No. S S226036

Service on Attorney General required by Rule 8.29(c)(1)

Exempt from Filing Fees
Government Code § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

City of San Buenaventura
Plaintiff and Respondent / Cross-Appellant.

vs.

United Water Conservation District and Board of Directors of United Water Conservation District
Defendants and Appellants / Cross-Respondents

SUPREME COURT
FILED

APR 28 2015

Frank A. McGuire Clerk

Deputy

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW

of a Published Decision of the
Second Appellate District, Division 6, Case No. B251810

Reversing a Judgment of the Superior Court of the State of California
County of Santa Barbara, Case Nos. VENCI 00401714 and 1414739
Honorable Thomas P. Anderle, Judge Presiding

*MICHAEL G. COLANTUONO (143551)
MColantuono@chwlaw.us
DAVID J. RUDERMAN (245989)
DRuderman@chwlaw.us
MICHAEL R. COBDEN (262087)
MCobden@chwlaw.us
COLANTUONO, HIGHSMITH & WHATLEY, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071-3137
Telephone: (213) 542-5700
Facsimile: (213) 542-5710

GREGORY G. DIAZ (156318)
GDiaz@cityofventura.net
City Attorney
CITY OF SAN BUENAVENTURA
P.O. Box 99
Ventura, California 93002-0099
Telephone: (805) 654-7818
Facsimile: (805) 641-0253

Attorneys for Respondent and Cross-Appellant City of San Buenaventura

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The City of San Buenaventura ("City") hereby moves this Court to take judicial notice of the documents attached as Exhibits A through I to the Declaration of Jon R. di Cristina under Evidence Code section 452, subdivisions (d) and (h), Evidence Code section 459, and rule 8.252 of the California Rules of Court:

A. Judgment and Statement of Decision in *North San Joaquin Water Conservation District v. All Persons Interested in the Matter of the Resolution Imposing Groundwater Charge*, San Joaquin Superior Court Case No. SV-266837, dated July 31, 2008;

B. Supplemental Petition for Writ of Mandate; Complaint for Declaratory Relief; and Complaint for Damages in *City of Cerritos, et al., v. Water Replenishment District of Southern California*, Los Angeles Superior Court Case No. BS128136, dated February 28, 2014;

C. Verified Petition for Writ of Mandate under Article XIII D of the California Constitution and Complaint for Declaratory and Injunctive Relief in *Glendale Coalition for Better Government, Inc. v. City of Glendale*, Los Angeles Superior Court Case No. BS153253, dated January 9, 2015;

D. Verified Petition for Writ of Mandate under Article XIII D of the California Constitution and Complaint for

Declaratory and Injunctive Relief in *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority*, San Diego Superior Court Case No. 37-2014-00029611-CM-MC-CTL, dated September 2, 2014;

E. Amended and Supplemental Complaint for Refund, Declaratory Relief, and Injunctive Relief in *Raymond and Michelle Plata v. City of San Jose*, Santa Clara Superior Court Case No. 1-14-CV-258879, dated February 3, 2015;

F. Plaintiff's Opposition to Demurrer in *San Diegans for Open Government v. Downtown San Diego Partnership, Inc., et al.*, San Diego Superior Court Case No. 37-2013-00062382-CU-MC-CTL, dated January 31, 2014;

G. Minute Order on Demurrer in *San Diegans for Open Government v. City of San Diego*, San Diego Superior Court Case No. 37-2012-00088065-MC-CU-CTL, dated September 27, 2013;

H. Plaintiff's Opposition to Defendant City of San Diego's Demurrer in *San Diegans for Open Government v. City of San Diego*, San Diego Superior Court Case No. 37-2013-00052721-CU-MC-CTL, dated September 9, 2013; and

I. Appellant's Opening Brief in *San Diegans for Open Government v. City of San Diego*, Fourth District Court of Appeal, Division One, Case No. D065929, dated November 26, 2014.

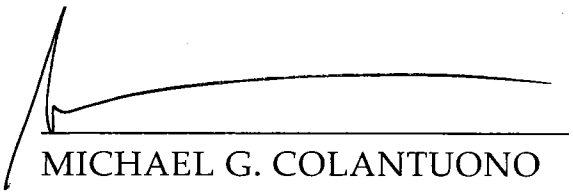
These materials are relevant to the City's Petition for Review because they demonstrate the statewide significance of the issues presented in this case, including whether Proposition 218 applies to groundwater augmentation charges, and whether a revenue measure is interpreted based on its legal or economic incidence. Not only does the Court of Appeal's decision here create conflicts with other published appellate decisions, but lower courts are also grappling with these questions. By granting review, this Court may provide guidance to these lower courts.

The above-listed materials were not presented to the trial court because they are relevant to the questions presented in the Petition for Review, but are helpful to demonstrate the implications of the Court of Appeal's opinion.

This motion is based on the attached Memorandum of Points and Authorities and Declaration of Jon R. di Cristina along with Exhibits A through I, the records and files of this Court, and the accompanying proposed order granting this motion.

DATED: April 24, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



MICHAEL G. COLANTUONO
DAVID J. RUDERMAN
MICHAEL R. COBDEN
Attorneys for Respondent and
Cross-Appellant
CITY OF SAN BUENAVENTURA

MEMORANDUM OF POINTS AND AUTHORITIES

I. GENERAL PRINCIPLES OF JUDICIAL NOTICE

A reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code, § 459.) Under subdivision (d) of Evidence Code section 452, the Court may notice "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." The Court may also notice "facts ... that are not reasonably subject to dispute." (Evid. Code, § 452, subd. (h).) A reviewing court may notice facts just as does a trial court. (Evid. Code, § 459, subd. (a).) In the trial court, judicial notice of such facts is mandatory upon request, where the opposing party is permitted to object and the court has enough information about the facts to determine that they come within a category subject to notice. (Evid. Code, § 453, subd. (b).)

"Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882 [citations and quotations omitted].) "The underlying theory of judicial notice is that the matter judicially noticed is a law or fact that is **not reasonably subject to dispute**." (*Ibid.*; see Evid. Code, § 452, subd. (h).)

II. EXHIBITS A THROUGH I ARE NOTICEABLE AND RELEVANT

The City of San Buenaventura ("City") respectfully requests this Court judicially notice Exhibits A through I to the Jon di Cristina Declaration ("di Cristina Declaration"). All are documents duly filed in California Superior Courts or the California Court of Appeal. (Evid. Code, § 452, subd. (d) [court records].) Further, as public records, the existence and contents of these documents are not reasonably subject to dispute. (Evid. Code, § 452, subd. (h).)

The City does not ask this Court to notice the truth of any fact asserted within these documents. Rather, the City seeks notice of the proposition that litigants and courts are grappling with the same or similar issues raised in the City's accompanying Petition for Review. For instance, Exhibits A and B are filings in two Superior Court cases that involve the applicability of Proposition 218 to groundwater augmentation charges. Exhibits C through E include the pleadings in Superior Court actions involving the interpretation of the cost-of-service requirements in Propositions 218 and 26. Finally, Exhibits F through I are briefs filed in both the lower and appellate courts that grapple with the issue of whether a revenue measure's legal or economic incidence controls its applicability. These are all questions the Court may resolve by granting review in this case.

The United Water Conservation District (the "District") requested the Court of Appeal in the instant case to judicially notice

the document attached to the di Cristina Declaration as Exhibit A. Exhibit A is therefore in the appellate record in this Court's possession as it considers the City's Petition for Review. (See UWCD's Mot. for Judicial Notice i.s.o. ARB & X-RB (Apr. 1, 2014) [Exh. M to that motion].) The City opposed the District's motion for judicial notice of this document because the District's purpose was to use an unpublished trial court decision to rebut one of the City's legal arguments. (See *id.*, p. 5; City's Opp. to Mot. for Judicial Notice (Apr. 16, 2014), pp. 19–20.) That was an improper basis for notice, and the Court of Appeal thus denied the District's motion. (Order re: Judicial Notice (Mar. 17, 2015).) Here, by contrast, the City seeks notice of Exhibit A for the proper purposes stated above: notice of the mere fact that lower courts are grappling with the issues presented in the City's Petition for Review. Other than Exhibit A, no party has sought judicial notice of these exhibits below.

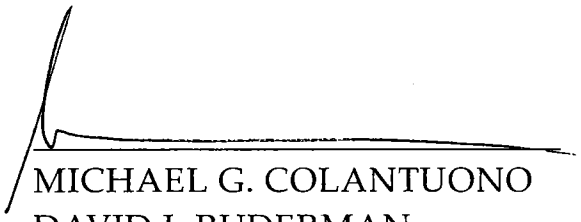
All documents are therefore relevant to the issues raised in the Petition for Review, and they should be noticed in consideration of that Petition.

III. CONCLUSION

For the reasons discussed above, the City respectfully requests this Court grant the City's motion to notice Exhibits A through I and consider them in support of the City's Petition for Review.

DATED: April 27, 2015

COLANTUONO, HIGHSMITH & WHATLEY, PC



MICHAEL G. COLANTUONO
DAVID J. RUDERMAN
MICHAEL R. COBDEN
Attorneys for Respondent and Cross-Appellant
CITY OF SAN BUENAVENTURA

DECLARATION OF JON R. di CRISTINA

[Cal. Rules of Court, rule 8.54(a)(2)]

1. I am an attorney in good standing, licensed to practice before the courts of this state. I am an associate with the firm Colantuono, Highsmith & Whatley, PC, counsel of record for Respondent and Cross-Appellant City of San Buenaventura in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of the Judgment and Statement of Decision in *North San Joaquin Water Conservation District v. All Persons Interested in the Matter of the Resolution Imposing Groundwater Charge*, San Joaquin Superior Court Case No. SV-266837, dated July 31, 2008. The United Water Conservation District included this document as part of a motion for judicial notice it submitted to the Court of Appeal in the instant case on April 1, 2014. This document is therefore part of the appellate record in this Court's possession as it reviews the City of San Buenaventura's Petition for Review. I have included a copy of this document here as Exhibit A for this Court's convenience.

3. Attached hereto as Exhibit B is a true and correct copy of the Supplemental Petition for Writ of Mandate; Complaint for Declaratory Relief; and Complaint for Damages in *City of Cerritos, et al., v. Water Replenishment District of Southern California*, Los Angeles Superior Court Case No. BS128136, dated February 28, 2014 (without attachments). My firm represents the City of Pico Rivera in a related case, and we were therefore served with a copy of this

document when it was filed. I obtained this document from our electronic files on April 22, 2015.

4. Attached hereto as Exhibit C is a true and correct copy of the Verified Petition for Writ of Mandate under Article XIII D of the California Constitution and Complaint for Declaratory and Injunctive Relief (without attachments) in *Glendale Coalition for Better Government, Inc. v. City of Glendale*, Los Angeles Superior Court Case No. BS153253, dated January 9, 2015. My firm represents the City Glendale in this case, and I therefore obtained this document from our electronic files on April 21, 2015.

5. Attached hereto as Exhibit D is a true and correct copy of the Verified Petition for Writ of Mandate under Article XIII D of the California Constitution and Complaint for Declaratory and Injunctive Relief (without attachments) in *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority*, San Diego Superior Court Case No. 37-2014-00029611-CM-MC-CTL, dated September 2, 2014. My colleague Michael R. Cobden, who is also an attorney with my firm, obtained this document via the San Diego Superior Court's website on March 2, 2015 and saved it to our firm's electronic files. I obtained this document from those files on April 21, 2015.

6. Attached hereto as Exhibit E is a true and correct copy of the Amended and Supplemental Complaint for Refund, Declaratory Relief, and Injunctive Relief without attachments) in *Plata v. City of San Jose*, Santa Clara Superior Court Case No. 1-14-

CV-258879, dated February 3, 2015. I obtained this document via e-mail from San Jose Senior Deputy City Attorney Katie Zoglin on April 22, 2015.

7. Attached hereto as Exhibit F is a true and correct copy of Plaintiff's Opposition to Demurrer in *San Diegans for Open Government v. Downtown San Diego Partnership, Inc., et al.*, San Diego Superior Court Case No. 37-2013-00062382-CU-MC-CTL, dated January 31, 2014. My firm represented the Downtown San Diego Partnership in this case, and I therefore obtained this document from our electronic files on April 21, 2015.

8. Attached hereto as Exhibit G is a true and correct copy of the court's Minute Order on Demurrer in *San Diegans for Open Government v. City of San Diego*, San Diego Superior Court Case No. 37-2012-00088065-MC-CU-CTL, dated September 27, 2013. My firm is counsel for defendant and interested party San Diego Tourism Marketing District Corporation in this case, and I therefore obtained this document from our electronic files on April 21, 2015.

9. Attached hereto as Exhibit H is a true and correct copy of Plaintiff's Opposition to Defendant City of San Diego's Demurrer in *San Diegans for Open Government v. City of San Diego*, San Diego Superior Court Case No. 37-2013-00052721-CU-MC-CTL, dated September 9, 2013. My firm is co-counsel for the City of San Diego in this case, and I therefore obtained this document from our electronic files on April 21, 2015.

10. Attached hereto as Exhibit I is a true and correct copy of the Appellant's Opening Brief in *San Diegans for Open Government v. City of San Diego*, Fourth District Court of Appeal Case No. D065929, dated November 26, 2014. My firm is co-counsel for the City of San Diego in this case, and I therefore obtained this document from our electronic files on April 21, 2015.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed April 23, 2015 in Penn Valley, California.

JON R. di CRISTINA

[Proposed]

ORDER TAKING JUDICIAL NOTICE

Good cause appearing, IT IS HEREBY ORDERED that Respondent and C City of San Buenaventura's Motion for Judicial Notice is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

A. Judgment and Statement of Decision in *North San Joaquin Water Conservation District v. All Persons Interested in the Matter of the Resolution Imposing Groundwater Charge*, San Joaquin Superior Court Case No. SV-266837, dated July 31, 2008;

B. Supplemental Petition for Writ of Mandate; Complaint for Declaratory Relief; and Complaint for Damages in *City of Cerritos, et al., v. Water Replenishment District of Southern California*, Los Angeles Superior Court Case No. BS128136, dated February 28, 2014;

C. Verified Petition for Writ of Mandate under Article XIII D of the California Constitution and Complaint for Declaratory and Injunctive Relief in *Glendale Coalition for Better Government, Inc. v. City of Glendale*, Los Angeles Superior Court Case No. BS153253, dated January 9, 2015;

D. Verified Petition for Writ of Mandate under Article XIII D of the California Constitution and Complaint for Declaratory and Injunctive Relief in *Sweetwater Authority*

Ratepayers Association, Inc. v. Sweetwater Authority, San Diego Superior Court Case No. 37-2014-00029611-CM-MC-CTL, dated September 2, 2014;

E. Amended and Supplemental Complaint for Refund, Declaratory Relief, and Injunctive Relief in *Raymond and Michelle Plata v. City of San Jose*, Santa Clara Superior Court Case No. 1-14-CV-258879, dated February 3, 2015;

F. Plaintiff's Opposition to Demurrer in *San Diegans for Open Government v. Downtown San Diego Partnership, Inc., et al.*, San Diego Superior Court Case No. 37-2013-00062382-CU-MC-CTL, dated January 31, 2014;

G. Minute Order on Demurrer in *San Diegans for Open Government v. City of San Diego*, San Diego Superior Court Case No. 37-2012-00088065-MC-CU-CTL, dated September 27, 2013;

H. Plaintiff's Opposition to Defendant City of San Diego's Demurrer in *San Diegans for Open Government v. City of San Diego*, San Diego Superior Court Case No. 37-2013-00052721-CU-MC-CTL, dated September 9, 2013; and

I. Appellant's Opening Brief in *San Diegans for Open Government v. City of San Diego*, Fourth District Court of Appeal, Division One, Case No. D065929, dated November 26, 2014.

DATED: _____ By:_____

Chief Justice Tani Cantil-Sakauye

EXHIBIT A

KARNA E. HARRIGFELD, State Bar No. 162824
JENNIFER L. SPALETTA, State Bar No. 200032
STEPHEN M. SIPTROTH, State Bar No. 252792
HERUM CRABTREE BROWN
A California Professional Corporation
2291 West March Lane, Suite B-100
Stockton, CA 95207
Telephone: (209) 472-7700

Attorneys for Plaintiff,
North San Joaquin Water Conservation District

Filed JUL 31 2008
ROSA JUNQUEIRO, CLERK
By Charlene Gray DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN JOAQUIN
STOCKTON BRANCH

NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT,

Plaintiff,

v.

ALL PERSONS INTERESTED IN THE MATTER OF THE RESOLUTION IMPOSING GROUNDWATER CHARGE,

Defendants

Case No.: SV 266837

~~[PROPOSED]~~ JUDGMENT

The above-entitled matter came on for trial on March 6 and 7, 2008 in Department 41 of the Superior Court in and for the County of San Joaquin before the Hon. Elizabeth Humphreys, Judge of the Superior Court, presiding. Attorneys Jennifer L. Spaletta, Esq. And Stephen M. Siptroth, Esq., of the law firm Herum Crabtree Brown, appeared on behalf of the Plaintiff North San Joaquin Water Conservation District, and Timothy A. Bittle, of the Howard Jarvis Taxpayers Association, appeared on behalf of Defendants Howard Jarvis Taxpayers Association, Bryan Pilkington and Cassandra J. Baines. Defendants William G. Castro and Terry Wagers appeared in propria persona. The following parties appeared in this matter by filing an Answer in response to Plaintiff's Complaint, but did not participate in the hearing: Nancy Frank, Danny Duke, Hazel E. Duke, Tim Duke, Mary M. Robinson, Gerald Harris, Wilson Lowell, Matthew Zarefakis, John Zarefakis, Veralyn Long, Marc Francis, Mark-Linn, Diana Davis, Ritsuye Fukunaga, Leroy & Alta Taylor, Kip & Joan Mellor, Raymond F. Kormen, Joy Bansmer,

Anthony & Rhonda Quintal, Lisa Chan, Dennis & Pam Regan, Charles & Pauline Vieira, Manuel Machado Jr., Barbara Wakeham, Thomas H. Wooldridge, Leroy & Alta Taylor, Jim & Rickie Bertsch, and David & Lynn Anthony.

Evidence, both oral and documentary, having been presented by all parties, the cause having been argued and submitted for decision and the Court, on request of Plaintiff North San Joaquin Water Conservation District, having cause to be made and filed herewith its written statement of decision,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff North San Joaquin Water Conservation District complied with all requisite provisions of the California Water Code and Proposition 218, Article XIII C & D of the California Constitution, and the District's 2007-2008 groundwater charge is hereby declared lawfully enacted. The Court adopts the Statement of Decision attached hereto as Exhibit A.

DATED: JUL 31 2008

By: _____
Hon. Elizabeth Humphreys
Judge, Superior Court in and for the
County of San Joaquin

PROOF OF SERVICE

I, **Julie M. Hassell**, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 2291 West March Lane, Suite B100, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On **June 20, 2008** at my place of business a copy of **[PROPOSED] JUDGMENT** was placed for deposit following ordinary course of business as follows:

[XX] BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelope(s) were addressed as follows:

Trevor A. Grimm Jonathan M. Coupal Timothy A. Bittle Howard Jarvis Taxpayers Foundation 921 Eleventh Street, Suite 1201 Sacramento, CA 95814 Telephone: (916) 444-9950 ***Attorneys for Defendants HJTA, Bryan Pilkington and Cassandra J. Baines*** ***(Via facsimile and regular mail)***	Nancy Frank 15710 Linn Road Lodi, CA 95240 ***In Propria Persona*** ***(Via regular mail)***
Danny Duke 2051 Kennifick Road Acampo, CA 95220 Telephone: (209) 339-2923 ***In Propria Persona*** ***(Via regular mail)***	Hazel E. Duke 15960 E. Collier Road Acampo, CA 95220 Telephone: (209) 339-1951 ***In Propria Persona*** ***(Via regular mail)***

Tim Duke 15948 Collier Road Acampo, CA 95220 Telephone: (209) 369-0689 ***In Propria Persona*** ***(Via regular mail)***	Mary M. Robinson Ron Robinson 24810 North Elliott Road Acampo, CA 95220-9482 (209) 581-5290 ***In Propria Persona*** ***(Via regular mail)***
Gerald Harris 12420 East Tokay Colony Road Lodi, CA 95240 (209) 931-5908 ***In Propria Persona*** ***(Via regular mail)***	Wilson Lowell 4569 E. Harvest Rd. Acampo, CA 95220
Matthew Zarefakis 9708 Enchantment Stockton, CA 95209	John Zarefakis 10051 E. Hwy 12 Lodi, CA 95240
Veralyn Long 25261 N. Eunice Acampo, CA 95220	Marc Francis 8048 E. Orchard Rd. Acampo, CA 95220
Mark-Linn PO Box 306 Victor, CA 95253	Diana Davis 22939 N. Sowles Rd. Acampo, CA 95220
Ritsuye Fukunaga 14704 Beckman Rd. Lodi, CA 95240-6403	Leroy & Alta Taylor 25300 N. Graham Rd. Acampo, CA 95220
Kip & Joan Mellor P.O. Box 711 Linden, CA 95236	Terry Wagers 17867 N. Kennison Ln. Lodi, CA 95240
Raymond F. Kormen 16695 N. Tecklenburg Rd. Lodi, CA 95240	Joy Bansmer 16700 Trethaway Rd. Lodi, CA 95240
Anthony & Rhonda Quintal 22091 N. Bruella Rd. Acampo, CA 95220	Lisa Chan 5305 Liberty Rd. Galt, CA 95632
Dennis & Pam Regan 4220E. Armstrong Rd. Lodi, CA 95240	Charles & Pauline Vieira 11420 E. Peltier Rd. Acampo, CA 95220

Manuel Machado Jr. P.O. Box 336 Lockeford, CA 95237	Barbara Wakeham P.O. Box 97 Clements, CA 95227
William B. Castro 24606 N. Elliott Rd. Acampo, CA 95220	Thomas H. Woodbridge 114 La Colima Pismo Beach, CA 92449
Leroy & Alta Taylor 25300 N. Graham Rd. Acampo, CA 95220	Jim & Rickie Bertsch **12801 E. Jahant Road** Acampo, CA 95220
David & Lynn Anthony 9477 E. Underwood Rd. Acampo, CA 95220	

[ ] **BY FEDERAL EXPRESS/OVERNIGHT MAIL** in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

The envelope(s) were addressed as follows:

[ ] **BY ELECTRONIC MAIL.**

[XX] BY FACSIMILE at approximately 2:41 p.m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 20, 2008

JULIE M. HASSELL

391

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

JOB NO.	2982
DESTINATION ADDRESS	19164449823
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	06/20 14:44
USAGE T	00'52
PGS.	6
RESULT	OK

HERUM CRABTREE BROWN
Attorneys At Law

FAX COVER SHEET

This is a confidential communication and is not to be delivered to or read by any person other than the addressee. Facsimile transmission is not intended to waive the attorney-client privilege or any other privilege.

TRANSMISSION DATE: June 20, 2008

TO: Timothy A. Bittle — **FAX #: (916) 444-9823**
Howard Jarvis Taxpayers Foundation

FROM: Jennifer L. Spaletta

RE: Matter ID 1776-005

COMMENTS:

Please see attached **[PROPOSED] JUDGMENT**.

We are transmitting 6 pages. Please call us immediately at (209) 472-7700 if any part of this transmission failed or was not clear.

Original transmittal will not follow: ___.
Original transmittal will follow by: XX Mail ____ Other

If this transmission is received by anyone other than the addressee, the recipient is requested to call the sender collect at (209) 472-7700, and to immediately return this document to Herum Crabtree Brown by United States mail, with return postage guaranteed.

392

FAX SENT BY: Julie M. Hassell **DATE: June 20, 2008**

Exhibit A

KARNA E. HARRIGFELD, State Bar No. 162824
JENNIFER L. SPALETTA, State Bar No. 200032
STEPHEN M. SIPTROTH, State Bar No. 252792
HERUM CRABTREE BROWN
A California Professional Corporation
2291 West March Lane, Suite B-100
Stockton, CA 95207
Telephone: (209) 472-7700

Attorneys for Plaintiff,
North San Joaquin Water Conservation District

Filed JUL 31 2008
ROSA JUNQUEIRO, CLERK
By Charlene Gray
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN JOAQUIN
STOCKTON BRANCH

NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT,

Plaintiff,

v.

ALL PERSONS INTERESTED IN THE MATTER OF THE RESOLUTION IMPOSING GROUNDWATER CHARGE,

Defendants

Case No.: SV 266837

~~[PROPOSED – Version 2]~~ STATEMENT OF DECISION

The above-entitled matter came on for trial on March 6 and 7, 2008 in Department 41 of the Superior Court in and for the County of San Joaquin before the Hon. Elizabeth Humphreys, Judge of the Superior Court, presiding. Attorneys Jennifer L. Spaletta, Esq. And Stephen M. Siptroth, Esq., of the law firm Herum Crabtree Brown, appeared on behalf of the Plaintiff North San Joaquin Water Conservation District, and Timothy A. Bittle, of the Howard Jarvis Taxpayers Association, appeared on behalf of Defendants Howard Jarvis Taxpayers Association, Bryan Pilkington and Cassandra J. Baines. Defendants William G. Castro and Terry Wagers appeared in propria persona. The following parties appeared in this matter by filing an Answer in response to Plaintiff's Complaint, but did not participate in the hearing: Nancy Frank, Danny Duke, Hazel E. Duke, Tim Duke, Mary M. Robinson, Gerald Harris, Wilson Lowell, Matthew Zarefakis, John Zarefakis, Veralyn Long, Marc Francis, Mark Linn, Diana Davis, Ritsuye

394

Fukunaga, Leroy & Alta Taylor, Kip & Joan Mellor, Raymond F. Kormen, Joy Bansmer, Anthony & Rhonda Quintal, Lisa Chan, Dennis & Pam Regan, Charles & Pauline Vieira, Manuel Machado Jr., Barbara Wakeham, Thomas H. Wooldridge, Leroy & Alta Taylor, Jim & Rickie Bertsch, and David & Lynn Anthony.

The Court took argument from the parties, heard testimony, reviewed all exhibits and took the matter under submission. The Court, having considered the arguments, testimony and exhibits, and being fully advised, issues the following Statement of Decision:

ANALYSIS

North San Joaquin Water Conservation District (hereafter "District") filed this lawsuit seeking judicial approval of its imposition of a groundwater charge. Defendants oppose the charge. The core of the dispute is whether the imposition of the groundwater charge is subject to Proposition 218, which requires voter approval before the fee or charge can be imposed. No voter approval has been obtained. In addition, Defendants submit that the proposed charges are disproportionate to the cost of the service provided so the charge violates Proposition 218.

I. History of Proposition 218 and Its Purpose

> "Article XIII D was added to the California Constitution in the November 1996 election with the passage of Proposition 218, the Right to Vote on Taxes Act...The provision...states, in relevant part: 'Except for fees or charges for sewer, water, and refuse collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.'
>
> Section 2 defines a 'fee' under this article as a levy imposed 'upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service.' A 'property-related service' is a public service having a direction relationship to property ownership.'

> Proposition 218 specifically stated that '[t]the provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.' [The court is] obligated to construe constitutional amendments in accordance with the natural and ordinary meaning of the language used by the framers – in this case, the voters of California – in a manner that effectuates their purpose in adopting the law." Howard Jarvis Taxpayers Association v. City of Salinas (2002) 98 C.A.4th 1351, 1354-1357.

A. **Groundwater Charge as Defined by the Districts' Resolution**

The groundwater charge is a "first time...charge on all parcels of real property within the [North San Joaquin Water Conservation] District served by wells." See Complaint, Exhibit A (Resolution Setting Groundwater Charges for 2007-2008). The Resolution further recites that "the North San Joaquin Water Conservation District Board of Directors has proposed a groundwater charge to generate revenue to be used to begin correcting the critical groundwater overdraft."[1] There is no "connection" occurring. The District's charge is new, but the landowner activity is the same; that is, the landowners will continue to use their wells to access the groundwater to which they have always had a right.

Groundwater charges are specifically approved by the Water Code. See Cal. Wat. Code § 75522 ["The groundwater charges are authorized to be levied upon the production of ground water from all water-producing facilities, whether public or private, within the district or a zone or zones thereof for the benefit of all who rely directly or indirectly upon the ground water supplies of the district or a zone or zones thereof and water imported into the district or a zone or zones thereof."]; see also, Cal. Water Code § 75596 ["Any ground water charge levied pursuant to this part shall be ...used in furtherance of district purposes in the replenishment, augmentation, and the protection of water supplies for users within the district or a zone or zones thereof."]

[1] "Overdraft directly depletes supply by extracting more water than is replenished (recharged) by natural processes" Pajaro Valley Water Mgmt. Agency v. Amrhein (2007) 150 Cal. App 4th 1364, 1370.

The District explains that generally, it will levy the charge on the amount of water produced from owner's facilities as measured by a device (a meter) or as computed using a method that includes certain statutory criteria.

The Resolution states that District shall estimate the charges for irrigated pasture and golf courses, orchard and row crops, vineyards, and single family rural residential use. It continues, "[a]ll other uses will be estimated with the understanding the District will revise the charges to reflect actual use measured by the property owner." See Complaint, Exhibit A (Resolution).

The Resolution gives the reason for the groundwater charge as follows:

"[T]he North San Joaquin Water Conservation District Board of Directors has proposed a groundwater charge to generate revenue to be used to begin correcting the critical groundwater overdraft."

The District explains that the revenue generated by the new groundwater charge will be used to improve existing facilities and build new facilities that will appropriate additional surface waters into the District and thereby, replenish the groundwater supplies.

