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McCORMICK
BARSTOW LLP
ATTORNEYS AT LAW

Jeffrey M. Reid
Partner
(Admitted in California, Virginia
and District of Columbia)
(559) 433-2310
jeff.reid@mccormickbarstow.com

FRESNO, CA OFFICE
7647 North Fresno Street
Fresno, CA 93720
P.O. Box 28912
Fresno, CA 93729-8912
Telephone (559) 433-1300
Fax (559) 433-2300

Other offices of
McCORMICK, BARSTOW, SHEPPARD
WAYTE AND CARRUTH, LLP

www.mccormickbarstow.com

CINCINNATI, OH OFFICE
Scripps Center, Suite 1050
312 Walnut Street
Cincinnati, Ohio 45202
Telephone (513) 762-7520
Fax (513) 762-7521

DENVER, CO OFFICE
999 18th Street, Suite 3000
Denver, Colorado 80202
Telephone (720) 282-8126
Fax (720) 282-8127

LAS VEGAS, NV OFFICE
8337 West Sunset Road, Suite 350
Las Vegas, Nevada 89113
Telephone (702) 949-1100
Fax (702) 949-1101

MODESTO, CA OFFICE
1125 I Street, Suite 1
Modesto, California 95354
Telephone (209) 524-1100
Fax (209) 524-1188

December 2, 2016

City Council President Paul Caprioglio
City Council Vice President Sal Quintero
Councilmember Oliver L. Baines, III
Councilmember Lee Brand
Councilmember Steve Brandau
Councilmember Clinton J. Olivier
Councilmember Esmeralda Z. Soria
City Clerk Yvonne Spence, CMC
Fresno City Hall
2600 Fresno Street
Fresno, California 93721

Re: Proposed Adoption of Citywide Water Capacity Fee

Dear Councilmembers:

I represent the BIA of Fresno/Madera Counties, Inc., and submit this letter on behalf of my client and on behalf of its several members who own property, or interests in property, that benefit from vested rights. Such vested rights arise from the California Subdivision Map Act and the Fresno Municipal Code. The rights relate to vesting tentative maps and vesting tentative parcel maps that have previously been accepted for filing by the City (the "Vested Maps"). Such rights may also exist under the terms of Development Agreements that provide protections against changes in City policies.

Based on a Notice published on November 21, 2016, we were advised that your Council intends to hold a hearing on Thursday, December 8, 2016 concerning adoption of a Citywide Water Capacity Fee. The purpose of this letter is to detail why any proposal to apply the proposed Citywide Water Capacity Fee to such Vested Maps is improper and subject to legal challenge. Please include this letter in the record of proceedings for the hearing that is to be conducted on that matter.

1. **Uncertainty of Council's Intended Deliberations.**

I wish to emphasize that, based on the published Notice and the materials referenced in that Notice, it is not entirely clear that your Council intends to impose the proposed Citywide Water Capacity Fee to such Vested Maps. The Notice references "modifications" of water capacity fee structures, and a "transition from area-based water capacity fees to a Citywide water capacity fee." As a result, the Notice acknowledges that the proposal would change existing City policies. It is not a mere increase in an existing fee. It is the kind of policy change that vesting rights provided to the Vested Maps are intended to specifically protect against.

In addition, page 19 of the report prepared by Bartle Wells Associates dated August 26, 2016 (the "Fee Study") (which is the report that includes certain data that the Notice refers to) details important considerations affecting Vested Maps. The Fee Study acknowledges that the Citywide Water Capacity Fee is a change in policy that

is otherwise protected against by vesting rights. However, it suggests that the City consider adopting a special finding pursuant to Government Code Section 66498.1(c)(1) to void the vesting rights of the Vested Maps. For reasons detailed below, the legal basis to adopt the findings recommended by Fee Study do not exist. Furthermore, the findings required under Government Code Section 66498.1(c)(1) are not referenced in the published Notice. The Notice therefore appears legally insufficient to support the consideration and adoption of such findings.

It is therefore uncertain as to whether your Council intends to take up a proposal to ignore or void the rights provided by law to the Vested Maps. We hope that such is not the case. Nevertheless, because of the significant adverse consequences that such action would create for property owners with Vested Maps, the lack of clear assurances from City staff concerning its intended recommendations, and the substantial legal claims that would result, we are compelled to set forth the legal objections to any such proposal.

