



CITY OF EL PASO DE ROBLES
"The Pass of the Oaks"

CITY COUNCIL MINUTES

Tuesday, September 2, 2008 7:30 PM

**MEETING LOCATION: PASO ROBLES LIBRARY/CITY HALL
CONFERENCE CENTER, 1000 SPRING STREET**

**PLEASE SUBMIT ALL CORRESPONDENCE FOR CITY COUNCIL PRIOR
TO THE MEETING WITH A COPY TO THE CITY CLERK**

7:30 PM – CONVENE REGULAR MEETING

CALL TO ORDER – Downstairs Conference Center

PLEDGE OF ALLEGIANCE

INVOCATION – Led by Pat Sheean

ROLL CALL Councilmembers John Hamon Gary Nemeth, Duane Picanco, Fred Strong, and Frank Mecham

PUBLIC COMMENTS

- Kathy Barnett, regarding the siting of a Regional Secure Community Reentry Facility in Paso Robles
- Christy Hodgkin, regarding 2000 Pioneer Day planning

AGENDA ITEMS TO BE DEFERRED (IF ANY)

City Manager Jim App informed Council that Agenda Items No. 1 and 2 were recommended for continuance to September 16, 2008 to allow additional time to study alternatives to the proposed water rate structure and water capacity fees as a result of public input.

PUBLIC HEARINGS

1. Adoption of Water Capacity Charges
D. Monn, Director of Public Works

Following a presentation by Christine Halley, T. J. Cross Engineers, and Roger Null, with Kennedy-Jencks, concerning the intention to provide an alternative method of calculation water capacity charges (i.e., water connection fees) and water rate structure, Mayor Mecham opened the public hearing. Speaking from the public was Jerry Bunin, Home Builders Association, and Kenneth Bornholdt, representing River Oaks II, LLC. There were no further comments from the public, either written or oral, and the public discussion was closed.

Councilmember Strong, seconded by Councilmember Picanco, moved to continue the item to the September 16, 2008 Council meeting.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Nemeth, Picanco, Strong, and Mecham
NOES:
ABSTAIN:
ABSENT:

2. Introduction of Proposed Water Rate Structure
D. Monn, Director of Public Works

The City Council conducted a Public Hearing, regarding the proposed water rate structure presented at the July 1, 2008 Council meeting, and noticed as required by Proposition 218.

Mayor Mecham opened the public hearing. Speaking from the public was Rudy Clark, Dale Gustin, Damon Maggiore, Tom Hardwick, Neil Olsen, Carl Hansen, Cheryl Solomon, Doug Bates, Karen Reed, Jim Norman, Kathy Barnett, Jerry Greene, John Borst, Barbara Partridge and Vince Vanderlip. There were no further comments from the public, either written or oral, and the public discussion was closed.

Mayor Pro Tem Nemeth, seconded by Councilmember Strong, moved to continue the item to the September 16, 2008 Council meeting which will also allow the Proposition 218 protest period to remain open until the close of the public hearing on that date.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Nemeth, Picanco, Strong, and Mecham
NOES:
ABSTAIN:
ABSENT:

Council adjourned for a 10-minute recess and reconvened at 9:34 PM. Mayor Pro Tem Nemeth returned to the dais following approval of the motion on the consent items.

CONSENT CALENDAR

Mayor Mecham called for public comments on Consent Calendar items. There were no comments from the public, either written or oral, and the public discussion was closed.

3. Approve City Council minutes of August 19, 2008
4. Approve Warrant Register: Nos. 79227—79352 (08/15/08), 79353-79508 (08/22/08), and other Payroll Services
5. Receive and file Advisory Body Committee minutes as follows:
Library Board of Trustees meeting of July 10, 2008
Parks & Recreation Advisory Committee meeting of June 10, 2008
Promotions Coordinating Committee meeting of July 24, 2008
6. Adopt Resolution No. 08-122 approving a salary adjustment for the City Manager in accordance with the City Manager Employment Contract. Based on the annual review of City Manager's performance recently conducted by the City Council, and in accordance with the

terms of the Contract, the City Manager is entitled to a pay increase. The City Manager has requested deferral of the pay increase due to current economic conditions.

7. Adopt Resolution No. 08-123 adding Kevin J. Small (ISA Certificate Number: WE-7333A) to the City's pre-approved Certified Arborist List.
8. Adopt Resolutions¹ to authorize the recordation of Tract 2778-1, a 17-lot subdivision located on Dry Creek Road, west of Airport Road, and execution of Subdivision Improvement Agreement guaranteeing the construction of improvements by September 2, 2009; to abandon a portion of Dry Creek Road; and to accept an offer of dedication of public right-of-way for the westerly extension of Dry Creek Road (Applicant: Mondo).

Consent Calendar Items Nos. 3-8 were approved on a single motion by Councilmember Strong, seconded by Councilmember Picanco, with Mayor Mecham abstaining on Warrant Register Item Nos. 079489.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Picanco, Strong, and Mecham

NOES:

ABSTAIN:

ABSENT: Nemeth

DISCUSSION

9. Cardiac Monitor/Defibrillator Replacement
K. Johnson, Emergency Services Chief

The City Council approved the purchase of a cardiac monitor/defibrillator to replace a unit in use since 1999. Emergency Services recommended deferring the purchase of other budgeted equipment in favor of replacing the aging cardiac monitor/defibrillator.

Mayor Mecham opened the public hearing. There were no comments from the public, either written or oral, and the public discussion was closed.

Councilmember Hamon, seconded by Councilmember Strong, moved to adopt Resolution No. 08-127 authorizing the purchase of a replacement cardiac monitor defibrillator for \$21,369.65 from Zoll Medical Corporation.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Nemeth, Picanco, Strong, and Mecham

NOES:

ABSTAIN:

ABSENT:

10. Wastewater Pretreatment Standards – Local Limits Laboratory Services
D. D. Monn, Director of Public Works

1

08-124	Vacating a portion of Dry Creek Road (as shown on Tentative Tract 2772, and dedicated on Parcel Map PR 04-078).
08-125	Approving the recordation of the final map and subdivision improvement agreement for Tract 2772-1, on Dry Creek Road
08-126	Accepting an Irrevocable and perpetual offer of dedication for road purposes on Dry Creek Road (Tract 2772-1)

The City Council awarded a contract to develop pretreatment standards (a.k.a., local limits) for the Industrial Waste Program. The limits are required to protect the treatment facility and limit adverse water quality impacts. Patti Gwathmey, Manager, Industrial Waste Discharge presented the staff report.

Mayor Mecham opened the public hearing. There were no comments from the public, either written or oral, and the public discussion was closed.

Councilmember Picanco, seconded by Councilmember Hamon, moved to adopt Resolution No. 08-128 authorizing the contract with Fruit Growers Laboratory, Inc. to perform analytical laboratory services for the local limits sampling program for a not-to-exceed amount of \$14,132.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Nemeth, Picanco, Strong, and Mecham

NOES:

ABSTAIN:

ABSENT:

11. Tow Service Contract

L. Solomon, Chief of Police

The City has contracted with local tow service providers since 1987. A review of the current Memorandum of Understanding (MOU) revealed the need to revise the agreement to meet current practices and industry standards. The City Council approved replacing the existing MOU with a new agreement to better protect the City against claims and liability issues.

Mayor Mecham opened the public hearing. Speaking from the public were James Foschaar from Alliance Automotive, Pete Johnston and Sergio Siordia from Pete Johnston Chevrolet-Pontiac-Oldsmobile-Buick-Cadillac. There were no further comments from the public, either written or oral, and the public discussion was closed.

Mayor Pro Tem Nemeth, seconded by Councilmember Hamon, moved to adopt Resolution No. 08-129 authorizing a new Paso Robles Tow Service Agreement with official Police Tow Service Providers that provides for the addition of another service provider outside the city limits to the rotation list, if necessary, at the discretion of the PRPD Chief of Police.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Nemeth, Picanco, Strong, and Mecham

NOES:

ABSTAIN:

ABSENT:

12. Authorization to Partner on Preparing a Habitat Conservation Plan

R. Whisenand, Community Development Director

The City Council considered partnering with the County of San Luis Obispo to prepare a North County Habitat Conservation Plan (HCP) for the San Joaquin Kit Fox and other species. Susan DeCarli, City Planner, presented the staff report.