II. The Groundwater Charge is Subject to Proposition 218

It is well-settled that the District's groundwater charge is subject to Proposition 218. See Pajaro Valley Water Mgmt. Agency v. Amrhein, (2007) 150 Cal.App.4th 1364, 1378 ["We have now concluded that while the [groundwater augmentation] charges is not a tax or assessment, it must be considered a property-related fee and, as such, subject to the relevant provisions of Proposition 218."] The groundwater charge has not been presented to the voters for approval. The critical question is whether the groundwater charge falls into the definition of one of the several exceptions to the voter approval requirement in Proposition 218.[2] More particularly, whether the groundwater charge is a fee or charge for water and/or water service. While it may seem insignificant, there is a difference between "water" and "water service." This difference is the threshold issue in this case.

---

[2] The District submitted evidence of compliance with all other procedural mandates of Proposition 218 (notice, hearing, majority protest, etc.) and no party disputed this evidence.

The District construes Article XIII D, section 6 to create an exception for "fees or charges for *water*." Defendants construe the language to require that the fees or charges be for "*water service*." Both constructions are reasonable; the Constitution reads as follows:

"Except for fees or charges for sewer, water, and refuse collection services no property related fee or charge shall be imposed or increased unless the fee or change is submitted and approved by majority vote." Cal. Const. Art. XIID §6(c).

When arguing that the ground water charge is a fee or charge for "water," the District points to Government Code section 53750 which defines "water" for purposes of Article XIII D of the California Constitution.[3] Government Code section 53750(m) defines water to mean "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." When arguing that the ground water charge must be a fee or charge for "water service" in order to be exempt, Defendants point to several cases in which "water service" was recognized as an exception to the voter approval requirement and further generally define "water service" to be some connection between the property and the supply of water to the property for personal, household, or commercial purposes.

A. The Groundwater Charge need Not Be a Charge For "Water Service" In Order to Qualify For the Voter Approval Exemption.

Defendants point to three cases in support of their position that Proposition 218 requires the charge be for "water service." Those cases are: Richmond v. Shasta Community Services Dist. (2004) 32 C.4th 409; Bighorn-Desert View Water Agency v. Verjil (2006) 39 C.4th 205; and Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 C.A.4th 1351.

In the first two of the above three cases, a connection or delivery of water was involved. In the third case, the court, *in dicta*, proposed an interpretation which presumed a connection or delivery of water. None of these three cases are determinative of the issue presented in this case and they certainly do not purport to decide the exclusive meaning of the phrase at issue.

---

[3] Government Code, section 53750 is part of the Proposition 218 Omnibus Implementation Act that was enacted by the Legislature in 1997 specifically "to prescribe procedures and parameters for local jurisdictions in complying with...Article XIII D of the California Constitution."

B. **The Groundwater Charge Must be a Charge For "Water" as Defined by Government Code section 53750(m) to Qualify for the Voter Approval Exemption.**

Government Code section 53750, which is also part of the Proposition 218 Omnibus Implementation Act, defines the term "water" as used in Article XIII D of the California Constitution as follows:

> "(m) 'Water' means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."

According, to the District, the charge qualifies for an exemption from the voter approval requirement if it is a charge that provides for the production, storage, supply, treatment or distribution of water. The District established that the groundwater charge is intended to be used for the production, storage and in-direct distribution of water to groundwater pumpers within the District's boundaries.

In response to this argument, Defendants claim that the Legislature's definition was not voted upon by the voters and is not what the average voter would say "water" means. Without citing legal authority, Defendants assert that a "post-election legislative reaction to Proposition 218 cannot possibly assist the Court in deciding how the voters understood the initiative." How the voters understood the initiative is not the definitive test for the interpretation of Proposition 218. A post-election Legislative interpretation has significance. Armstrong v. County of San Mateo (1993) 146 Cal.Appl.3d 597.

> "Ordinarily, '[r]ules of construction and interpretation that are applicable when considering statutes are equally applicable in interpreting constitutional provisions' (Citation omitted.)...[T]he question presented here...is whether legislation *may* be enacted to aid in the implementation of a constitutional provision. As stated in *Flood v. Riggs* [(1978) 80 C.A.3d 138, '[a]lthough a constitutional provision may be self-executing the Legislature may enact legislation to facilitate the exercise of the powers directly granted by the Constitution.' Id. at 154.
>
> ...[I]t is well established that 'where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling...It is no small matter for one branch of the government to annul the formal exercise by

> another and coordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution.'
>
> The canons of construction...collectively create a powerful presumption that a legislative interpretation of a constitutional provision of doubtful meaning is valid. Significantly, the legislative interpretation may prevail regardless whether it can be shown that it is 'more probably than not' the meaning intended by those who framed or adopted the proposal.' The Legislature's interpretation cannot be declared void unless there is a *plain and unmistakable* conflict between the statute and the constitution."

C. **The Legislature's Interpretation of the Disputed Provision is Controlling**

The phrase at issue in Cal. Const. Art. XIIID can be read to mean a fee or charge for "water service" or a fee or charge for "water." Accordingly, an ambiguity has arisen regarding the extent of the exemption. As was the case in Armstrong, "literally and structurally," the text of the article can support both of the conflicting interpretations urged by the parties. Like Armstrong, "we are left with precious little evidence[4] of the intent of the voters with respect to the particular provision in question." Therefore, we are left with the Legislature's interpretation of the phrase and the Legislature's interpretation prevails. Armstrong v. County of San Mateo (1983) 146 C.A.3d 597, 624.

The voter approval exemption applies to a fee or charge for water; that is, "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." The groundwater charge at issue qualifies and is exempt. The cases [Richmond, Bighorn-Dessert & Howard Jarvis, *supra*] relied upon by Defendants and the Government Code do not conflict and there is no need to create a conflict. Adoption of the groundwater charge is not contingent upon voter approval because the charge is for water as that term is defined by Government Code, section 53750(m) and it is exempt from the voter approval requirement of Proposition 218.

---

[4] The Court heard no testimony and saw no exhibits regarding this issue.

III. **The Groundwater Charge Is Not Disproportionate and Does Not Violate Proposition 218.**

The Constitution at Article XIII D requires that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." See Section 6 (b)(3). It is specifically the burden of the agency to demonstrate compliance. See subdivision 5. Defendants submit that the groundwater charge is disproportionate because the charge for agriculturally zoned parcels is $4.28 per acre-foot of water extracted, and the charge is $21.40 per acre-foot for non-agricultural parcels.

In response, the District states that each parcel is charged based on its usage; there is no set charge per parcel. The rate charged, however, differs due to the mandates of Water Code section 75594 which reads:

> "...[A]ny ground water charge in any year shall be established at a fixed and uniform rate for each acre-foot for water other than agricultural water which is not less than three times nor more than five times the fixed and uniform rate established for agricultural water. However, any groundwater charge in any year for water other than agricultural water used for irrigation purposes on parks, golf courses, schools, cemeteries, and publicly owner historical sites may be established at a fixed and uniform rate for each acre-foot which shall not be less than the rate established for agricultural water, nor more than the rate established for all water other than agricultural water."

The Water Code requires that the rates differ. The District contends that it is powerless to ignore the mandates of Water Code, section 75594 because Article III, section 3.5 of the California Constitution directs: "An administrative agency...has no power; (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional."

A. **Water Code section 75594 (which authorizes the groundwater charge at differing rates) Does Not Conflict With the Requirements of Proposition 218.**

Whether the provisions of Proposition 218 impliedly repealed, abrogated, or otherwise invalidated another statute was raised in Barratt American Inc. v. City of San Diego (2004) 117

C.A.4th 809. A developer challenged an assessment as unconstitutional under Proposition 218 and argued that Proposition 218 invalidated the limitation period set forth in Code of Civil Procedure, section 329.5. In its discussion, the Barratt court explained:

> "[A]ll presumptions are against a repeal by implication. Absent an express declaration of legislative intent, we will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.
>
> The same standards apply in determining whether a constitutional amendment impliedly repealed a statutory provision. 'So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, [i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.'"
>
> Related to these principles are those by which we presume a statute's constitutionally when confronted with facial challenges to its validity. It is a 'bedrock principle that courts are exceedingly reluctant to declare legislation unconstitutional...'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their [un]constitutionality clearly, positively and unmistakably appears.' A statute will not be deemed facially invalid on constitutional grounds unless its provisions present a total and fatal conflict with applicable constitutional prohibitions in all of its applications." Ibid @ 817 (emphasis added).

When arguing that there is no "total and fatal conflict," the District points to Government Code section 53739 (also a part of the Proposition 218 Omnibus Implementation Act) wherein the Legislature specifically acknowledged that "an ordinance or resolution presented for voter approval pursuant to this article or to Article XIII C or Article XIII D of the California Constitution may state a range of rates or amounts." The implication, the District urges, is that if the Legislature perceived a conflict between Water Code section 75594, it could have easily provided guidance, but it did not do so. The court can harmonize Water Code section 75594 and

Proposition 218. Water Code section 75594 does not impliedly repeal, invalidate or otherwise conflict with Proposition 218.

B. **The Groundwater Charge Does Not Exceed the Proportional Cost of the Services Provided.**

Proposition 218 addresses "proportional cost of service." Water Code section 75594 addresses rates charged. They are not the same. Water Code section 75594 required that the rate for non-agricultural users be higher than the rate for agricultural users. Proposition 218 requires that the charge "not exceed the proportional cost of service attributable to the parcel." The fact that one rate is higher that another does not mean that the charge is disproportionate to the cost of service. So long as the cost of service does not exceed the higher rate, the varying rates are constitutional and there is no conflict.

The "services" provided by the District is the accumulation of additional surface water and recharge of the groundwater basin and storage of the same for use by parcel owners. Only those property owners who use their well and access the ground water are charged and they are charged at a uniform rate based upon either actual use or estimated use.[5] The District's costs associated with the accumulation recharge and storage of groundwater will be borne totally by those who use the groundwater; i.e., those who will benefit from the improvements. The parties stipulated that the rate charge for non-agricultural water at $21.40/AF is exactly five times the rate of $4.28/AF for agricultural water and thus, it is not more than five, nor less than three, times the rate for agricultural water. Stipulated Fact 32.

Defendants urge that the charge is disproportional because non-agricultural users of the groundwater are required to pay five times more than the agricultural users of the groundwater to support the same projects. Defendants argue that the groundwater charge is disproportional because "the District cannot justify the higher rate on any theory that one person's use of groundwater affects the basin differently than another person's use."

---

[5] If a property owner is charged based upon estimates use, the property owner may challenge the charge and provide a means to determine actual use and be charged accordingly.

The District submitted as Plaintiff's Exhibit 3 a memo from Edward Steffani, the manager of the District, to the Board of Directors detailing the revenue to be generated (net, $820,000) and further detailing the new annual costs associated with the new projects and power costs over the next 10 years. The anticipated costs range from $768,000-$820,000 each year. Generally speaking, the annual groundwater charges will cover the annual costs of the accumulation, recharge and storage of the groundwater.

The District argues that it is following the mandates of the Water Code by establishing differing rates and complying with Proposition 218 because the revenue to be generated by the charge will not, generally, exceed the cost of the projects and the charges are proportional because they are based on use. The testimony of Edward Steffani established that the higher rate charge does not exceed the proportional cost of the service because the non-agricultural user uses very little groundwater compared to the agricultural user. Typically, the non-agricultural user will use one acre feet or less of groundwater and the charge will be $21.40 for the year. The agricultural user uses much more of the groundwater (for example, for irrigation) and so, even if the rate is less, they will be paying much more money to the District for the augmentation services. Differing rates do not automatically equate to disproportionate charges when use is a factor considered when determining proportionality.

The groundwater charge satisfies the proportionality requirement of Proposition 218 because, while the rates differ, there are practical and economical reasons for that difference and charge is based on use; that is, the charge is proportional to the benefit derived from the accumulation, recharge and storage of the groundwater.

FINDINGS

For the factual and legal reasons set forth above, the Court makes the following findings:

1. The District's adoption of the groundwater charge is not contingent upon voter approval as set forth in Article XIII D, section 6, subsection c because the charge is for water as that term is defined in Government Code section 53750(m). The groundwater charge is subject to the exception to the voter approval requirement set forth in Proposition 218.

2. The District's groundwater charge satisfies the proportionality requirement of Article XIII D, section 6, subsection b (3) (Proposition 218) because while the rates differ, there are practical and economical reasons for that difference and charge is based on use; the charge is proportional to the benefit derived from the accumulation, recharge and storage of the groundwater.

3. Proposition 218 did not repeal Water code, section 75594 as a matter of law, Water code section 75594 is not repealed by Proposition 218 because a differing rate schedule does not automatically equate to disproportionality.

4. What the voters believe "water service" meant when they adopted the following phrase "[e]xcept for fees or charges for sewer, water and refuse collections services" presumes an interpretation that requires the charge be for "water service" rather than for "water." In the absence of extrinsic evidence regarding what the voters meant when they adopted this phrase, the Legislature's interpretation is controlling. Accordingly, the Court is interpreting Proposition 218 to require the charge be for "water," as opposed to "water service."

5. Whether the District provides "water service" to the well owners is irrelevant to the court's decision in this case. The court has determined that Proposition 218 requires the groundwater charge be for "water," as opposed to "water service."

6, The testimony of Edward Steffani and Morris Allen, that nonagricultural wells have no greater impact on groundwater that agricultural wells was not sufficient to prove that the groundwater charge, which is five times higher per acre-foot of water pumped for nonagricultural parcels than for agricultural parcels, violates the proportionality requirement of Article XII D, section 6(b)(3). The Court has determined that differing rates alone does not prove disproportionality. Usage is also a factor to be considered. The testimony of Edward Steffani established proportionality.

7. Whether an amendment of the Constitution must include a list of all existing statutes it will impact to prevent them from persisting unaffected by the amendment is not an issue before the court in this case.

8. No irreconcilable conflict exists between Article XIII D, section 6 (b)(3), which required rates to be "proportional of the services attributable to the parcel," and Water Code section 75594, which requires the District to set nonagricultural rates between three and five times higher than agricultural rates.

DECISION

The Court determines that the North San Joaquin Water Conservation District complied with all requisite provisions of the California Water Code and Proposition 218, Article XIII C & D of the California Constitution. The District's 2007-2008 groundwater charge is hereby declared lawfully enacted.

DATED: JUL 31 2008

Hon. Elizabeth Humphreys
Judge, Superior Court in and for the
County of San Joaquin

PROOF OF SERVICE

I, **Maryann Dalrymple**, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 2291 West March Lane, Suite B100, Stockton, California 95207, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing. On **June 30, 2008** at my place of business a copy of **[PROPOSED-Version 2] STATEMENT OF DECISION** was placed for deposit following ordinary course of business as follows:

[XX] BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.

The envelope(s) were addressed as follows:

Trevor A. Grimm Jonathan M. Coupal Timothy A. Bittle Howard Jarvis Taxpayers Foundation 921 Eleventh Street, Suite 1201 Sacramento, CA 95814 Telephone: (916) 444-9950 ***Attorneys for Defendants HJTA, Bryan Pilkington and Cassandra J. Baines*** ***(Via facsimile and regular mail)***	Nancy Frank 15710 Linn Road Lodi, CA 95240 ***In Propria Persona*** ***(Via regular mail)***
Danny Duke 2051 Kennifick Road Acampo, CA 95220 Telephone: (209) 339-2923 ***In Propria Persona*** ***(Via regular mail)***	Hazel E. Duke 15960 E. Collier Road Acampo, CA 95220 Telephone: (209) 339-1951 ***In Propria Persona*** ***(Via regular mail)***

407

Tim Duke 15948 Collier Road Acampo, CA 95220 Telephone: (209) 369-0689 ***In Propria Persona*** ***(Via regular mail)***	Mary M. Robinson Ron Robinson 24810 North Elliott Road Acampo, CA 95220-9482 (209) 581-5290 ***In Propria Persona*** ***(Via regular mail)***
Gerald Harris 12420 East Tokay Colony Road Lodi, CA 95240 (209) 931-5908 ***In Propria Persona*** ***(Via regular mail)***	Wilson Lowell 4569 E. Harvest Rd. Acampo, CA 95220
Matthew Zarefakis 9708 Enchantment Stockton, CA 95209	John Zarefakis 10051 E. Hwy 12 Lodi, CA 95240
Veralyn Long 25261 N. Eunice Acampo, CA 95220	Marc Francis 8048 E. Orchard Rd. Acampo, CA 95220
Mark-Linn PO Box 306 Victor, CA 95253	Diana Davis 22939 N. Sowles Rd. Acampo, CA 95220
Ritsuye Fukunaga 14704 Beckman Rd. Lodi, CA 95240-6403	Leroy & Alta Taylor 25300 N. Graham Rd. Acampo, CA 95220
Kip & Joan Mellor P.O. Box 711 Linden, CA 95236	Terry Wagers 17867 N. Kennison Ln. Lodi, CA 95240
Raymond F. Kormen 16695 N. Tecklenburg Rd. Lodi, CA 95240	Joy Bansmer 16700 Trethaway Rd. Lodi, CA 95240
Anthony & Rhonda Quintal 22091 N. Bruella Rd. Acampo, CA 95220	Lisa Chan 5305 Liberty Rd. Galt, CA 95632
Dennis & Pam Regan 4220E. Armstrong Rd. Lodi, CA 95240	Charles & Pauline Vieira 11420 E. Peltier Rd. Acampo, CA 95220

Manuel Machado Jr. P.O. Box 336 Lockeford, CA 95237	Barbara Wakeham P.O. Box 97 Clements, CA 95227
William B. Castro 24606 N. Elliott Rd. Acampo, CA 95220	Thomas H. Woodbridge 114 La Colima Pismo Beach, CA 92449
Leroy & Alta Taylor 25300 N. Graham Rd. Acampo, CA 95220	Jim & Rickie Bertsch 12801 E. Jahant Road Acampo, CA 95220
David & Lynn Anthony 9477 E. Underwood Rd. Acampo, CA 95220	

[ ] **BY FEDERAL EXPRESS/OVERNIGHT MAIL** in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]

The envelope(s) were addressed as follows:

[ ] **BY ELECTRONIC MAIL.**

[ ] **BY FACSIMILE** at approximately 3:00 p.m. by use of faccimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 30, 2008

MARYANN DALRYMPLE

****
*** FAX TX REPORT ***
****

TRANSMISSION OK

JOB NO.	3015
DESTINATION ADDRESS	19164449823
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	06/30 14:58
USAGE T	03'05
PGS.	19
RESULT	OK

HERUM CRABTREE BROWN
Attorneys At Law

FAX COVER SHEET

This is a confidential communication and is not to be delivered to or read by any person other than the addressee. Facsimile transmission is not intended to waive the attorney-client privilege or any other privilege.

TRANSMISSION DATE: June 30, 2008

TO: Timothy A. Bittle — **FAX #: (916) 444-9823**
Howard Jarvis Taxpayers Foundation

FROM: Jennifer L. Spaletta

RE: Matter ID 1776-005

COMMENTS:

Please see attached **[PROPOSED Version 2] STATEMENT OF DECISION**

We are transmitting 19 pages. Please call us immediately at (209) 472-7700 if any part of this transmission failed or was not clear.

Original transmittal will not follow: ___.
Original transmittal will follow by: XX Mail ____ Other

If this transmission is received by anyone other than the addressee, the recipient is requested to call the sender collect at (209) 472-7700, and to immediately return this document to Herum Crabtree Brown by United States mail, with return postage guaranteed.

FAX SENT BY: Maryann Dalrymple **DATE: June 30, 2008**

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF VENTURA

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Ventura, State of California. My business address is 2801 Townsgate Road, Suite 200, Westlake Village, California 91361.

On April 2, 2014, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANTS' REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address y.dubeau@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Musick, Peeler & Garrett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 2, 2014, at Westlake Village, California.

Yvette du Beau

SERVICE LIST

United Water Conservation District, et al. v. City of San Buenaventura
Santa Barbara County Superior Court
Case Nos. VENCI 00401714 and 1414739
Court of Appeal Case No. B251810

Counsel	**Representing**
Ariel Pierre Calonne, Esq. City Attorney City of San Buenaventura P.O. Box 99 Ventura, CA 93002-0099 Telephone: (805) 654-7818 Facsimile: (805) 641-0253 Email: acalonne@ci.ventura.ca.us	Attorney for Respondent and Cross-Appellant City of San Buenaventura
Michael G. Colantuono, Esq. Holly O. Whatley, Esq. David J. Ruderman, Esq. Colantuono & Levin, PC 300 South Grand Ave., Suite 2700 Los Angeles, CA 90071-3137 Telephone: (213) 542-5700 Facsimile: (213) 542-5710 Email: mcolantuono@cllaw.us hwhatley@cllaw.us druderman@cllaw.us alloyd@cllaw.us	Attorneys for Respondent and Cross-Appellant City of San Buenaventura

Dennis LaRochelle, Esq. Susan McCarthy, Esq. Arnold, Bleuel, LaRochelle, Mathews & Zirbel, LLP 300 Esplanade Drive, Suite 2100 Oxnard, CA 93036 Telephone: (805) 988-9886 Facsimile: (805) 988-1937 Email: dlarochelle@atozlaw.com smccarthy@atozlaw.com jmathews@atozlaw.com jmahan@atozlaw.com	Attorneys for Intervener Pleasant Valley County Water District
Nancy N. McDonough, Esq. Christian C. Scheuring, Esq. Associate Counsel California Farm Bureau Federation 2300 River Plaza Drive Sacramento, CA 95833 Telephone: (916) 561-5500 Facsimile: (916) 561-5699 Email: nmcdonough@cfbf.com cscheuring@cfbf.com dchasteen@cfbf.com	Attorneys for Interveners California Farm Bureau Federation and Farm Bureau of Ventura County

EXHIBIT B

ALESHIRE & WYNDER, LLP
Patricia J. Quilizapa, Bar No. 233745
Lindsay M. Tabaian, Bar No. 268586
18881 Von Karman Avenue, Suite 400
Irvine, CA 92612
Telephone: (949) 223-1170
Facsimile: (949) 223-1180
pquilizapa@awattorneys.com

Attorneys for Petitioners and Plaintiffs
CITY OF CERRITOS, CITY OF DOWNEY, and CITY OF SIGNAL HILL

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

CITY OF CERRITOS, a municipal corporation; CITY OF DOWNEY, a municipal corporation; and CITY OF SIGNAL HILL, a municipal corporation,,

Petitioners and Plaintiffs,

vs.

WATER REPLENISHMENT DISTRICT OF SOUTHERN CALIFORNIA, a public entity,,

Respondent and Defendant.

Case No. BS128136

(Related Case Nos. BC464772, BS134239, BS139228, BS512581, BC493914, VC060496, VC060498, VC060499, VC060592, and VC060546)

Writ Petitions Assigned to:
Judge: Hon. James C. Chalfant
Dept.: 85

Assigned for all other purposes to:
Judge: Hon. Michael P. Linfield
Dept.: 34

-Filing Fees Exempt, Per Gov't Code § 6103-

SUPPLEMENTAL PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY RELIEF; AND COMPLAINT FOR DAMAGES

[Code Civ. Proc. §§ 464, 526, 526(a), 1060, 1085, et seq.]

Complaint Filed: August 24, 2010.
Trial Date: Not Yet Set.

Petitioners/Plaintiffs, City of Cerritos, City of Downey and City of Signal Hill ("Petitioner and Plaintiff" or collectively, "Petitioners and Plaintiffs" or "Cities") hereby submit this Supplemental Petition For Writ of Mandate, Complaint for Declaratory Relief, and Complaint for Damages, pursuant to Code of Civil Procedure, Section 464, and allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction under Article XIII of the California Constitution and sections 526, 526(a), 1060 and 1085, *et seq.* of the Code of Civil Procedure.

2. Venue is proper in this Court as the parties are located within the County of Los Angeles and the acts and events giving rise to the claims occurred in the County of Los Angeles.

PARTIES

Municipal Corporations: Petitioner/Plaintiff Cities

3. Petitioner/Plaintiff City of Cerritos is a municipal corporation organized under the laws of the State of California and under its City Charter, and is located in the County of Los Angeles. Petitioner overlies the Central Basin from which it annually pumps and delivers groundwater to a residential population in excess of 52,000, and to local businesses and industry.

4. Petitioner/Plaintiff City of Downey is a municipal corporation organized under the laws of the State of California and under its City Charter, and is located in the County of Los Angeles. Petitioner overlies the Central Basin from which it annually pumps and delivers groundwater to a residential population in excess of 110,000, and to local businesses and industry.

5. Petitioner/Plaintiff City of Signal Hill is a municipal corporation organized under the laws of the State of California and under its City Charter, and is located in the County of Los Angeles. Petitioner overlies the Central Basin from which it annually pumps and delivers groundwater to a residential population in excess of 10,000, and to local businesses and industry.

6. Each Petitioner/Plaintiff City owns parcels of land in overlying the Central Basin from which they operate groundwater producing wells, collectively referred to as the "groundwater producing facilities."

///

///

Special Purpose District:

Respondent/Defendant Water Replenishment District of Southern California

7. Respondent/Defendant Water Replenishment District of Southern California ("WRD") is a public agency located in the County of Los Angeles. WRD was created by a special ballot vote in 1959 pursuant to the Water Replenishment Act, California Water Code section 60000, *et seq.* (the "Act"), for the sole purpose of replenishing the underground water basins within its District. In 1990, the Legislature amended WRD's Act to add "clean-up" activities to WRD's authorized functions.

8. Attached hereto as Exhibit A is a map of WRD's service area, incorporated by reference herein.

GENERAL ALLEGATIONS

9. The Cities filed a Petition and Complaint on August 24, 2010 seeking in the first and second causes of action a peremptory writ of mandate and declaratory relief invalidating four years of Replenishment Assessment ("RA") imposed by WRD, and ordering WRD to comply with the provisions of Article XIII D of the California Constitution before imposing any new RA.

The Invalidated 2006-2007 Through 2010-2011 RAs

10. On April 25, 2011, the Honorable James C. Chalfant held a Writ hearing and entered a Court Order in this case granting the first and second causes of action for a peremptory writ of mandate and declaratory relief (the "Writ Order"), concluding:

> Art. XIII D applies to the RA, which is a property-related fee. It is undisputed that WRD did not comply with Art. XIII D in imposing the RAs. Accordingly, the Cities are entitled to mandamus relief commanding the WRD to vacate the RAs imposed by WRD over the past four years, and to comply with the provisions of Article XIII D before imposing any new RA.

11. Attached hereto as Exhibit B is a copy of the Writ Order, incorporated by reference herein.

12. Thus, the Writ Order invalidated the RAs for fiscal years 2006-2007 through 2010-2011 immediately preceding the filing of this action on August 24, 2010. In addition, the Writ Order also granted the *prospective* declaratory relief sought by Petitioners.

13. The case was transferred to the general civil department and remains pending before Department 34 for resolution of the Third Cause of Action.

The Invalidated 2011-2012 RA

14. Two weeks after the Writ Order, on May 6, 2011, Respondent WRD adopted the RA for fiscal year July 1, 2011 to June 30, 2012 (the "2011-2012 RA") without making any attempt to comply with the provisions of Article XIII D of the California Constitution.

15. On May 6, 2011, *two weeks after the April 25, 2011 Writ Order*, WRD adopted Resolution No. 11-901 setting the RA for fiscal year July 1, 2011 to June 30, 2012 "to be levied upon the production of groundwater from the groundwater supplies within [WRD's] District" at $244 per acre-foot. (*See* September 6, 2012 Order discussed herein.) WRD did not comply with *any* provision of Article XIII D.

16. The Cities submitted objections to the proposed RA. The Cities also repeated their claims for refunds of previously-paid illegal RAs.

17. On May 20, 2011, the Central Basin Municipal Water District ("CBMWD") filed a Petition of Writ of Mandate and Complaint nearly identical to the operative Petition and Complaint in the Cities' RA Case on behalf of all pumpers in the Central Basin: *CBMWD v. WRD,* LASC Case No. BS132202.

18. On October 7, 2011, Tesoro Refining and Marketing Company ("Tesoro") also filed its own Petition of Writ of Mandate and Complaint against WRD: *Tesoro Refining and Marketing v. WRD*, Los Angeles County Superior ("LASC") Case No. BS134239.

19. Both CBMWD and Tesoro's cases were deemed related to this RA Case. The Petitions and Declaratory Relief causes were assigned to the Honorable James C. Chalfant in Department 85.

20. On September 6, 2012, Judge Chalfant held a writ hearing and entered a Court Order invalidating the 2011-2012 RA, rejecting WRD's argument that the 2011-2012 RA was distinguishable from the previously invalidated RAs *and* ordering WRD again to comply with Article XIII D before adopting any new RA.

21. Attached hereto as Exhibit C is the September 6, 2012 Order (the "2012 Writ Order"), incorporated by reference herein.

WRD Adopts the 2012-2013 RA Without Complying With *Any* Portion of Article XIII D

22. On May 4, 2012, WRD adopted a new RA for 2012-2013 fiscal year, again without complying with Article XIII D. Specifically, on this date, WRD adopted Resolution No. 12-929 setting the RA for fiscal year July 1, 2012 to June 30, 2013 "to be levied upon the production of groundwater from the groundwater supplies within [WRD's] District" at $244 per acre-foot.

23. The 2012-2013 RA is indistinguishable from the invalidated 2011-2012 RA (as well as the 2006-2007 through 2010-2011 subject to the Writ Order).

24. The Cities submitted objections to the proposed RA. The Cities again demanded a refund of the illegal RAs previously imposed upon the Cities.

