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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

HOOTAN DANESHMAND; LAURI McINTOSH; and BRIAN MONTGOMERY, on behalf of themselves and all those similarly situated,

Plaintiffs,

v.

CITY OF SAN JUAN CAPISTRANO; and DOES 1-20,

Defendants.

CASE NO. 30-2016-00829167-CU-BC-CXC
CX-105
Judge Thierry Patrick Colaw

CLASS ACTION COMPLAINT FOR:

1. **BREACH OF CONTRACT**
2. **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**
3. **COMMON COUNT – MONEY HAD AND RECEIVED**
4. **NEGLIGENCE**

DEMAND FOR JURY TRIAL

TABLE OF CONTENTS

I. INTRODUCTION

1. Plaintiffs Dr. Hootan Daneshmand, Lauri McIntosh and Brian Montgomery (collectively, "Plaintiffs") bring this action to require Defendant City of San Juan Capistrano (the "SJC") to refund its customers (including individuals and businesses, herein, "Residents") the millions of dollars which it illegally and wrongfully assessed for water services. Thousands of Residents were overcharged during for water from at least February 2010 to July 2015.

2. On April 20, 2015, the Fourth District Court of Appeal found SJC had charged residents illegal and improper water rates in violation of the California Constitution. The city continues to retain overcharges paid by Plaintiffs and class of Residents, including interest on those overcharges.

3. In or around July 2015, SJC announced it was going to be issuing "refunds" as a result of its illegal overcharges. Unfortunately, SJC's "refund" program was nothing more than a continuance of its illegal conduct. SJC failed to disclose that its water rates were charged in violation of state law and failed to disclose that the "refund" it was offering included less than 20% of the overcharges SJC collected from Residents, and failed to provide this "refund" offer to all of the people who were charged illegal rates. Further SJC's "refund" requires that claimants give up the legal right to collect the complete overcharges (which were concealed by SJC) by signing a complete release for all of SJC's overcharges, and refused to refund Residents who submitted claims but did not sign the release.

4. SJC has abrogated a mandatory, constitutional duty which resulted in the city's residents substantially overpaying for the cost of water. SJC failed to calculate its costs in setting its water rates, instead arbitrarily increasing those rates and using improper tiers with no support, justification or relationship to the cost of supplying the water, as required by Proposition 218 and was found by the Court of Appeal and the Orange County Superior Court.

5. SJC's attempt to escape the consequences of its illegal conduct by accounting sleight of hand should be rejected.

6. There can be no dispute that SJC overcharged its residents, nor any dispute that SJC has an obligation to return the illegally collected water rates in the form of refunds or credits.

Instead of complying with the law, complying with the judgment of this Court and the decision of the Court of Appeals, and instead of returning to the people of San Juan Capistrano the money it illegally collected from them, SJC has doubled down on its illicit conduct.

7. SJC has harmed and continues to harm Plaintiffs and the Class by retaining the overcharges its customers paid. SJC should be forced to comply with the law and to refund or credit the full amount of the overcharges it collected from Residents, together with legal interest.

II. PARTIES

A. Plaintiffs

8. Plaintiff Dr. Hootan Daneshmand is a resident of Orange County, CA. Dr. Daneshmand has resided in San Juan Capistrano and been a water customer of SJC for approximately seventeen years. Between February 2010 and July 2014, Dr. Daneshmand was charged more than a "Tier 1" water rate, which amounts Dr. Daneshmand paid.

9. Plaintiff Lauri McIntosh is a resident of Orange County, CA. Ms. McIntosh has resided in San Juan Capistrano and been a water customer of SJC for four years. Between February 2010 and July 2014, Ms. McIntosh was charged more than a "Tier 1" water rate, which amounts Ms. McIntosh paid.

10. Plaintiff Brian Montgomery is a resident of Orange County, CA. Mr. Montgomery has resided in San Juan Capistrano and been a water customer of SJC for approximately twenty years. Between February 2010 and July 2014, Mr. Montgomery was charged more than a "Tier 1" water rate, which amounts Mr. Montgomery paid.

B. Defendants

11. Defendant City of San Juan Capistrano is a municipal corporation that operates the City of San Juan Capistrano.

12. Defendants Does 1-20 are fictitious names for individuals or entities that may be responsible for or caused or contributed to the wrongful conduct and labor practices that caused harm to the Plaintiffs and the Class, the true names and capacities of which are unknown to Plaintiffs, but Plaintiffs will amend this Class Action Complaint when and if the true names of said Defendants become known to them.

III. JURISDICTION AND VENUE

A. Jurisdiction is Proper in this Court

13. The Superior Court of the State of California has jurisdiction of this class action pursuant to C.C.P. §§ 71 and 382, and the amount in controversy exceeds the minimum jurisdictional amount of unlimited civil cases.

B. Venue in Orange County is Proper

14. Venue is proper in the Superior Court for the County of Orange because the injury of which the named Plaintiffs herein complain occurred in Orange County, Defendant is located within Orange County and Plaintiffs are residents of Orange County.

C. Plaintiffs Provided Notice to SJC

15. On September 30, 2015, counsel for Plaintiffs served a Notice of Governmental Claim on Clerk of San Juan Capistrano. A true and correct copy of that Notice is attached as Exhibit 1. As of the date of filing of this action, SJC has not responded to that Notice.

16. On December 4, 2015, counsel for Plaintiffs served an Additional Notice of Governmental Claim on the Clerk of San Juan Capistrano. A true and correct copy of that Notice is attached as Exhibit 2. As of the date of filing this action, SJC has not responded to the Additional Notice.

IV. CLASS ACTION ALLEGATIONS

17. Plaintiffs bring this action on behalf of themselves and the other members of the following Class and Subclass, pursuant to C.C.P. § 382.

a. Class:

All water customers San Juan Capistrano who were charged more than a Tier 1 water rate between February 2010 and July 2015 and paid the higher rate.

b. Subclass:

All water customers of San Juan Capistrano who were charged more than a Tier 1 water rate between February 2010 and July 2015, paid the higher rate, and who received a partial refund and/or credit from San

Juan Capistrano as a result of filling out and returning San Juan Capistrano Water Refund Claim Form on or before October 1, 2015.

18. Plaintiffs are informed and believed that approximately 11,000 people were sent the notice of overcharge by SJC, and that there are thousands of Residents who were charged and paid the improper and excessive water rates, including many individuals who did not receive the notice from SJC.

19. There are questions of law and fact common to the Plaintiffs and other members of the Class and Subclass. Plaintiffs are members of the Class and/or Subclass and are similarly situated to the other members of their respective Class and Subclass and are adequate representatives of the Class and the Subclass.

20. The following questions of law and fact are common to the Class:

a. Whether Defendant will honor the judicial decisions holding that SJC overcharged Residents and will provide a complete refund;

b. Whether Defendants overcharged the Class for water by billing more than Tier 1 water rates;

c. Whether Defendants overcharged the Class by raising water rates in Tiers 2, 3 and 4 without evidence to justify those higher rates;

d. Whether Defendants overcharged the Class by charging rates that were higher than the proportional cost of providing water services to the Class; and,

Whether SJC violated the California Constitution, Article XIII D § 6(b)(3) by imposing fees or charges on parcels and people for water that exceeded the proportional cost of service attributable to the parcel.

21. The following questions of law and fact are common to the Subclass

a. Whether Defendant will honor the judicial decisions holding that SJC overcharged Residents and will provide a complete refund;

b. Whether Defendants overcharged the Subclass for water by billing more than Tier 1 water rates;

c. Whether Defendants overcharged the Subclass by raising water rates in Tiers 2, 3 and 4 without evidence to justify those higher rates;

d. Whether Defendants overcharged the Subclass by charging rates that were higher than the proportional cost of providing water services to the Class;

e. Whether SJC violated the California Constitution, Article XIII D § 6(b)(3) by imposing fees or charges on parcels and people for water that exceeded the proportional cost of service attributable to the parcel;

f. Whether SJC's condition of a signed "Water Refund Claim Form" and payment of a partial refund or credit for the time period from August 28, 2013 to July 1, 2014 was improper; and,

g. Whether SJC's water refund program concealed the full amount due to residents.

22. Plaintiffs' are asserting claims that are typical of the Class and Subclass. Plaintiffs will fairly and adequately represent and protect the interests of the Class and Subclass members. Plaintiffs have retained attorneys who are competent and experienced in the prosecution of class action litigation.

23. Plaintiffs and the Class have suffered damages as a result of Defendants' illegal conduct. Because the amount of each individual's damages are relatively modest, few if any members of the Class could afford to seek legal redress for the wrongs complained of herein. This makes a class action lawsuit superior to other available methods for the fair and efficient adjudication of this controversy.

24. Absent a class action, the Class and Subclass are unlikely to obtain redress of their injuries and SJC will retain the proceeds of its violation of the California Constitution.

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V. FACTUAL BACKGROUND

A. SJC's Changes to Its Water Rates and Prior Litigation Finding Those Changes Unconstitutional

25. On February 2, 2010, SJC adopted new water rates, which were subject to subsequent annual rate increases. These rates and increases were originally set as a result of a 2010 Water Rate Study, which was also adopted on February 2, 2010.

26. The rates were instituted based upon a Water Rate study completed in December 2009 by Black & Veatch, a rate-consulting firm which SJC retained to revise its tiered rate structure.

27. In asking Black & Veatch to revise the rate structure, SJC requested the revision include a fourth tier of rate payers, instead of the three tiers SJC had used in the past. Neither the Black & Veatch study, nor the Administrative Record related to the adoption of the water rates included financial cost data or any other credible evidence to show that the substantial rate increases for Tiers 2, 3 and 4 were proportional to SJC's costs of providing water services to the Class.

28. In August 2012, a California non-profit public interest group, the Capistrano Taxpayers Association sued SJC seeking declaratory and injunctive relief on the basis that SJC's newly adopted rates were illegal and violated the California Constitution.

29. In a Minute Order dated August 28, 2013, served on August 29, 2013, the Hon. Gregory Munoz of this Court entered Judgment against SJC finding that "SJC's Water Rate Structure violates California Constitution, Article XIIID, section 6(b)(3), and is invalid because fees (not penalties) are imposed on each parcel of property that exceed the proportional cost of the services attributable to each parcel." A copy of the Minute Order is attached as Exhibit 3.

30. SJC appealed that decision to the Fourth District Court of Appeal.

31. On April 20, 2015, the Fourth District Court of Appeal affirmed the Superior Court's determination that the Water Rate Structure violated the California Constitution. *See Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015), 235 Cal.App.4th

1493 ("*CTA Appeal*"). A copy of the Court of Appeal decision is attached as Exhibit 4. As the Fourth District explained:

> The trial court did not err in ruling that Proposition 218 requires public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 221 (*Bighorn*) provides that water rates must reflect the "'cost of the service attributable'" to a given parcel. While tiered, or inclined rates that go up progressively in relation to usage are perfectly consonant with article XIII D, section 6, subdivision (b)(3) and *Bighorn*, the tiers must still correspond to the actual cost of providing service at a given level of usage. The water agency here did not try to calculate the cost of actually providing water at its various tier levels. It merely allocated all its costs among the price tier levels, based not on costs, but on predetermined usage budgets. Accordingly, the trial court correctly determined the agency had failed to carry the burden imposed on it by another part of Proposition 218 (art. XIII D, § 6, subd. (b)(5)) of showing it had complied with the requirement water fees not exceed the cost of service attributable to a parcel at least without a vote of the electorate.

CTA Appeal, 235 Cal.App.4th at 1497-98 (footnotes omitted).

32. The Court continued:

> SJC Water allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs, and thus the four-tier system would be, taken as a whole, revenue neutral, and SJC Water would not make a profit on its pricing structure. SJC Water did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, at oral argument in this court, admitted it effectively used revenues from the top tiers to subsidize below cost rates for the bottom tier.

Id. at 1499.

33. SJC admitted that it did not even try to allocate costs across the various water tiers. As explained by the Court of Appeal:

> As respondent CTA quickly ascertained, the difference between tier 1 and tier 2 is a tidy 1/3 extra, the difference between tier 2 and 3 is a similarly exact 1/2 extra, and the difference between tier 3 and tier 4 is precisely 5/6ths extra. This fractional precision suggested to us that SJC Water did not attempt to correlate its rates with cost of service. Such mathematical tidiness is rare in multi-decimal point calculations. This conclusion was confirmed at oral argument in this court, when SJC Water acknowledged it had not tried to correlate the incremental cost of providing service at the various incremental tier levels to the prices of water at those levels.

Id. at 1504-05 (emphasis *added*).

34. SJC argued that it was not required to calculate the proportional costs for the tiered water rates and that, even if it were required to do so, this obligation was discretionary. The *CTA Appeal* decision rejected both positions. *Id.* at 1505.

35. There is no dispute that the Tier 2, 3 and 4 rates charged by SJC were illegal overcharges and that SJC violated a mandatory, constitutional obligation in adopting those rates. Because of SJC's violation of this obligation, Plaintiffs and the Class were charged higher rates than they should have been, and have suffered harm.

B. SJC's Deceptive "Refund" Offer

36. After the appellate court decision telling SJC that its rates were illegal, and knowing that it was in possession of millions of dollars of its customers' money that it wrongfully collected, SJC decided to offer a "refund" program to current water customers.

37. On or around July 15, 2015, SJC sent a letter to its current customers offering a refund of just ten months (August 28, 2013 to July 1, 2014) of overcharges in exchange for those customers signing a full release of any claims related to the illegal water rates. A copy of the letter sent by SJC is attached as Exhibit 5.

38. Instead of returning the full overcharges to all customers, SJC sent letters to current water customers stating "due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment, Credits/Refunds will be issued for water rate overbillings made between August 28, 2013 and July 1, 2014. An 'overpayment' was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing."

39. Unfortunately for the customers who paid the inflated and illegal water rates, they were not informed of the reality that SJC had charged those higher rates for a much longer period of time than described in the letter SJC sent out. Moreover, SJC's letter demanded that water customers were not entitled to receive a refund of the overbillings unless they signed a release discharging SJC, its officers, officials, employees and agents, from all known and unknown claims arising out of water rates charged prior to July 1, 2014. The scope of the (unnecessary) release is substantially broader than the refund offered by SJC, and was an attempt to prevent residents from receiving the full amount of money they are owed.

40. SJC concealed from its customers the full extent of the harm they had suffered. SJC did not inform water customers that the illegal rates were charged for a time period substantially greater than the ten months referred to in the letter and release form.

41. SJC required Residents to submit the claim form with the signed release on or before October 1, 2015. Upon information and belief, SJC will not issue refunds or credits to water customers who filled out the claim form but refused to sign the release.

42. SJC's also did not intend to include interest in the refunds it was paying to its customers, meaning that SJC's plan to compensate water customers who were harmed by SJC's illegal conduct consisted of: (1) concealing the length of time the illegal rates were charged, (2) retaining illegal overcharges collected for the months prior to September 2013 or after June 2014, (3) not paying interest to the water customers for the time period during which they were overcharged, and (4) require claimants to submit a claim prior to October 1, 2015 which purportedly released any claims the customer had against SJC for five years of illegal conduct.

43. SJC's offer also was only sent to current customers, not necessarily to the customers who actually paid the illegal rates. Members of the class who are no longer water customers of SJC were not sent the offer.

