Agenda Item: ID17-0013 (10:15 A.M.#1)
Date: 3/09/17

FRESNO CITY COUNCIL

City of FRESNO

Supplemental Information Packet

Agenda Related Item(s) – ID17-0013 (10:15 A.M.#1)

Contents of Supplement: Letter from McCormick Barstow LLP, Attorneys at Law

Item(s)

Actions pertaining to proposed water capacity fees (Citywide):

1. Hold a public hearing regarding the proposed Water Capacity Fees.
2. Adopt findings that the proposed Water Capacity Fees and Municipal Code amendments are exempt from environmental review under a Statutory Exemption to the California Environmental Quality Act (CEQA) for rates, tolls, fares, and charges (pursuant to Public Resources Code section 21080(b)(8) and CEQA Guidelines section 15273(a)(4).
3. 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.
4. ***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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March 6, 2017

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Fresno City Hall
2600 Fresno Street
Fresno, California 93721

Re: Proposed Adoption of Citywide Water Capacity Fee
Agenda Item 10:15 A.M. #1, March 9, 2017 (ID17-0013)

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, in the City of Fresno and/or its sphere of influence. This letter specifically relates to the Water Capacity Fees proposed for adoption pursuant to the above referenced Agenda Item.

1. The Proposed Municipal Code Revisions Will Illegitimately Deny Reimbursement Rights and Fee Credits Where Water Facilities Are Mandated By The City.

The existing UGM program, as implemented by the existing Fresno Municipal Code, provides a developer the right to fee credits and reimbursement arrangements for specified water facilities constructed by the developer. These arrangements comply with California laws concerning nexus standards, and the requirements of the Subdivision Map Act that requires reimbursement to a developer where a local government mandates the installation of improvements that provide water capacity available to property outside the subdivision. (Government Code Section 66485).

Unfortunately, provisions in the 56 pages of proposed Fresno Municipal Code Revisions repeal that long-standing legal requirement in two specific circumstances. The proposal authorizes the City to require a Developer to construct water facility improvements, but nevertheless deny any right to a fee credit or reimbursement for those improvements. This is a significant legal and policy issue that is not addressed in the Staff Report.

a. Proposed Municipal Code Section 6-513(e)(1)(a) Adopts Unfettered Authorities to Deny Fee Credits and Reimbursements for Mandated Water Facility Installations.

Proposed Section 6-513(e)(1)(a) (at page 42 of Appendix A to the implementing Ordinance), provides the City Manager and City Council the right to require a developer to develop water supply facilities if the City makes a finding that ***"The water demands for the development can be served with a dedicated water supply facility that only serves that development"***. As a practical matter, that finding could be made for any subdivision development. The Ordinance imposes no standards or any other basis for limiting the authorities to adopt such a finding.[1]

Where that finding is adopted, the City intends to deny all rights to any reimbursement for those facilities. It also intends to deny credits against the Water Capacity Fee for the costs of installing those facilities.

Section 6-513(e)(1)(a) adopts policies that are entirely inappropriate, both legally and as a matter of long standing policy. They provide a right to impose special burdens on a nearly unfettered class of subdivisions. The authorities allow the City to require stand-alone water facility installations, while providing no credit against Water Capacity Fees and no reimbursements for extra capacity facilities. Those authorities violate nexus standards and Subdivision Map Act rights to obtain reimbursements under specified circumstances.

b. Municipal Code Section 6-513(e)(1)(b) Denies Fee Credits And Reimbursements If Development Is Alleged To Violate Undefined Standards Of "Orderly Development".

Proposed Municipal Code Section 6-513(e)(1)(b) (at page 42 of the draft Municipal Code Revision) involves many of the same legal and policy issues as those raised by Section 6-513(e)(1)(a) discussed above. It provides the City Council and City Manager to the right to require a developer to construct water supply facilities if the City makes a finding that ***"The proposed development is not consistent with the orderly sequence of development as defined in the City's then-current General Plan"***. Where that finding is made, the City intends to deny all Water Capacity Fee Credits and all reimbursement rights.

The problem is that the current General Plan does not include a definition of what constitutes an "orderly sequence of development". The Implementation Element of the 2035 General Plan does provide a map that is labeled "Sequencing of

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[1] At the December 8, 2016 Council hearing, staff advised that the proposed program provided an option ("Option 1") for a developer to elect to avoid the Water Capacity Fee by developing a standalone water service for their development. If Section 6-513(e)(1)(a) is what the Option 1 was intended to reference, it clearly misses the mark. Section 6-513(e)(1)(a) provides authorities solely to the Council and City Manager. It is not an election that can be made by a developer.

