Court of Appeal, Second Appellate District
Daniel P. Potter
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

City of Oxnard, et al., Plaintiffs & Appellants/Respondents, v. **Aaron Starr,** Defendant & Respondent/Appellant.	Court of Appeal No. **B295252** (consolidated with B297294) *Super. Ct. No.* *56-2016-00479696*

Consolidated Appeals from Judgment &
Order Denying Motion to Amend Judgment of the Superior Court
Hon. Rocky J. Baio, Judge Presiding

AARON STARR'S PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal of the State California, Second Appellate District, Division 6:

Aaron Starr, Respondent and Appellant in these consolidated appeals, petitions this court for rehearing of this matter due to omissions of material legal issues and misstatements of material fact. (See, *e.g.*, *In re Estate of Jessup* (1889) 81 Cal. 408, 472; Cal. Rules Ct., rule 8.500, subd. (c)(2).) Among the errors is the court's failure to consider or address *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*).

When *Bighorn* affirmed the people's right to lower utility rates by initiative, it contemplated a situation such as the instant case and recognized that the legislative process provides a way to resolve disputes between the voting public and their elected representatives. (39 Cal. 4th at pp. 209, 220-221.) Here, even though the court acknowledged its lack of "expertise in operating a wastewater facility or any other utility" (Opinion (Opn.) at *10), its opinion disregards *Bighorn* and effectively limits the people's initiative power by forcing the City Council's preferred means of financing its wastewater system even though **the City's own evidence showed that there were other means of financing the exact same system**.

Rejection of *Bighorn* is where the confusion might lie. *Bighorn* requires a process that leads to "compromises that are mutually acceptable and both financially and legally sound." (39 Cal.4th at

p. 220.) The City Council's argument in this case ignores the *Bighorn* requirements, taking an all-or-nothing approach to wastewater financing. Essentially, the City's position is: "Finance the system we want, the way we want, or we will let everything fall apart."[1] Accepting that the system the City wants is correct,[2] this approach is wrong because there were alternative ways to finance the exact same system. The City may not hold its wastewater service hostage unless it gets to finance the system the way it wants. Because there must be a give-and-take to the power sharing arrangement between the City Council and the City's voters, existence of viable alternatives means that the City failed to meet its burden of proving that Measure M is invalid.

Adding to the confusion is the court's misinterpretation of several material facts. Correcting these facts and considering them in line with *Bighorn* precludes any possibility that the City met its substantial burden of proving that Measure M was clearly, positively, and unmistakably invalid.

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[1] From a practical matter, aside from its arguments in this lawsuit, the City followed the *Bighorn* process, which culminated in the new rates set by Ordinance 2917. This was the compromise *Bighorn* expects if not requires. Looking back with three years of hindsight, this worked because the City has funded a wastewater system its consultants recommended without ever needing to use the $5 million "lost" a result of Measure M.

[2] The Court would not need to reach Starr's contention that the people have the right to accept a lower quality wastewater treatment system or that the Revenue Bond Law of 1941 does not apply to voter initiatives under articles XIII C and D of the California Constitution.

Additionally, in several instances, it appears as if the court has required that Starr prove Measure M's validity when it was the City's burden to prove the opposite. One example is charging Starr with failing to counter the City's expert testimony even though none of the City's witnesses testified as experts and those "experts" testified to the alternative funding options that support Starr's position. Because the City's evidence shows that it can "make-up" wastewater revenue "lost" by Measure M in other ways, this case becomes less about the wastewater system and its infrastructure and more about policy decisions relating to that system's financing. As to these policy decisions, because the City did not show that they are illegal as a matter of law, separation of powers requires that this court leave those decisions to the political branches of government. (See 8 RT 877:25-878:16 [trial court describing case as a "political discussion"].) For these reasons, and those discussed below, the judgment should be upheld.