2. Purposes of Vested Rights.

This matter involves legislative policies that exist because "[t]he private sector should be able to rely upon an approved vesting tentative map prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency, provided the time periods established [by the Subdivision Map Act] have not elapsed the private sector can rely upon an approved vesting tentative map prior too expending resources." (Government Code Section 66498.9; *Bright Development v. City of Tracy* (1993) 20 CalApp.4th 783, 729).

As a result, a subdivider who files a vesting tentative map application has a vested right to proceed with development in substantial compliance with the ordinances polices and standards in effect on the date that the subdivider's application was deemed complete. (Government Code Section 66774.2(a)). Fresno Municipal Ordinances have adopted similar vesting rights for applicants of vesting parcel maps. (Fresno Municipal Code Section 15-3401). Similar rights exist for parties who have entered into development agreements under the authorities of Government Code Section 65864 et seq.

3. The Citywide Water Capacity Fee is a Change In Policy.

The City's current program for assuring development of water facilities to support new development was adopted as part of the Urban Growth Management (UGM) program. That water supply feature of the UGM program is part of the City of Fresno Ordinances at Section 6-513.

The UGM Water Supply program has many facets that are very different from those that would apply under the proposed Citywide Water Capacity Fee. Among the differences are that the UGM program adopts Water Supply Areas, and fees to provide facilities for each Water Supply Area to construct wells, water supply

facilities, or equivalent water delivery facilities to be constructed in the separate UGM Water Supply Area.

Water Supply Areas can be single well areas or multiple well areas and the fees are allocated based on the per acre area of the supply area. Fees collected from development are retained in separate funds for each Supply Area, and made available to reimburse developers in that specific Supply Area on a first in-first out basis.

The Citywide Water Capacity Fee abolishes the UGM program of adopting Water Supply Areas and of relating the fee levy amounts required to support water supply facilities in the Water Supply Area. Fees are instead to now be levied based on meter sizes and total number of meters in a development, not acreage. Reimbursements are not apportioned based on the Water Supply Area and are not to be allocated on a first in-first out basis.

The two programs are substantially different. The Citywide Water Capacity Fee jettisons a program concerning water supply fees and water supply facility development that has existed for many decades. The new policies under the Citywide Water Capacity Fee impose substantially greater and different obligations on subdividers with Vested Maps and Development Agreements. The prior notice and reliance rights intended to be protected by vested rights established for Vesting Tentative Maps, Vesting Parcel Maps, and Development Agreements, are thereby violated. (*Kaufman & Broad Central Valley, Inc., v. City of Modesto* (1994) 25 Cal.App.4th 1577, 1588).

The Fee Study states that it is intending to support fees for facilities recommended in a 2011 Study prepared by the City of Fresno, entitled Metropolitan Water Resources Management Plan – Phase 3 Implementation Plan (the "Metro Plan Update"). The Metro Plan Update, however, did not recommend or require the abolition of the UGM Water Supply program. In fact, the Metro Plan Update specifically referenced the UGM Water Supply program and suggested that updates to fee schedules may be appropriate. (Metro Plan Update, at pages ES-8 and 3-6).

The actions intended by adoption of the Citywide Water Capacity Fee are clearly not the mere implementation of a previously existing fee escalation policy that updates, based on an ascertainable standard, a previously existing fee. If that were the case, no violation of vested rights would arise because the continuation of existing policies are not protected by vested rights. Because the Citywide Water Capacity Fee fundamentally transforms existing City policies concerning its water capacity fee program, the Vested Maps are entitled to develop without the burdens imposed under the new program. (*Kaufman & Broad Central Valley, Inc., v. City of Modesto, supra*)¹.

¹ Government Code Section 66474.2 allows a change in policy adopted *after* a vesting tentative map applications is deemed complete, to be applied to vesting maps where the policy change has been formally initiated through an adopted resolution, and a published notice of such intent before the vested map

4. No Legal Basis Exists to Adopt Findings Under Government Code Section 66498.1(c)(1).

As noted above, in apparent recognition that the Citywide Water Capacity Fee is a new policy and program, the Fee Study suggests an alternative mechanism to void the substantial benefits and legal protections accorded the Vested Maps. However, the legal standards required by the Fee Study's recommended strategies do not exist.

Government Code Section 66498.1(c)(1) allows a local agency to impose a new condition on a vested map "if the failure to impose that new condition would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health and safety, or both"². The Fee Study, however, includes findings and recommendations that demonstrate that the Citywide Water Capacity Fee is not required to address a condition dangerous to health or safety.