Mayor Mecham opened the public hearing. Speaking from the public were Deb Hillyard, CA Department of Fish and Game, Chris Kofron, US Fish and Wildlife Service, and Nick Gilman. There were no further comments from the public, either written or oral, and the public discussion was closed.

Councilmember Hamon, seconded by Mayor Pro Tem Nemeth, moved to adopt Resolution No. 08-130 authorizing the City to partner with the County of San Luis Obispo to develop a North County Habitat Conservation Plan.

Motion passed by the following roll call vote:

AYES: Hamon, Nemeth, Strong, and Mecham
NOES: Picanco
ABSTAIN:
ABSENT:

13. Vector Disease Control Benefit Assessment Balloting
K. Johnson, Emergency Services Chief

A vector of disease is an insect or rodent that is capable of transmitting diseases to humans.

The City Council authorized participation in a ballot measure for Paso Robles citizens to determine if they wish to participate in a benefit assessment for disease control and allow the County to provide vector control services within the City Limits. The anticipated annual assessment per single family residence under 1 acre would be \$9.80.

Mayor Mecham opened the public hearing. There were no comments from the public, either written or oral, and the public discussion was closed.

Councilmember Strong, seconded by Mayor Pro Tem Nemeth, moved to adopt Resolution No. 08-131 providing San Luis Obispo County the authority required for Paso Robles citizens to be balloted for inclusion in a Vector Control Assessment District and provide the related services.

Motion passed by the following unanimous roll call vote:

AYES: Hamon, Nemeth, Picanco, Strong, and Mecham
NOES:
ABSTAIN:
ABSENT:

COUNCIL COMMENTS (Including oral reports on conferences attended) - None

ADJOURNMENT at 10:40 PM.

- BLACK TIE BINGO, at 6:00 PM ON SATURDAY, SEPTEMBER 6, 2008, AT THE SENIOR CENTER, 270 SCOTT STREET, PASO ROBLES
- THE REGULAR MEETING AT 7:30 PM ON TUESDAY, SEPTEMBER 16, 2008, AT THE LIBRARY/CITY HALL CONFERENCE CENTER, 1000 SPRING STREET

Submitted:

Deborah D. Robinson, Deputy City Clerk
Approved:

**THESE MINUTES ARE NOT OFFICIAL OR A PERMANENT
PART OF THE RECORDS UNTIL APPROVED BY THE CITY
COUNCIL AT A FUTURE REGULAR MEETING.**



MEMORANDUM

To: Jerry Bunin, Home Builders Association of the Central Coast

From: Joanne Brion, Brion & Associates

Subject: Additional and Re-summarized Comments on City of Paso Robles proposed water capacity charge fee studies and related documents: B&A #2310-2008

Date: September 1, 2008

It is our understanding that the City Staff is moving forward with the proposed Water Capacity Charge and supporting documents on which we have provided significant comments and questions. Although we greatly appreciate the Staff and consultant's efforts to address and respond to our concerns in a timely manner, we still have significant concerns about the reasonableness of the City's proposed fee of \$27,617 per EMU. The purpose of this memorandum is to further document, summarize, and explain our concerns for the HBA members and the City's benefit. Since we know that these issues are very technical and complex, we have attempted to reduce them to the basic graphics and calculations that illustrate our points clearly. We have shared some of these with Staff already but some of the graphics are new.

Overview

The Staff response on August 22, 2008 has misrepresented the number of agreements that have been reached by the HBA and the City. We understand that all of this is taking place at a very fast pace, and there are many issues to be resolved and numerous documents to be reconciled. Nevertheless, there are many inconsistencies in Staff's recent calculation of the connection fee of \$27,617 per EMU (August 27, 2008 Staff Report). In most of the revised documents we have received, many figures have changed for no apparent or explained reason, and we have updated our analysis in response to your questions and those changes. It is very interesting that the new revised fee, which ostensibly addresses our comments as noted in the Staff letter, is about the same as the original fee. This result is illogical, given the breadth and magnitude of our comments and questions as well as the fact that Staff and the City's consultants changed the calculation of the EMUs at 2025 from a population based method to a land use based method.

The ever slightly changing fee can be summarized as follows:

- ◆ July 1, 2008 Staff Report - June 20, 2008 Draft HF&H Study: \$28,654 per EMU
- ◆ July 9, 2008 meeting packet for HBA/Staff meeting: \$28,687 per EMU
- ◆ August 7, 2008 HF&H Final Study: \$28,654 per EMU or SF Unit
- ◆ August 13, 2008 HF&H Final Study prepared for the August 19, 2008 public hearing and viewed at August 26th meeting with HBA/Staff: \$25,300 per EMU (never made public)¹
- ◆ August 22, 2008 Letter to HBA from Ron Whisenand: \$27,932
- ◆ August 27, 2008 HF&H Final Study - Letter to HBA from City Staff: \$27,617 per EMU

Each of these reports, letters, or revised fee schedules supposedly addressed our concerns. Yet they do not vary significantly from the originally proposed \$28,654 per EMU amount. We find it illogical that our concerns and questions, which substantially affect the basis of calculation, could be addressed without the fee changing more significantly. We have proposed illustrations of how our concerns could result in a lower fee, ranging from about \$11,000 to \$25,000 per EMU.

In a recent letter from the City (August 22, 2008) the Staff has selected various data and tables from the supporting water planning documents and changed key numbers without considering the implications to the integrity of these studies and revised them without the review and approval of the studies' authors. .

This is tantamount to someone stating that they would like the estimated net revenue from a fiscal impact analysis, but want to reduce the amount of development envisioned while maintaining the same net revenue. The complexities of the analyses that comprise a water connection fee make it extremely difficult for the average person to understand the nuances of these issues and the fundamental problems with the City's latest calculations. We have prepared a number of charts and tables that attempt to further illustrate our challenges to the City's proposed connection fee, the methodology used, and the assumptions embedded in the analysis. We also have the following comments concerning the points of agreement outlined by the City:

¹ At our August 26th meeting with Staff, John Farnkopf made several references to that version of the study as being part of the August 19th Staff Report to Council; however, after reviewing the document which the HBA had never been provided City staff admitted that that version had been pulled from the Staff report and replaced with the older August 7th version of the HF&H study. However, it was apparent that John Farnkopf was not aware of this switch. Thus, we believe that his August 13th version of the report with a fee that was about \$25,300 per EMU was his firm's solution to compromise on the issue of depreciation.

1. **Additional Water Purchases.** It appears the City, will purchase the firsts 4,000 AFY of Nacimiento water in 2009/2010 as shown in the cash flow table in the latest Water User Rate Fee Study by Kennedy Jenks. The second 4,000 AFY is used incrementally as outlined in the Final 2005 UWMP Table ES-1 indicating that only 374 AFY of Nacimiento water would be used in 2015, followed by 2,644 AFY in 2020 and 4,000 AFY in 2025. As a result, it is inappropriate to burden through debt financing new development as well as existing city users now for water that conceivably would not be utilized for another 18 years. The other facet of the Nacimiento water purchase is that the costs of the associated conveyance and treatment infrastructure will be paid off in 18 years although the financing utilizes 30-year bonds. In addition, the actual City purchase cost has never been clearly quantified. It is not possible to calculate the actual City water cost based upon the NWP Document Titled “Determination of the “Buy-In Fee” This is discussed further below.
2. **Value of Existing System.** The City removed developer-provided infrastructure from the value of the existing system or \$69 million out of \$177 million. This is a new change to the method of calculating value. While it addresses some of our concerns about the valuation of the existing water system, it does not address the entirety of our comments, as discussed further below.
3. **Buy-in Approach and Depreciation.** The City’s offer to remove developer funded improvements is one approach to reducing the buy-in fee for existing facilities/system to a more reasonable amount. However, this change is not the method that we have been requesting. Depreciation is the method typically used by most cities and water districts, spreading the cost of the remaining useful life of existing improvements over new development through a connection fee. In fact, the City argues that depreciation would make existing development subsidize new development. In reality, the lack of using depreciation means that new development is subsidizing existing development because the buy-in fee as previously calculated would mean that new development is paying for an entire new system and that existing development is not responsible for maintaining and replacing any of its existing system. The City’s current estimate results in a buy-in fee of about \$4,888 per new development EMU with the developer funded improvements removed. Our estimates show the fee should be closer to \$3,500 per EMU citywide. As a result, we are still in disagreement over this issue. The original buy-in component of the fee was about \$8,500 per EMU.
4. **General Plan Development Assumptions.** It is our understanding that the 44,000 population included in the current General Plan includes the Chandler Ranch, and Olsen-Beechwood projects. River Oaks II is accounted for in the additional 7,251 additional population included in the HF&H study. What appears to be missing however, is the development potential associated with city sponsored specific plans for Uptown and the Town Center areas, which we understand will include at least 1,000 new dwelling units, combined. We appreciate the City’s policies toward growth and development and firmly believe

that development should pay for the facilities and services it demands; however, we do not believe that the analyses provided for the connection fee make the case.