The Cities Paid the 2011-2012 and 2012-2013 RA[1]

25. Following the Writ Order, the Cities withheld payment of the illegal RAs on various grounds, including the allegation that WRD had adopted the RAs again without complying with Article XIII D and in defiance of the prospective relief provided by the Writ Order.

26. Attached hereto as Exhibit C is a copy of the Court's June 7, 2012 Order confirming the prospective relief, which is incorporated herein by reference.

27. On April 27, 2012, Judge Raul A. Sahagun in the Norwalk Courthouse of the Los Angeles County Superior Court denied WRD's Motions for Preliminary Injunction to enjoin the Cities from operating their wells for failure to pay the RA until WRD could prove it has a valid RA against the Cities.

28. October 30, 2013, the Court of Appeal reversed the trial court's denial of the Preliminary Injunction Motion.[2]

---

[1] Although on May 10, 2013, WRD adopted yet another RA for fiscal year 2013-2014, it did so by erroneously applying Article XIII D. Any challenge to the 2013-2014 RA would involve allegations and causes of actions different from the scope of the existing Writ Order and remaining Complaint for Refund. Therefore, the Cities do not include any allegations to the 2013-2014 RA herein.

29. The Cities paid the 2011-2012 and 2012-2013 RAs and claimed a refund from WRD, as follows:

a. On December 2, 2013, the City of Signal Hill paid WRD's invoices for the 2011-2012 and 2012-2013 RAs, amounting to $1,050,317.52, and demanded a refund of the same. Attached hereto as Exhibit E is the letter from City of Signal Hill reflecting the payment, which is incorporated by reference herein

b. On January 8, 2014, the City of Downey paid WRD's invoices for the 2011-2012 and 2012-2013 RAs, amounting to $7,955.010.00 (*See* Supp. Pet. and Comp., Ex. F.) Attached hereto as Exhibit F is the letter from City of Downey reflecting the payment, which is incorporated by reference herein.

c. On January 10, 2014, the City of Cerritos paid WRD's invoices for the 2011-2012 and 2012-2013 RAs, amounting to $4,347,123.52, and demanded a refund of the same. Attached hereto as Exhibit G is the letter from City of Cerritos reflecting the payment, which is incorporated by reference herein.

Constitutional Violations of The Right to Vote on Taxes Act (Article XIII D)

30. Article XIII D requires that prior to adopting a property related fee an agency must comply with the procedural requirements set forth at Section (6). The agency must identify all parcels upon which it will be imposed, and conduct a public hearing. The hearing must be preceded by written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel...." (Art. XIII D, §6, subd. (a)(2).) If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." (*Id.*) Moreover, unless the charge is for sewer, water or refuse collection services, the property related fee or charge may not be imposed or increased

---

(...Continued)

[2] Notably, the Court of Appeals also determined that the Cities *were not required* to pay interest on the withheld funds — acknowledging the public policy concerns behind the Cities refusal to pay unlawful RAs. (*See, WRD v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1471.)

"unless it is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge, or at the option of the agency, a two-thirds vote of the electorate residing in the affected area." (Art. XIII D, §6, subd. (c).)

31. WRD did not follow the procedures required by Article XIII D before adopting and levying its 2011-2012 and 2012-2013 RAs. WRD did not provide notice or obtain approval as mandated by Article XIII D. WRD did not treat the RA as a property related fee subject to Article XIII D in any way. Therefore, WRD's failure to comply with procedural requirements set forth by Article XIII D, intended to protect against unrepresentative taxation, renders the 2011-2012 and 2012-2013 RA invalid. Additionally, WRD's collection of invalid RAs has been completely unlawful.

32. Article XIII D further prohibits a public agency from adopting a property related fee unless it meets all of the following requirements:

> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service;
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed;
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel;
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4; and
>
> (5) No fee or charge may be imposed for general governmental services ... . (Cal. Const., Art. XIII D, Section 6, subd.(b) (1) – (5).)

33. However, WRD did not perform a cost and benefit, or any other type, of analysis to ensure compliance with this constitutional mandate prior to adopting its 2011-2012 and 2012-2013 RAs, particularly as to ensuring that the fees or charges are proportionately distributed to users based on the cost of providing WRD's services to those users. Instead, WRD imposed a uniform RA without regard for Article XIII D's requirements. Moreover, WRD's violation of its

statutory requirements also result in violations of Article XIII D's substantive requirements.

WRD's Rate Structure Creates An Illegal Subsidy

34. In 2006, HF&H Consultants conducted a study on behalf of the Southeast Water Coalition ("SEWC"), which concluded that the costs WRD incurred in providing its services to the West Coast Basin Pumpers were approximately 300% higher than the costs WRD incurred in the Central Basin.

35. The higher costs WRD incurs in the West Coast Basin are largely due to:

a. Replenishment of water in the West Coast Basin through injection wells, which costs significantly more than the replenishment of water in the Central Basin through spreading grounds;

b. Significantly higher costs in groundwater cleanup and projects and programs in the West Coast Basin than in the Central Basin; and

c. Administration costs related to the replenishment through injection wells and groundwater cleanup and projects required in the West Coast Basin.

36. Even though WRD incurs in the West Coast Basin approximately three times the costs it incurs in the Central Basin, WRD has at all times relevant to this action assessed a uniform RA on groundwater pumpers in the Central and West Coast Basins that is not based on the costs WRD incurs in providing services to the pumpers in each Basin.

37. The Cities are informed and believe that even if WRD had complied with the voting requirements of Article XIII D, the assessment and collection of WRD's RA would have been unlawful. The uniform RA throughout WRD's service area has resulted in an overcharge on Central Basin pumpers of approximately 150%. The overcharge on the Central Basin pumpers amounts to tens of millions of dollars per year.

38. On or about January 7, 2007, the Southeast Water Coalition ("SEWC") which included the Cities, presented the results of the study to the Board of Directors of WRD in the form of a presentation by the HF&H Consultants. In that presentation, SEWC informed WRD that it had charged Central Basin pumpers an amount that significantly exceeded the proportional cost or benefits of Defendant WRD's services. In response, WRD formed an RA working group

("RAWG") to determine, among other things, whether it was possible to allocate benefits attributable to pumpers in each basin as the 2006-2007 RA Study had done. The RAWG met on an approximately monthly basis, and WRD's General Manager and Chief Hydrogeologist actively participated in the group.

39. The minutes of such meetings report that WRD identified the issue of the "underflow" between the basins as an obstacle to determining the benefits attributable to each basin. The minutes further report that WRD would consider the costs and possibility of determining the "underflow" between the basins in order to address the "RA equity" issues raised by SEWC members, including the Cities, and other pumpers in the Central Basin. Month after month, WRD discussed the possibility of determining the "underflow" issue to address the "RA equity" concerns. WRD's representatives also discussed the possibility of reducing replenishment costs in the West Coast Basin to address the concerns raised in the 2006 HF&H Consultants' study.

40. WRD never provided a response to the complaints made by the Cities and other SEWC members. At times relevant herein, WRD represented to the Cities that it was taking the Cities' complaints seriously and their claims would be reviewed and resolved informally. However, in spite of its creation of the RAWG, neither WRD's staff or directors ever had any intention to remedy the proportionality issues raised by the Cities in their 2006 HF&H Study presentation. The creation of the RAWG was a concerted ploy to mislead the Cities into thinking that their complaints were being addressed by WRD and to forestall the Cities from instituting legal action against WRD.

41. In 2009, HF&H Consultants updated the conclusions of its 2006 Study. The results were consistent with the 2006 Study and showed that in the 2009-2010 fiscal year, the Central Basin pumpers overpaid WRD by approximately $12 million.

42. WRD did not correct, or even address, this subsidy when it adopted the 2011-2012 and 2012-2013 RAs.

The RA Exceeds The Funds Required By WRD

43. As set forth in more detail below, the Cities are informed and believe that WRD

has maintained excess reserve funds in violation of the Act's limit on reserves since at least July 1, 2011. Rather than apply all excess reserves towards the reduction of the RA or towards the purchase of water, as mandated by the Act, the Cities are informed and believe that WRD has carried over funds year after year. Therefore, WRD has levied funds from the Cities and other pumpers even though it already maintained funds statutorily mandated to be used for the same purposes as the RA was levied. Such unnecessary and excessive taxing violates Article XIII D, Section 6(b).

WRD Levies The RA For Purposes

Other Than Providing Replenishment And Clean-Up Services

44. WRD may only levy an RA for the purposes authorized by its Act. To the extent WRD uses RA funds for any purpose other than those specifically authorized at Part 6, Chapter 3 of the Act, it violates Article XIII D.

45. Part 6, Chapter 3 of the Act provides specific guidance for the calculation of the RA. It provides that WRD may charge pumpers an RA on the extraction of water on a per-acre-foot basis, but only in the amount necessary for WRD to:

(a) purchase replenishment water available during the current fiscal year;

(b) obtain funds to place in reserve for future purchase of replenishment water, to the extent the full amount of water needed is not currently available;

(c) engage in certain groundwater cleanup activities, and

(d) undertake capital projects related to WRD's replenishment or groundwater cleanup duties.

46. The Cities are informed and believe that WRD has levied RA funds for purposes other than those authorized by the Act since at least July 1, 2011. Such unauthorized purposes include, but are not limited to:

(a) Advocacy and lobbying;

(b) Contributions to political organizations;

(c) Sponsorships of financial conferences;

(d) Sponsorship of music and arts festivals;

(e) Sponsorship of environmental conferences;

(f) Purchase of promotional items;

(g) Elementary school education programs;

(h) Water conservation programs that are duplicative of the pumpers' programs, and

(i) Union dues.

47. The Cities are informed and believe that WRD has also levied the RA since at least July 1, 2011 for the purpose of funding general government services available to the public at large in substantially the same manner as they are available to the pumpers, in violation of Article XIII D. Such general purpose services include, but are not limited to:

(a) Water conservation programs that are duplicative of the pumpers' program;

(b) Eco-gardener class available to the public;

(c) Elementary school education programs;

(d) Sponsorships of financial conferences;

(e) Sponsorship of Middle School music and arts festivals;

(f) Sponsorship of environmental conferences;

(g) Camping equipment for Boy Scouts;

(h) Primavera Fest sponsorship; and

(i) Community organizations.

48. Such expenses may be beneficial to the community as a whole, but are not legal expenses for a special district with strictly limited collection and spending authorization. Moreover, such expenses are duplicative of services provided by public agencies who, unlike WRD, are authorized to provide them.

49. WRD has not only spent RA funds for purposes other than those authorized by law, but it has also spent those funds for the benefit of only a few pumpers in violation of Section 60305 of the Act.

Statutory Limitations on WRD's Excessive Reserves - Result in Excessive RAs

50. Pursuant to Section 60290, added to the Act in 2000, WRD may not maintain

reserves exceeding $10 million, which may be adjusted for the percentage change in the blended cost of water from district supply sources on an annual basis. The reserves at the time WRD adopted each of the 2011-2012 RA and 2012-2013 RA unlawfully exceeded that limitation, resulting in excessive RAs in violation of Article XIII D, Section 6(b).

51. WRD may exempt only the "unexpended balances" of capital improvement projects under construction when calculating the amount it holds in reserves. However, WRD must apply all other reserves over the $10 million, or the adjusted amount, towards an RA rate reduction or towards the purchase of water the following year on an annual basis pursuant to Section 60328.1. Thus, WRD must apply all excess reserves for the direct benefit of the pumpers.

52. At the time WRD adopted the 2011-2012 and 2012-2013 RAs, the Act also provided that WRD must allocate at least 80% of its authorized reserves towards the purchase of water. Therefore, WRD was allowed to reserve $8 to $10 million for water purchases at most. The Cities are informed and believe WRD violated this limitation when it adopted the 2011-2012 and 2012-2013 RAs.

53. WRD repeatedly reported that imported replenishment water was unavailable and that future water availability is questionable. WRD's excessive accumulation over the allowed amount violated the Act and was unnecessary given WRD's own representations that water was unavailable for purchase.

Injury To Cities

54. This Court already ruled that the 2011-2012 RA completely violates Article XIII D.

55. The 2012-2013 RA is indistinguishable from the invalidated 2011-2012 RA. It was adopted pursuant to the same procedure, on a similar record, and without any cost of service analysis to support its uniform RA.

56. The Cities have collectively paid WRD at least $13,352,451 pursuant to the unconstitutional 2011-2012 and 2012-2013 RAs.

57. The Cities are informed and believe that WRD's failure to comply with Article XIII D results in wholly unlawful charges on the Cities. Additionally, even if WRD would have

lawfully-imposed the RAs, they were disproportional to the costs associated with WRD's services to the Cities, and to the residents and businesses that ultimately pay such costs. WRD's excessive and inequitable charges constitute an illegal tax in violation of Article XIII D.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

58. WRD made no formal objection process, or refund process available to challenge the legality of its RA prior to or after the adoption of each RA at issue herein. WRD simply notified pumpers that they were "invited to attend and be heard in support of or opposition." The Cities have expressed their opposition to WRD at every hearing adopting the RA, but WRD refused to even consider the legal issues raised by the Cities' objections at those hearings.

59. Additionally, although the Cities deny the applicability of WRD's claims policy, which it revealed to the Cities for the first time one year into this litigation, the Cities have submitted claims for refunds to WRD. WRD has not responded to any of these claims in any way.

ACTION BROUGHT IN THE PUBLIC INTEREST

60. This action benefits the residents overlying the Central Basin, including the residents and businesses onto whom the Cities pass the cost of the RA (the "Central Basin Ratepayers"). The cities overlying the Central Basin include the Cities of Artesia, Bell, Bell Gardens, Bellflower, Cerritos, Commerce, Compton, Downey, Huntington Park, Lakewood, Long Beach, Los Angeles, Lynwood, Montebello, Norwalk, Paramount, Pico Rivera, Santa Fe Springs, Signal Hill, South Gate, Vernon, and Whittier.

61. The Cities are informed and believe that Central Basin groundwater accounts for approximately 65% of the total water use by all Central Basin Ratepayers. For the Cities alone, the Central Basin groundwater accounts for 97% of their total water use. Therefore, in light of their great reliance on the Central Basin water and the economic disparity between them and the West Coast Basin residents, WRD's overcharge is inequitable and significant to the Central Basin Ratepayers.

62. If successful, this action will also enforce the right of all groundwater producers to vote on the RA, as provided by the Right to Vote on Taxes Act (Proposition 218).

63. If successful, this action will also enforce the Central Basin Ratepayers' right to use water from the Central Basin without subjection to water charges comprised of illegal and excessive payments by the Cities to WRD which effectively subsidize WRD's services in the West Coast Basin. If this action succeeds, the Cities will recover millions of dollars in overpayments made by the Cities, who necessarily pass on the RA costs to their residents and businesses.

64. Prosecution of this action has placed and will continue to place great financial burden on the Cities. The hardship is especially great in light of the Cities' current economic distress. However, the Cities' residents and businesses continue to pay millions of dollars every year to fund WRD's services in the West Coast Basin, as well as WRD's wasteful spending. If the Central Basin Ratepayers were required to bring individual actions against WRD, they would suffer great hardship, making it necessary for the Cities to bring this action for their benefit.

FIRST CAUSE OF ACTION

(Petition for Writ of Mandate Re: Unconstitutional RA)

65. Petitioners/Plaintiffs refer to and incorporate by reference paragraphs 1 through 52, as though set forth at length herein.

66. The 2011-2012 and 2012-2013 RAs are property related fees subject to Article XIII D. However, WRD has refused to treat its RA as a property related fee by not following procedural or substantive requirements of Article XIII D.

67. On September 6, 2012, the Court entered a writ order invalidating the 2011-2012 RA and mandating compliance with Article XIII D before imposing any new RA.

68. The 2012-2013 RA is indistinguishable from the 2011-2012 RA for purposes of Article XIII D.

69. As a result, WRD has adopted excessive and inequitable charges that constitute illegal taxes, in violation of Article XIII D. The Cities have paid at least $13,352,451 to WRD pursuant to the illegal taxes for groundwater production from July 1, 2011 through June 30, 2013.

70. WRD's violations have resulted in waste of public funds in violation of Code of Civil Procedure Section 526a.

71. Accordingly, the Cities are entitled to a peremptory writ of mandate as specified more fully below.

SECOND CAUSE OF ACTION

(Declaratory Relief Re: Unconstitutional RA)

72. Petitioners/Plaintiffs refer to and incorporate by reference paragraphs 1 through 55, as though set forth at length herein.

73. An actual controversy has arisen and now exists between the Cities and WRD concerning their respective rights and duties in that the Cities unsuccessfully objected to WRD's RA before the adoption of each RA, including the RA for fiscal year 2011-2012 and 2012-2013 RA. The Cities are informed and believe WRD contends that its 2011-2012 and 2012-2013 RAs are not subject to Article XIII D and are valid in all respects.

74. WRD's refusal to comply with Article XIII D has resulted in and continues to result in waste of public funds in violation of California Code of Civil Procedure Section 526a.

75. Therefore, the Cities desire a judicial determination of the rights and duties of the parties, including a declaration that WRD must follow the procedural requirements of Article XIII D before adopting an RA and must not levy an RA on the Cities that does not comply with the substantive requirements of Article XIII D.

76. The continued imposition of the RA without proper compliance with Article XIII D is causing the Cities irreparable harm, in that WRD continues to violate the Cities' constitutional rights and continues to collect an illegal tax from the Cities.

77. The continued imposition of the unlawful RAs also results in waste of public funds, as WRD is collecting and spending funds it will be required to refund to the pumpers.

78. The Cities have no adequate remedy at law to prevent the future violation of their rights, except by incurring the burden of multiple actions, thereby making a judicial declaration necessary and appropriate at this time.

///

///

///

THIRD CAUSE OF ACTION

(Complaint for Damages Re: Unconstitutional RA)

79. Petitioners/Plaintiffs refer to and incorporate by reference paragraphs 1 through 60, as though set forth at length herein.

80. All funds collected in violation of Article XIII of the California Constitution constitute illegal taxes. From July 1, 2011 through June 30, 2013, WRD levied and collected at least $13,352,451 from the Cities in violation of Article XIII D.

81. Accordingly, the Cities are entitled to recover all payments levied and collected from them by WRD in violation of the constitutional mandates found at Article XIII D of the Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioners/Plaintiffs pray for judgment as follows:

FIRST CAUSE OF ACTION:

1. For the issuance of preemptory writs of mandate directing WRD to:

   (a) Vacate the 2011-2012 and 2012-2013 RAs it adopted in violation of Article XIII D;

   (b) Comply with the procedural and substantive requirements pursuant to Article XIII D of the California Constitution before adopting an RA, including notice and protest opportunities to each owner of parcels containing groundwater producers who are subject to the RA;

   (c) Conduct a cost and benefit analysis as set forth in Article XIII D of the California Constitution before adopting an RA;

   (d) Collect RAs from the Cities only in the amount equal to the costs and benefits attributable to the Cities; and

   (e) Use the RA funds collected from the Cities only for services WRD provides to the Cities.

2. For a temporary stay, and preliminary and permanent injunctions pursuant to Code of Civil Procedure Section 526a restraining WRD from:

(a) Enforcing the 2011-2012 or 2012-2013 RAs, or any other RA adopted in violation of Article XIII D, against the Cities in any manner whatsoever;

(b) Adopting a resolution to set an RA without first complying with the procedural and substantive requirements of Article XIII D of the California Constitution, including notice and protest opportunity to all owners of parcels containing groundwater producing facilities subject to the RA;

(c) Levying an RA on the Cities that exceeds the costs and benefits attributable to the Cities; and

(e) Using RA funds collected from the Cities to provide WRD's services to the West Coast Basin pumpers.

3. For a refund of all payments made pursuant to the RAs invalidated by the writ, pursuant to Code of Civil Procedure Section 1095, in the amount of at least $13,352,451.

SECOND CAUSE OF ACTION:

3. A declaratory judgment declaring that:

(a) The 2011-2012 and 2012-2013 RAs are property related fees subject to Article XIII D of the California Constitution;

(b) The 2011-2012 and 2012-2013 RAs violate Article XIII D of the California Constitution, are invalid, and must be set aside;

(c) WRD must comply with Article XIII D procedural and substantive requirements before adopting an RA, including notice and protest opportunity to the owners of parcels containing groundwater producing facilities subject to the RA;

(d) WRD cannot levy an RA on the Cities that exceeds the costs and benefits attributable to the Cities; and

(e) WRD cannot use RA funds collected from the Cities to provide WRD's services to the West Coast Basin pumpers.

///

///

THIRD CAUSE OF ACTION:

4. Damages, including, but not limited to, all payments the Cities have made to WRD pursuant to each illegal RA in the amount of at least $13,352,451, according to proof.

ALL CAUSES OF ACTION:

5. For attorneys' fees and costs, including those recoverable pursuant to California *Code of Civil Procedure* section 1021.5;

6. For prejudgment interest according to proof; and

7. For such other and future relief as the Court deems just and proper.

Dated: February 28, 2014

ALESHIRE & WYNDER, LLP
PATRICIA QUILIZAPA
LINDSAY M. TABAIAN

By: _____
Patricia J. Quilizapa
Lindsay M. Tabaian
Attorneys for Plaintiffs/Petitioners, CITY OF CERRITOS, CITY OF DOWNEY, and CITY OF SIGNAL HILL

EXHIBIT C

Benjamin T. Benumof (SBN 227340)
William M. Hensley (SBN 90437)
ALVARADOSMITH APC
1 MacArthur Place, Suite 200
Santa Ana, CA 92707
Telephone: 714.852.6800
Facsimile: 714.852.6899
bbenumof@alvaradosmith.com
mhensley@alvaradosmith.com

Attorneys for Petitioner and Plaintiff
GLENDALE COALITION FOR BETTER GOVERNMENT, INC.

6/5/2014

FILED
Superior Court of California
County of Los Angeles

JAN 09 2015

Sherri R. Carter, Executive Officer/Clerk
By _____ Deputy
Shaunya Bolden

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

GLENDALE COALITION FOR BETTER GOVERNMENT, INC., a California non-profit public interest corporation, Petitioner and Plaintiff, vs. CITY OF GLENDALE, a California public agency; and DOES 1 through 25, inclusive, Respondents & Defendants.	Case No. [redacted] JUDGE: BS153253 (ORIGINAL) DEPT: **VERIFIED PETITION FOR WRIT OF MANDATE UNDER ARTICLE XIIID OF THE CALIFORNIA CONSTITUTION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

BY Fax

Petitioner and Plaintiff Glendale Coalition for Better Government, Inc. (hereinafter the "Coalition" or "Petitioner") alleges as follows:

INTRODUCTORY ALLEGATIONS

1. This action arises out of the City of Glendale's (hereinafter, "City" or "Respondent") failure and ongoing refusal to acknowledge and rectify that its 2014 water rate pricing ("2014 Water Rate Structure") violates Article XIIID of the California Constitution (aka "Proposition 218") and is invalid.

2. Petitioner Coalition is a non-profit public interest organization incorporated and existing under the laws of the State of California. The Coalition is made up of numerous residents and taxpayers residing in Glendale, California, and its principal place of business is located in Glendale.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

3. The Coalition was formed by local residents in response to community concerns about issues such as the rising cost of water, the imposition of discriminatory water rates, and various other "fee" increases passed on to residents and businesses by the City of Glendale. The Coalition's Mission is, in pertinent part, assuring that the residents of Glendale are charged the true cost of water as required by Proposition 218 and that governing bodies such as the City comply with the California Constitution, namely Article XIIID.

4. Petitioner is informed and believes that Respondent City of Glendale is a municipal corporation that operates the City of Glendale.

5. The names and capacities of the respondents/defendants named as Does 1 through 25 are currently unknown to Petitioner. Petitioner will amend this Petition and Complaint to reflect their true names and capacities when ascertained.

6. Petitioner brings this action on its own behalf, as well as in the public interest. Specifically, the Coalition seeks to enforce important public duties and rights under the California Constitution, recent authoritative state case law, and the rules and regulations of the City of Glendale. Other beneficially interested individuals would find it difficult or impossible to seek vindication of the rights herein asserted. The Coalition's interests in this action are in no way competitive or commercial, and are instead entirely consistent with the public duties and rights it asserts. The Coalition has a continuing interest in, and a well-established commitment to, the public rights asserted.

7. Respondent's determinations are final, and no further administrative or appeal procedures are available.

8. Petitioner is informed and believes, and based upon such information and belief alleges, that each material issue and ground for non-compliance raised by this Petition and Complaint was presented to Respondent at multiple public hearings and in writing prior to the filing of this action.

9. Jurisdiction is proper under Code of Civil Procedure ("CCP") sections 1060, 1085 and/or 1094.5. Venue is proper under CCP section 393.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

10. This action is timely commenced. The City's continued imposition and collection of illegal water delivery "charges" or "fees" is an ongoing constitutional violation (i.e., an unconstitutional "tax"), upon which the statutory limitations period begins anew with each monthly collection. (*Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809).

11. Petitioner served Respondent with prior written notice of the commencement of this proceeding. The written notice of intent to file litigation, and its proof of service, are attached hereto as **Exhibit "1"**.

THE PROPOSITION 218 MANDATE

12. Building on the foundation laid earlier by Proposition 13 in 1978, Proposition 218 is a further limitation on government's ability to impose taxes. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.) Growing weary of "special taxes" under the guise of "assessments" without a two-thirds electorate vote, California voters adopted Proposition in 218 curtailing assessments in these key ways (*Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 446; *City of Palmdale v. Palmdale Water District* (2012) 198 Cal.App.4th 926, 931; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640):

a. assessments could only be imposed on specific property-oriented "benefits" (Art. XIIID, §§ 2, subd. (b), 4, subd. (a), subd. (i));

b. property-oriented assessments must be strictly proportional, with assessments not being imposed on any parcel "which exceeds the reasonable cost of the proportional special benefit conferred on that parcel," specifically separating the general benefits from the specific benefits for Proposition 218 purposes (Art. XIIID, § 4 subd. (a));

c. "[r]evenues derived from the fee or charge shall not exceed the funds required to provide the property-related services" and "the amount of the fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of service attributable to the parcel" (Art. XIID, § 6, subds. (b)(1), (b)(3);

d. "no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question," with "[f]ees or charges based on

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

potential or future use of a service [not being, or as the statute says, 'are not'] permitted" (Art. XIIID, § 6(b)(4));

e. "no fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners" (Art. XIIID, § 6, subd. (b)(5)); and

f. shifted traditional presumptions that had favored assessment validity, making local agencies bear the burden "to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question" (Art. XIIID, § 6, subd. (b)(5)).

13. In addition, Proposition 218 has crucial procedural requirements, including the germane requirement that the agency must conduct a public hearing that is "preceded by written notice to affected owners setting forth, among other things, a 'calculat[ion]' of '[t]he amount of the fee or charge proposed to be imposed upon each parcel ....'" (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.)

14. Likewise, California Constitution, Article XIIID, section 6(a)(1) further requires that the advance notice to the public about water assessments like the one here must contain "the basis upon which the amount of the proposed fee or charge was calculated," because, otherwise, no member of the public would be able to appear and frame a meaningful objection to the calculation data unless that data is vetted in the public arena.

15. Importantly, a constitutional amendment like Proposition 218 "shall be liberally construed to effectuate its purposes of limiting the local government revenue and enhancing taxpayer consent." (*Silicon Valley, supra*, 44 Cal.4th at p. 448; *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, review denied.)

16. With respect to the imposition of any given water rate structure, conservation and allocation based principles may be utilized "*so long as*, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel'" and there

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

is adequate support "for the inequality *between* tiers, depending on the category of user." (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936-937.)

17. Tiered water rates are water rate structures that (a) discretionally allocate certain water use limits amongst the tiers and (b) progressively increase in pricing from the lowest tier to the highest tier. Under Proposition 218, higher tier pricing must be the result of higher costs at higher tiers and public agencies must not unfairly discriminate against certain customer groups in favor of subsidizing others. (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926.)

RESPONDENT'S 2014 WATER RATE STRUCTURE VIOLATES PROPOSITION 218

18. On or about August 5, 2014, the City approved its current water rate structure ("2014 Water Rate Structure") following a duly noticed Proposition 218 hearing that numerous ratepayers attended and voiced their opposition to the City's arbitrary, punitive, and discriminatory water rate scheme, including several Coalition members.

19. The City's 2014 Water Rate Structure is substantially based on a water rate study performed by the City's water rate consultant Bartle Wells (dated July 15, 2014) for water rates that became effective on or about September 1, 2014 ("Bartle Wells Water Rate Study").

20. The Bartle Wells Water Rate Study was made available to the public in advance of the August 5, 2014, Proposition 218 hearing as part of the City's written notice to affected owners presumably setting forth, among other things, a calculation of the amount of the fee or charge proposed to be imposed upon each parcel. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.)

21. As evidenced in Tables 24 and 25 of the Bartle Wells Water Rate Study, a major fallacy of the City's 2014 Water Rate Structure is that it arbitrarily assigns one cost with meeting a given customer's average or normal demand for water and an increased cost when that user's demand spikes higher. This spiking or peaking is expressed in the City's 2014 Water Rate Structure by a "peaking factor," where 1.00 represents average demand and anything above 1.00 represents "peaking."

22. The Bartle Wells Water Rate Study discriminates against single and multi-family residential customers. For example, while single family residential customers and irrigation

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

customers have a nearly identical peaking factor (1.82 and 1.84, respectively), single family residential customers are charged progressively punitive tiered rates and irrigation and commercial customers are charged a flat rate.

