



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

CITY COUNCIL MINUTES

ADJOURNED REGULAR MEETING

Thursday, January 15, 2009 7:00 PM

ADVISORY BODY INTERVIEWS & APPOINTMENTS:
PROJECT AREA COMMITTEE APPOINTMENTS

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

CALL TO ORDER

ROLL CALL Councilmembers Nick Gilman, John Hamon, Ed Steinbeck, Fred Strong, and Mayor Duane Picanco

PUBLIC COMMENTS

This is the time the public may address the Council on items other than those scheduled on the agenda. **PLEASE SPEAK DIRECTLY INTO THE MICROPHONE AND BEGIN BY STATING YOUR NAME AND ADDRESS. EACH PERSON AND SUBJECT IS LIMITED TO A 3-MINUTE DISCUSSION.** Any person or subject requiring more than three minutes may be scheduled for a future Council meeting or referred to committee or staff. Those persons wishing to speak on any item scheduled on the agenda will be given an opportunity to do so at the time that item is being considered.

1. Project Area Committee (PAC)

R. Whisenand, Community Development Director

The Project Area Committee (PAC) consists of eleven (11) regular appointed members who are each assigned in staggered three year terms. Three of the member's terms will expire December 31, 2008.

Jeffrey Bower
Don Fransen
Dale Gustin
Bonnie Hall
Jody Harms
Patti Youngclaus

After interviewing all the candidates Council moved to delay the appointments until after Council determines to continue with PAC or reduce Advisory Body Commissioners.

Three Regular Terms Expiring 12/31/2011

1. Jeffrey Bower
2. Bonnie Hall
3. Patti Youngclaus

Motion passed by the following unanimous roll call vote:

AYES: Gilman, Hamon, Steinbeck, Strong and Picanco

NOES:

ABSTAIN:

ABSENT:

The Mayor adjourned the meeting at 8:30 P.M.

ADJOURNMENT:

- THE REGULAR MEETING AT 7:30 PM ON TUESDAY, JANUARY 20, 2009,
AT THE LIBRARY/CITY HALL CONFERENCE CENTER, 1000 SPRING
STREET

Submitted:

Cathy M. David, 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.**



CITY OF EL PASO DE ROBLES

"The Pass of the Oaks"

CITY COUNCIL MINUTES

Tuesday, January 20, 2009

CLOSED SESSION 6:00 P.M.

REGULAR MEETING 7:30 P.M.

**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**

**PLEASE REFRAIN FROM CELL PHONE USE DURING THE MEETING
PLEASE TURN RINGER OFF**

CALL TO ORDER – Downstairs Conference Center

ROLL CALL Councilmembers Nick Gilman, John Hamon, Ed Steinbeck, Fred Strong, and Mayor Duane Picanco

PUBLIC COMMENTS ON CLOSED SESSION

Public comments limited to Closed Session items only.

CLOSED SESSION

CALL TO ORDER – Large Conference Room, 2nd Floor

a. Conference with Legal Counsel – Anticipated Litigation

Government Code Section 54956.9 (b)

Significant exposure to litigation

Number of cases: One

RETURN TO OPEN SESSION

CLOSED SESSION REPORT

City Attorney Iris Yang announced that there was no reportable actions taken.

By unanimous voice vote, Council moved to adjourn to regular session at 7:30 P.M.

7:30 PM – CONVENE REGULAR MEETING

CALL TO ORDER – Downstairs Conference Center

PLEDGE OF ALLEGIANCE

INVOCATION – No pastor – a moment of silence initiated by the Mayor Picanco.

PUBLIC COMMENTS

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PUBLIC HEARING

1. **Water Rate Structure**

D. Monn, Public Works Director

For the City Council to conduct a public hearing, and if there is no majority protest, consider introduction of an ordinance establishing a revised water rate structure.

Mayor Picanco opened the public hearing. Speaking from the public was John Borst, Kathy Barnett, Pascale Padilla, Dale Gustin, Don Gooding, Liz Baier, Thomas Hardwick, Karen Reed, Kathy Barnett, Joy Pimentel, John Borst, and Tom Flynn. The public discussion was closed.

Councilmember Strong, seconded by Councilmember Steinbeck, moved to approve Ordinance 09-952 N.S. that establishes a revised water rate structure as a majority protest was not received.

Motion passed by the following unanimous roll call vote:

AYES: Gilman, Hamon, Steinbeck, Strong and Picanco

NOES:

ABSTAIN:

ABSENT:

AGENDA ITEMS TO BE DEFERRED (IF ANY)

CONSENT CALENDAR

ITEMS ON THE CONSENT CALENDAR ARE CONSIDERED ROUTINE, NOT REQUIRING SEPARATE DISCUSSION. However, if discussion is wanted or if a member of the public wishes to comment on an item, the item may be removed from the Consent Calendar and considered separately. Councilmembers may ask questions of clarification without removing an item from the Calendar. INDIVIDUAL ITEMS ARE APPROVED BY THE VOTE THAT APPROVES THE CONSENT CALENDAR, UNLESS AN ITEM IS PULLED FOR SEPARATE CONSIDERATION.

2. Approve City Council Minutes of January 6, 2009 and January 8, 2009
D. Fansler, City Clerk
3. Approve Warrant Register: Nos. (81922 - 82012) and Nos. (82013 - 82112)
J. Throop, Administrative Services Director
4. Receive and file Advisory Body Committee minutes as follows:
Library Board of Trustees – December 11, 2008

Consent Calendar Items Nos. 2 - 4 were approved on a single motion by Councilmember Hamon, seconded by Councilmember Strong.

Motion passed by the following unanimous roll call vote:

AYES: Gilman, Hamon, Steinbeck, Strong and Picanco

NOES:

ABSTAIN:

ABSENT:

COUNCIL COMMENTS - None

ADJOURNMENT:

- LEAGUE OF CALIFORNIA CITIES NEW MAYORS AND COUNCIL MEMBERS CONFERENCE AND LEAGUE POLICY MEETINGS IN SACRAMENTO, HYATT REGENCY AND DOUBLE TREE INN JANUARY 21 THROUGH JANUARY 23, 2009
- PASO ROBLES CHAMBER OF COMMERCE ANNUAL DINNER, JANUARY 24, 2009 AT THE PASO ROBLES EVENT CENTER AT 7:00 P.M.
- PASO ROBLES WINE COUNTRY ALLIANCE ANNUAL GALA, PARK BALLROOM, JANUARY 30, 2009 AT 7:00 P.M.
- THE REGULAR MEETING AT 7:30 PM ON TUESDAY, FEBRUARY 3, 2009, AT THE LIBRARY/CITY HALL CONFERENCE CENTER, 1000 SPRING STREET

Submitted:

Cathy M. David, Deputy City Clerk

Approved: 02-03-2009

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COUNCIL AT A FUTURE REGULAR MEETING.**

Received @ 1/20/09
City Council meeting

To: Paso Robles City Council
From: John Borst, 209 Navajo Ave.

Date: Jan. 20, 2009

At the City Council meeting on Oct. 21, 2008 Iris Yang, City Attorney for Paso Robles, made the below claim regarding the City's Water Rate Proposal, Agenda Item 12. That Water Rate Proposal is also the subject of the Protest Hearing this evening. Ms. Yang stated:

"We believe the City has the legal authority to finance capital improvements to its water system through water user fees rather than an assessment or special tax. In order to be able to use the special assessment mechanism there has to be a showing that there is some particular area that is receiving a special benefit from the improvements that would be funded through the special assessment. The case [*Silicon Valley Taxpayers Assoc. v. Santa Clara County Open Space Authority*, 2008] also specifically said that when you have improvements that provide a general benefit to the entire city that the special assessment mechanism is not appropriate.