5. **Inflation factors.** Inflationary adjustments on debt financed improvements have been excluded. Agreed; no further discussion needed. It would be helpful to have a schedule that breaks down the components of the fee and shows which components would be inflated and which would not, so that in the future, it would be possible to see and calculate whether this was taking place.
6. **Multi-family EMUs.** The City's latest EMU estimates assume all multi-family units will have 1" meters, when their own data in the Water User Rate Study by Kennedy Jenks refutes this. This assumption minimizes the amount of net new EMUs that will occur in the City and inadvertently increases the connection fee rate per EMU. An analysis included below of the existing Multi-family meter connections extrapolated to 2025 indicates that the City has underestimated the number of Multifamily EMUs by approximately 1,733 EMUs This is one example where there is a lack of mathematical correlation between land use and EMU. (See spreadsheet tables by Christine Halley, dated August 27, 2008 and sent to Wallace Group and used in August 27, 2008 calculations of capacity fee at end of this memo).
7. **Water Accounts and the UWMP, Water Sharing and Water Demand**

The city has not made the case for why the UWMP had the wrong number of accounts (about 17,000 instead of the original 25,500 in 2025 in the final UWMP Study). It is merely taking a number out of the UWMP plan and replacing it with a number that is derived by a population based growth ratio factor prepared by HF&H in its first connection fee study dated July 1, 2008. In fact our analysis indicates that the anticipated water demand would support approximately 24,772. The HF&H estimate of accounts is neither General Plan based nor based in any data from the Water User Fee Study. In fact the UWMP Study states:

"Note that the population projections in Table 3 and the number of accounts or dwelling units in Table 4 (see below) are not comparable as these values were derived from different sources." (UWMP by Todd Engineers, June 2008, page 7).

These accounts are then converted to EMUs based on the EMU multiplier also shown in Figure 2 (page 7). The EMU multiplier takes the accounts by meter size and adjusts them into like equivalents or EMUs. Thus, a 3" meter uses 10 times as much water as a 5/8" meter.

The problem with this simple purported correction in the underlying result is that the water demand implied in this adjustment becomes excessive and is not reasonable. In fact, the water demand rates increase significantly instead of decreasing as is the common trend due to conservation, technological improvements, state legal requirements, and higher meter costs. As shown below,

the current AFY per Account is .63 in 2005 and increases to .92 per account in AFY in 2025. The Staff suggests that this is the result of shifts in land use but in reality is the result of other issues and problems with the analysis as further discussed below. In the City’s revised Table 4 from the UWMP, water demand increases from .78 AFY per account to .91, while keeping the average use per account the same.

Table A
Revised Table 4 with Water Demand and Accounts - 2005 to 2025

Table 4 Annotated from UWMP June 2008 by Todd Engineers Past, Current and Projected Water Deliveries								
Water Use Sectors	2007			2025			Increase in AFY per Acct	% Increase in Water Demand
	# of Accounts	Deliveries (AFY)	AFY per Acct	HFH # of Accounts	Deliveries (AFY)	HFH AFY per Acct		
Single Family	8,788	4,908	0.56	12,033	6,720	0.56	-	0%
Multi-family	399	755	1.89	1,974	3,735	1.89	-	0%
Commercial	759	1,122	1.48	2,008	2,969	1.48	-	0%
Industrial	68	180	2.64	216	571	2.64	-	0%
Parks, Landscape Irrigation, Other	357	979	2.74	463	1,270	2.74	-	0%
Other	51	184	-	-	-	-	-	-
Total	10,422	8,127	0.78	16,695	15,265	0.91	0.13	17%

As corrected and updated by Christine Halley, TJ Cross; August 2008.

Data source: El Paso de Robles Urban Water Management Plan,

Todd Associates, June 2008

Retyped by Brion & Associates

8.29.08

8. Fundamental Problem with EMUs and Water Demand in Latest Fee Study

In the City’s most recent correspondence, they provided the HBA with a few tables in an Excel file. One, dated August 27, 2008 and prepared by Christine Halley of TJ Cross, includes the following information: The table compares the current and buildout values, for meters and EMUs. However, for the current data they provide the data in “meters” i.e., accounts and in the buildout projections they provide the data in “EMUs” or equivalent meter units. This is misleading due to the fact that Demand/EMU has increased rather than remaining the same or decreasing for reasons discussed previously in this document. In addition we disagree with the City’s comment in the City’s August 27, 2008 letter stating “alternative approaches to projected equivalent meter units at buildout point to essentially the same number.” Our analysis indicates that the difference between the City’s and the HBA’s methods result in a difference of up to 10,000 EMUs.

City of Paso Robles
Equivalent Meter Unit Calculations
C. Halley; 2025 Projection Table Rev03.xls
Water Capacity Charge Overview

Meter Size	EMU Multiplier ¹	2007 Dec		Percent Increase in Usage per User Category (4)	2025
		Accounts ² (1)	EMUs		EMUs with 10% safety
5/8" & 3/4"	1.00	9,145	9,145	45.8%	14,667
1"	1.67	606	1,010	79.8%	1,998
1 1/2"	3.33	169	563	45.8%	903
2"	5.33	275	1,467	48.6%	2,397
3"	10.00	28	280	48.6%	458
4"	16.67	27	450	48.6%	736
6"	33.33	1	33	48.6%	54
8"	53.33	4	213	48.6%	349
		10,255	13,162		21,562

Retyped by Brion & Associates from C. Halley spreadsheet dated 8.27.08

Table B
Revised City Tables from Christine Halley, 8.27.08

Item	Water Production AFY (6)	Estimated Values (7)	Water Production per Unit (8)	notes
Current Values	8,127	10,255	meters (accounts) 0.79	C. Halley Table 8.27.08 via email
Buildout Projections	15,252	21,563	EMUs 0.71	
Revised: Meters to Meters				
Current Values	8,127	10,255	meters 0.79	\water demand spikes
Buildout Projections	15,252	16,683	meters 0.91	
Revised EMUs to EMUs				
Current Values	8,127	13,162	EMUs 0.62	\water demand spikes
Buildout Projections	15,252	21,562	EMUs 0.71	

2025 meters =

accounts taken from HFH Table 3 - Fee per EMU (August 27, 2008 report with staff report)

(6) Source: Current projection as stated in 2007 Public Water system Statistics, DWR.

Buildout production per 2007 Potable Water Distribution Master Plan.

(7) See Table above.

(8) = (6)/(7) or water demand per unit.

yellow figures are from revised Table 4 from UWMP from C. Halley; and from table above, which shows current and future EMUs by C. Halley.

Prepared by Brion & Associates -8.29.08

The city's figures suggest that water demand goes from .79 to .71 AFY by 2025. The contrary is true:

- ◆ If you compare meters at 2007 to meters at 2025, the demand increases from .79 to .91 AFY per meter or account.
- ◆ If you compare EMUs to EMUs at 2025, the water demand increases from .62 at 2007 to .71 AFY per EMU at 2025.

In both cases, with using comparable measures, water demand INCREASES and does not decrease over the life of the General Plan.

9. August 13, 2008 Recalculated Capacity Charge Fee

It was of some interest to us when we saw a version of the HF&H report that had a proposed fee rate of about \$25,000 instead of the constant \$28,000 fee. We have replicated what we believe to be the basis of this revised fee, specifically Table 2-Fee Calculation from the HF&H Study from August 7, 2008 and replaced the "costs" data from the new August 27, 2008 but left the EMUs the same. As noted in some of the staff reports, they have changed the EMUs and slightly reduced the net new EMUs from 8,610 to 8,400. We have highlighted in yellow the changes that have been made and inserted comments about the changes. As such the costs have been reduced overall by \$62.7 million; but all of this reduction is associated with removing the developer funded infrastructure from the buy-in fee calculation, which is actually \$69 million. Other infrastructure costs have "increased" since the earlier reports for no apparent reason.