Development". That Map depicts Growth Areas 1 and 2. However, there is no statement of policy concerning when the "orderly sequence of development" would permit development in both Growth Areas 1 and 2. It simply states that the City will need to establish a method to monitor investment within infill area and Growth Area 1 prior to approving development in areas that are the subject of restrictions in the City/County MOU. When and how the sequencing into Growth Area 2 is triggered is nowhere detailed, except by this reference to the City/County MOU.

More importantly, where the City authorizes annexation of lands for development, it adopts findings that the development complies with the General Plan and the City/County MOU. These land use development entitlements address the City's growth policies. There is therefore no basis for the Water Capacity Fee program to impose special burdensome sanctions on City approved development patterns.

Where the City authorizes a development, it should not condition that approval on water facility developments that are not provided a credit against the Water Impact Fee, or deny all opportunities for future reimbursement of extra capacity facilities.

c. Recommended Edits to Proposed Municipal Code Section 6-513(e) Will Address The Legal And Policy Issues Discussed Above.

Your Council previously directed staff to engage in dialogue with stakeholders about the Water Capacity Fee program. Many helpful dialogues were conducted that substantially reduced the staff recommended fee. In addition, some slight edits to the originally proposed Municipal Code Revisions were incorporated.

However, the concerns raised about the above-described provisions were not addressed. We requested an adjustment to the cited provisions to fix what we thought was simply a drafting error. However, no edits were adopted. Instead, the staff made clear that the proposals were not the result of any drafting error.

I am therefore submitting, as attached Exhibit "A", an illustration of edits to proposed Section 6-513(e), that addresses the policy and legal issues raised above, and which add additional clarity to the rights for fee credits and reimbursements.

2. The Proposed Revisions To The Fresno Municipal Code Include Unnecessary And Punitive Limitations On The Reimbursement Rights That It Does Acknowledge.

Where developers are provided rights of reimbursement under the Municipal Code Revisions, they are nevertheless suffering from an unnecessary and relatively short sunset for those reimbursement rights. Specifically, the Ordinance proposes that all reimbursement rights be terminated after 10 years.

There is no justifiable reason to terminate reimbursement rights except to provide a windfall to the City Water fund. This intention to capture such a windfall is

particularly inequitable where the City reserves to itself the right to mandate land acquisitions and facility improvements on developers.

The City is expressly intending to take over the primary responsibility for ensuring that water supply facilities are constructed to assure orderly sequencing of the City's development (See draft proposed Municipal Code Section 6-513(e)). However, when it is unable to meet that standard, developers must fill in the gap with property acquisitions and facility development.

No complaint is being made about that City's reserved authorities to reasonably impose such exactions on development. However, reimbursements should be provided. The developers should not take a risk that the Water Capacity Fee cash flows are insufficient, over some artificial time horizon, to fully fund the reimbursement.

We therefore request that the references to expired reimbursement agreements, or a ten-year term for such agreements, be deleted. Those references are in Section 6-513(f)(3)-b (at page 45); Section 6-513(f)(5) (at page 45); Section 6-513(g)(2) (at page 46); and, Section 6-513(g)(3) (at page 47).

3. The Agenda Materials Do Not Confirm The City's Intended Treatment of Existing Vested Maps.

At the December 8, 2016 Council meeting, we raised issues about the importance for the City to exempt existing vested maps and other vested development entitlements from the impact of the new Water Capacity Fee program. Those vesting rights include protections from both the fee increases and the policy changes adopted in the Municipal Code revisions.

We have been orally advised by staff, and informally advised by the City Attorney, that the intent is to honor and respect the vested rights of such entitlements, in accordance with applicable law. However, there is unfortunately no clear statement of that intention in any of the materials submitted to you for adoption. The concerns about the City's intentions therefore remain. They are reinforced because the proposed Master Fee Schedule amendments exclude the kind of language protecting vested maps that is routinely included in prior adopted new fee programs.

The City's special counsel on this matter advised that it was unnecessary and awkward to incorporate a statement protecting vested rights in the adoption materials because the development community could simply rely on applicable state law. The recommended reference to vested rights is not, however, awkward to incorporate or adopt. The requested provisions are illustrated in Exhibit "B" that is attached, which we ask that you incorporate into your adopting ordinance. We also ask that references to vested rights provided in prior Master Fee resolutions also be incorporated into the proposed Master Fee resolution.