So, for both of those reasons, both with respect to the California Supreme Court holding in *Bighorn* and the more recent case dealing with special assessments, the property related fee is the appropriate mechanism to use."

With respect to both reasons, Ms. Yang is wrong in her claim that property related (user) fees are appropriate. First, the California Supreme Court in *Silicon Valley Taxpayers Assoc. v. Santa Clara Open Space Authority* found that when capital improvements provide only a general benefit a "special tax" is the appropriate fundraising mechanism.¹ In addition, the courts previously ruled in *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154 that a fee charged by a public water district to defray the costs of capital improvements is a special assessment. And, when property assessed receives no special benefit beyond that received by the general public, the levy is a special tax. (*City of Los Angeles v. Offner* [1961] 55 Cal.2d 103; *Knox v. City of Orland* [1992].)

Secondly, even if Ms. Yang's claim is considered on its merits, her claim is proved wrong because: (a) the legitimacy of using fees for funding capital improvements was not the issue at hand before the Court in *Bighorn*²; and (b) even if the *Bighorn* case could be construed as relevant, the City's fees (water rates) as published in its Oct. 2008 Notice of Public Hearing (or its revision) do not meet the requirements for a fee or charge as outlined in California's Proposition 218 Article XIID, Sec. 6b. That is....

According to California's Proposition 218 Article XIID Sec. 6b a fee or charge *shall not* be extended, imposed, or increased by any agency unless it meets all of the following 5 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.

¹ The Plaintiffs in the case contended "the levy is in essence is a 'special tax'"... and "violates both Propositions 13 (Cal. Const., art. XIII A) and 218." With respect to this assertion the Court expressly noted, "we agree with plaintiffs' contentions."

² In *Bighorn Desert Water Agency v. Verjil* (2006), the Supreme Court reviewed the question of whether a water agency's charges for domestic water are subject to the voter initiative provisions of article XIIC of the California Constitution. Article XIIC provides that "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." The initiative provision was affirmed.

- (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) 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. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. *In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article. (Emphasis added.)*

The proposed water rates (user fees), and/or portions thereof, intended to fund the capital costs of those projects identified in the City of Paso Robles' October 2008 Notice of Public Hearing water mailer and in the City's Sept. 29, 2008 Kennedy/Jenks Water Rate and Revenue Analysis report fail to meet the requirements of numbers 1, 2, 3, 4 and 5 listed above. The failure to meet these requirements (and more) is each discussed in turn below.

1. Revenues derived from the fee or charge exceed the funds required to provide the property related service. This is true for two principal reasons, "a" and "b":

- (a) Customers already have water in sufficient quantity and quality to last at least through 2020 or 2025. Indeed, there are no special benefits for City water customers to be derived from the importation of water through the Nacimiento water pipeline, nor has the City of Paso Robles provided any data to show that current water customers require a new source of water. To the contrary, according to SLO LAFCO's Sept. 2004 Municipal Service Review (MSR): the City has annual rights to eight cubic feet per second from the wells Situated adjacent to the Salinas River; the City's water supply is adequate to serve the additional Sphere of Influence Areas (MSR, p. 1-7); no limits have been placed on the water Drawn from the Paso Robles Formation (MSR, p. 3-7); and, ...the Water Assessment Completed pursuant to water code 10910 concluded **the City has an adequate water supply to accommodate the 20 years of growth planned for in the recent update of the General Plan** (MSR, p. 3-9).³ Also, the City's August 7, 2007 staff report (Agenda Item no. 25) on the Paso Robles Water System and Water Supply, states that Paso Robles meets its water supply demand through pumping groundwater from the Salinas River and the "east side" Paso Robles Basin and that according to Public Works Director Doug Monn "[T]hese water supplies are expected to meet all future water demands through 2025." Additionally, in 2007 the City officials expressed connection fees "would increase to provide adequate revenues to meet new infrastructure needs arising from new development and capital construction obligations for its [Nacimiento] pipeline and treatment facility." (SLO Financing Authority Nacimiento Bond document, Sept. 10, 2007, p. A-19). Additionally, in a City staff report dated July 1, 2008 (Agenda Item no. 4, page 54) HF&H Consultants state, "The future

³ *City of Paso Robles, Sphere of Influence Update Municipal Service Review*. San Luis Obispo Local Agency Formation Commission, Sept. 2004.

water supply in addition to the City's current 4,000 acre-feet of Nacimiento water is assumed to benefit only growth...." Finally, the City's recent series of 2008 Kennedy/Jenks Water Rate and Revenue Analysis reports give no indication current water customers need an additional water supply, let alone a now proposed/budgeted 2000 acre-feet of Nacimiento water a year.⁴ Instead, the Kennedy/Jenks' reports offer a capital cost rationale and forecast of why and when to fund the Nacimiento water projects needed for new development build-out through 2025.

Based on the above findings, it is clear that existing water resources and infrastructure provide current water customer parcels with sustainable water service for the foreseeable future. In short, current water customers do not require 2000 acre-feet of Nacimiento water nor the pipeline for service; instead, new development does. Hence, the capital cost of the pipeline project far exceeds the cost necessary to provide water service to current water customers. Instead, the Nacimiento pipeline is a financial burden that should be shared by new development (which needs the project to achieve build-out), as well as by City government which, without voter approval and apparently without sufficient revenue, has entered into a debt obligation to fund their capital cost of the pipeline project. **Pursuant to the Court in Howard Jarvis Taxpayers Association v. City of Fresno (127 Cal. App. 4th 914, [2005]) where a rate/fee is "not required to provide the property related service" it exceeds the cost to provide the service.** Thus, the proposed rate/fee increase to be imposed on existing customer parcels to pay for the costs of unneeded water delivery infrastructure (i.e., the Nacimiento pipeline) *will* produce revenue in excess of that required to provide water to their parcels, and the amount of the fee *will* exceed the necessary cost of water delivery attributable to their charged parcel(s). This is in violation of Proposition 218 [Sec. 6b (1) as stated above].

- (b) Customers already have water in sufficient quantity and quality⁵ to last at least through 2020 or 2025. There are no special benefits for current City water customers to be derived from the construction of a new water treatment plant, nor has the City of Paso Robles provided any data to show that a new water treatment plant (or replacement of current treatment facilities⁶) is required or necessary for current customers' water service. That is, water imported from Lake Nacimiento via the Nacimiento pipeline could just as easily and much more economically be dumped into percolation ponds adjoining or situated above the Salinas River underflow to receive the same water filtration benefit now experienced by current customers as would be provided by a new water treatment plant. Again, the city has provided no data to suggest any privilege or special benefits current customers will receive in water quality via the construction and operation of a new water treatment plant. Based on this finding, it is concluded that existing water treatment facilities necessarily provide current water customers' parcels with sustainable and adequate water treatment service into the foreseeable future. Moreover, current water customers do not require that 2000 acre-feet of Nacimiento water be processed through a new water treatment plant to receive or improve water treatment service; instead, it would appear that this capital project inures to the benefit of new development since they (or City officials) need or want imported Nacimiento water to be treated in this fashion. In light of the above, the capital

⁴ Indeed, less costly water conservation measures will add 919 afy by 2010. 10/7/08 City staff report, Agenda item 13, p. 2.

⁵ The City's August 7, 2007 staff report (Agenda Item no. 25) on the Paso Robles Water System and Water Supply states that the quality of Paso Robles' groundwater "meets existing regulatory requirements," as does the City's 2007 *Annual Water Quality Report*.