With these changes held constant against the original EMUs, the connection fee would be \$25,300 per EMU. This is similar to the figure we saw during our August 26, 2008 meeting with Staff. This suggests that the EMUs changed not because the data was made more current or accurate but because the desired "target" fee of \$28,000 could not be reached with the adjustment to the buy-in fee.

It is important to note that we are not trying to suggest what the connection fee should be. We are merely illustrating that if particular issues are addressed, then the requisite connection fee would most likely be less. This table illustrates such relationships.

10. Water Demand and EMU Comparisons

Table C summarizes our key concerns. It compares many key figures and assumptions used in the City's analysis and tries to illustrate the implications of these assumptions in a way that shows why we contend that either of two things must be true:

- ◆ The city does not need the amount of water that the UWMP suggests currently, 15,252 AFY
- ◆ Or if this water is needed, it must be spread over more EMUs

Scenario A shows how if we extrapolate a straight population growth from about 30,000 residents to 44,000 by 2025. Residents would increase by about 14,000 or 47% and water demand would increase at the same rate or 47%. This would imply a future demand of 11,946 AFY, or much less than the 15,252 AFY included in the City's studies.

The city claims that this additional water is needed to address water quality issues, loss of ground water, etc. There may be merit to this. **Scenario B** shows the water proposed in the UWMP. Current EMUs are shown as calculated by the city, at 13,158 in 2007. This equals a relationship of .62 AFY per EMU. If we divide the projected water demand of 16,400 AFY by .62 AFY per EMU we have total EMUs at 2025, of 26,452 or substantially more than the City's estimated 21,563 as shown above. Thus, if we assume water demand or use is constant on a per EMU basis, which is logical, then future EMUs would be about 4,900 more than the City estimates.

Another way to look at this situation is by looking at the revised water demand estimate from **Scenario A** or 11,946 AFY at 2025. This amount of water, assuming a constant .62 AFY per EMU would result in total EMUs of 19,341 at 2025, as shown under **Scenario C**.

City of Paso Robles
 Water Connection Fee Study
 Table 2 - Fee Calculation
 Replicated by Brion & Associates from HF&H Study - August 7, 2008 and August 27, 2008

represent costs that changed since original 8.7.08 study

HFH Changes	Project Costs			Capacity Charge Components		
	Cash Funded	Debt Funded ¹	Cost in 2008 Dollars	Common Benefit (20,716 EMUs)	Growth-Only Increment (8,610 EMUs)	Total Capacity Charge Per EMU
Existing Facilities						
Supply	\$3,033,386	\$0	\$3,033,386	\$146	\$0	\$146
Treatment	\$0	\$0	\$0	\$0	\$0	\$0
Conveyance	\$104,763,623	\$0	\$104,763,623	\$5,057	\$0	\$5,057
Existing Facilities Total	\$107,797,009	\$0	\$107,797,009	\$5,203	\$0	\$5,203
Future Facilities						
Supply						
Nacimiento Regional Pipeline	\$0	\$144,190,000	\$144,190,000	\$6,960	\$0	\$6,960
Other						
Costs were \$5.7 million	\$7,371,372	\$0	\$7,371,372	\$356	\$0	\$356
Treatment						
Nacimiento Treatment Plant	\$0	\$144,190,000	\$151,561,372	\$7,316	\$0	\$7,316
Other						
Costs were \$6.6 million	\$6,843,741	\$89,770,000	\$89,770,000	\$4,333	\$0	\$4,333
	\$6,843,741	\$0	\$6,843,741	\$330	\$0	\$330
Conveyance						
Costs were \$19.9 million	\$23,870,121	\$68,770,000	\$96,613,741	\$4,664	\$0	\$4,664
Additional Future Water Supply						
Treatment Plant Expansion (6 to 7.5 MGD)	\$60,000,000	\$0	\$60,000,000	\$1,152	\$0	\$1,152
Future Facilities Total	\$88,065,234	\$233,960,000	\$332,045,234	\$13,132	\$6,968	\$20,100
All Facilities Total	\$205,862,243	\$233,960,000	\$439,842,243	\$19,335	\$6,968	\$26,304

1. Costs include principal and interest.

Keep EMUs at August 7, 2008 report level	20,716
Buildout EMUs	8,810
Growth EMUs	

Prepared by Brion & Associates and updated from HF&H Study, August 7, 2008.

Table C
Simplified Water Demand and EMU Comparisons
Paso Robles Water Capacity Charge Fee Study Critique

Scenario	2007	2025	Calculation Basis	Comments
A. Water Demand with 44,000 population at 2025				
Population	29,924	44,000	from City JWMP	Note UWMP states that there is not a direct relationship between 44,000 and # of accounts/EMUs on Table 4
Water Production (AFY)	8,127	11,946	Water Demand Calculated based upon straight Ratio of Existing Population vs. Future Population	Would indicate that only 11,946 AFY is required for 44,000 instead of 15,252 AFY
B. Water Demand per EMU				
Water Production (AFY)	8,127	16,400	from City TWMP Table 4	includes water losses
EMUs	13,158	26,452	EMUs calculated based upon Future Water Demand at a constant AFY/EMU	If EMUs are held constant (as they typically are) results in a higher total EMUs at 2025 than City's analysis, of 21,553 EMUs
AFY/EMU	0.62	0.62		water demand factor held constant
C. Future EMUs with water consumption held constant				
Water Production (AFY)	8,127	11,946	from Scenario A above	
EMUs	13,158	19,341	EMUs calculated based upon Future Water Demand of revised 11,946 AFY at a constant AFY/EMU (Note the City's most current Calculations indicate an estimated EMU of 21,563)	Current City Calculations indicate 11,550 EMUs before safety factor is applied
AFY/EMU	0.62	0.62		water demand factor held constant

Note these figures are only based upon rates and does not existate land use conditions or other variables.

Prepared by Brion & Associates and Wallace Group based on data from Paso Robles City reports, UWMP, and FF&H studies

11. Water Production Quantity Consistency

As cited in the C. Halley Corrected Table 4, the City's gross water production is 8,127 AFY, as of 2007. For 2025 a water amount of 15,265 AFY is utilized by C. Halley. However, the UWMP indicates that gross water demand will be on the order of 16,400 AFY to account for system losses. As a result this larger number should be used by the City in its EMU calculations. Using this higher number of 16,400 AFY, would further exacerbate the issue of very high Demand/EMU values.

12. Inconsistency of Water Demand Analysis

Appendix C from Volume 2 of the General Plan, Residential Water Demand Generation Tables used 210 gallons per capita per day (gpcd) for residential units. This number is overstated in that Industrial and Commercial demand is calculated separately from Residential water demand to develop the total water demand of 14,682 AFY. In reality, the UWMP uses a generation rate of 159 gpcd as stated on page 9 of the UWMP, which is substantially lower than the 210 gpcd used by the City. The Potable Water Distribution System Master Plan uses generation rates of 167 gpcd and 236 gpcd resulting in a higher water demand of 15,252 AFY. It is unclear how the difference is accounted for in these studies.

