XIIID, section 2(e) and (h). The court reasoned that "among the fees or charges covered by article XIII D, section 2, subdivision (e), is a 'user fee or charge for a property-related service.'" *Id.* at 843. Such a service is defined in article XIIID section 2(h) to mean "a public service having a direct relationship to property ownership." Thus, "the relationship between the city's inspection fee and property ownership is indirect— it is overlain by the requirement that the landowner be a landlord." *Id.*

The decision rejected the plaintiff's reliance on the liberal construction language of article XIIID, section 5, the position repeatedly relied upon by the Howard Jarvis Taxpayers Association and delivery approach proponents. The court cites for its authority the Fourth District Court of Appeal's decision in *Howard Jarvis Taxpayers Ass'n v. City of San Diego*, 72 Cal. App. 4th 230, 237-38 (1999), and concludes that the plain meaning of the language of article XIIID renders resort to a broad rule of construction unnecessary. *Apartment Ass'n*, 24 Cal. 4th at 844-45.

Although the decision in the *Apartment Association* case reviewed the application of article XIIID to what generally would be considered a regulatory fee, the decision has far reaching implications regarding fees for providing a service to an individual, such as water, sewer, and storm sewer services. If it can be shown that the fees and charges for water, sewer, and storm sewer services are *not* imposed on property owners in their capacity as such, such fees arguably are not subject to the provisions of article XIIID, section 6.

2. *Howard Jarvis Taxpayers Association v. City of Los Angeles*

In *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 85 Cal. App. 4th 79 (2000) [*Jarvis I*], the plaintiff, Howard Jarvis Taxpayers Association, challenged the city's water rates. Plaintiffs alleged that the fees and charges imposed for water services in the city of Los Angeles were special taxes or property-related user fees, imposed as an incident of property ownership, and therefore required voter approval. The association further alleged that ratepayers were

overcharged for water services and that the overcharges resulted in a surplus of revenues to the water fund. The surplus was illegally transferred to the city's general fund in violation of articles XIIIC and D.

The city argued that its water department had the power to set water rates and enjoy a reasonable rate of return. Moreover, the water fees were not property-related fees or a special tax within the meaning of article XIIID, rather they were charges for the sale of a commodity. *Id.* at 81.

The Court of Appeal agreed with the city and adopted the commodity approach often articulated by the League of California Cities. "Water rates established by the lawful rate-fixing body are presumed reasonable, fair, and lawful." *Id.* at 82 (citing *Hansen v. City of San Buenaventura*, 42 Cal. 3d 1172, 1180 (1986)). The burden of proof for establishing that rates are unreasonable rests on the plaintiff challenging the rates. *Id.* (citing *Elliott v. City of Pacific Grove*, 54 Cal. App. 3d 53, 60 (1975)). The plaintiff did not allege that the rates were unreasonable per se; rather it argued that the mere fact that there was a surplus of revenues demonstrated that the city was overcharging its ratepayers. The court dismissed this argument, noting that "a municipal utility is entitled to a reasonable rate of return and that utility rates need not be based purely on costs." *Id.* (citing *Hansen*, 42 Cal. 3d 1172, 1176, 1183 (1986)).

The court disagreed with the plaintiff that the charges imposed for water services were in reality special taxes imposed as an incident of property ownership.

> These usage charges are basically commodity charges which do not fall within the scope of Proposition 218. They do not constitute "fees" as defined in California Constitution, article XIII D, section 2, because they are not levies or assessments "incident of property ownership." (Subd. (e).) Nor are they fees for a "property-related service," defined in subdivision (h), as a "public service having a direct relationship to property ownership." As indicated in the ordinances setting water rates, the supply and delivery of water do not require that a person own or rent property where the water is delivered. The charges for water service are based primarily on the amount consumed, and are not incident to or directly related to property ownership.

Id. at 83 (footnote omitted).