44. This limited offer was made despite SJC stating in the letter that it was "providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment." In reality, the refund offer does no such thing – it merely gave the appearance of a "refund" without the actual return of all sums that were wrongfully charged in violation of state law.

45. Until receipt of the letter in July 2015, Plaintiffs were not aware and could not have known that SJC did not intend to refund the full amount of its illegal overcharges. On September 30, 2015, Plaintiff, through counsel, sent a Notice Letter to SJC. On December 4, 2015 Plaintiffs, through counsel, sent a Additional Notice Letter to SJC.

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VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Breach of Contract

46. Plaintiffs repeat and reallege by reference the allegations set forth in paragraphs 1-45 above as though set forth herein in full.

47. SJC and each of its water customers are in a contractual relationship whereby SJC has agreed to supply its customers with water and the customers have agreed to pay the amounts the city legally charges them for that water.

48. SJC breached this contract by illegally charging its water customers excessive water rates.

49. Plaintiffs and the Class have performed each of the obligations they are required to under their contract with SJC.

50. Plaintiffs and the Class have been damaged as a result of SJC's illegal conduct in an amount to be proven at trial.

51. Wherefore, Plaintiffs pray for relief as set forth below.

SECOND CAUSE OF ACTION

Breach of the Covenant of Good Faith and Fair Dealing

52. Plaintiffs repeat and reallege by reference the allegations set forth in paragraphs 1-45, above as though set forth herein in full.

53. Every contract in the State of California contains an implied covenant of good faith and fair dealing.

54. By offering to "refund" only a small portion of the money SJC owed to Plaintiffs, failing to disclose the fact that the "refund" is a partial offer in exchange for a full release to obtain the overcharges, and by only offering the "refund" to a portion of the Class, Defendant breached the covenant of good faith and fair dealing.

55. Plaintiffs and the Class have been harmed by SJC's breach of the covenant of good faith and fair dealing in an amount to be proven at trial.

56. Wherefore, Plaintiffs pray for relief as set forth below.

THIRD CAUSE OF ACTION

Common Count Money Had and Received

57. Plaintiffs repeat and reallege by reference the allegations set forth in paragraphs 1-45, above as though set forth herein in full.

58. Plaintiffs and the Class paid money to SJC based upon the charges from SJC for water services. SJC has retained the money Plaintiffs and the Class have paid.

59. SJC owes Plaintiffs and the Class the portion of the money they paid which constitutes an illegal overcharge as a result of SJC's adoption of illegal tiered rates in February 2010, plus interest.

60. Prior to SJC sending its "offer" letter in July 2015, Plaintiffs and the Class did not know and could not have known that SJC did not intend to return the money it owed to Plaintiffs and the Class, including interest.

61. Plaintiffs and the Class have been damaged in an amount to be proven at trial.

62. Wherefore, Plaintiffs pray for relief as set forth below.

FOURTH CAUSE OF ACTION

Negligence

63. Plaintiffs repeat and reallege by reference the allegations set forth in paragraphs 1-45, above as though set forth herein in full.

64. SJC owed Plaintiffs and the class a duty to comply with the mandatory obligations found in California law. The California Constitution, through Proposition 218, requires public water agencies to calculate the actual costs of providing water at various levels of usage. Cal. Const. Article XIII D, section 6, subdivision (b)(3). This is a mandatory duty, owed to protect Residents from overpaying for water services.

65. SJC breached its duty to calculate the actual costs of providing water at various levels of usage, instead using tiered water rates which were not related to the actual costs. Defendants failed to use due care and act in a prudent and careful manner in computing and implementing the illegal tiered water rates charged to Plaintiffs and the Class. SJC also failed to use due care and act in a prudent and careful manner in the design and implementation of the

"refund" plan offered by SJC in that the "refund" plan resulted in SJC failing to properly return to Residents the amount of money SJC overcharged and illegally collected.

66. SJC's conduct was a substantial factor in harming Plaintiffs and the Class.

67. Wherefore, Plaintiffs pray for relief as set forth below.

VII. PRAYER FOR RELIEF

WHEREFORE, in accordance with the above claims in the First through Fourth Causes of Action, Plaintiffs demand:

1. A Judgment requiring SJC to refund all moneys which were wrongfully charged and collected in violation of state law to the Class and Subclass;

2. A Judgment requiring SJC to pay interest at the legal rate from the date they received the money from the Class and Subclass in violation of state law to the date of full payment;

3. An order providing for incentive fees to the named class representatives for their service in representing the Class and Subclass; and,

4. For such other and further relief as the Court deems just and proper.

Dated: January 8, 2016

COTCHETT, PITRE & McCARTHY, LLP

By: _____
NIALL P. McCARTHY
ERIC J. BUESCHER

LAW OFFICES OF MARC GOLDSTEIN

By: _____
MARC GOLDSTEIN

VIII. JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated: January 8, 2016

COTCHETT, PITRE & McCARTHY, LLP

By: _____
NIALL P. McCARTHY
ERIC J. BUESCHER

LAW OFFICES OF MARC GOLDSTEIN

By: _____
MARC GOLDSTEIN

EXHIBIT 1

Marc Goldstein
620 Newport Center Drive
11th Floor
Newport Beach, California 92660
Telephone: (949) 718-4433
Fax: (949) 666-7752

September 30, 2015

City Clerk
City of San Juan Capistrano
32400 Paseo Adelanto
San Juan Capistrano, CA 92675

By Fax (949) 493-1053 and
By Email – cityclerk@sanjuancapistrano.org

Re: Notice of Governmental Claim

Dear Ms. Morris:

On or about July 15, 2015, the City of San Juan Capistrano, in conjunction with the Water Department of the City of San Juan Capistrano, (collectively referred to as "The City") sent out a notice to approximately 11,000 residents together with a document entitled "City of San Juan Capistrano Water Refund Claim Form." A true copy of those documents are attached as Exhibit 1.

> The City stated that it was "providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment. Credits/Refunds will be issued for water rate overbillings made between August 28, 2013 and July 1, 2014. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing. You can demonstrate your eligibility by completing and returning the enclosed form. Your claim for a water refund/credit must be filed no later than October 1, 2015."

Exhibit 1 failed to inform the recipients of the July 15, 2015 notice, that the City had been improperly overcharging and improperly billing residents

and users of water since sometime in or around 2010 and in use for at least four to five years. The City also failed to disclose to the persons who were sent Exhibit 1, that only months earlier, the California Court of Appeal had decided that the tiered water rates which had been approved by the San Juan Capistrano in 2010 violated Proposition 218, which requires government fees to be set in accordance with cost.

Within the last six months, the City began advising the public that the City would be refunding the overcharges that they had wrongfully collected. On or about July 15, 2015, for the first time, the City disclosed that it was unwilling to refund most of the millions of dollars of money that they had wrongfully assessed for its water, and in a surprise move, sent out Exhibit 1 stating that not only would the City refuse to give a full refund for the amounts that they wrongfully charged for water, but it would limit the refunds for a period of 10 months when the overcharges were taking place for nearly 5 years. Furthermore, the City in Exhibit 1 was requiring claimants to waive not only any and all claims for other time periods, but also sign a release that in part stated:

> "Any water rate refund provided by the City shall not constitute any admission by the City of wrongdoing or liability in connection (sic) the Disputed Rates."

It was disingenuous for the City to have required such releases, particularly since the City and City Council knew full well that not only had the Orange County Superior Court found the City to have violated Proposition 218, but it was affirmed by the Court of Appeal and is now final and binding. The City had no right to withhold refunding money which they wrongfully overcharged nor did they have the right to require persons who were entitled to a refund to be forced to sign a release and surrender rights that they have as a condition of receiving a partial refund of the amounts that the City had wrongfully charged them. Claimant and all persons similarly situated have a right to and intend on pursuing a claim for deprivation of Constitution Rights under color of State Law under the California and United States Constitution in violation of 42 USC Section 1983.

This Notice of Claim is being made by The Law Offices of Marc Goldstein, 620 Newport Center Drive, 11th Floor, Newport Beach, California 92660,

(949) 718-4433 on behalf of The Beck Trust, C. Bailey Trustee, an individual and class representative who resides at [redacted] in San Juan Capistrano; as well as a serving as a representative for the class action on behalf of: (a) all persons and entities who have paid tiered water rates to the City of San Juan Capistrano including but not limited to all persons and entities that were sent a copy of Exhibit 1 by the City on or about July 15, 2015, (b) any and all persons that paid tiered water rates to the City of San Juan Capistrano which was in violation of Proposition 218 who were not sent Exhibit 1 or otherwise were not informed of their right to receive a refund from the City for overpayments they made to the City relating to tiered water rates that they were charged by the City, and (c) any and all persons who paid tiered water rates to the City which the City has failed to refund with legal interest from the date the funds were first received by the City until refunded. Claimant hereby reserves the right to amend or revise this claim based upon further discovered facts, issues or evidence. Claimant also reserves the right to pursue an action on behalf of any and all persons who have paid tiered water rights to the City of San Juan Capistrano at any other time which the City concealed from the Public and, which the City has not yet returned including legal interest. Any and all communication regarding this matter should be made directly to the Law Offices of Marc Goldstein at the address and phone number above, or by email which is at marcgoldstein@cox.net. At all times relevant, the Beck Trust, and C. Bailey Trustee, have paid the City of San Juan Capistrano for water use which was on the tiered system and otherwise constitutes a proper class representative.

The City has had possession of what is believed to be at least $15 Million Dollars or more which was improperly billed and collected by the City and therefore does not rightfully belong to the City and should be refunded with interest at the legal rate from the date they first overcharged on a tiered basis for water in or about 2010 until they fully refund the money that they wrongfully obtained. The Public and claimant and all persons similarly situated, have a right to expect that the City would voluntarily return said money without further court intervention. However, the conduct of the City demonstrates that they did not intend on fully returning the money that they wrongfully obtained, even though they knew what they had done was wrong. By disseminating Exhibit 1, the City demonstrated their willingness to retain money which did not rightfully belong to them and

thereby avoided to have to give back the money they wrongfully charged and obtained from claimant and other persons similarly situated, justifying the need for the filing of this Notice and subsequent Class Action Lawsuit.

A purpose of this letter is to notify the City of San Juan Capistrano, as well as the San Juan Capistrano Water Department, which is a subdivision of the City of San Juan Capistrano (hereafter referred to "the City") including its agents, associates, and any and every agency or subdivision, whether private or a subdivision of any governmental entity, who participated of our intention to file a claim and class action suit on behalf of The Beck Trust, by C. Bailey trustee, individually and on behalf of a class of persons or entities similarly situated who were overcharged for water by the City and who have not been made whole or repaid in full for the sums which they were overcharged by The City, as more fully described herein.

The City also refused to provide a refund to persons who had been overcharged unless and until those persons would agree to sign Exhibit 1 and waive their rights to obtain the money which the City knew it owed to them, and accept a smaller amount than they knew they were due. The City also acted improperly by imposing terms and conditions using their color of state law, to force residents and citizens that they had defrauded, to concede that the payment of water overcharges did not constitute evidence of wrongdoing or liability on the part of the City. The City was demanding that as a condition of getting repair by the City, they had to falsely agree, and agree that even though the California Superior Court and the Court of Appeal both determined that the overcharges were illegal and improper, il they

In or about 2010 on dates known by the City of San Juan Capistrano, it began charging excessive and improper tiered rates for water which it supplied to residents and users of water. Within the last six months, the City stated that instead of fully returning the money which it wrongfully and improperly collected and obtained from members of a large class of persons and entitles believed to number at least 11,000, the City announced that it would only repay a small fraction of the money which it wrongfully obtained. Claimant is informed and believes that the City's wrongful overcharge for its tired water rates in violation of the law, resulted in the City retaining and being unjustly enriched by approximately Sixteen

Million Dollars. Claimant and all of those in the putative class that are similarly situated, learned within the last six months that the City did not intend on returning the funds which they wrongfully charged, and instead adopted a plan by which it was requiring all persons to sign a release of all claims and to surrender any and all rights that they had to recover the money which the City has wrongfully received and instead accept a substantially reduced sum of money and surrender rights that they have under the United States and California Constitution in violation of Title 42 USC Section 1983. Claimant and all other persons similarly situated are therefore entitled to damages for the deprivation of their constitution rights and to recover attorneys and fees according to proof.

The total amount at issue in this case is believed to be a sum of at least $15 million dollars and possibly more. This is based in part on the belief that an offer that the City made to a Mr. Eric Krogius pursuant to Exhibit 1 was about 20% to $25% of the total amount that the City had collected from Mr. Krogius in violation of Proposition 218. The City has stated that it has set aside $4.1 Million to settle a ten month period of time, which we believe to be a small fraction of the City's total exposure. In addition to recovering the principal amount of money that the City wrongfully charged, we intend to seek attorneys' fees and costs on behalf of the Claimant and those similarly situated. Further, as a result of previous communications that were made by this office to the City and to their attorney, the City Council agreed to contribute an additional $375,000 to the fund, from which council should be compensated for having increased the amount of money that the City agreed to pay to claimants. The City has not manifested any intention to compensate or reimburse Claimant or the other persons similarly situated for the legal fees and costs that have been incurred on their behalf in this matter.

It is believed that the City has been violating Proposition 218 since 2010 by charging tier rates for water which exceeded their true costs. The names of the employees or former employees of the City who caused or contributed to the damages sought herein on information and belief include the members of the City Council of the City of San Juan Capistrano, the Director or Manager of the Water Department of the City of San Juan Capistrano, and the City Manager(s) of the City of San Juan Capistrano during the period of time from January 2010 through the Present time. We

reserve the right to amend and supplement this Notice based on newly discovered facts. Claimant does not believe that proper notice was sent to all of the potential claimants, and further believes that the notice imparted by the City to only a small percentage of the potential claimants was insufficient, which thereby should justify an extension of time to submit claims based on inadvertence, surprise, or neglect or otherwise allow claims that were made after October 1, 2015.

Very truly yours,

Marc Goldstein
Attorney for Claimant and for
The Prospective Class Action

Enclosure: 2

cc: Jeff Ballinger, Esq.
City Attorney of the City of San Juan Capistrano

EXHIBIT 1

32400 Paseo Adelanto
San Juan Capistrano, CA 92675
(949) 493-1171
(949) 493-1053 FAX
www.sanjuancapistrano.org

[redacted]

CITY OF SAN JUAN CAPISTRANO WATER CUSTOMER

[redacted]

Dear Water Customer,

The City of San Juan Capistrano is providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment. Credits/Refunds will be issued for water rate overbillings made between August 28, 2013, and July 1, 2014. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing.

You can demonstrate your eligibility by completing and returning the enclosed form. Your claim for a water refund/credit must be filed **no later than October 1, 2015**.

We appreciate your patience during this process. Refunds will be processed in the order received and may take up to 90 day due to the number of claims expected.

If you have further questions or for more information, please visit the City of San Juan Capistrano website or call the Customer Service Department at (949) 493-1515.