⁶ Groundwater used by customers is currently treated at the wellhead.

cost of a new water treatment plant far exceeds the cost necessary to adequately and economically treat water for current water customers. In short, existing water customers do not need a new water treatment plant or require the replacement of current treatment facilities. Instead, the water treatment plant, if needed, is a financial burden that should be lawfully shared by new development and City Government proper, both of which apparently desire the capital project to be built without voter approval in accordance with Article III C, Sec. 2(d) or Article III D, Sec. 4.

Finally, pursuant to the court in **Howard Jarvis Taxpayers Association v. City of Fresno (127 Cal. App. 4th 914, [2005])** where a fee is “not required to provide the property related service” it exceeds the cost to provide the service. Thus, that portion of the proposed rate/fee increase attributed to existing Paso Robles water customer parcels to pay for the costs of the unneeded water treatment infrastructure (i.e., a new water treatment plant) will produce revenue in excess of that required to provide water treatment service to their parcels, and the amount of the fee will exceed the necessary cost of water treatment service attributable to their charged parcel(s). For this to happen is in violation of Proposition 218 [Sec. 6b (1) as stated above].

2. Revenues derived from the fee or charge will be used for a purpose other than that for which the fee or charge was imposed. This is true for two reasons, “a” and “b,” as discussed below.

- (a) The proposed fees and the revenues generated thereby for funding capital improvement/ infrastructure projects (e.g., the pipeline and water treatment plant) will not actually provide a measurable benefit to current City water customers. Instead, the fees will be used to pay (that is, subsidize) the capital costs for new development through build out. No data has been provided by the City that substantiates any improvement benefit or justifies a 50%⁷ (or any percentage) capital cost allocation to current water customers for the funding of the *Nacimiento pipeline* and *water treatment* projects mentioned in the City’s 2008 Kennedy/Jenks Water Rate and Revenue Analysis reports or the City’s Oct. 2008 Notice of Public Hearing mailer sent to water customers. As substantiated in (1a) and (1b) above, the revenues generated by the proposed fees are largely for the purposes of constructing infrastructure facilities necessary for or needed by new development, not for the purpose of serving existing customers. Indeed, according to the Oct. 2008 Notice of Public Hearing, existing water customers inure no privilege or special benefit from the capital improvement projects.⁸ **In essence, what is being levied on current water customers is a tax disguised as a fee.**⁹ “[N]othing is more familiar in taxation than the

⁷ In a similar situation to that now under consideration by Paso Robles regarding its water rates, the Shasta Community Services District “proposed to divide the costs of new capital improvements between users receiving service through existing connections and users applying for new connections.” The Supreme Court concluded in their discussion on assessments, “any costs imposed on customers receiving service through existing connections would be subject to article XIII D’s voter approval requirements, and thus their consent. Customers who apply for new connections give consent by the act of applying” (*Richmond v. Shasta Community Services Dist.* [2004]). *Consequently, the City’s proposed capital improvement projects require voter approval, either by way of an assessment, or if no special benefits can be shown, a special tax.*

⁸ The fee imposition is solely for the purpose of raising revenue. That is, “*The increases are needed to help pay for the City’s share of the Nacimiento Water Pipeline Project and associated City water system improvements.*” (For these capital projects City officials also stated in their June 2007 water mailer: “*The sole purpose of the proposed rate increases is to provide adequate revenues to meet debt and operating expense obligations for the pipeline and treatment facility.*”)

⁹ Note too a “user fee” levied on existing water customers to pay for water system infrastructure needed by new development is not the revenue raising mechanism cited in the City’s 2004 General Plan Housing Element update. On the contrary, to pay for that infrastructure it expressly reads: “To accomplish this, the City will be creating a community facilities (Mello-Roos) district in which new development will be assessed for its share of the costs associated with providing City services” (p. H-61). For more on the Mello-Roos revenue raising mechanism and its special tax requirement see Attachment A

imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.” (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 142.) Under modern law, the central distinction between a tax and a fee appears to be that a tax is “imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege¹⁰ granted.” (*Sinclair Paint Co. v. State Bd. of Equalization* [1997] 15 Cal.4th 866, 874; *Barratt American Inc. v. City of Rancho Cucamonga* [2005] 37 Cal.4th 685, 727.)

- (b) The fees collected are for an incidental regulatory purpose. The California Supreme Court in *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165, stated: “If revenue is the primary purpose and regulation is merely incidental the imposition is a tax.” The City of Paso Robles is currently being fined for dumping excess TDS and salts in its wastewater effluent back into the Salinas River. The Nacimiento Water Project (NWP – pipeline and/or water treatment plant) was one of several alternatives investigated and ultimately chosen to help address this regulatory problem. For example, as stated in Malcom Pirnie’s 2003 report titled, *City of El Paso de Robles Water & Wastewater Quality Concern – Water Quality Strategy*,

“The City of El Paso de Robles faces two important wastewater discharge challenges. Specifically, the City’s wastewater effluent to the Salinas River does not consistently comply with numerical permit limits for Total Dissolved Solids (TDS) and the individual constituents chloride, sodium, and sulfate. The Regional Water Quality Control Board (RWQCB) has also indicated that ceasing discharge to the river altogether will likely become a future permit requirement (p. ES-1).”

“The City must take action to address its immediate wastewater discharge concern – its current inability to regularly meet its numerical NPDES permit effluent limits for TDS and related constituents (chloride, sodium, and sulfate). Currently the City is at high risk for continuing to exceed its permit limits, which is not an acceptable situation (p. ES-2).”

“[The Nacimiento Project] In addition to bringing the City’s effluent into compliance with its current TDS limit, it would provide increased water supply reliability, improved drinking water quality, relief from local groundwater overdraft, and salt reduction across all TDS sources to the City’s wastewater treatment plant (p. ES-2).”

City Officials trust regulatory compliance will follow with the introduction (“blending”) of Nacimiento water with current customers’ groundwater (and/or effluent). Nonetheless, the proposed fees (rates) to be imposed on City water customers are solely for the purpose of raising revenue for the *water* fund. The regulatory effect of the Nacimiento Water Project is incidental, being one hoped for benefit among many. **Consequently, the**

¹⁰ BLACK’S LAW DICTIONARY 1197 (6th ed. 1990), defines privilege as: A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens.

proposed NWP fees or rates represent in whole or part a disguised or hidden tax.¹¹

3. The amount of the proposed fee or charge to be imposed upon a water customer's parcel or person as an incident of property ownership exceeds the proportional cost of the service attributable to the parcel. This is true for 3 primary reasons, "a," "b," and "c" below.

- (a) In considering the City's proposed \$18 dollar monthly charge as a cost of service, the fee is NOT proportional because all water customers or users are NOT being treated the same with respect to the fee. Here's why:

"Fees are discriminatory if they disproportionately allocate costs to one class of service to the benefit of another class."¹²

The \$18 fee is disproportionate across all classes of service based on meter size. That is, someone or some parcel in Paso Robles with an 8-inch meter size is being charged the same fixed fee as one who has a 3/4 inch meter size (i.e., a single family resident). I contend to charge the \$18 fixed fee across all classes of service is clearly disproportionate as well as discriminatory. For example, if a customer with an 8 inch meter is being charged a fixed fee of \$18 a month, this means that a family residence with a 3/4 inch meter should only have to pay the proportional equivalent of ~ 34 cents a month (\$18 divided by an 8" EMU of 53.33¹³ = ~34 cents). Thus, for the City to charge the same \$18 fixed fee across all classes of service is discriminatory and disproportionate, and is a violation of Proposition 218, Article XIII D Sec. 6b (3).