On February 14, 2001, the California Supreme Court denied review of the *Jarvis I* decision. This decision has significant relevance to water, sewer, and storm sewer service fees and charges. Similar to the decision in *Apartment Association*, the appellate court reasoned that the language of article XIIID, section 2 defining "fee" and "property-related service" does not apply to fees that do not have a direct relationship to property ownership. Fees therefore, that are

charged to an individual based upon the amount of the individual's use of the service rather than his or her status as the owner of the property to which the service is provided, arguably are not property-related fees and charges within the meaning of article XIIID.

3. *Howard Jarvis Taxpayers Ass'n v. City of Salinas*

In *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, Monteray County Superior Court case number M45873 (2001) [*Jarvis II*], the plaintiff, Howard Jarvis Taxpayers Association, challenged the City of Salinas' adoption of storm sewer fees. The fees are collected on the property tax roll and were adopted without a landowner or registered voter election. Instead, Salinas adopted the fees in compliance with the noticing provisions of article XIIID, section 6(a). Salinas asserted that the fees are exempt from the voter approval provisions of article XIIID, section 6(c) because they are water or sewer fees. Salinas prevailed in the trial court on a summary judgment motion. The plaintiff filed an appeal. Although the court of appeal has not rendered a decision in this matter, the arguments presented by Salinas and adopted by the trial court are worth examining to determine whether the City may wish to follow a similar course in the adoption of any proposed increase in its Storm Fees.

Salinas begins its argument with the premise that article XIIID, section 6(c) specifically exempts from the voter approval process fees for water, sewer, and refuse collection services. Salinas asserts that its storm sewer fees fall within the exemptions for both sewer and water services fees. Salinas also asserts that the fees are not imposed upon a person "as an incident of property ownership;" rather they are user fees which are directly related to the burden placed on the storm sewer system. Because property owners may avoid the fees by arranging for their own on-site storm water management facilities, the fees are not an "incident of property ownership" subject to article XIIID, section 6.

For support for its position, Salinas noted that it operates a sanitary sewer, a storm sewer, and an industrial waste sewer system. Article XIIID does not define the term "sewer." Using standard principles of statutory construction, Salinas looked to dictionary definitions of the word "sewer" to demonstrate that the common usage definitions of the word include storm water within the meaning of sewer. Some of the dictionary definitions for sewer used in the city's trial brief include:

> "1: a ditch or surface drain; 2: an artificial usu. subterranean conduit to carry off water and waste matter (as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." Webster's Third New International Dictionary of the Language, Unabridged 2081 (1976).

> . . . "An artificial, usually underground conduit for carrying off sewage or rainwater." American Heritage Dictionary of the English Language 1187 (1969).
>
> . . . "1. An artificial water course for draining marshy land and carrying off surface water into a river or the sea. 2. An artificial channel or conduit, now usually covered and underground, for carrying off and discharging waste water and the refuse from houses and towns." 2 Compact Edition of the Oxford English Dictionary 2756 (1971).

Defendant's Trial Brief, *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, Monterey County Superior Court No. M45873, 10-11 (Aug. 23, 2000).

Salinas also relied on the California Public Utilities Code definition of "sewer system," which includes "any and all drains, conduits and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." *Id.* at 11 citing Cal. Pub. Util. Code § 230.5. Finally, Salinas relied on its own city code, which provides that "'Storm drain' means a sewer which carries storm and surface waters and drainage." *Id.*, citing Salinas City Code § 36-2(31).

In addition to asserting that its storm sewer fees are exempt as sewer fees, Salinas also claimed that they are exempt as water fees. The term "water" is defined in California Government Code section 53750(m) (a provision of the implementing legislation for article XIIID adopted by the California legislature). This provision provides that "[w]ater means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." Thus, Salinas maintains that if the city's system of pipes, drains, ponds and treatment facilities is not considered a "sewer" system, then alternatively it should be considered a "water" system. Salinas posits that the storm water runoff is discharged into ponds, and basins, and then it percolates into underground aquifers. The recharging of these aquifers is an important source of water to the city's water supply. Salinas therefore concludes that the storm water is water and its storm drainage fees are exempt from the election requirements of article XIID, section 6(c).