23. More specifically, to allegedly capture the costs of supplying water to single family homes, Bartle Wells created four (4) water pricing tiers for monthly charges. The first 6 units of water fall in Tier 1 and for 2014/2015 are charged at $2.31; the next 6 units in Tier 2 are charged at $2.84; the next 13 units fall into Tier 3 and are charged at $3.22; and Tier 4 covers anything over 25 units and the charge is $3.90. For multi-family customers, Bartle Wells created two (2) tiers; one for consumption up to or equal to 5 units, and one tier for consumption above 5 units.

24. According to the Bartle Wells Water Rate Study, single family residential Tier 1 represents efficient *indoor* use of water for a family of 2.7, which translates to 135 to 148.5 gallons of water per day. Tier 2 represents efficient *indoor* use of water for a family of 5.6, which translates to 2.75 to 297 gallons of water per day. Efficient *indoor* use, according to Bartle Wells, is restricted to 50-55 gallons per person per day.

25. When it comes to Tiers 3 and 4, the Bartle Wells Water Rate Study states (p.49): "...peaking is estimated to occur in Tiers 3 and 4 which have been designated for *outdoor* water use and therefore, *additional costs are allocated* to these higher tiers. Likewise, peaking for multi-family residential occurs in Tier 2." (Emphasis added.)

26. Contrary to the these conclusions of Bartle Wells Water Rate Study, however, customer consumption data found at page 151 of Appendix "A" of the Water Rate Study actually shows that peaking on a per meter basis does not begin until 17.94 units of water is consumed, which is almost halfway through the Tier 3 allocation, yet the City applies a peaking charge to Tier 2.

27. While Respondent City believes the foregoing methodologies of the Water Rate Study justify the Tier 2, Tier 3, and Tier 4 charges, the Bartle Wells Water Rate Study does not provide any cost-of-service data to support the inequality of fees charged between the four tiers; i.e., there is no cost-based financial data to support higher costs at higher tiers.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

28. In addition, the Bartle Wells Water Rate Study provides no Proposition 218 rationale for imposing progressively punitive tiered pricing on residential customers and charging irrigation and commercial customers a flat rate.

29. The Coalition is informed and believes that the residential tiered rates are no more than an arbitrary financial penalty intended to penalize residents for exceeding the City-directed allocations of water. For example, irrigation customers, whose peaking factor is a bit greater than for single family residential customers (1.84 versus 1.82), use their *entire* water supply for *outdoor* use. However, in the Bartle Wells Water Rate Study irrigation customers are only charged $2.95 for each unit of water while single-family residential customers are charged either $3.22 or $3.90 for outdoor use of water. Thus, the difference of $2.95 compared to $3.22 or $3.90 appears to be more in the nature of an illegal penalty rather than a method for capturing the actual proportional costs of supplying water that is attributable to various customers.

30. Further, the Bartle Wells Water Rate Study makes no allowance for normal or average outdoor water use for single-family residential customers. Rather, it relegates all water designated for outdoor use as peaking water use. Thus, rather than capturing true costs, the charge for all outdoor water use – as if it were peaking use – appears to be a penalty designed to discourage outdoor water use by single-family customers while the Water Rate Study does not do the same for irrigation and commercial customers' outdoor use.

31. Likewise, there is no cost-of-service justification for the City providing a 15% discount on fixed charges for recycled water customers compared to potable water customers.

32. In addition, as evidenced in Table 17 of the Bartle Wells Water Rate Study, the City's water rate scheme impermissibly "collapses" several of the user group categories that are not residential or irrigation customers into a single peaking factor of 1.52, despite the fact that Bartle Well Water Rate Study assigns these various groups widely disparate peaking factors (i.e., from as low as 1.20 to as high as 2.19). These user groups include various commercial uses and multiple uses designated to the City of Glendale, which raises serious Article XIID subsidization issues.

33. For example, as indicated in Table 17 of the Bartle Wells Water Rate Study, the "Public Authority" user category, which is collapsed into a generalized "Commercial" category with

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

a peaking factor of 1.52, has the highest peaking factor (2.19) of the 15 user categories (i.e., 1.00 representing normal consumption and 1.19 representing peaking consumption).

34. In contrast, the "Small Business" user category, which has the second lowest peaking factor, 1.25 (i.e., 1.00 for normal consumption; .25 peaking consumption), is also collapsed into the generalized "Commercial" category with a peaking factor of 1.52 (i.e., 1.00 for normal consumption; .52 for peaking consumption).

35. Because there is only one variable charge to cover both normal and peaking consumption costs, the City's water rate scheme imposes illegal subsidies that financially benefit the City at the expense of small business owners and other commercial and industrial owners that reside and operate in the City. The "Small Business" category ratepayers, for example, must pay on the basis that their contribution to the cost of peaking is 0.52 when in fact it is less than half of that according to the Bartle Wells Study. In contrast, the "Public Authority" customers pay for the cost of peaking on the basis that their contribution is 0.52 when in fact it is more than twice that (i.e., 1.19).

36. Ultimately, a simple comparison of the City's peaking factors and water rate pricing shows that the water fees charged by the City exceed the proportional cost of the service attributable to certain ratepayers' parcels. Indeed, the City of Glendale, with one of the highest peaking factors (2.06), pays one of the lowest per-unit costs for water ($2.86), while master-metered Residential customers with the lowest peaking factor (1.16) pay the highest per unit cost ($3.51).

37. Curiously, the City did not adopt the exact rates specified in the 2014 Bartle Wells Water Rate Study. However, although the actual rates adopted by the City are not exactly as those noted in the Water Rate Study, they mirror those rates and the peaking multipliers are approximate. More specifically, the actual rates charged to single-family residential customers, beginning September 1, 2014, are $2.27 (Tier 1), $2.80 (Tier 2), $3.18, and $3.86 (Tier 4). In addition, multi-family users are charged $2.38 (Tier 1) and $3.52 (Tier 2), while irrigation users are commercial users are charge a flat rate of $2.90 and $2.81 per unit of water, respectively.

38. Finally, the 2014 Bartle Wells Water Rate Study earmarks a portion of fixed charges to pay for fire services, including fire hydrants. These services are available to any member of the

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

public at large whose life, limb or property is threatened by fire, irrespective of whether they are property owners within the meaning of Article XIIID. Thus, using a portion of the water fixed charge for fire service, on its face, is in direct conflict with Article XIIID, section 6(b)(5).

FIRST CAUSE OF ACTION

(Declaratory Relief – Violation of Article XIIID of the California Constitution)

39. Petitioner incorporates all previous allegations as if fully set forth herein.

40. Because the City's water rates are imposed for the property-related service of water delivery, the water rates, including their fixed monthly charges, are fees or charges within the meaning of Article XIIID of the California Constitution. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.) "All charges for water delivery" incurred after a water connection is made "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.*)

41. The City is an "agency" as that term is defined in the California Constitution, Article VIIID, §2(a), and is therefore subject to the provisions of Proposition 218, the "Right to Vote on Taxes Act," approved by the voters of California on November 5, 1996.

42. Section 6(b) of Article XIIID of the California Constitution provides that an increased fee or charge imposed by the Respondent must comply with the following requirements:

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

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

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. . . In any legal proceeding contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article."

43. In adopting its 2014 Water Rate Structure, the City violated the provisions of the California Constitution, Article XIIID, and, accordingly, the tiered water rates are unconstitutional, illegal and invalid.

44. The Coalition is informed and believes and thereupon alleges that City's revenues derived from its 2014 Water Rate Structure exceed the funds required to provide the property related service and the 2014 Water Rate Structure adopted by Respondent therefore violates Article XIIID, §6(b)(1).

45. The Coalition is informed and believes and thereupon alleges that City's revenues derived from the 2014 Water Rate Structure are used for purposes other than that for which the fee or charge was imposed and that the 2014 Water Rate Structures adopted by Respondent therefore violates Article XIIID, §6(b)(2).

46. The Coalition is informed and believes and thereupon alleges that the inequality in pricing between Tiers 1-4 in City's 2014 Water Rate Structure is unrelated to "the proportional cost of the service attributable to the parcel," and therefore violates Article XIIID, §6(b)(3).

47. The Coalition is informed and believes and thereupon alleges that, as approved, the City's 2014 Water Rate Structure imposes a fixed monthly service charge based on the size of the customer's meter and a commodity charge for the amount of water used. The customer pays a progressively higher charge per unit of water used above the arbitrarily allocated amount as outlined above and in the Bartle Wells Water Rate Study.

48. The Coalition is informed and believes and thereupon alleges that the Bartle Wells Water Rate Study provides no cost of service data to support the disproportionate fees charged amongst Tiers 1 through 4 to residential customers, while charging irrigation and commercial customers a flat rate.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

49. The Coalition is informed and believes and thereupon alleges that the City's tiered pricing for residential customers is a financial penalty intended to punish higher water users, while subsidizing other customer groups, and is not a fee for service. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.)

50. The Coalition is informed and believes and thereupon alleges that the Bartle Wells Water Rate Study impermissibly collapses several user groups with widely disparate peaking factors into a single generalized "Commercial" user group, such that the City user groups, with the highest peaking factors, are financially subsidized by residential, small business, and various other commercial and industrial customers.

51. The Coalition is informed and believes and thereupon alleges that the Proposition 218 ballot Pamphlet makes it clear that the voters intended that no property owner's fee may be greater than the actual cost to provide the service to the owner's land. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.) The City's water rate pricing for Tiers 1 through 4 bears no relation to the costs of providing water service, and the City's peaking factors are arbitrarily and illogically imposed to discriminate against residential customers.

52. The Coalition is further informed and believes and thereupon alleges that City's revenues under its 2014 Water Rate Structures bears no relation to and exceed the costs of providing water service in contravention of article XIIID, section 6(b)(1), and instead "all but assures the revenues the Respondent receives from customers in the higher tiers is more than is required to cover the City's costs of service." (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.)

53. The Coalition is further informed and believes and thereupon alleges that the earmarked portion of fixed charges to pay for fire services, including fire hydrants, is in direct conflict with Article XIIID, section 6(b)(5).

54. An actual controversy has arisen and now exists between the Coalition and the City in that the Coalition contends that the 2014 Water Rate Structure is invalid and illegal in that the City has failed in multiple respects to comply with the California Constitution, Article XIIID, section 6, and City continues to enforce its illegally tiered water rate scheme. The Coalition is informed and

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

believes and thereon alleges that City takes the legal position that its above-referenced Water Rate Structure is valid, legal, and enforceable in nature, including, but not limited to, compliant with Proposition 218.

55. Unless and until the Court renders a judgment declaring the rights and responsibilities of the parties under the law, the Coalition, the taxpayers of Glendale, and Respondent itself, will operate in a state of uncertainty, with all interested parties unsure whether the water rates are properly charged or payable by any ratepayer in Respondent's jurisdiction.

56. A judicial determination of the rights and obligations of the parties is necessary and appropriate so that the parties hereto may ascertain those rights and act accordingly.

57. Petitioner has no plain, speedy, or adequate remedy at law for the harm that will be caused by Respondent's continued imposition of the water charges/fees at issue in this case. By continuing to impose its arbitrary tiered water rate scheme, Respondent is failing to perform the legal duties required of it by Proposition 218. A judgment from this Court, declaring the rights and responsibilities of the parties pursuant to Code of Civil Procedure section 1060, is therefore necessary and appropriate.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

SECOND CAUSE OF ACTION

(Injunctive Relief – Unlawful Enforcement of Water Rate Structure)

58. Petitioner incorporates all previous allegations as if fully set forth herein.

59. Petitioner is informed and believes and thereupon alleges that, unless enjoined and restrained by this Court, Respondent will continue to impose its arbitrary tiered water rate scheme on Petitioner and upon the residents of Glendale, in violation of the California Constitution, Article XIIID.

60. Petitioner has no plain, speedy, or adequate remedy at law with respect to the City's unlawful policies and interpretations or its related patterns and practices.

61. Petitioner accordingly seeks preliminary and permanent injunctive relief prohibiting the Respondent from continuing to implement or apply its arbitrary tiered water rate scheme, discriminatory peaking factors, and illegal subsidization of certain customers.

THIRD CAUSE OF ACTION

(Writ of Mandate, CCP §1085, 1094.5 (Proposition 218))

62. Petitioner incorporates all previous allegations as if fully set forth herein.

63. Respondent has mandatory duty to correctly apply Article XIIID of the California Constitution, which requires that inequalities between water rates be based on cost of service and that certain customer groups shall not be unfairly discriminated against to subsidize other customer groups. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.) Respondent violates these mandatory duties.

64. Petitioner is informed and believes and thereupon alleges that Respondent's revenues derived from its 2014 Water Rate Structures exceed the funds required to provide the property related service and the 2014 Water Rate Structures adopted and implemented by Respondent therefore violates Article XIIID, §6(b)(1).

65. Petitioner is informed and believes and thereupon alleges that Respondent's revenues derived from the 2014 Water Rate Structures are used for purposes other than that for which the fee or charge was imposed and that the 2014 Water Rate Structures adopted by Respondent therefore violates Article XIIID, §6(b)(2).

66. Petitioner is informed and believes and thereupon alleges that the City's water rate pricing for Tiers 1 through 4 bears no relation to the proportional costs of providing water service attributable to residential customers, and the City's peaking factors are arbitrarily and illogically imposed to discriminate against residential customers, therefore violating Article XIIID, §6(b)(3).

67. Petitioner is informed and believes and thereupon alleges that the City earmarks a portion of fixed charges to pay for fire services, including fire hydrants. These services are available to any member of the public at large whose life, limb or property is threatened by fire, irrespective of whether they are property owners within the meaning of Article XIIID. Thus, using a portion of the water fixed charge for fire service, on its face, is in direct conflict with Article XIIID, section 6(b)(5).

68. Petitioner consequently petitions for a writ of mandate under CCP §§1085 and/or 1094.5 compelling the Respondent to comply with its mandatory duties and prohibiting and

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

correcting the Respondent's abuses of discretion. Petitioner has no plain, speedy or adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests:

1. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the City of Glendale's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(1), and is invalid because the revenues derived from the Water Rate Structure bear no relation to and/or exceed the funds required to provide the property related service.

2. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the City of Glendale's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(2), and is invalid because revenues derived from the fee or charge are used for purposes other than that for which the fee or charge was imposed.

3. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the City of Glendale's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(3), and is invalid because the fees imposed on each parcel of property exceed the proportional cost of the services attributable to each parcel.

4. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the City of Glendale's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(5), and is invalid because the City impermissibly uses a portion of the fixed water charge for fire service.

5. Preliminary and permanent injunctive relief prohibiting and restraining Respondent, and each and all of its agents, employees, representatives, officers, directors, and all persons acting in concert with it, from imposing, billing or collecting water charges/fees as currently being imposed, in violation of the California Constitution, Article XIID.

6. A writ of mandate ordering the Respondent to abandon Respondent's current 2014 Water Rate Structure and base all rates on cost of service in conformance with the California Constitution, Article XIID (Proposition 218).

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

7. For attorneys' fees as allowed by law, including but not limited to those pursuant to Code of Civil Procedure section 1021.5.

8. For costs of suit herein.

9. For such other relief as the Court may deem just and proper.

DATE: January 9, 2015

ALVARADOSMITH APC

By: _____

Benjamin T. Benumof, Ph.D., Esq.
William M. Hensley, Esq.
Attorneys for Petitioner and Petitioner
GLENDALE COALITION FOR BETTER GOVERNMENT, INC.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

VERIFICATION

I, Roland Kedikian, declare:

I am an Officer of the Glendale Coalition for Better Government, Inc. ("Coalition"), a California public interest corporation organized and existing under the laws of California. The Coalition is the Petitioner and Plaintiff in the above-entitled action, and I have been authorized to make this verification on its behalf. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE UNDER ARTICLE XIIID OF THE CALIFORNIA CONSTITUTION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know the contents thereof, except as to those matters alleged on information and belief, and to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this verification was signed on January 9, 2015, in Glendale, California.

Roland Kedikian

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

EXHIBIT D

FILED
CIVIL BUSINESS OFFICE 10
CENTRAL DIVISION

2014 SEP -2 P 3:41

SUPERIOR COURT
SAN DIEGO COUNTY, CA
Clerk of the Superior Court

SEP 02 2014

By: _____ Deputy

Benjamin T. Benumof (SBN 227340)
William M. Hensley (SBN 90437)
ALVARADOSMITH APC
1 MacArthur Place, Suite 200
Santa Ana, CA 92707
Telephone: 714.852.6800
Facsimile: 714.852.6899
bbenumof@alvaradosmith.com
mhensley@alvaradosmith.com

Attorneys for Petitioner and Plaintiff
SWEETWATER AUTHORITY RATE PAYERS ASSOCIATION, INC.

ORIGINAL

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL

SWEETWATER AUTHORITY RATE PAYERS ASSOCIATION, INC., a California non-profit public interest corporation. Petitioner and Plaintiff, vs. SWEETWATER AUTHORITY, a California publicly owned water agency; and DOES 1 through 25, inclusive. Respondents & Defendants.	Case No. **37-2014-00029611-CU-MC-CTL** JUDGE: DEPT: **VERIFIED PETITION FOR WRIT OF MANDATE UNDER ARTICLE XIIID OF THE CALIFORNIA CONSTITUTION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Petitioner and Plaintiff Sweetwater Authority Rate Payers Association, Inc. (hereinafter the "SARPA" or "Petitioner") alleges as follows:

INTRODUCTORY ALLEGATIONS

1. This action arises out of the Sweetwater Authority's (hereinafter, "Respondent") failure and ongoing refusal to acknowledge and rectify that its water rate structure – which has been progressively ramped-up by yearly rate hikes since September 2010 (excepting 2011) – currently violates Article XIIID of the California Constitution (aka "Proposition 218") and has done so for the past four years.

2. Petitioner SARPA is a non-profit public interest organization incorporated and existing under the laws of the State of California. SARPA is made up of numerous residents and

taxpayers of National City, Bonita, and Chula Vista, and its principal place of business is located in Bonita, California.

3. SARPA was formed by local residents in response to community concerns about issues such as the rising cost of water and various other "fee" increases passed on to residents and businesses by the Sweetwater Authority. SARPA"s Mission is, in pertinent part, assuring that the residents of National City, Bonita, and Chula Vista are charged the true cost of water as required by Proposition 218 and that governing bodies such as Respondent comply with the California Constitution, namely Article XIIID.

4. Petitioner is informed and believes Sweetwater Authority ("Respondent") is a publicly-owned water agency with policies and procedures established by a seven-member Board of Directors.

5. The names and capacities of the respondents/defendants named as Does 1 through 25 are currently unknown to Petitioner. Petitioner will amend this Petition and Complaint to reflect their true names and capacities when ascertained.

6. SARPA brings this action on its own behalf, as well as in the public interest. Specifically, SARPA seeks to enforce important public duties and rights under the California Constitution, recent authoritative state case law, and the rules and regulations of the Sweetwater Authority. Other beneficially interested individuals would find it difficult or impossible to seek vindication of the rights herein asserted. SARPA's interests in this action are in no way competitive or commercial, and are instead entirely consistent with the public duties and rights it asserts. SARPA has a continuing interest in, and a well-established commitment to, the public rights asserted.

7. Respondent's determinations are final, and no further administrative or appeal procedures are available.

8. Petitioner is informed and believes, and based upon such information and belief alleges, that each material issue and ground for non-compliance raised by this Petition and Complaint was presented to Respondent at multiple public hearings and in writing.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

9. Jurisdiction is proper under Code of Civil Procedure ("CCP") sections 1060, 1085 and/or 1094.5. Venue is proper under CCP section 393.

10. This action is timely commenced. Respondent's continued imposition and collection of illegal water delivery "charges" or "fees" is an ongoing constitutional violation (i.e., an unconstitutional "tax"), upon which the statutory limitations period begins anew with each monthly collection. (*Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809).

11. Petitioner served Respondent with prior written notice of the commencement of this proceeding. The written notice of intent to file litigation, and its proof of service, are attached hereto as Exhibit "1".

THE PROPOSITION 218 MANDATE

12. Building on the foundation laid earlier by Proposition 13 in 1978, Proposition 218 is a further limitation on government's ability to impose taxes. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.) Growing weary of "special taxes" under the guise of "assessments" without a two-thirds electorate vote, California voters adopted Proposition in 218 curtailing assessments in these key ways (*Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 446; *City of Palmdale v. Palmdale Water District* (2012) 198 Cal.App.4th 926, 931; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640):

a. assessments could only be imposed on specific property-oriented "benefits" (Art. XIIID, §§ 2, subd. (b), 4, subd. (a), subd. (i));

b. property-oriented assessments must be strictly proportional, with assessments not being imposed on any parcel "which exceeds the reasonable cost of the proportional special benefit conferred on that parcel," specifically separating the general benefits from the specific benefits for Proposition 218 purposes (Art. XIIID, § 4 subd. (a));

c. "[r]evenues derived from the fee or charge shall not exceed the funds required to provide the property-related services" and "the amount of the fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of service attributable to the parcel" (Art. XIID, § 6, subds. (b)(1), (b)(3);

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

d. "no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question," with "[f]ees or charges based on potential or future use of a service [not being, or as the statute says, 'are not'] permitted" (Art. XIIID, § 6(b)(4)); and

e. shifted traditional presumptions that had favored assessment validity, making local agencies bear the burden "to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question" (Art. XIIID, § 6, subd. (b)(5)).

13. In addition, Proposition 218 has crucial procedural requirements, including the germane requirement that the agency must conduct a public hearing that is "preceded by written notice to affected owners setting forth, among other things, a 'calculat[ion]' of '[t]he amount of the fee or charge proposed to be imposed upon each parcel ...." (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.)

14. Likewise, California Constitution, Article XIIID, section 6(a)(1) further requires that the advance notice to the public about water assessments like the one here must contain "the basis upon which the amount of the proposed fee or charge was calculated," because, otherwise, no member of the public would be able to appear and frame a meaningful objection to the calculation data unless that data is vetted in the public arena.

15. Importantly, a constitutional amendment like Proposition 218 "shall be liberally construed to effectuate its purposes of limiting the local government revenue and enhancing taxpayer consent." (*Silicon Valley, supra*, 44 Cal.4th at p. 448; *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, review denied.)

16. With respect to the imposition of any given water rate structure, conservation and allocation based principles may be utilized "*so long as*, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel'" and there is adequate support "for the inequality *between* tiers, depending on the category of user." (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936-937.)

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

RESPONDENT'S 2014 WATER RATE STRUCTURE EVOLVED FROM AN EQUALLY ILLEGAL WATER RATE STRUCTURE IMPLEMENTED IN SEPTEMBER 2010

17. On or about August 25, 2014, Respondent approved its current water rate structure ("2014 Water Rate Structure") following a duly noticed Proposition 218 hearing that numerous ratepayers attended and voiced their opposition to Respondent's punitive tiered water rate scheme, including several SARPA members.

18. Tiered water rates are water rate structures that (a) discretionally allocate certain water use limits amongst the tiers and (b) progressively increase in pricing from the lowest tier to the highest tier.

19. According to Respondent, the 2014 Water Rate Structure is substantially based on a water rate study performed by Respondent's water rate consultant PBS&J in 2010 for tiered water rates that became effective on or about September 1, 2010 ("PBS&J Water Rate Study").

20. The PBS&J Water Rate Study was distributed to the public at the August 25, 2014, hearing as part of Respondent's written notice to affected owners setting forth, among other things, a calculation of the amount of the fee or charge proposed to be imposed upon each parcel. (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.)

21. As documented in Table 5-5 the PBS&J Water Rate Study, Tiers 1-4 are calculated by an ***arbitrary*** percentage increase as follows:

a. The Tier 1 rate ($0.35) is increased by an unidentified multiplier ("price differential" as defined in Table 5-5) of 9.77 to calculate the Tier 2 rate ($3.42)

b. The Tier 2 rate ($3.42) is increased by an identified multiplier of 1.50 to calculate the Tier 3 rate ($5.13);

c. The Tier 2 rate ($3.42) is increased by an identified multiplier of 2.00 to calculate the Tier 4 rate ($6.84);

22. The PBS&J Water Rate Study does not provide any cost-of-service data to support the inequality of fees charged between the four tiers.

///

///

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

23. SARPA is informed and believes and thereon alleges that the charges for Tiers 2 through 4 are no more than an arbitrary financial penalty intended to penalize residents for exceeding the Sweetwater Authority-directed allocations of water, while subsidizing Tier 1 users.

24. The PBS&J Water Rate Study treats multi-unit residential and business owners much differently than single-family residential users, charging these users a uniform rate of $4.31. There is no Proposition 218 rationale for doing so as highlighted by the *Palmdale* court.

25. Curiously, in adopting and implementing the PBS&J Water Rate Study in September 2010, Respondent did not adopt the specific rates specified in the PBS&J Water Rate Study except for the Tier 1 rate, which is greatly subsidized by the higher tier users.

26. The actual rates adopted by Respondent in September 2010 are not exactly as those noted in the PBS&J Water Rate Study, however they mirror those rates and the multipliers are approximate. More specifically, the actual rates charged beginning in September 2010 were:

a. $0.35 (Tier 1);

b. $3.61 (Tier 2; a 10.31 multiplier from Tier 1);

c. $5.42 (Tier 3; a 1.50 multiplier from Tier 2); and

d. $7.22 (Tier 4; a 2.00 multiplier from Tier 2); and with

e. A uniform rate of $4.99 for commercial/multi-family users.

27. The 2014 Water Rate Structure, much like the interim tiered rate structures approved in 2012 and 2013, has essentially the same percentage (multiplier) increases:

a. The jumps from Tier 2 to Tier 3 ($4.10 to $6.17) and Tier 2 to Tier 4 ($4.10 to $8.24) are also based on multipliers of 1.50 and 2.00, respectively; and

b. The Tier 1 to Tier 2 jump ($2.80 to 4.10) is based on a multiplier of approximately 1.50 instead of 10.31 (as adopted in September 2010).

28. SARPA is informed and believes and thereon alleges that the 2014 Water Rate Structure is not based on any additional or further water rate studies. Rather, the rate jumps between the tiers merely echo the rate jumps first presented in the PBS&J Water Rate Study and treat commercial/multi-family users differently than single-family residential users, charging them a uniform rate of $5.85.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

THE 2013 INTERIM WATER RATE STRUCTURE

29. Respondent's 2013 Water Rate Structure, much like the 2010 Water Rate Structure and 2012 (interim) Water Rate Structure, has essentially the same percentage (multiplier) increases as recommended in the adopted PBS&J Water Rate Study. More specifically:

a. The jumps from Tier 2 to Tier 3 ($4.02 to $6.05) and Tier 2 to Tier 4 ($4.02 to $8.08) are also based on approximate multipliers of 1.50 and 2.00, respectively; and

b. The Tier 1 to Tier 2 jump ($1.40 to 4.02) is based on a multiplier of approximately 2.87 instead of 10.31 (as adopted in September 2010).

THE 2012 INTERIM WATER RATE STRUCTURE

30. Respondent's 2012 Water Rate Structure, much like the 2010 Water Rate Structure, has essentially the same percentage (multiplier) increases as recommended in the adopted PBS&J Water Rate Study. More specifically:

a. The jumps from Tier 2 to Tier 3 ($3.84 to $5.77§) and Tier 2 to Tier 4 ($3.84 to $7.69) are also based on multipliers of 1.50 and 2.00, respectively; and

b. The Tier 1 to Tier 2 jump ($0.70 to $3.84) is based on a multiplier of approximately 5.48 instead of 10.31 (as adopted in September 2010).

THE 2011 INTERIM WATER RATE STRUCTURE

31. Respondent's 2011 Water Rate Structure remained the same as the 2010 Water Rate Structure, including the same percentage (multiplier) increases as recommended in the adopted PBS&J Water Rate Study and the same water rates.

FIRST CAUSE OF ACTION

(Declaratory Relief – Violation of Article XIIID of the California Constitution)

32. Petitioner incorporates all previous allegations as if fully set forth herein.

33. Because Respondent's water rates are imposed for the property-related service of water delivery, the water rates, including their fixed monthly charges, are fees or charges within the meaning of Article XIIID of the California Constitution. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.) "All charges for water delivery" incurred after a water

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

connection is made "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.*)

34. Respondent is an "agency" as that term is defined in the California Constitution, Article VIIID, §2(a), and is therefore subject to the provisions of Proposition 218, the "Right to Vote on Taxes Act," approved by the voters of California on November 5, 1996.

35. Section 6(b) of Article XIIID of the California Constitution provides that an increased fee or charge imposed by the Respondent must comply with the following requirements:

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

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

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) . . . In any legal proceeding contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article."

36. In adopting its 2010-2014 Water Rate Structures, Respondent violated the provisions of the California Constitution, Article XIIID, and, accordingly, the tiered water rates are unconstitutional, illegal and invalid.

37. Petitioner is informed and believes and thereupon alleges that Respondent's revenues derived from the 2010-2014 Water Rate Structures exceed the funds required to provide the property related service and the 2010-2014 Water Rate Structures adopted by Respondent therefore violate Article XIIID, §6(b)(1).

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

38. Petitioner is informed and believes and thereupon alleges that Respondent's revenues derived from the 2010-2014 Water Rate Structures are used for purposes other than that for which the fee or charge was imposed and that the 2010-2014 Water Rate Structures adopted by Respondent therefore violates Article XIIID, §6(b)(2).

39. Petitioner is informed and believes and thereupon alleges that the inequality between Tiers 1-4 in Respondent's 2010-2014 Water Rate Structures is totally unrelated to "the proportional cost of the service attributable to the parcel," and therefore violates Article XIIID, §6(b)(3).

40. Petitioner is informed and believes and thereupon alleges that, as approved, the Respondent's 2010-2014 Water Rate Structures impose a fixed monthly service charge based on the size of the customer's meter and a commodity charge for the amount of water used. The customer pays a progressively higher charge per unit of water used above the arbitrarily allocated amount as outlined above and in the PBS&J Water Rate Study.

