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 1620
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 236-6220
FAX (619) 236-7215

# MEMORANDUM OF LAW

**DATE:** April 16, 2004

**TO:** Richard Mendes, Deputy City Manager/Utilities Manager

**FROM:** City Attorney

**SUBJECT:** Imposition of a Fire Suppression Fee for Fire and Medical Emergency Facilities and Equipment

## BACKGROUND

On February 9, 2004, the California Supreme Court determined in *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409 (2004) [*Richmond*], that a water connection fee imposed by a community services district, components of which included a capacity fee and a fire suppression fee, is not an assessment or a property-related fee subject to the provisions of article XIII D of the California Constitution [article XIII D]. After apprising you of this decision, you asked whether the City could impose a similar fire suppression fee, the proceeds of which would be used for purchasing fire and medical emergency facilities and equipment. This memorandum analyzes the California Supreme Court decision in *Richmond* and whether a similar fee could be imposed by the City of San Diego. Additionally, the memorandum addresses how such a fee would have to be structured in order to comply with articles XIII A and XIII B of the California Constitution and relevant provisions of the California Government Code governing fees and taxes.

## QUESTION PRESENTED

May the City impose a fire suppression fee to pay for fire and medical emergency facilities and equipment?

## SHORT ANSWER

Yes. The City may impose a fire suppression fee to pay for fire and medical emergency facilities and equipment; provided that the fee (1) does not exceed the reasonable cost of

providing fire suppression and medical emergency services; (2) is not levied for general revenue purposes; and (3) is collected at the time a property owner initiates water service.

## ANALYSIS

The Shasta Community Services District [District] is a local public entity organized under the community services district law (California Government Code sections 61000-61850). In addition to operating a water system, the District also operates a volunteer fire department that provides fire suppression and emergency medical services. The District adopted a connection fee for new water connections which had three components: (1) a capacity component, to fund estimated capital improvements to the water system necessitated by new development; (2) a water connection component, to recover the actual costs of installing a new meter and connecting a property to the water system; and (3) a fire suppression component, to fund equipment purchases for the District's fire and emergency medical services programs. *Richmond,* 32 Cal. 4th at 416. Certain developers challenged an increase in the connection fee that was imposed by the District, claiming, among other things, that: (1) the capacity component is an assessment subject to the provisions of article XIII D, section 4; and (2) the fire component is a property-related fee and violates the provisions of article XIII D, section 6(b) that such fees not be used for general governmental services such as fire suppression. *Id.* at 417.

The trial court concluded that the entire water connection fee is exempt from all provisions of article XIII D as a development fee pursuant to article XIII D, section 1(b). The Court of Appeal reversed in part, finding that the fire suppression component is a property-related fee in violation of article XIII D, section 6. *Id.* The Supreme Court concluded that the capacity component is not an assessment or a development fee and the fire suppression component is not a property-related fee or charge. *Id.* At 430.

### I. Capacity Charge

Article XIII D, section 2(b) defines assessment to be "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." Article XIII D, section 4(a) requires that in order to impose an assessment, the agency must "identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed." The agency must then provide a notice of the proposed assessment to the property owners of the identified parcels and an opportunity to protest the levy of the assessment through a ballot protest hearing. Art. XIII D, § 4(c).

In reviewing the District's capacity component, the Supreme Court reasoned that the District cannot identify the parcels for which the fee is to be imposed at the time the fee is established or increased; those parcels cannot be identified until a property owner applies for a new water service connection. "Therefore, it is impossible for the District to comply with article XIII D's requirement that the agency identify the parcels on which the assessment will be imposed and provide an opportunity for a majority protest weighted according to the proportional financial obligation of the affected property."*Richmond*, 32 Cal. 4th at 419. The Supreme Court therefore reasoned that "[b]ecause the District does not impose the capacity

charge on identifiable parcels, but only on individuals who request a new service connection, the capacity charge is not an assessment within the meaning of article XIII D." *Id.*

The Supreme Court noted that the case is only concerned with imposition of costs on new connections. "Presumably, any costs imposed on customers receiving service through existing connections would be subject to article XIII D's voter approval requirements, and thus their consent. Customers who apply for new connections give consent by the act of applying." *Id.* at 420.

The Supreme Court also concluded that the District's capacity fee component is not a development fee. Article XIII D, section 1(b) provides that "[n]othing in [article XIII D] . . . shall be construed to . . . [a]ffect existing laws relating to the imposition of fees or charges as a condition of property development." The trial and appellate courts had determined that the District's capacity fee component is a "development fee," and therefore is exempt from article XIII D's noticing and other provisions regulating property-related fees and charges. The Supreme Court rejected this analysis and narrowly construed the term "development fee." The court reasoned that the capacity component "is similar to a development fee in being imposed only in response to a property owner's voluntary application to a public entity, but it is different in that the application may be only for a water service connection without necessarily involving any development of the property." *Richmond*, 32 Cal. 4th at 425. Accordingly, where a fee is imposed on new users of services which sometimes, but not always, relate to development, the Supreme Court appears to conclude that the development fee exception provided in article XIII D, section 1(b) is not applicable.