The final argument presented by Salinas is that the storm sewer fees are not property-related fees within the meaning of article XIIID, section 6. The fees are not imposed on property owners who do not use the storm sewer facilities. Undeveloped property or property which has its own on-site storm water management system is either not charged the storm sewer fee or is charged a reduced fee. The fees are commensurate with the cost of providing the service to individual properties and are not imposed as an incident of property ownership or as a user fee for a property-related service.

The trial court ruled in favor of Salinas and adopted the city's position that the storm sewer fees are fees related to sewer and water services and therefore are exempt from the voter approval requirements of article XIIID, section 6(c). The court further found that the fees are not property-related fees and charges inasmuch as the fees have a direct relationship to usage of the storm sewer system and are incurred only if a property owner uses the system.

With the foregoing analyses by the League of California Cities, the Howard Jarvis Taxpayers Association, the California Attorney General, and the California courts in mind, a discussion of whether article XIIID, section 6 applies to the Water, Sewer, and Storm Fees and water and sewer capacity charges follows.

II. Are the City's Water, Sewer, and Storm Fees subject to the provisions of article XIIID, section 6?

A. City's Water and Sewer Fees, and Capacity Charges

1. Water and Sewer Fees

The commodity approach has been adopted by the California Attorney General's office and at least one court of appeal in their analysis of water fees that are consumption-based. Although these opinions analyze water fees, they are equally applicable to a sewer fee that is consumption based. The California Supreme Court's decision in *Apartment Association* also provides support for asserting that fees that are not imposed by virtue of property ownership are not subject to the provisions of article XIIID, section 6. While this opinion does not analyze either a water or a sewer fee it also has application in the analysis of whether the Water and Sewer Fees are subject to article XIIID, section 6.

The Attorney General's opinion concludes that a structure that is consumption based contrasts sharply with a rate mechanism that is established on a parcel or per acre basis. The opinion concludes that consumption-based water fees are not property-based fees and charges subject to the provisions of article XIIID, section 6. In *Jarvis I* the court concluded that water fees which are primarily based on the amount of the commodity consumed are not incident to or directly related to property ownership. Such fees, the court reasoned, are therefore not property-related fees and charges subject to the provisions of article XIIID, section 6. The California Supreme Court's decision in *Apartment Association* similarly provides support for the assertion that if a fee is not imposed upon a person in his or her capacity as a property owner, such fees are not incident to property ownership and therefore are not subject to the provisions of article XIIID, section 6.

Given the decisions in *Jarvis I* and *Apartment Association*, as well as the Attorney General's opinion on water charges, it is clear that the Water and Sewer Fees are not property-related fees and charges within the meaning of article XIIID, section 6. First, the fees are not

imposed as an incident of property ownership. Ownership of property does not determine who will be charged the Water and Sewer Fees. Additionally, the Water Department and the Metropolitan Wastewater Department do not rely on a parcel map to determine whether a fee or charge should be imposed. Rather, the departments require that a customer open an account and initiate service. As was the case in the water district analyzed by the California Attorney General, *Jarvis I*, and *Apartment Association*, the Water and Sewer Fees are not imposed solely because a person owns property. Paraphrasing the California Supreme Court, the fees cease along with cessation of the service. *Apartment Ass'n*, 24 Cal. 4th at 834.

The Water and Sewer Fees are both based on the amount of the service consumed by water and sewer customers. As discussed above, a water customer is billed based on the amount of water he or she consumes at the property for which he or she has initiated service. A meter is connected to the property to measure this amount. Similarly, a sewer customer is billed based on his or her winter months water usage. The amount of water consumed during this period provides the best approximation of the amount of wastewater the sewer customer discharges into the sewerage system. This water usage is measured through the same water meter. Moreover, the individual receiving the water or sewer service does not have to be the owner of the property.

Second, the noticing provisions of article XIIID, section 6(a)(1) assume that property-related fees may be readily calculated on a per parcel basis. These provisions state that the amount of the fee or charge proposed to be imposed shall be calculated.[8] Among other things, the agency proposing to impose the new or increased fee must provide notice to the record owner of each affected property of (1) the amount of the fee or charge proposed to be imposed, and (2) the basis on which the fee or charge was calculated. Cal. Const. art. XIIID, § 6(a)(1). The Water and Sewer Fees are established on a consumption-based rate structure. The amount charged to an individual customer is not capable of calculation until that customer has used the services.