Jerry Bunin
 Additional Comments – Paso Robles Water Fee
 September 1, 2008

Multifamily Analysis									
Existing Multifamily Accounts (K/J Table 2 - 6/23/08)									
Rate Class	Meter Size								Comments
Meter Size	5/8"	1"	1-1/2"	2"	3"	4"	6"	8"	Total
W2	127	21	-	1					149
W4	26	65	17	11	2	1	1	2	125
W3	36	63	3	1					103
MR	-	1	-	2					3
Total Accounts	189	150	20	15	2	1	1	2	380
Meter Multiplier	1	1.67	3.33	5.33	10	16.67	33.33	53.33	
EMU Equivalent	189	251	67	80	20	17	33	107	763
									Total Existing EMUs (Multi-family)
									Note - 19 accounts missing should be 399 as stated in Corrected Table 4, C. Halley 8/11/08
									Total Accounts 380
									EMU Multiplier 2.01
									Current Demand (AFY) 755
									Equivalent Meter Units (Total) 763
									From Above
									Demand AFY /EMU 0.99
									Usage Factor (Demand/Total Demand/Acct) 1.99
									Calculated
									AWWA EMU Multiplier for Multifamily 1.67
									Obtained from C.Halley Meter Counts and EMUs, 8/27/08
									Derived Meter EMU Multiplier 2.01
									Calculated
									Percent Difference 20%
									Anticipated Multi-family Demand (AFY) (2025) 3,735
									Obtained from Corrected Table 4, C. Halley 8/11/08
									Demand (AFY) EMU 0.99
									From above
									Anticipated EMUs 3,773
									Calculated
									EMUs Projected in C. Halley Table, 8/27/08 2,002
									Obtained from C.Halley Meter Counts and EMUs, 8/27/08
									Under represented number of EMUs 1,733



Tuesday, September 2, 2008

Mayor Mecham and Members of the City Council
City of Paso Robles
1000 Spring St.
Paso Robles, Ca. 93446

Re: City of Paso Robles Water Capacity Charge

Dear Mayor Mecham and Members of the City Council:

The Home Builders Association thanks the City of Paso Robles for allowing us to provide further comments on the proposed Water Capacity Charge increase on the Sept. 2 City Council agenda.

In addition to this cover letter, we have attached our legal comments from Daniel Muller of Morgan Miller Blair and our technical comments from Joanne Brion of Brion & Associates.

We recognize that the issue is complex because of the volume of numbers being used and different studies being referenced.

Nevertheless, our interests are simply stated. We are fully willing to pay our share of the cost for the Nacimiento Water Project and related improvements, but we have been unable to determine what those costs are. We do not have a specific fee amount that we are supporting. Our concern has been that city reports have not clearly and consistently stated and explained how many accounts will be paying for the water, how much water the accounts and equivalent meter units (EMUs) will use, how much water the city will need by 2025, and how the "buy-in" cost for the existing water system will factor in the depreciation that has already occurred.

The association appreciates the city's efforts to work with us to resolve our questions. However, as suggested in the attachments, we have continuing concerns regarding the proposed fee increase and wish to continue our dialogue with city official to address them fully.

Respectfully,

Jerry Bunin
Government Affairs Director
Home Builders Association

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September 2, 2008

VIA E-MAIL & HAND DELIVERY

Jim App (japp@prcity.com)
City Manager
City of Paso Robles
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Paso Robles, CA 93446

Iris P. Yang ([iYang@mhalaw.com](mailto:iyang@mhalaw.com))
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McDonough Holland & Allen PC
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**Re: City of Paso Robles, Council Agenda for September 2, 2008
Agenda Item #1 - Proposed Water Capacity Charges**

Dear Mr. App and Ms. Yang:

As you know, this office represents the Home Builders Association of the Central Coast (“HBA”) in connection with the City of Paso Robles’ (“City”) related proposals to increase water user rates (“User Rates”) and water capacity or connection fees (“Connection Fee”).

This letter’s main purpose is to state that - given the Connection Fee’s complexity, magnitude, and rapid evolution - the City-HBA discussion is unfinished. Ending dialogue now would be an unusual departure from the City’s practice of giving reasonable time and opportunity to seek common ground with stakeholders. Despite the conversations since July 1st, the latest iteration of the fee remains inscrutable. For the reasons stated herein (and in the attached memorandum from Brion & Associates), we respectfully ask the Council to continue this matter, to afford the HBA’s and City’s respective teams a reasonable opportunity to review a static fee proposal that is not based on morphing methodologies, assumptions, and data. We would further ask that the HBA be allowed reasonable access to all the relevant information the City is utilizing. The HBA is not seeking a pre-determined fee amount, but asking that the process leading to a supportable fee be fully and fairly finished.

While a secondary purpose of this letter is to observe that the Connection Fee is vulnerable to challenge, the HBA would much rather work collaboratively with the City, as it has in the past, to find a mutually acceptable way to pay for the water that is needed to serve the community.

1. Introduction & Summary

This is our firm's third letter to the City since July 1st. The earlier letters were dated July 1st and July 21st. Like this letter, they raised process-related and legal concerns regarding the proposed Connection Fee. (An even earlier letter directly from Mr. Bunin was sent September 28, 2007, when the Connection Fee increase was originally proposed at a much lower amount.) According to the Staff Report for tonight's hearing, the proposed Connection Fee is \$15,142 per residential unit in 2009, and will increase to \$28,208 in 2013. Compared the current fee of \$9,119, the magnitude of the proposed increase is significant.

This letter incorporates by reference the attached Brion & Associates memorandum dated September 1, 2008, plus all other submittals and communications between the City and the HBA to date, whether to the Council or to City Staff relating to the several working meetings, as if fully set forth herein.

For sake of convenience, and to form a more complete record, we felt it necessary to cover some of the outstanding concerns conveyed before. Additionally, due to the continually changing methodologies, documentation, support and analyses provided by the City's team in response to our past letters and meetings, this letter also includes additional relevant questions and concerns. In part, this letter and the attached memorandum by Ms. Brion are intended to respond to the City's most recent letter dated August 22nd, and staff's recently prepared information provided August 27th, after our meeting August 26th.

The HBA has consistently stated its willingness to pay its share of costs of facilities serving its projects. The HBA deserves little credit for such willingness, however, because rather than a gracious offer this merely acknowledges the City's valid power to charge impact fees to pay for facilities serving new development. Equally certain, however, is that the City's power comes with fundamental constitutional limitations, the foremost being that fees cannot exceed the reasonable cost of the public facilities. This is the so-called "nexus" requirement - i.e., fees must be reasonably and proportionally connected to the impacts created by new development. Thus, the HBA cannot be required to pay *more* than its share.

Additionally, in impact fee cases the following legal requirements also apply: (1) it is the City who bears the initial burden of showing, based on "substantial evidence", that there is a reasonable constitutional "nexus"; and (2) opinions and conclusions offered by professionals to support a fee can only constitute legally sufficient "substantial evidence" if they are based on facts or otherwise solid information and analyses. For the reasons stated herein and in previous correspondence, the HBA believes the City has not met its burden of providing substantial evidence showing the Connection Fee passes constitutional muster.

In view of both the City's power, and its limitations, the HBA and the City have wisely worked hard in the past to reach agreement. Although sometimes the agreements have come

after intense dialogue, it has been a healthy process and created a respectful relationship. All the past efforts on impact fees have been open and informative, and the results have been reasonable.

For many reasons, the Connection Fee presents a sharp departure from the City's past practice. The Connection Fee is highly unusual in terms of complexity, methodology, fluidity, and magnitude. During the relatively short period after the fee was unveiled in July, the underlying analysis has rapidly morphed. (Surprisingly, the fee *amount* has not materially changed.) Key City-approved water reports that were initially cited as the source documents for the data supporting the initial iteration of the fee (i.e., the Urban Water Management Plan) have now been disavowed by the City's team as incorrect, and replaced with other reports (e.g., the Potable Water System Master Plan) - whose names the HBA had not previously heard. While the sides have met several times to seek common ground, the ground has shifted so rapidly and fundamentally that the meetings have not fully addressed all the issues.

2. Relevant Factual Background

A. Events Preceding July 1st Hearing: City's Failure to Engage/Notify HBA

The HBA sought to communicate promptly and openly when the water fee issues arose last year. Specifically, the HBA submitted Mr. Bunin's letter of September 28, 2007, which raised many questions and concerns stemming from the HBA's review of the report prepared in August 2007 by the City's consultant, Hilton, Farnkopf & Hobson ("HF&H").

The City responded almost four months later via Mr. Falkenstien's letter of February 19, 2008. The letter noted that with the retirement of the Director of Administrative Services, the City had "taken a hiatus on the subject of water and sewer connection fees since your letter" of September 28th. The City noted that "We have a new Director on board, Jim Throop, and we are now gearing up to get back to work."