## II. Fire Suppression Charge

In addition to the capacity charge component of the water connection fee, the Supreme Court also found in favor of the District with respect to the fire suppression component. The Supreme Court noted that article XIII D, section 6(b)(5) provides that "[n]o fee or charge may be imposed for general governmental services including, but not limited to, police, *fire*, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." (emphasis added) It further noted the fire suppression fee is collected by the District for the purpose of purchasing firefighting and emergency medical equipment and that the District provides fire and emergency medical services to the public at large. "Accordingly, the District's fire suppression charge is 'imposed for general governmental services' within the meaning of section 6, subdivision (b)(5), of article XIII D, and it is prohibited by that provision if it satisfies XIII D's definition of a 'fee or charge.'" *Richmond,* 32 Cal. 4th at 425.

"Fee" or "charge" is defined in article XIII D, 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." Reviewing the definition of fee or charge, the Supreme Court concluded that the connection charge is not imposed "as incident of property ownership" and therefore is not a fee or charge subject to the provisions of article XIII D. The court reasoned that "[a] connection fee

is not imposed simply by virtue of property ownership, but instead it is imposed as an incident of the voluntary act of the property owner in applying for a service connection." *Richmond,* 32 Cal. 4th at 426.

Applying the same logic that it used in analyzing the capacity component of the connection fee as an assessment, the Supreme Court further considered the requirements of article XIII D for the imposition of property-related fees and charges and concluded that the fire suppression fee is not a property-related fee or charge. In order to impose a property-related fee or charge, the local agency must identify the parcels affected by the fee or charge. The court reasoned that inasmuch as the District cannot determine in advance which property owners will apply for a service connection, the District cannot comply with the provisions of article XIII D, section 6 for the imposition of the fire suppression charge. "As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are not subject to article XIII D's restrictions on property-related fees. Because the connection fee, including the fire suppression charge, is not a property-related fee or charge within the meaning of article XIII D, it is not subject to article XIII D's prohibition on property-related fees or charges for general governmental services." *Id.* at 428.

## III. Fees and Taxes

As noted above, the Supreme Court concluded that the fire suppression fee imposed by the District is a fee imposed for general governmental services but it is not a property-related fee or charge subject to the provisions of article XIII D. Although not addressed by the California Supreme Court in *Richmond*, other provisions of the California Constitution and the California Government Code governing the imposition of taxes should be considered by the City prior to adopting a fire suppression fee.

California Constitution article XIII A, section 4 [article XIII A] provides that, by a two-thirds vote of the electorate, cities may impose special taxes. California Constitution, article XIII C [article XIII C], section 1(d) defines special taxes as "any tax imposed for specific purposes, including, a tax imposed for specific purposes, which is placed into a general fund." Article XIII C, section 2(d) restates the requirements of article XIII A, that any imposition of a special tax must be supported by a two-thirds vote of the electorate.

California Constitution, article XIII B [article XIII B] generally imposes an appropriations limit, which limits the amount of "proceeds of taxes" that each local agency may appropriate in a given year. Article XIII B, section 8, provides that "proceeds of taxes" include user fees to the extent that the proceeds of the user fees exceed the costs reasonably related to providing the service.

To implement the authorizations granted to cities, counties, and districts in article XIII A, the legislature enacted California Government Code sections 50075 and 50076. California Government Code section 50075 provides that it is the intent of the legislature to provide all cities, counties and districts with the authority to impose special taxes, pursuant to the provisions of article XIII A. California Government Code section 50076 then excludes from the definition

of special tax "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

Assuming that the proceeds of the proposed fire suppression fee will be used for the specific purpose of acquiring fire and medical emergency facilities and equipment, the fee would not constitute a special tax if the fee does not exceed the reasonable cost of providing the service. The case of *Beaumont Investors v. Beaumont-Cherry Valley Water District*, 165 Cal. App. 3d 227 (1985) [*Beaumont*] is instructive in demonstrating what actions the City must take to ensure that the proposed fire suppression fee complies with the provisions of Government Code section 50076 and therefore is not a special tax.

In *Beaumont*, a real estate developer challenged a facilities fee imposed by a water district, claiming, among other things, that it was a special tax imposed without voter approval as required pursuant to article XIII A. The water district sought to impose a facilities fee on the developer before it could connect to the district's water system. The trial court rendered a judgment in favor of the water district. The Court of Appeal reversed.