Finally, with the decisions in *Apartment Association* and *Jarvis I*, the courts have clearly indicated that they apply a plain meaning to the language in article XIIID. Article XIIID "applies only to exactions levied by virtue of property ownership." *Apartment Ass'n,* 24 Cal. 4th 830, 842. Fees that are charged to an individual based upon the amount of the individual's use of the service rather than his or her status as the owner of the property to which the service is provided, are not property-related fees and charges within the meaning of article XIIID, section 6. *Jarvis I*, 85 Cal. App. 4th at 83; 80 Op. Cal. Att'y Gen. 183, 186 (1997). The applicability of these decisions to the Water and Sewer Fees is evident. Both fees are calculated based on consumption of the services provided, rather than incident to property ownership.

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[8]The provisions of article XIIID do not explain how a public agency shall calculate fees, such as water fees and sewer fees, that are determined by the consumer's conduct.

2. Water and Sewer Capacity Charges

To date, there have not been any cases challenging the applicability of article XIIID to capacity charges. The Annotated Draft, however, provides some insight into what issues may be raised in the event that a challenge is ever brought against the City respecting an increase in its capacity charges. According to the Annotated Draft, the drafters of Proposition 218 intended "to leave unaffected any existing law relating to developer fees. . . ." Annotated Draft 4 (1996). Because developer fees are imposed as an incident of the voluntary act of development, the drafters were not concerned with the imposition of developer fees and specifically exempted them from the mandates of article XIIID. *Id.*

Developer fees have been defined by the courts to mean "an exaction imposed as a precondition for the privilege of developing land, commonly exacted in order to lessen the adverse impact of increased population generated by the development." *Carlsbad Muni. Water Dist. v. QLC Corp.*, 2 Cal. App. 4th 479, 485 (1992). In *Carlsbad*, the court concluded that capacity charges imposed by the Carlsbad Municipal Water District are development fees. In relation to the City's water fees and charges, the article XIIID, section 1(b) exemption for developer fees would appear to include capacity charges. Like those imposed by the Carlsbad Municipal Water District, the City's water and sewer capacity charges are paid when a person requests a new water or sewer connection or in any way causes an increase in water usage. Payment of the capacity charge is due when building permit fees or water connection fees are paid, and therefore is a precondition to development. SDMC §§ 67.0513, 64.0410.

An argument can be made, however, that the City's capacity charges are property-related fees and charges subject to the provisions of article XIIID. In analyzing the nature of capacity charges, some courts have determined that a capacity charge is "in effect a special assessment under a different name." *San Marcos Water Dist. v. San Marcos Unified School Dist.*, 42 Cal. 3d 154, 161 (1986); *accord Regents of Univ. of Calif. v. City of Los Angeles*, 100 Cal. App. 3d 547, 549-50 (1979); *County of Riverside v. Idyllwild County Water Dist.*, 84 Cal. App. 3d 655 (1978). "Assessment" is defined in article XIIID, section 2(b) as "any levy or charge upon property by an agency for special benefit conferred upon the real property." Cal. Const. art. XIIID, § 2(b). Thus, although a capacity charge *is not* an assessment, it arguably is in the nature of an assessment and therefore is "property related." The more persuasive argument, however, is that capacity charges are not property-related fees and charges. They are not paid as an incident of property ownership but as an incident of property development. Hence, they come under the "developer fee" exemption of article XIIID, section 1(b).

B. Storm Fees

Assuming the Attorney General's analysis on the issue of storm sewer fees is correct, storm sewer service fees that are not directly related to use of the storm sewer system, are property related and subject to the provisions of article XIIID, section 6(c). Such is the case with

the Storm Fees. The current rate structure for the Storm Fees is a flat rate, imposed on any person who connects to the water or sewerage system. The fees do not take into account the amount of storm water runoff that a property may generate based on its land use or any other factor which would be relevant to determining whether or how much storm sewer service is being provided to a property.