41. Petitioner is informed and believes and thereupon alleges that the PBS&J Water Rate Study provided no cost of service data to support the disproportionate fees charged amongst Tiers 1 through 4. Therefore, Petitioner is informed and believes and thereupon alleges that the charges for Tiers 2 through 4 are a financial penalty intended to punish higher water users, while subsidizing Tier 1 users, and are not a fee for service.

42. Petitioner is informed and believes and thereupon alleges that Respondent's 2010-2014 Water Rate Structures for Tiers 2 through 4 are not based on cost of service, but are instead derived from an arbitrary mathematical progression using fixed percentages to calculate Tiers 2 through 4, while Tier 1 users are greatly subsidized. Consequently, the fee charged to customers who use more than the allocated amount of water in Tiers 2 through 4 does not comply with the Proposition 218 Article XIIID. (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.)

43. Petitioner is informed and believes and thereupon alleges that the Proposition 218 ballot Pamphlet makes it clear that the voters intended that no property owner's fee may be greater than the actual cost to provide the service to the owner's land. (*City of Palmdale v. Palmdale Water*

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

District (2011) 198 Cal.App.4th 926, 934.) Respondent's commodity charges for Tiers 1 through 4 bear no relation to the costs of providing water service.

44. Petitioner is further informed and believes and thereupon alleges that Respondent's revenues under its 2010-2014 Water Rate Structures bears no relation to and exceed the costs of providing water service in contravention of article XIIID, section 6(b)(1), and instead "all but assures the revenues the Respondent receives from customers in the higher tiers is more than is required to cover the City's costs of service." (*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.)

45. An actual controversy has arisen and now exists between Petitioner and Respondent in that Petitioner contends that the Respondent's 2010-2014 Water Rate Structures are invalid and illegal in that the Respondent has failed in multiple respects to comply with the California Constitution, Article XIIID, section 6, and Respondent continues to enforce its illegally tiered water rate scheme. Petitioner is informed and believes and thereon alleges that Respondent takes the legal position that its above-referenced Water Rate Structures are valid, legal, and enforceable in nature, including, but not limited to, compliant with Proposition 218.

46. Unless and until the Court renders a judgment declaring the rights and responsibilities of the parties under the law, SARPA, the taxpayers of National City, Bonita, and Chula Vista, and Respondent itself, will operate in a state of uncertainty, with all interested parties unsure whether the water rates are properly charged or payable by any ratepayer in Respondent's jurisdiction.

47. A judicial determination of the rights and obligations of the parties is necessary and appropriate so that the parties hereto may ascertain those rights and act accordingly.

48. Petitioner has no plain, speedy, or adequate remedy at law for the harm that will be caused by Respondent's continued imposition of the water charges/fees at issue in this case. By continuing to impose its arbitrary tiered water rate scheme, Respondent is failing to perform the legal duties required of it by Proposition 218. A judgment from this Court, declaring the rights and responsibilities of the parties pursuant to Code of Civil Procedure section 1060, is therefore neeessary and appropriate.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

SECOND CAUSE OF ACTION

(Injunctive Relief – Unlawful Enforcement of Water Rate Structure)

49. Petitioner incorporates all previous allegations as if fully set forth herein.

50. Petitioner is informed and believes and thereupon alleges that, unless enjoined and restrained by this Court, Respondent will continue to impose its arbitrary tiered water rate scheme on Petitioner and upon the residents of the National City, Bonita, and Chula Vista, in violation of the California Constitution, Article XIIID.

51. Petitioner has no plain, speedy, or adequate remedy at law with respect to the City's unlawful policies and interpretations or its related patterns and practices.

52. Petitioner accordingly seeks preliminary and permanent injunctive relief prohibiting the Respondent from continuing to implement or apply its arbitrary tiered water rate scheme.

THIRD CAUSE OF ACTION

(Writ of Mandate, CCP §1085, 1094.5 (Proposition 218))

53. Petitioner incorporates all previous allegations as if fully set forth herein.

54. Section 6(b) of Article XIIID of the California Constitution provides that an increased fee or charge imposed by Respondent must comply with the following requirements:

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

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

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

. . .

(5) . . . In any legal proceeding contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article."

55. Respondent has mandatory duty to correctly apply Article XIIID of the California Constitution, which requires that the inequality between water rate tiers be based on cost of service.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

(*City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926, 934.) Respondent violates these mandatory duties.

56. Petitioner is informed and believes and thereupon alleges that Respondent's revenues derived from its 2010-2014 Water Rate Structures exceed the funds required to provide the property related service and the 2010-2014 Water Rate Structures adopted and implemented by Respondent therefore violate Article XIIID, §6(b)(1).

57. Petitioner is informed and believes and thereupon alleges that Respondent's revenues derived from the 2010-2014 Water Rate Structures are used for purposes other than that for which the fee or charge was imposed and that the 2010-2014 Water Rate Structures adopted by Respondent therefore violates Article XIIID, §6(b)(2).

58. Petitioner is informed and believes and thereupon alleges that the inequality between the City's water rate tiers is totally unrelated to "the proportional cost of the service attributable to the parcel," and therefore violates Article XIIID, §6(b)(3).

59. Petitioner consequently petitions for a writ of mandate under CCP §§1085 and/or 1094.5 compelling the Respondent to comply with its mandatory duties and prohibiting and correcting the Respondent's abuses of discretion. Petitioner has no plain, speedy or adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests:

1. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(1), and is invalid because the revenues derived from the Water Rate Structure bear no relation to and/or exceed the funds required to provide the property related service.

2. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2013 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(1), and is invalid because the revenues derived from the Water Rate Structure bear no relation to and/or exceed the funds required to provide the property related service.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

3. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2012 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(1), and is invalid because the revenues derived from the Water Rate Structure bear no relation to and/or exceed the funds required to provide the property related service.

4. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2011 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(1), and is invalid because the revenues derived from the Water Rate Structure bear no relation to and/or exceed the funds required to provide the property related service.

5. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2010 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(1), and is invalid because the revenues derived from the Water Rate Structure bear no relation to and/or exceed the funds required to provide the property related service.

6. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(2), and is invalid because revenues derived from the fee or charge are used for purposes other than that for which the fee or charge was imposed.

7. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2013 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(2), and is invalid because revenues derived from the fee or charge are used for purposes other than that for which the fee or charge was imposed.

8. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2012 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(2), and is invalid because revenues derived from the fee or charge are used for purposes other than that for which the fee or charge was imposed.

9. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2011 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(2), and is invalid because revenues derived from the fee or charge are used for purposes other than that for which the fee or charge was imposed.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

10. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2010 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(2), and is invalid because revenues derived from the fee or charge are used for purposes other than that for which the fee or charge was imposed.

11. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2014 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(3), and is invalid because the fees imposed on each parcel of property exceed the proportional cost of the services attributable to each parcel.

12. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2013 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(3), and is invalid because the fees imposed on each parcel of property exceed the proportional cost of the services attributable to each parcel.

13. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2012 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(3), and is invalid because the fees imposed on each parcel of property exceed the proportional cost of the services attributable to each parcel.

14. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2011 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(3), and is invalid because the fees imposed on each parcel of property exceed the proportional cost of the services attributable to each parcel.

15. Judgment, pursuant to Code of Civil Procedure section 1060, finding and declaring that the Sweetwater Authority's 2010 Water Rate Structure violates California Constitution, Article XIIID, §6(b)(3), and is invalid because the fees imposed on each parcel of property exceed the proportional cost of the services attributable to each parcel.

16. Preliminary and permanent injunctive relief prohibiting and restraining Respondent, and each and all of its agents, employees, representatives, officers, directors, and all persons acting in concert with it, from imposing, billing or collecting water charges/fees as currently being imposed, in violation of the California Constitution, Article XIID.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

17. A writ of mandate ordering the Respondent to abandon Respondent's current 2014 Water Rate Structure and base all rates on cost of service in conformance with the California Constitution, Article XIID (Proposition 218).

18. For attorneys' fees as allowed by law, including but not limited to those pursuant to Code of Civil Procedure section 1021.5.

19. For costs of suit herein.

20. For such other relief as the Court may deem just and proper.

DATE: September 2, 2014

ALVARADOSMITH APC

By: _____

Benjamin T. Benumof, Ph.D., Esq.
William M. Hensley, Esq.
Attorneys for Petitioner and Petitioner
SWEETWATER AUTHORITY
RATE PAYERS ASSOCIATION, INC.

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

VERIFICATION

I, Michael M. Sampsel, declare:

I am an Officer of the Sweetwater Authority Rate Payers Association, Inc, ("SARPA"), a California public interest corporation organized and existing under the laws of California. SARPA is the Petitioner and Plaintiff in the above-entitled action, and I have been authorized to make this verification on its behalf. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE UNDER ARTICLE XIIID OF THE CALIFORNIA CONSTITUTION AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know the contents thereof, except as to those matters alleged on information and belief, and to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this verification was signed on September 2, 2014, in Bonita, California.

Michael M. Sampsel

Michael M. Sampsel

ALVARADOSMITH
A PROFESSIONAL CORPORATION
SANTA ANA

EXHIBIT E

E-FILED
Feb 3, 2015 3:33 PM
David H. Yamasaki
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
Case #1-14-CV-258879 Filing #G-69554
By R. Walker, Deputy

JAMES McMANIS (40958)
TYLER ATKINSON (257997)
HILARY WEDDELL (293276)
McMANIS FAULKNER
50 W. San Fernando Street, 10th Floor
San Jose, CA 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244
tatkinson@mcmanislaw.com

Attorneys for Plaintiffs,
RAYMOND AND MICHELLE PLATA, individually and on behalf of other members of a class of similarly situated residents and taxpayers

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

RAYMOND AND MICHELLE PLATA, individually and on behalf of other members of a class of similarly situated residents and taxpayers, v. CITY OF SAN JOSE, a California municipal corporation, and DOES 1 THROUGH 100, Defendants.	No. 1-14-CV-258879 CLASS ACTION **AMENDED AND SUPPLEMENTAL COMPLAINT FOR REFUND, DECLARATORY RELIEF, AND INJUNCTIVE RELIEF** UNLIMITED JURISDICTION

Plaintiffs Raymond and Michelle Plata, and a class of residents and taxpayers to which the Platas belong (collectively "plaintiffs"), file this action to recover monies unlawfully paid to the City of San Jose, and to seek declaratory and injunctive relief to prohibit the City from violating Proposition 218, codified at Articles XIII C and XIII D of the California Constitution. Plaintiffs allege as follows:

PARTIES

1. Plaintiffs Raymond and Michelle Plata own property in, and are residents of, the City of San Jose and are customers of the San Jose Municipal Water System ("Muni Water"), an entity wholly owned and operated by the City of San José. At all relevant times, plaintiffs paid

for water from Muni Water, and lived in a region of San Jose for which Muni Water is the only water utility. Plaintiffs are real property owners in and residents of the City of San José, County of Santa Clara, California, and are taxpayers thereof. Plaintiffs have been assessed for and are liable to pay property taxes in the City of San José, state and federal income taxes, and other taxes. Plaintiffs have retained counsel who is experienced in class actions and taxpayer actions.

2. Defendant City of San José (the "City" or "San Jose") is located in the County of Santa Clara, State of California, and is a municipal corporation organized and existing under the laws of the State of California.

3. Plaintiffs are ignorant of the true names or capacities of the defendants sued herein under the fictitious names Does 1 through 100 inclusive. When their true names and capacities are ascertained, plaintiffs will amend this complaint to show such true names and capacities. Plaintiffs are informed and believe, and thereon allege, that Does 1 through 100, inclusive, and each of them, were responsible in some manner for the events and happenings set forth herein.

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned, defendants were the agents, servants, and employees of their codefendants and in doing the things hereinafter alleged were acting within the course and scope of their authority as agents, servants, and employees with the permission and consent of their codefendants.

5. Unlimited jurisdiction is proper as the amount in controversy exceeds $25,000.

GENERAL ALLEGATIONS

6. In 1961, the City purchased Muni Water using money from its general reserve. Since 1971, the cost of the purchase has been fully recovered. Through Muni Water, the City provides water services to the citizens of San Jose located in the neighborhoods of Alviso, North San Jose, Evergreen, Edenvale, and Coyote Valley.

7. Muni Water is the exclusive water utility for approximately ten (10) percent of the population of San Jose.

8. Muni Water imposes fees and charges on the users of the utility on a monthly basis. The water services it provides are property-related services and the fees and charges are imposed by San Jose upon parcels and persons as an incident of property ownership.

9. Proposition 218, codified under Articles XIII C and XIII D of the California Constitution, was adopted by California voters in 1996. Since the enactment of Proposition 218, the California Constitution has prohibited the City from imposing fees or charges such that "revenues . . . exceed the funds required to provide [water] service." Cal. Const., art. XIII D, § 6(b)(1). The California Constitution further provides that revenues derived from fees or charges "shall not be used for any purpose other than that for which the fee or charge was imposed." Cal. Const., art. XIII D, § 6(b)(2).

10. Under Proposition 218, the City may not collect, either for retention or transfer, rates for water and water-related services that are designed to generate a surplus, profit, or other return on investment, i.e., revenues that exceed the funds required to provide water and water-related service, setting aside reasonable reserves.

11. Since January, 1997, up to and including today, approximately Thirty (30) Million Dollars have been illegally transferred as "rate of return" transfers, "in-lieu fees," and other transfers not actually related to the maintenance or improvement of the Muni Water system. The City has repeatedly, regularly, and unconstitutionally used Muni Water as a profit-center, in clear violation of Proposition 218 and the California Constitution.

12. Plaintiffs are informed and believe, and on that basis allege, the water utility fees and charges exceed the reasonable and actual cost of providing the services, and are imposed by the City for general revenue purposes.

13. For each year following 1997, the City has used and transferred Muni Water funds for purposes other than those for which the funds were collected. For each year since 1997, the City has used Muni Water fees or charges for purposes other than those for which they were imposed.

14. The City's unconstitutional draw-down of Muni Water fund reserves has resulted in Muni Water customers having to pay higher rates than they otherwise would need to pay, but for the City's illegal conduct, to fund capital improvements and to replenish Muni Water reserves.

15. The charges levied against the class have been unreasonable and unfair. In addition to illegal draw-downs, the rates are consistently pegged higher than necessary. On an annual basis, Muni Water revenue has consistently exceeded projected amounts. At the same time, Muni Water expenditures have consistently fallen short of their projected amounts. Rate inflation has regularly outstripped increases on the wholesale market.

16. Plaintiffs are informed and believe and on that basis allege, the City and City officials knew or should have known the rates were inflated and knew the transfers were unconstitutional. They materially misrepresented or failed to disclose these facts to the public.

17. The Budgets for 2013-2014 and 2014-2015 continue these unlawful transfers, as they include payments from funds associated with Muni Water to the City Hall Debt Service Fund and the General Fund.

18. Furthermore, the City's Municipal Code purports to allow the unconstitutional transactions by expressly allowing monies in the consolidated water utility fund to be transferred to the City's general fund in an amount representing a "reasonable rate of return to the city." San Jose Municipal Code section 4.80.630, subdiv. A, states (emphasis added):

> **Except as provided in this Section 4.80.630**, monies in the consolidated water utility operating fund [also known as the San Jose Municipal Water System Consolidated Water Utility Fund, or, Fund 515] shall only be expended for costs of water system operations, including but not limited to payment of required debt service; for repair, on-going capital improvements and maintenance of a potable water system for the consolidated potable water service area; and for the purchase of supplies, materials, and equipment attributable to or necessary for the operation, improvement and maintenance of a water potable system in the consolidated potable water service area.

San Jose Municipal Code section 4.80.630, subdiv. D, states (emphasis added):

> **Monies in the consolidated potable water utility operating fund may only be transferred to the general fund of the city as follows:**
>
> 1. Amounts calculated in the same manner as amounts paid to the general fund (such as in lieu fees, encroachment or other ministerial fees and utility taxes) by potable water utilities that are not exempt from the payment of franchise fees to the city, and are operated under the authority of the California public utilities commission; and
> 2. If adequate monies remain after the expenditures authorized . . . , monies may be transferred to the general fund **on an annual basis** to reimburse the city for indirect overhead costs and **to provide a reasonable rate of return to the city**, provided that the amount so transferred shall not exceed the following: . . . From and after July 1, 2005, an amount not to exceed eight percent of the revenue, as described in subsection A. of Section 4.80.620, which was received in the immediately preceding fiscal year.

19. The annual revenue of the Water Utility Fund, "Fund 515," is approximately $29,000,000. Thus, the San Jose Municipal Code as it is currently drafted permits the City to take $2,320,000 as a "rate of return." This provision violates Proposition 218 and the California Constitution.

20. Plaintiffs have presented four separate claims pursuant to California Government Code sections 905, 905.2, 910, and 910.2 for damages for the City's unconstitutional conduct regarding Muni Water. True and correct copies of the claims are attached hereto as Exhibit A and incorporated herein by reference. The City has rejected each of these claims.

21. On or about August 7, 2014, the City served discovery responses stating that, as to each fiscal year, from 1997 to 2014, the City was unable to admit or deny that the fees and charges it collected from Muni Water customers exceeded the funds required to provide Muni Water services.

22. Before this litigation, plaintiffs were ignorant of the City's purported lack of knowledge about excessive Muni Water fees and charges. Plaintiffs could not have discovered through the exercise of reasonable diligence within the time period of any applicable statutes of limitation that the City was unaware of whether it collected excessive fees and charges.

23. Plaintiffs became aware of the City's purported lack of knowledge about excessive fees and charges through the course of discovery in this case.

24. On or about July 7, 2014, plaintiffs first learned that the City does not believe that, under Proposition 218 and the California Constitution, revenues from Muni Water fees and charges may not be used for any purpose other than that for which the fee or charge was imposed.

25. Before this litigation, plaintiffs were ignorant of the City's erroneous interpretation of Proposition 218. It was reasonable for plaintiffs to assume the City had complied with its official duties. See Evid. Code § 664; Civ. Code § 3548. Plaintiffs could not have discovered through the exercise of reasonable diligence within the time period of any applicable statutes of limitation that the City did not believe that, under Proposition 218 and the California Constitution, revenues from Muni Water fees and charges may not be used for any purpose other than that for which the fee or charge was imposed.

26. The only information plaintiffs had regarding Muni Water rates was the water bill they received every other month which contains no information regarding the basis of the rates. The bills received by plaintiffs did not provide any facts or information that would have required them to inquire into whether the City was utilizing Muni Water in an unlawful manner or whether the City was collecting excessive fees and charges. Plaintiffs reasonably believed the bills sent to them by the City reflected charges authorized by law.

CLASS ACTION ALLEGATIONS

27. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated. The class that plaintiffs represent is composed of residents and taxpayers who live in the San Jose neighborhoods serviced by the San Jose Municipal Water System, including but not limited to the neighborhoods of Alviso, North San Jose, Evergreen, Edenvale, and Coyote Valley. The persons in the class are so numerous that joinder of all such persons is impracticable.

The disposition of these claims in a class action rather than in individual actions will benefit the parties and the Court. While the exact number of Class Members is unknown to plaintiffs at this time, plaintiffs are informed and believe and thereon allege that over 100,000 residents live in the affected areas.

28. There is a well-defined community of interest in that common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact, common to the Class:

a. Whether the fees and charges set by Muni Water exceed the reasonable and actual cost of providing water service;

b. Whether the water utility fees are imposed by the City for general revenue purposes;

c. Whether the City's acts alleged herein violate Proposition 218, codified at Articles XIII C and XIII D of the California Constitution.

29. These questions of law and fact predominate over questions that affect only individual class members. Proof of a common or single state of facts will establish the right of each member of the class to recover. The claims of the plaintiffs are typical of those of the class and plaintiffs will fairly and adequately represent the interests of the class.

30. The prosecution of individual remedies by members of the plaintiff class would also present the potential for inconsistent or contradictory judgments.

FIRST CAUSE OF ACTION

[Violation of Article XIII D of the California Constitution]

31. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 30, inclusive.

32. Article XIII D, section 6(b) of the California Constitution prohibits setting fees for property related services, such as water, at an amount that would "exceed the funds required to provide the property related service" or for using revenues derived from such fees for purposes "other than that for which the fee or charge was imposed."

33. The City has continuously refused to comply with Cal. Const. art. XIII D, section 6(b) by imposing water utility fees and charges that exceed the cost of providing water services, and using the revenues generated from water users to illegally fund the general fund, which is used for general government services, and to pay for other city costs not related to water system operations.

34. In addition, in engaging in and performing the acts, omissions, and conduct alleged above, the City has failed to perform one or more mandatory duties within the meaning of California Government Code section 815.6, including but not limited to its mandatory duties under Articles XIII C and XIII D section 6(b) of the California Constitution by imposing water utility fees and charges that exceed the cost of providing water services, and using the revenues generated from water users for general government services.

35. Plaintiffs have suffered injury as a result of the City's failure to discharge their mandatory duties.

36. As a proximate result of the City's unconstitutionally excessive rates and illegal transfers, plaintiffs are entitled to a refund in the amounts paid in excess of the cost of providing water service, or in the alternative, return to the Water Utility Fund of all illegally transferred amounts.

37. The City's unconstitutionally excessive rates, illegal transfers, and San Jose Municipal Code section 4.80.630, which purports to allow the unconstitutional transfers, will cause plaintiffs to suffer irreparable injury. Because of the irreparable injury that will be caused to plaintiffs by allowing the City to continue violating Proposition 218 and the California Constitution, plaintiffs have no adequate remedy at law.

38. The City's expenditure of city, county, and state money to implement, enforce, or otherwise carry out the illegal policies and practices complained herein constitutes illegal expenditure of public funds within the meaning of Code of Civil Procedure 526a.

39. The City's expenditure of city, county, and state money to implement, enforce, or otherwise carry out their illegal policies and practices will cause the taxpayers of San Jose, Santa Clara County, and the State of California to suffer irreparable injury.

40. Unless enjoined by the Court, the City will continue to spend the money of San Jose, Santa Clara County, and the State of California in furtherance of their illegal policies and practices, causing irreparable injury to the taxpayers of San Jose, Santa Clara County, and California.

41. Plaintiffs and the taxpayers of San Jose, Santa Clara County, and the State of California have no plain, adequate, or speedy remedy at law and are entitled to injunctive relief against defendants. Plaintiffs have no administrative remedy because defendants' policies and practices preclude any administrative relief.

SECOND CAUSE OF ACTION
[Declaratory Relief]

42. Plaintiffs hereby incorporate by this reference the allegations of paragraphs 1 through 41, alleged above.

43. The fees and charges set by Muni Water exceed the reasonable and actual cost of providing water service in clear violation of Proposition 218. In addition, the City continuously transfers funds from the Water Utility Fund to the General Fund, the City Hall Debt Service Fund, or other transfers not actually related to the maintenance or improvement of the Muni Water system.

44. By complying with the Government Tort Claim requirements, plaintiffs have exhausted all administrative remedies available to it. The City's rejection or return of each of plaintiffs' Claims has left plaintiffs with no other choice but to file this action.

45. An actual, present, and substantial controversy exists between plaintiffs and the City. Plaintiffs contend that the City has violated and will continue to violate Cal. Const. art. XIII D, section 6(b). The City contends otherwise.

46. A declaration as to the respective rights and duties of the parties is necessary and appropriate.

///

///

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment against Defendant as follows:

1. For a refund to plaintiffs for the amounts paid in excess of the cost of providing water service, or in the alternative, the return to the Water Utility Fund of all previously-transferred funds; and
2. For a declaration of legal rights and duties including, but not limited to the following:
   (a) A declaration, order, and judgment that SJMC Section 4.80.630 violates Article XIII D, section 6(b) of the California Constitution;
   (b) A declaration, order, and judgment that the "rate of return" transfers, and other transfers not actually related to the maintenance or improvement of the Muni Water system, are in violation of Article XIII D, section 6(b) of the California Constitution.
3. For a permanent injunction pursuant to California Code of Civil Procedure sections 526 and 526a:
   (a) enjoining the City from continuing to impose water charges that exceed the cost of providing those services;
   (b) enjoining illegal transfers of funds from the Water Utility Fund to the General Fund, the City Hall Debt Service Fund, or other transfers not actually related to the maintenance or improvement of the Muni Water system;
   (c) enjoining enforcement of San Jose Municipal Code section 4.80.630, subdiv. D.2;
   (d) directing the City to refund to plaintiffs amounts paid in excess of the cost of providing the Muni Water service, or in the alternative, return to the Water Utility Fund amounts illegally transferred for non-Muni Water purposes.
4. For general and special damages;
5. For plaintiff's costs of suit;

6. For attorneys' fees; and

7. For any such other and further relief as this Court may deem just and proper.

DATED: 2/3/15

McMANIS FAULKNER

JAMES McMANIS
TYLER ATKINSON
HILARY WEDDELL

Attorneys for Plaintiffs,
RAYMOND AND MICHELLE PLATA, individually and on behalf of other members of a class of similarly situated residents and taxpayers

EXHIBIT F

BRIGGS LAW CORPORATION [FILE: 1593.23]
Cory J. Briggs (State Bar no. 176284)
Mekaela M. Gladden (State Bar no. 253673)
Anthony N. Kim (State Bar no. 283353)
99 East "C" Street, Suite 111
Upland, CA 91786
Telephone: 909-949-7115

Attorneys for Plaintiff San Diegans for Open Government

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
01/31/2014 at 11:09:00 AM
Clerk of the Superior Court
By Calvin Beutler,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO--HALL OF JUSTICE

SAN DIEGANS FOR OPEN GOVERNMENT; and DOES 1 through 10, Plaintiffs, vs. DOWNTOWN SAN DIEGO PARTNERSHIP, INC.; NEW CITY AMERICA, INC.; MARCO LI MANDRI; PROGRESSIVE URBAN MANAGEMENT ASSOCIATES, Inc.; and DOES 11 through 990, Defendants; CITY OF SAN DIEGO; and DOES 991 through 1,000, Real Parties in Interest.	CASE NO. 37-2013-00062382-CU-MC-CTL **PLAINTIFF SAN DIEGANS FOR OPEN GOVERNMENT'S BRIEF IN OPPOSITION TO DEFENDANT DOWNTOWN SAN DIEGO PARTNERSHIP, INC.'S DEMURRER** Action filed: August 13, 2013 Department: 62 (Hon. R. L. Styn) Hearing Date: February 14, 2014 Hearing Time: 8:30 a.m.

Plaintiff SAN DIEGANS FOR OPEN GOVERNMENT ("Plaintiff") respectfully submits this brief in opposition to Defendant DOWNTOWN SAN DIEGO PARTNERSHIP, INC.'s general demurrer to the first amended complaint.

Table of Contents

Table of Authorities

Judicial Authority

Statutory Authority

I. INTRODUCTION

This case is about various illegal expenditures of taxpayer funds collected in connection with the Downtown Property and Business Improvement District ("PBID"). The City of San Diego filed an answer. However, Downtown Partnership filed a demurrer on various grounds, which was joined by Progressive Urban Management, Inc., New City America, Inc. and Marco LiMandri. As the joinders do not add anything substantive, they will not be addressed separately. As explained in more detail below, the demurrer should be overruled.

II. BACKGROUND

The City of San Diego established the PBID prior to 2005, and the PBID was scheduled to expire in or around 2005 in the absence of an extension. First Amended Complaint ("FAC") ¶ 7. In April 2005, the City's city council adopted Resolution no. R-300287 and gave notice of its intent to renew the PBID. *Id.* In June 2005, the city council adopted Resolution no. R-300533 and renewed the PBID. *Id.* The renewal effectively extended the expiration of the PBID until 2015. *Id.* Resolution no. R-300533 states (in part): "The revenue from the levy of assessments within the District [*i.e.*, the PBID] ***shall not be used*** to provide activities or improvements outside the District or ***for any purpose other than the purposes specified in the resolution of intention*** [*i.e.*, Resolution no. R-300287]." FAC ¶ 9 (emphasis added). In April 2005, Downtown Partnership and the City entered into an Operating and Management Agreement pertaining to the operation and management of the PBID ("2005 PBID Contract"). The city council then adopted Ordinance no. O-19365 and thereby effectively approved the making of the 2005 PBID Contract. FAC ¶ 10.

In October 2012, Downtown Partnership and the City entered into a First Amendment to the 2005 PBID contract ("2012 PBID Contract Amendment"). FAC ¶ 11. The city council adopted Ordinance no. O-20206 and thereby effectively approved the City's making of the 2012 PBID Contract Amendment. *Id.*

Downtown Partnership has made numerous expenditures from PBID revenues in violation of Resolutions R-300287 and R-300533 (or at least one of them). FAC ¶ 12. The Challenged PBID Expenditures include: (1) approximately $13,000.00 paid to NCA for professional services; (2) approximately $19,000.00 paid to PUMA for consulting services; and an as-of-yet undetermined amount paid for service related to homelessness outside the scope of what was authorized. *Id.* Plaintiff

has had difficulty in ascertaining whether there are additional expenditures that warrant challenge because Downtown Partnership has failed to provide a full accounting thereof and has taken affirmative steps to conceal the nature and extent of some of the Challenged PBID Expenditures. FAC ¶ 13. After this lawsuit was initiated, the PBID Advisory Board, which is dominated by Downtown Partnership, authorized the expenditure of PBID funds up to $100,000.00 to defend Downtown Partnership (and possibly others) in this lawsuit. FAC ¶ 17. The expenditure of PBID funds for such purpose would also constitute a Challenged PBID Expenditure, and to the extent PBID funds have been spent for such purpose, this lawsuit seeks to recover those funds as well.