The Court of Appeal analyzed the record of the adoption of the facilities fee and concluded that the water district failed to make a sufficient showing that the facilities fee was reasonably related to the cost of providing the service. At a minimum, the court concluded, the water district should have introduced reports or other

> evidence of (1) the estimated construction costs of the proposed water system improvements, and (2) the District's basis for determining the amount of the fee allocated to plaintiff, i.e., the manner in which defendant apportioned the contemplated construction costs among the new users, such that the charge allocated to plaintiff bore a fair or reasonable relation to plaintiff's burden on, and benefits from, the system.

*Beaumont*, 165 Cal. App. 3d at 234-235.

The court cited the actions of the City of San Diego in *J.W. Jones Co. v. City of San Diego,* 157 Cal. App. 3d 745 (1984) as illustrative of the factual showing that should be made by a public agency in order for a fee to be exempt from special tax provisions of article XIII A. Specifically, the court reviewed the actions of the City of San Diego in adopting its facilities benefit assessments. The court referenced the City's actions in formulating areas of benefit to apportion costs of future public works among developments within the area in proportion to the estimated benefits received by the development. The City record regarding the adoption of the facilities benefit assessments included a report which specified the precise cost of the public facilities to be charged to developers and the formula by which the costs were apportioned among developers. *Beaumont,* 165 Cal. App. 3d at 236.

By contrast, the administrative record of the Beaumont-Cherry Valley Water District board hearing at which the fee was adopted merely referenced reports of a district "field foreman." These reports did not contain any specific information demonstrating how costs were estimated or apportioned for future facilities. *Id.* at 237. Because of the inadequacy of the record, the court concluded that the fee was not excluded under the provisions of Government Code section 50076 and therefore constituted a special tax subject to the provisions of article XIII A. Since the fee was not approved by a two-thirds vote of the electorate, the court concluded that it was enacted in violation of article XIII A. *Id.* at 238.

The City bears the burden of establishing that the proposed fire suppression fee does not exceed the reasonable cost of providing the service. *Id.* at 236; *Garrick Dev. Co. v. Hayward Unified Sch. Dist.,* 3 Cal. App. 4th 320, 329 (1992). Thus, prior to imposing the proposed fire suppression fee, the City will need to undertake an analysis of the estimated costs of the equipment and facilities for which the fee will be imposed and determine a formula or rate which reasonably apportions those costs to individuals paying the fee;[1] such fees may not be used for general revenue purposes. Additionally, how the fee is structured will be important in ensuring that the fee does not run afoul of constitutional provisions. An analysis of how the fee should be structured follows.

## IV. Fee Structure

The District fire suppression fee is a component of its water connection fee. The Supreme Court, however, analyzed the component as though it is a stand alone fee. The Supreme Court concluded that the fee is not a property-related fee because it is imposed as an incident of the voluntary act of a property owner requesting a water service connection. Moreover, the District could not determine in advance which property owners would apply for a service connection or which parcels would be affected by the imposition of the fee and therefore could not comply with the provisions of article XIII D. While the fire suppression fee was a component of the District's connection fee, any fire suppression fee adopted by the City would have to be adopted as a stand alone fee.

The City of San Diego currently collects a water connection fee for new connections to the water system. The fee charged to property owners includes the cost of installing the water service connection, any meter, and any equipment necessary to initiate, expand, or continue a water service connection. The rate for the fee is established by the City Council and must fully reimburse the Water Department for its costs. San Diego Municipal Code § 67.0203. All revenues collected from the water connection fee must be deposited in the Water Utility Fund and may only be used for water utility purposes. San Diego Charter § 53.

If the proposed fire suppression fee is a component of the water connection fee then the

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[1]The cost analysis should take into account other fees paid by individuals in the course of developing their property, such as facilities benefit assessments and development impact fees, to ensure that the costs are reasonably allocated.

revenues collected from the fee would constitute water revenues and must be used for water utility purposes. Consequently, the fire suppression fee should be imposed as a stand alone fee but collected at the same time as the water connection fee is collected for new connections to the water system. By collecting the fire suppression fee at the same time as the water connection fee, it would be imposed as an incident of the voluntary act of the property owner in applying for a service connection. *Richmond,* 32 Cal. 4th at 426. Such a fee structure would comport with the analysis of the Supreme Court in *Richmond*.

**CONCLUSION**

The City may impose a fire suppression fee to pay for fire and medical emergency facilities and equipment. If the fee is collected at the time a property owner requests a new connection to the City's water system and does not exceed the reasonable cost of providing the service, the fee would not violate articles XIII A, XIII B, XIII C, XIII D, and California Government Code section 50076. The City, however, should undertake an analysis of the estimated costs of the facilities and equipment for which the fee will be imposed and determine a formula or rate which reasonably apportions those costs to individuals paying the fee. The fee should be a separate fee from the water connection fee. The revenues derived from the fee must not be for general revenue purposes but used for the purpose for which they were collected.

CASEY GWINN, City Attorney

By
Kelly J. Salt
Deputy City Attorney

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