Sincerely,

City of San Juan Capistrano

CITY OF SAN JUAN CAPISTRANO
WATER REFUND CLAIM FORM

INSTRUCTIONS

1. Read entire claim form before returning. Print legibly.
2. Completed form must be delivered by e-mail, mail, or in person at San Juan Capistrano City Hall, Customer Service Division.
3. Refund/Credits will be issued for water rate overbillings made between August 28, 2013, and July 1, 2014, which resulted in overpayments.
4. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during the time period above and paid that billing. Your refund will be calculated by the City based on usage records for your account.
5. Claims for water rate refund/credit must be filed **no later than October 1, 2015, and may take up to 90 days to be processed.**
6. A signature and date is required at bottom of form. Submit form to:

City of San Juan Capistrano - Water Refund
32400 Paseo Adelanto, San Juan Capistrano, CA 92675
OR by email, at: waterrefund@sanjuancapistrano.org

ELIGIBILITY INFORMATION

Customer Name: _____

Service Address: _____

Mailing Address: _____

Account/Customer Number: _____ Phone Number: _____

Email: _____

When did you reside at/occupy the service address: From: _____ To: _____

Please check box that qualifies you for the credit:

☐ I am the primary account holder

☐ I am the secondary account holder. Primary holder's name: _____

REFUND METHOD – Please provide my water refund as follows:

☐ Refund check made out to the primary account holder and mailed to the mailing address above

☐ Credit to the utility account number above

Release and Waiver of Further Refund Claims. In exchange for a refund of water rates as set forth in this document, the person signing below ("Claimant"), on behalf of Claimant, any other account holder(s) of the above-referenced account, and their heirs, assigns and representatives, hereby fully, finally and forever discharges the City of San Juan Capistrano ("City"), and its officers, officials, employees and agents from any and all claims, demands, liabilities or causes of action, in law or in equity, of any nature whatsoever, known or unknown, which the Claimant now or may have against the City arising out of the water rates charged by the City prior to July 1, 2014, ("Disputed Rates). Claimant further covenants not to sue, or participate in any lawsuit regarding the Disputed Rates. Any water rate refund provided by the City shall not constitute any admission by the City of wrongdoing or liability in connection the Disputed Rates.

By signing this form you are claiming that the information above is true and correct.

Type or Print Name:

EXHIBIT 2

LAW OFFICES
COTCHETT, PITRE & MCCARTHY, LLP
LOS ANGELES
SAN FRANCISCO AIRPORT OFFICE CENTER
840 MALCOLM ROAD
BURLINGAME, CALIFORNIA 94010
TELEPHONE (650) 697-6000
FAX (650) 697-0577
www.cpmlegal.com
NEW YORK

December 4, 2015

VIA CERTIFIED MAIL
City Clerk
City of San Juan Capistrano
32400 Paseo Adelanto
San Juan Capistrano, CA 92675

Re: Additional Notice of Governmental Claim

To whom it may concern:

This Additional Notice of Governmental Claim relates back to the attached prior Notice of Governmental Claim sent on September 30, 2015 on behalf of the Beck Trust, C. Bailey as Trustee, and a the class of persons who were overcharged by San Juan Capistrano for water services. That Notice is attached hereto.

On or about July 15, 2015, the City of San Juan Capistrano, in conjunction with the Water Department of the City of San Juan Capistrano, (collectively referred to as "The City") sent out a notice to approximately 11,000 residents together with a document entitled "City of San Juan Capistrano Water Refund Claim Form." These documents were attached to the prior notice as Exhibit 1, and are included herewith.

> The City stated that it was "providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment. Credits/Refunds will be issued for water rate overbillings made between August 28, 2013 and July 1, 2014. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing. You can demonstrate your eligibility by completing and returning the enclosed form. Your claim for a water refund/credit must be filed no later than October 1, 2015."

Exhibit 1 failed to inform the recipients of the July 15, 2015 notice, that the City had been improperly overcharging and improperly billing residents and users of water since sometime in or around 2010. The City also failed to disclose to the persons who were sent Exhibit 1, that only a months earlier, the California Court of Appeal had decided that the tiered water rates which had been approved by the San Juan Capistrano in 2010 violated Proposition 218, which requires government fees to be set in accordance with cost.

Within the last six months, the City began advising the public that the City would be refunding the overcharges that they had wrongfully collected. On or about July 15, 2015, for the first time, the City disclosed that it was unwilling to refund the millions of dollars of money that they had wrongfully assessed for its water, and in a surprise move, sent out Exhibit 1 stating that not only would the City refuse to give a full refund for the amounts that they wrongfully charged for water, but it would limit the refunds for a period of 10 months when the overcharges were taking place for nearly 5 years. Furthermore, the City in Exhibit 1 was requiring claimants to waive any and all claims for other time periods, but also sign a release that in part stated:

> "Any water rate refund provided by the City shall not constitute any admission by the City of wrongdoing or liability in connection (sic) the Disputed Rates."

It was improper for the City to have required such releases, particularly since the City and City Council knew full well that not only had the Orange County Superior Court found the City to have violated Proposition 218. That decision was affirmed by the Court of Appeal and is now final and binding. The City had no right to withhold refunding money which they wrongfully overcharged nor did they have the right to require persons who were entitled to a refund to be forced to sign a release and surrender rights that they have as a condition of receiving a partial refund of the amounts that the City had wrongfully charged them.

This Second Notice of Claim is being made by Cotchett, Pitre & McCarthy, LLP, 840 Malcom Road, Burlingame, CA, 94010, (650) 697-6000 and The Law Offices of Marc Goldstein, 620 Newport Center Drive, 11th Floor, Newport Beach, California 92660, (949) 718-4433 on behalf of the following:

- Brian Montgomery, an individual and class representative who resides at [redacted] in San Juan Capistrano;
- Lauri McIntosh, an individual and class representative who resides at [redacted] in San Juan Capistrano;
- Dr. Hootan Daneshmand, an individual and class representative who resides at [redacted] in San Juan Capistrano; and,
- A class of persons defined as "all water customers of the City of San Juan Capistrano who were charged more than a Tier 1 water rate between February 2, 2010 and July 1, 2015 and paid that rate."

These individuals are referred to herein as "Claimants." Claimants and all persons similarly situated have a right to and intend on pursuing a claim against the City for any potential violations of state and federal law, including breach of contract, breach of the covenant of good faith and fair dealing, money owed, negligence, deprivation of constitutional rights under color of law in violation of 42 U.S.C. § 1983, violation of the Consumer Legal Remedies Act, and/or violation of the Unfair Competition Law.

Claimants hereby reserve the right to amend or revise this claim based upon further discovered facts, issues or evidence. Claimants also reserve the right to pursue an action on behalf of any and all persons who have paid tiered water rights to the City of San Juan Capistrano, which the City has not yet returned including legal interest.

Any and all communication regarding this matter should be made directly to either Eric Buescher and Niall McCarthy of Cotchett, Pitre & McCarthy, LLP or to the Law Offices of Marc Goldstein at the address and phone numbers above, or by email at marcgoldstein@cox.net or ebuescher@cpmlegal.com. At all times relevant, Claimants have paid the City of San Juan Capistrano for water use which was on the tiered system and otherwise constitutes a proper class representative.

The City has had possession of what is believed to be at least $15 Million Dollars or more which was improperly billed and collected by the City and therefore does not rightfully belong to the City and should be refunded with interest at the legal rate from the date they first overcharged on a tiered basis for water in or about 2010 until they fully refund the money that they wrongfully obtained. The Public has a right to expect that the City would voluntarily return said money without further court intervention. However, the conduct of the City demonstrates that they did not intend on fully returning the money that they wrongfully obtained, even though they knew what they had done wrong. By disseminating Exhibit 1, the City demonstrated their willingness to retain money which did not rightfully belong to them, justifying the need for the filing of this Notice and subsequent Class Action Lawsuit.

A purpose of this letter is to notify the City of San Juan Capistrano, as well as the San Juan Capistrano Water Department, which is a subdivision of the City of San Juan Capistrano (hereafter referred to "the City") including its agents, associates, and any and every agency or subdivision, whether private or a subdivision of any governmental entity, who participated of our intention to file a claim and class action suit on behalf of Claimants and all persons or entities similarly situated who were overcharged for water by the City and who have not been made whole or repaid in full for the sums which they were overcharged by The City, as more fully described herein.

In or about 2010 on dates known by the City of San Juan Capistrano, it began charging excessive and improper tiered rates for water which it supplied to residents and users of water. Within the last six months, the City stated that instead of fully returning the money which it wrongfully and improperly collected and obtained from members of a large class of persons and entitles believed to number at least 11,000, the City announced that it would only repay a small fraction of the money which it wrongfully obtained. Claimant is informed and believes that the City's wrongful overcharge for its water in violation of the law, resulted in the City retaining and being unjustly enriched by approximately Sixteen Million Dollars. Claimant and all of those in the class that are similarly situated, learned within the last six months that the City did not intend on returning the funds which they wrongfully charged, and instead adopted a plan by which it was requiring all persons to sign a release of all claims and to surrender any and all rights that they had to recover the money which the City has wrongfully received.

The total amount at issue in this case is believed to be a sum of at least $15 million dollars and possibly more. This is based in part on the belief that an offer that the City made to a Mr. Eric Krogius pursuant to Exhibit 1 was about 20% to $25% of the total amount that the City had collected from Mr. Krogius in violation of Proposition 218. The City has stated that it has set aside $4.1 Million to settle a ten month period of time, which we believe to be a small fraction of the City's total exposure. In addition to recovering the principal amount of money that the City wrongfully charged, we intend to seek attorneys' fees and costs on behalf of the class. Further, as a result of previous communications between counsel for claimants and the City and its attorneys, the City Council agreed to contribute an additional $375,000 to the fund for interest payments for the inadequate "refund" program which the City agreed to pay.

It is believed that the City has been violating Proposition 218 since 2010 by charging tier rates for water which exceeded their true costs. The names of the employees or former employees of the City who caused or contributed to the damages sought herein on information and belief include the members of the City Council of the City of San Juan Capistrano, the Director or Manager of the Water Department of the City of San Juan Capistrano, and the City Manager(s) of the City of San Juan Capistrano during the period of time from January 2010 through the Present time. We reserve the right to amend and supplement this Notice based on newly discovered facts. Claimant does not believe that proper notice was sent to all of the potential claimants, and further believes that the notice imparted by the City to only a small percentage of the potential claimants was insufficient, which thereby should justify an extension of time to submit claims based on inadvertence, surprise, or neglect or otherwise allow claims that were made after October 1, 2015.

Very truly yours,

MARC GOLDSTEIN

ERIC J. BUESCHER

Attorneys for Claimants and the Class

Enclosure

cc: (via mail and e-mail):
Jeff Ballinger
City Attorney, City of San Juan Capistrano
Best Best & Krieger LLP
655 West Broadway, 15th Floor
San Diego, CA 92101
Jeff.Ballinger@bbklaw.com

Marc Goldstein
620 Newport Center Drive
11th Floor
Newport Beach, California 92660
Telephone: (949) 718-4433
Fax: (949) 666-7752

September 30, 2015

City Clerk
City of San Juan Capistrano
32400 Paseo Adelanto
San Juan Capistrano, CA 92675

By Fax (949) 493-1053 and
By Email – cityclerk@sanjuancapistrano.org

Re: Notice of Governmental Claim

Dear Ms. Morris:

On or about July 15, 2015, the City of San Juan Capistrano, in conjunction with the Water Department of the City of San Juan Capistrano, (collectively referred to as "The City") sent out a notice to approximately 11,000 residents together with a document entitled "City of San Juan Capistrano Water Refund Claim Form." A true copy of those documents are attached as Exhibit 1.

> The City stated that it was "providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment. Credits/Refunds will be issued for water rate overbillings made between August 28, 2013 and July 1, 2014. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing. You can demonstrate your eligibility by completing and returning the enclosed form. Your claim for a water refund/credit must be filed no later than October 1, 2015."

Exhibit 1 failed to inform the recipients of the July 15, 2015 notice, that the City had been improperly overcharging and improperly billing residents

and users of water since sometime in or around 2010 and in use for at least four to five years. The City also failed to disclose to the persons who were sent Exhibit 1, that only months earlier, the California Court of Appeal had decided that the tiered water rates which had been approved by the San Juan Capistrano in 2010 violated Proposition 218, which requires government fees to be set in accordance with cost.

Within the last six months, the City began advising the public that the City would be refunding the overcharges that they had wrongfully collected. On or about July 15, 2015, for the first time, the City disclosed that it was unwilling to refund most of the millions of dollars of money that they had wrongfully assessed for its water, and in a surprise move, sent out Exhibit 1 stating that not only would the City refuse to give a full refund for the amounts that they wrongfully charged for water, but it would limit the refunds for a period of 10 months when the overcharges were taking place for nearly 5 years. Furthermore, the City in Exhibit 1 was requiring claimants to waive not only any and all claims for other time periods, but also sign a release that in part stated:

> "Any water rate refund provided by the City shall not constitute any admission by the City of wrongdoing or liability in connection (sic) the Disputed Rates."

It was disingenuous for the City to have required such releases, particularly since the City and City Council knew full well that not only had the Orange County Superior Court found the City to have violated Proposition 218, but it was affirmed by the Court of Appeal and is now final and binding. The City had no right to withhold refunding money which they wrongfully overcharged nor did they have the right to require persons who were entitled to a refund to be forced to sign a release and surrender rights that they have as a condition of receiving a partial refund of the amounts that the City had wrongfully charged them. Claimant and all persons similarly situated have a right to and intend on pursuing a claim for deprivation of Constitution Rights under color of State Law under the California and United States Constitution in violation of 42 USC Section 1983.

This Notice of Claim is being made by The Law Offices of Marc Goldstein, 620 Newport Center Drive, 11th Floor, Newport Beach, California 92660,

(949) 718-4433 on behalf of The Beck Trust, C. Bailey Trustee, an individual and class representative who resides at [redacted] in San Juan Capistrano; as well as a serving as a representative for the class action on behalf of: (a) all persons and entities who have paid tiered water rates to the City of San Juan Capistrano including but not limited to all persons and entities that were sent a copy of Exhibit 1 by the City on or about July 15, 2015, (b) any and all persons that paid tiered water rates to the City of San Juan Capistrano which was in violation of Proposition 218 who were not sent Exhibit 1 or otherwise were not informed of their right to receive a refund from the City for overpayments they made to the City relating to tiered water rates that they were charged by the City, and (c) any and all persons who paid tiered water rates to the City which the City has failed to refund with legal interest from the date the funds were first received by the City until refunded. Claimant hereby reserves the right to amend or revise this claim based upon further discovered facts, issues or evidence. Claimant also reserves the right to pursue an action on behalf of any and all persons who have paid tiered water rights to the City of San Juan Capistrano at any other time which the City concealed from the Public and, which the City has not yet returned including legal interest. Any and all communication regarding this matter should be made directly to the Law Offices of Marc Goldstein at the address and phone number above, or by email which is at marcgoldstein@cox.net. At all times relevant, the Beck Trust, and C. Bailey Trustee, have paid the City of San Juan Capistrano for water use which was on the tiered system and otherwise constitutes a proper class representative.