- (b) Related to the above, Kennedy/Jenks do not state the methodological basis of the calculations found in their report. A review of their September 29, 2008 Water Rate and Revenue Analysis report and the City's Oct. 2008 Notice of Public Hearing water rate mailer seems to imply the basis for their calculation and setting of the water rates/fees is a "commodity-demand" method to determine cost of service (COS). This method is more suitable for an agency with a large number of wholesale customers. By contrast, under the "base-extra capacity" method, revenue requirements are allocated to the different user classes proportionate to their use of the water system. Allocations are based on average day (base), maximum day peak (Max Day) usage, maximum hour peak (Max Hour) usage,

¹¹ On Aug. 3, 2004 City sewer users were told they would be asked to pay 50% of the NWP cost due to the wastewater problem. That is,

Of the cost for Nacimiento Water 50% is being allocated to new development. Given the water quality issue as it relates to existing wastewater discharges, current and future sewer users are being required to pick up the remaining 50% cost. (City staff report, *Public Hearing - Sewer and Water Development Impact Fees*, 8/3/04)

Yet, in 2008 only *water* customers are being asked to pay via a proposed "fee." In addition, the fees/rates now under consideration by the City when calculated will generate more revenue than is actually needed each month to achieve wastewater regulatory compliance.

¹² Quote source: City staff report dated July 1, 2008 (Agenda Item no. 4, page 49), HF&H Consultants

¹³ AWWA (1999). *Water Meters - Selection, Installation, Testing, and Maintenance*, Manual M6
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meters and services, billing and collection, and fire protection. (Note. In their Sept. 29, 2008 report Kennedy/Jenks do not make any class differentiations based on these allocation criteria. They provide the reader with no explanation/justification for not using the criteria. Thus, their COS method is not “base-extra capacity.”) Using a base-extra capacity Method results in an AWWA (American Water Works Assoc.) accepted cost distribution amongst customer classes and a means of calculating and designing rates that are more proportional and equitable in the recover and allocation of costs. For example, in a study conducted by CDM for the City of Big Bear Lake in March 2007 their cost of service analysis “followed the base-extra capacity the method set forth by the American Water Works Association in their Manual M-1. The methodology recognizes the relative water demands that each type of customer places on the system as well as the number of users in each customer class. The analysis found that under the current rate structure and rates, commercial customers are paying about 20 percent less than cost of service and commercial landscape users are paying about 75 percent less than cost of service.” (City of Big Bear Lake, Dept. of Water, *Financial Plan and Water Rate Study* March 2007, p.7 at <http://www.bbldwp.com/Downloads/FinancialRateStudyReport.pdf>). And for a similar cost of service analysis that used the base-extra capacity approach see City of San Diego, CA at <http://www.sandiego.gov/water/pdf/rates/watercos.pdf>. Even the City of Paso Robles has stated that greater equity is achieved when the relative demands of each type of customer places on the system and number of users in each customer class is taken into account:

Adoption of the monthly service charge based on these AWWA meter ratios will improve the equity in the City's rate structure and align the new fixed rates with the general purpose of this rate component; to support the recovery of the utility's fixed monthly (readiness-to-serve) costs.¹⁴

- (c) As substantiated in “1a,” “1b,” and “2a” above, new development should bear the burden for paying the capital cost of the proposed water improvement projects since they, *not* current water customers, are the most significant if not sole beneficiaries of the pipeline and water treatment plant. Because the capital costs as allocated for these projects inure wholly as proportioned to the benefit of new development through build out, and the allocated capital costs to existing customers exceeds the cost necessary to provide their service, the fees or charges are in violation Proposition 218, Article III D, Sec. 6b (3).

4. The fees or charges for that portion of the proposed water rates to be collected and used to fund the capital improvement projects (as identified in the City's 2008 Kennedy/Jenks Water Rate and Revenue Analysis reports and Oct. 2008 Notice of Public Hearing mailer) are being imposed for a service that is not actually or immediately available to the owner of the property in question. That is, Paso Robles water customers should not be asked to approve or adopt a fee for “blended” water (a mix of groundwater with “Nacimiento” water) before it is actually available for their use or receipt. Groundwater is now customers’ “choice” of service. According to Proposition 218 Article XIII D Section 6b (4) such fees or charges based on a potential or future use of any water service -- like “blended” water service -- are not permitted. In addition, a “fee” for the yet to be received water treatment service has been collected *since* July 2005, and will continue in 2009 and thereafter for the next 12 years according to the City's capital improvement plan (see Kennedy/Jenks Water Rate and Revenue Analysis report, Sept. 29, 2008). The Court in *San Marcus Water District v. San Marcus*

¹⁴ Paso Robles City Council Agenda Item No. 2, page 26 of 47, 9/02/08.
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Unified School District (1986) recognized that “revenues collected as a result of the ‘sewage facilities charge’ are used by the city to provide capital for sewer construction, i.e. to finance local improvements. Such a charge for capital funding is little more than a disguised special assessment.” Likewise, the collection of this fee from City water customers for a new water treatment facility is a disguised special assessment (requiring voter approval). *Nonetheless*, special assessments may in reality be special taxes if the property assessed receives no special benefit beyond that received by the general public. (*Knox v. City of Orland*, 1992, at pp. 142-143; *Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority*, 2008). Paso Robles City officials have claimed no “special benefits” for the water treatment plant beyond that received by the general public. Hence, the levy of a fee to pay for the capital cost of the proposed water treatment plant requires funding through a special tax.

5. Article XIII D 6b(5) states, “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.” To relieve “stress” or prevent “overdraft” on the Paso Robles Groundwater Basin is a general governmental service provided to the “public at large” in substantially the same manner as it is to City property owners. Indeed, “on September 6, 2005 the City entered the Paso Robles Groundwater Basin Agreement with the County of San Luis Obispo and a number of overlying landowners” (Paso Robles Urban Water Management Plan, 2008, p. 3, 14). The Agreement is a joint cooperative effort by *all* Basin users to prevent Basin overdraft and relieve Basin stress: “Execution of the Paso Robles Groundwater Basin Agreement and initiation of cooperative groundwater monitoring and management reduces the likelihood of overdraft and water rights disputes and promotes the long-term reliability of groundwater supplies” (p. 14). Similarly, in a December 2007 report to the “Paso Robles Groundwater Basin Committee” entitled, “Update for the Paso Robles Groundwater Basin” by Todd Engineers, the *Nacimiento Project* is identified as one project undertaken by the San Luis Obispo County Flood Control and Water Conservation District, the City of Paso Robles, and a group of private landowners called “PRIOR” (Paso Robles Imperiled Overlying Rights group) to improve groundwater management of the Basin. Further, a City March 2008 water mailer states: “Domestic rural demand for groundwater is expected to double over the next 25 years” and “without an additional source of water, demand may soon exceed the yield of the Paso Robles Groundwater Basin” and “Lake Nacimiento water is high quality for consumers and will yield long-term water quality benefits to the Paso Robles Groundwater Basin.” In addition, Congressman Bill Thomas is on record as stating the *Nacimiento Project* “will benefit San Luis Obispo County’s agriculture by helping to preserve the area’s existing groundwater supply” (Press release Tim Wood for Congressman Bill Thomas, July 19, 2005. Congressman Bill Thomas also included the *Nacimiento* pipeline in a 2005 Water Resources Development Act, H.R. 2864, which contained a \$25M “authorization.”).