Because the proposed materials do not presently reference protections for vested entitlements, the BIA and its members are put in the position of needing to establish a record in these proceedings to detail the legal basis why such vested rights must be protected. I am therefore providing, and incorporating by this reference, a copy of a letter previously submitted on December 2, 2016.

4. The Bartle Wells Associates Nexus Study Presented To Support The Water Capacity Fee Program Includes Unnecessary Advocacy For Fee Levels That The Council Should Expressly Disclaim.

The consultations conducted by staff and stakeholders resulted in significant reductions in the fees that the Staff is now recommending. At the December 8, 2016 hearing, the staff was proposing connection fee for a 1-inch meter equal to $6,373.00. That proposed fee level is now reduced to $4,246.

Unfortunately, the Bartle Wells Associates Nexus Study used to justify the proposed fee recommendation includes analysis and legal justifications to impose the originally proposed and substantially higher fee. Your consultants recommend this approach because they do not want to publicly acknowledge that their originally fee proposal fails to satisfy applicable nexus standards.

Unfortunately, the consultant's approach puts the BIA in the awkward circumstance of having to challenge the legal basis for the Nexus Study's support for a fee that your staff is not even recommending. For the reasons detailed below, we ask that you incorporate language into the adopting ordinance to disclaim reliance on those elements of the Nexus Study tied to provisions of the fee that your staff is no longer recommending. That language is incorporated into and illustrated in the attached Exhibit B.

By way of further background, the most significant issue addressed during the stakeholder meetings that resulted in this reduced fee proposal was the stakeholder objection to a proposal to require new development to pay a proposed "Buy-In" charge. The Buy-In would require developers to pay for water facilities that had already been previously constructed, to a large extent by the development community.

The Buy-In was based on an artificially escalated "current value". As a result, the development community was not simply being asked to pay for the previously developed facilities a second time. They were being asked to pay the second time at an artificially inflated price.

The Buy-In was also related to capacity that existing ratepayers had, in prior years, actually relied upon before recent water demand reductions were implemented. That previously developed capacity was therefore not previously surplus capacity.

The originally proposed Buy-In would have added a total of $232,196,010.00 to the originally proposed Water Capacity Fees. The staff had no plan as to how they intended to use the funds that these substantial fee impositions were intended to raise.

Your staff wisely revised their approach and removed elements of the Buy-In from the proposed Water Capacity Fee, except for a portion that relates to the funding of existing bond payments. As a result, the Buy-In proposal adds a total of $12,725,024.00 to the fee burden, rather than $232,196,010.00.

For the reasons stated above, the $232,196,010.00 lacked legal justification under applicable nexus standards. This significant burden is no longer being recommended by your staff as part of the Water Capacity Fee. However, the consultant refuses to delete that claimed justification from the nexus study, and is recommending that you make findings that incorporate those inappropriate standards of analysis. Therefore, we must provide this written record to object to the legitimacy of that portion of the analysis in the Nexus Study.

5. Conclusion.

We thank the Council for its sponsorship of the previously conducted stakeholder meetings, which have resulted in significant modifications to the Water Capacity Fee proposal. Nevertheless, for reasons stated above, we believe refinements to the proposed Municipal Code Revisions (illustrated on Exhibit "A"), and to the proposed adopting Ordinance (illustrated on Exhibit "B"), should be incorporated and adopted. We also request that the 10-year limit on Reimbursement Agreements be deleted.

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

Jeffrey M. Reid

Enc. Exhibit "A" – Redline Illustration of Edits to Proposed Municipal Code Section 6-513(e)
Exhibit "B" – Redline Illustration of Edits to Proposed Adopting Ordinance
December 2, 2016 Letter to City Council

Exhibit "A"

Proposed Edits to
Draft Municipal Code
Section 6-513(e)

(e) WATER SUPPLY FACILITY CONSTRUCTION. The City shall be responsible for constructing water supply facilities in a manner which will supply water to all properties developed in an orderly sequence as defined in the City's then-current General Plan.

