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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

MONTEREY PENINSULA TAXPAYERS' ASSOCIATION, INC., a California nonprofit corporation; and RICHARDS J. HEUER III, an individual, Petitioners, vs. THE MONTEREY PENINSULA WATER MANAGEMENT DISTRICT, a California public agency; and DOES 1 through 10, Respondents.	21CV003066 **ORDER GRANTING PETITION FOR WRIT OF MANDATE AND REQUEST FOR DECLARATORY RELIEF**

On December 20, 2022, in Department 14 of the above-referenced court, the Honorable Carrie M. Panetta heard Petitioner Monterey Peninsula Taxpayers' Association, Inc. and Richards J. Heuer III's ("Petitioners") Petition for Writ of Mandate. Eric Benink and Prescott Littlefield appeared for Petitioners and Matthew Slenz appeared for Respondent the Monterey Peninsula Water Management District ("Respondent" or "the District").

The court read and considered the papers filed in support and in opposition of the Petition for Writ of Mandate and oral argument presented at the hearing, and good cause appearing therefrom, the Court hereby GRANTS the Petition for Writ of Mandate.

The court makes the following findings.

I. Factual and Procedural Background.[1]

As alleged in the Petition, water service on the Monterey Peninsula is principally supplied by California-American Water Company ("Cal-Am"), an investor-owned water supplier. Cal-Am owns a water supply, storage and distribution system on the Monterey Peninsula that provides

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[1] The facts outlined below are taken from the administrative record.

service to 100,000 residents. However, because Cal-Am is not a government agency, in 1977 the California Legislature established the District "to carry out such functions which only can be effectively performed by government, including, but not limited to, management and regulation of the use, reuse, reclamation, conservation of water and bond financing of public works projects." (Wat. Code App. § 118-2.) The Legislature conferred upon the District broad powers to manage and regulate water use and distribution in the Monterey Peninsula area. (*Id.* at §§ 301-494.)

Beginning in 1983, the District imposed a User Fee on Cal-Am customers. The User Fee was set at 8.325% of Cal-Am's charges for water, and was collected by Cal-Am, which remitted it to the District. In 2009, the California Public Utilities Commission ("CPUC") ruled that Cal-Am could no longer collect the User Fee. At that time, the annual amount collected through the User Fee was approximately $3.7 million and constituted nearly half of the District's budgeted revenues.

Faced with this loss, which resulted in insufficient funding for the District's operating and capital expenses and new water supply activities, the District began to explore ways to "restore the collection of the user fee or otherwise collect a similar amount through a surcharge." (October 11, 2011 Water Supply Planning Committee Report; see also January 23, 2012 Board Report referencing Committee's recommendation to examine alternative approaches.) The need for an alternative fee was particularly acute given the fact that the District was facing an urgent need to supplement its water supplies. This was due to, among other things, a July 6, 1995 State Water Resources Control Board's order that Cal-Am reduce its diversions from the Carmel River system and limitations that had been placed on Cal-Am's ability to produce water from the Seaside Groundwater Basin pursuant to the judgment in *California American Water Company v. City of Seaside* (No. M66343).

The District's Board of Directors (the "Board") retained a consultant to prepare a rate study for a Proposition 218 hearing process. On March 28, 2012, the District's rate consultant presented the Board with a "User Fee Alternatives Study." The presentation stated that the "[f]ee must recover $3.7 million per year from about 43,500 connections" and one of the goals of the study was to "replace [the] existing user fee."

Following these presentations, the Board conducted a public hearing on April 16, 2012, to discuss its proposal to "establish an alternative user fee collection mechanism." The District's rate

consultant presented a "User Fee Study" which stated that the goal was to "replace [the] existing user fee." At the end of the April 16, 2012 meeting, the Board adopted the rate study and implemented a Proposition 218 hearing process. It also approved the first reading of Ordinance No. 152, entitled "An Ordinance of The Board of Directors of the Monterey Peninsula Water Management District Authorizing an Annual Water Use Fee to Fund Water Supply Services, Facilities and Activities Needed to Ensure Sufficient Water is Available for Present Beneficial Water Use in the Main California American Water Distribution System" (the "Ordinance"). The original version of the Ordinance did not have a sunset date. Instead, it provided that "[t]he District shall require the annual water use fee to sunset in full or in part unless the Board determines that the purpose of the fee is still required, and the amount of the fee is still appropriate."