As demonstrated above, the *Nacimiento* Water pipeline is said to have several general benefits for the public. Revenue derived from any fee, rate or charge levied upon current City water customers will be funding a project whose purpose is to benefit *all* Basin (City and County and PRIOR) water users. Consequently, for the City to provide/fund such a general governmental service for the benefit of all in the region (which is really a County governmental responsibility), and indeed inures to the benefit of non-City water customers (County resident and PRIOR Basin users do *not* pay the fee but will receive the service/benefits anyway), it is a violation of Proposition 218 Article XIII D 6b (5).

Sixth, as pointed out in the objections/reasons stated in 1 to 5 above, there is no special benefit or privilege granted to City water customers who would pay a *Nacimiento* pipeline and water treatment “fee” as a portion of the water rates.¹⁵ If a water customer were to pay a fee and receive no benefit not

¹⁵ The percentage portion of the water rates specifically to be devoted to each of these new capital improvement

received by those who did not pay the fee (and thus by the general public), it negates the distinguishing feature of a user fee¹⁶ (Bay Area Cellular Telephone Co. v. City of Union City, 2008). Likewise, there are many people in the City of Paso Robles who will not pay the proposed “Nacimiento pipeline fee” or the “water treatment plant fee,” yet would receive the benefits that the Nacimiento pipeline and/or water treatment plant are said to provide City water customers.¹⁷ For example, many persons who rent a room or an apartment for their home receive water provided to their residence on demand -- but will not pay a user fee for using a specific quantity of water supplied. Such a person though *would* necessarily receive -- without actually paying the fee -- the suggested benefits made possible by new City water system infrastructure. In short, the aforementioned capital improvement projects are at best a general benefit to the City, to the public at large. Such improvement projects that serve the public at large are funded through a “tax.”¹⁸ **A fee or charge collected from water customers by the City to construct or add infrastructure projects to its existing water system, levied “without reference to peculiar benefits to particular individuals or property,”¹⁹ and is imposed for a specific purpose (e.g., to pay for the capital costs of transporting water through a Nacimiento pipeline; to pay for the capital cost of a facility necessary to treat and blend Nacimiento water) is a “special tax.”** In *Coleman v. County of Santa Clara*, 64 Cal. App. 4th 662, 75 Cal. Rptr. 2d 516 (1998), the 6th District Court of Appeals applied a two-part test for identification of a “special tax”: (1) is the entity which imposes the tax a general-purpose entity (like a city) or a special-purpose entity, which can impose only special taxes by its very nature; (2) if the tax is imposed by a general-purpose entity, are the proceeds “legally obligated” for a “special purpose.” Similarly, the essence of a special tax “is that its proceeds are earmarked or dedicated in some manner to a specific project or projects” (Neecke v. City of Mill Valley [1995] 39

projects is not specifically stated on the City’s October 2008 Notice of Public Hearing mailer sent to water customers. The Nacimiento pipeline though does have an annual City debt obligation of \$4.23 million. Currently a monthly \$18 charge/fee is being collected from City water customers for “Nacimiento Water” (i.e., for a proposed water treatment plant) and remains an \$18 “fee” as part of the proposed water rates (I assume to service the debt obligation beginning 2010). The San Luis Obispo County Grand Jury has stated that portion devoted to the Nacimiento pipeline appear as such on customers’ water bills. The proposed rate schedule provides no such indication. In addition, the present and proposed \$18 “fee” appears to not be based on a customer’s actual use of the Nacimiento water system infrastructure, but simply on the presence of a City water account, *whether or not the customer uses that infrastructure*. For instance, if water from Lake Nacimiento is unavailable for some reason, or the customer does not use their water service for 1 or more calendar days the customer must still pay the monthly “Nacimiento fee.” As found by the California Appellant Court in Bay Area Cellular Telephone Co. v. City of Union City (4/29/2008), “*such a charge is not a legitimate user fee.*”

¹⁶ In *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th the court described user fees as “those which are charged only to the person actually using the service.” It seems to follow then that each person, say in a family of 4 living at the same residence, pays no “user fee” for their city water actually used. Only in a household of *one person* would this *Isaac* description seem most likely to apply to city water users.

¹⁷ “Benefits” of the Nacimiento Water Project’s capital improvements have been published in Oct. 2007, Jan. 2008 and July 2008 Paso Robles water mailers. Briefly, the purported benefits are to: diversify supply, increase reliability, enhance quality, meet demand and reduce stress on the Paso Robles Groundwater Basin.

¹⁸ When capital improvements provide a general benefit the special assessment mechanism is not appropriate. Instead, as found in *Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority* (7/14/08), a special tax is the required revenue raising mechanism.

¹⁹ *Silicon Valley Taxpayers Association v. Santa Clara Open Space Authority*, 7/14/08.

Cal.App.4th 946, 956). And Proposition 218 Article XIII C Sec. 1(d) defines "special tax" as *"any tax²⁰ imposed for specific purposes, including taxes imposed for specific purposes, and placed into a general fund."* Applying each of these "tests" to the two infrastructure projects discussed at hand, a special tax as the appropriate funding/revenue-raising mechanism applies.²¹

Seventh, the existing fixed water fee of \$18 established under Ordinance 882 is in violation of Proposition 218 Article XIID Section 6 (d) wherein it states: "Beginning July 1, 1997, all fees or charges shall comply with this section." Ordinance 882 (as well as its predecessor) never complied with the procedural and substantive requirements of Article XIID Section 6 (a) and (b). The failure of Ordinance 882 to comply with Article XIID Section 6 (b) is similar to those objections/reasons stated in 1 through 6 above. The collection of fees under Ordinance 882 and any future ordinance continues to be illegal until full compliance with Proposition 218 Article XIIC or D is achieved.

Eight, under Government Code section 53756(a), the City's proposed nine year schedule of water rate increases which include automatic adjustments for inflation is prohibited and the planned January 20, 2009 adoption of the proposed rate structure, *and* its revision identified in the Addendum to the Jan. 20, 2009 Paso Robles City Council Meeting Agenda, violates this new legislation. Compliance with section 53756 and with the substantive and procedural mandates of Proposition 218 entails restructuring the proposed water rate increases and resubmitting the existing and/or new rate increases to property owners and rate payers according to the notice, hearing, and opportunity to protest required by Proposition 218. (See attached or accompanying Dec. 10, 2008 Cynthia Hawley letter.) Failure of the City to do so I consider a violation of my due process rights under Article 1 Sec. 7(a) of the California Constitution.

Nine, the City's participation in the Nacimiento Water Project appears to be illegal, hence making the collection of any water related special tax, assessment or fee unauthorized. That is, the bonds to finance the Nacimiento Water Pipeline were issued "pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7, Title 1 of the Government Code of the State of California" (SLO County Financing Authority Nacimiento Water Project Revenue Bonds, Sept. 10, 2007. SLO County Public Works Department.), yet the city of Paso Robles and/or County failed to comply with the procedural requirements identified in California Government Codes 6547, 6547.2, 6547.5 and possibly 6548.

Ten, California's Proposition 218 Article XIII D Sec. 6a(1) reads:

Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be

²⁰ Generally speaking, a tax is a monetary imposition of a governmental legislative body on persons or property subject to the jurisdiction of the governmental body, for the purpose of raising revenue to support its activities. *People v. McCreery* (1868) 34 Cal.432; *Taylor v. Palmer* (1866) 31 Cal.240.

²¹ Also of note, in *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, the Court of Appeal held that where a utilities charge could be considered *either* a tax or a fee, "the trial court properly found 'the utilities charge in issue is a tax.'" This finding is consistent with California's Proposition 218 Section 5, which states, "**LIBERAL CONSTRUCTION.** The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent."

imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

The “**basis upon which the amount of the proposed fee or charge was calculated**” is not identified on the Oct. 2008 Notice of Public Hearing mailer sent to City water customers regarding the proposed rate increases. This omission on that written notice violates the procedural requirement stated in Article XIII D Sec. 6a(1). Hence, the Notice/mailer as written is unlawful and void under Proposition 218.