I. THE OPINION OMITS MATERIAL ISSUES OF LAW.

A. *Bighorn, supra*, 39 Cal.4th 205 permeates through this case and cannot be ignored.

The *Bighorn* trial and appellate courts rejected the voters' constitutional right to reduce utility rates by initiative. (39 Cal.4th at p. 211.) The Supreme Court corrected this error. (*Id* at pp. 213-216, 222 [affirming decisions below for differing reasons that do not apply here]; see also Cal. Const., arts. XIII C & XIII D.) While discussing the effect of this right and problems that might arise, the *Bighorn* court

anticipated the very situation presented in the instant case. At page 221 it wrote:

> … we are not holding that the authorized initiative power is free of all limitations. In particular, we are not determining whether the electorate's initiative power is subject to the statutory provision requiring that water service charges be set at a level that will pay the operating expenses of the agency, … provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due. (Citations and quotations omitted.)

In line with its anticipation of these issues, *Bighorn* also recognized a practical solution:

> … both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected, will give appropriate consideration and deference to the voters' expressed wishes for affordable water service.

(39 Cal.4th at p. 220 [citations omitted].) This solution avoids the question *Bighorn* reserved (whether such voter initiatives are subject to limitations in first instance) and respects boundaries between the judiciary and political branches of government.

As applied here, this solution worked. The voters disagreed with the rate increase and repealed it; the City disagreed with the

repeal and sued; then the parties got together and worked a compromise solution that everyone could live with.[3] While this case was languishing in the courts, *Bighorn* worked without any of the calamity the City feared. This itself demonstrates that Measure M is, at minimum probably, valid.[4]

Looking deeper at the *Bighorn* process, it does not mean that either party concedes the other was right in the first instance. By participating in the URAP process, Starr neither admitted nor conceded that more money was needed. (7 RT 615:04-13 [Starr testified that it was a compromise].) Instead, his concessions gave a degree of "consideration and deference" to the City's desire for higher rates (even if he disagreed). At the same time, the City gave a degree of "consideration and deference" to the voters' desire to pay less. Then they reached a "mutually acceptable and both financially and legally sound" compromise, based in part of suspension of the "infrastructure use fee" (IUF), which Starr argued was one way the City could maintain the proposed wastewater system without increasing rates.

Ultimately, this all happened without the City ever spending a single dollar of the Measure M increase, which it holds in escrow. (13

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[3] The compromise is evidenced by the City's adoption of Ordinance 2917 and the voters' failure to challenge it the way Measure M challenged Ordinance 2901.

[4] If Measure M is "probably" valid, then its invalidity is neither clear, positive, or unmistakable.

AA 4542, ¶ 3, 4560; 1 RT 57:14-17.) Here, the proof is in the pudding: Without ever needing any of the Ordinance 2901 increase, none of Measure M's feared adverse consequences came to fruition, demonstrating that those allegations were speculative and premature at the time of filing. In this regard, the trial court was correct in its judgment.

B. The opinion effectively shifts the burden from the City to Starr.

In several instances, the opinion suggests that it was Starr's burden to prove that Measure M was valid. Examples include:

- "Starr had two opportunities prior to trial to show that Measure M rates were adequate." (Opn. at p. *12.)
- "He claims that the utility accounts for depreciation multiple times. But he makes no attempt to show that the aggregate amount of depreciation is excessive." (Opn. at pp. *12-13.)
- "Starr did not introduce expert opinion to counter that evidence." (Opn. at p. *12.)
- "Starr does not argue, no less attempt to show, that the rates charged under Measure M are sufficient to pay for the repairs and improvements necessary to place the wastewater system in good repair and working order." (Opn. at p. *14.)

- With respect to the IUF, "[Starr] says such charges are being challenged in a different case, but cites no authority holding them to be unlawful." (Opn. at p. *13.)

The burden, as this court correctly recognized, is to show that Measure M is clearly, positively, and unmistakably invalid." (See Opn. at p. *9 citing *In re Ricky H.* (1970) 2 Cal.3d 513, 519.) It is the City's burden to meet this challenge, not Starr's to show its inverse.

Under the City's burden, Measure M can be invalid only if there is no possible way for the City to comply with the Revenue Bond Law of 1941 and other applicable requirements. If there is any possibility of compliance, then the City has not shown that Measure M is "clearly, positively, and unmistakably invalid."