(1) The Council may require, as a condition precedent to approval of development, a developer to construct water supply facilities in accordance with City standards, if the City Manager or his or her designee determines ~~one or more of the following conditions exist:~~

~~a. The water demands for the development can be served with a dedicated water supply facility that only serves that development;~~

~~b. The proposed development is not consistent with the orderly sequence of development as defined in the City's then-current General Plan; c.~~ It is in the best interest of the city water system for the developer to construct the required water supply facility, ~~and to request reimbursement in accordance with 6-513(f).~~

(2) The Council may require as a condition precedent to approval of development, the dedication or acquisition of property for a water supply facility if the Director of Public Utilities determines a water supply facility is needed either within or in close proximity to the proposed development.

~~a. The~~(3) In instances where a developer is required to construct water facilities pursuant to Subsection (1) above, or dedicate or acquire property pursuant to Subsection (2) above, the developer shall be issued a fee credit against the Water Capacity ~~Fee equal to~~. The amount of the fee credit provided under Subsection (1) shall be equal to the lesser of the total Water Capacity Fee payable for such development, or the amount of the full, audited and approved cost of constructing such facilities determined in accordance with Section 6-513(f). The amount of the fee credit provided under Subsection (e) shall be equal to the lesser of the total Water Capacity Fee payable for such development, or the fair market value of the dedicated property~~,~~ and ~~the~~ fair market value shall be based on the properties surrounding the water supply facility, or as determined by the Director of Public Utilities.

~~b. In the event a prospective developer dedicates or acquires a water supply facility~~ If fee credit is capped at the ~~request~~amount of the ~~City in advance of approval of~~Water Capacity fee payable for such development, the developer shall be ~~eligible for~~entitled to a reimbursement ~~or issued a fee credit in a manner as described above.~~ for the excess amount in accordance with Section 6-513(f).

~~c.~~ (4) In the event a developer is required to assume the responsibility for the construction of a water supply facility, construction shall be in accordance with city standards and specifications, or as determined by the Director of Public Utilities.

~~The developer shall be reimbursed based on the full, audited and approved cost of the water supply facility less the Water Capacity Fees due for the development. Reimbursements shall be processed in accordance with 6-513(f). Reimbursements shall be issued from Water Capacity Fee revenues in accordance with the fee allocation methodology described in Section 6-513(d).~~

Exhibit "B"

Proposed Edits to Adopting Ordinance

BILL NO. _____

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF FRESNO ESTABLISHING AND SETTING A SCHEDULE FOR WATER CAPACITY CHARGES UNDER THE MITIGATION FEE ACT, AND AMENDING ARTICLE 5 OF CHAPTER 6 AND ARTICLE 4.5 OF CHAPTER 12 OF THE FRESNO MUNICIPAL CODE.

WHEREAS, the City of Fresno (City) owns, operates, and maintains surface water treatment facilities, groundwater recharge facilities, groundwater pumping facilities, water storage reservoirs, and water distribution pipelines, valves, fire hydrants, and water meters. The City relies on both groundwater and surface water to serve the daily water supply needs of approximately 130,000 existing ratepayers; and

WHEREAS, the City's water utility is operated as an enterprise fund within the City's general government operations. As an enterprise fund, the City's water utility is funded by an independent schedule of rates, fees, and charges that ensures that all current and future users of the City's public water system pay their proportionate share of the management, administration, operations, maintenance, and capital facilities required to deliver potable water service to existing and future connections to the system; and

WHEREAS, the City has relied on groundwater as its primary water supply source for more than 100 years, which groundwater supply is severely strained; and

WHEREAS, the City of Fresno is located within the Kings Subbasin of the Tulare Lake Hydrologic Region (Region); and

Date Adopted:
Date Approved
Effective Date: Ordinance No.
City Attorney Approval: _____

WHEREAS, the United State Geological Survey (USGS) reports that groundwater extractions in the Region currently exceed the Region's groundwater recharge by approximately 1.5 million acre–feet per year. For comparison, Pine Flat Reservoir has a storage capacity of approximately 1 million acre feet; thus, the annual groundwater overdraft in the region is equivalent to 1.5 times the storage capacity of Pine Flat Reservoir each year; and

WHEREAS, as documented by the California Department of Water Resources (DWR) in Bulletin 118, the Kings Subbasin is one the most critically overdrafted groundwater basins in the State of California based on groundwater data collected and evaluated by DWR for 515 basins throughout the State. Specifically, in January 2015, the DWR ranked the San Joaquin Valley Basin (and therefore the Kings Subbasin) as one of 21 top-priority basins (out of 515 basins) identified by DWR in Bulletin 118 requiring corrective action for overdraft conditions; and