Finally, I have attached/included two documents presented at a previous City Council meeting in Oct. 2008. One, as you may remember, is a 6 page Concerned Citizens for Paso Robles document explaining why the City’s proposed fees (water rates) again under consideration this evening are in reality a special assessment or special tax, and the other document is an Oct. 7, 2008 letter from the Howard Jarvis Taxpayers Association supporting this contention.

Because of the above objections, I ask members of the City Council to reject the Ordinance establishing any water rate structure or schedule as currently proposed to water customers. Thank you. – John Borst

California

PROPERTY TAX INFORMATION

*Any County, City,
Special District, School
District or Joint Powers
Authority can establish
a Community
Facilities District
for the purpose
of financing
public facilities
and services.*

What is Mello-Roos?

Background:

In 1978 Californians enacted Proposition 13, which limited the ability of local public agencies to increase property taxes based on a property's assessed value. In 1982, the Mello-Roos Community Facilities Act of 1982 (Government Code §53311-53368.3) was created to provide an alternate method of financing needed improvements and services.

The Mello-Roos Community Facilities Act of 1982

The Act allows any county, city, special district, school district or joint powers authority to establish a Mello-Roos Community Facilities District (a "CFD") which allows for financing of public improvements and services. The services and improvements that Mello-Roos CFDs can finance include streets, sewer systems and other basic infrastructure, police protection, fire protection, ambulance services, schools, parks, libraries, museums and other cultural facilities. By law, the CFD is also entitled to recover expenses needed to form the CFD and administer the annual special taxes and bonded debt.

Why is a Mello-Roos CFD Needed?

A CFD is created to finance public improvements and services when no other source of money is available. CFDs are normally formed in undeveloped areas and are used to build roads and install water and sewer systems so that new homes or commercial space can be built. CFDs are also used in older areas to finance new schools or other additions to the community.

How is a Mello-Roos CFD Formed?

A CFD is created by a sponsoring local government agency. The proposed district will include all properties that will benefit from the improvements to be constructed or the services to be provided. A CFD cannot be formed without a two-thirds majority vote of residents living within the proposed boundaries. Or, if there are fewer than 12 residents, the vote is instead conducted of current landowners. In many cases, that may be a single owner or developer.

Once approved, a Special Tax Lien is placed against each property in the CFD. Property owners then pay a Special Tax each year. If the project cost is high, municipal bonds will be sold by the CFD to provide the large amount of money initially needed to build the improvements or fund the services.

How is the Annual Charge Determined?

By law (Prop. 13), the Special Tax cannot be directly based on the value of the property. Special Taxes instead are based on mathematical formulas that take into account property characteristics such as use of the property, square footage of the structure and lot size. The formula is defined at the time of formation, and will include a maximum special tax amount and a percentage maximum annual increase.

How Long Will the Charge Continue?

If bonds were issued by the CFD, special taxes will be charged annually until the bonds are paid off in full. Often, after bonds are paid off, a CFD will continue to charge a reduced fee to maintain the improvements.

IMPORTANT TO KNOW:

- **Rights to Accelerated Foreclosure.** It is important for CFD property owners to pay their tax bill on time. The CFD has the right (and if bonds are issued, the obligation) to foreclose on property when special taxes are delinquent for more than 90 days. Additionally, any costs of collection and penalties must be paid by the delinquent property owner. This is considerably faster than the standard 5 year waiting period on county ad valorem taxes.
- **Disclosure Requirement for Sellers (California Civil Code §1102.6).** When reselling a property in a CFD, the seller must make a "good faith effort" to obtain a Notice of Special Tax from the local agency that levies the Special Tax, and provide it to the buyer.

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California Tax Data

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CYNTHIA HAWLEY
ATTORNEY AT LAW

December 10, 2008

Mayor Duane Picanco
Paso Robles City Council Members
City of Paso Robles
1000 Spring Street
Paso Robles, CA 93446

Re: Assembly Bill 3030
Government Code section 53756

Dear Mayor Picanco and City Council Members:

I represent Concerned Citizens for Paso Robles in relation to the City of Paso Robles' proposed water rate increases. I have reviewed your October 2008 "Notice of Public Hearing Regarding Proposed Increase in Water Rates," noting the proposal for automatic rate increases extending over a nine year period. According to the September 29, 2008 Kennedy/Jenks Water Rate and Revenue Analysis Report at page 3, the City's projected operating expenses covered by the rate increases include automatic increases for, among other things, *inflationary adjustments*.

As you know, the mandates of Proposition 218 as set out in Articles XIII C and D of the California Constitution are implemented by statute in Government Code sections 53750 et seq. entitled the "Proposition 218 Omnibus Implementation Act". These sections have been amended by recent legislation that affects the legality of your proposed schedule for water rate increases.

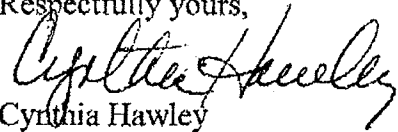
Government Code section 53756 (see attachment) has been added to the Proposition 218 Omnibus Implementation Act and will take effect January 1, 2009. This new law authorizes local agencies to adopt a schedule of fees or charges for water services that include automatic adjustments for increases in the wholesale cost of water and for inflation. *However*, subsection (a) specifically limits the authority to adopt such scheduled increases to those that *do not exceed a period of five years*. Since any adoption of the City's proposed schedule of water rate increases will not take place until after January 1, 2009, adoption of such scheduled increases now falls within the purview of this legislation and its mandates.

Consequently, under Government Code section 53756(a), the City's proposed nine year schedule of water rate increases which include automatic adjustments for inflation is prohibited and your January 20, 2009 approval/adoption of the proposed rate structure would be a violation of this new legislation. Compliance with section 53756 and with the

substantive and procedural mandates of Proposition 218 will entail restructuring your proposed water rate increases and resubmitting the new rate increases to property owners and rate payers according to the notice, hearing, and opportunity to protest required by Proposition 218.

I hope that this information is helpful to you. Your prompt reply to this letter would be appreciated.

Respectfully yours,



Cynthia Hawley

Assembly Bill No. 3030 CHAPTER 611

An act to add Section 53756 to the Government Code, relating to local government. [Approved By Governor September 30, 2008. Filed with Secretary of State September 30, 2008.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3030, Brownley. Local publicly owned water utility: rate cases.

Articles XIII C and XIII D of the California Constitution generally require that assessments, fees, and charges be submitted to property owners for approval or rejection after the provision of written notice and the holding of a public hearing. Existing law, the Proposition 218 Omnibus Implementation Act, prescribes specific procedures and parameters for local jurisdictions to comply with Articles XIII C and XIII D of the California Constitution. Existing law provides notice, protest, and hearing procedures for the levying of new or increased fees and charges by local government agencies pursuant to Articles XIII C and XIII D of the California Constitution. This bill would authorize an agency providing water, sewer, or refuse collection service to adopt a schedule of fees or charges that authorize automatic adjustments that pass through increases in wholesale charges for water or adjustments for inflation, if prescribed conditions are met, including, but not limited to, that the schedule of fees or charges not exceed a period of 5 years and that the schedule be adopted pursuant to existing law providing notice, protest, and hearing procedures for the levying of new or increased fees and charges by local government agencies.