Assuming for the sake of argument that Measure M (or any other initiative) temporarily places the City (or any other entity) out of compliance, *Bighorn, supra*, requires that the parties work together to solve the problem using the political and legislative process. If there is any means possible by which the City can comply with both the initiative and other requirements, then *Bighorn* presumes that the City will take appropriate action. (39 Cal.4th at p. 220.) If the City fails to act, then it is *the City* that has violated applicable requirements rather than the initiative.

Starr has consistently argued that the City could comply and that the only potential violation flowing from Measure M would be the City's failure to adjust to voter-approved constraints. Perhaps if adjustment was impossible, then an initiative might be invalid by the

"clearly, positively, and unmistakably" standard. But the City did not meet this standard, in part because its own evidence proved that alternatives exist.

In the context of this case, it is incorrect to demand that Starr prove those options are legally mandated (see Opn. at p. *13) when the City bears the burden of persuasion. Thus, in this context, it is the City's burden to prove that the alternatives are legally prohibited. It did not do this.

Even if the alternatives Starr proposed are not legally mandated, they are still permissible. Thus, consistent with *Bighorn* and with consider for separation of powers, Measure M must be valid because the City could fund an appropriate wastewater system by making some policy changes.

Starr's first suggestion was suspension of the City's "infrastructure use fee" (IUF), which the opinion describes as "cover[ing] what the utility would pay in taxes if it were a private enterprise." (Opn. at p. *7.) The City has avoided describing its IUF in this manner, presumably because an in lieu fee for that purpose is presumptively illegal. (See *Howard Jarvis Taxpayers Ass'n v. Fresno* (2005) 127 Cal.App.4th 914.) Regardless, in the best light to the City this is discretionary and certainly not required.

Starr's second suggestion would eliminate excessive depreciation calculations, which the opinion dismissed absent Starr's affirmative showing that they were excessive. (Opn. at pp. *12-13.) But proof to a court of law that the charges are excessive should not be

necessary because Starr is not asking the court to order the change. Instead, the changes are merely an option available to the City, sufficient to uphold Measure M unless the City proved that the changes are impermissible. The City did not do this, and this is another reason why the City failed to meet its "clearly, positively, and unmistakably" burden.

Starr's third suggestion related to allocation of assets between the water and wastewater utilities.[5] Similar to the suggestions listed above, Starr did not seek to prove that the charges must be charged to water because that was not his burden. He needed only to show that it was an option. Then it was up to the City to choose among its various options that which worked best.

On balance, the City's refusal to adapt in light of the voters' adoption of Measure M demonstrates its failure to "act reasonably and in good faith" as required by *Bighorn, supra*. (39 Cal. 4th at p. 220.) In this regard, it was not the voters who obstinately tied the City's hands, preventing them from operating the wastewater utility in the required manner, but the City Council's obstinate refusal to adapt to constitutional constraints solely because they preferred a different approach.

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[5] As discussed below, the court's conclusion that these charges were in fact charged to water rather than wastewater (see Opn. at p. *13) is a material misstatement of fact.

C. The opinion did not give full effect to Government Code section 54514.

When considering the Revenue Bond Law of 1941, the opinion addressed Government Code sections 54513, 54515, and 54516. It omitted section 54514, which is an error. Section 54514 requires that the City "prescribe, revise, and collect such charges that the services, facilities or water of the enterprise are furnished **at the lowest possible cost** consistent with sound economy, and prudent management, and the security and payment of the principal and interest of the bonds." (Emphasis added.)

More specifically, the opinion fails to give full effect to section 54514's "lowest possible cost" requirement, which must necessarily be part of the *Bighorn* balancing process. Had Starr sued the City, alleging failure to comply with section 54514, it might have been his burden to prove that the City failed to set rates at the "lowest possible cost." But that is not the posture of this case. Here, with the City's the high burden, any evidence that the City could provide the same service for a lower cost precludes a showing that Measure M was "clearly, positively, and unmistakably" invalid.