The City has had possession of what is believed to be at least $15 Million Dollars or more which was improperly billed and collected by the City and therefore does not rightfully belong to the City and should be refunded with interest at the legal rate from the date they first overcharged on a tiered basis for water in or about 2010 until they fully refund the money that they wrongfully obtained. The Public and claimant and all persons similarly situated, have a right to expect that the City would voluntarily return said money without further court intervention. However, the conduct of the City demonstrates that they did not intend on fully returning the money that they wrongfully obtained, even though they knew what they had done was wrong. By disseminating Exhibit 1, the City demonstrated their willingness to retain money which did not rightfully belong to them and

thereby avoided to have to give back the money they wrongfully charged and obtained from claimant and other persons similarly situated, justifying the need for the filing of this Notice and subsequent Class Action Lawsuit.

A purpose of this letter is to notify the City of San Juan Capistrano, as well as the San Juan Capistrano Water Department, which is a subdivision of the City of San Juan Capistrano (hereafter referred to "the City") including its agents, associates, and any and every agency or subdivision, whether private or a subdivision of any governmental entity, who participated of our intention to file a claim and class action suit on behalf of The Beck Trust, by C. Bailey trustee, individually and on behalf of a class of persons or entities similarly situated who were overcharged for water by the City and who have not been made whole or repaid in full for the sums which they were overcharged by The City, as more fully described herein.

The City also refused to provide a refund to persons who had been overcharged unless and until those persons would agree to sign Exhibit 1 and waive their rights to obtain the money which the City knew it owed to them, and accept a smaller amount than they knew they were due. The City also acted improperly by imposing terms and conditions using their color of state law, to force residents and citizens that they had defrauded, to concede that the payment of water overcharges did not constitute evidence of wrongdoing or liability on the part of the City. The City was demanding that as a condition of getting repair by the City, they had to falsely agree, and agree that even though the California Superior Court and the Court of Appeal both determined that the overcharges were illegal and improper, il they

In or about 2010 on dates known by the City of San Juan Capistrano, it began charging excessive and improper tiered rates for water which it supplied to residents and users of water. Within the last six months, the City stated that instead of fully returning the money which it wrongfully and improperly collected and obtained from members of a large class of persons and entitles believed to number at least 11,000, the City announced that it would only repay a small fraction of the money which it wrongfully obtained. Claimant is informed and believes that the City's wrongful overcharge for its tired water rates in violation of the law, resulted in the City retaining and being unjustly enriched by approximately Sixteen

Million Dollars. Claimant and all of those in the putative class that are similarly situated, learned within the last six months that the City did not intend on returning the funds which they wrongfully charged, and instead adopted a plan by which it was requiring all persons to sign a release of all claims and to surrender any and all rights that they had to recover the money which the City has wrongfully received and instead accept a substantially reduced sum of money and surrender rights that they have under the United States and California Constitution in violation of Title 42 USC Section 1983. Claimant and all other persons similarly situated are therefore entitled to damages for the deprivation of their constitution rights and to recover attorneys and fees according to proof.

The total amount at issue in this case is believed to be a sum of at least $15 million dollars and possibly more. This is based in part on the belief that an offer that the City made to a Mr. Eric Krogius pursuant to Exhibit 1 was about 20% to $25% of the total amount that the City had collected from Mr. Krogius in violation of Proposition 218. The City has stated that it has set aside $4.1 Million to settle a ten month period of time, which we believe to be a small fraction of the City's total exposure. In addition to recovering the principal amount of money that the City wrongfully charged, we intend to seek attorneys' fees and costs on behalf of the Claimant and those similarly situated. Further, as a result of previous communications that were made by this office to the City and to their attorney, the City Council agreed to contribute an additional $375,000 to the fund, from which council should be compensated for having increased the amount of money that the City agreed to pay to claimants. The City has not manifested any intention to compensate or reimburse Claimant or the other persons similarly situated for the legal fees and costs that have been incurred on their behalf in this matter.

It is believed that the City has been violating Proposition 218 since 2010 by charging tier rates for water which exceeded their true costs. The names of the employees or former employees of the City who caused or contributed to the damages sought herein on information and belief include the members of the City Council of the City of San Juan Capistrano, the Director or Manager of the Water Department of the City of San Juan Capistrano, and the City Manager(s) of the City of San Juan Capistrano during the period of time from January 2010 through the Present time. We

reserve the right to amend and supplement this Notice based on newly discovered facts. Claimant does not believe that proper notice was sent to all of the potential claimants, and further believes that the notice imparted by the City to only a small percentage of the potential claimants was insufficient, which thereby should justify an extension of time to submit claims based on inadvertence, surprise, or neglect or otherwise allow claims that were made after October 1, 2015.

Very truly yours,

Marc Goldstein
Attorney for Claimant and for
The Prospective Class Action

Enclosure: 2

cc: Jeff Ballinger, Esq.
City Attorney of the City of San Juan Capistrano

EXHIBIT 1

32400 Paseo Adelanto
San Juan Capistrano, CA 92675
(949) 493-1171
(949) 493-1053 FAX
www.sanjuancapistrano.org

[redacted]

CITY OF SAN JUAN CAPISTRANO WATER CUSTOMER

[redacted]

Dear Water Customer,

The City of San Juan Capistrano is providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment. Credits/Refunds will be issued for water rate overbillings made between August 28, 2013, and July 1, 2014. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing.

You can demonstrate your eligibility by completing and returning the enclosed form. Your claim for a water refund/credit must be filed **no later than October 1, 2015**.

We appreciate your patience during this process. Refunds will be processed in the order received and may take up to 90 day due to the number of claims expected.

If you have further questions or for more information, please visit the City of San Juan Capistrano website or call the Customer Service Department at (949) 493-1515.

Sincerely,

City of San Juan Capistrano

CITY OF SAN JUAN CAPISTRANO
WATER REFUND CLAIM FORM

INSTRUCTIONS

1. Read entire claim form before returning. Print legibly.
2. Completed form must be delivered by e-mail, mail, or in person at San Juan Capistrano City Hall, Customer Service Division.
3. Refund/Credits will be issued for water rate overbillings made between August 28, 2013, and July 1, 2014, which resulted in overpayments.
4. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during the time period above and paid that billing. Your refund will be calculated by the City based on usage records for your account.
5. Claims for water rate refund/credit must be filed **no later than October 1, 2015, and may take up to 90 days to be processed.**
6. A signature and date is required at bottom of form. Submit form to:

City of San Juan Capistrano - Water Refund
32400 Paseo Adelanto, San Juan Capistrano, CA 92675
OR by email, at: waterrefund@sanjuancapistrano.org

ELIGIBILITY INFORMATION

Customer Name: _____

Service Address: _____

Mailing Address: _____

Account/Customer Number: _____ Phone Number: _____

Email: _____

When did you reside at/occupy the service address: From: _____ To: _____

Please check box that qualifies you for the credit:

☐ I am the primary account holder

☐ I am the secondary account holder. Primary holder's name: _____

REFUND METHOD – Please provide my water refund as follows:

☐ Refund check made out to the primary account holder and mailed to the mailing address above

☐ Credit to the utility account number above

Release and Waiver of Further Refund Claims. In exchange for a refund of water rates as set forth in this document, the person signing below ("Claimant"), on behalf of Claimant, any other account holder(s) of the above-referenced account, and their heirs, assigns and representatives, hereby fully, finally and forever discharges the City of San Juan Capistrano ("City"), and its officers, officials, employees and agents from any and all claims, demands, liabilities or causes of action, in law or in equity, of any nature whatsoever, known or unknown, which the Claimant now or may have against the City arising out of the water rates charged by the City prior to July 1, 2014, ("Disputed Rates). Claimant further covenants not to sue, or participate in any lawsuit regarding the Disputed Rates. Any water rate refund provided by the City shall not constitute any admission by the City of wrongdoing or liability in connection the Disputed Rates.

By signing this form you are claiming that the information above is true and correct.

Type or Print Name:

EXHIBIT 3

Benjamin T. Benumof, Ph.D., Esq. (SBN 227340)
Chad C. Wilcox, Esq. (SBN 198498)
WILCOX | BENUMOF
1520 N. El Camino Real, Suite 4
San Clemente, CA 92672
Telephone: (949) 272-0800
Facsimile: (949) 272-0789
Email: ben@wilcoxbenumof.com

Attorneys for Plaintiff & Petitioner
CAPISTRANO TAXPAYERS ASSOCIATION, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE – CENTRAL DISTRICT

CAPISTRANO TAXPAYERS ASSOCIATION, INC., a California non-profit public interest corporation, Plaintiff and Petitioner, vs. CITY OF SAN JUAN CAPISTRANO, a California public agency; and DOES 1 through 25, inclusive, Defendants and Respondents.	Case No. 30-2012-00594579 JUDGE: Hon. Gregory Muñoz DEPT: C-13 **NOTICE OF ENTRY OF JUDGMENT** Trial Date: July 29, 2013 Final Court Judgment: August 28, 2013

TO ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 28, 2013, the Court rendered a Final Statement of Decision and Judgment in this matter. Attached hereto as "Exhibit A" is a true and correct copy of the Court's Final Statement of Decision and Judgment, dated August 28, 2013.

DATE: September 3, 2013

WILCOX | BENUMOF

Benjamin T. Benumof, Ph.D., Esq.

Attorneys for Plaintiff and Petitioner
CAPISTRANO TAXPAYERS ASSOCIATION

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 1520 N. El Camino Real, Ste. 4, San Clemente, CA, 92672.

On September 3, 2013, I served the foregoing document described as **NOTICE OF ENTRY OF JUDGMENT** on all interested parties in this action as stated on the attached mailing list:

Hans Van Ligten, Esq.
Rutan & Tucker, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-1931
Attorneys for Defendant City of SJC
hvanligten@rutan.com

(**XX**) BY MAIL: I caused such envelope(s) to be deposited in the mail at San Clemente, CA. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Clemente, California in the ordinary course of business. I am aware that on motion for the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing in affidavit.

( ) BY FACSIMILE: On September _____, 2013, at approximately _____.m. I served/transmitted the aforementioned document(s) by facsimile machine telephone number, pursuant to California Rules of Court, Rule 2.306. The facsimile machine I used complied with Rule 2.301 and the transmission was reported as complete and without error. Pursuant to Rule 2.306(g)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached hereto.

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(**XX**) BY EMAIL

Executed on September 3, 2013, at San Clemente, California.

(**XX**) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

BENJAMIN T. BENUMOF

EXHIBIT “A”

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

CAPISTRANO TAXPAYERS ASSOCIATION Plaintiff(s) Vs. CITY OF SAN JUAN CAPISTRANO Defendant(s)	CASE NUMBER: 30-2012-00594579 CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED 8-28-13

I, ALAN CARLSON, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on 8-29-13, I served the MINUTE ORDER, dated 8-28-13, on each of the parties herein named by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mail box at Santa Ana, California addressed as follows:

COLANTUONO & LEVIN PC
300 S GRAND AVENUE #2700
LOS ANGELES, CA 90071

RUTAN & TUCKER
611 ANTON BLVD., STE 1400
COSTA MESA, CA 92626

WILCOX BENUMOF
1520 N EL CAMINO REAL, SUITE FOUR
SAN CLEMENTE, CA 92672

ALAN CARLSON,
Executive Officer and Clerk of the Superior Court
In and for the County of Orange

DATED: 8-29-13

By: M. Diaz
M. DIAZ, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 08/28/2013 TIME: 11:28:00 AM DEPT: C13

JUDICIAL OFFICER PRESIDING: Gregory Munoz
CLERK: Martha Diaz
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2012-00594579-CU-PT-CJC** CASE INIT.DATE: 08/29/2012
CASE TITLE: **Capistrano Taxpayers Association, Inc. vs. City of San Juan Capistrano**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Petitions - Other

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EVENT ID/DOCUMENT ID: 71788317

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.
The Court having rendered a Proposed Statement of Decision on 8-6-13 now renders a Final Statement of Decision And Judgment. A copy of the Final Statement of Decision And Judgment is attached and incorporated herein for reference.

Court orders clerk to give notice.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

CAPISTRANO TAXPAYERS ASSOCIATION, INC., a California non-profit public interest corporation,

Plaintiff and Petitioner,

vs.

CITY OF SAN JUAN CAPISTRANO, a California public agency,

Defendants and Respondents.

Case No. 30-2012-00594579

FINAL STATEMENT OF DECISION AND JUDGMENT

The above-entitled matter came on regularly for trial on July 29, 2013, in Department 13 of the above-entitled Court, before the Honorable Gregory Munoz, Judge Presiding, sitting without a jury. Plaintiff/Petitioner Capistrano Taxpayers Association (CTA), was represented by the Law Offices of Wilcox|Benumof by Benjamin T. Benumof, Esq.

Defendant/Respondent City of San Juan Capistrano (City) was represented by the Law Offices of Colantuono & Levin, PC, by Michael G. Colantuono, Esq. CTA filed a trial brief and City filed Opposition to Petitioner's Complaint and Petition for Writ of Mandate. The parties gave Opening Statements and Closing Arguments and submitted the matter to the Court based on the Administrative Record (A/R) that had been lodged with the Court. Prior to submitting the matter for the Court's decision the Petitioner dismissed the Fourth Cause of Action that sought an injunction pursuant to CCP Section 526a to prevent Waste of, or Injury to Public Funds. The Court now renders its Proposed Statement of Decision and Judgment.

STATEMENT OF DECISION

The Court has carefully reviewed the A/R and considered the briefs and motions filed by the parties. After considering and weighing all of the evidence, the Court has reached its decision by the following analysis.

CTA is a non-profit public interest organization made up of residents and taxpayers of the City of San Juan Capistrano. CTA has filed this action seeking a writ of mandate to prohibit City from continuing to charge its residents the water rates that City adopted on February 2, 2010, as well as the subsequent annual rate increases that have occurred as a result of City's 2010 Water Rate Study, which was also adopted on February 2, 2010. CTA also asks this court to prohibit City from collecting the annual 1.3 million dollars to pay debt service on bonds that were never issued by City. In addition, CTA seeks to halt collection of a monthly charge to all ratepayers in the City for recycled water that is not actually used by or immediately available to all residents. CTA claims that the fees charged for water and the fees charged for recycled water and to re-pay the bonds are made illegal by Proposition 218, which amended the California State Constitution and which is codified in Articles XIIIC and XIIID of the Constitution. The water rates instituted in 2010 were primarily based on a Water Rate Study completed in December, 2009, by a rate-consulting firm, Black & Veatch, which the City retained to revise City's tiered rate structure. City requested that the tier

revision include a fourth tier of rate payers, instead of the three tiers that City had used in the past. CTA claims in this lawsuit that City has violated Proposition 218 in several respects. CTA first alleges that City violated Article XIIID, Section 6(b)(3), which states: "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." CTA has no quarrel with respect to the new rates under Tier One but argues that in substantially raising water rates under Tiers 2, 3, and 4, the City failed to provide any evidence to justify the new rates as required by Proposition 218. Proposition 218 further states: "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."

This Court finds that City failed to carry its burden of establishing credible evidence that the rate increases were proportional to the costs of providing water services to its customers. City refers to the administrative record as providing the proof on which the new rates were based, but the Court could not find any specific financial cost data in the A/R to support the substantial rate increases. The Black & Veatch study also did not include any of this financial information. Both parties have cited to the case of *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App. 4th 926, as support for their respective positions, but the Court finds that *City of Palmdale*, which has very similar facts to the instant case, is more supportive of CTA's position. City argues that it has used a tiered water rate structure since 1991 and that it is one of the best ways to promote the conservation of water. Furthermore, it states that it may impose conservation charges "on all increments of water use" that exceed a reasonable amount a parcel requires per Water Code Section 372. However, as *City of Palmdale* points out on page 936: "While this statute contemplates allocation-based conservation pricing consistent with California Constitution, article X, section 2, PWD fails to explain why this provision cannot be harmonized with Propostion 218 and its mandate for proportionality. PWC fails to identify any support in the record for the inequality between tiers, depending on the category of

use." In the instant case, City also failed to identify any support in the record for the inequality between tiers depending on the category of use.