Before commencing this lawsuit, Plaintiff caused a Notice of Intent to Sue to Recover for Improper Expenditures of Taxpayer Funds to be sent to Downtown Partnership. FAC ¶ 14. Plaintiff also caused a Notice of Intent to Sue to Recover for Improper Expenditures of Taxpayer Funds to be sent to the City. FAC ¶ 16. The City did not respond. *Id.*

III. ARGUMENT AND ANALYSIS

A. Courts Have Rejected the Downtown Partnership's Narrow Interpretation of Code of Civil Procedure Section 526a

Downtown Partnership's lead argument is that Plaintiff does not have standing under Code of Civil Procedure Section 526a. Section 526a provides:

> An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities. [¶] An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

Here, Plaintiff is attempting to recover public funds. The real issue presented by the demurrer appears to be whether standing under Section 526a is limited to suing the governmental agency.

Case law interpreting Section 526a rejects a narrow, literal interpretation. *See Chiatello v. City and County of San Francisco*, 189 Cal. App. 4th 472, 482 (2010) (explaining that numerous courts have

applied the statute in a manner that has "outrun the literal statutory language"). For example, Section 526a makes no mention of state agencies or state funds, yet, as Downtown Partnership points out, "[t]axpayer suits may be brought against a state agency or officer." Demurrer, p. 3, lns. 8-9 (*citing California Assn. for Safety Education v. Brown*, 30 Cal. App. 4th 1264, 1281 (1994)). More recently, the Court of Appeal sitting in this very district and division applied Section 526a in a broad manner exceeding the statute's literal language. In *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District*, 215 Cal. App. 4th 1013 (2013), the issue was whether a representative organization had standing to bring a taxpayer action under Section 526a when the organization's individual members paid taxes but the organization itself did not. Despite the statute's literal language, which seemingly confers standing only on individual persons or corporations that pay taxes,[1] the Court held that corporations that did not pay taxes, but had taxpaying members, also had standing to bring a taxpayer action under Section 526a. *Taxpayers*, *supra*, 215 Cal. App. 4th 1013.

Indeed, numerous appellate courts have uniformly refused to give Section 526a the narrow, literal reading that Downtown Partnership is suggesting and "have consistently construed Section 526a liberally to achieve [its] remedial purpose," which is to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." *Blair v. Pitchess*, 5 Cal. 3d 258, 267-268 (1994); *see also Vazquez v. State of Calif.*, 105 Cal. App. 4th 849 (2003) ("although by its terms . . . [Section 526a] applies to local governments, it also extends to all state and local agencies and officials"); *Los Altos Property Owners Ass'n v. Hutcheon*, 69 Cal. App. 3d 22 (1977) (taxpayers had standing to bring action against school districts and its members even though language of statute is limited to actions against towns, cities, counties, and cities and counties); *Van Atta v. Scott*, 27 Cal. 3d 424, 449-450 (1980) ("While [section 526a] clearly encompasses a suit for injunctive relief, . . . in furtherance of the policy liberally construing section 526a, . . . our courts have permitted taxpayer suits for declaratory relief, damages and mandamus").

---

[1]Section 526a contains no language expressly conferring standing on representative organizations whose members pay taxes when the organization itself does not pay taxes.

Downtown Partnership cites to no authority that taxpayers may not bring suit directly against a private party under Section 526a. In *Schaefer v. Berenstein*, 140 Cal. App. 2d 278 (1956), a taxpayer filed a lawsuit "in a representative capacity as a taxpayer" against several private defendants, including a city's special counsel, in order to recover damages for a number of fraudulent real-estate transactions. *Id.* at 284-286. The taxpayer alleged damages of $1 million and sought a judgment in favor of the city. *Id.* at 287. For present purposes, it is important to note defendants' first argument: "Defendants first say that plaintiff does not have the legal capacity to maintain the action and that he is not the real party in interest." *Id.* at 289-290. The appellate court concluded that the judgment entered after the demurrer to the plaintiff's claims was sustained had to be reversed as to the attorney and several of his ***private*** co-defendants. *Id.* at 300. That reversal would not have happened if the appellate court had accepted the defendants' first argument. The issue is whether Plaintiff, as a taxpayer organization, is legally authorized to sue Defendants, and the right of a taxpayer to sue a private party to recover on behalf of the injured public agency is confirmed by *Schaefer*.

What Downtown Partnership's opening brief fails to mention is that the state's highest court has itself allowed Section 526a lawsuits against private parties. Consider what it said in *Miller v. McKinnon*, 20 Cal. 2d 83, 96 (1942) (emphasis added): "As heretofore pointed out, however, a cause of action exists to recover from the person receiving the money illegally paid, ***independent of any statute***, and it is also clear that ***the action may be prosecuted by a taxpayer in his name on behalf of the public agency***." This is important because the defendants in *Miller* included a partnership and its members--that is to say, private parties. *Id.* at 86 (describing defendants). So when the Supreme Court concluded that the defendants' demurrer had to be over-ruled and that they had to file an answer to the taxpayer's complaint, that's the strongest possible indication that Section 526a lawsuits by private taxpayers on behalf of public agencies against private parties are permissible. *Id.* at 101. In this regard, Plaintiff has alleged that it is suing on behalf of the City and the general public. *See* FAC, ¶ 3. The FAC's prayer bolsters the point because all relief involving the recovery of illegally spent money asks that the money be returned to the City. *Accord Blair v. Pitchess*, 5 Cal. 3d 258, 268 (1971) (emphasis added): "We have even permitted ***taxpayers to sue on behalf of a city or county*** to recover funds illegally expended."

Even if the Court sticks closely to Section 526a's exact language, Plaintiff would still have adequate standing to bring this action under the statute. Section 526a states that a taxpayer action "restraining and preventing any illegal expenditure of . . . funds, or other property of a county, town . . . or ***city*** . . . , may be maintained ***against any*** officer thereof, or any agent, or ***other person, acting in its behalf***. . ." CODE OF CIV. PROC. § 526a (emphasis added). The Court need look no further than the operating agreement between Downtown Partnership and the City to determine that the former are acting on behalf of the City. For example, the agreement states that Downtown Partnership agrees to perform some of the same functions that would otherwise be performed by the City. *See, e.g.*, FAC Ex. C, pp. 14-16 (listing services provided by the City), pp. 17-18 (listing services generally provided by the City to be provided by Downtown Partnership).

Downtown Partnership asserts that the Property and Business Improvement District Law of 1994 prohibits Downtown Partnership's role from being played by a governmental actor and the Legislature somehow "intended to protect private nonprofits like the Partnership from suits like SDOGs." Demurrer, p. 5, lns. 9-17. The argument skips key steps. An "owners' association" cannot be a governmental entity. However, an owners' association does have responsibilities to comply with laws intended to protect the public such as the Ralph M. Brown Act and California Public Records Law. STS. & HY. CODE § 36614.5. Furthermore, nothing precludes deeming an entity like Downtown Partnership from being an agent of a governmental entity. Section 526a applies to agents and others acting on behalf of a city. Under Streets and Highways Code Section 36651, a management district plan "may, but is not required to, state that an owners' association will provide the improvements or activities described in the management district plan." If the management plan designates an owners' association, the city then contracts with the designated nonprofit corporation to provide services. *Id.*

The cases relied on by Downtown Partnership are inapposite. Downtown Partnership cites to *People ex rel. Harris v. Rizzo,* 214 Cal. App. 4th 921 (2013), for the proposition that since Kamala Harris did not have standing under Section 526a to bring a lawsuit against Bell's city manager for waste of public funds, Plaintiff should not have standing here. Demurrer, p. 3, lns. 17-25. However, the argument is unavailing and actually misleading. The Attorney General was found to have standing to bring a government-waste case against the city manager. *Rizzo, supra*, 214 Cal. App. 4th at 937-938.

Section 526a provides standing to taxpayers; it does ***not limit*** standing to taxpayers. *Id.* at 938. Thus, even if the Attorney General could not assert a claim against the city manager under Section 526a, the Attorney General still had standing to pursue the city manager. The case in no way suggests Plaintiff does not have standing here given that its members are taxpayers.

Downtown Partnership relies on *Fort Emory Cove Boatowners Association v. Cowett*, 221 Cal. App. 3d 508 (1990), for the proposition that taxpayers may not bring an action under Section 526a against entities that provide contract services. Demurrer, p. 5, lns. 2-5. However, it is important to note what the case does and does not stand for. In *Fort Emory*, the public agency accused of the illegal spending was not even a party to the lawsuit, and the plaintiffs were not suing on the agency's behalf. *Fort Emory, supra*, 221 Cal. App. 3d 514. The Court noted that there was no authority presented for the proposition that a taxpayer suit could be maintained on behalf of the taxpayer individually--as opposed to being maintained on behalf of a public agency--for illegally "receiving" public funds. The Court also observed that the activity being challenged did not even fall within the scope of Section 526a. *Id.* (explaining that interest in which attorney prosecutes case is not a proper purpose of a taxpayers' suit). Here, in contrast, Downtown Partnership is (through its contract with the City) ***spending*** public funds to provide public services. Furthermore, it is well established that in a government-waste case, restitution must be made from the persons who improperly receive public funds. *See Rizzo, supra*, 214 Cal. App.4th at 945 (unlawfully paid compensation entitled "the City to restitution from the Councilmembers ***who received*** the improper salaries"; emphasis added). Consequently, Plaintiff has standing and Downtown Partnership *et al.* are proper defendants because they're the ones from whom restitution must come. (As noted above, Plaintiff is suing on the City's behalf. *See* FAC, ¶ 3. The prayer is consistent with this, seeking repayment of the money to the City.)

In *Humane Society of the United States v. State Board of Equalization*, 152 Cal. App. 4th 349 (2007), the action was directed at the beneficiaries of tax relief for their allegedly illegal conduct. Here, the issue is that Downtown Partnership is spending public funds on what Plaintiff alleges to be outside the scope of what it is authorized to spend the money on.

Altogether, the demurrer should be overruled on this ground. Plaintiff does have standing to assert a taxpayer claim directly against Downtown Partnership for the illegal expenditure of public

funds. If the Court is inclined to sustain the demurrer, leave to amend should be granted such that Plaintiff can name the City of San Diego as an involuntary plaintiff or as a defendant rather than just as a "Real Party in Interest," or to challenge the City for allowing public funds to be spent in an unauthorized manner.

B. Plaintiff Adequately Alleges Public Funds Are Being Spent in an Unauthorized Manner

Downtown Partnership tries to cast this lawsuit as a preference dispute over how the PBID money is spent. *See* Demurrer, p. 7, lns. 7-26. That is not the case. In *Taxpayers for Accountable School Bond Spending*, the Court determined that Proposition S, which included a "Bond Project List" of projects the bond proceeds could be used for, did not authorize the use of bond funds to pay for new field lighting at a particular football stadium because the lighting was not on the approved list. *Taxpayers for Accountable School Bond Spending, supra*, 215 Cal. App. 4th at 1027-1031. While reasonable minds can debate whether lighting at this stadium is beneficial or a wise use of resources, the legal issue was whether the bond proceeds generated as a result of a voter initiative could be spent on a project not on the approved list. Similarly, the issue here is not whether the programs and services Downtown Partnership implements are beneficial or a wise use of resources. The issue is whether they are authorized. In *Taxpayers for Accountable School Bond Spending*, the issue was ***not whether the voters could*** have identified field lighting for this particular stadium as an authorized use of the funds, ***but whether they did***. It is the same here: the issue is not whether the PBID law in the abstract allows for funds to be used in the way Downtown Partnership has been using the funds, but whether Downtown Partnership was actually authorized to use the funds as it did by the property owners who voted for the PBID in the first place.

By way of further example, in *Trickey v. City of Long Beach*, 101 Cal. App. 2d 871, 879 (1951), the state granted a city all right, title, and interest in tidelands within the city, in trust for development of a harbor, to the city. All monies derived from the land were to be used only in furtherance of the trust. *Id.* The petitioner brought a taxpayer-waste action against the city because it believed trust funds were being misappropriated to general municipal purposes instead of trust purposes. *Id* at 879-880. The city argued that taxpayers had no standing to bring the action and that enforcement of the trust must be by the state, which created the trust. *Id.* at 880. However, the appellate court rejected the city's

argument and stated that a "taxpayer has a sufficient interest to restrain the officials from making unlawful use of the trust funds and to compel the retransfer of trust funds unlawfully transferred." *Id.* The court then posed the following question: "Must a taxpayer, when he sees the money of the city being unlawfully applied and paid out for unlawful purposes, sit idly by, and is he without right either to stay the illegal expenditures or recover the same on behalf of the city after they are made, simply because he cannot show that he thereby sustained some special damage? This court has repeatedly held that he is not so helpless." *Id.* at 881 (citing *Crowe v. Boyle*, 184 Cal. 117 (1920)); *see also Terry v. Bender*, 143 Cal. App. 2d 198 (1956) (allowing for taxpayer-waste action to challenge contractual payment from city to attorney despite taxpayer not being party to contract).

Plaintiff's members need not run for office to ensure accountable government and to make sure their tax dollars are not being wasted. There are may ways to participate in a democracy, including pursuing litigation when necessary. The Legislature provided that every taxpayer can maintain a lawsuit for government waste. Plaintiff is exercising that right on behalf of its members.

C. <u>This Action Is Not Time-Barred</u>

Downtown Partnership asserts that this lawsuit is time-barred under either PBID Law or the validation rules codified in Code of Civil Procedure Section 863. First, validation law is not applicable here. For the validation law to be applicable, validation proceedings must be "authorized to be determined pursuant to [the Validation Proceedings Chapter]" under some ***other*** law--that is, another law must independently authorize a validation proceeding. CODE OF CIV. PROC. § 860. There is no law that authorizes validation procedures with respect to the PBID, and Downtown Partnership certainly has not cited to one. *See Cal. Commerce Casino, Inc. v. Schwarzenegger*, 146 Cal. App. 4th 1406, 1423 (2007) (explaining that courts must look to other statutes to determine if the public agency's actions are subject to validation under the statute).

Second, Streets and Highways Code Section 36633 does not bar this action. That section limits the time to challenge an assessment. Plaintiff is not challenging the assessment in this action. Plaintiff is challenging the illegal expenditure of the collected taxes/assessments. *See* FAC ¶¶ 1 & 12.

Overall, this action is timely and the demurrer should be overruled on this ground.

D. Plaintiff Has Standing on Its Declaratory Relief Claim

Downtown Partnership argues that Plaintiff does not have standing because Plaintiff or its members are not parties to the contract between the City and Downtown Partnership. First, Plaintiff is suing on behalf of the City. FAC ¶ 3 ("Plaintiff is suing ***on behalf of and for the benefit of*** its members, all persons similarly situated, all taxpayers within the geographic jurisdiction of the PBID, ***CITY itself as a public agency***, and the general public"; emphasis added). More fundamentally, however, Downtown Partnership is taking an overly narrow view of declaratory relief.

"The fundamental basis of declaratory relief is an actual, present controversy." *Friends of the Trails v. Blasius*, 78 Cal. App. 4th 810, 831 (2000) (citing 5 Witkin Cal. Proc. (4th ed. 1997) Pleading, § 817, pp. 273-274). In that connection, the scope of declaratory relief is far broader than one might think from the statutory language alone. *See, e.g., City of Cotati v. Chasman*, 29 Cal. 4th 69, 79 (2002) ("That the constitutionality of an ordinance can be a proper subject for declaratory relief is without doubt."); *Vedanta Soc'y of S. Cal. v. California Quartet*, 84 Cal. App. 4th 517, 532 (2000) (providing declaratory relief in action to ascertain effect of tie votes in CEQA context); *Alameda County Land Use Assn. v. City of Hayward*, 38 Cal. App. 4th 1716, 1723 (1995) (explaining that action for declaratory relief lies when parties dispute whether a public entity has engaged in conduct or established policies in violation of applicable law); *Viso v. State of Cal.*, 92 Cal. App. 3d 15, 22 (1979) (stating that plaintiff "may properly test the validity of a zoning ordinance in an action for declaratory relief"). Whether a party may seek declaratory relief does not turn on whether that party is named in a contract. *See Maryland Casualty Co. v. National Am. Ins. Co.*, 48 Cal. App. 4th 1822, 1829 (1996) (determining plaintiff had standing to bring declaratory relief action despite not being party to contract at issue). Declaratory relief has even been sought in taxpayer cases seeking to void contracts to which the taxpayer was not a party. *See, e.g., Finnegan v. Schrader*, 91 Cal. App. 4th 572, 577 (2001) ("The complaint sought declaratory relief that the contract was void and restitution of all salary and benefits paid to Schrader under the contract"). Finally, despite the statutory language seemingly aimed at just injunctive relief, taxpayer standing has been extended to declaratory relief. *See Cates v. California Gambling Control Comm.*, 154 Cal. App. 4th 1302, 1308 (2007) ("While the statute speaks of injunctive relief, taxpayer standing has also been extended to actions for declaratory relief.").

In addition, this argument appears to be aimed at just part of Plaintiff's cause of action or at one of the forms of relief Plaintiff seeks. A demurrer does not lie to part of a cause of action. *See Kong v. City of Hawaiian Gardens Redev't Agency*, 108 Cal. App. 4th 1028, 1046 (2003) (explaining that if there are sufficient allegations to entitle a plaintiff to relief, other allegations cannot be challenged by general demurrer). A demurrer is not the correct vehicle to challenge any particular method of relief so long as some relief can be obtained. *See, e.g., Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal. App. 1547, 561-1562 (1996).

On the whole, the demurrer should be overruled on this ground.

E. Plaintiff Has Not Improperly Split Its Causes of Action

Downtown Partnership makes the conclusory argument that Plaintiff has improperly split its claims without citing adequate legal authority to support its claim. In California, "a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. . . . A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action. . . . As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered." *Hamilton v. Asbestos Corp., Ltd.*, 22 Cal. 4th 1127, 1145 (2000).

This lawsuit and the one Downtown Partnership refers to are distinct. In the other action, Plaintiff sued the City for imposing taxes without voter approval as required by Article XIII C of the California Constitution. Def't Req. J. Notice, Ex. "D," p. 2, ¶ 4. If Plaintiff is successful there, the City will not be able to impose and collect the taxes that Downtown Partnership is illegally spending. For purposes of this lawsuit, however, Plaintiff is assuming that the tax itself is legal, but that does not mean that the tax revenues are being spent legally. The problem addressed in this lawsuit is that the funds are being illegally spent. FAC ¶ 1. If Plaintiff succeeds here, Defendants will have to return to the City all taxpayer monies that were illegally spent--even if in the other lawsuit the imposition of the taxes is found to be lawful. The injuries that the two lawsuits aim to redress are distinct.

F. Plaintiff Adequately Alleges that Illegal Expenditures Were Made

Downtown Partnership argues that Plaintiff fails to specify what expenditures are unlawful and why. Plaintiff alleges that in adopting the resolutions, the city council proposed and intended to "levy

and collect assessments to pay a prescribed portion of the cost of future activities, improvements, maintenance, and/or services of those items described in the Engineer's Report and Management Plan." FAC ¶ 24(A). Plaintiff alleges that in adopting the resolutions, the city council resolved that the proposed improvements activities, maintenance and/or services for the district consisted of "those items described in the [Engineer's Report and Management Plan." *Id.*, ¶ 24(B). The special benefit assessment done was based on the activities and improvements identified in the Engineer's Report and Management Plan. *Id.*, ¶ 24(C). Plaintiff alleges that the city council indicated that the public would have an opportunity to object to the proposed activities and improvements or the amount of the assessment at the public hearing. *Id.*, ¶ 24(D). Plaintiff alleges that the resolutions do not authorize the expenditure of any PBID funds outside the scope of the Engineer's Report and Management Plan. *Id.*, ¶¶ 25-26. Plaintiff alleges that Downtown Partnership has made numerous expenditures from PBID revenues in violation of the resolutions. *Id.*, ¶ 12. Plaintiff alleges one of those expenditures was "[a]pproximately$130,000.00 paid to NCA for professional services." *Id.*, ¶ 12(a). Plaintiff alleges another of those expenditures was "[a]pproximately $19,000.00 paid to PUMA for consulting services." *Id.*, ¶ 12(B). Other expenditures include money paid for efforts to reduce homelessness, but Plaintiff does not yet now the amount. *Id.*, ¶ 12(c). Plaintiff also alleges that it does not yet know the full nature and extent of the expenditures outside the scope of what was authorized because Downtown Partnership has failed to provide a full accounting thereof and has concealed the nature and extent of some of the expenditures. *Id.*, ¶ 13.

Downtown Partnership complains that Plaintiff generally refers to the Management Plan, which is 23 pages long (excluding the 99-page appendix). Demurrer, p. 12, lns. 11-12. However, the issue is that the Challenged PBID Expenditures are not authorized under ***any portion of*** the Management Plan. Plaintiff must reference the whole Management Plan to demonstrate that the expenditures are not listed as being authorized ***anywhere*** in the Plan. While more details will be uncovered during discovery, the complaint is sufficiently specific to enable Downtown Partnership and others to understand the basis of Plaintiff's concern.

Finally, objections to a complaint based on ambiguity or uncertainty, or asserting that facts appear only inferentially, as conclusions of law, or by way of recitals, must be raised by a ***special***

demurrer and cannot be challenged by a general demurrer. *Johnson v. Mead*, 191 Cal. App. 3d 156, 160 (1987). This demurrer was noticed as a general demurrer.

Overall, the demurrer should be overruled on this ground.

G. The Expenditures Are Unlawful

Downtown Partnership's final argument demonstrates why this lawsuit is necessary. Apparently Downtown Partnership is under the impression that it may spend the PBID funds on any "Activity" the law generally allows rather than being limited to what is authorized under the Management Plan and by the city council's resolutions.

To begin, Downtown Partnership focuses the discussion on homeless services, which are only one of three examples given of unauthorized expenditures. *See* FAC ¶ 12(C). The demurrer does not address the other two specific items Plaintiff identified: an expenditure for professional services and an expenditure for consulting services. *Id.*, ¶¶ 12(A) & (B). Plaintiff assumes that this is an attempt to garner the Court's sympathy. The issue, however, is not whether it would be wise or beneficial to society for Downtown Partnership to spend the money in this way. *Id.*, ¶ 28. The issue is whether, under the resolutions and Management Plan, such spending is authorized.

The remainder of Downtown Partnership's argument goes to factual issues. To resolve whether the Challenged PBID expenditures were for items that might fit into certain categories would require the Court to weigh and consider evidence. Plaintiff submits that a demurrer is not the appropriate forum for the Court to do so.

Altogether, the demurrer should be overruled on this ground as well.

IV. CONCLUSION

For all the foregoing reasons, the Court should overrule the demurrer in its entirety. Any defects in the allegations can easily be amended, and Petitioners request leave to amend if the Court believes the allegations are not sufficient to overrule the demurrer.

Date: January 31, 2014

Respectfully submitted,

BRIGGS LAW CORPORATION

By: _____
Mekaela M. Gladden

Attorneys for Plaintiff San Diegans for Open Government

PROOF OF SERVICE

1. My name is **Alison Greenlee**. I am over the age of eighteen. I am employed in the State of California, County of **San Diego**.

2. My ✓ business ___ residence address is **Briggs Law Corporation, 814 Mornea Blvd, Suite 107 San Diego, CA, 92110**.

3. On **January 31, 2014**, I served ___ an original copy ✓ a true and correct copy of the following documents: **Plaintiff San Diegans for Open Government's Brief in Opposition to Defendant Downtown Sna Diego Partnership, Inc.'s Demurrer**

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

✓ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

___ deposited the envelope/package with the U.S. Postal Service

✓ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of **San Diego**, California.

___ ***by overnight delivery.*** I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

___ ***by e-mail delivery.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws ___ of the United States ✓ of the State of California that the foregoing is true and correct.

Date: **January 31, 2014** Signature: _____

SERVICE LIST

San Diegans for Open Government, et al. v. Downtown San Diego Partnership, et al.
Superior Court of the State of California - County of San Diego - Hall of Justice
Case No.: 37-2013-00062382-CU-MC-CTL

Michael G. Colantuono David J. Ruderman Ryan T. Dunn Colantuono & Levin, PC 11364 Pleasant Valley Road Penn Valley, California 95946	Attorneys for Defendant Downtown San Diego Partnership, Inc.
Jan I. Goldsmith Carmen A. Brock Office of the City Attorney 1200 Third Avenue, Suite 1100 San Diego, California 92101	Attorneys for Real Parties in Interest City of San Diego
James T. Diamond Goldfarb & Lipman, LLP 1300 Clay Street, 11th Floor Oakland, California 94612	Attorney for Defendant Progressive Urban Management Associates, Inc.
Theresa C. McAteer McAteer & McAteer, APLC 110 West "C" Street, Suite 1500 San Diego, California 92101	Attorney for Marco LiMandri and New City America, Inc.

EXHIBIT G

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 09/27/2013 TIME: 10:30:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Jay Browder
REPORTER/ERM: Yvonne Medina-Luna, CSR # 12697
BAILIFF/COURT ATTENDANT: R. Camberos

CASE NO: **37-2012-00088065-CU-MC-CTL** CASE INIT.DATE: 12/19/2012
CASE TITLE: **San Diegans for Open Government v City of San Diego [Imaged]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

---

EVENT TYPE: Demurrer / Motion to Strike
MOVING PARTY: City of San Diego
CAUSAL DOCUMENT/DATE FILED: Demurrer, 06/12/2013

APPEARANCES
Cory Briggs, specially appearing for counsel Mekaela M Gladden, present for Plaintiff(s).
Michael G. Colantuono, specially appearing for counsel David J Ruderman, present for Defendant,Interested Party(s).
Carmen A Brock, counsel, present for Defendant,Interested Party(s).

The Court hears argument.

The Court confirms as modified the tentative ruling as follows:
The Request of Defendant and Interested Party San Diego Tourism Marketing District Corporation ("TMD Corp.") for Judicial Notice is granted in part and denied in part. The Court takes judicial notice of San Diego City Council Resolution No. R-303226 entitled "A Resolution of the Council of the City of San Diego Establishing a Tourism Marketing District (TMD); Levying Assessments Upon the Assessed Businesses for a Period of Five Years; Authorizing the Mayor or his Designee, on Behalf of the City, to Enter into an Agreement with the San Diego Tourism Promotion Corporation for the Operation of the Tourism Marketing District; and Prescribing a Method for Collection of Assessments," passed on December 12, 2007, a true and correct copy is attached as Exhibit "A" to the Declaration of Michael R. Cobden ("Cobden Declaration"); San Diego City Council Resolution No. R-307843 entitled "A Resolution of the Council of the City of San Diego Renewing the San Diego Tourism Marketing District; Levying Assessments Upon the Assessed Businesses for a Period of Thirty-Nine and One-Half Years; and Prescribing a Method for Collection of Assessments," passed November 27,2012, a true and correct copy is attached as Exhibit "B" to the Cobden Declaration; and San Diego Municipal Code, chapter 6, article I, division 25, sections 61.2501 through 24 61.2526: "San Diego Tourism Marketing District Procedural Ordinance", a true and correct copy is attached as Exhibit "E" to the Cobden Declaration. The Court does not take judicial notice of Exhibits "C" and "D", a true and correct copy of which are attached to the Request.

Plaintiff's Request for Judicial Notice is denied.

The Demurrer of Defendant City of San Diego ("City") and Defendant and Interested Party San Diego Tourism Marketing District Corporation ("TMD Corp.") ("Defendants") to the Second Amended Complaint ("SAC") by Plaintiff SAN DIEGANS FOR OPEN GOVERNMENT ("Plaintiff") is sustained with 10 days leave to amend, conditionally granted, as reflected below.

A validation proceeding is the exclusive remedy for cases within the scope of the validation requirements. Cal. Code Civ. Proc. § 869; *see also* Barratt American, Inc. v. City of Rancho Cucamonga, 37 Cal. 4th 685; 704-705 (2005). Therefore, a writ of mandate is not an available remedy and a parallel mandate action is unnecessary and inappropriate where a validation action is proceeding. Barratt American, Inc., 37 Cal. 4th at 705; County of Orange v. Barratt American, Inc. (2007)150 Cal. App. 4th 420, 440-441. Furthermore, declaratory and injunctive relief claims coextensive with a validation claim should be dismissed. Katz v. Campbell Union High School District (2006) 144 Cal.App.4th 1024, 1033-1034. The procedural framework for validation actions is found in California Code of Civil Procedure sections 860 through 870.5 (hereinafter referred to as the validation statutes). Any challenges to the validity of the governmental action must be raised in the validation proceeding and the validation judgment is binding on the agency seeking the judgment and on all other parties. Committee for Responsible Planning v. City of Indian Wells (1990) 225 Cal. App. 3d 191, 196.

Regarding standing, "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem." C.C.P. § 860. "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter." C.C.P. § 863.

An interested person within the meaning of the validation statutes "is a person having a direct, and not merely a consequential, interest in the litigation." Torres v. City of Yorba Linda (1993) 13 Cal.App. 4th 1035, 1042 (quoting Associated Boat Industries v. Marshall (1951) 104 Cal. App. 2d 21, 22). In Torres, the Court held that Plaintiffs, who had paid sales tax in the city, but did not reside or pay property taxes there, did not have standing to challenge a redevelopment project. Torres, 13 Cal. App. 4th at 1038-1039. The Court also noted that sales tax was "a levy imposed on the retailer, not the consumer." Id. at 1047.