II. THE OPINION IS DEPENDENT ON MATERIAL MISSTATEMENTS OF FACT.

A. The so-called $50,000 Measure M deficit was not proven or accepted as true.

Based on Starr's position that Measure M must be upheld if there is any alternative means to make up its $5 million effect, he has accepted the $50,000 deficit solely for the sake of argument. More

importantly, the record does not otherwise indicate that this disputed fact is uncontrovertibly true.

1. ***The $50,000 deficit was an estimate based on an apples-to-oranges comparison of a 6-month average to an annual average.***

The first defect in accepting the $50,000 deficit as true is that it was an estimate. Expenses for this figure were based on an annual average. (6 RT 443:10-14.) Expenses were compared to Measure M revenues averaged over a 6.5-month period from December 2016 to May 2017. (6 RT 444:02-05, 448:05-11; see also 12 AA 3924.) For this reason, the result can be construed only as an estimate because both revenues and expenses fluctuate from month-to-month based on usage.

Wastewater revenue is tied to water usage (5 RT 271:25-272:01), and it is within common knowledge that water usage in California increases during the summer months. (See 3 AA 385; see also 12 AA 3924 [Exhibit 62 from trial showing monthly increases in wastewater revenue into the summer months]; 6 RT 444: 02 *et seq.* [testimonial description of the exhibit].) Thus, the 6-month average from which the deficit was derived was necessarily lower than it would have been if based on an entire year because it focused on the winter months.[6] Additionally, the possibility of a periodic deficit is not inherently wrong because wastewater expenses would necessarily be

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[6] Annual data was unavailable because the City adopted Ordinance 2917, setting new rates in early 2017.

higher during the winter months (when revenues were lowest) because rainy weather results in peak flows through the wastewater system. (7 RT 719:04-14.) Given that annual revenues must be equal to annual costs (see generally Cal. Const., art. XIII D, § 6, subd. (b)(3)), it must be assumed that the utility would run a deficit during the winter months only to make up for in the summer.

2. The $50,000 deficit **did not** *exclude the IUF.*

The average expenses from which the so-called $50,000 deficit derived from did not exclude the IUF. Throop expressly testified to this, acknowledging that the $50,000 "deficit" was within a margin of error caused by his inability to back-out the IUF. (6 RT 538:07-21.) In briefing, Starr argued (and citied to documentary evidence) that elimination of the IUF would turn the $50,000 monthly deficit into a $117,000 monthly surplus. (Respondents Combined Brief (RCB) at pp. 36-37.) This precludes (A) an admission by Starr that there would be a $50,000 deficit, (B) a conclusion that this fact is uncontradicted, and (C) any possibility of the City prevailing.

B. The $5 million effect of Measure M was not Starr's "argument" but was agreed upon by all parties.

The opinion suggests that the court did not accept the $5 million effect of Measure M as true, as if it was an argument not grounded in fact. Examples of this include:

- "Starr calculates the amount the City collected under Ordinance No. 2901, above what would have been

allowed under Measure M, to be $5 million." (Opn. at p. *6.)

- "Starr estimated the amount at $5 million." (Opn. at p. *9.)
- "… the $5 million Starr claims the wastewater ratepayers would have saved had Measure M gone into effect." (Opn. at pp. *13-14.)

However, Starr did not calculate this amount. The City did, and the parties have accepted it as true. (See 6 RT 441-443, 446-448; see also RCB, p. 29 *et seq.*; Appellant's Reply Brief (ARB), p. 39.) To the extent it is an "estimate," that is only because the $5 million figure is rounded down from $5.074 million, solely for the ease of discussion.

This is important because the $5.074 million is an undisputed bright line used to evaluate Measure M. If, outside the Ordinance 2901 rate increase, the City has another $5.074 million available to the wastewater utility, then Measure M must be valid because Ordinance 2901 was not the City's only means of obtaining those funds.