CTA also charges that City violated Article XIII D section 6(b)(4), which states: "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." The Court agrees with CTA. The evidence clearly reflects the City imposed a fee on all ratepayers for recycled water services and delivery of recycled water, despite the fact that not all ratepayers used recycled water or have it immediately available to them or would ever be able to use it. The situation in the instant case is very much like the situation in the *City of Palmdale* case in which the Court of Appeal struck down a pricing structure that charged a disproportionate fee to irrigation customers, which was found to be in violation of Proposition 218. City contends that it is appropriate to distribute the cost of recycled water to all ratepayers because they benefit from this practice in that by supplying recycled water to ratepayers who can use it, this displaces demand for local potable supplies that can thus be made available to other customers. In other words, City's position is that if recycled water customers had to bear the whole cost of this service, its cost would be prohibitively high, demand for potable sources would increase, and everyone's rates would rise due to the need for more expensive water imports. However, this rationalization flies in the face of the holding in *City of Palmdale* and Section 6(b)(4), which require that the "service is actually used by, or immediately available to, the owner of the property in question." City has failed to carry its burden to prove that it is in compliance with Proposition 218 in charging all ratepayers for recycled water.

CTA alleges City had planned to issue the so-called "Phantom Bonds" to finance the water infrastructure pursuant to the Black & Veatch proposal. The bonds were never issued, but CTA claims that resident have been charged for them and continue to be charged. City has carried its burden in showing that it is not in violation of Proposition 218

concerning these bonds. The fact that the Black & Veatch report recommended issuance of bonds to finance City's water infrastructure and water services and that City was unable to issue such bonds does not prove a violation of Proposition 218. The A/R shows that when City was unable to issue the bonds, it reverted to PAYGO to finance the infrastructure costs. As long as the evidence establishes that City used the PAYGO funds to pay for infrastructure and water services, there is no Proposition 218 violation.

On May 30, 2013, CTA filed its Extra-Record Evidence in Support of its Opening Trial Brief. In response, City filed on July 2, 2013, a Notice of motion to Strike Extra-Record Evidence. As both sides are aware, the claims by CTA are limited to the Administrative Record. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559.) The Court grants City's motion as to all twelve items referred to in its motion. In CTA's Reply to Respondent City of San Juan Capistrano's Opposition to Plaintiff's Complaint and Petition for Writ of Mandate file on July 15, 2013, CTA makes a Motion to Strike the Water Rate Model from the A/R in its entirety. The motion is denied.

IT IS ADJUDGED:

(1) The Court finds and declares pursuant to Code of Civil Procedure section 1060 as follows: (a) That the City of San Juan Capistrano did not violate Proposition 218 when it was unable to issue bonds to finance water supply infrastructure and water service and instead adopted a capital improvement plan for which it continues to collect fees; (b) That City's Water Rate Structure violates California Constitution, Article XIIID, section 6(b)(3), and is invalid because fees (not penalties) are imposed on each parcel of property that exceed the proportional cost of the services attributable to each parcel; (c) That City is in violation of California Constitution, Article XIIID, section 6(b)(4), by charging certain ratepayers for recycled water that they do not actually use and that is not immediately available to them;

(2) The Court issues a writ of mandate ordering City to abandon City's current Water Rate Structure and base all rates on cost of service in conformance with the California Constitution, Article XIIID.

(3) Judgment is ordered restraining and preventing City and each and all of its agents, employees, representatives, officers, directors, and all persons acting in concert with it, from imposing billing or collecting water charges/fees as currently being imposed, in violation of the California Constitution, Article XIIID and from charging its residents for recycled water that they do not actually use and which is not immediately available to them.

(4) Court awards costs to CTA.

Dated: August 28, 2013

Gregory Munoz, Judge of the Superior Court

EXHIBIT 4

CAPISTRANO TAXPAYERS ASSOCIATION, INC., Plaintiff and Respondent, v. CITY OF SAN JUAN CAPISTRANO, Defendant and Appellant.

G048969

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

235 Cal. App. 4th 1493; 186 Cal. Rptr. 3d 362; 2015 Cal. App. LEXIS 330

April 20, 2015, Opinion Filed

NOTICE:

As modified May 19, 2015.

SUBSEQUENT HISTORY: Modified by, Request granted Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano, 2015 Cal. App. LEXIS 429 (Cal. App. 4th Dist., May 19, 2015)
Request denied by Capistrano Taxpayers Ass'n v. City of San Juan Capistrano, 2015 Cal. LEXIS 5268 (Cal., July 22, 2015)

PRIOR HISTORY: [***1] Appeal from a judgment of the Superior Court of Orange County, No. 30-2012-00594579, Gregory Munoz, Judge.

DISPOSITION: Affirmed in part; reversed in part and remanded.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A taxpayers association challenged a city water district's decision to impose a tiered rate that went up progressively in relation to usage and charges for recycling within the rate structure. The trial court found that the rates did not comply with Cal. Const., art. XIII D. (Superior Court of Orange County, No. 30-2012-00594579, Gregory Munoz, Judge.)

The Court of Appeal affirmed the judgment in part, reversed in part, and remanded the matter for further proceedings. Water rate fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue, do not contravene Cal. Const., art. XIII D, § 6, subd. (b)(4). While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service--water service--which was immediately available to customers. However, the record was unclear whether low usage customers might be paying for a recycling operation made necessary only because of high usage customers, which would be inconsistent with art. XIII D, § 6, subd. (b)(4). The court also held that the agency did not meet its burden to show that the tiered rate complied with the requirement that fees not exceed the cost of service attributable to a parcel (art. XIII D, § 6, subd. (b)(3)). The agency did not try to calculate the cost of actually providing water at its various tier levels and merely allocated all its costs among the price tier levels based on predetermined usage budgets. Tiered water rate structures and Prop. 218 are compatible so long as those rates reasonably reflect the cost of service attributable to each parcel. (Opinion by Bedsworth, Acting P. J., with Moore and Thompson, JJ., concurring.)

HEADNOTES [*1494]

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Waters § 184--Public Utilities Selling Water--Rates.--When each kind of water is provided by a single local agency that provides water to different kinds of users, some of whom can make use of recycled water (for example, cities irrigating parkland) while others, such as private residences, can only make use of traditional potable water, providing each kind of water is providing the same service. Both are getting water that meets their needs. Nonpotable water for some customers frees up potable water for others. And where water service is already immediately available to all customers, there is no contravention of Cal. Const., art. XIII D, § 6, subd. (b)(4) in including charges to construct and provide recycled water to some customers. Under Gov. Code, § 53750, subd. (m), water is part of a holistic distribution system that does not distinguish between potable and nonpotable water. Gov. Code, § 53756, contemplates timeframes for water rates that can be as much as five years. Rates to pay for a recycling plant do not have to be figured on a month-to-month basis.

(2) Waters § 176--Public Utilities Selling Water--Powers.--Wat. Code, § 31020, gives local water agencies power to do acts to furnish sufficient water in the district for any present or future beneficial use.

(3) Municipalities § 98--Public Utilities--Rates.--Prop. 218 protects lower-than-average users from having to pay rates that are above the cost of service for them because those rates include capital investments their levels of consumption do not make necessary.

(4) Constitutional Law § 10--Construction--Voter Intent.--The court must enforce the provisions of the California Constitution and may not lightly disregard or blink at a clear constitutional mandate. In so doing, the court is obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. Provisions of the California Constitution, particularly when enacted in the same measure, should be construed together and read as a whole.

(5) Constitutional Law § 11--Construction--Liberality--Local Government Revenue.--The provisions of Prop. 218 shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

(6) Municipalities § 98--Public Utilities--Rates.--Cal. Const., art. XIII D, § 6, subd. (b)(3), assumes that there really is an ascertainable cost of service that can be attributed to a specific--hence that little word "the"--parcel. [*1495]

(7) Municipalities § 98--Public Utilities--Rates.--The "proportional cost of the service" language from Cal. Const., art. XIII D, § 6, subd. (b)(3), is part of a general subdivision (b), and there is an additional reference to costs in subd. (b)(1). Subdivision (b)(1) provides that the total revenue from fees shall not exceed the funds required to provide the property related service.

(8) Waters § 184--Public Utilities Selling Water--Rates--Tiered--Usage--Correlation to Cost.--A city water agency did not meet its burden to show that a tiered rate based on usage complied with the requirement that water fees not exceed the cost of service attributable to a parcel because the agency did not try to calculate the cost of actually providing water at its various tier levels. A water agency imposing tiered rates has to do more than merely balance its total costs of service with its total revenues. To comply with Cal. Const., art. XIII D, § 6, subd. (b)(3), the agency also has to correlate its tiered prices with the actual cost of providing water at those tiered levels.

[Cal. Forms of Pleading and Practice (2015) ch. 540, Taxes and Assessments, § 540.91.]

(9) Waters § 184--Public Utilities Selling Water--Rates.--There is no conflict between Prop. 218 and Cal. Const. art. X, § 2, so long as art. X, § 2 is not read to allow water rates that exceed the cost of service. Art. X, § 2 is not at odds with Cal. Const., art. XIII D, so long as, for example, conservation is attained in a manner that shall not exceed the proportional cost of the service attributable to the parcel (art. XIII D, § 6, subd. (b)(3)). Art. X, § 2, certainly does not require above-cost water rates. Art. X, § 2 and art. XIII D, § 6, subd. (b)(3), work together to promote increased supplies of water. The California Constitution allows tiered pricing, but it must be done in a particular way.

(10) Taxation § 1--Definition of Tax--Exclusion--Fines--Violation of Law.--Cal. Const., art. XIII C, § 1, subd. (e)(5), defines the word "tax" to exclude fines imposed by a local government as a result of a violation of law.

(11) Municipalities § 98--Public Utilities--Rates.--The calculations required by Prop. 218 may be complex, but such a process is now required by the California Constitution.

(12) Waters § 184--Public Utilities Selling Water--Rates--Capital Improvements--Recycling Plant.--Water rate fees to fund the costs of capital-intensive operations to produce more or new water, such as a [*1496] recycling plant, do not contravene Cal. Const., art. XIII D, § 6, subd. (b)(4). While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service--water service.

(13) Waters § 184--Public Utilities Selling Water--Raters--Tiered.--Nothing in Cal. Const., art. XIII D, § 6, subd. (b)(3), is incompatible with water agencies passing on the true, marginal cost of water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water. However, above-cost-of-service pricing for tiers of water service is not allowed by Prop. 218.

COUNSEL: Colantuono & Levin, Colantuono, Highsmith & Whatley, Michael G. Colantuono, Tiana J. Murillo, Jon di Cristina; Rutan & Tucker, Hans Van Ligten and Joel Kuperberg for Defendant and Appellant.

Best, Best & Krieger and Kelly J. Salt for the Association of California Water Agencies, League of California Cities and California State Association of Counties as Amici Curiae on behalf of Defendant and Appellant.

Mills Legal Clinic at Stanford Law School, Environmental Law Clinic and Deborah A. Sivas for Natural Resources Defense Council and Planning and Conservation League as Amici Curiae on behalf of Defendant and Appellant.

AlvaradoSmith, Benjamin T. Benumof and William M. Hensley for Plaintiff and Respondent.

Trevor A. Grimm, Jonathan M. Coupal, Timothy A. Bittle and Ryan Cogdill for Howard Jarvis Taxpayers Foundation as Amicus Curiae on behalf of Plaintiff and Respondent.

Foley & Mansfield and Louis C. Klein for Mesa Water District as Amicus Curiae on behalf of Plaintiff and Respondent.

JUDGES: Bedsworth, Acting P. J. Moore, J., Thompson, J., concurring. [***2]

OPINION BY: Bedsworth, Acting P. J.

OPINION

[**364] **BEDSWORTH, Acting P. J.**--

I. INTRODUCTION

Southern California is a "semi-desert with a desert heart."[1] Visionary engineers and scientists have done a remarkable job of making our home habitable, and too many of us south of the Tehachapis never give a thought to [*1497] its remarkable reclamation. In his brilliant--if opinionated--classic Cadillac Desert, the late Marc Reisner laments how little appreciation there is of "how difficult it will be just to hang on to the beachhead they have made."[2]

1 Webb, *The American West, Perpetual Mirage* (May 1957) Harper's Magazine.

2 Reisner, Cadillac Desert: The American West and Its Disappearing Water (1986) p. 6.

In this case we deal with parties who have an acute appreciation of how tenuous the beachhead is, and how desperately we all must fight to protect it. But they disagree about what steps are allowable--or required--to accomplish that task. We are called upon to determine not what is the right--or even the more reasonable--approach to the beachhead's preservation, but what is the one chosen by the state's voters.

We hope there are future scientists, engineers, and legislators with the wisdom to envision and enact water plans to keep our beloved Cadillac Desert habitable. [***3] But that is not the court's mandate. Our job--and it is daunting enough--is solely to determine what water plans the voters and legislators of the past have put in place, and to determine whether the trial court's rulings complied with those plans.

We conclude the trial court erred in holding that Proposition 218 does not allow public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water--such as building a recycling plant. Its findings

were that future water provided by the improvement is not immediately available to customers. (See Cal. Const., art. XIII D, § 6, subd. (b)(4) [no fees "may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question"].) But, as applied to water delivery, the phrase "a service" cannot be read to differentiate between recycled water and traditional, potable water. Water *service* is already "immediately available" to all customers, and *continued* water service is assured by such capital improvements as water recycling plants. That satisfies the constitutional and statutory requirements.

[**365] However, the trial court did not err in ruling that Proposition 218 requires [***4] public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 221 [46 Cal.Rptr.3d 73, 138 P.3d 220] (*Bighorn*) provides that water rates must reflect the "'cost of the service attributable'" to a given parcel.[3] While tiered, or inclined rates that go up progressively in relation to usage are perfectly [*1498] consonant with article XIII D, section 6, subdivision (b)(3) and *Bighorn*, the tiers must still correspond to the actual cost of providing service at a given level of usage. The water agency here did not try to calculate the cost of actually providing water at its various tier levels. It merely allocated all its costs among the price tier levels, based not on costs, but on predetermined usage budgets. Accordingly, the trial court correctly determined the agency had failed to carry the burden imposed on it by another part of Proposition 218 (art. XIII D, § 6, subd. (b)(5)) of showing it had complied with the requirement water fees not exceed the cost of service attributable to a parcel at least without a vote of the electorate. That part of the judgment must be affirmed.

> 3 Until *Bighorn*, there was a question as to whether Proposition 218 applied at all to water rates. In 2000, the appellate court in *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 83 [101 Cal. Rptr. 2d 905] (*Jarvis v. Los Angeles*), held that a city's water rates were not subject [***5] to Proposition 218, reasoning that water rates are mere commodity charges. *Bighorn*, however, formally disapproved *Jarvis v. Los Angeles* and held that water rates *are* subject to article XIII D of the California Constitution. (*Bighorn, supra*, 39 Cal.4th at p. 217, fn. 5.)