One important aspect of the Fee Study is its allocation of a "Buy-In" for 20% of the "current value" of existing groundwater system capacities to be reimbursed by new development. This Buy-In totals \$232 million, and represents 60% of the total capital improvement costs for the Groundwater Distribution System allocated to Growth. It thereby represents 33% of the entire Citywide Water Capacity Fee, or \$2,061 of the proposed \$6,373 fee for each new residential home.

Therefore, nearly 1/3 of the entire Citywide Water Capacity Fee is to collect costs from new development *for capacities that already exist in the existing system*. There can be no immediate health and safety need to assure that such capacities are developed, because they already exist.

In addition, as noted above, the Citywide Water Capacity Fee has a stated purpose of funding facilities recommended by Metro Plan Update. However, the Metro Plan Update acknowledged that the facilities it recommended could be (and would be) funded under the existing UGM Water Supply Program (subject to fee escalations). Therefore, the several facets of the Citywide Water Capacity Fee that adopt

application has been accepted as complete. There is no evidence in the Notice or other record of such a policy change being initiated in that manner. Therefore, all vested map applications that are accepted as complete up until the date of the adoption of the proposed new Citywide Water Capacity Fee policy benefit from the vested rights.

² Government Code Section 66498.1(c)(2) also allows the imposition of new condition where it is required in order to comply with state or federal law. The Notice and the Fee Study make no reference to any claim the imposition of the changes proposed in City policies by the Citywide Water Capacity Fee are required to comply with state or federal law. Further, there is no legal support for such a claim. The UGM Water Supply program has existed for several decades and been effective in responding to multitude of changes in regulatory policies. Therefore, any determination that the UGM program could not accommodate recent changes in regulatory policies, including the Sustainable Groundwater Management Act, would be an unreasonable abuse of discretion.

significant policy changes for the City are not required to fund the facilities recommended by the Metro Plan Update. The Citywide Water Capacity Fee, and its revised policies, are not required to address any immediate health and safety need. Nor are those policy revisions required to assure that required water supply facilities are developed.

The revisions to the City policies recommended by the consultants who prepared the Fee Study may be useful and beneficial to the City for its ease of administration. They may also be better suited for the attainment of other policy goals. Nevertheless, they are not necessary for addressing a condition dangerous to the health and safety of the community. For that reason, the standards of Government Code Section 66498.1(c)(1) cannot be satisfied.

5. The Proposed Increase In Water Supply Fees Are of Such Enormity That Equities and Public Policy Support Protection of Established Vested Rights.

Even if the City staff and City Attorney dispute the analysis and conclusions set forth above, your Council should nevertheless exercise its own discretion to reject proposals to impose the new Citywide Water Capacity Fee program on Vested Maps. Among the other reasons, the increase in such fees is unnecessarily enormous and thereby unjust to those who invested in vested map developments in reliance upon existing City policies.

Page 21 of the Fee Study sets forth an illustration of how the implementation of the Citywide Water Capacity Fee program compares with the implementation of the existing UGM program. That example shows that a UGM residential development in Southeast Fresno will increase from \$215,238.00 to \$605,435.00, a nearly 300% increase.

It is acknowledged that the Citywide Water Capacity Fee intends to fund development of some facilities that the UGM Water Supply program does not presently fund. One such element is the Northeast Surface Water Treatment Plant capacity expansion. However, expansion of the Northeast Surface Water Treatment Plant does not appear required to support development otherwise presently authorized by Vested Maps in Southeast Fresno (or in any other part of the community).

In addition, the Council should carefully consider and evaluate the Fee Study's allocation of a "Buy-In" for 20% of the "current value" of existing groundwater system capacities to be reimbursed by new development. This Buy-In totals \$232 million, and represents 33% of the entire Citywide Water Capacity Fee. It ignores the fact that prior new development, pursuant to existing UGM Water Supply policies, developed such infrastructure and intends that the new development pay for such improvements twice. Actually, it is much worse than a double payment collection, because that arrangement assumes the second payment is the same cost as the original payment. The Citywide Water Capacity Fee actually escalates the value of the

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existing improvements (previously paid for by new development) and then demands a second payment be paid based on this inflated value.

Regardless of the merits of a "Buy-In" policy on a going forward basis, it is an enormous impact on the total cost of the Citywide Water Capacity Fee. That feature of the Citywide Water Capacity Fee, on its own, is a significant illustration of the type of subsequent policy changes that frustrate project development. Even if you believe the City could legally support and defend voiding the rights of Vested Maps to impose the Citywide Water Capacity Fee's new program policies, the principles of fairness and equity that are the basis for adopted vested rights statutes and ordinances, recommend against it.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP


Jeffrey M. Reid