C. Aaron Starr never admitted that Measure M set rates too low.

As stated below, the opinion charges Starr with admitting that Measure M set rates too low:

- In opposition to the City's motion for preliminary injunction, "[Starr] did not dispute the facts on which the City based its request for an injunction. Nor did he dispute that the utility needed more money than Measure

M would provide. Instead, he filed an affidavit in which he stated he had been meeting with City Staff" to discuss reductions that reduced the amount of the rate increase. (Opn. at pp. *3-4.)

- Starr's "Scenario 6" presented to the URAP panel "recommended rates that exceeded those allowed under Measure M." (Opn. at p. *4.)

These are not admissions that Measure M set rates too low.

1. Starr did not concede that Measure M set rates too low prior to the preliminary injunction.

The City applied for the TRO on December 7, 2016. (1 AA 169.) Starr filed minimal opposition, with only a supporting declaration from counsel, the same day. (4 AA 897.) At the December 8, 2016 ex parte hearing, the court continued the matter to December 13 and ordered supplemental briefing by December 9. (4 AA 910.)

Just two days after receiving the TRO application, Starr filed a supplemental opposition (4 AA 911) and declaration (4 AA 933). With minimal time to respond, his opposition to the TRO focused on big-picture issues with time to dig deeper into the weeds in a subsequent opposition to the preliminary injunction.

At the December 13, 2016 TRO hearing, the court stated:

> And this is clearly without me making a ruling on where we're going when we come back for the trial. **I know I'm supposed to analyze this in terms of likelihood of success. But when you're up here, it's nearly impossible to do that at this stage.** But I have considered that. But I want you to know that I haven't decided how I'm going to

> rule on this because I haven't really seen all the evidence other than what's been presented in the declarations. Okay?

(1 RT 8:04-011 [emphasis added].) It then ruled in the City's favor based on balancing of harms, without consideration for the merits. (1 RT 11:03-10.) The court also promised to get to trial quickly (1 RT 11:13-15), generally indicating that it reached its decision on both the TRO and preliminary injunction until the merits were resolved at trial. (See also 1 RT 12:18-13:05.) Starr's failure to provide additional opposition to the preliminary injunction (see 4 AA 979-978) signals not his agreement on the merits, but his acquiescence on the balancing of harms as described by the court at the December 13 hearing. Given the court's decision on the balancing of harms, Starr had nothing left to do but prepare for trial.

Regardless, in broader form, Starr opposed the TRO on the merits. In his December 9, 2016 declaration, Starr declared, "Recognizing that the residents of the City of Oxnard should not be penalized because the City cannot get its financial house in order, I organized a protest …" (4 APP 934, Starr Decl. ¶ 3; see also id. at ¶ 5 [similar].) This reasonably relates to the availability of other funding to satisfy the City's wastewater needs without increasing relates.

2. Starr did not concede that Measure M set rates too low during the URAP process.

During the URAP process, Starr advanced options that increased rates beyond those set by Measure M. This is not an admission that Measure M's rates were too low. Instead, it was an attempt to resolve the underlying dispute in the manner *Bighorn*,

supra, requires with both sides using the political process to reach a compromise. (39 Cal.4th at p. 220; 7 RT 615:04-13 [Starr's testimony that it was a compromise].)

In this context, it was a negotiation between two legislative bodies, the electorate as a whole and the City Council, and was typical of most other negotiations. The fact that opposing parties gave up some ground they believed in and met somewhere in the middle is not proof that one or the other conceded to the other's position. Indeed, if such communications were made during litigation, they would be excluded from evidence presented to a jury. (See Evid. Code § 1152.) Here, in the course of a bench trial, the trial court was able to sift through these concerns (cf. 5 RT 246:01-03) and it should be presumed that the trial court ignored this "evidence" if it is evidence of anything. As a matter of policy, using Starr's URAP participation against him in this manner would serve to undermine *Bighorn* by discouraging similarly situated parties from participating in negotiation process in fear that it might subsequently be used against them.

D. There was no expert opinion testimony or evidence.

On page 213 of the opinion, the court stated that "[t]he consensus of expert opinion is that Measure M would not produce sufficient revenue." In that same paragraph, the court stated that "Starr did not introduce expert opinion to counter that evidence."