II. FACTS

Sometimes cities are themselves customers of a water district, the best example in the case law being the City of Palmdale, which successfully invoked Proposition 218 to challenge the rates *it* was paying to a water district.[4] (See *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926 [131 Cal. Rptr. 3d 373] (*Palmdale*).) And sometimes cities are, as in the present case, their own water district. As amicus curiae Association of California Water Agencies (ACWA) points out, government water suppliers in California are a diverse lot that includes municipal water districts, irrigation districts, county water districts, and, in some cases, cities themselves. To focus on its specific role in this case as a municipal water supplier--as distinct from its role as the provider of municipal services which consume water such as parks, city landscaping or public golf courses--we will refer to appellant City of San Juan Capistrano as "City Water."

> 4 For reader convenience, we will occasionally refer in this opinion in shorthand to "subdivision (b)(1)," "subdivision (b)(3)," "subdivision (b)(4)," [***6] and "subdivision (b)(5)," and sometimes even just to "(b)(1)" "(b)(3)," "(b)(4)" or "(b)(5)." Each time those references refer to article XIII D, section 6, subdivision (b) of the California Constitution. Also, all references to any "article" are to the California Constitution.

In February 2010, City Water adopted a new water rate structure recommended by a consulting firm. The way City Water calculated the new rate structure is well described in City Water's supplemental brief of November 25, 2014.[5] City Water followed a pattern generally recommended [**366] by a manual used by public water agencies throughout the western United States known as the "M-1" manual. It first ascertained its total costs, including things like debt service on previous infrastructural improvements. It then [*1499] identified components of its costs, such as the cost of billing and the cost of water treatment. Next it identified classes of customers, differentiating, for example, between "regular lot" residential customers and "large lot" residential customers, and between construction customers and agricultural customers. Then, in regard to each class, City

Water calculated four possible budgets of water usage, based on historical data of usage patterns: low, reasonable, excessive and very excessive. [***7]

> 5 We requested supplemental briefing prior to oral argument to clarify the nature of the issues and precisely what was in, and not in, the administrative record. We are indebted to able counsel on all sides for giving us their best efforts to answer our questions.

The four budgets were then used as the basis for four distinct "tiers" of pricing.[6] For residential customers, tier 1, the low budget, was assumed to be exclusively indoor usage, based on World Health Organization guidelines concerning the "minimum quantity of water required for survival," with adjustments for things like "low-flush toilets and other high-efficiency appliances." Tier 2, the reasonable budget, included an outdoor allocation based on "typical landscapes," and assumed "use of native plants and drought-tolerant plants." The final two tiers were based on budgets of what City Water considers excessive usages of water or overuse volumes. Using these four budgets of consumption levels, City Water allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs, and thus the four-tier system would be, taken as a whole, revenue neutral, and City Water would not [***8] make a profit on its pricing structure. City Water did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, at oral argument in this court, admitted it effectively used revenues from the top tiers to subsidize belowcost rates for the bottom tier.

> 6 Such rate structures are sometimes called "inclining" as in the pre-Proposition 218 case, *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 184 [29 Cal. Rptr. 2d 128] (*Brydon*). Amicus curiae ACWA estimates that over half its members now have some sort of tiered water rate system. As we will say numerous times in this opinion, tiered water rate structures and Proposition 218 are thoroughly compatible "so long as"--and that phrase is drawn directly from *Palmdale*--those rates reasonably reflect the cost of service attributable to each parcel. (*Palmdale, supra*, 198 Cal.App.4th at p. 936.)

Here is the rate structure adopted, as applied to residential customers: [**367]

Tier	Usage	Price
1	Up to 6 ccf[7]	$2.47 per ccf
2	7 to 17 ccf[8]	$3.29 per ccf

[*1500]

3	18 to 34 ccf[9]	$4.94 per ccf
4	Over 34 ccf[10]	$9.05 per ccf

> 7 Ccf stands for one hundred cubic feet, which translates to 748 gallons. (See *Brydon, supra*, 24 Cal.App.4th at p. 184.)
>
> 8 A precise figure for the usage is complicated by an attempt in the rate structure to distinguish indoor and outdoor use. Technically, tier 2 is tier 1 + [***9] 3 extra ccfs, plus an outdoor allocation that is supposed to average out to a total of 17 ccfs, i.e., 8 ccfs are allocated (on average) for outdoor use.
>
> 9 Technically, tier 3 is defined as up to 200 percent of tiers 1 and 2, which, given City Water's projected 17 ccf average, works out to be 34 ccf.
>
> 10 While the consultants distinguished between regular and large lot residential customers, the

final structure made no distinction between the two.

City Water obtains water from five separate sources: a municipal groundwater recovery plant, the Metropolitan Water District, five local groundwater wells, recycled water wells, and the nearby Moulton Niguel Water District. With the exception of water obtained from the Metropolitan Water District, City Water admits in its briefing that the record does not contain any breakdown as to the relative cost of each source of supply.

The breakdown of cost from each of its various sources of water is, in percentage terms: [**368]

Source	Percent of Supply	Cost to Supply
Groundwater Recovery Plant	51.95%	Not ascertained
Metropolitan Water District	28.54%	$1,007 per-acre foot[11]
Local Wells	7.79%	Not ascertained
Recycled Wells	6.11%	Not ascertained
Moulton Niguel Water District	5.61%	Not ascertained [***10]

11 In 2010, City Water was paying $719 per acre-foot for water from the Metropolitan Water District, and that cost was projected to increase incrementally each year until it reached $1,007 per acre-foot by 2014. One acre-foot equals 435.6 ccf.

Various percentages of City Water's overhead--or fixed costs in the record--were allocated in percentages to some of the sources of water, so the price per tier reflected a percentage of fixed costs and costs of some sources.

This chart reflects those allocations:

Tier	Price	Percentage Allocation
1	$2.47	$1.78 to fixed costs, $0.62 to wells
2	$3.29	$1.78 to fixed, $1.46 to wells
3	$4.94	$1.53 to fixed, $0.69 to wells, $0.17 to the Metropolitan Water District, and $2.50 to the groundwater recovery plant
4	$9.05	0 to fixed, 0 to wells, $0.53 to groundwater recovery plant, $2.53 to recycled, $3.32 to the Metropolitan Water District, and $2.64 to penalty set aside

[*1501]

There is no issue in this case as to the process of the adoption of the new rates, such as whether they should have been voted on first under the article XIII C part of Proposition 218. For purposes of this appeal it is enough

to say City Water adopted them.[12]

12 With a minor qualification that, given our disposition, it need not [***11] be addressed in too much detail. A minor issue in the briefing is whether City Water should have made its consultants' report available for taxpayer scrutiny prior to the public hearing contemplated in article XIII D, section 6, subdivision (c). Since City Water is not able to show its price structure correlates with the actual cost of providing service at the various incremental levels even *with* the consultants' report, we need not get bogged down in this issue.

[**369] In August 2012, the Capistrano Taxpayers Association, Inc. (CTA), filed this action, challenging City Water's new rates as violative of Proposition 218, specifically article XIII D, section 6, subdivision (b)(3)'s limit on fees to the "cost of the service attributable to the parcel." After a review of the administrative record and hearing, the trial court found the rates were not compliant with article XIII D, noting it "could not find any specific financial cost data in the A/R to support the substantial rate increases" in the progressively more expensive tiers. In particular the trial judge found a lack of support for the inequality between the tiers.

The statement of decision also concluded that the imposition of charges for recycling within the rate structure violated the "immediately available" provision in article XIII D, section 6, subdivision (b)(4), because [***12] *recycled* water is not used by residential parcels. (City Water concedes that when the recycling plant comes on line, it will supply water to some, but not all, of its customers. Residences, for example, are not typically plumbed to receive nonpotable recycled water.) City Water has timely appealed from the declaratory judgment, challenging both determinations.

III. DISCUSSION

A. *Capital Costs and Proposition 218*

We first review the constitutional text. Article XIII D, section 6, subdivision (b)(4) provides: "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."

The trial court ruled City Water had violated this provision by "charging certain ratepayers for recycled water that they do not actually use and that is [*1502] not immediately available to them." The trial judge specifically found, in his statement of decision, that "City [Water] imposed a fee on all ratepayers for recycled water services and delivery [***13] of recycled water services, despite the fact that not all ratepayers used recycled water or have it immediately available to them or would ever be able to use it."

(1) But the trial court assumed that providing recycled water is a fundamentally different kind of service from providing traditional potable water. We think not. When each kind of water is provided by a single local agency that provides water to different kinds of users, some of whom can make use of recycled water (for example, cities irrigating parkland) while others, such as private residences, can only make use of traditional potable water, providing each kind of water is providing the *same* service. Both are getting water that meets their needs. Nonpotable water for some customers frees up potable water for others. And since water service is already immediately available to all customers of City Water, there is no contravention of subdivision (b)(4) in including charges to construct and provide recycled water to some customers.

On this point, *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 [163 Cal. Rptr. 3d 243] (*Griffith*) is instructive. *Griffith* involved an augmentation fee on parcels that had their own wells. An objection to the augmentation fee by the well owners was that the fee included [***14] a charge for delivered water, [**370] even though some of the properties were outside the area and not actually receiving delivered water. The *Griffith* court said that even if some parcel owners were not receiving delivered water, revenues from the augmentation fee still benefited those parcels, since they funded "activities required to prepare or implement the groundwater management program for the common benefit of all water users." (*Id.* at p. 602.) In *Griffith* the augmentation fee was thus intended to fund aggressive capital investments to increase the general supply of water, including some customers receiving delivered water when other customers did not. It was undeniable that by funding

delivered water to some customers water was *freed up* for all customers. (See *Griffith, supra*, 220 Cal.App.4th at p. 602; accord, *Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358 [102 Cal. Rptr. 3d 270] [customer in rural area who periodically went inactive still had water immediately available to him].)

In the present case, there is a Government Code definition of water which shows water to be part of a holistic distribution system that does not distinguish between potable and nonpotable water: "'Water' means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution [***15] of water from any source." (Gov. Code, § 53750, subd. (m).) [*1503]

A recycling plant, like other capital improvements to increase water supply, obviously entails a longer timeframe than a residential customer's normal one-month billing cycle. As shown in *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892 [167 Cal. Rptr. 3d 687], the timeframe for the calculation of the true cost of water can be, given capital improvements, quite long. (See *id.* at p. 900 [costs amortized over a six-year period].) And, as pointed out by amicus curiae Howard Jarvis Taxpayers Association, Government Code section 53756 contemplates timeframes for water rates that can be as much as five years.[13] There is no need, then, to conclude that rates to pay for a recycling plant have to be figured on a month-to-month basis.

> 13 Government Code section 53756 provides in relevant part:
>
> "An agency providing water, wastewater, 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, sewage treatment, or wastewater treatment 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." (Italics added.)

(2) The upshot is that within a five-year period, a water agency [***16] might develop a capital-intensive means of production of what is effectively *new* water, such as recycling or desalinization, and pass on the costs of developing that new water to those customers whose marginal or incremental extra usage requires such new water to be produced. As amicus curiae Mesa Water District points out, Water Code section 31020 gives local water agencies the power to do acts to "furnish sufficient water in the district for any present or *future* beneficial use." (Wat. Code, § 31020, italics added.) The trial court thus erred in concluding the inclusion of charges to fund a recycling operation was, by itself, a violation of subdivision (b)(4).

(3) However, the record is insufficient to allow us to determine at this level whether residential ratepayers who only use six ccf or less--what City Water considers the superconservers--are being required to pay for recycling facilities that [**371] would not be necessary but for above-average consumption. Proposition 218 protects lower-than-average users from having to pay rates that are *above the cost of service for them* because those rates include capital investments their levels of consumption do not make necessary. We note, in this regard, that in *Palmdale*, one of the reasons the court there [***17] found the tiered pricing structure to violate subdivision (b)(3) was the perverse effect of affirmatively penalizing conservation by some users. (See *Palmdale, supra*, 198 Cal.App.4th at pp. 937-938; accord, *Brydon, supra*, 24 Cal.App.4th at p. 202 ["To the extent that certain customers overutilize the resource, they contribute disproportionately to the necessity for conservation, and the requirement that the District acquire new sources for the supply of domestic water."].) [*1504]

There is a case with an analogous lacuna, the Supreme Court case of *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 [121 Cal. Rptr. 3d 37, 247 P.3d 112] (*Farm Bureau*). In *Farm Bureau*, the record was also unclear as to the issue of apportionment between a regulatory activity's fees and its costs. (*Id.* at p. 428.) Accordingly, the high court directed the matter to be remanded to the trial court for such necessary findings.

That seems to us the appropriate way to complete the record in our case. Following the example of *Farm Bureau*, we remand the matter for further findings on whether charges to develop City Water's nascent recycling operation have been improperly allocated to users whose levels of consumption are so low that they cannot be said to be responsible for the need for that

recycling.

B. *Tiered Pricing and Cost of Service*

1. *Basic Analysis*

We begin, as we did with the capital cost [***18] issue, with the text of the Constitution. In addition to subdivision (b)(3), the main provision at issue in this case, we also quote subdivision (b)(1), because it throws light on subdivision (b)(3). Subdivision (b) describes "Requirements for Existing, New or Increased Fees and Charges," and provides that, "A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge *shall not exceed the funds required to provide the property related service*. [¶] ... [¶] (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.*" (Italics added.)

In addition to these two substantive limits on fees, article XIII D, section 6, subdivision (b)(5) puts an important procedural limit on a court's analysis in regard to the burden of proof: "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." The trial court found City Water had failed to carry its burden of proof under subdivision (b)(5) of showing its 2010 tiered water [***19] fees were proportional to the cost of service attributable to each customer's parcel as required by subdivision (b)(3).

As respondent CTA quickly ascertained, the difference between tier 1 and tier 2 is a tidy 1/3 extra, the difference between tier 2 and 3 is a similarly exact 1/2 extra, and the difference between tier 3 and tier 4 is precisely 5/6ths extra. This fractional precision suggested to us that City Water did not [*1505] attempt to correlate its rates with [**372] cost of service. Such mathematical tidiness is rare in multidecimal point calculations. This conclusion was confirmed at oral argument in this court, when City Water acknowledged it had not tried to correlate the incremental cost of providing service at the various incremental tier levels to the prices of water at those levels.

In voluminous briefing by City Water and its amici curiae allies, two somewhat overlapping core thoughts emerge: First, they contend that when it comes to water, local agencies do not have to--or should not have to--calculate the cost of water service at various incremental levels of usage because the task is simply too complex and thus not required by our Constitution. The second core thought is that even if [***20] agencies are required to calculate the actual costs of water service at various tiered levels of usage, such a calculation is necessarily, as City Water's briefing contends, a legislative or quasilegislative, discretionary matter, largely insulated from judicial review. We cannot agree with either assertion.