WHEREAS, the groundwater levels in the City have fallen at an annual average rate of approximately 1.0 to 1.5 feet per year for approximately 80 years. However, during calendar year 2014, the City's groundwater levels fell an average of 4.0 feet. In calendar year 2015, the City pumped 83,360 acre-feet of groundwater and 28,350 acre-feet of surface water to the distribution system, and recharged 19,778 acre-feet at Leaky Acres and other recharge basins in the area, resulting in a net overdraft of the groundwater aquifer of 63,582 acre-feet; and

WHEREAS, without corrective action, the City was concerned that the continued groundwater overdraft would result in (1) the migration of existing contamination plumes, (2) an increase in the number of wells requiring treatment, and (3) an increase

in the number of wells that will need to be removed from service due to quality or quantity issues, or both; and

WHEREAS, in September 2014, the Governor signed into law three bills collectively referred to as the Sustainable Groundwater Management Act (SGMA), which includes without limitation Water Code section 113, Water Code sections 10720 *et seq.*, and amendments to provisions of the Government Code; and

WHEREAS, Water Code section 113 states that "[i]t is the policy of the state that groundwater resources be managed sustainably for long-term reliability and multiple economic, social, and environmental benefits for current and future beneficial uses," and, "[s]ustainable groundwater is best achieved through the development, implementation, and updating of plans and programs based upon the best available science"; and

WHEREAS, the SGMA recognizes that excessive groundwater extraction can cause overdraft, failed wells, deteriorated water quality, environmental damage, and irreversible land subsidence – all conditions which currently exist in the City and require state-mandated corrective action; and

WHEREAS, the SGMA requires that by January 31, 2020, all basins designated as high- or medium-priority basins subject to critical overdraft conditions shall be managed under a groundwater sustainability plan (GSP) or coordinated GSP to achieve sustainable groundwater management by implementing measures targeted to ensure that the groundwater basin is operated within its sustainable yield. (See, e.g., Water Code § 10727.) GSPs must include measurable objectives to achieve the sustainability goal in the basin within 20 years of the implementation of the plan, mitigation of

overdraft, replenishment of groundwater extractions, measures addressing groundwater contamination cleanup, and consideration of surface water supply used or available for use for groundwater recharge or in-lieu use; and

WHEREAS, the California Legislature in Water Code section 79770 recognized that prevention and cleanup of groundwater contamination are critical components of successful groundwater management, and that groundwater quality becomes especially important as water providers evaluate investments in groundwater recovery and recharge projects with surface water, storm water, recycled water, and other conjunctive use projects that augment local groundwater supplies to improve regional water self-reliance; and

WHEREAS, the Legislature has also recognized in Water Code sections 79771 and 79773 that preventing or reducing the contamination of groundwater contaminated with various contaminants, including 1,2,3-TCP (trichloropropane), is necessary to protect public health; and

WHEREAS, Water Code section 10726.2 permits the City to transport, reclaim, purify, treat, or otherwise manage and control polluted water for subsequent use in a manner that is necessary or proper to carry out the purposes of the SGMA; and

WHEREAS, Water Code sections 10735.2 and 10735.8 provide that by January 31, 2020, if the City fails to adopt a groundwater sustainability plan or adopts an inadequate groundwater sustainability plan, DWR may place the City on a probationary status and prepare an interim groundwater sustainability plan for the City, which may include restrictions on the City's groundwater extractions, physical solutions, and principles and guidelines for the administration of the City's surface water supplies; and

WHEREAS, in accordance with the SGMA, a group of water supply agencies and local governments within the Kings Subbasin, including the City of Fresno, have agreed to form a Joint Powers Authority designated as the North Kings Groundwater Sustainability Agency (NKGSA). As a joint powers authority, the NKGSA has been established to sustainably manage the groundwater resources within a portion of the Kings Subbasin (Subbasin Number 5-22.08), which is located within the greater San Joaquin Valley Basin (Basin Number 5-22); and

WHEREAS, on January 21, 2015, the City received a letter from the Director of DWR confirming that in the event a local agency, such as the City of Fresno, fails to exercise its responsibilities as stipulated in the SGMA, the State will intervene on an interim basis; and

WHEREAS, the City, in collaboration with the NKGSA member agencies, will be responsible for developing and implementing a GSP. The GSP will define the corrective action measures that the NKGSA member agencies will implement to address the overdraft, failed well, and deteriorated water quality conditions that exist; and

WHEREAS, in response to the City's current groundwater overdraft and contamination conditions and the compliance requirements of the SGMA, the City in cooperation with the State Water Resources Control Board, developed a $429 million capital investment plan that implemented corrective action to address declining groundwater levels, groundwater contamination, and the requirements of the SGMA; and

WHEREAS, the corrective action plan was designed to use the City's surface water entitlements at Pine Flat Reservoir and Millerton Lake, which total 180,000 acre-

feet per year during a normal precipitation year, to allow the City to reduce groundwater pumping. The corrective action plan includes without limitation the construction of raw water pipelines to deliver surface water to two of the City's surface water treatment facilities, a new 80 million gallon per day surface water treatment facility, and finished water distribution facilities to deliver treated surface water to the community's existing 130,000 water accounts; and

WHEREAS, the current water demands in the City total approximately 128,000 acre-feet per year. To serve the City's existing customers, the funded corrective action plan will allow the City to reduce groundwater extractions to 18,000 acre-feet per year; increase surface water production to 110,000 acre-feet per year, and allow the City to recharge approximately 32,000 acre-feet per year. This will result in a net positive contribution to the groundwater aquifer of 14,000 acre-feet per year; and

WHEREAS, the first phase of projects set forth in the corrective action plan are designed to support the water supply and reliability needs of existing customers, and therefore, will be funded through the City's water rates. The first phase of projects will help bring the groundwater basin back into sustainable balance for existing water customer demands, but it will not be sufficient to meet the new demands placed on the system by new development, which consist of new connections and expanded connections to the water system; and

WHEREAS, to address water supply reliability, and regulatory requirements for serving new development, subsequent phases of improvements will need to be constructed. These facilities will be used to meet the water capacity needs of new development, and therefore, the costs of these improvements should be funded by the

City's water capacity fees to ensure these costs are equitably recovered from new development; and

WHEREAS, the City currently levies a number of water capacity fees, including Urban Growth Management (UGM) fees for 21 areas, Well Head Treatment Fees for five areas, Transmission Grid Main Charges and related Bond Debt Service Charges, Recharge Area Fees, and 1994 Bond Debt Service Fees; and

WHEREAS, under the UGM process, everyone who developed in a UGM area was required to pay their share of UGM fees for the cost of the infrastructure, improvements, and services to provide City services to the development; and

WHEREAS, the City's existing water fee programs were last updated in 2003 (see Ordinance No. 2003-96) and (1) do not recover costs for capacity in existing infrastructure that benefits new development; (2) do not recover costs for future infrastructure and water supply projects needed to meet the demands of growth; (3) fail to recover any costs from non-Urban Growth Management areas; and (4) are administratively burdensome with almost 150 separate UGM funds, and require an update; and

WHEREAS, the City's authority to impose capacity charges for the privilege of connecting property to the City's water systems is governed in part by the Mitigation Fee Act (Gov. Code § 66000 et seq.), particularly Government Code 66013 and 66016. The Mitigation Fee Act requires that when a local agency, such as a City, imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges must not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed. (Gov. Code § 66013.) Accordingly, the City has

worked with a consultant, Bartle Wells Associates, to develop a Water Capacity Fee Study (Study), Attachment 2 to the Report to the City Council dated March 9, 2017 and incorporated herein, which develops updated capacity fees (Water Capacity Fees) and establishes the reasonable relationship between the City's fees and the City's estimated reasonable costs of providing water capacity service to new development; and

WHEREAS, the Water Capacity Fees are designed to recover a share of costs for (a) existing and future groundwater and distribution system assets benefitting new development through buildout, and (b) the next 30 mgd expansion of the City's surface water supply and regional distribution facilities needed to address water supply and reliability needs for serving new development; and

WHEREAS, the Water Capacity Fees exclude cost recovery for the City's first phase of surface water system improvements, which were designed to benefit the City's existing customer base; and

WHEREAS, the Water Capacity Fees excludes elements of the Buy-In for Existing Infrastructure detailed in Table 7 of the Bartle Wells Associates Report to the City Council dated March 9, 2017 ;and

WHEREAS, the Water Capacity Fees effectuate a transition to a single, consistent system that can be applied uniformly to all future development within the City's service area, regardless of where development occurs, reducing administrative burden; and

WHEREAS, the City must amend the Fresno Municipal Code (FMC) to repeal and amend sections relating to the UGM fees to be replaced with the Citywide water capacity fee program set forth herein; and

WHEREAS, the City Council has determined it is necessary to increase water capacity fees and costs to (1) provide water facilities necessary to serve new development, and (2) protect public health and safety~~.~~; and

WHEREAS, the City Council, however, acknowledges the vested rights that arise from the California Subdivision Map Act and the Fresno Municipal Code that benefit vesting tentative maps and vesting tentative parcel maps previously accepted for filing by the City, and rights that exist under certain Development Agreements, that provide protections against changes in City policies, which make it inappropriate to apply the new program for Water Capacity Fees and amended provisions of the Fresno Municipal Code to developments that benefit from such vested rights. ..

THE COUNCIL OF THE CITY OF FRESNO DOES ORDAIN AS FOLLOWS:

Section 1. The above recitals are true and correct, are material to the adoption of this ordinance, and are incorporated herein by reference.

Section 2. In addition to the findings set forth in the recitals, the City Council hereby finds and determines as follows:

A. The City Council has received and reviewed the Water Capacity Fee Study dated February 27, 2017, by Bartle Wells Associates, independent public finance advisors, setting forth recommendations for the water capital improvements together with necessary financial requirements.

B. The purpose of the Water Capacity Fees is to provide revenue to recover costs for existing facilities and facilities to be acquired or constructed in the future that are of proportional benefit to new development.

C. The Water Capacity Fees are to be used to finance installation of new water related infrastructure, assets, and water supply to serve new development. The fees will also be used to reimburse individuals who construct capital facilities above their conditions of approval and Water Capacity Fee obligation.

D. The Water Capacity Fees ensure new development and infill development will pay for water system infrastructure and assets benefitting growth, but will not pay for facilities required to serve existing ratepayers

E. The Water Capacity Fees are based on maintaining a level of service consistent with the, goals, policies and objectives of the adopted Fresno General Plan, as analyzed in the Master Environmental Impact Report (MEIR)

prepared for the Fresno General Plan (State Clearing House # 2012111015), and supporting documents

F. The Water Capacity Fee Study complies with the Mitigation Fee Act, including without limitation Government Code section 66013, by determining the estimated reasonable costs of providing water capacity facilities and infrastructure that are of proportional benefit to new development.

G. The Water Capacity Fees will be used to cover the costs of existing public facilities and new public facilities to be acquired or constructed in the future that are of proportional benefit to new development, as detailed in the Bartle Wells Associates Study, except for those provisions of the Buy-In for Existing Infrastructure detailed in Table 7, item 1, of the Bartle Wells Associates Study, which the Water Capacity Fee does not incorporate and which the City Council hereby disclaims any reliance upon;

H. The Water Capacity Fees will be applied to projects approved under the Subdivision Map Act (Government Code sections 66410 et seq.) in accordance with the provisions of that Act.

I. The Water Capacity Fees enacted herein are not levied as an incident of property ownership but are levied solely at the request of a property owner or its agent for the privilege of gaining access to use of the City's systems and facilities. The revenues derived from the Water Capacity Fees do not exceed the estimated reasonable costs of providing the service for which the fees are imposed.

~~J.~~ J. After considering the specific infrastructure systems and cost estimates identified in the Water Capacity Fee Study, the City Council approves such descriptions and cost estimates, and finds them reasonable as the basis for

~~10 of 14~~ calculating and imposing the updated Water Capacity Fees as set forth herein; and

~~K.~~ K. Pursuant to California Government Code section 66016, at least 14 days before the public hearing, the City mailed notice of the public hearing and the City's consideration of the updated fee to any party that filed a written request for mailed notice of meetings on new or increased fees or services charges that included a general explanation of the matter to be considered and a statement that the data indicating the amount of the cost, or estimated costs, required to provide the water capacity service for which the capacity fees are imposed and the revenue sources anticipated to provide the service, is publicly available.