The applicability of the *Jarvis I* decision to the Storm Fees is even more tenuous. The Storm Fees are billed based on a flat rate for single-family residential water and sewer customers and on water consumption for industrial, commercial, and multi-family water and sewer customers. As previously noted, there is no correlation between the amount charged to the customer and the amount of the service provided to the customer as is suggested in *Jarvis I.* There is a potential argument, however, that the Storm Fees are not property-related fees in that an individual is billed for the service only if he or she initiates water or sewer service to a property. That individual does not have to be the owner of the property. Thus, the fee is not directly related to property ownership, rather it is related to the use of the City's storm sewer services.

This argument would be more persuasive if the Storm Fees had a more direct relationship to use of the storm sewer system by the ratepayer than the current rate structure for storm sewer services indicates. For example, if the rate structure was based on an examination of particular land uses and their contribution of storm water to the storm sewer system (i.e., the impermeability of the land), then such storm fees would be more directly related to the amount of the services "consumed" by the ratepayer than to his or her ownership of the property. Properties that do not accelerate storm water runoff (e.g., unimproved properties) under such a rate structure would be charged a lower rate inasmuch as the property owner chooses to "consume" a lesser amount of the City's storm sewer services. This was the rate structure adopted by the city of Salinas and challenged in *Jarvis II.*

In light of the California Supreme Court's decision in *Apartment Association*, the arguments presented by the city of Salinas in *Jarvis II* may have some merit. The California Supreme Court has stated that it will apply a plain meaning to the interpretation of article XIIID, section 6. *Apartment Ass'n*, 24 Cal. 4th at 844-45. The dictionary definitions identified in *Jarvis II* provide a plain meaning to the term "sewer" which would include storm water. The Salinas City Code also reiterates that the city considers its storm sewer system to be a sewer. With respect to our own Municipal Code, however, the definition provided to the term "storm water" does not provide as clear an association between what the City considers to be its sewer system and its storm sewer system.

The City's municipal code defines "storm water" to mean "surface runoff and drainage associated with storm events and snow melt which is free of [p]ollutants to the maximum extent possible." SDMC § 43.0302. There are instances in which storm water goes into the City's sewer conveyance system to a treatment facility (e.g., a low flow diversion facility), or goes to some

other on-site treatment facility through a conveyance system (e.g., continuous debris separators, detention ponds, grass swales, catch basin inserts). In such instances, the City may argue that its storm sewer system is a sewer system within the plain meaning of article XIIID, section 6 and any fees charged for such storm sewer services are either exempt from the provisions of article XIIID, section 6 or only subject to the noticing procedures of section 6(a) for any increase thereof.

The City may also look to the NPDES Permit for support that its storm sewer system is in effect a sewer system as that term is understood for the purposes of article XIIID, section 6. The NPDES Permit sets forth the waste discharge requirements for discharges of urban runoff from the City's "storm sewer system." The NPDES Permit specifically uses the term "storm sewer system" in the permit. It further provides that urban runoff is a "waste," as that term is defined in the California Water Code. NPDES Permit, 1. California Water Code section 13050 defines "waste" to mean "sewage and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal." This definition demonstrates a clear association between sewage and storm water. Reading the Municipal Code, the NPDES Permit, and the Water Code together, and applying a plain meaning to article XIIID, the City's storm sewer system arguably is a sewer system within the meaning of article XIIID, section 6. The Storm Fees under such an analysis therefore are fees or charges for sewer services.

Even assuming that Salinas' analysis is correct, and storm sewer fees are equivalent to sewer fees, the City will need to demonstrate that the Storm Fees are not property-related fees and charges subject to the provisions of article XIIID, section 6(a). The lack of correlation between the rate structure for the Storm Fees and the amount of the services consumed by the ratepayers is problematic for framing such an argument. Without this correlation it is difficult to argue that the Storm Fees are *not* directly related to property ownership, but are related to use of the storm sewer system. In order to fashion an argument that the Storm Fees are not property-related fees and charges within the meaning of article XIIID, section 6, the current rate structure would have to be revised. Additionally, it would be advisable to amend the Municipal Code provisions governing the storm sewer and sewerage systems to more clearly demonstrate that the City's "storm sewer system" is a sewer system as that term is given its plain meaning in article XIIID, section 6.