(4) The appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [79 Cal. Rptr. 3d 312, 187 P.3d 37] (*Silicon Valley*): "We ""must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate."""" [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.] [¶] **(5)** Proposition 218 specifically states that '[t]he provisions of this act shall be *liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.*' (Ballot Pamp., [Gen. Elec. (Nov. 5, 1996)] text of Prop. 218, § 5, p. 109; see Historical Notes, [2A West's Ann. Const. (2008 supp.) foll. Cal. Const., art. XIII C.] at p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging [***21] assessments; shift the burden of demonstrating assessments' legality to local government; *make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent.*" (*Silicon Valley*, *supra*, 44 Cal.4th at p. 448, italics added.)

(6) If the phrase "proportional cost of the service attributable to *the* parcel" (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really *is* an ascertainable cost of service that can be attributed to a specific--hence that little word "the"--parcel. Otherwise, the cost of the service language would be meaningless. Why use the phrase "cost of the service to the parcel" if a local agency does not actually have to ascertain a cost of

service to that particular parcel? [*1506]

(7) The presence of subdivision (b)(1) of section 6, article XIII D, just a few lines above subdivision (b)(3), confirms our conclusion. Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole. (*Bighorn, supra*, 39 Cal.4th at p. 228.) The "proportional cost of the service" language from subdivision (b)(3) is part of a general subdivision (b), and there is an additional reference to costs in subdivision (b)(1). Subdivision (b)(1) provides that the total revenue from fees [***22] "shall not exceed the funds required to provide *the property* related service." (Italics added.)

[**373] **(8)** It seems to us that to comply with the Constitution, City Water had to do more than merely balance its total costs of service with its total revenues--that is already covered in subdivision (b)(1). To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since City Water did not try to calculate the actual costs of service for the various tiers, the trial court's ruling on tiered pricing must be upheld simply on the basis of the constitutional text.

We find precedent for our conclusion in the *Palmdale* case. There, a water district obtained its water from two basic sources: 60 percent from a reservoir and the state water project, and the 40 percent balance from the district's own area groundwater wells. Most (about 72 percent) of the water went to single-family residences, with irrigation users accounting for 5 percent of the distribution. (*Palmdale, supra*, 198 Cal.App.4th at p. 928.) For the previous five years, the district had spent considerable money to upgrade its water treatment plant ($56 million) but revenues suffered from a "'decline [***23] in water sales,'" so its reserves were depleted. The district wanted to issue more debt for "future capital projects." (*Id.* at pp. 928-929.) Relying on consultants, the water district adopted a new, five-tiered rate structure, which progressively increased rates (for the top four tiers) for three basic categories of customers: residences, businesses, and irrigation projects. The tiered budgets for irrigation users were more stringent than for residential and commercial customers. (*Id.* at p. 930.) The way the tiers operated, all three classes of customers got a tier 1 budget, but irrigation customers had less leeway to increase usage without progressing to another tier. Thus, for example, the tier 2 rates for residential customers did not kick in until 125 percent of the budget, but tier 2 rates for irrigation customers kicked in at 110 percent of the budget. The tiered rate structure was itself based on a monthly allocated water budget. (*Ibid.*)

Two irrigation users--the city itself and its redevelopment agency--sought to invalidate the new rates. The trial court had the advantage of the newly decided Supreme Court opinion in *Silicon Valley*, which had clarified the [*1507] standard of review for Proposition 218 cases. [***24] There, the high court made it clear that in Proposition 218 challenges to agency action, the agency had to bear the burden of proof of demonstrating compliance with Proposition 218, and both trial and reviewing courts are to apply an independent review standard, not the traditional, deferential standards *usually* applicable in challenges to governmental action. (*Silicon Valley, supra*, 44 Cal.4th at p. 448.) More directly, said *Silicon Valley*, it is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review. (See *id.* at pp. 441, 448-449 [explaining why substantial evidence to support the agency action standard was too deferential in light of Prop. 218's liberal construction in favor of taxpayer feature].)

With this in mind, the *Palmdale* court held the district had failed to carry its burden of showing compliance with Proposition 218. (*Palmdale, supra*, 198 Cal.App.4th at pp. 937-938.) The core of the *Palmdale* court's reasoning was twofold. First, there was discrimination against irrigation-only customers, giving an unfair price advantage to those customers in other classes who were inclined to inefficiently use--or, for that matter, waste--outdoor water. (The opinion noted the perfect exemplar of [***25] water waste: hosing off a parking lot.) Thus an [**374] irrigation user, such as a city providing playing fields, playgrounds and parks, was disproportionately impacted by the inequality in classes of users. (*Palmdale, supra*, 198 Cal.App.4th at p. 937.) Second, the discrimination was gratuitous. The district's own consultants had proposed a "cost of service" option that they considered Proposition 218 compliant, but the district did not choose it because it preferred a "fixed" option providing better "'rate stability.'" (*Palmdale, supra*, 198 Cal.App.4th at pp. 937, 929.) In fact the choice had the perverse effect of entailing a "'*weaker* signal for water conservation'" for "'small customers who *conserve* water.'" (*Id.* at pp. 929, 937, some italics

added.)[14]

> 14 As described by the court, the fixed cost option was really a "fixed/variable" option, with fixed charges being 60 percent of total costs, the balance being variable. (*Palmdale, supra*, 198 Cal.App.4th at p. 929, capitalization omitted.)

We recognize that *Palmdale* was primarily focused on inequality between classes of users, as distinct from classes of water rate tiers. But, just as in *Palmdale* where the district never attempted to justify the inequality "in the cost of providing water" to its various classes of customers at each tiered level (*Palmdale, supra*, 198 Cal.App.4th at p. 937), so City Water has never attempted to justify its price points as based on *costs* [***26] *of service for those tiers*. Rather, City Water merely used what it thought was its legislative, discretionary power to attribute percentages of total costs to the various tiers. While an interesting conversation might be had about whether this was [*1508] reasonable or wise, we can find no room for arguing its constitutionality. It does not comply with the mandate of the voters as we understand it.

2. *City Water's Arguments*

a. *Article X, Section 2*

In supplemental briefing prior to oral argument, this court pitched a batting practice fastball question to City Water, intended to give the agency its best chance of showing that the prices for its various usage tiers, particularly the higher tiers (e.g., $4.94 for all usage over 17 ccf to 34 ccf, and $9.05 for usage over 34 ccf) corresponded with its actual costs of delivering water in those increments. We were hoping that, maybe, we had missed something in the record that would demonstrate the actual cost of delivering water for usage over 34 ccf per month really is $9.05 per ccf, and City Water would hit our question into the upper deck.

What we got back was a rejection of the very idea behind the question. As would later be confirmed at oral argument, City Water's [***27] answer was that there does not have to be a correlation between tiered water prices and the cost of service. Its position is that the "cost-of-service principle of Proposition 218" must be "balance[d]" against "the conservation mandate of article X, section 2." In short, City Water justifies the lack of a correlation between the marginal amounts of water usage represented by its various tiers and the actual cost of supplying that water by saying the lack of correlation is excused by the subsidy for low usage represented by tier 1, on the theory that subsidized tier 1 rates are somehow *required* by article X, section 2. While we agree that low-cost water rates do not, in and of themselves, offend subdivision (b)(3) (see *Morgan v. Imperial Irrigation Dist., supra*, 223 Cal.App.4th at p. 899), we cannot adopt City Water's constitutional extrapolation of that point.

We quote the complete text of article X, section 2 [**375] in the footnote.[15] Article X, section 2 was enacted in 1928 in reaction to a specific Supreme Court case [*1509] decided two years earlier, *Herminghaus v. South. California Edison Co.* (1926) 200 Cal. 81 [252 P. 607] (*Herminghaus*). The *Herminghaus* decision, as Justice Shenk wrote in his dissent there, allowed downstream riparian landowners--basically farmers owning land adjacent to a river--to claim 99 percent of the flow of the San Joaquin River even though they were actually using less than 1 percent of that flow. [***28] [16] To compound that anomaly, the downstream riparian landowners' claims came at the expense of the efforts of an electric utility company to generate electricity for general, beneficial use by building reservoirs at various points upstream on the river. (See *Herminghaus*, at p. 109.) In the process of upholding the downstream landowners' "riparian rights" over the rights of the electric company to use the water to make electricity, the *Herminghaus* majority invalidated legislation aimed at preserving water in the state for a reasonable beneficial use, thereby countenancing what Justice Shenk perceived to be a plain waste of good water. (*Herminghaus, supra*, 200 Cal. at p. 123 (dis. opn. of Shenk, J.).) As our Supreme Court would describe *Herminghaus* about half a century later: "we held not only that riparian rights took priority over appropriations authorized by the Water Board, a point which had always been clear, but that as between the riparian and the appropriator, the former's use of water was not limited by the doctrine of reasonable use." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442 [189 Cal. Rptr. 346, 658 P.2d 709].)

> 15 "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the [***29] fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable

method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving [***30] any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

16 "In order to have the beneficial use of less than one per cent of the maximum flow of the San Joaquin River on their riparian lands the plaintiffs are contending for the right to use the balance in such a way that, so far as they are concerned, over ninety-nine per cent of that flow is wasted. This is a highly unreasonable use or method of the use of water." (*Herminghaus, supra*, 200 Cal. at p. 123 (dis. opn. of Shenk, J.).)

The voters overturned *Herminghaus* in the 1928 election by adopting article X, section 2, then denoted article XIV, section 3. (See *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 699 [22 P.2d 5] (*Gin Chow*).) In the 1976 constitutional revision, old article XIV, section 3, was recodified *verbatim* as article X, section 2. (See Gray, *"In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution* (1989) [**376] 17 Hastings Const. L.Q. 225 (hereinafter *Origins of Article X, Section 2*).[17]

17 Professor Gray's article is an exceptionally valuable source on the origins of article X, section 2.

The purpose of article X, section 2 was described in *Gin Chow*, the first case to reach the Supreme Court in the wake of the adoption of what is now [*1510] article X, section 2, in 1928. Justice Shenk, having been vindicated by the voters on the point of a perceived need to prevent the waste of [***31] water by letting it flow to the sea, summarized the new amendment in terms emphasizing beneficial use: "The purpose of the amendment was stated to be 'to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea', and is an effort 'on the part of the state, in the interest of the people of the state, to conserve our waters' without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners. That such purpose is reflected in the language of the amendment is beyond question. Its language is plain and unambiguous. In the main it is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource, and thereby render available for beneficial use that portion of the waters of our rivers and streams which, under the old riparian doctrine, was of no substantial benefit to the riparian owner and the conservation of which will result in no material injury to his riparian right, and without which conservation such waters would be wasted and forever lost." (*Gin Chow, supra*, 217 Cal. at p. 700.)

The emphasis in [***32] the actual language of article X, section 2 is thus on a policy that favors the beneficial use of water as against the waste of water for nonbeneficial uses. That is what one would expect, consistent with both Justice Shenk's dissent in *Herminghaus* and his majority opinion in *Gin Chow*. (See Gray, *supra, Origins of Article X, Section 2*, 17 Hastings Const. L.Q. at p. 263 [noting emphasis in text on beneficial use].) The word "conservation" is used in the introductory sentence of the provision in the context of promoting beneficial uses: "'the conservation of such waters is to be exercised *with a view to the reasonable and beneficial use thereof* in the interest of the people and for the public welfare.'" (*Origins of Article X, Section* 2, at p. 225, italics added.)

(9) But nothing in article X, section 2, requires water

rates to exceed the true cost of supplying that water, and in fact pricing water at its true cost is compatible with the article's theme of conservation with a view toward reasonable and beneficial use. (See *Palmdale, supra*, 198 Cal.App.4th at pp. 936-937 [reconciling art. X, § 2 with Prop. 218]; accord, *Brydon, supra*, 24 Cal.App.4th at p. 197 [noting that incremental rate structures create an incentive to reduce water use].) Thus it is hard for us to see how article X, section 2, can be read to trump subdivision (b)(3). We would note here that in times of drought--which looks increasingly like the [***33] foreseeable future--providing water can become very pricey indeed.[18] And, we emphasize, there [*1511] is [**377] nothing at all in subdivision (b)(3) or elsewhere in Proposition 218 that prevents water agencies from passing on the incrementally higher costs of expensive water to incrementally higher users. That would seem like a good idea. But subdivision (b)(3) does require they figure out the true cost of water, not simply draw lines based on water budgets. Thus in *Palmdale*, the appellate court perceived no conflict between Proposition 218 and article X, section 2, *so long as* article X, section 2 is not read to allow water rates that exceed the cost of service. Said *Palmdale:* "California Constitution, article X, section 2 is not at odds with article XIII D *so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel*.' (Art. XIII D, § 6, subd. (b), par. (3).)" (*Palmdale, supra*, 198 Cal.App.4th at pp. 936-937, italics added.) And as its history, and the demonstrated concern of the voters in 1928 demonstrates, article X, section 2 certainly does not require above-cost water rates.

> 18 It was recently noted that Santa Barbara is dusting off a desalinization plant built in the 1990's to provide additional water for the city in the current drought. (See Covarrubias, *Santa Barbara Working to Reactivate Mothballed* [***34] *Desalinization Plant*, L.A. Times (Mar. 3, 2015) <http://www.latimes.com/local/california/la-me-santa-barbara-desal-20150303-story.html> (as of Apr. 20, 2015) [noting, among other things, that desalination can be expensive].)

In fact, if push came to shove and article X, section 2, really were in irreconcilable conflict with article XIII D, section 6, subdivision (b)(3), we might have to read article XIII D, section 6, subdivision (b)(3) to have carved out an *exception* to article X, section 2, since Proposition 218 is both more recent, and more specific. (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290 [109 Cal. Rptr. 3d 620, 231 P.3d 350] ["'As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision.'"]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371 [285 Cal. Rptr. 231, 815 P.2d 304] [same].)

Fortunately, that problem has not arisen. We perceive article X, section 2 and article XIIID, section 6, subdivision (b)(3) to work *together* to promote increased supplies of water--after all, the main reason article X, section 2 was enacted in the first place was to ensure the *capture and beneficial use* of water and prevent its wasteful draining into the ocean. As a pre-Proposition 218 case, *Brydon, supra*, 24 Cal.App.4th 178 observed, one of the benefits of tiered rates is that it is reasonable to assume people will not waste water as its price goes up. (See *id.* at p. 197 [noting that incremental rate structures create an incentive to reduce water use].) Our courts have made it clear they interpret the Constitution to allow tiered pricing; but the voters have made it clear they [***35] want it done in a particular way.

b. Brydon *and* Griffith

We believe the precedent most on point is *Palmdale*, and we read *Palmdale* to support the trial court's conclusion City Water did not comply [*1512] with the subdivision (b)(3) requirement that rates be proportional to cost of service. The two cases City Water relies on primarily for its opposite conclusion, *Brydon* and *Griffith*, do not support a different result.

Brydon was a pre-Proposition 218 case upholding a tiered water rate structure as against challenges based on 1978's Proposition 13 rational basis and equal protection challenges. Similar to the case at hand, the water district promulgated an "inclining block rate structure." (*Brydon, supra*, 24 Cal.App.4th at p. 182; see p. 184 [details of four-tier structure].) Proposition 218 had not yet been enacted, so the opponents of the block rate structure did not have the "proportional cost of the service attributable to the parcel" language in subdivision (b)(3) [**378] to use to challenge the rate structure. They relied, rather, on the theory that Proposition 13 made the rate structure a "'special tax,'" requiring a vote. (*Brydon*, at p. 182.) As a backup they made traditional rational basis and equal protection arguments. They claimed the rate structure [***36] was "arbitrary, capricious and not rationally

related to any legitimate legislative or administrative objective" and, further, that the structure unreasonably discriminated against customers in the hotter areas of the district. (*Brydon, supra*, at p. 182.) The *Brydon* court rejected both the Proposition 13 and rational basis/equal protection arguments.