The City's February letter further stated that:

"the City has retained Kennedy-Jenks to perform a water rates study. It is essential that the water rates study and the water-sewer connection fee report be aligned with regard to projected numbers of accounts by meter size and the 50-50 growth versus rate payer allocation. [¶] We will review our water and sewer capital improvement project list and will update our 10-year capital improvement programs to be consistent. Within the next 30 days, we will comprehensively respond to your comment letter. As we bring Kennedy-Jenks aboard and refine our reporting, your input can be valuable. We would be pleased to see your projections of commercial and housing development in the next ten years. [¶] It is our intent to bring the new water rates and connection fees to the City Council sometime in May.

We welcome your input and appreciate any additional comments you may have.”

While a four-month hiatus was understandable based on staff changes, other aspects of the letter raised concerns in light of later events.

First, the City did not provide a response to the HBA’s September 28th letter until June 26, 2008 (discussed briefly below).

Second, despite the City’s acknowledgement that “it is essential that the water rate study and the water-sewer connection fee report be aligned with regard to projected numbers of accounts by meter size and the 50-50 growth versus rate payer allocation”, inconsistencies and problems regarding these issues still persist today (discussed further in Ms. Brion’s attached memorandum).

Third, despite stating that the City valued the HBA’s input, for some reason the City did not engage the HBA while it was actively pursuing a Connection Fee much higher than the fee that triggered the HBA’s initial concerns last year. Instead of hearing from the City, it was through a June 19, 2008 article in The Tribune that the HBA first learned that on July 1st the City was going to consider the remarkably higher Connection Fee. The lack of City outreach to a key stakeholder and the extremely limited time to review the information offered to justify the dramatic increase, were surprising.

On June 20th, immediately after learning about the July 1st hearing, the HBA requested that the City provide the materials relating to the fee proposal.

On June 25th, as some of the City’s information starting coming to the HBA, Mr. Bunin sent the City a letter asking for a continuance of the City’s July 1st Connection Fee hearing, as follows:

The Home Builders Association decided to write you as soon as possible since we are requesting a delay in the city presenting the Paso Robles City Council with a discussion item at the July 1 meeting and a resolution on the July 15 meeting to set new water rates and a water capacity charge, particularly relating to the connection fee to the Nacimiento Water Project.

The association appreciates the hard work the city is doing to develop a well thought out plan for sewer and water services and water connection fees. Our interest is always in making sure that the best information is used and that the studies accurately reflect new development's share of the costs. In order for us to do that, we need adequate time to reassemble our team, analyze the most recent documents, and prepare our response.

The association was unaware that the city was planning a \$15,000 increase in the proposed Nacimiento connection charge until we read a story in the June 19, 2008, San Luis Obispo Tribune about a city meeting that the association had not been notified about. On June 20, we requested the staff report and related documentation for the July 1 Council meeting. We received most of that today, June 25. While starting to read that material, we immediately saw references to a recently completed study – the June 2008 “City of Paso Robles Water Revenue Analysis Public Review Draft Report,” prepared by Kennedy Jenks Consultants – that we do not yet have and will need to read and assess as part of our understanding and response. We also request the alternative resolutions referenced on Page 8 in the staff report.

As you remember, we submitted a three-page letter on Sept. 28, 2007, to the city detailing our questions and concerns surrounding a water and sewer fee (and connection charge) proposal that the city staff was then preparing to present to the City Council. We had hoped then and still do hope for a detailed response from the city to our letter, and we requested then and still do request that the city hold a workshop with the development community, city staff and city consultants before proceeding to the council so we can resolve issues in a deliberative and cooperative environment without having to raise them in a public hearing before the council.

We received a response Feb. 19, 2008, from City Engineer John Falkenstien. It explained that the process had been delayed as a new city director of administrative services was brought on board and brought up to speed. Mr. Falkenstien noted that the city was “gearing up to get back to work” and had retained Kennedy Jenks to perform a water rates study since it “is essential that the water rates study and water-sewer connection fee report be aligned.”

Mr. Falkenstien noted in the Feb. 19 letter: “Within the next 30 days, we will comprehensively respond to your comment letter. As we bring Kennedy-Jenks aboard and refine our reporting, your input can be valuable. ... It is our intent to bring the new water rates and connection fees to the City Council sometime in May. We welcome your input and appreciate any additional comments.”

In all sincerity, the association fully appreciates the difficulties that busy people have trying to meet the schedules that they hope to keep. We are certainly not trying to fault the city for missing either the 30 days noted above for the response or the May hearing schedule. However, we have not yet received the response. We are asking for more time in order to:

- Determine, read and analyze all the relevant documents;

- Participate in a workshop with city staff and consultants; and
- Prepare our input in time for the City Council to read and consider it before the initial public discussion or public hearing.

Via a letter dated June 26th, the City finally provided a fairly general response to the HBA's September 2007 letter. With the letter, the City enclosed a copy of the June 20th "Water Capacity Charge Study - Public Review Draft" prepared by HF&H. The June 20th HF&H study has undergone four subsequent iterations - dated June 25th, August 7th (final report), August 13th (not provided to the HBA), and August 27th (revised final report). Counting the iterations HF&H prepared in 2007, there are at least a half dozen reports from just that consultant.

B. The July 1st Connection Fee Proposal & Staff Report

The proposal on July 1st was to increase the current fee from \$9,119, to \$17,386 in 2009, with further increases to \$28,687.

The Staff Report for that hearing was 59 pages long, including three dense consultant reports only provided to the HBA days earlier: the June 23rd "Water Rate and Revenue Analysis - Public Review Draft Report" by Kennedy/Jenks Consultants ("Kennedy/Jenks"), the June 24th "2008 Water Rate Study - Revised Draft Projected Water Supply Plan and 10-Year CIP" by TJCross Engineers ("TJCross"), and the June 25th "Water Capacity Charge Study, Public Review Draft" by HF&H.

Given its longstanding desire to work productively with the City on proposed fee increases, the HBA's team worked very hard to analyze the issues despite the lack of time. Our firm provided its first letter dated July 1st, raising a host of concerns and questions and summarizing the legal standards governing such fees. As it had in the past, the HBA retained Brion & Associates, a well-regarded urban economics consulting firm whose principal, Joanne Brion, has prepared and peer-reviewed fee studies for both fee payers and public agencies. Along with our letter was a 9-page memorandum from Ms. Brion, dated July 1st, containing technical commentary.

At the July 1st hearing, the City also acted to approve its "2005 Urban Water Management Plan" ("UWMP"). We find it puzzling that Staff has recently determined that the UWMP is at least partially incorrect, and Staff appears to be replacing some of the key UWMP data that was used in the fee calculations, with data from the so-called Potable Water System Master Plan. To the extent the UWMP is still being used, it should be amended and re-approved before any Connection Fee is approved. The same holds true for other approved reports - before the Connection Fee is approved, they should be formally amended and approved if they are now deemed inaccurate and other information that differs from the reports is being used to support the Connection Fee.

C. City-HBA Dialogue After July 1st

While the dialogue between the City and the HBA has been fairly regular after July 1st, the results have been confusing and inconsistent. As noted in Ms. Brion's memorandum (attached), while the City's analysis has changed dramatically, and the reports upon which it is based have been modified (some data in City-adopted reports has been deemed incorrect, and supplanted with data from other reports), the amount of the proposed fee has remained substantially the same. As noted above, the process leading to a supportable fee remains unfinished. It could be finished with reasonable effort and time, as the HBA remains willing to engage in that worthwhile process.

3. Legal Analysis

The HBA strongly believes the currently proposed Connection Fee violates federal and state constitutional nexus requirements, codified in the state's Mitigation Fee Act (Govt Code section 66000, et seq). Importantly, the legislature has expressly recognized that imposing fees for public facilities in excess of constitutional and statutory limits improperly adds to the costs of providing much-needed housing in California, and has condemned such practices. See Government Code § 53395(b). However, as it has in the past, the HBA would rather continue working with the City to find common ground by understanding the details of the ultimate Connection Fee.

A. Development Fees Generally

Development fees are subject to the underlying legal principles that limit exactions imposed as conditions of property development. Such constitutional limitations provide the boundaries between permissible police power regulation and unconstitutional regulatory "taking" of property for which just compensation must be paid. (U.S. Const. amend. V.) The U.S. Supreme Court has identified at least two constitutional nexus-related constraints on such fees and exactions: (1) the "rational relationship" test which requires the fee to be reasonably related to adverse impacts attributable to proposed development; and (2) the "rough proportionality" requirement under which exactions must be "roughly proportional" to the costs or impacts imposed on the public agency as a result of the proposed development activity. (*Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).)