On June 12, 2012, as part of the Proposition 218 hearing process, the District conducted a public hearing to consider the proposed Water Use Fee. At this hearing, there was significant public opposition to the proposed fee from individuals and groups, including Petitioners. The District did not take action on the Ordinance at that time but instead continued the matter to June 19, 2012.

At the June 19, 2012 meeting, the District's General Manager David Stoldt indicated that 15,709 protest letters had been received, but only 10,343 were valid. Board member Robert Brower advised that there had been a Water Supply Committee meeting earlier in the day with members of the public who had expressed concerns about the fee, and the dialogue was scheduled to continue. Brower further recommended deferring any action on the adoption of the Ordinance until after the meeting with community members, stating the District was trying its best to earn public support for the proposed fee. The Board agreed to continue consideration of the Ordinance to June 27, 2012.

On June 25, 2012, the Water Supply Committee met and discussed various areas of compromise. It also developed five conditions that would be presented to the Board at the June 27, 2012 meeting, including the condition that there be a date certain for sunsetting the proposed fee. At the June 27, 2012 Board meeting, General Manager Stoldt presented a PowerPoint stating that the District had met with community representatives and had, among other things, reached a "compromise and agreement" in the form of "stronger 'sunset' provisions." The Board then

approved (4-1) an amended ordinance which authorized and established the Water Supply Charge[2] effective July 1, 2012. The "Findings" portion of the Ordinance indicated that the purpose of the Water Supply Charge was to "replace and augment the former charge collected by CAW[3] on its bills to water customers" while the section titled "Section Three: Purposes" stated the purpose of the Ordinance was to "fund District water supply activities" and "ensure sufficient water is available for present beneficial use or uses[.]"

The Ordinance, as adopted, also included a new sunset provision:

> Notwithstanding any other provision of this Ordinance, the District shall not collect a water supply charge pursuant to this Ordinance: (a) in Fiscal Year 2018-2019 (or any subsequent fiscal year) if no District project is identified by the Board of Directors to have been underway as of December 31, 2017, (b) to the extent alternative funds are available via a charge collected on the California American Water Company bill, or (c) to the extent the Board of Directors determines that the charge (or portion thereof) is no longer required because bonds financing a specific project having [sic] been repaid.

(Ordinance No. 152, § 10C.)

In 2016, after an ongoing challenge by the District to the CPUC's decision to prohibit Cal-Am's collection of the User Fee, the California Supreme Court set aside the CPUC's decision in *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016) 62 Cal.4th 693. On October 17, 2016, the District adopted Resolution 2016-18 which ordered Cal-Am to "continue to set and remit the User Fee at 8.325% of each [Cal-Am] water bill[.]" Since that time, the District has collected both the Water Supply Charge and the User Fee.

On September 28, 2021, Petitioners filed a petition for writ of mandate seeking that the District be enjoined from any further collection of the Water Supply Charge. The petition includes two causes of action. The first cause of action for writ of mandate alleges the District had a clear, present and ministerial duty to comply with both the Ordinance (§ 10) and Proposition 218 (Cal. Const., article XIII D, § 6, subd. (b)(2)). Petitioners plead that the District was required to cease the collection of the Water Supply Charge to the extent alternative funds were being collected via the User Fee on the Cal-Am water bill pursuant to the Ordinance. Additionally, Petitioners contend the District was required to reduce the Water Supply Charge by the amount of the User Fee and its

[2] Earlier versions of the ordinance and various Board documents referred to this charge as a "water use fee."

[3] The Ordinance refers to Cal-Am as "CAW."

failure to do so has resulted in revenue from the Water Supply Charge being utilized for purposes other than that for which the fee or charge was imposed in violation of Proposition 218. The second cause of action seeks declaratory relief.

II. Request for Judicial Notice.

The court finds, and the Petitioners agree, that the documents requested to be judicially-noticed are not necessary to resolving the issues raised in the Petition.

III. The Continued Imposition of the Water Supply Charge Violates the Ordinance's Sunset Provision.

Petitioners contend that the District was required to stop collection of the Water Supply Charge to the extent alternative funds were being collected via the User Fee based on the Ordinance's sunset provisions. Section 10 of the Ordinance, titled "Effective Date; Review Requirements; Sunset," includes three relevant subdivisions:

Subdivision A governs the effective date of the Ordinance and states that the Ordinance "shall not have a sunset date, provided however, that charges set by this Ordinance shall not be collected to the extent proceeds exceed funds required to achieve the Purposes of this Ordinance[.]" (Ordinance, § 10, subd. (A).)

Subdivision B ("Section 10B") discusses the annual review requirement whereby the District Board "shall review amounts collected and expended in relation to the purposes for which the Water Supply Charge is imposed." (Ordinance, § 10, subd. (B).) This provision states the District "shall require the annual water supply charge to sunset in full or in part unless the Board determines that the purpose of the charge is still required, and the amount of the charge is still appropriate and less than the proportionate cost of the service attributable to each parcel on which the charge is imposed." (*Ibid.*) "If the purpose is fully accomplished, the charge shall be required to sunset. If the purpose for the charge is determined to continue, but amounts needed to fund that purpose are decreased, the charge shall be reduced to that lesser amount." (*Ibid.*) This subdivision also states that in the event the aggregate annual charge collections are insufficient to fund all appropriate purposes to which the charge may be expended, the Board has the discretion to determine which purposes will be funded so long as the charge does not exceed the proportionate cost of service. (*Ibid.*)

Subdivision C ("Section 10C" or the "Sunset Provision") is the primary subject of the parties' dispute, and enumerates three circumstances under which the Water Supply Charge shall not be collected under the Ordinance. This subdivision states: "*Notwithstanding any other provision of this Ordinance*, the District shall not collect a water supply charge pursuant to this Ordinance: (a) in Fiscal Year 2018-19 (or any subsequent fiscal year) if no District project is identified and determined by the Board of Directors to have been underway as of December 31, 2017, (b) ***to the extent alternative funds are available via a charge collected on the California American Water Company bill***, or (c) to the extent the Board of Directors determines that the charge (or portion thereof) is no longer required because bonds financing a specific project having [sic] been repaid." (Ordinance, § 10, subd. (C), emphasis added.)

Petitioners and the District disagree about the meaning of the phrase "to the extent alternative funds are available via a charge collected on the [Cal-Am] bill." While Petitioners assert that alternative funds are "available" and trigger the sunset provision of the Ordinance once the User Fee is reinstated in any measure, the District contends that funds from the User Fee are "available" only if they are not committed to other District obligations, such as conservation, mitigation and general overhead. The District argues the Board has determined that alternative funds from the User Fee are not available because revenues from the User Fee have been required to fund other costs, including those related to mitigation and conservation surcharges the District retired, and those required to pay off loans the District took out for its water supply projects.

The issue presented concerns the proper interpretation of the Sunset Provision. As such, the court will apply the rules of statutory construction, which also apply to the interpretation of ordinances. (*Chaffee v. San Francisco Pub. Libr. Com.* (2005) 134 Cal.App.4th 109, 114.) Specifically, the Court will "turn first, to the words of the statute, giving them their usual and ordinary meaning." (*Id.* at 114.) "When the language of a statute is clear, [courts] need go no further. However, when the language is susceptible of more than one reasonable interpretation, [courts] look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Ibid.*)

"[S]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute

internally and with related statutes. Moreover, statutes must be construed so as to give a reasonable and common-sense construction consistent with the apparent purpose and intention of the lawmakers – a construction that is practical rather than technical, and will lead to wise policy rather than mischief or absurdity. [Citation.] In approaching this task, the courts may consider the consequences which might flow from a particular interpretation and must construe the statute with a view to promoting rather than defeating its general purpose and the policy behind it. [Citation.]…Ultimately, [i]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." (*Pac. Merch. Shipping Ass'n v. Newsom* (2021) 67 Cal.App.5th 711, 725-26, internal citations and quotation marks omitted.)

A. Plain Language of the Sunset Provision.

In reviewing the plain language of Section 10C, the Court finds that the word "available" is clear. The ordinary meaning of the word "available" is "able to be bought or used." (Cambridge Dictionary Online (2023) https://dictionary.cambridge.org/us/dictionary/english/available [as of January 27, 2023]; see also Merriam-Webster Dict. Online (2023) https://www.merriam-webster.com/dictionary/available [as of January 27, 2023] ["present or ready for immediate use"]; see also *Ross v. Blake* (2016) 578 U.S. 632, 642 ["[T]he ordinary meaning of the word "available" is " 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.' " [*Booth v. Churner*] 532 U.S., at 737–738 (quoting Webster's Third New International Dictionary 150 (1993)); see also Random House Dictionary of the English Language 142 (2d ed. 1987) ("suitable or ready for use"); Black's Law Dictionary 135 (6th ed. 1990) ("useable"; "present or ready for immediate use")."].)

The court finds that once Cal-Am began collecting the User Fee again, the District was able to use the funds from that fee because those funds were both present and accessible. As such, funds from a charge collected on the Cal-Am water bill are "available" and Section 10C requires the Water Supply Charge to sunset.

The District asserts the User Fee funds are only "available" if the District has not already committed such funds to other uses. For example, the District points out that since the enactment of the Water Supply Charge, it has embarked on various capital projects (such as the Aquifer Storage and Recovery Project and Pure Water Monterey Groundwater Replenishment Project)

which require funding from the Water Supply Charge revenues. It also asserts that it has used and committed funds from the Water Supply Charge to fund a $4 million Rabobank loan. Further, the District states that after the User Fee was reestablished on the Cal-Am water bill, the District discontinued about $3 million in surcharges it had been collecting on customers' bills for conservation and mitigation; thus, the mitigation and conservation programs require nearly all the User Fee proceeds, leaving little for the water supply program. As such, the District concludes that funds from the User Fee are not "available" and the Sunset Provision has not been triggered.

The Court is not persuaded. Although it may be that the District has chosen in its discretion to retire certain surcharges and use the proceeds from the reinstated User Fee for other purposes, this does not render those funds *unable* to be used. To the contrary, those funds are still very much present, accessible and useable, even if the District has, for the time being, chosen to commit those funds elsewhere. The Court also notes that if the word "available" was interpreted in the manner argued by the District, it could be that funds from the User Fee will *never* become available as there are any number of projects the District may choose to embark on in its efforts to address the Monterey Peninsula water supply issues.

Furthermore, if the word "available" was susceptible to the District's interpretation, this would render the plain language of the Sunset Provision ambiguous as it would be susceptible to either party's interpretation. The Court would then be required to resort to other extrinsic aids, such as "the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (See *Chaffee v. San Francisco Pub. Libr. Com.* (2005) 134 Cal.App.4th 109, 114.) Even under this analysis, the Court finds that Petitioners' interpretation of the Sunset Provision is more tenable and consistent with the legislative history and the language of the Ordinance as a whole.

B. Legislative History Behind Establishment of the Sunset Provision.

In looking at the history behind the enactment of the Ordinance, it is undisputed there was significant public opposition to the Water Supply Charge when it was first presented to the public. The June 12, 2012 District Board meeting minutes indicate that 11,783 protests were submitted to the Board and 34 individuals publicly commented about the Ordinance at the meeting, largely to

express opposition to the charge. This level of opposition is significant as 15,255 valid protests were required for there to have been a majority protest against the imposition of the charge and 15,709 raw protests were ultimately received, though only 10,343 of those were deemed valid. (Ordinance, Finding No. 14.)

In the face of significant opposition to the proposed charge, the record indicates the District met with community representatives regarding the proposed Ordinance on June 19 and June 25, 2012, to try and address the concerns they had related to the Water Supply Charge. (See, e.g., 6/25/12 Water Supply Planning Committee discussion item indicating that the committee "invited round table discussion from community representatives" at its 6/19/12 meeting regarding "[a]reas of potential compromise on the proposed annual water supply charge" including "a) Limiting expenditures to 'water projects' only, b) Establishing a sunset date, c) Creation of an oversight committee"; Final Minutes from 6/25/12 Water Supply Planning Committee meeting where the committee developed five conditions that would be presented to the District Board at the 6/27/12 meeting, including various suggestions for sunsetting the provision; Slides from the 6/27/12 District Board meeting indicating that meetings were held with community representatives to discuss "Topics of Compromise & Agreement" including "Stronger 'Sunset' Provisions".) One of the District Board Directors, Robert Brower, mentioned at the June 19, 2012 Board meeting that the Water Supply Committee had met with community members who expressed concerns regarding the Ordinance and was "trying [its] best to earn the public support and public opinion support[.]"

As a result of those meetings, it appears that the District made some fairly significant changes to the Ordinance. This is evident from a comparison of versions of the Ordinance that preceded the community meetings with the version that was ultimately enacted. For example, while the "Findings" section in prior versions of the Ordinance focused on the District's general need to fund various water supply projects to ensure sufficient water would be present for beneficial use due to constraints that had been placed upon Cal-Am's ability to deliver water, the version of the Ordinance that was ultimately adopted still acknowledged the District's need to supplement its water supplies due to the Carmel River ruling, but also brought to the forefront the issue that the District "no longer had access to CAW bills." Similarly, while the "Purposes" section of the Ordinance indicated that proceeds from the Water Supply Charge could only be used

to fund water supply activities, the "Findings" in the Ordinance stated that the purpose of the charge was to replace and augment the charge previously collected by the User Fee. (Compare April 16, 2012 and June 12, 2012 versions of Ordinance with June 27, 2012 and enacted versions of Ordinance.) As such, there was a shift from the Ordinance expressing a general need for funds for District water supply activities to emphasizing that the User Fee needed to be replaced.

Even more significantly, the final version of the Ordinance included a revised sunset provision that explicitly tied the collection of the Water Supply Charge to funds that could be collected through the User Fee. Whereas prior versions of the Ordinance merely provided that the District Board would determine annually if the charge was still required and sunset the charge if not, the version of the Ordinance that was actually enacted specified the previously-quoted three conditions under which the Water Supply Charge would have to sunset. The District itself indicated at its June 27, 2012 Board meeting that this was a "stronger 'sunset' provision", presumably because the District had replaced a sunset provision based largely on Board discretion with a provision that established three automatic triggers for sunsetting the Water Supply Charge. The strength of this provision seems further confirmed by the fact Section 10C indicated that it would be effective "*[n]otwithstanding any other provision of th[e] Ordinance*," signaling the intent that this provision would trump other provisions of the Ordinance. (See *Tan v. Superior Ct. of San Mateo Cnty.* (2022) 76 Cal.App.5th 130, 138 ["When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like 'notwithstanding any other law' or 'notwithstanding other provisions of law.'"].)

Based on the foregoing, it seems apparent that after the District's meetings with community members, there was a shift that occurred in the language of the Ordinance which placed much more emphasis on the Water Supply Charge serving as a replacement for the prior User Fee, and not merely a means to generally raise revenue to fund water supply projects. There also was a revision to the Ordinance that tied the longevity of the charge to the availability of funds from the User Fee whereas, previously, the Ordinance provided the charge would sunset at the discretion of the District Board. Both modifications suggest that, as a concession and compromise in response to strong opposition to the Water Supply Charge, the legislative intent was to automatically sunset the Water Supply Charge once alternative funds from the User Fee could be accessed and used.

C. Construction of Section 10C in Context of Ordinance as a Whole.

The Court observes that interpreting the Sunset Provision as being automatically triggered once the User Fee is reinstated is a more reasonable construction when the Sunset Provision is read in the context of the Ordinance as a whole. The District would have the Court construe "available" to mean that funds from the User Fee are available only insofar as the District has not otherwise decided to allocate the User Fee funds for other purposes. This reading would confer broad discretion to the District in determining when the User Fee funds are actually available, as illustrated by the actions the District has taken since the User Fee was reinstated.

For example, at a District Board meeting that took place on October 19, 2020, a few years after the User Fee had been reinstated, several District Directors indicated a desire to phase out the Water Supply Charge sooner, believing this is what was promised to the taxpayers. In response, General Manager Stoldt responded: "I think we all had dreams of getting the user fee back on and all the water supply projects would be over *so we didn't need the water supply charge*." (*Ibid.*, emphasis added.) But, he went on to assert that even if the District did not have any water supply projects and had a big surplus in the User Fee, the District "would have to look at the user fee, also, for…personnel and services that are related to the water-supply projects." He further indicated that though the District "can't just bank money for the sake of banking money…there are sensible levels of reserves" and "[t]here are things that [the Board] ha[s] identified, setting a little something away for OPEB and pension-fund liabilities, and so forth." Later in the meeting, Stoldt stated the following:

> We've funded the water supply projects to date at a deficit to the water-supply charge. And so, to the extent the Board wishes to reimburse the other funds which have been used to do inter-fund borrowing for water-supply projects, that's a continuing obligation. All of these that I'm speaking of can go away. Unrelated to water-supply projects, **if the Board says, in our general duties, we want to fund more of the pension liability, or, we want to fund more of the OPEB on an annual basis, then that just simply means you don't have an extent alternative funds are available yet. I can move all the money from the left-hand pocket to my right-hand pocket, but it doesn't mean that I've now covered everything that I want to do.**

(Emphasis added.) Stoldt added: "So, I'm grateful that the user fee's coming in over expectations, ***but I've already identified some other use for that. That kind of discussion is really a Board-policy discussion***. It needs to had [sic] before you just lockstep decide to take, hey, we collected

more than we said we would. Let's use it all on reducing the water-supply charge or things that are circuited [sic] the water-supply charge."

In short, the record makes clear that the District views the issue of whether User Fee funds are "available" as a Board decision based on whether the charge is still "need[ed]," and to the extent the District identifies other uses for the User Fee or has other things it "want[s] to do" with that money (including funding more of the District's pension liability), the Water Supply Charge cannot sunset. In other words, the District reads the Sunset Provision as sanctioning the continuation of the Water Supply Charge so long as the District determines the charge is still needed.

But, the Court observes, this interpretation of Section 10C would render it virtually indistinguishable from another provision in the Ordinance. Specifically, the Court notes that Section 10B of the Ordinance, which existed *before* the District met with community members, states that the District shall annually review the amounts collected through the Water Supply Charge and "require [it] to sunset in full or in part *unless the Board determines that the purpose of the charge is still required[.]*" "If the purpose is fully accomplished, the charge shall be required to sunset. If the purpose for the charge is determined to continue, but amounts needed to fund the purpose are decreased, the charge shall be reduced to that lesser amount." If the court construes "available" as meaning the Board can continue to deem funds unavailable as long as they believe the Water Supply Charge is still required, this would render Section 10B superfluous. Such a result is to be avoided. (See *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 937 ["[A]n interpretation that renders statutory language a nullity is obviously to be avoided."].)

Further, if Section 10C were read as conferring upon the District the same amount of discretion as that conferred upon it through the sunset provision in Section 10B, it is patently unclear how Section 10C could have been framed by the District Board as a "stronger" sunset provision that operates "[n]otwithstanding" any other provision in the Ordinance. Instead, the sunset provisions in Section 10B and 10C can only be read harmoniously if Section 10B is construed as generally conferring upon the District the broad discretion to sunset the Water Supply Charge whenever it determines the charge is no longer required, while Section 10C is understood as enumerating three circumstances in which the District's broad discretion to sunset the charge is trumped and the Water Supply Charge is automatically required to sunset in some fashion. These

circumstances include the situation where alternative funds become available through a User Fee collected on the Cal-Am bill

D. Conclusion.

For all of the above reasons, the Court agrees with Petitioners that funds from a charge collected on the Cal-Am water bill were "available" once the District resumed collecting the User Fee. At that point, some sunsetting of the Water Supply Charge was automatically required. In this regard, the Court notes that the Sunset Provision required the District to sunset the Water Supply Charge "to the extent" alternative funds were being collected through the Cal-Am User Fee. Courts have construed the phrase "to the extent" as a term of limitation and qualification. (See, e.g., *Aozora Bank, Ltd. v. 1333 N. California Boulevard* (2004) 119 Cal.App.4th 1291, 1296 [construing "to the extent" as a qualifier that limited a carve-out provision to the extent of the waste itself]; *Oltmans Constr. Co. v. Bayside Interiors, Inc.* (2017) 10 Cal.App.5th 355, 366 [observing that the phrase "to the extent" is a qualification and citing numerous cases where courts have construed such language as limiting an indemnitor's liability].) In the context of the Sunset Provision, the reasonable construction of "to the extent" is that there will be a pro rata reduction of the Water Supply Charge for every dollar that is collected through the User Fee. When the User Fee proceeds meet or exceed the Water Supply Charge revenue, the Water Supply Charge must sunset in full.

IV. The Continued Imposition of the Water Supply Charge Did Not Violate Proposition 218.

Proposition 218 added Articles XIII C and XIII D to the California Constitution. These articles provide for voter approval for local government general taxes and special taxes, and set forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges. (*Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 640.) Article XIII D, section 6, subdivision (b) establishes "Requirements for Existing, New or Increased Fees and Charges" and states in relevant part that "[a] fee or charge shall not be *extended, imposed, or increased* by any agency unless it meets all of the following requirements," including the requirement that "[r]evenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed." (Cal. Const., art. XIII D, § 6,

subd. (b)(2), emphasis added.) Article XIII D, section 6, subdivision (d) provides that "[b]eginning July 1, 1997, all fees or charges shall comply with this section."

The District contends that maintaining the Water Supply Charge at existing rates does not amount to an extension of a fee or charge because the Ordinance does not have a *fixed* sunset date. Petitioners argue that the District extended the Water Supply Charge when it renewed the charge at each annual Board meeting. Government Code section 53750, enacted as part of the Proposition 218 Omnibus Implementation Act, states that when applied to an existing tax or fee or charge, "extended" means "a decision by an agency to extend the stated effective period for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date." (Gov. Code, § 53750, subd. (e).) Although the Ordinance states it "shall not have a sunset date, the use of the phrase "including, but not limited to" is generally a term of enlargement. (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1228.) Therefore, although the Ordinance does not have a specific sunset date that can be amended or removed, that is not dispositive. Here, where the Ordinance at issue specifically provides for an annual review of a charge to determine if it is still needed and the amount is still appropriate, the annual decision to continue imposing the Water Supply Charge constitutes an extension of the charge.

The court is not persuaded by Respondent's argument that there would be a perpetual election season if Proposition 218's notice, hearing, protest and election requirements were applied to the mere continued existence of a fee. By its clear terms, Article XIII D, section 6, subdivision (a)'s notice and hearing requirements only apply to "New or Increased Fees and Charges," and not to fees and charges that merely continue to exist. Nor is there any merit to the District's assertion that the language in subdivision (d) merely directs "agencies [to] conform existing fees to the requirements of subdivision (b)(1) through (b)(5) by the stated date of July 1, 1997" citing *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 924.

The *Howard Jarvis* court did not hold that Article XIII D, section 6, subdivision (d) only requires agencies to conform fees that existed at the time of Proposition 218's enactment of the requirements for fees and charges under subdivision (b). Rather, in the face of the City of Fresno's contention its in lieu fee was not a "fee" because it had not been formally extended, the court held that "Section 6, subdivision (b) requires that a city or agency that acts to extend, impose, or increase a fee after the effective date of Proposition 218 must comply with the requirements of

subdivision (b)(1) through (5)" and that "section 6, subdivision (d) clearly requires, *in addition*, that cities and other agencies conform existing fees to the requirements of subdivision (b)(1) through (b)(5) by the stated date of July 1, 1997." (127 Cal.App.4th at 924, emphasis added.) As such, the *Howard Jarvis* court did not state that subdivision (d) *only* applies to charges already in existence when Proposition 218 was enacted. Nor would such an interpretation make sense because the plain language of that provision states without limitation that "[b]eginning July 1, 1997, ***all*** fees or charges shall comply with this section." (Cal. Const., art. XIII D, § 6, subd. (d), emphasis added.)

Additionally, the District suggests that because the Sixth District Court of Appeal found that the Water Supply Charge complied with Proposition 218 when it was first enacted, that charge is forever immunized from further challenge. Once again, the language of Article XIII D, section 6, subdivision (b) indicates that the requirements are ongoing. Therefore, the Court does not interpret Article XIII D's provisions as suggesting a charge can somehow be insulated from further review simply because it was deemed to be in compliance with Proposition 218 at one point in time.

Notwithstanding the above, the court agrees with the District that its ongoing imposition of the Water Supply Charge does not violate Proposition 218. It does not appear to the court that the Water Supply Charge has been utilized for a "purpose other than that for which the fee or charge was imposed" under Article XIII D, section 6, subdivision (b)(2). The findings in the Ordinance state the "purpose [of the ordinance]…is to replace and augment the former charge collected by CAW on its bills to water customers with a supply charge collected from owners of parcels that receive from the District through CAW's distribution system." (Ordinance, Findings, ¶ 10.) The findings also state the "Supply Charge proceeds will be expended only to fund water supply services and for no other purpose." (*Id.* at ¶ 18.) As for the substantive portion of the Ordinance, Section Three lists the "Purposes" as follows:

> Proceeds of the charge imposed by this Ordinance may only be used to fund District water supply activities, including capital acquisition and operational costs for Aquifer Storage and Recovery (ASR) and Groundwater Replenishment (GWR) purposes, as well as studies related to project(s) necessary to ensure sufficient water is available for present beneficial water use in the main CAW system. In addition to direct costs of the projects, proceeds of this annual water supply charge may also be expended to ensure sufficient water is available for present beneficial use or uses,

> including water supply management, water demand management, water augmentation program expenses such as planning for, acquiring and/or reserving augmented water supply capacity, including engineering, hydrologic, legal, geologic, financial, and property acquisition, and for reserves to meet the cash-flow needs of the District and to otherwise provide for the cost to provide services for which the charge is imposed.

There is no indication the Water Supply Charge has not been used for the purpose of replacing the User Fee and funding the District's water supply activities. In fact, the record indicates the Water Supply Charge has likely *not* been used for any purposes other than to fund water supply activities because the revenues from the charge have not even been sufficient to cover water supply costs. (See, e.g., 10/19/20 District Board Meeting Transcript [indicating there are loans the District took out to fund aquifer storage and recovery along with "inter-fund borrowing for water supply projects," and further stating the District has "funded the water supply projects to date at a deficit to the water-supply charge"]; 2013-2020 Water Supply Charge Revenue & Expenditures [indicating the District's expenditures for water supply costs have always exceeded the proceeds of the Water Supply Charge].)

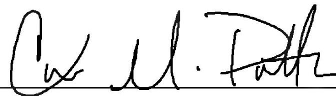
As such, the Court finds that no violation of Proposition 218 occurred.

V. Disposition

Accordingly, the Petition for Writ of Mandate is granted solely on the basis that the continued collection of the Water Supply Charge, after the User Fee was reinstated and collected on the Cal-Am bill, violated the Ordinance's Sunset Provision. The District is ordered to cease the imposition and collection of the Water Supply Charge by the amount of the User Fee.

IT IS SO ORDERED.

Date: 3/3/2023



The Honorable Carrie M. Panetta
Judge of the Superior Court

Ordinance No. 152 Citizen's Oversight Panel
April 19, 2023, Item No. 3
As Referenced in the Staff Note, this Order and Request for Declaratory Relief was shared with the Panel Members of the Ordinance No. 152 Citizen's Oversight Panel