Plaintiff's status as an association of city residents and taxpayers does not in and of itself confer standing. An association does not have standing unless it can demonstrate: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Property Owners of Whispering Palms, Inc. v. Newport PacWc, Inc. (2005) 132 Cal.App.4th 666, 672-673, quoting Hunt v. Washington State Apple Advertising Com'n (1977) 432 U.S. 333, 343. Accordingly, an association is not an "interested person" in validation unless it can show at least one of its members is an "interested person." *See* Citizens Against Forced Annexation v. County of Santa Clara (1984) 153 Cal.App.3d 89, 98 (association adequately alleged standing to challenge annexations in validation by alleging members resided or owned land in territories to be annexed); *see also* Regus v. City of Baldwin Park (1977) 70 Cal.App.3d 968, 972; *cf.* Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 563 (one or more organization members must be "directly" affected by the challenged act).

Plaintiff does not appear to pay the assessment/tax it challenges. Torres, 13 Cal.App.4th at 1047 (retail customer cannot assert taxpayer standing to challenge tax on businesses). Plaintiff is a non-profit taxpayer and voter organization formed and operating under the laws of the State of California. Plaintiff alleges an interest in open, accountable, responsive government, and the protection of its members' rights as taxpayers and voters. The assessment/tax at issue directly impacts the business owners it is levied against. Specifically, assessed businesses are hotel owners, operators or authorized representatives within the District. Paragraph 8 of the SAC alleges that at least one member of the Plaintiff organization falls into the enumerated categories A-G, but fails to affirmatively state which category. Failure to identify the category is crucial because only category E demonstrates the "special interest" required to sufficiently allege standing. Thus, Paragraph 8 does not sufficiently allege that at least one of the organization's members falls into a category of persons affected by the assessment/tax. Therefore, Plaintiff in and of itself does not have a direct interest in the litigation and lacks association standing for the purpose of a validation action.

Plaintiff is granted 10 days leave to amend on condition that it can allege that at least one or more of Plaintiff's members specifically fall into category D and E set forth in paragraph 8 of the SAC. Property Owners of Whispering Palms, Inc. K Newport Pacific, Inc. (2005) 132 Cal.App.4th 666, 672-673.

Defendant is directed to give notice of ruling.

Judge Joel R. Wohlfeil

EXHIBIT H

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
09/09/2013 at 01:38:00 PM
Clerk of the Superior Court
By Lee McAlister,Deputy Clerk

BRIGGS LAW CORPORATION [FILE: 1593.19]
Cory J. Briggs (State Bar no. 176284)
Mekaela M. Gladden (State Bar no. 253673)
Anthony N. Kim (State Bar no. 283353)
99 East "C" Street, Suite 111
Upland, CA 91786
Telephone: 909-949-7115
Fax: 909-949-7121

Attorneys for Plaintiff San Diegans for Open Government

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO--CENTRAL DIVISION

SAN DIEGANS FOR OPEN GOVERNMENT, Plaintiff, vs. CITY OF SAN DIEGO; and DOES 1 through 1,000, Defendants.	CASE NO. 37-2013-00052721-CU-MC-CTL **OPPOSITION TO DEFENDANT CITY OF SAN DIEGO'S DEMURRER TO PLAINTIFF SAN DIEGANS FOR OPEN GOVERNMENT'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Complaint Filed: June 12, 2013 Department: 71 (Prager) Hearing Date: September 20, 2013 Hearing Time: 10:00 a.m.

Plaintiff San Diegans for Open Government respectfully submits this opposition to Defendant City of San Diego's demurrer.

I. INTRODUCTION

This demurrer is unnecessary but convenient. It's unnecessary because Plaintiff has members who are subject to the BID taxes at issue in this lawsuit, have paid those taxes, and will have to pay them in the future if they are not invalidated here. Plaintiff seeks leave to amend its pleading, only in an abundance of caution, in order to add this factual (and truthful) allegation if the Court believes it's necessary to do so.

The reason this demurrer is convenient is that it allows Plaintiff an opportunity to brief the Court on what the proper legal standard should be when a new tax is authorized--even when the person challenging the tax is not subject to it but is a registered voter within the jurisdiction where the tax is being imposed. In other words, Plaintiff believes it's irrelevant that it actually has members who are subject to, have paid, and in the future will have to pay the BID taxes, because Plaintiff also has members who are registered voters within the City of San Diego who were not allowed to vote on the taxes. California's voters took back control over government's ability to raise revenues by passing Proposition 26 in 2012, to close numerous loopholes to Proposition 13 that had developed over the decades. BID taxes used to fall into one of those loopholes for "assessments." They do no more.[1] Plaintiff appreciates the opportunity to explain the new legal requirements for revenue generators like the BID taxes. The fact that Plaintiff can make a truthful allegation that satisfies Defendant City of San Diego's desired legal standard does not mean that such standard is correct. It's not.

This lawsuit challenges Defendant's authorization of a variety of "tax" levies and collections--labeled "assessments" by Defendant--without first obtaining the requisite approval of San Diego's voters. Defendant asserts that Plaintiff does not have standing because Plaintiff has not demonstrated that any of its members are liable to pay the tax. The problem with the demurrer is that it invites the Court to take the wrong approach to evaluating standing to raise a Proposition 26 challenge to a new tax. Defendant asks the Court to assume that it Defendant was correct all along, that what is at issue

---

[1] The taxes at issue here fall under a legal framework that is different from the Mello-Roos framework on which this Court validated the special tax for the San Diego Convention Center expansion earlier this year (which is now on appeal). Unlike the special tax there, the BID taxes at issue here are business-based and not property-based. Even Defendant's own city attorney has written legal memos calling the BID taxes into serious constitutional doubt.

here is an "assessment" that was not required to go to the vote of the electorate. Assuming Defendant is right and Plaintiff is wrong, the only harm would be to those who pay the tax. However, that is not how standing works. To assess whether a plaintiff has standing, the Court should look to see whether a plaintiff has standing assuming the wrong alleged in the complaint is true. In this case, Plaintiff alleges that the tax required a vote of the electorate but that the vote was denied to most of the electorate. Thus, it is not only those liable for the tax who have standing, but also those who were denied the right to vote on it.

As explained in more detail below, Plaintiff has adequately alleged that it has standing to maintain this action and the demurrer should be overruled.

II. BACKGROUND

Plaintiff is a non-profit taxpayer and voter organization formed and operating under the laws of the State of California. Plaintiff's members reside in or near the City of San Diego, California, and have an interest in ensuring open, accountable, responsive government, and the protection of their rights as taxpayers and voters. Complaint ¶ 1. Defendant is a "local government" under Section 1(b) of Article XIII C of the California Constitution. *Id.*, ¶ 2.

This lawsuit challenges Defendants' authorization of a variety of "tax" levies and collections--euphemistically labeled "assessments" by Defendants in order to avoid public scrutiny--without first obtaining the requisite approval of the voters of the City of San Diego. *Id.*, ¶ 4. The illegal tax scheme received final approval on or about May 24, 2013, in order to generate revenues for what are commonly known as Business Improvement Districts ("BIDs") for Fiscal Year 2013-14, the proceeds of which are used to fund the activities of the BIDs under management agreements between Defendants and third-party contractors. *Id.* This scheme was approved by Defendants' city council through Resolution nos. 308143 and 308144 ("BID Resolutions"). *Id.*

In November 2010, the voters of California approved Proposition 26. *Id.*, ¶ 5. Proposition 26 amended several provisions of Article XIII C and Article XIII D of the California Constitution in order to close a variety of loopholes that government agencies, including local governments like Defendants, had been using to increase tax revenues without having to use the word "tax" and thereby escape the

requirement for voter approval of tax increases. *Id.* Proposition 26 amended several provisions of Article XIII C and Article XIII D of the California Constitution in order to close a variety of loopholes that government agencies, including local governments like Defendants, had been using to increase tax revenues without having to use the word "tax" and thereby escape the requirement for voter approval of tax increases. *Id.* Following Proposition 26, Section 1(e) of Article XIII C now defines "tax" to mean any "levy, charge, or exaction of any kind by a local government" with certain exceptions. *Id.*, ¶ 5(A). All taxes must be submitted to the electorate and voted on. *Id.*, ¶ 5(B).

Defendant held a public hearing on the BID Resolutions on May 13, 2013. *Id.*, ¶ 9. Plaintiff opposed the approval of the BID Resolutions prior to completion of the public hearing. *Id.* The levies and collections authorized by the BID Resolutions constitute a "tax" within the meaning of Section 1(e) of Article XIII C of the California Constitution. *Id.*, ¶ 13. The levies and collections authorized by the BID Resolutions do not qualify for any of the exceptions to the "tax" definition under Section 1(e) of Article XIII C of the California Constitution. *Id.*, ¶ 14. There has been no vote of the electorate of the City of San Diego on the levies and collections authorized by the BID Resolutions, in violation of the California Constitution. *Id.*, ¶ 15.

III. STANDARD OF REVIEW

A demurrer is limited to defects on the face of the pleading at issue or from judicially noticed facts. CODE OF CIV. PROC. § 430.30. Its purpose is to test the sufficiency of a complaint by raising questions of law, and in ruling on it, a court must accept all allegations of fact as true. *Gayer v. Polk Gulch* (1991) 231 Cal. App. 3d 515, 519. Courts are required to construe pleadings liberally, with a view toward achieving substantial justice. CODE OF CIV. PROC. § 452.

A demurrer may not be sustained if the defects do not appear on the face of the complaint or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. A complaint's minor imperfections will be ignored, and a general demurrer to a complaint will be overruled as long as "the necessary facts are shown to exist, although inaccurately or ambiguously stated, or appearing by necessary implication only." *Anderson v. Bank of Lassen* (1903) 140 Cal. 695, 699.

IV. ARGUMENT AND ANALYSIS

A. Plaintiff Has Standing

Defendant argues that Plaintiff has not alleged that any one of its members has been subject to, has paid, or will ever have to pay a BID assessment. To understand Plaintiff's standing, an understanding of what Plaintiff intends to achieve is necessary. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-690 (1973) (basing standing determination on allegation in complaint; and if allegations are proved, whether plaintiffs would be among the persons injured). The constitutional wrong that Plaintiff complains of is that the tax should have been approved by a vote of the electorate, but Plaintiff's members have not been given the opportunity to vote on the tax even though at least one of Plaintiff's members was registered to vote in the City of San Diego. Complaint ¶ 16. That is because the levies and collections authorized constitute a "tax" within the meaning of Section 1(e) of Article XIII C of the California Constitution. Complaint ¶ 14. Taxes require a vote of the electorate.

The constitutional context within which this case arises is the wake of a series of voter-approved initiatives aimed at guaranteeing the right to vote on any measure designed to increase government revenues. Proposition 218 is the "Right to Vote on Taxes Act." *Howard Jarvis Taxpayer Assn. v. City of San Diego* (1999) 72 Cal. App. 4th 230, 235 (1999). Proposition 26 is the "Supermajority Vote to Pass New Taxes and Fees Act." In essence, the constitutional claim being asserted by Plaintiff here is about the right to vote. Thus, to establish standing, all Plaintiff needs to allege is that at least one of its members was qualified to vote and was denied that opportunity. Plaintiff has done so. *See, e.g.*, Complaint ¶¶ 1 & 16.

In arguing that Plaintiff does not have standing, Defendant first indirectly disputes the merits of Plaintiff's case. Defendant cites to *Howard Jarvis Taxpayers Association, supra*, challenging a BID assessment under Proposition 218, and *Evans v. City of San Jose* (1992) 3 Cal. App. 4th 728, challenging a business assessment under Proposition 13. However, both of those cases arose before Proposition 26, which further aims to close loopholes on approving taxes without a vote of the electorate, and before our local appellate court's decision in *Golden Hill Neighborhood Association v. City of San Diego* (2011) 199 Cal. App. 4th 416. Now it is Defendant's burden to show that the

contested assessment amounts are proportional to the benefits conferred on the businesses in order for an assessment to pass constitutional muster.[2] *See id.* at 433-434 (finding City had not met its burden of showing assessment amounts were proportional to special benefits conferred on parcels subject thereto). In other words, what previously was considered a legitimate assessment no longer qualifies as an assessment under current law.

Defendant next relies on *Torres v. City of Yorba Linda* (1993) 13 Cal. App. 4th 1035. However, that case does not stand for the proposition Defendant says it does. Defendant asserts that "plaintiffs who merely paid sales tax in a city, but did not reside or pay property taxes there, were held not to have standing to challenge a city action." Demurrer, p. 4, lns. 18-20. The case held no such thing. In *Torres*, the plaintiffs challenged a redevelopment plan in Yorba Linda. *Id.* at 1038-1039. The plaintiffs were not residents of Yorba Linda, did not pay property taxes in Yorba Linda, and were not otherwise beneficially interested in the area covered by the amended redevelopment plan. *Id.* at 1043. Here, Plaintiff's members are residents, pay taxes, and are otherwise beneficially interested in both the geographic area and the subject matter. Complaint ¶ 1. To the extent the court in *Torres* held that a plaintiff must be a taxpayer to have standing, that was in the context of taxpayer standing under Code of Civil Procedure Section 526a. *Torres*, 13 Cal. App. 4th at 1048 ("Nonetheless, a plaintiff must establish he or she is a taxpayer to invoke standing under section 526a or the case law."). In *Torres*, the plaintiffs were not challenging a tax; they were challenging a redevelopment plan. Section 526a provides a vehicle for taxpayers to challenge illegal waste of public funds. As Plaintiff is challenging the legality of the tax itself in this action and not how taxpayer money is being spent, Plaintiff has not invoked taxpayer standing under Section 526a (but will if necessary). *See* Complaint ¶ 8.

While Plaintiff will assert taxpayer standing if necessary, the reality is that it shouldn't be necessary to do so. A plaintiff can have standing to pursue an illegal tax without invoking taxpayer standing. For instance, in *City of Industry v. City of Filmore* (2011) 198 Cal. App. 4th 191, the appellate court determined that the plaintiffs did not need to establish standing as taxpayers to challenge the disbursement of sales-tax revenues because the plaintiffs alleged a variety of other harms, including ***taking actions without voter approval***. In other words, just because there is a tax involved does not

[2] This evidence-dependent inquiry is obviously inappropriate for decision by demurrer.

mean that only those who allege taxpayer standing under Code of Civil Procedure Section 526a have standing to maintain a lawsuit; there are other harms that give rise to standing. In this case, Plaintiff has alleged harm in its members having been denied the opportunity to vote on the BID taxes.

Altogether, Plaintiff has alleged a sufficient interest in the area and the subject matter to maintain this action.

B. Plaintiff Is Beneficially Interested in Compelling the Performance of the City's Duty

Defendant also asserts that Plaintiff is not entitled to the relief requested because Plaintiff's members do not have a "beneficial interest." The "beneficial interest" issue is addressed in the standing discussion above and will not be repeated. Furthermore, to the extent that Defendant takes issue with some of the relief requested, a demurrer does not lie to part of a cause of action. See *Kong v. City of Hawaiian Gardens Redev't Agency*, 108 Cal. App. 4th 1028, 1046 (2003) (explaining that if there are sufficient allegations to entitle a plaintiff to relief, other allegations cannot be challenged by general demurrer). A demurrer is not the correct vehicle to challenge any particular method of relief so long as some relief can be obtained.

C. If Necessary, Plaintiff Should Be Granted Leave to Amend

If the Court determines that Plaintiff does not have standing on behalf of its members who should have had the opportunity to vote but were denied that opportunity, Plaintiff can amend to meet the standard Defendant is espousing. Plaintiff has members who are subject to the tax being levied. While Plaintiff does not believe that it is necessary to include allegations that its members are subject to the tax and/or invoke taxpayer standing, Plaintiff is able to make those allegations and requests leave to amend if the Court determines that such allegations are required.

V. CONCLUSION

For all of these reasons, the demurrer should be overruled. Any defects in the allegations can easily be amended, and Plaintiff requests leave to amend if the Court believes the allegations are not sufficient to overrule the demurrer. Leave to amend is especially appropriate given that there has been only one contested round of attacks on Plaintiff's operative pleading.

Date: September 9, 2013.

Respectfully submitted,

BRIGGS LAW CORPORATION

By: 

Mekaela M. Gladden

Attorneys for Plaintiff San Diegans for Open Government

PROOF OF SERVICE

1. My name is **Alison Greenlee**. I am over the age of eighteen. I am employed in the State of California, County of **San Bernardino**.

2. My ✓ business ___ residence address is **Briggs Law Corporation, 99 East "C" Street, Suite 111, Upland, CA, 91786**.

3. On **September 9, 2013**, I served ___ an original copy ✓ a true and correct copy of the following documents: **OPPOSITION TO DEFENDANT CITY OF SAN DIEGO'S DEMURRER TO PLAINTIFF SAN DIEGANS FOR OPEN GOVERNMENT'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

✓ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

___ deposited the envelope/package with the U.S. Postal Service

✓ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of **San Diego**, California.

___ ***by overnight delivery.*** I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

✓ ***by e-mail delivery.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws ___ of the United States ✓ of the State of California that the foregoing is true and correct.

Date: **September 9, 2013** Signature: _____

SERVICE LIST

San Diegans for Open Government v. City of San Diego et al.
San Diego County Superior Court Case no. 37-2013-00052721-CU-MC-CTL

Carmen A. Brock Office of the City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101-4100	Attorney for Defendant City of San Diego

EXHIBIT I

COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT,
DIVISION ONE,
STATE OF CALIFORNIA

~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~

Docket no. D065929

San Diego County Superior Court Case No. 37-2013-00062908-CU-MC-CTL
(Judge Timothy B. Taylor--Department 72)

SAN DIEGANS FOR OPEN GOVERNMENT,
Appellant and Plaintiff

v.

CITY OF SAN DIEGO,
Respondents and Defendants

~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~

APPELLANT'S OPENING BRIEF

BRIGGS LAW CORPORATION [BLC file: 1593.25]
Cory J. Briggs (SBN 176284)
Cory@briggslawcorp.com
Mekaela M. Gladden (SBN 253673)
Mekaela@briggslawcorp.com
99 East "C" Street, Suite 111
Upland, CA 91786
Telephone: 909-949-7115

Attorneys for Appellant San Diegans for Open Government

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D065929
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Briggs Law Corporation (file no. 1593.25) Cory J. Briggs (SBN 176284) Mekaela M. Gladden (SBN 253673) 99 East "C" Street, Suite 111 Upland, CA 91786 TELEPHONE NO.: 909-949-7115 FAX NO. (Optional): 909-949-7121 E-MAIL ADDRESS (Optional): cory@briggslawcorp.com ATTORNEY FOR (Name): San Diegans for Open Government	Superior Court Case Number: 37-2013-00062908-CU-MC-CTL FOR COURT USE ONLY Court of Appeal Fourth Appellate District **FILED ELECTRONICALLY** *05/28/2014* Kevin J. Lane, Clerk By: Alissa Galvez
APPELLANT/PETITIONER: San Diegans for Open Government RESPONDENT/REAL PARTY IN INTEREST: City of San Diego	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): San Diegans for Open Government

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 26, 2014

Mekaela M. Gladden
(TYPE OR PRINT NAME)

▶ /s/ Mekaela M. Gladden
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

CERTIFICATE OF WORD COUNT

As required by Rule 8.204(c) of the California Rules of Court, and based on the "word count" function of the word processor on which this brief was written, I certify that there are less than 7,900 words in this document, excluding the cover sheet, tables, running footers, and this certificate. This brief uses font size 13.

Date: November 21, 2014.

Original Signed

By:_____
Mekaela M. Gladden

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Authorities

Judicial Authorities

Legislative Authorities

I. INTRODUCTION

Appellant asks this Court to reverse the trial court's decision to sustain the demurrer to Appellant's Verified Second Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate under the California Constitution and Other Laws without leave to amend as to the second cause of action.[1] The demurrer should have been overruled. At the very least, Appellant should have been granted leave to amend.

This lawsuit is fundamentally about the denial of the San Diego electorate's right to vote under the California Constitution. Appellant is challenging the imposition of taxes known as the City of San Diego's Maintenance Assessment District ("MAD") levies. If it is ultimately determined that the MAD levies are "taxes" under the California Constitution, as Appellant asserts, then San Diego voters had the right to vote before the levies were imposed and were denied that opportunity.

After local governments creatively identified loopholes in prior anti-tax amendments to the California Constitution, California's voters took back control over the government's ability to raise revenues by passing Proposition

---

[1] The first cause of action dealt with the San Diego Downtown Property and Business Improvement District. The issues with this district have been resolved through settlement efforts. Accordingly, Appellant is no longer asking for any relief with respect to the first cause of action.

218 in 1996 and then tightening down even further with the passage of Proposition 26 in 2010. Proposition 26 presumes that government funding mechanisms--levies, collections, or exactions of any kind--are taxes unless the funding mechanism fits into an exception. One of those exceptions is for assessments and property-related fees "imposed in accordance with the provisions of Article XIII D" of the California Constitution. The key question thus becomes whether the MAD levies and collections are being imposed in accordance with the provisions of Article XIII D. If not, then they are "taxes" that had to be approved by the voters.

This is not a case of first impression when it comes to the procedures under Proposition 218. The City was handed a major defeat by this Court in a challenge to a maintenance assessment district also subject to Article XIII D. In that case, it was held that the assessment in question could not constitutionally be imposed on property owners under Article XIII D because the engineer's report on which it was based did not adequately "separate and quantify the general and special benefits provided by the assessment." *Golden Hill Neighborhood Ass'n v. City of San Diego*, 199 Cal. App. 4th 416, 440 (2011) ("*Golden Hill*"). The language in the engineer's report in *Golden Hill* stated: "any general benefits from the Services are determined to be minimal and are more than offset by the significant other contributions the City

provides to property in the District."[2] *Id.* at 439. It turns out that the various engineer's reports for the MAD levies approved by the resolutions at issue here have essentially the same language rejected by this Court in *Golden Hill.* Because the City bears a burden of proof, thanks to Proposition 218, that the levies were properly imposed under Article XIII D, the levies are taxes under Article XIII C that should have been (but have not been) approved by the voters.

The trial court concluded that Appellant lacked standing to challenge the MAD levies. In addressing the standing issue, the gravamen of this lawsuit must be kept in mind. ***This is a voters' rights case.*** If the MAD levies are taxes, as Appellant alleges them to be, then the electorate--not the payers of the tax itself--have the right to vote. The denial of that right to vote has a direct impact on all registered voters in the jurisdiction, not just those directly responsible for the payment of the tax. The United States Supreme Court has determined that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Board of Elections*, 383

---

[2] Property owners may be assessed for the special benefit but not for the general benefit, which must be paid for by the City from other sources. *Golden Hill, supra*, 199 Cal. App. 4th at 423.

U.S. 663, 665 (1966). The Highest Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.* If the right to vote cannot be incumbent on the payment of the tax, standing to challenge the denial of the right to vote cannot be limited to those that pay the tax.

This Court should also keep in mind that this issue arises in the wake of multiple state-wide propositions approved by California voters and, in particular, Proposition 26. "All political power is inherent in the people . . . and they have the right to alter or reform it when the public good may require." CAL. CONST., art. 2, § 1. California voters have gone to the polls multiple times to secure their right to vote on taxes--even taxes that local governments have tried to pass of as "fees," "assessments," or "charges." After local politicians cleverly identified loopholes in prior propositions, California's voters again took back control over local government's ability to raise revenues with the passage of Proposition 26 in 2010. Proposition 26 presumes that all government-funding mechanisms--levies, collections, or exactions of any kind--are taxes unless the mechanism fits into an exception. The California electorate has a constitutional right to vote on taxes. CAL. CONST.,

art. 13C, § 2. The fact that California voters insisted that the electorate have the last word on taxes is indicative of the interest that they recognize in themselves, whether taxpayers or not. *See Choudry v. Free*, 17 Cal. 3d 660, 668 (1976) (determining that "the very fact that the Legislature granted the franchise to electors who do not own land indicates that they have an appreciable stake in the affairs of the district"). Thus, for standing purposes, an organization consisting of registered voters within the jurisdiction can challenge the deprivation of the electorate's right to vote.

Finally, it must be noted that this Court's role is not to judge the wisdom of what the electorate has done with Propositions 218 or 26 or the wisdom of the MAD levies. Appellant recognizes that there are some who happily pay the MAD levies and that it is tempting for courts to avoid invalidating a controversial tax when it appears, at least on the face of things, to be a matter of taxpayers self-assessing in a time of limited government revenue. The appellate court in *Altadena Library District v. Bloodgood*, 192 Cal. App. 3d 585, 592 (1987), felt that pressure and expressed sympathy for those who decided to tax themselves a bit higher in order to restore services. However, the sympathy for their plight does not--and in *Altadena* did not--trump compliance with the electorate-approval requirement codified in the California Constitution. The California Supreme Court *in Rider v. County of*

San Diego, 1 Cal. 4th 1 (1991), closed its decision with the following important observation:

> We are sympathetic to the plight of local government in attempting to deal with the ever-increasing demands for revenue in the post-Proposition 13 period, and we are especially reluctant to interfere with sorely needed projects for new and improved courtrooms, criminal detention facilities, and other justice facilities. ***Yet Proposition 13 and its limitations on local taxation are constitutional mandates of the people which we are sworn to uphold and enforce. Any modification of these mandates must come from the people who, by constitutional amendment, may adopt such changes by simple majority vote.*** (Cal. Const., art. XVIII, § 4).

Id. at 16 (emphasis added). Indeed, the electorate had the absolute right to take control of what they have viewed as a runaway revenue-raising political system and impose limitations on local government through amendments to the state's constitution. There are also legitimate concerns about the MADs and these revenue-generation attempts. However, it is not for the courts to make the policy decisions. For better or worse the role of this Court is to determine whether the MAD levies were lawfully approved, not whether they are wise.

The trial court also summarily determined that Appellant did not establish that the MAD levies were not special property-based assessments. As demonstrated below, Appellant did in fact make sufficient allegations.

Furthermore, it is the City's burden to prove that the levies are not taxes, that the amounts are no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. CAL. CONST. art. 13C, § 1 (final, unnumbered paragraph). Similarly, it is the City's burden to demonstrate that the properties in question "receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the properties in question. CAL. CONST., art. 13D, § 4(f). In other words, it is ***not*** Appellant's obligation to ***establish***--and especially at the pleading stage--that the levies do not meet an exception to the definition of "taxes"; the allegations are sufficient.

Here, the MAD levies are "taxes" requiring voter approval if they do not fall under an exception to Article XIII C, Section 1(e), of the California Constitution. Insofar as the electorate was denied the opportunity to vote on the MAD levies, the City of San Diego electorate was harmed--not trivially, but on a constitutional scale. Appellant's members include registered City of San Diego voters who were not given an opportunity to vote on the levies at issue here, and thus Appellant has standing. Because Appellant has standing

to maintain this lawsuit, the demurrer should have been overruled. At the very least, Appellant should be granted leave to amend in order to provide any additional allegations needed in the issue of standing.

II. BACKGROUND

This lawsuit challenges what Appellant contends is an illegal tax scheme approved by the City in July 2013 in order to generate revenue for 57 MADs for Fiscal Year 2014 (*i.e.*, July 2013 to June 2014). Appellant is a non-profit taxpayer and voter organization formed and operating under the laws of the State of California. Appellant's Appendix ("AA") 1:7:75, ¶ 1. Appellant's members reside in or near the City of San Diego, California, and have an interest in ensuring open, accountable, responsive government, and the protection of their rights as taxpayers and voters. *Id.* Appellant has been before this Court previously in governmental-accountability lawsuits. *See, e.g., City of San Diego v. Shapiro*, 228 Cal. App. 4th 756 (2014) (validation action regarding legality of special tax); *Gilbane Building Co. v. Superior Ct.*, 223 Cal. App. 4th 1527 (2014) (conflict-of-interest action involving school district officials and government contractors). With respect to this lawsuit in particular, Appellant's members have a variety of interests relating to government accountability. AA 1:7:82-87. Meanwhile, the City of San Diego

and the County of San Diego are "local governments" under Section 1(b) of Article XIII C of the California Constitution. AA 1:7:75, ¶ 2.

On or about July 16, 2013, the City's city council approved Resolution nos. 308362 and 308364, which authorized levies in 57 MADs[3] for Fiscal Year 2014 and accepted the corresponding 57 Engineer's Reports ("2014 MAD Resolutions"). AA 1:7:77, ¶ 4(B). Appellant contends that the MAD levies and collections are not being imposed in accordance with the provisions of Article XIII D of the California Constitution. *Id.*, ¶ 5. If the levies are not imposed in accordance with Article XIII D, the levies constitute "taxes," and taxes require a vote of the electorate before they may be imposed. *Id.*

---

[3] The 57 MADs are known as Bay Terraces - Honey Drive, Bay Terraces - Parkside, Bird Rock, Black Mountain Ranch North, Black Mountain Ranch South, Calle Cristobal, Camino Santa Fe, Campus Point, Carmel Mountain Ranch, Carmel Valley Neighborhood #10, Carmel Valley, Coral Gate, Coronado View, Del Mar Terrace, Eastgate Technology Park, El Cajon Boulevard, First San Diego River Improvement Project, Gateway Center East, Genesee Avenue & North Torrey Pines Road, Hillcrest, Kings Row, La Jolla Village Drive, Liberty Station, Linda Vista Community, Mira Mesa, Miramar Ranch North, Mission Boulevard, Mission Hills Historic Street Lighting, North Park, Ocean View Hills, Otay International Center, Pacific Highlands Ranch, Park Village, Penasquitos East, Rancho Bernardo, Rancho Encantada - Stonebridge Estates, Remington Hills, Robinhood Ridge, Sabre Springs, Scripps Miramar Ranch, Stonecrest Village, Street Light District #1, Talmadge, Tierrasanta, Torrey Highlands, Torrey Hills, University Heights, Washington Street, Webster - Federal Blvd., Adams Avenue, Barrio Logan Community Benefit, Central Commercial, City Heights, College Heights, Hillcrest Core, Little Italy, and Newport Avenue.