However, there was no "expert opinion" for Starr to counter. The City's only witnesses were staff: Thien Ng, its Public Works

Director (see 5 RT 220:19 *et seq.*), and James Throop, its Chief Financial Officer (5 RT 296:27 *et seq.*) Both disclaimed expert knowledge. (5 RT 326:27 [Ng]; cf. 7 RT 660:20-661:17, 662:03-13, 677:01-05, 680:10-23 [Throop admitting that the City did not have expertise to prepare cost of services study and otherwise evaluate its wastewater facilities].)

This leaves only the Cost of Services Study, prepared by an outside consultant because the City did not have the expertise to do it itself. (7 RT 660:20-661:17, 662:03-13, 677:01-05, 680:10-23.) The City did not present evidence from that consultant in support of its case. Ordinarily, information obtained from the consultant, including its report, would be hearsay. And it is, if it is offered as proof for matters contained in the report. (See Evid. Code § 1200.) However, to the extent the report forms the basis of the City's opinion, it is presumably within a hearsay exception (see Evid. Code § 1250 *et seq.*) but only to provide evidence of the basis for the City's action without concern for whether it was right.

In this context, we know that the City adopted Ordinance 2901 because it believed the Carollo report, but we cannot accept the Carollo report as true fact. Thus, much of the City's "evidence" is inadmissible for its truth. If, in response to this Petition the court does not amend its opinion to affirm the judgment below, it should at least grant rehearing to allow further review of what evidence was or was not admissible.

However, it bears repetition that the court need not (and should not) reach these issues because even if accepted as true (solely for the purpose of argument) the City had viable means to fund the Carollo plan without increasing rates. This prevents the City from meeting its burden of proof in this case.

E. Concerns relating to the City's bonds and credit rating were overstated.

On page 12 of the opinion, the court states that "Standard and Poor's (S&P) said Measure M would lower the City's bond rating if it went into effect." This was hearsay and Starr's objection on this point should have sustained. (6 RT 415:25 et seq.) Regardless, in the context of this petition, it may be more important that this is not what the S&P notice said.

In relevant part, the S&P notice says: "We believe that the wastewater system's credit profile could materially degrade during the next 90 days depending on [several possible actions, including the possibility that the City would request a stay]." (10 AA 2381.) S&P further recognized its understanding that Measure M did not "impair or restrict the city's future rate setting authority and that new service rates may be set …." (*Ibid.*) As to the Union Bank and Royal Bank of Canada letters of credit, the S&P suggested adverse actions *only if* the City refused to request a stay. (*Ibid.*) As to direct action by S&P, the noticed said "[w]e will likely take a negative action if, in our opinion, these decisions are likely to result in significant reduction in the wastewater system's liquidity position …" (10 AA 2832.)

This raises two important corrections: (1) S&P did not say it "would" take action, only that it might; and (2) the negative threats demanded only that the City request a stay of Measure M's implementation. On the first point, the S&P threat is, on its face, speculative. Second, the threats related only to a request for stay and not a determination on the merits. Hindsight suggests that creditors wanted time, not a permanent block because the parties agreed at trial that a decision upholding Measure M would not adversely affect the City's letter of credit. (8 RT 882:9-13.)

F. There were in fact $55 million of wastewater capital improvement projects that could have been charged to water.

In addressing Starr's argument that $55 million of wastewater projects could have been charged to water, the court opines: "In fact, none of the AWPF program costs were attributed to the wastewater utility in structuring its rates. Instead, AWPF costs were attributed to the water utility rates." (Opn. at p. *13.) The source for this conclusion is not clear because the City did not argue this, and it is not supported by evidence presented at trial. The fact that the City did not argue it should be determinative because it stands to reason that if the $55 million of projects Starr argues should have been charged to water actually were charged to water that the City would have argued that fact vigorously.