But *Brydon*--though it might still be read as evidence that tiered pricing not otherwise connected to cost of service would survive a rational basis or equal protection challenge--simply has no application to post-Proposition 218 cases. In fact, the construction of Proposition 13 applied by *Brydon* was based on cases Proposition 218 was designed to overturn.[19] The best example of such reliance was *Brydon*'s declination to follow *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal. Rptr. 567] (*Beaumont*) on the issue of the burden of proof. *Beaumont* had held it was the agency that had the burden of proof to show compliance with Proposition 13. *Brydon*, however, said the burden was on the taxpayers to show lack of compliance. In coming to its conclusion, *Brydon* invoked *Knox v. City of Orland* (1992) 4 Cal.4th 132 [14 Cal. Rptr. 2d 159, 841 P.2d 144]. *Knox*, said *Brydon*, had "cast substantial doubt" on the "propriety of shifting the burden of proof to the agency." (*Brydon, supra*, 24 Cal.App.4th at [*1513] p. 191.) But, more than a decade later, our Supreme [***37] Court in *Silicon Valley* recognized that *Knox* itself was one of the targets of Proposition 218. (See *Silicon Valley, supra*, 44 Cal.4th at p. 445.)[20] In the wake of *Knox*'s fate (see in particular subd. (b)(5) [changing burden of proof]), it seems safe to say that *Brydon* itself was part of the general case law which the enactors of Proposition 218 wanted replaced with stricter controls on local government discretion.

19 Two examples of early, post-Proposition 13 cases that took a strict constructionist view of the provision are *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 199 [182 Cal. Rptr. 324, 643 P.2d 941] (*Los Angeles County v. Richmond*) [strictly construing Prop. 13's voting requirements to avoid finding a transportation commission was a "'special district'"]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 [184 Cal. Rptr. 713, 648 P.2d 935] [strictly construing words "special tax[]" used in § 4 of Prop. 13 as ambiguous to avoid finding municipal payroll and gross receipts tax was a "special tax"].) *Brydon* expressly relied on *Los Angeles County v. Richmond*. (See *Brydon, supra*, 24 Cal.App.4th at p. 190.) Proposition 218 effectively reversed these cases with a liberal construction provision. (See *Silicon Valley, supra*, 44 Cal.4th at p. 445.)

20 Here is the relevant passage from *Silicon Valley*: "As the dissent below points out, a provision in Proposition 218 shifting the burden of demonstration was included in reaction to our opinion in *Knox*. The drafters of Proposition [***38] 218 were clearly aware of *Knox* and the deferential standard it applied based on *Dawson* [*v. Town of Los Altos Hills* (1976)] 16 Cal.3d 676 [129 Cal. Rptr. 97, 547 P.2d 1377]." (*Silicon Valley, supra*, 44 Cal.4th at p. 445.)

As the *Silicon Valley* court observed, Proposition 218 effected a paradigm shift. Proposition 218 was passed by the voters in order to *curtail* discretionary models of local agency fee determination. (See *Silicon Valley, supra*, 44 Cal.4th at p. 446 ["As further evidence that the voters sought to curtail local agency discretion in raising [**379] funds ... ."].)[21] Allocation of water rates might indeed have been a purely discretionary, legislative task when *Brydon* was decided, but not after passage of Proposition 218.

21 Here and there in City Water's briefing there are references to a discretionary, legislative power in regard to local municipal water agencies conferred by article XI, section 9, which was a 1970 amendment to the Constitution, though one can trace it back to the Constitution of 1879. Basically, article XI, section 9, gives cities the right to go into the water supply business. We quote its text, unamended since 1970: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, [***39] except within another municipal corporation which furnishes the same service and does not consent. [¶] (b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law."

Article XI, section 9 obviously does not *require* municipal corporations to establish fees in

excess of their costs, so there is no incompatibility between it and the later enacted Proposition 218.

The other key case in which City Water's analysis of this point is *Griffith*. There, the fee itself varied according to the location of the property, e.g., whether the parcels with wells were coastal and metered, noncoastal and metered, or residential and nonmetered. Objectors to the fee asserted certain tiers in the fee, *based on the geographic differences in the parcels covered* by the fee, were not proportional to the cost they were paying. One objector in particular complained the fee was improperly established by working backwards from the overall amount of the project, subtracting other revenues, the balance being the augmentation charge, which was then apportioned among the users. (*Griffith, supra*, 220 Cal.App.4th at p. 600.) This objector argued that the proportional [***40] cost of service had to be calculated prior to setting the rate for the charge. [*1514]

The court noted the M-1 industry manual recommends such a work-backwards-from-total-cost methodology in setting rates, and held that the objectors did not attempt to explain why such an approach "offends Proposition 218 proportionality." (*Griffith, supra*, 220 Cal.App.4th at p. 600.) The best the objectors could do was to point to what *Silicon Valley* had said about *assessments*, namely, agencies cannot start with "'an amount taxpayers are likely to pay'" and *then* determine their annual spending budget from that. (*Ibid.*, quoting *Silicon Valley, supra*, 44 Cal.4th at p. 457.) The *Griffith* court distinguished the language from *Silicon Valley*, however, by saying the case before it did not entail any what-the-market-will-bear methodology. (*Griffith, supra*, 220 Cal.App.4th at p. 600.)

The objectors had also relied on *Palmdale* for the proposition that "... Proposition 218 proportionality compels a parcel-by-parcel proportionality analysis." (*Griffith, supra*, 220 Cal.App.4th at p. 601.) The *Griffith* court rejected that point by stating "Apportionment is not a determination that lends itself to precise calculation," for which it cited a pre-Proposition 13, pre-Proposition 218 case, *White v. County of San Diego* (1980) 26 Cal.3d 897, 903 [163 Cal. Rptr. 640, 608 P.2d 728], without any explanation. (*Griffith, supra*, 220 Cal.App.4th at p. 601.)

When read in context, *Griffith* does not excuse water agencies from ascertaining the true costs [***41] of supplying water to various tiers of usage. Its comments on proportionality [**380] necessarily relate only to variations in property location, such as what side of a water basin a parcel might fall into. That explains its citation to *White*, which itself was not only pre-Proposition 218, but pre-Proposition 13. Moreover, while the *Griffith* court may have noted that the M-1 manual generally recommends a work-backwards approach, we certainly do not read *Griffith* for the proposition that a mere manual used by utilities throughout the Western United States can trump the plain language of the California state Constitution. The M-1 manual might show working backwards is reasonable, but it cannot excuse utilities from ascertaining cost of service now that the voters and the Constitution have chosen cost of service.

To the extent *Griffith* does apply to this case, which is on the (b)(4) issue, we find it helpful and have followed it. But trying to apply it to the (b)(1) and (b)(3) issues is fatally flawed.

c. *Penalty Rates*

A final justification City Water gives for not tying tier prices to cost of service is to say it does not make any difference because the higher tiers can be justified as penalties [***42] not within the purview of Proposition 218 at all. (In [*1515] the context of art. X, § 2, City Water euphemistically refers to its higher tiered rates as conservation rates as if such a designation would bring them within art. X, § 2 and exempt them from subd. (b)(3), but as we have explained, art. X, § 2, does not require what art. XIII D, § 6, subd. (b)(3) forbids) and designating something a "conservation rate" is no more determinative than calling it an "apple pie" or "motherhood" rate.

(10) City Water's theory of penalty rates relies on article XIII C, section 1, subdivision (e)(5). This subdivision defines the word "tax" to exclude fines "imposed by" a local government "as a result of a violation of law."[22] That is hardly a revelation, of course. We may take as a given that Proposition 218 was never meant to apply to parking tickets.

22 The relevant text from article XIII C, section 1, subdivision (e)(5) is: "(e) As used in this article, 'tax' means any levy, charge, or exaction of any kind imposed by a local government, except the following: [¶] ... [¶] (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a

result of a violation of law."

But City Water's penalty rate theory [***43] is inconsistent with the Constitution. It would open up a loophole in article XIII D, section 6, subdivision (b)(3) so large it would virtually repeal it. All an agency supplying *any* service would need to do to circumvent article XIII D, section 6, subdivision (b)(3), would be to establish a low legal base use for that service, pass an ordinance to the effect that any usage above the base amount is illegal, and then decree that the penalty for such illegal usage equals the incrementally increased rate for that service. Such a methodology could easily yield rates that have no relation at all to the actual cost of providing the service at the penalty levels. And it would make a mockery of the Constitution.

IV. CONCLUSION

All of which leads us to the conclusion City Water's pricing violates the constitutional requirement that fees "not exceed the proportional cost of the service attributable to the parcel." (Art. XIII D, § 6, subd. (b)(3).) This is not to say City Water must calculate a rate for 225 Elm Street and then calculate another for the house across the street at 226. Neither the voters nor the Constitution say [**381] anything we can find that would prohibit tiered pricing.

The way Proposition 218 operates, water rates that exceed the cost of service operate as a tax, similar to the way a 'carbon tax' might be imposed on use of energy. But, we should emphasize: Just because such above-cost rates are a tax does not mean they cannot be imposed--they just have to be submitted to the relevant electorate and approved by the people in a vote. There is no reason, for example, why a water district or local government cannot, consistent with Proposition 218, seek the approval of the voters to [*1516] impose a tax on water over a given level of usage--as we indicated earlier, that might be a good idea. However, if a local government body chooses to impose tiered rates unilaterally without a vote, those tiers must be based on cost of service for the incremental level of usage, not predetermined budgets. (For the moment, of course, we need not decide whether such a proposed tax would constitute a general tax or special tax.)

(11) Having chosen to bypass the electorate, City Water's article X, section 2 position kept it from explaining to us *why* it cannot anchor rates to cost of service. Nothing [***44] in our record tells us why, for example, they could not figure out the costs of given usage levels that require City Water to tap more expensive supplies, and then bill users in those tiers accordingly. Such computations would seem to satisfy Proposition 218, and City Water has not shown in this record it would be impossible to comply with the constitutional mandate in this way or some other. As the court pointed out in *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 923 [26 Cal.Rptr.3d 153], the calculations required by Proposition 218 may be "complex," but "such a process is now required by the California Constitution."

(12) Water rate fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII D, section 6, subdivision (b)(4). While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service--water service. And water service most assuredly is immediately available to City Water's customers now.

But, because the record is unclear whether low usage customers might be paying for a recycling operation made necessary only because of high usage customers, we must reverse the trial court's judgment that the rates [***45] here are *necessarily* inconsistent with subdivision (b)(4), and remand the matter for further proceedings with a view to ascertaining the portion of the cost of funding the recycling operation attributable to those customers whose additional, incremental usage requires its development.

(13) By the same token, we see nothing in article XIII D, section 6, subdivision (b)(3) that is incompatible with water agencies passing on the true, marginal cost of water to those consumers whose extra use of water forces water agencies to incur higher costs to supply that extra water. Precedent and common sense both support such an approach. However, we do hold that above-cost-of-service pricing for tiers of water service is not allowed by Proposition 218 and in this case, City Water did not carry its burden of proving its higher tiers reflected its costs of service. In fact it has [*1517] practically admitted those tiers do not reflect cost of service, as shown by their tidy percentage increments and City Water's refusal to defend the calculations. And so, on the subdivision (b)(3) issue, we affirm the trial court's

judgment.

Given the procedural posture the case now finds itself in, the issue of who is the prevailing party is premature. That question should [***46] be first dealt with by the trial court only after all proceedings as to City Water's rate structure are final. Accordingly, we do not make an appellate cost order now, but reserve that matter for future adjudication in the trial court. (See *Neufeld v. Balboa Ins. Co.* (2000) 84 Cal.App.4th 759, 766 [101 Cal. Rptr. 2d 151] [deferring question of appellate costs in case being remanded until litigation was final].)

Moore, J., and Thompson, J., concurred.

EXHIBIT 5

32400 Paseo Adelanto
San Juan Capistrano, CA 92675
(949) 493-1171
(949) 493-1053 FAX
www.sanjuancapistrano.org

[redacted]

CITY OF SAN JUAN CAPISTRANO WATER CUSTOMER

[redacted]

Dear Water Customer,

The City of San Juan Capistrano is providing a refund/credit of water charges, due to an overbilling of water charges prior to July 1, 2014, which resulted in an overpayment. Credits/Refunds will be issued for water rate overbillings made between August 28, 2013, and July 1, 2014. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during that time period and paid that billing.

You can demonstrate your eligibility by completing and returning the enclosed form. Your claim for a water refund/credit must be filed **no later than October 1, 2015**.

We appreciate your patience during this process. Refunds will be processed in the order received and may take up to 90 day due to the number of claims expected.

If you have further questions or for more information, please visit the City of San Juan Capistrano website or call the Customer Service Department at (949) 493-1515.

Sincerely,

City of San Juan Capistrano

CITY OF SAN JUAN CAPISTRANO
WATER REFUND CLAIM FORM

INSTRUCTIONS

1. Read entire claim form before returning. Print legibly.
2. Completed form must be delivered by e-mail, mail, or in person at San Juan Capistrano City Hall, Customer Service Division.
3. Refund/Credits will be issued for water rate overbillings made between August 28, 2013, and July 1, 2014, which resulted in overpayments.
4. An "overpayment" was made if you were billed more than a Tier 1 water rate at any time during the time period above and paid that billing. Your refund will be calculated by the City based on usage records for your account.
5. Claims for water rate refund/credit must be filed **no later than October 1, 2015, and may take up to 90 days to be processed.**
6. A signature and date is required at bottom of form. Submit form to:

City of San Juan Capistrano - Water Refund
32400 Paseo Adelanto, San Juan Capistrano, CA 92675
OR by email, at: waterrefund@sanjuancapistrano.org

ELIGIBILITY INFORMATION

Customer Name: _____

Service Address: _____

Mailing Address: _____

Account/Customer Number: _____ Phone Number: _____

Email: _____

When did you reside at/occupy the service address: From: _____ To: _____

Please check box that qualifies you for the credit:

☐ I am the primary account holder

☐ I am the secondary account holder. Primary holder's name: _____

REFUND METHOD – Please provide my water refund as follows:

☐ Refund check made out to the primary account holder and mailed to the mailing address above

☐ Credit to the utility account number above

Release and Waiver of Further Refund Claims. In exchange for a refund of water rates as set forth in this document, the person signing below ("Claimant"), on behalf of Claimant, any other account holder(s) of the above-referenced account, and their heirs, assigns and representatives, hereby fully, finally and forever discharges the City of San Juan Capistrano ("City"), and its officers, officials, employees and agents from any and all claims, demands, liabilities or causes of action, in law or in equity, of any nature whatsoever, known or unknown, which the Claimant now or may have against the City arising out of the water rates charged by the City prior to July 1, 2014, ("Disputed Rates). Claimant further covenants not to sue, or participate in any lawsuit regarding the Disputed Rates. Any water rate refund provided by the City shall not constitute any admission by the City of wrongdoing or liability in connection the Disputed Rates.

By signing this form you are claiming that the information above is true and correct.

Type or Print Name: