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Agenda Item: ID17-458 (11:00 A.M.#2)

Date: 4/6/17

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Supplemental Information Packet

Agenda Related Item(s) – ID17-458 (11:00 A.M.#2.)

Contents of Supplement: Letter from John Kinsey of Wanger Jones Helsley PC, Attorneys

Item(s)

Actions pertaining to proposed water capacity fees (Citywide):

1. CONTINUED HEARING regarding the proposed Water Capacity Fees.
2. BILL - (For introduction) - Amending Article 5 of Chapter 6 of the Fresno Municipal Code and Article 4.5 of Chapter 12 to repeal various fees associated with providing water capacity for new and expanded connections to the water system and create a new Water Capacity Fee classification, and to adopt Water Capacity Fees as proposed by and justified in the nexus study prepared by Bartle Wells Associates.
3. ***RESOLUTION - 530th amendment to the Master Fee Resolution No. 80-420 adopting Water Capacity Fees under the Public Utilities Section.

Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2)). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

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The meeting room is accessible to the physically disabled, and the services of a translator can be made available. Requests for additional accommodations for the disabled, sign language interpreters, assistive listening devices, or translators should be made one week prior to the meeting. Please call City Clerk's Office at 621-7650. Please keep the doorways, aisles and wheelchair seating areas open and accessible. If you need assistance with seating because of a disability, please see Security.

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April 5, 2017

VIA EMAIL & HAND DELIVERY

Honorable Members of the City Council
c/o Yvonne Spence, City Clerk
City of Fresno
2600 Fresno Street
Fresno, California 93721

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Re: Fresno City Council Agenda Item No. ID17-458:
Actions Pertaining to Proposed Water Capacity Fees

Dear Honorable Members of the Fresno City Council:

My law firm is submitting this letter on behalf of Granville Homes (“Granville”) and Wathen Castanos Homes (“Wathen Castanos”) in connection with the City’s consideration of proposed water capacity fees (the “Proposed Capacity Fees”), including the adoption of Bill No. B-15 and Master Fee Resolution No. 80-420. For each of the reasons set forth below, Granville and Wathen Castanos respectfully request that the City decline to adopt the Proposed Capacity Fees until such time as City engages in a process that (i) ensures the Proposed Capacity Fees will “not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed,” (Govt. Code, § 66013, subd. (a)), (ii) complies with the City’s obligations under the California Constitution, and (iii) fully analyzes the potential impacts of the project under the California Environmental Quality Act, Public Resources Code, § 21000, *et seq.* (“CEQA”).

A. The Proposed Capacity Fees Constitute a “Project” Under CEQA

The March 31, 2017, Staff Report takes the position that the Proposed Capacity Fees do not constitute a “project” under CEQA because the fees allegedly do not have the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (See Pub. Resources Code, § 21065;

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CEQA Guidelines, § 15378(a).) The Staff Report also claims that the Proposed Capacity Fees are merely a government funding mechanism that does not involve any commitment on behalf of the City to any specific project that may result in a potentially significant physical impact on the environment. (CEQA Guidelines, § 15378(b)(4).)

CEQA, however, defines the term “project” as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (CEQA Guidelines, § 15378(a).) The term “project” “is *broadly construed* and applied in order to *maximize protection of the environment*,” (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271 [emphasis added]), and the lead agency must consider “the effects, both individual and *collective*, of all activities involved in [the] project.” (Pub. Resources Code, § 21002.1, subd. (d); *cf. City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1450 [the project description must describe the entire project]; Pub. Res. Code, § 21002.1(d) [CEQA requires the lead agency to “consider[] the effects, both individual and *collective*, of *all activities involved in [the] project*”] [emphasis added].)

In this case, the Water Capacity Fee Study supporting the Proposed Capacity Fees specifically recognizes that the “City plans to construct additional surface water system improvements,” which include the “NE Surface Water Treatment Plant Expansion (30 mgd to 60 mgd).” (Water Capacity Fee Study at 11.) The entire purpose of the Water Capacity Fee Study is to establish a constitutional nexus between the fee imposed and the cost of particular infrastructure, (see Cal. Const., art. XIII X § 1, subd. (e) [stating the burden is on the local agency to show “the amount [of the fee or charge] is no more than necessary to cover the reasonable costs of the governmental activity”]), which specifically includes the NESWTP Expansion. This requirement is enforced by audit and Section 66013(c) itself, which mandates that the City may expend the fees collected “*solely* for the purposes for which the charges were collected.” (Govt. Code, § 66013, subd. (c) [emphasis added].) Simply put, the NESWTP is part of the “whole” of the “action” being considered as part of the Proposed Capacity Fees, and thus must be analyzed under CEQA.¹

In addition, in the event the City approves the Proposed Capacity Fees, the City would be committing itself to a “definite course of action” in regard to the infrastructure improvements, (see CEQA Guidelines, § 15352(a)), including the NESWTP Expansion, and

¹ By declining to evaluate the NESWTP Expansion until an earlier date, the City is also impermissibly deferring environmental review. The City is also attempting to piecemeal environmental review. The “requirements of CEQA cannot be avoided by piecemeal review which results from chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.” (*Env’t Prot. Info. Ctr. v. Calif. Dept. of Forestry & Fire Prot.* (2008) 44 Cal.4th 459, 503.) CEQA, therefore, “forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs* (2011) 91 Cal.App.4th 1344, 1358.)

would thus be “approving” those facilities for purposes of CEQA. (See Pub. Resources Code, § 21080, subd. (a); CEQA Guidelines, §§ 15004; *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116; *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 566; *RiverWatch v. Olivenhain Muni. Water Distr.* (2009) 170 Cal.App.4th 1186.) The fact that the City may seek other approvals for the NESWTP Expansion at a later date is irrelevant. “Just as CEQA itself requires environmental review before a project’s approval, not necessarily its *final* approval [citations], so the guideline defines ‘approval’ as occurring when the agency *first* exercises its discretion to execute a contract or grant financial assistance, not when the *last* such discretionary decision is made.” (*POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681, 726 [citing *Save Tara, supra*, 45 Cal.4th at 134].)²

The NESWTP Expansion is plainly contemplated as an action that will be facilitated by the Proposed Capacity Fees. Under the California Constitution and Section 66013, the funds provided under the Proposed Capacity Charges can only be used for the NESWTP Expansion and related infrastructure. As a result, the NESWTP Expansion is part of the “project,” and the City’s consideration of the Proposed Capacity Fees constitutes the “approval” of infrastructure improvements, including the NESWTP Expansion, under CEQA. The Proposed Capacity Fees therefore constitute a “project” under CEQA, and the City cannot rely upon Section 15378 or any exemption³ to shield the analysis of the Proposed Capacity Fees (and the NESWTP Expansion) from environmental review.

B. If the Proposed Capacity Fees are Not a Project Under “CEQA,” the City Cannot Meet its Burden of Establishing a Constitutional Nexus Between the Fee and the Governmental Activity at Issue

The March 31, 2017, Staff Report takes the position that the Proposed Capacity Fees do not constitute a “project” under CEQA because the fees are “intended to fund as-yet unknown, future projects and programs, which may include potential infrastructure related to growth.” (Staff Report at 10.) First, this assertion is contrary to the Water Capacity Fee Study, which specifically states that the “City plans to construct additional surface water system improvements,” including the “NE Surface Water Treatment Plant Expansion (30 mgd to 60

² Even if the NESWTP Expansion was not specifically identified in the Water Capacity Fee Study as part of the “whole” of the “action,” (*cf.* CEQA Guidelines, § 15378(a)), it must still be analyzed as a cumulative impact associated with a reasonably foreseeable environmental effect of the project. “Cumulative impacts” are “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” (CEQA Guidelines, § 15355.) Notably, the “[c]umulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable future *projects.*” (CEQA Guidelines, § 15355(b) [emphasis added].)

³ Several commenting parties have addressed other exemptions upon which the City has sought to rely for the Proposed Capacity Fees. This letter incorporates those comments as if fully set forth herein.

mgd).” (Water Capacity Fee Study at 11.) This position is also contrary to the City’s legal obligations under Section 66013 of the Government Code and the California Constitution, which require, *inter alia*, that the fees imposed are “no more than necessary to cover the reasonable costs of the governmental activity,” and “bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, *the governmental activity*.” (Cal. Const., art. XIII X § 1, subd. (e) [emphasis added]; see also Govt. Code, § 66013.) The “governmental activity” at issue here includes the NESWTP Expansion. Thus, if the City contends the Proposed Capacity Fees are not a “project” under CEQA because those fees are “intended to fund as-yet unknown, future projects and programs,” (Water Capacity Fee Study at 11), the City cannot meet its burden of establishing the requisite constitutional nexus between the fee and the “governmental activity” at issue. (See Cal. Const., art. XIII X § 1, subd. (e); see also Govt. Code, §§ 50067, 66013.)

C. A 2/3 Vote of the City’s Qualified Electors Is Required Because the Charges Under the Proposed Capacity Fees Would Exceed the Reasonable Cost of Providing Service

Section 66013(a) provides that when a local agency, such as the City, “imposes fees for water connections . . . or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed,” unless approved by 2/3 of the City’s qualified electors. (Govt. Code, § 66013, subd. (a).) The City also “bears the burden of proving by a preponderance of the evidence that . . . the amount [of the fee or charge] is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.” (Cal. Const., art. XIII X § 1, subd. (e).)

In this case, the Proposed Capacity Fees far exceed the “estimated reasonable cost of providing the service” at issue, and do not “bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity,” for the following reasons:

- The Water Capacity Fee Study and the Staff Report suggest that the existing capacity of the NESWTP of 30 mgd “benefits existing ratepayers.” (Water Capacity Fee Study at 6.) The Study, however, goes on to say that the Proposed Capacity Fees would “require[] new development to fund the next phase of surface water system improvements needed to meet the capacity needs for serving the next phase of growth.” (*Id.* at 6.) There is no evidence supporting the assertion that these improvements, and in particular the NESWTP Expansion, are “needed to meet the capacity needs for serving the next phase of growth.” Without any such evidence, the City cannot meet its burden of proving that the amount of the fee is no more than necessary to cover the costs of the activity, and that the costs bear a reasonable relationship to the impacts of the new connections.

- There is also no evidence that existing ratepayers will not benefit from the NESWTP Expansion, and thus that the costs of the expansion should be borne fully by new connections. According to the Water Capacity Fee Study, 30 mgd equals 33,600 AF, which is approximately 100,000 AF less than the City’s existing demand. Through the NESWTP

Expansion, the amount of surface water that could be used directly (instead of recharged) would still be under the City's total water demand, strongly suggesting that existing connections would also benefit from the NESWTP Expansion.

- If, in contrast, the existing 30 mgd capacity of the NESWTP, in conjunction with the Southeast facility, is sufficient to meet the existing needs of the City, there is no evidence or analysis: (i) suggesting that the NESWTP Expansion would be necessary to adequately serve new connections, (ii) as to what extent the NESWTP Expansion is necessary to serve new connections, and (iii) what capacity is needed to adequately serve new connections (as there is no evidence to support the notion that new connections would require 30 mgd or 33,600 AF of treated surface water).

- One of the issues identified in the Water Capacity Fee Study as a need for the Proposed Capacity Fees was the Sustainable Groundwater Management Act of 2014 ("SGMA"), which requires the formation of local agencies (known as "Groundwater Sustainability Agencies") that will ultimately monitor and evaluate overdraft within the subbasin, and adopt Groundwater Sustainability Plans identifying and adopting measures needed to achieve the sustainable yield. The City of Fresno is a member of the North Kings GSA, which only recently provided notice of formation to the Department of Water Resources. The North Kings GSA has not yet adopted a GSP or any implementation measure within a GSP. Until such time as the North Kings GSA formally identifies the subbasin's sustainable yield, and specifies what measures the City must implement as a member of the North Kings GSA to help achieve sustainable yield, it is presently unknown whether displacing groundwater recharge with direct surface water use (particularly through the proposed NESWTP Expansion) will even be a necessary or effective measure for the City to meet its obligations under SGMA and/or the GSP. As such, the City cannot show the burdens of new connections will result in impacts that would necessitate the NESWTP Expansion.

- Moreover, the City's own documents show that, with the presently permitted capacity of the NESWTP of 30 mgd, the City is projected to remain within its "safe yield" through 2035, and that the aquifer underlying the City would not be in a state of overdraft without the NESWTP Expansion. (See **Exhibit "A."**) In other words, the NESWTP Expansion is unnecessary for the City to remain within its "safe" or "sustainable yield," and the costs for the NESWTP Expansion do not bear a fair or reasonable relationship to the burdens of new connections on the City's water supply.

- According to the City's documents, the NESWTP Expansion may not have any impact on the City's "safe yield" or "sustainable yield" under SGMA. This is because the NESWTP admittedly "does not directly provide a new supply" of water, "but allows the City to utilize the supply for direct use rather than" groundwater recharge. (City of Fresno's 2015 Urban

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Water Management Plan⁴ [the “UWMP”] at 6-28.) In other words, the NESWTP Expansion would merely displace groundwater recharge with the direct use of surface water.

- The UWMP shows that in 2015 – perhaps the most challenging year with respect to water supply in California’s history – the City’s actual water used was 128,088 AF, while the City’s water supplies totaled 233,903 AF. (See UWMP at 6-30.) In other words, due to intentional recharge efforts and other measures, the City’s actual 2015 water use was far below the volume at which the City would no longer be in balance. As such, the costs for the NESWTP Expansion do not bear a fair or reasonable relationship to the burdens of new connections on the City’s water supply.

- According to the UWMP, the NESWTP (including the expansion) is expected to displace groundwater recharge with 103,000 AF in surface water usage. (UWMP at 6-29.) Even if it were “new yield” – and it is not – the 103,000 AF is lower than the difference between the City’s 2015 water supplies of 233,903 AF and the City’s actual usage of 128,088. (UWMP at 6-29.) Thus, it is unclear (and unexplained) how new development is causing any impact that would require the displacement of 103,000 AF available for groundwater recharge with direct surface water usage. The City thus cannot meet its burden of proving the charges are commensurate with “estimated reasonable cost of providing the service,” and “bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.”⁵

- In its 2035 General Plan Master EIR,⁶ the City estimated that in 2035, “based on a population of 780,600,” the City would have a demand of 218,596 AF/year. (City of Fresno,

⁴ The City of Fresno’s 2015 Urban Water Management Plan is available for review at https://wuedata.water.ca.gov/public/uwmp_attachments/2174955070/City%20of%20Fresno%202015%20UWMP_adopted.pdf (last visited April 4, 2017). This document should be included, in its entirety, in the administrative record. (See Pub. Resources Code, § 21167.6, subd. (e); *Consolidated Irrig. Distr. v. Superior Court* (2012) 205 Cal.App.4th 697, 724-25.)

⁵ None of the documents presented explain how the excess water available under the City’s surface water entitlements is presently being used, although the documents generally reference banking activities and groundwater recharge. Nor do any of the documents explain how the City’s banking activities assist the City in balancing the City’s water supplies. Without this information, it is impossible to determine to what extent, if any, the NESWTP Expansion bears a relationship to new connections.

⁶ The MEIR is available for review at <https://www.fresno.gov/darm/wp-content/uploads/sites/10/2017/01/FullMEIR3918pages.pdf> (last visited April 4, 2017). The City’s 2035 General Plan, in turn, is available for review at <https://www.fresno.gov/darm/wp-content/uploads/sites/10/2016/11/consolidatedGP.pdf> (last visited April 4, 2017). These documents should be included, in their entirety, in the administrative record. (See Pub. Resources Code, § 21167.6, subd. (e); *Consolidated Irrig. Distr.*, *supra*, 205 Cal.App.4th at 724-25.)

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Master EIR, 2035 General Plan at 5.15-41.) This is far less than the City's total water supplies in 2015 (a historically dry year), and far less than the City's projected total water supply in 2035 of 269,700 AF/year. (*Id.* at 5.15-42.) Because projected water usage in 2035 would be far less than its supplies under even 2015 conditions, and due to the recharge and banking activities available to the City, the costs for the NESWTP Expansion do not bear a fair or reasonable relationship to the burdens of new connections on the City's water supply.

- Even under full build-out of the 2035 General Plan, with the population of Fresno nearly doubling to 900,000, the total projected water supply would be only 2,000 AF/year less projected water use of 271,594 AF/year. (See *id.* at 5.15-41, -42.) Moreover, this 2,000 AF/year shortfall would be captured by Mitigation Measure USS-21, which requires the construction of a 25,000 AF/year tertiary recycled water expansion to the Fresno-Clovis Regional Wastewater Reclamation Facility in accordance with the January 2012 City of Fresno Metropolitan Water Resources Management Plan." (*Id.* at 5.15-43-44.) In other words, the NESWTP Expansion is unnecessary for the City to remain within the "safe yield" of the aquifer, and the costs for the NESWTP Expansion do not bear a fair or reasonable relationship to the burdens of new connections on the City's water supply.

- The City does not anticipate the NESWTP Expansion will be operational until 2035. (See UWMP at 6-28.) Thus, the 30 mgd capacity added through the NESWTP Expansion is not actually necessary to accommodate growth contemplated under the 2035 General Plan.

- The March 9, 2017, PowerPoint concerning the Proposed Capacity Fees states that the revenue from the fee would be allocated 50% toward debt service and 50% toward developer reimbursements. While the PowerPoint suggests that some revenue would go toward "water system facility improvements to benefit new growth," the 50% allocation for both debt service and development reimbursements would preclude the revenues from being used to support the infrastructure identified in the Water Capacity Fee Study. In any event, it appears the City is contemplating using the fees for purposes substantially different from those identified in the Water Capacity Fee Study, and as such the fees are not aligned with the reasonable cost of providing the service at issue, bear no relationship on the burden associated with new connections, and also violate Section 66013(c).

In short, the Proposed Capacity Fees far exceed the "estimated reasonable cost of providing the service" at issue, and do not "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." The City should not adopt the Proposed Capacity Fees until such time as the City has complied with its constitutional and statutory obligations.⁷

⁷ For similar reasons, the Proposed Capacity Fees also constitute a "special tax" requiring a 2/3 vote of qualified electors because the fees it imposes would "exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged" (Govt. Code, § 50076.) In addition, the fees are unlawful because they are not "imposed for a specific government service or product provided directly to the payor that is not provided to those not

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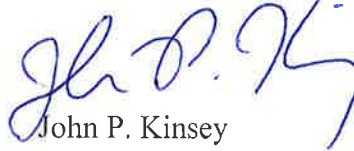
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D. Conclusion

For each of the foregoing reasons, Granville and Wathen Castanos respectfully request that the City decline to approve the Proposed Capacity Fees until such time as the City has fully complied with CEQA, and sufficiently establishes a constitutional nexus between the fees and the activity at issue.

Respectfully submitted,

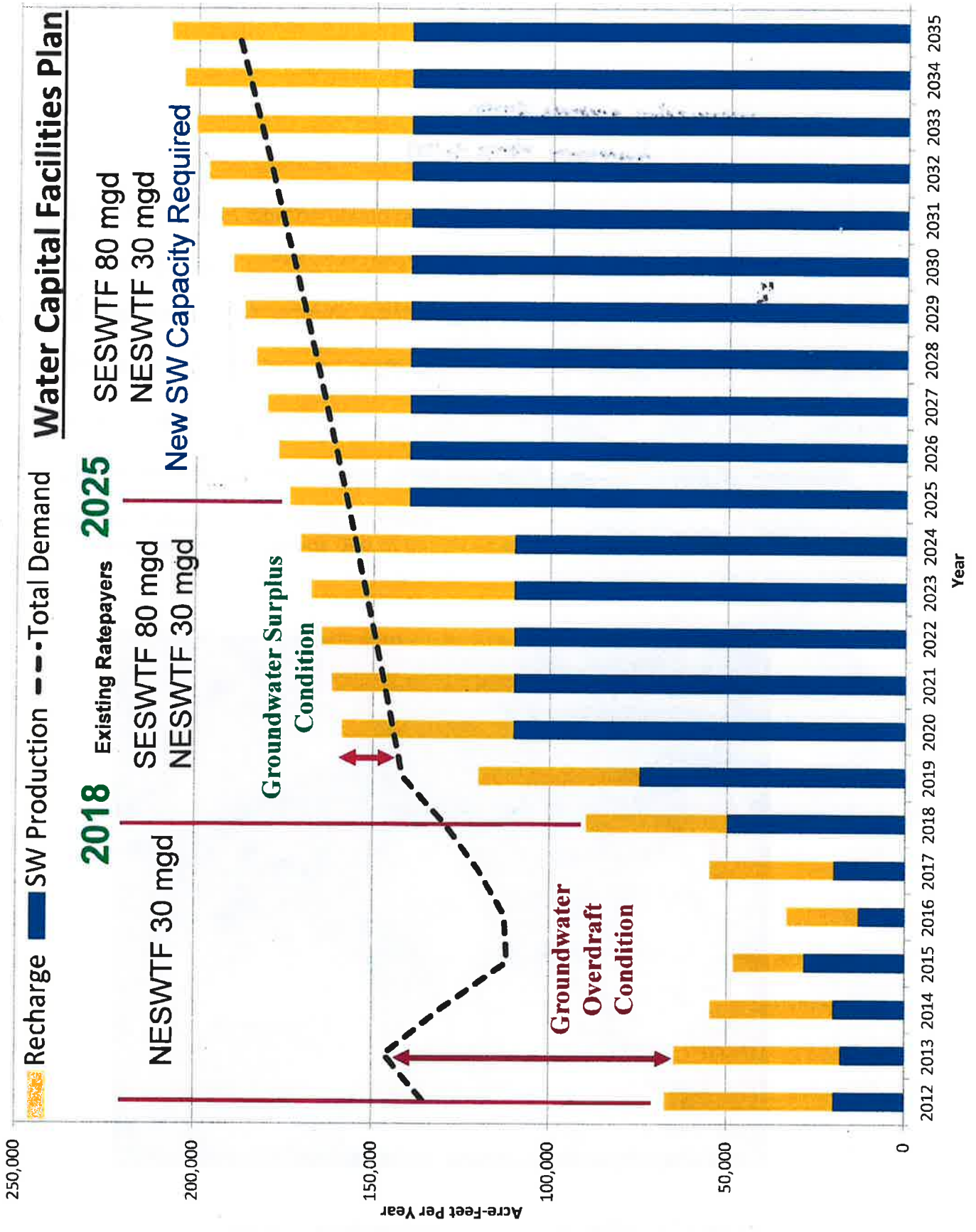


John P. Kinsey

cc: Darius Assemi, Granville Homes
Jeff Roberts, Granville Homes
Josh Peterson, Wathen Castanos Homes

Enclosure

charged” and they “exceed the reasonable costs to the local government of providing the service or product.” (See Cal. Const., art. XIII C, § 1, subd. (e)(2).)



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