~~L.~~ L. Pursuant to California Government Code section 66016, at least 10 days before the public hearing, the City made available to the public data indicating the amount of cost, or estimated cost, required to provide the service for which the fee or service charge is levied and the revenue sources anticipated to provide the service, including General Fund revenues. The published information included the notice of the public meeting on March 9, 2017, at 10:15 a.m. in the Council Chambers of the City of Fresno, 2600 Fresno Street, Fresno, CA 93721, as part of a regularly scheduled City Council meeting, during which the City Council gave members of the public the opportunity to make oral or written presentations to the City Council on the proposed changes to the water fees and charges and the analysis included in the Study; and

~~M.~~ M. On March 9, 2017, at 10:15 a.m., the City held a duly noticed public meeting in the Council Chambers of the City of Fresno, 2600 Fresno Street,

~~11 of 14~~ Fresno, CA 93721, to consider oral or written presentations regarding the proposed fees and charges as set forth in this ordinance.

Following the consideration of all comments at the public meeting, the City Council determined to establish the structure and fees and charges detailed herein for water connections to the City's systems.

Section 3. The Water Capacity Fees reflected in the Bartle Wells Associates Water Capacity Fee Study are hereby adopted as the new Water Capacity Fees for all parcels within the City and these Water Capacity Fees shall replace the transmission grid main charge, UGM water supply fee, well head treatment fee, recharge fee, transmission grid main bond debt service charge, and bond debt service fee set forth in previous ordinances, last amended by Ordinance No. 2003-96.

Section 4. The funds generated by the imposition of the Water Capacity Fees shall be deposited in a separate Capacity Fee account and will be used solely for the purposes for which the fees were collected and/or for reimbursing developers who funded infrastructure as part of the Water Capacity Fee program beyond that needed to serve the developers' project or projects. The Water Capacity Fees shall be deposited, accounted for, and expended in accordance with the Mitigation Fee Act and all other applicable provisions of law.

Section 5. The Water Capacity Fees shall automatically increase on July 1 in each year hereafter, commencing on July 1, 2018, in accordance with any increases in

the Engineering News Record Construction Cost Index (20-city average) in the twelve months from April 1 of the fiscal year preceding said July 1 and March 30 of the fiscal year ending on such July 1.

Section 6. Annually, the City Manager or his or her designee shall make available to the public information to the extent required by section 66013(d) of the Government Code, as it may be amended from time to time.

Section 7. The Water Capacity Fee program shall be administered in accordance with procedures outlined in Section 6-513 of the Fresno Municipal Code as hereby amended, provided, however, the Water Capacity Fee program shall not apply to vesting tentative maps or vesting tentative parcel maps that have been accepted for filing by the City prior to the effective date of this Ordinance, or to those Development Agreements that include protections against changes in City policies or relevant water facility fees.

Section 8. Article 5 of Chapter 6 and Article 4.5 of Chapter 12 of the Fresno Municipal Code are amended to read as set forth in Exhibit A, which is hereby incorporated as though set forth in its entirety herein.

Section 9. The adoption of this ordinance is exempt under the California Environmental Quality Act from environmental review pursuant to California Public Resources Code section 21080(b)(8) and Title 14 of California Code of Regulations, sections 15273(a)(4) (CEQA Guidelines).

Section 10. If any provision or clause, or paragraph of this ordinance or the imposition of the Water Capacity Fees for any project within the City or the application

thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the other provisions of this ordinance or other fees levied by this ordinance which can be given effect without the invalid provisions or application of fees, and to this end the provisions of the ordinance are declared to be severable.

Section 11. The City Manager or his or her designee is hereby authorized and directed to execute documents pertaining to this ordinance and the Water Capacity Fee program for and on behalf of the City of Fresno.

Section 12. Any judicial action or proceeding to attack, review, set aside, void, or

annul this ordinance shall be brought pursuant to Government Code section 66022.

Section 13. Pursuant to Government Code section 66017(a), this ordinance shall become effective and in full force and effect at 12:01 a.m. on the sixty-first day after its final passage.

* * * * * * * * * * * * * * *

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.
CITY OF FRESNO)

I, YVONNE SPENCE, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Council of the City of Fresno, at a regular
meeting held on the_____day of_____, 2017.

AYES :
NOES :
ABSENT :
ABSTAIN :

Mayor Approval: _____, 2017
Mayor Approval/No Return: _____, 2017
Mayor Veto: _____, 2017
Council Override Vote: _____, 2017

YVONNE SPENCE,
CMC City Clerk

BY:_____
Deputy

APPROVED AS TO FORM:
DOUGLAS T. SLOAN,
City Attorney

BY:_____
Amanda B. Freeman Date
Deputy

Exhibit "C"

December 2, 2016 Correspondence

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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

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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

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