Notwithstanding the foregoing conclusions respecting the application of article XIIID to the Water, Sewer, and Storm Fees, the City must make certain policy decisions regarding whether it will comply with the hearing and notice or voting requirements of article XIIID for any future rate increases. The following section discusses the implications of such policy decisions.

III. Should the City comply with the notice and hearing or voting requirements of article XIIID, section 6?

As previously discussed, article XIIID, section 6(a)(1) imposed noticing requirements for imposing a new, or increasing an existing, property-related fee or charge. This section requires that the public agency proposing to impose a new or to increase an existing property-related fee or charge provide written notice by mail to the record owner of each parcel upon which the fee or charge will be imposed notifying him or her of: (1) the amount of the fee or charge; (2) the basis on which the fee or charge was calculated; (3) the reason for the fee or charge; and, (4) the date, time, and location the public agency will conduct its public hearing on the proposed fee or charge. Cal. Const. art. XIIID, § 6(a)(1). Article XIIID, section 6(a)(2) further requires that the public hearing be held not less than forty-five days after the mailing of the notice. If at the conclusion of the hearing the public agency receives written protests against the imposition of the proposed fee or charge from a majority of the property owners, the fee or charge may not be imposed. Cal. Const. art. XIIID, § 6(a)(2).

Article XIIID, section 6(c) requires that except for fees or charges for water, sewer, and refuse collection services, a public agency proposing to impose a new or increase an existing property-related fee or charge shall submit the fee proposal to a vote of the affected property owners or the electorate residing in the affected area. If the vote is by the property owners, then a majority of the property owners must approve the new fee or increase of the existing fee. If the vote is of the electorate, then a two-thirds vote is required for approval. Cal. Const. art. XIIID, § 6(c).

A. City Water and Sewer Rate Increases

After the adoption of Proposition 218, the City elected to follow the noticing requirements of article XIIID, section 6(a) when it proposed a rate increase on August 12, 1997, for its Water Fees, and on January 19, 1999, for its Sewer Fees. Although the City did not concede at that time that the Water and Sewer Fees are property-related fees or charges and therefore subject to the noticing provisions of Article XIIID, section 6(a), the lack of any enabling legislation or case law interpreting these provisions caused the City to err on the side of caution in bringing its rate increases forward to the City Council for approval.

In particular, this decision was made because of the Water Department's plans to issue its first series of Water Bonds for its capital improvement program in the spring of 1998, and the Metropolitan Wastewater Department's outstanding and future bond issuances. Certain risks were identified if the City did not comply with the noticing provisions in bringing its proposed rate increases forward. These risks were as follows: First, the City could be sued by the Howard Jarvis Taxpayers Association or a water or sewer ratepayer. Any lawsuit could result in protracted litigation, thereby delaying the imposition of the Water and Sewer Fees and construction of the water and sewer capital improvement programs. The need for the revenue

from the rate increases for the capital program and bond payments caused the City to avoid these risks. Additionally, if a legal challenge had been filed, the City would have been required to disclose the litigation in the offering documents for the Water and Sewer Bonds. Such disclosure could have had a negative impact on the sale of the securities. Second, the City also would have been required to disclose the mere fact that the City did not follow the noticing procedures of article XIIID, section 6. That disclosure also could have had a negative impact on the sale of the bonds. Finally, the City is under a compliance order by the California Department of Health Services to construct certain capital improvements for its water system and a final order by a federal district court to construct certain capital improvements for its sewerage system. Any delay in the issuance of the Water Bonds and Sewer Bonds could have had significant ramifications, both financial and legal, ono the two programs.

In *Jarvis I*, a court of appeal definitively found that a water fee based upon consumption of the water commodity is not a property-related fee or charge and therefore is not subject to the provisions of article XIIID, section 6. The City's Water Fees fully comport with the water rate structure approved by the court of appeal in *Jarvis I*. The California Supreme Court has denied review of this decision and further rejected the plaintiff's request to depublish the opinion. It is very clear, therefore, that the Water Fees are not subject to the provisions or article XIIID, section 6. The City therefore does not need to comply with the hearing and notice provisions of article XIIID, section 6(a) for any future increases of its Water Fees.