While developers are expected to provide or pay for infrastructure needed to serve their development projects and to mitigate adverse impacts on public facilities that are attributable to such new development, California law (i.e., Cal. Const., Art. 1, Section 19, and case law) also recognizes and enforces limits on fees or exactions that can be imposed for public facilities. For example, fees on new development cannot include any costs which are attributable to the costs of repairing, replacing, or otherwise curing existing deficiencies. (*Bixel Assoc.*, 216 Cal.App.3d at 1218 – 1219.) More generally, the California courts have held that developers cannot

“be required to shoulder the entire burden of financing public facilities for all future users. ‘[T]o impose the burden on one property owner to an extent beyond his [or her] own use shifts the government's burden unfairly to a private party’ It follows that facilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development. The [public agency] imposing the fee must therefore show that a valid method was used for arriving at the fee in question, ‘one that established a reasonable relationship between the fee charged and the burden posed by the development.’ ” (*Shapell Industries, Inc. v. Governing Board of the Milpitas School District*, 1 Cal.App.4th 218, 234-35 (1992), citing *Bixel Assoc. v. City of Los Angeles*, 216 Cal.App.3d 1208, 1219 (1989)).

In *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 859, the California Supreme Court noted that the Mitigation Fee Act (Gov’t Code § 66000 et seq., “Act”) implements the above-described constitutional nexus principles. The Court confirmed that the protections against takings afforded by the federal and state constitutions apply to monetary exactions as conditions of development approval. Thus, under the Act - consistent with constitutional mandates - the regulatory agency must demonstrate that the exaction bears a “reasonable relationship” to the public impact of the proposed development. (12 Cal.4th at 860.)

More specifically, in *Ehrlich* the Court noted that the Act’s requirements - i.e., that any fee imposed as a condition of approval of a development project bear a “reasonable relationship” between “the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed,” and there must also be a reasonable relationship between the proposed use of a given exaction and both “the type of development project” and “the need for the public facility and the type of development project on which the fee is imposed” (Gov. Code, § 66001, subd. (a)(3), (4)) - essentially codify, as the statutory standard applicable by definition to nonpossessory monetary exactions, the “reasonable relationship” standard employed in California and elsewhere to measure the validity of required dedications of land (or fees imposed in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments. (*Ehrlich*, 12 Cal.4th at 865.) Accordingly, “the term ‘reasonable relationship’ embraces both constitutional and statutory meanings which, for all practical purposes, have merged” under the Act. (*Id.*, 12 Cal.4th at 867.)

B. Water Connection Fees

In addition to the above constitutional limitations (as implemented by the Act), water connection fees are also subject to section 66013 of the Act, which provides that “fees for water connection . . . , or . . . capacity charges . . . shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed.” (*See also Rincon del Diablo Municipal Water Dist. v. San Diego County Water Authority*, 121 Cal.App.4th 813, 818 (2004).) Although some may seek to argue that portions of the Act somehow exclude water and sewer fees from various procedural aspects of the Act (see, e.g., Gov. Code., § 66013(h); see, e.g.,

Capistrano Beach Water Dist. v. Taj Development Corp. (1999) 72 Cal.App.4th 524, 529-530 [water and sewer fees were not the type of development fees that could be refunded after protest under Gov. Code, § 66020]), any such procedural exclusions are legally inconsequential, and cannot relieve water fees from the fundamental constitutional requirements noted above. It is axiomatic that legislation cannot circumvent the constitution. Thus, to the extent that the substantive requirements of Section 66001 of the Act, especially subsections (a)(3) – (5) and (g), reflect the constitutional requirements to justify an exaction - as noted by the Court in *Ehrlich* - any water or sewer fee must meet these same requirements. Indeed, by calling out water connection fees as requiring an additional showing of proof under section 66013, the Act suggests the legal standard for water fees is potentially higher than for other types of fees.

C. The City Has Not Satisfied its Burden of Establishing All the Various Factors Which Govern the Fee Amount Are Based on Legally Sufficient Substantial Evidence

Contrary to the remarks by some from the City's team, that the HBA's concerns merely reflect "reasonable differences of professional opinion", the HBA's concerns reflect important constitutional legal requirements that have not been met. California law requires the City to meet a heavy burden when increasing such fees. While we agree that experts can indeed provide sufficient, substantial evidence by way of their professional opinions, such opinions must be based on reasonable evidence, not merely their independent judgment devoid of solid support. In several fundamental respects, the City's staff and consultants have not met this heavy burden of proof.

In California, development impact fees which exceed the reasonable cost of providing facilities or services are deemed "special taxes", which must be approved by at least two-thirds of the electorate. (Cal. Const., Art. 13.) In the absence of such voter approval, the basis for a fee must bear a fair and reasonable relationship *to the developer's benefit from the fee*. (See, e.g., *Sea and Sage Audubon Society, Inc. v. Planning Commission* (1983) 34 Cal.3d 412; *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1219.) Courts have held that because the costs of providing water and sewer services are uniquely within the control of governmental agencies, *the agency should bear the burden* under Article XIII of demonstrating its proposed fees are not in reality taxes which exceed the reasonable costs of providing those services. (See *Oildale Mut. Water Co. v. North of the River Mun. Water Dist.* (1989) 215 Cal.App.3d 1628, 1634.)

In keeping with this principle, the Act imposes the burden of proof on the agency. (Gov. Code, § 66024(a).) Specifically, the City has the burden to produce evidence in the administrative record to demonstrate the propriety and amount of the Connection Fee. (*Bixel Associates*, 216 Cal.App.3d 1208 (fire hydrant connection fees held invalid due to insufficient evidence to justify allocation of costs to new development); *Oildale Mutual Water Co. v. North of the River Municipal Water Dist.*, 215 Cal.App.3d 1628 (1989) (water service fee held invalid

where the district failed to demonstrate that its fee did not exceed the reasonable costs of service).)

As described in the City's own analysis, and in the attached memorandum from Ms. Brion, there are myriad issues or factors requiring solid evidentiary support in order to adopt a legitimate Connection Fee. One issue or factor is the cost of constructing the facilities that will be built using the fee. To lawfully impose the proposed fee increases, the City must, at a minimum provide evidence of the estimated reasonable cost of the services or facilities actually planned to be provided with the proceeds of the fees. (*See, e.g., Shapell Industries, Inc. v. Governing Board of the Milpitas School District*, 1 Cal.App.4th 218 (1992); *Bixel Assoc. v. City of Los Angeles*, 216 Cal.App.3d 1208 (1989); *Russ Building Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496 (1987); *Beaumont Investors v. Beaumont-Cherry Valley Water District*, 165 Cal.App.3d 227 (1985); *J.W. Jones Companies v. City of San Diego*, 157 Cal.App.3d 745 (1984).) Even more importantly, however, are the other issues or factors that also require support based on substantial evidence. These include the number of Equivalent Meter Units that exist now and will exist at build-out, and an accurate number of accounts, by meter size, all of which affect water demand from new development. There are many other issues and factors, as described in the Brion memorandum. Many of the factors and issues are confused and unsupported by the City's collection of analyses, which cannot constitute substantial evidence supporting the proposed fee.

Perhaps the most problematic flaw in the City's analysis is the *quality of and support for the City's proffered evidence*. This is not a "jab" at the capabilities or expertise of the City's team, but merely proof that the issues are very complicated and the dialogue is not yet finished. It is critical to note that professional opinions that are conclusory, unsupported, or contradictory fail the substantial evidence test. The City must offer legally sufficient "substantial evidence" (*County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 438). What constitutes substantial evidence in cases involving development fees is analogous to cases involving the California Environmental Quality Act (Pub. Resources Code, section 21000, et seq., "CEQA"). Notably, the leading treatise on CEQA describes "substantial evidence" as evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value. (Kostka, *Practice Under the California Environmental Quality Act*, § 6.39, 2d ed. [citations omitted].) CEQA itself defines substantial evidence as "fact(s), ...reasonable assumption(s) predicated upon fact(s), or expert opinion supported by fact(s). (2) Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous..." (Emphasis added; CEQA, § 21080(e).)

Thus, under CEQA, as should be the case here, the opinion of a purported "expert" or consultant is not per se "substantial evidence". Such opinions do not become "substantial evidence" solely by dressing them in the garb of authority. (See *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144; *Lucas Valley Homeowners Ass'n v. County of Marin* (1991) 233 Cal.App.3d 130, 142, 157 [testimony by real estate agent, unqualified to give scientific opinion, unsupported with data, was not substantial evidence];

Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359, 1422 [letter from engineering professor regarding groundwater and erosion impacts not substantial evidence where not founded on specific project information].) Similarly, in *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344, the court rejected an environmental impact report (“EIR”) in part because it failed to consider more recent, and specific, data regarding anticipated air contaminants from a project. The EIR almost wholly failed to address detailed information and comments from air pollution control professionals, officials, and agencies of the nature, quantity, and effects of air contaminants likely to come from the project. (91 Cal.App.4th at 1367, 1368-1370.) Comments by responsible experts (like the HBA’s team) must be considered and responded to in good faith. (91 Cal.App.4th at 1367.) Further, this information must be considered, even where there is no scientific consensus on methodology for considering it. (91 Cal.App.4th at 1370.)

As discussed in Ms. Brion’s memorandum, attached, the vast majority of the City’s evidence is contradicted by other factual evidence, or is unexplained. Given that the fee amount has only changed slightly, despite the many changes in the analysis, one might argue it suffers from an apparent effort to collect a pre-determined revenue stream that is divorced from the analytical nexus factors and steps that the above-referenced legal standards require. It seems that the City’s evidence is not of ponderable legal significance, reasonable in nature, credible, and of solid value, nor based on sufficient facts.

Despite generally affording public agencies some reasonable degree of deference, courts have become increasingly skeptical of development fees that appear to be insufficiently documented. For example, in *County of Orange, supra*, a developer challenged fees for building inspections and construction plan checks under Section 66016 of the Act. (Like water and sewer connection fees under Section 66013, challenges to fees assessed pursuant to Section 66016 are brought pursuant to Section 66022.) Specifically, the developer argued that the fees had not been reduced enough following an audit and declining permit applications. The court found, based on conclusions by a court-appointed expert and special master, that the County’s fees were more than reasonably necessary to administer the inspection and plan check program. (150 Cal.App.4th at 428–430.) The court of appeal upheld the trial court’s determination based on the evidence provided by the special master and appointed expert. There had been an unexplained increase of over 200% in County overhead, and actual program costs had increased despite declining activity over a time period where growth in activity had not been reasonably expected. (150 Cal.App.4th at 439.)

Similarly, an unpublished decision issued last year (*Gomes v. Ukiah Unified Sch. Dist.* (2007 WL 242366, January 30, 2007)), demonstrates that cities cannot be complacent, as courts will often carefully scrutinize the nexus analyses, and will invalidate fees that do not pass constitutional or statutory muster. In *Gomes*, the First District Court of Appeal invalidated a resolution imposing school facilities fees and ordered the school district to refund all fees collected from the protesting plaintiff with interest. In light of the constitutional underpinnings

governing development fees, the court analogized the requirements for adopting school facilities fees to the Act's statutory requirements for other development fees. The court's decision included a balanced overview of the law on school facilities fees, and the evidentiary burdens on school districts and on all local agencies imposing development fees generally. It also addressed several points that, if echoed by a court reviewing the Connection Fee, would likely render the fee invalid:

- (1) the burden of proof is on the agency "to establish that the fee does not exceed the cost of the facility for which it is imposed;"
- (2) to carry this burden, in the school context, the district must not only quantify the number of new students projected from growth, but "must also estimate what it will cost to provide the necessary facilities for that approximate number of students;"
- (3) the district must have a facilities plan or other publicly-available document that identifies the new facilities needed with sufficient detail that the costs of facilities may be reasonably projected, and applied the AB1600 (Act) requirements for identification of the proposed use of the fees: an agency adopting a fee resolution must identify "the use to which the fee will be put."
- (4) the court emphasized that the evidence justifying fees needs to be available at the time the district board acts to adopt the fees, and rejected the district's efforts to justify the fees based on new fee documentation and new testimony. "This kind of post-hoc rationalization fails to conform to the procedures required by law."
- (5) importantly, the court gave little deference to the district in light of the fact it was setting its own fees: "It is this court's responsibility to ensure that an agency has adequately considered all relevant factors and demonstrated a rational connection between those factors ... and the purposes of the enabling statute."
- (6) the court distinguished the 1992 decision in *Garrick, supra* (which accepted a roughly done facilities 'study' and allowed the district to impose fees without "identification of an actual construction project") on the basis that the study in *Garrick* at least demonstrated that the costs of hypothetical new facilities for the projected numbers of new students "would vastly exceed" the revenues to be raised by the new fees, unlike the case in Ukiah, and
- (7) the court reminded agencies of the limits on fees: "The statutes granting the power to impose monetary exactions also impose specific requirements in the exercise of that power which have not been met here."

The *Gomes* court held that when the district adopted the fee resolution, it did not have any plan or publicly-accessible document identifying the new school facilities which were ostensibly needed to accommodate new high school students attributable to new development, nor did it have an estimate of the costs of housing the number of new students projected.

Instead, the district had relied upon a "study" which merely extrapolated pro forma per-pupil costs of construction from State formulas for prototypical costs for "hypothetical" elementary, middle, and high school construction. In an earlier case involving the same parties, the court had faulted the district's fee justification but had remanded the case based on the district's assurance that it did have a "facilities plan" which identified the proposed new school construction. However, on remand the district failed to produce any such plan, and the court rejected the district's proffer of its application to the State for matching funds as "indecipherable."

Additionally, the Connection Fee will also likely run afoul of constitutional nexus limitations because it does not include any *credit* or *reimbursement* mechanism. While the Connection Fee appears to remove developer built facilities, it seems to ignore projects with extant water rights. For the reasons stated in both the letter dated August 18, 2008 by counsel for River Oaks II LLC and the testimony at the public hearing on August 19, 2008, projects like River Oaks II LLC which have independent water rights, must be given credits against the Connection Fee, since their water rights logically affect their project's need for City water service. Specifically, the water rights of such projects will either (a) serve as a supply that renders the City's service completely or partially unnecessary, or (b) will provide an offset to the City's services upon contribution for the City's use.

4. Conclusion

Coupled with the previous communications, and the further analysis contained in the attached memorandum by Brion & Associates, the foregoing comments highlight the HBA's continuing concerns with the proposed Connection Fee. In sum, we believe the Connection Fee increase as presently proposed exceeds constitutional and statutory limits. Despite our comments, however, the HBA seeks to continue the relatively productive - but unfinished - working dialogue with the City, and requests such dialogue be completed before the Connection Fee is approved.

Respectfully submitted,

MORGAN MILLER BLAIR



DANIEL A. MULLER

Attachment: Memorandum from Brion & Associates dated September 1, 2008.

cc: Jerry Bunin, HBA (jbunin@hbacc.org)
Joanne Brion, Brion & Associates (jgbrion@pachell.net)

To: Paso Robles City Council

From: John Borst

Date: September 2, 2008

Subject: Water Rate Protest

“The courts generally regard fees as being reasonable if they are not capricious, arbitrary, or discriminatory. Fees are capricious if there is no factual basis for the underlying data used to make the calculations. Fees are arbitrary if there is no logical rationale for choosing among alternatives. Fees are discriminatory if they disproportionately allocate costs to one class of service to the benefit of another class.” (Page 2, H&H Consultants, LLC August 27, 2008 letter to Jim App, City Manager)

The proposed rates/fees in the City's July 2, 2008 water rate flier are discriminatory. The proposed rates/fees for current water customers' service (one class of service) are discriminatory because the same standard, EMU's, was not used when fees for capacity charges (another class of service) were calculated/established. 21,566 EMU's were used in calculating the capacity charge fees, but not in the calculation of current water customers' service rates/fees. To be non-discriminatory the same standard, 21,566 EMU's, should have been used in calculating the City's proposed rates for current water customers' service. Consequently, because this was not done, the amount of the fee or charge to be imposed upon current water customers as was announced in the July 2008 water rate mailer exceeds the proportional cost of the service attributable to current City water customers' parcels. **This is a violation of Proposition 218 Article XIID Section 6b(3).**