Relevant here, Appellant specifically alleged that "[u]nder Section 4 of Article XIII A, cities (including charter cities) may only impose special taxes by a two-thirds vote of qualified electors." AA 1:7:77, ¶ 5(A). A vote of the electorate on special taxes is also required under Article XIII C. AA 1:7:78, ¶ 5(C). "Under Section 1(e) of Article XIII C, 'tax' means any "levy, charge, or exaction of any kind by a local government" with certain exceptions. AA 1:7:77, ¶ 5(B). One of those exceptions is for "[a]ssessments and property-related fees imposed in accordance with the provisions of Article XIII D." AA 1:7:78, ¶ 5(B). Section 4 of Article XIII D sets forth certain procedures and requirements for assessments. AA 1:7:79, ¶ 5(D). Section 5 of Proposition 218 states as follows: "The provision of this act shall be liberally construed to effectuate its purposes of ***limiting local government revenue*** and ***enhancing taxpayer consent.***" *Id.*, ¶ 5(E) (emphasis added).

With respect to the MAD levies, Appellant alleges that "[n]one of the levies approved by the 2014 MAD Resolutions constitutes an 'assessment' within the meaning of Section 2(b) of Article XIII D." AA 1:7:80, ¶ 6(G). Appellant alleges that none of the levies approved by the 2014 MAD Resolutions was intended by the City at the time of the approval "to constitute an 'assessment' within the meaning of Section 2(b) of Article XIII D." *Id.*, ¶ 6(H). Appellant alleges that none of the MAD levies constitutes a "fee" or

"charge" within the meaning of Section 2(e) of Article XIII D, nor were they intended to be. *Id.*, ¶¶ 6(I)-(J). Appellant alleges that none of the money collected pursuant to the 2014 MAD Resolutions may be used to pay for "property-related service" within the meaning of Section 2(h) of Article XIII D. *Id.*, ¶¶ 6(K)-(L). Appellant further alleges:

- "No portion of the 2014 MAD Engineer's Report separates and quantifies the general and special benefits provided by the MADs during Fiscal Year 2014."

- "No provision in Defendant CITY OF SAN DIEGO's contract with the engineers who prepared the 2014 MAD Engineer's Reports required the engineers to separate and quantify the general and special benefits to be provided by the MADs during Fiscal Year 2014."

- "Prior to the 2014 MAD Resolutions' approval, Defendants had not prepared any 'writing' as defined by Evidence Code Section 250 that separates and quantifies the general and special benefits to be provided by the MADs during Fiscal Year 2014."

AA 1:7:81, ¶¶ 6(P)-(R).

Prior to the approval of the 2014 MAD Resolutions, the City held a public hearing. AA 1:7:82, ¶ 11. Appellant opposed their approval prior to the completion of that hearing. *Id.* Appellant filed this lawsuit not more than 30 days after their approval. *Id.*, ¶ 8.

III. Summary of Trial-Court Proceedings

This action was filed in August 2013. AA 1:2:2-10. The lawsuit was amended a month later. AA 1:3:11-54. Appellant sought a temporary restraining order, but *pendente lite* relief was denied. AA 1:4:55-59. Preliminary-injunction and demurrer hearings were subsequently set. *Id.* In December, the trial court denied the preliminary injunction and sustained the demurrer with leave to amend. AA 1:5:60-65. With respect to the demurrer, the trial court determined that Appellant failed to plead standing to sue, that this Court's decision in *Golden Hill* appears distinguishable, that causes of action not addressed here were barred by the statute of limitations, and the third cause of action failed because there was no allegation establishing the MAD levies are not in fact special property-based assessments. *Id.* Notice of the ruling was given, and Appellant filed a second amended pleading shortly thereafter. AA 1:6:66-74 (notice) & 1-2:7:75-337 (amended complaint).

The second amended pleading alleged two causes of action (only the second one, challenging the MAD levies, is relevant here). AA 1-2:7:75-337. The County filed an answer.[4] AA 4:16:892-894. The City, however, again

---

[4] The County is involved in this lawsuit despite not approving the MAD levies because they appear on the tax bills sent out by the County each year for real property. AA 1:4:56.

filed a demurrer. AA 2:9:341-361. This time the City also moved to strike portions of Exhibit "B" from the second amended pleading. AA 2:13:515-522. Exhibit "B" was the deposition transcript of Scott Koppel that came about from an earlier lawsuit regarding the prior fiscal year's MAD levies. AA 1:7:127-128. Several engineer's reports for prior fiscal years were attached to that deposition transcript. AA 1:7:131. Despite determining that the motion to strike was moot, the trial court granted the motion to strike as to the deposition transcript and the engineer's reports that were attachments to that transcript. AA 4:22:989. While Appellant is not challenging the ruling on the motion to strike, the motion and decision are included in the record so that this Court has an understanding of the scope of the operative pleading and, if necessary, to determine whether leave to amend should have been granted; the example engineer's reports may be useful in making that determination.

The trial court sustained the City's demurrer as to both the first and second causes of action. AA 4:22:983-991; Reporter's Transcript, March 28, 2014 hearing. With respect to the second cause of action, the trial court sustained the demurrer for two reasons.[5] First, the trial court determined that

[5] While the entire case was not ultimately resolved through settlement, Appellant appreciates the extensions of the time to file this brief being granted so that at least the first cause of action could be resolved without further judicial intervention.

Appellant failed to plead standing because, in the in the trial court's view, Appellant was required to and failed to plead that it paid or had a member who paid the 57 MAD levies at issue here. AA 4:22:987. The trial court also determined that the second cause of action fails "since there is no allegation establishing that the MAD assessments are not in fact special property based assessments." AA 4:22:989. Leave to amend was requested but denied because the trial court did not believe the request was supported by any indication of how Appellant could state a good cause of action. *Id.*

Judgment of dismissal was entered on April 16, 2014. AA 4:23:992-995. A judgment is appealable. CODE OF CIV. PROC. § 904.1(a)(1). Notice of entry of judgment was served by mail on April 25, 2014. AA 4:24:969-999 (notice) & 4:25:1000-1001 (declaration of service by mail). Appellant filed a timely appeal on May 9, 2014. AA 4:26:1002-1003. The judgment is final. Accordingly, this Court has appellate jurisdiction.

IV. STANDARD OF REVIEW

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, "the reviewing court gives the complaint a reasonable interpretation." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 810 (2005). A demurrer may only be sustained if the complaint fails to

state a cause of action under ***any*** possible legal theory. *Id.* A demurrer is limited to defects on the face of the pleading at issue or from judicially noticed facts. CODE OF CIV. PROC. § 430.30. The Court is required to construe the pleading liberally, with a view toward achieving substantial justice. *Id.*, § 452. For purposes of appellate review, the Court is to assume the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts. *See Miklosy v. Regents of University of California*, 44 Cal. 4th 876, 883 (2008) ("Because this case comes before us on appeal from a judgment sustaining a demurrer, we assume the truth of the facts alleged in the complaint and the reasonable inferences that may be drawn from those facts."). "It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment." *Roman v. County of Los Angeles*, 85 Cal. App. 4th 316, 322 (2000). "Regardless of whether a request therefore [*sic*] was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion." *Id.* A plaintiff may make this showing in the first instance to the appellate court. *Id.*

V. ARGUMENT & ANALYSIS

A. The Maintenance Assessment District Levies Are "Taxes"

In sustaining the demurrer, the trial court concluded that "the second cause of action fails since there is no allegation establishing that the MAD assessments are not in fact special property based assessments." AA IV:22:989. The trial court determined that the California Constitution "specifically excludes property based assessments from the definition of a 'tax.'" *Id.*

The trial court was mistaken. Under the California Constitution, assessments are excluded from the definition of a "tax" if they are "imposed in accordance with the provisions of Article XIII D." CAL. CONST., Art. 13C, § 1(e)(7). As Appellant alleged:

> The key question in this lawsuit is whether the PBID and MAD levies and collections are being imposed in accordance with the provisions of Article XIII D of the California Constitution, which came into existence with the passage of Proposition 218. If not imposed in accordance with Article XIII D, these levies constitute "taxes" under Article XIII C. Taxes require a vote of the electorate before they may be imposed.

AA 1:7:77, ¶ 5.

In passing Proposition 218 and enacting Article XIII D, "the voters clearly sought to limit local government's ability to exact revenue under the rubric of special assessments." *Golden Hill, supra*, 199 Cal. App. 4th at 422 (citing *Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 4th 431, 446 (2008)). Under Proposition 218, the agency has the burden of proving the validity of an assessment. *See id.* at 423-424 (discussing agency's burden of proving that assessment meets certain requirements).

Article XIII D's provisions apply to ***all*** assessments (with limited exception not applicable here). CAL. CONST., art. 13D, § 1. Pursuant to Article XIII D, no tax, assessment, fee, or charge is to be assessed by any agency upon any parcel of property or any person as an incident of property ownership except for (1) an ad valorem property tax imposed pursuant to Article XIII and Article XIII A; (2) a special tax receiving a two-thirds vote of qualified electors; (3) assessments as provided under Article XIII D; (4) fees or charges as provided under Article XIII D; or (5) certain electrical or gas service fees. *Id.*, § 3. To impose an assessment under Article XIII D, certain procedures and requirements must be met. *Id.*, § 4. One of those requirements is that "[n]o assessment shall be imposed on any parcel which exceeds the

reasonable cost of the proportional special benefit conferred on that parcel." *Id.*, § 4(a). In that connection, because only special benefits are assessable, "an agency shall separate the general benefits from the special benefits conferred on a parcel." *Id.* It is the City's burden to demonstrate that the properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the properties in question. *Id.*, § 4(f).

In *Golden Hill*, this Court recognized that "the general and special benefits conferred on real property by a service or improvement for which a special assessment is to be levied must be *separated and quantified*." *Golden Hill, supra*, 199 Cal. App. 4th at 438 (italics in original). This Court determined that this quantification generally must be accomplished by apportioning the cost of a service or improvement between general and special benefits and assessing property owners only for the portion of the cost representing special benefits. *Id.* This Court gave the following example:

> A hypothetical example of such apportionment would be that if property owners are to be specially assessed for street lighting that will provide both a special benefit for residents of the street and a general benefit to the general public using the street, a reasonable separation and

> quantification of general and special benefit would be to determine the approximate percentage of daily (or nightly) trips on the street made by the specially benefitted residents as opposed to other members of the public and recoup only that percentage of the cost of the lighting through the special assessment.

Id., n. 18.

Here, Appellant alleges that this quantification did not occur. For example, Appellant alleges:

- "No portion of the 2014 MAD Engineer's Report separates and quantifies the general and special benefits provided by the MADs during Fiscal Year 2014."

- "No provision in Defendant CITY OF SAN DIEGO's contract with the engineers who prepared the 2014 MAD Engineer's Reports required the engineers to separate and quantify the general and special benefits to be provided by the MADs during Fiscal Year 2014."

- "Prior to the 2014 MAD Resolutions' approval, Defendants had not prepared any 'writing' as defined by Evidence Code Section 250 that separates and quantifies the general and special benefits to be provided by the MADs during Fiscal Year 2014."

AA 1:7:81, ¶¶ 6(P)-(R). If these allegations are true, and for purposes of demurrer they must be taken as true, then the City did not comply with the provisions of Article XIII D. If the provisions of Article XIII D were not complied with, then the levies are "taxes" requiring a vote of the electorate.

The approval of the levies without a vote of the qualified electors or electorate is what is being challenged.

Citing to pre-Proposition 218 cases, the City argued in the trial court that the authority to impose assessments is within the City's taxing power and a valid exercise of the City's authority. The argument ignores that the legal landscape of a local jurisdiction's taxing and assessing authority was changed at the insistence of the California electorate. Appellant understands that local governments are in a frustrating position where the ability to generate revenue has been hindered and that it was easier for them under the prior laws without the limitations of Propositions 218, 26, and others. However, this is a different time. *See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 225 (1978) (recognizing after Proposition 13 that it "is undeniably true that a constitutional limitation upon prevailing local taxation rates and assessments will have a potentially limiting effect upon the management and resolution of local affairs"). Now local governments must get voter approval for a number of revenue-generating schemes that could previously have been imposed without such a vote

Altogether, the trial court abused its discretion in sustaining the demurrer as to the second cause of action. At the very least, if additional

factual allegations are necessary, the trial court should have granted leave to amend.[6]

B. Appellant Has Standing

The trial court also determined that Appellant failed to establish standing because Appellant did not allege that it or any of its members pays any of the 57 MAD assessments. AA 4:22:987. However, as explained in more detail below, Appellant is not required to make such an allegation to demonstrate standing to maintain this action.

1. Standing Requirements Are Liberal

Before addressing the merits, it should be recognized that standing requirements are liberally construed, particularly in California. While Code of Civil Procedure Section 367 states that every action "must be prosecuted in the name of the real party in interest," California has no equivalent of the federal-style, Article III "case or controversy" standing requirement. *See* CAL. CONST., art. VI, § 10 (providing superior courts with original jurisdiction in all causes not specifically granted to Supreme Court and appellate divisions); *Jasmine Networks, Inc. v. Superior Ct.*, 180 Cal. App. 4th 980, 991 (2009)

---

[6] Appellant's other interests giving rise to standing, apart from having San Diego registered voters as members, are discussed later in this brief.

(explaining California has no equivalent to federal Article III standing requirement).

Not surprisingly, while the concept of "standing" is applied in California courts, its application is extremely liberal. The leading decision on the standing requirement in cases involving public duties comes from the California Supreme Court, which recently pronounced that "where the question is one of public right and the object of mandamus is to procure enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having laws executed and the duty in question enforced."[7] *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 167 (2011) (internal citations omitted). The Supreme Court determined that "corporate entities should be as free as natural persons to litigate in the public interest." *Id.* at 168. The Supreme Court reaffirmed its position that "strict rules of standing that might be appropriate in other contexts have no application where broad and long-term [environmental] effects are involved." *Id.* at 170.

---

[7] Appellant's lawsuit includes a petition for writ of mandate.

Even if Appellant must frame this lawsuit in terms of taxpayer standing under Code of Civil Procedure Section 526a, however, even taxpayer standing is itself liberally construed. In the words of the Supreme Court: "The primary purpose of [Section 526a], originally enacted in 1909, is to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.'" *Blair v. Pitchess*, 5 Cal. 3d 258, 267-268 (1971) (quoting Comment, Taxpayers' Suits: A Survey and Summary (1960) 69 Yale L. J. 895, 904). The Supreme Court pointed out that "California courts have consistently construed section 526a liberally to achieve this remedial purpose." *Id.* at 268.

Altogether, when considering whether Appellant adequately alleged standing, it should be remembered that this is a voting-rights case and that standing is liberally construed in this type of case involving a public right.

2. Appellant Has Standing to Pursue Denial of the Right to Vote on a Tax

To understand Appellant's standing, an understanding of what Appellant intends to achieve is necessary. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689-690 (1973) (basing standing determination on allegation in complaint; and if allegations

are proved, whether plaintiffs would be among the persons injured). The constitutional wrong that Appellant complains of is that the MAD levies are taxes that should have been approved by a vote of the electorate.

As noted in the introduction, the constitutional context within which this case arises is the wake of a series of voter-approved initiatives aimed at guaranteeing the right to vote on any measure designed to increase government revenues. Proposition 13 is the landmark measure in Californians' quest to curb taxes. *Town of Tiburon v. Bonander*, 180 Cal. App. 4th 1057, 1073 (2009). It focused on limiting increases to property taxes. *Id.* Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. *Id.*

After local governments found a way to get around Proposition 13, the voters approved Proposition 218 in 1996. *Id.* Known as the "Right to Vote on Taxes Act," Proposition 218 added Articles XIII C and XIII D to the California Constitution. *Id.* at 1074. Proposition 218 also added procedural requirements and expanded the need to vote on new or increased assessments, fees, and charges--pretty much every type of revenue-raiser. *Id.*

While this case is analyzed largely under Proposition 218, Proposition 26 is implicated as well. Unfortunately, Proposition 218 was not enough to rein in crafty politicians with a tax-in-disguise bent. That's why in November

2010, the voters of California approved Proposition 26. It amended several provisions of Articles XIII C and XIII D in order to close a variety of loopholes that government agencies, including local governments like the City and the County, had been using to increase tax revenues without having to use the word "tax" and thereby escape the electorate-approval requirement for tax increases. Following Proposition 26, Section 1(e) of Article XIII C now defines "tax" to mean any "levy, charge, or exaction of any kind by a local government" that does not fall into one of the enumerated exceptions. *Id.* Under Proposition 26, all taxes must be submitted to the electorate for approval.

In essence, the constitutional claim being asserted by Appellant here is about the right to vote. Thus, to establish standing, all Appellant needs to allege is that at least one of its members was qualified to vote in the City of San Diego and was denied that opportunity. Appellant has done so. *See, e.g.*, AA 1:7:82, ¶ 13(A).

As noted earlier, the fact that California voters insisted that the electorate consent to new taxes is indicative of the interest that voters, not just taxpayers, have. *See Choudry, supra*, 17 Cal. 3d at 668 (determining that "the very fact that the Legislature granted the franchise to electors who do not own land indicates that they have an appreciable stake in the affairs of the district").

"The right to vote is, of course, fundamental." *Peterson v. City of San Diego*, 34 Cal. 3d 225 (1983). There are numerous examples of where non-property owners, who arguably have less of a financial interest at stake than property owners paying certain taxes, were entitled to vote.

In *Choudry*, the Supreme Court stated: "If a voter who does not own property cannot constitutionally be excluded from voting on a bond issue for the construction of a library (*Hill*) or bonds to be used by a municipal water district (*Cipriano*) a fortiori, he may not be deprived of the right to vote in an election for director of an irrigation district, which exercises broad powers and provides the essential services rendered by Imperial." *Choudry, supra*, 17 Cal. 3d at 668. In so stating, the first case the Supreme Court mentioned was *Hill v. Stone*, 421 U.S. 289 (1975). There the Texas Constitution limited voting in certain elections to those that pay taxes on property in the city. *Id.* at 292. A Texas city conducted a bond election where persons owning taxable property rendered for taxation voted separately than persons who did not and the votes were tallied differently. *Id.* It was argued that the rendering requirement extended protection to property owners, who would bear the direct burden of retiring the bonded indebtedness. *Id.* at 298-299. The Highest Court rejected the argument, in part, because even under a system in which the responsibility of retiring the bonded indebtedness falls on property taxpayers, "all members

of the community share in the cost in various ways." *Id.* at 299. If non-property owners who are not directly financially responsible for repaying a debt being incurred cannot be disenfranchised, then non-property owners who are not assessed a property-based tax cannot be deprived of the ability to exercise their franchise.

Furthermore, as recognized in *Hill* and by this very Court recently, the impacts of a tax and the use of funds goes beyond the payment of the tax itself. As this Court put it:

> Finally, despite the superficial normative appeal of allowing those who "pay" for a tax to approve its imposition, it is often difficult to calculate the true economic incidence of any given tax. (See *Fulton Corp. v. Faulkener* (1996) 516 U.S. 325, 340-341, 116 S.Ct.848, 133 L.Ed.2d 796 [noting the "extreme complexity of economic incidence analysis].) While the City argues that only Landowners should vote on the special tax since they are the taxpayers who will pay the tax, it is far from clear that the incidence of the special tax will actually fall only on Landowners and not on those individuals who pay for hotel rooms and generate the room revenue on which the tax is based.

Shapiro, supra, 228 Cal. App. 4th at 783-784. So too here: It is not just property owners who are impacted by the imposition of the MAD taxes. For example, the renters of property in MADs are likely to see higher rents and thus less affordable-housing opportunities due to owners passing on the cost

of higher taxes (as discussed at the end of this brief). Accordingly, those with a right to vote on the imposition, and not just those who directly remit payment of the tax, have standing to uphold that right.

There is additional authority that non-taxpayers may have standing to challenge the validity of a tax. In *Gowens v. City of Bakersfield*, 179 Cal. App. 2d 282 (1960), a hotel owner who did not pay the challenged tax nevertheless challenged the ordinance imposing the tax on transients. *Id.* at 283. The appellate court found that the hotel owner, despite not paying the tax, had standing to sue because a hotel owner is vitally interested in the validity of the ordinance. *Id.* at 285. For example, the tax might drive customers away from his business. *Id.* Under the logic of *Gowens*, if a hotel owner not liable for the tax had standing to challenge a tax on his guests, voters who are not liable for a tax but have other interests have standing to challenge a tax.

In *Andal v. City of Stockton*, 137 Cal. App. 4th 86 (2006), the appellate court determined that cell-phone companies, which did not pay the local government fee imposed by the municipal ordinance being challenged, had standing to challenge the ordinance. In *City of Industry v. City of Filmore*, 198 Cal. App. 4th 191, 208-209 (2011), the appellate court determined that the

plaintiffs[8] did not need to establish standing as taxpayers to challenge the disbursement of sales-tax revenues because the plaintiffs alleged a variety of other harms, including actions taken without voter approval. In other words, just because a tax is involved does not mean that only those who allege taxpayer standing under Code of Civil Procedure Section 526a have standing to maintain a lawsuit; there are other harms that taxes inflict. In this case, Appellant has alleged harm in its members having been denied the opportunity to vote.

The trial court relied on *Torres v. City of Yorba Linda*, 13 Cal. App. 4th 1035 (1993), in reaching its determination that only those liable for the MAD levies would have standing. Reliance on that case was misplaced. In *Torres*, the plaintiffs challenged a redevelopment plan in Yorba Linda. *Id.* at 1038-1039. The plaintiffs were not residents of Yorba Linda, did not pay property taxes in Yorba Linda, and were not otherwise beneficially interested in the area covered by the amended redevelopment plan. *Id.* at 1043. In contrast here, Appellant's members are San Diego residents, pay taxes here, and are otherwise beneficially interested in both the geographic area and subject matter of the MAD levies. AA I:7:75, ¶ 1. To the extent the appellate court in *Torres*

---

[8] They were not even humans, much less registered voters, but instead were government agencies.

held that a plaintiff must be a taxpayer to have standing, that was in the context of taxpayer standing under Code of Civil Procedure Section 526a. *Torres*, 13 Cal. App. 4th at 1048 ("Nonetheless, a plaintiff must establish he or she is a taxpayer to invoke standing under section 526a or the case law."). This lawsuit, in contrast, is based on Appellant's members' interests in voting on taxes and, as indicated below, in maintaining affordable housing in the City.

Altogether, because Appellant has registered voters in the jurisdiction, Appellant has standing to challenge the denial of the right to vote.

3. Appellant Has Public-Interest Standing

What is more, Appellant has public-interest standing. This issue was addressed in *Common Cause of California v. Board of Supervisors of Los Angeles County*, 49 Cal. 3d 432 (1989). There the plaintiffs, including a taxpayer and several organizations concerned with voting rights, sought declaratory relief, a writ of mandate, and an injunction requiring the county to implement an employee-deputization program. *Id.* at 437. The plaintiffs asserted taxpayer standing, which was challenged by the county. *Id.* at 438-439. The Supreme Court, however, explained that it was unnecessary to reach the question of taxpayer standing because there was an independent basis for standing. *Id.* at 439. It indicated that the ultimate relief sought included a writ of mandate and, citing earlier precedent, explained that where the "question is

one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. . . ." *Id.* (internal citations omitted). Thus, the High Court determined that the case involved a "public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." *Id.*

As in *Common Cause*, this case includes a petition for writ of mandate. AA 1:7:75. Similarly, this case is about a public right. California Constitution, Article II, Section 2, states: "A United States citizen 18 years of age and a resident in this State may vote." Article XIII C, Section 2, provides that the electorate holds the right to approve any tax imposed, extended, or increased, with the percentage of required affirmative votes dependent on whether the tax is general or special. The public right at stake in this case is even more fundamental than the voter-outreach program in *Common Cause*, for this case actually seeks to directly vindicate the constitutionally protected right to vote. No legal or special interest is required to maintain this action.

Thus, even if Appellant lacks standing on the basis of its registered-voter members, Appellant has public-interest standing because of its concern about the disenfranchisement of voters generally.

4. Appellant Has Adequately Alleged Alternative Grounds for Standing

There are several harms that Appellant's members face aside from the denial of the right to vote, which were alleged. For example, the City's general fund is impacted by the MAD levies. AA 1:7:83, ¶ 13(a)(iii) & 1:7:85, ¶ 13(D). There are concerns about which neighborhoods get certain services. *Id.* Increased costs adversely affect the affordability of housing in the City. AA 1:7:85-85, ¶ 13(E) & 1:7:84, ¶ 13(A)(ix). The levies and resulting impacts on development and where businesses go even has an environmental impact. AA 1:7:86, ¶ 13(H). In other words, there are a variety of harms that Appellant has a right to vindicate through this action.

Thus, Appellant has an adequate interest to establish standing.

VI. Conclusion

For all of these reasons, Appellant respectfully requests that this Court reverse the trial court's decision to sustain the demurrer without leave to amend as to the second cause of action. Appellant adequately alleged voter-

standing, and not allowing the voter-members represented by Appellant to challenge the MAD levies would create an enormous loophole in the California electorate's repeated efforts to give themselves a veto right over new local taxes.

PROOF OF SERVICE

1. My name is Alison Greenlee. I am over the age of eighteen. I am employed in the State of California, County of San Diego.

2. My ✓ business ___ residence address is Briggs Law Corporation 814 Morena Blvd., Suite 107, San Diego, CA 92110.

3. On November 26, 2014, I served ___ an original copy ✓ a true and correct copy of the following documents: Appellant's Opening Brief

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

✓ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

___ deposited the envelope/package with the U.S. Postal Service

✓ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of San Diego, California.

___ ***by overnight delivery.*** I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and ovemight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

___ ***by e-mail delivery.*** Based on the parties' agreement or a court order or rule, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws ___ of the United States ✓ of the State of California that the foregoing is true and correct.

Date: November 26, 2014 Signature: Original Signed

SERVICE LIST

San Diegans for Open Government v. City of San Diego, et al.

CA Court of Appeal Docket No: D065929

San Diego County Superior Court Case No. 37-2013-00062908-CU-MC-CTL

Jan I. Goldsmith Daniel F. Bamberg Carmen A. Brock Office of the City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101 cbrock@sandiego.gov	Attorneys for Respondent/Defendant City of San Diego
Thomas E. Montgomery Walter J. De Lorrell, III Office of the County Counsel 1600 Pacific Highway, Suite 355 San Diego CA 92101 walter.delorrell@sdcounty.ca.gov	Attorneys for Appellant/ Defendant County of San Diego
Honorable Timothy Taylor c/o Civil Appeal Division San Diego Superior Court 220 Broadway, Room 3005 San Diego, CA 92101	Superior Court Trial Judge
Kamala D. Harris Attorney General State of California Office of the Attorney General 300 South Spring Street Los Angeles, CA 90013	Attorney General
California Supreme Court 350 McAllister Street San Francisco, CA 94102	Electronic Service Only

CIVIL DIVISION
14 NOV 39 AM 11:40
CITY ATTORNEY

PROOF OF SERVICE

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. _____
Court of Appeal, Second Appellate District, Division 6,
Case No. B251810

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, California 94946. On April 27, 2015, I served the document described as **MOTION FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

X **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 27, 2015, at Penn Valley, California.

Ashley A. Lloyd

SERVICE LIST

City of San Buenaventura v. United Water Conservation District, et al.
Supreme Court Case No. _____
Court of Appeal, Second Appellate District, Division 6,
Case No. B251810

Anthony H. Trembley Jane E. Usher Musick, Peeler & Garrett LLP 2801 Townsgate Road, Suite 200 Westlake Village, CA 91361 Phone: (805) 418-3100 Fax: (805) 418-3101 E-mail: A.Trembley@mpglaw.com; J.Usher@mpglaw.com; Y.Dubeau@mpglaw.com *Attorneys for Defendant and Appellant United Water Conservation District and Board of Directors of United Water Conservation District*	Dennis LaRochelle Susan L. McCarthy John M. Mathews Arnold LaRochelle Mathews Vanconas & Zirbel, LLP 300 Esplanade Dr., Suite 2100 Oxnard, CA 93036 Phone: (805) 988-9886 Fax: (805) 988-1937 E-mail: dlarochelle@atozlaw.com; jmathews@atozlaw.com *Attorneys for Intervener Pleasant Valley County Water District*
Office of the Attorney General 1300 I Street Sacramento, CA 95814-2919	Nancy McDonough Chris Scheuring Associate Counsel California Farm Bureau 2300 River Plaza Drive Sacramento, CA 95833 Phone: (916) 561-5500 Fax: (916) 561-5699 E-mail: cscheuring@cfbf.com; dchasteen@cfbf.com *Attorneys for California Farm Bureau Federation and Farm Bureau of Ventura County, Amicus Curiae for Appellant*

Paul N. Singarella Latham & Watkins 650 Town Center Dr., 20th Floor Costa Mesa, CA 92626 *Attorneys for Water Replenishment District of Southern California, Amicus Curiae*	Patricia J. Quilizapa Aleshire & Wynder, LLP 18881 Von Karman Ave., #1700 Irvine, CA 92612 *Attorneys for Cerritos, City of Downey and City of Signal Hill, Amicus Curiae*
Clerk of the Court Santa Barbara Superior Court 1100 Anacapa Street Santa Barbara, CA 93121-1107	Clerk of the Court Court of Appeal Second District, Division 6 200 East Santa Clara Street Ventura, CA 93001