At present, however, there are no published opinions by a California court finding that sewer fees and charges that are based on consumption of sewer services are not property-related fees and charges. The City therefore must decide if it will continue to follow the noticing procedures of article XIIID, section 6(a) for any future increases of its Sewer Fees. While the likelihood of any challenge succeeding is very small, there is a possibility that a court could find that sewer services are sufficiently different from water services such that the analysis in *Jarvis I* is not applicable. Water clearly is a commodity which you purchase from a purveyor of the product. Sewer fees are a charge for a service provided, the conveyance and treatment of waste water from property. Given the lack of a judicial determination on this issue, the risks previously identified with failing to comply with article XIIID, section 6(a) for any future increase of the Sewer Fees, however remote, remain the same.

B. Storm Fee Rate Increases

The City currently is operating its storm sewer system under the terms and conditions of the NPDES Permit. That permit has a number of terms and conditions which are time sensitive. Of primary concern is the requirement that the City have in place by February 2002 its storm sewer program in compliance with the NPDES Permit conditions. Additionally, it must have in place a fiscal analysis for the program demonstrating how the City will pay for the program. Failure to meet these deadlines could result in fines to the City by the Regional Board. The need

for revenue from the Storm Fees to fund these improvements and the ongoing operations and maintenance therefore is also time sensitive.

As with sewer fees, there are no published court decisions determining whether storm sewer fees are property-related fees and charges. The only published opinion is one by the California Attorney General, and that opinion found that storm sewer fees are subject to the voting provisions of article XIIID, section 6(c). The court of appeal in *Jarvis II* has not rendered an opinion, and it is not likely that there will be a decision until this fall at the earliest. Assuming that the appellate court decision is favorable, it is likely that the Howard Jarvis Taxpayers Association would appeal the decision. In the event of an appeal, the City could not rely upon the court of appeal decision. With the need for revenues for the storm sewer program by February 2002, waiting for a court decision on this issue may not be an option. In addition to the timing issues associated with obtaining a final decision in the *Jarvis I* case, it is more difficult to argue that storm sewer fees and charges are fees and charges for services consumed by a ratepayer. Given these parameters, and the deadlines associated with the City's NPDES Permit, the City will need to decide whether to raise the Storm Fees in compliance with the voting provisions of article XIIID, section 6(c).

IV. Are there any other alternatives available to the City regarding its Sewer and Storm Fees?

A. Sewer Fees

If the City does not want to follow the noticing procedures for future increases of the Sewer Fees, then it should take some form of legal action to resolve whether its Sewer Fees are in fact property-related fees subject to the provisions of article XIIID, section 6. To initiate such an action, the City should follow the noticing procedures of article XIIID, section 6(a) and file a declaratory relief action or validation action, asking a court to determine whether consumption-based sewer fees and charges are property-related fees and charges subject to the notice and hearing procedures of article XIIID, section 6(a). Although such action may resolve the matter for the City, there is some risk in asking for a court's determination of the matter. The court could find that the Sewer Fees are property-related fees and charges, or the City could have to litigate the matter in court for several years. Ultimately, however, the issue would be resolved.

B. Storm Fees

With regard to the Storm Fees, if the City does not proceed with a vote pursuant to article XIIID, section 6(c) for a fee increase, it should consider taking legal action to assert or clarify its position by initiating a declaratory relief action or a validation action. This would first require that the City take some form of action to raise its Storm Fees. One method to initiate such an action would be to comply with the noticing procedures of article XIIID, section 6(a) but assert (1) that the storm sewer services are sewer services as that term is understood in

article XIIID, section 6, and (2) that the storm sewer services are *not* property-related fees and charges. In the event that a court determines that the fees are sewer services, the City then has at least complied with the noticing provisions of article XIIID, section 6(a), thereby avoiding one additional challenge to the rates. The risk in this approach is that if a court determines that the Storm Fees are not sewer fees within the meaning of article XIIID, section 6, the City will have lost a significant amount of time in collecting the revenue necessary to comply with the mandates of the NPDES Permit.

The second method for initiating such an action goes one step farther. It also presumes (1) that storm sewer services are sewer services, and (2) that sewer services are not property-related fees and charges. However, the City would simply raise the Storm Fees without either sending a notice in compliance with article XIIID, section 6(a), or submitting the increase to a vote in compliance with article XIIID, section 6(c). This latter alternative is riskier because it is vulnerable to challenge as violative of both article XIIID, sections 6(a) and 6(c).

In either case, it would be advisable to change the current rate structure for the Storm Fees to more closely correlate the amount of the fee imposed to the amount of the services consumed by the ratepayer. Additionally, the Municipal Code sections governing the sewerage system and the storm sewer system should be amended to provide a stronger position for the City to argue that a plain reading of the term "sewer system" includes storm sewer system. Finally, the City should not collect any of the proposed increase in the Storm Fees until the matter is resolved in order to avoid the risk of future refunds should the City's validation or declaratory relief action fail.

In the event the City elects to go forward with a rate increase for its Storm Fees, and to initiate a declaratory relief or validation action to validate the rates as outlined above, the City will need to work cooperatively with the Regional Board to negotiate extensions for the implementation of the NPDES Permit requirements. Alternatively, the City will need to have other sources of revenue available on an interim basis to fund the capital improvement and operations and maintenance expenses necessitated by the NPDES Permit requirements.

CONCLUSION

Since the adoption of Proposition 218, public agencies tasked with the responsibility of providing water, sewer, and storm sewer services have struggled with interpreting whether the broad language of the newly enacted provisions of the California Constitution apply to their water, sewer, and storm sewer fees and charges. Opinions have been provided by the League of California Cities, the Howard Jarvis Taxpayers Association, the California Attorney General's office and the courts on the applicability of article XIIID, section 6 to water, sewer, and storm sewer services. These opinions are instructive in analyzing the Water, Sewer, and Storm Fees.

The Court of Appeal in *Jarvis I* determined that consumption-based water fees and charges are not property-related fees and charges within the purview of article XIIID, section 6. That decision, review of which was denied by the California Supreme Court, provides ample authority that the provisions of article XIIID, section 6(a) do not apply to the City with respect to any future increases of its Water Fees. Additionally, the decision of the California Supreme Court in *Apartment Association* provides further support for a plain reading of the language of article XIIID. The import of this decision is that it limits the application of the provisions of article XIIID to fees and charges that are imposed upon a property owner in his or her capacity as such. The City's Water Fees clearly are not imposed in such a manner.

The decisions in *Jarvis I* and *Apartment Association* can be interpreted to further conclude that the Sewer Fees are not property-related fees and charges subject to article XIIID, section 6. Until a court renders a decision on consumption based sewer fees, however, the City cannot definitively assert that its Sewer Fees do not have to comply with the noticing provisions and the cost of service provisions of article XIIID, section 6(a). If the City decides not to comply with these provisions, then it must disclose this decision in the offering documents for any future revenue bonds for its waste water capital improvement program. As discussed above, there are certain risks associated with such a decision.

Similarly, the City can assert that its storm sewer services are sewer services within the meaning of article XIIID, section 6. If they are sewer services, then arguably they also are not property-related fees or charges subject to the provisions of article XIIID, section 6. While one trial court has accepted the initial premise that storm sewer services are sewer services, that decision is on appeal.

As the City prepares to bring forward increases of its Sewer and Storm Fees, the City must determine whether it will (1) comply with the provisions of article XIIID, section 6; (2) initiate a validation or declaratory relief action to resolve the matter; or (3) wait until a court decision resolves whether sewer and storm sewer service fees that are based on the amount of the services consumed by the ratepayer are subject to the provisions, if any, of article XIIID, section 6. There is some risk to the City in pursuing a judicial resolution of this issue. In any instance, however, it would be advisable for the City to revise its current Storm Fee rate structure to demonstrate that the Storm Fees are based on the amount of the storm sewer service being provided to the ratepayer.

CASEY GWINN, City Attorney

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By
Kelly J. Salt
Deputy City Attorney

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