The people of the State of California do enact as follows:

SECTION 1. Section 53756 is added to the Government Code, to read:

53756. An agency providing water, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water or adjustments for inflation, if it complies with all of the following:

- (a) It adopts the schedule of fees or charges for a property-related service for a period not to exceed five years pursuant to Section 53755.
- (b) The schedule of fees or charges may include a schedule of adjustments, including a clearly defined formula for adjusting for inflation. Any inflation adjustment to a fee or charge for a property-related service shall not exceed the cost of providing that service.
- (c) The schedule of fees or charges for an agency that purchases wholesale water from a public agency may provide for automatic adjustments that pass through the adopted increases or decreases in the wholesale charges for water established by the other agency.
- (d) Notice of any adjustment pursuant to the schedule shall be given pursuant to subdivision (a) of Section 53755, not less than 30 days before the effective date of the adjustment.

HOWARD JARVIS, Founder (1903-1986)
JON COUPAL, President
TREVOR GRIMM, General Counsel
TIMOTHY BITTLE, Director of Legal Affairs



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October 7, 2008

Paso Robles City Council and City Manager
1000 Spring Street
Paso Robles, CA 93446

Dear Council Members and City Manager,

Concerned Citizens for Paso Robles (CCPR) is a citizen's group formed in part to ensure that taxes, assessments and fees imposed by the City of Paso Robles for municipal services conform to state and local laws, including California's Proposition 218 "Right to Vote on Taxes Act." One of CCPR's members has contacted the Howard Jarvis Taxpayers Association (HJTA) regarding the lawfulness of the revenue-raising/financing mechanism the City has chosen to fund selected capital improvement projects related to its enterprise water service.

That CCPR member (who is also a member of the HJTA) has expressed to the City Council that the capital cost portion of the proposed water rates should not be levied as a "fee" but as an "assessment" or "special tax." The Howard Jarvis Taxpayers Association strongly and unequivocally agrees. That is, we have reviewed CCPR's September/October 2008 6-page document and concur with what is written therein. The California State Constitution and associated case law is clear in regards to how the capital cost of your City's proposed public improvement projects should be funded.

The Howard Jarvis Taxpayers Association is quite aware of property-owner rights set forth in California's Constitution, and in Appellant and Supreme Court case law related to Proposition's 13, 62 and 218. We strongly advise the City Council and Manager to implement the capital cost portion of the proposed water rates as an assessment or a special tax.

Sincerely,

Eric Scott Eisenhammer
Legal Assistant

Concerned Citizens for Paso Robles is an association formed in part to ensure that taxes, assessments, and fees imposed by the City of Paso Robles for municipal services conform to state and local laws -- including California's Proposition 218 "Right to Vote on Taxes Act". Thus, this letter is in regards to the lawfulness of the revenue-raising/financing mechanism the City has chosen to fund selected public improvement projects related to its enterprise water service.

We and hundreds, if not thousands in our community, are of the opinion that the City's currently proposed water rates should not be levied as a "fee" but as an "assessment" or "special tax." We believe this strongly and unequivocally. The California State Constitution and associated case law is clear in regards to how the capital cost of a public improvement project should be funded.

First, according to CALIFORNIA GOVERNMENT CODE SECTION 53750 (b) an

"Assessment" means any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the *capital cost* of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment," and "special assessment tax."

Second, in Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority, 2008, the California Supreme Court states:

Capital cost is defined as "the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency." Art. XIII D, § 2, subd. (c)

The public improvement projects identified in the City's 2008 Kennedy/Jenks Water Rate & Revenue Analysis report clearly fall within this definition of capital cost. The public improvement projects identified in that report are public improvement projects having a capital cost. For example, the June 28, 2008 (and later revisions) Kennedy/Jenks' cover letter/preface to the report reads:

There are several important factors associated with the performance of the City's water fund that impact the study findings. First and foremost is the need to plan for the funding of the new Nacimiento water supply. The capital, debt, and operational costs associated with the City's transition to this source of supply will continue to place

pressure on the City's water rates for several years.

And on page 1 of the report it then goes on to read,

...the City is now in the implementation phase of a comprehensive long range water system improvement program....

Likewise, Attachment B, page B-2 of Doug Monn's 9/16/08 letter to Jim App on the subject of "Community Water Rates and Capacity Charges" states:

Another aspect of water system planning has evolved since the July 1, 2008, proposal. The planned capital improvement projects were originally staged over 10 years. A 17 year program (i.e. through build out) is now under consideration.

The total capital cost of this 17-year program to rate payers is \$189,564,000. This amount includes \$65,050,000 in debt financing for the Nacimiento pipeline. (Source: *Kennedy/Jenks Water Rate and Revenue Analysis Pay-As-You-go Approach Revised Final Report*, Project No. 0883005, "Table 4: Proposed Capital Improvement & Debt Financing Program," Sept. 29, 2008)

Again, the public improvement projects identified in the Kennedy/Jenks report(s), as well as in Monn's 9/16/08 memo, are public improvement projects having a capital cost.

Third, all City 2008 Kennedy/Jenks Water Rate & Revenue Analysis reports identify several public improvement projects as capital costs, immediate and future, to be funded by the proposed water rates -- the Nacimiento pipeline and a new water treatment plant to name but two.

Fourth, in a pre-Proposition 218 the California Supreme Court in *Knox v. City of Orland* (1992) explained the nature of a *special assessment*. A special assessment is a "compulsory charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein"¹ The capital improvement projects identified in the 2008 Kennedy/Jenks report clearly identifies and provides the rationale for compulsory charges to be levied upon water customers by the City. Those compulsory charges have the purpose of "defraying in whole or in part the expense of a permanent public improvement therein". In addition, the Supreme Court ruled in *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 228 Cal.Rptr. 47; 720 P.2d 935, and again stated in *Richmond v. Shasta Community*

¹ Thus, the City of Inglewood, CA, e.g., defines a special assessment as "A compulsory levy made against certain properties to defray all or part of the cost of a specific capital improvement or service deemed to benefit primarily those properties." (Source: City of Inglewood web site, Glossary of Government terms, http://www.cityofinglewood.org/help_index/glossary.asp, Accessed 7/24/08.)

Services Dist. (2004), that *"a fee aimed at assisting a utility district to defray costs of capital improvements will be deemed a special assessment from which other public entities are exempt."*² (Also in *Richmond v. Shasta Community Services District* [2004] the Court noted, *"We agree that supplying water is a 'property-related service' within the meaning of article XIII D's definition³ of a fee or charge."* The Court in *San Marcus Water District v. San Marcus Unified School District* [1986] also recognized that *"revenues collected as a result of the 'sewage facilities charge' are used by the city to provide capital for sewer construction, i.e. to finance local improvements. Such a charge for capital funding is little more than a disguised special assessment."*). In short, the fees and/or charges as proposed on 7/1/08, 9/16/08 and 10/7/08 by the City to pay for its capital improvements, in light of the above statements of law, are actually "assessments" and should be levied as such following the procedural requirements of Article XIII D Section 4 of the California State Constitution.

Fifth, in a similar situation to that now under consideration by the City of Paso Robles regarding its water rates, the Shasta Community Services District "proposed to divide the costs of new capital improvements between users receiving service through existing connections and users applying for new connections." The Supreme Court concluded in their discussion on assessments, "any costs imposed on customers receiving service through existing connections would be subject to article XIII D's voter approval requirements, and thus their consent. Customers who apply for new connections give consent by the act of applying" (*Richmond v. Shasta Community Services Dist.* [2004]). *Consequently, the City's proposed capital improvement projects require voter approval, either by way of an assessment or a special tax.*

Sixth, practical application of the above law(s) in which a Governmental agency properly recognized that a capital improvement project requires an assessment -- *and voter approval* -- includes the Salinas Valley Water Project (Monterey County, 2003, http://www.mcwra.co.monterey.ca.us/welcome_svwp_n.htm), and the Los Osos Wastewater Treatment Project (San Luis Obispo County, 2007). The Nacimiento pipeline and the proposed City water treatment plant, as capital costs, should likewise conform to Proposition 218's voter approval assessment requirement (a ballot vote) to secure project funding.

² AB 2951 in 2006 established that public agencies such as schools are *also* subject to charges for water, sewer and electricity that contain a capital facilities component. This now permits a public utility to equitably apportion the costs of operating, maintaining, repairing, and replacing their system facilities among all customers - public and private.

³ The definition in Sec. 2 (e) of Article XIII D reads, a "'Fee' or 'charge' means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."

Seventh, “while a special assessment may, like a special tax, be viewed in a sense as having been levied for a specific purpose, a critical distinction between the two public financing mechanisms is that a special assessment must confer a special benefit upon the property assessed beyond that conferred generally.” (*Knox, supra*, 4 Cal.4th at pp. 141-142.) “Benefits” of the Nacimiento Water Project capital improvements have been published in Oct. 2007 and Jan. 2008 Paso Robles water mailers. Similarly, these same benefits (and more) are stated on Monn’s 9/16/08 memo referred to above. Briefly, the alleged benefits are to: diversify supply, increase reliability, enhance quality, and meet demand. Nonetheless, special assessments may in reality be special taxes if the property assessed receives no special benefit beyond that received by the general public. (*Knox v. City of Orland, supra*, 4 Cal.4th at pp. 142-143; *Silicon Valley Taxpayers Association v. Santa Clara County Open Space Authority*, 2008)

Eighth, the City to date has been unable to identify measurable benefits required for the levy of an assessment on water customers. Thus, City officials have then but only one other financing or revenue-raising mechanism under Proposition 218 to use for funding its capital improvement projects -- a special tax. Indeed, the projects identified in the 2008 Kennedy/Jenks report have all the earmarks of a special tax.

For example, as stated previously by the City, “*The sole purpose of the proposed rate increases is to provide adequate revenues to meet debt and operating expense obligations for the pipeline and treatment facility.*” (Source: Paso Robles Proposition 218 Notice of Public Hearing, June 2007.) The City’s desire to solely raise revenues to meet capital, debt and operating costs for the pipeline and water treatment plant is again confirmed in the City’s June (and later revised) 2008 Water Rate & Revenue Analysis report by Kennedy/Jenks Consultants. In addition, the water rates presented in that report appear in the July 2008 Proposition 218 Notice of Public Hearing sent to City water customers.

With respect to the above-identified purpose, the Courts have spoken on how a revenue-raising mechanism with a specific purpose can be characterized:

In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240 [1 Cal.Rptr.2d 818])

The essence of a special tax “is that its proceeds are earmarked or dedicated in some manner to a specific project or projects” (*Neecke v. City of Mill Valley* [1995] 39 Cal.App.4th 946, 956).

Additionally, Proposition 218 defines “special tax” as “*any tax⁴ imposed for specific purposes, including taxes imposed for specific purposes, and placed into a general*

⁴ Generally speaking, a tax is a monetary imposition of a governmental legislative body on persons or

fund.” See Cal. Const., Article XIII C, § 1(d).

The proceeds derived from the City’s proposed water rates are earmarked and dedicated to largely pay for the Nacimiento pipeline and a new City water treatment plant. The earmarking and dedication of funds to these and other capital improvement projects is made clear in the Kennedy/Jenks Water Rate & Revenue Analysis 2008 report (and in all revisions). Consequently, in light of the above case law and Article XIII C, Sec. 1(d), the related capital project costs identified in the report require funding through a special tax.

Ninth, the court in *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165, stated: “If revenue is the primary purpose and regulation is merely incidental the imposition is a tax.” The City of Paso Robles is currently being fined for dumping excess TDS and salts in its wastewater effluent back into the Salinas River. The Nacimiento Water Project (NWP) was one of several alternatives investigated and ultimately chosen to help address this regulatory problem. For example, as stated in Malcom Pirnie’s 2003 report titled, *City of El Paso de Robles Water & Wastewater Quality Concern – Water Quality Strategy*,

The City of El Paso de Robles faces two important wastewater discharge challenges. Specifically, the City’s wastewater effluent to the Salinas River does not consistently comply with numerical permit limits for Total Dissolved Solids (TDS) and the individual constituents chloride, sodium, and sulfate. The Regional Water Quality Control Board (RWQCB) has also indicated that ceasing discharge to the river altogether will likely become a future permit requirement (p. ES-1).

The City must take action to address its immediate wastewater discharge concern – its current inability to regularly meet its numerical NPDES permit effluent limits for TDS and related constituents (chloride, sodium, and sulfate). Currently the City is at high risk for continuing to exceed its permit limits, which is not an acceptable situation (p. ES-2).

[The Nacimiento Project] In addition to bringing the City’s effluent into compliance with its current TDS limit, it would provide increased water supply reliability, improved drinking water quality, relief from local groundwater overdraft, and salt reduction across all TDS sources to the City’s wastewater treatment plant (p. ES-2).

City Officials trust regulatory compliance will follow with the introduction (“blending”) of Nacimiento water with current customers’ groundwater (and/or effluent). Nonetheless, the proposed fees (rates) to be imposed on City water customers are solely for the

purpose of raising revenue for the *water* fund. The regulatory effect of the Nacimiento Water Project is incidental, being one expected benefit among many. Consequently, the proposed NWP fee or rates represent in whole or part a disguised or hidden tax.⁵

Tenth, the definition of special tax under Proposition 218 means that a tax with an identified purpose requires a two-thirds vote (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* [2003] 106 Cal.App.4th 1178); and, as with general taxes, no local government may impose, extend, or increase any special tax until such tax is submitted to the electorate and approved. Cal. Const., art. XIII C, § 2(b). The imposition, extension or increase of special taxes requires a two-thirds vote of the electorate voting in an election on the tax. Cal. Const., art. XIII C, § 2(d). Consequently, the capital improvement costs (as identified in the Kennedy/Jenks 2008 Water Rate & Revenue Analysis reports and Monn's 9/16/08 memo) if not levied as an assessment do lawfully require two-thirds voter approval for project funding, extension or increase.

Finally, Proposition 218's underlying purpose is to limit government's power to exact revenue from taxpayers without their consent and to curtail the deference traditionally accorded legislative enactments on fees, assessments, and charges. The Concerned Citizens for Paso Robles construes article XIII D, section 4, subdivision (f) — the "burden . . . to demonstrate" provision — liberally in light of the Proposition's other provisions, and concludes for the reasons stated above that the City errors in its attempt to so levy water rates as fees or charges under Proposition 218 Article XIID Section 6 to finance capital costs. The proper and lawful financing mechanism for funding City capital improvement water enterprise projects is through an assessment or a special tax.

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Approved by CCPR members for distribution. (See www.paso218.org)

⁵ On Aug. 3, 2004 City sewer users were told they would be asked to pay 50% of the NWP cost due to the wastewater problem. That is,

Of the cost for Nacimiento Water 50% is being allocated to new development. Given the water quality issue as it relates to existing wastewater discharges, current and future sewer users are being required to pick up the remaining 50% cost. (City staff report, *Public Hearing - Sewer and Water Development Impact Fees*)

Yet, in 2008 only *water* customers are being asked to pay via a proposed "fee." In addition, the fees/rates now under consideration by the City will generate more revenue than is actually needed each month to achieve wastewater regulatory compliance.