Regardless, support for Starr's position is found in Daniel Rydberg's complete testimony. While Rydberg testified that he did not recall whether the $55 million contribution to water made it into

the final rate model (7 RT 689:23), this was not the end of his testimony.[7]

During Rydberg's testimony, he reviewed and discussed trial Exhibit 52 (11 AA 3120) and was forced to acknowledge that the projects in question were in fact charged to wastewater rather than water. (7 RT 692 *et seq.*) It was here that he attempted to provide reasons why he believed that it was most appropriately charged to wastewater rather than water despite his prior request to the rate modeler. This, by itself, is not determinative because as long as the City had the option of charging the projects to water, Starr should prevail. But Rydberg's continued testimony suggests that the projects are best charged to water.

On this point, Rydberg acknowledged that the only purpose of that technology was to provide water to the City's recycled water program. (7 RT 694:24 *et seq.*, 698:27 *et seq.*) Application of this technology solely for the water utility was confirmed by the City's Public Works Integrated Master Plan. (7 RT 700:27 et seq.; 9 AA 2582.) If the projects exist solely to support water, why are they charged to wastewater?

On Rydberg's cross examination, counsel for the City attempted to elicit testimony that the projects in question were

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[7] Because the City bears the burden of proving Measure M's invalidity by a high burden, Rydberg's inability to remember, if his testimony stopped here, should be sufficient to find this fact against the City.

outside the scope of the capital improvement plan in question, meaning that they would not have been included in the rate model. (See 7 RT 723:24 *et seq.*) However, the City's rate modeler contradicted this testimony, providing evidence that funding for these projects was in fact built into the Ordinance 2901 wastewater rates. (7 RT 756:19 *et seq.*)

CONCLUSION

Whether the court's opinion in this case resulted from (A) the materially false fact that that Measure M would have resulted in a $50,000 deficit when it more likely would have resulted in a $117,000 surplus, (B) the court's disregard for *Bighorn*, or (C) any of the other errors discussed above, the court should reconsider its opinion and affirm the judgment below. Or, in the alternative, it should order supplemental briefing on any or all of these issues and schedule this matter for rehearing.

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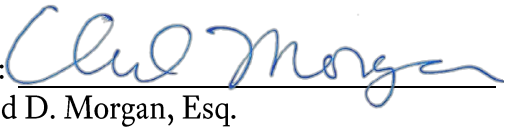
Dated: October 28, 2020

LAW OFFICE OF CHAD D. MORGAN

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to rules 8.268(b)(3) and 8.204(c)(5) of the California Rules of Court, I hereby certify that this brief contains 5,725 words, including footnotes. This is fewer than 7,000 words. In making this certification, I have relied on the word count of Microsoft Word the computer program used to prepare this brief.

Dated: October 28, 2020

LAW OFFICE OF CHAD D. MORGAN

By: 

Chad D. Morgan, Esq.
Attorneys for Defendant & Respondent/Appellant,
Aaron Starr

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is 40729 Village Drive #8, Big Bear Lake, CA 92315.

On October 28, 2020, I served:

1. Aaron Starr's Petition for Rehearing

On the following parties to this action:

Holly O. Whatley, Attorney for Plaintiffs & Appellants/Respondents
790 E. Colorado Boulevard, Suite 850 Pasadena, California 91101-2109
Telephone: (213) 542-5700 Facsimile: (213) 542-5710

Benjamin P. Fay, Attorney for Amicus League of California Cities
4912 Ninth Street, Suite 310, Oakland, CA 94607
Telephone: (510) 238-1400 Facsimile: (510) 238-1404

Laura Dougherty, Attorney for Amicus Howard Jarvis Taxpayers Assn
921 Eleventh Street, Ste. 1201, Sacramento CA 95814
Telephone: (916) 444-9950 Facsimile: (916) 444-9823

I served the party listed above via True Filing from my electronic service address of chad@chadmorgan.com.

Hon. Rocky Baio, Trial Court Judge
Ventura County Superior Court, Hall of Justice
800 South Victoria, Ventura, CA 93009

I served the party listed above as follows: I deposited the sealed envelope with the U.S. Postal Service, with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 28, 2020 at Big Bear Lake, California.

CHAD D. MORGAN