SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

AARON STARR, an individual, Petitioner and Plaintiff, vs. CITY OF OXNARD, a general law city; and DOES 1-10, Respondent and Defendant.	Case No.: 56-2017-00494475-CU-WM-VTA **TENTATIVE DECISION AND PROPOSED STATEMENT OF DECISION AND JUDGMENT**

On October 1, 2020, at 8:20 a.m., the matter came before the Court for a hearing on the Petition for Writ of Mandamus and Prohibition of petitioner, Aaron Starr ("Starr'), against respondent, the City of Oxnard ("City"), challenging the establishment and use of so-called Infrastructure Use Fees ("IUF"s) embedded in the rates City charges its residents for water, waste water (sewer), and solid waste disposal ("Environmental Resources" or garbage/trash) utility services operated by City. The Petition is brought pursuant to Propositions 13, 26, and 218, as embodied in California Constitution, articles XIII C and XIII D. The central issue in this action is whether the IUFs constitute a prohibited tax (which may be implemented only upon a vote of City's residents) or a permitted fee for utility services (which is not subject to the vote requirement).

The parties appeared as set forth in the Clerk's minutes. The record consists of the declarations and exhibits submitted in support of and opposition to the petition, including matters as to which the Court takes judicial notice. The Court received and considered briefing and oral arguments in support of and opposition to the Petition. At the conclusion of the arguments, the Court took the matter under submission. The parties timely made an oral request for a Statement of Decision. Pursuant to Code of Civil Procedure section 632, the Court hereby issues its Tentative Decision and Proposed Statement of Decision in this matter. This Tentative Decision and Proposed Statement of Decision shall become the Court's Final Statement of Decision and Judgment in this case, subject to the parties' rights to timely object and make further proposals concerning same pursuant to California Rules of Court, rule 3.1590.

INTRODUCTION

Propositions 13, 26, and 218 collectively amend the California Constitution to prohibit municipalities from enacting special taxes in the guise of use fees or surcharges without voter approval. Thus, a municipality may charge its residents a use fee only if it does not exceed the sum required to provide property-related services. Additionally, revenues derived from a use fee shall not be used for any purpose other than that for which the fee is imposed. Municipalities may not impose use fees to subsidize general government services, including police, fire, ambulance, or streets and roads, where the services are available to the public at large to the same extent as they are to property owners. Use fees must reflect the reasonable cost to the municipality for the property-related services provided. Municipalities are permitted broad leeway in reasonably estimating the actual cost of providing services to property owners for purposes of substantiating constitutionally-permissible use fees. Use fees which do not meet these constitutional standards are invalid unless they were approved by the voters.

Here, Starr, a resident and taxpayer of City, brings a petition for writ of mandamus and/or prohibition alleging that City has violated articles XIII C and XIII D of the California Constitution by charging residents with a use fee – the IUF at issue – for water, waste water, and

solid waste disposal services. The IUFs were not approved by a vote of City's residents. Starr argues that the IUFs exceed the reasonable sum associated with providing the respective services to property owners. Further, Starr argues that City has transferred IUF fees from the utility services' budgets to City's general fund in sums exceeding the reasonable cost City bears in subsidizing the utility services.

The period during which these constitutional violations are alleged to have occurred is beginning in the 2014-2015 fiscal year through June 30, 2017, as to IUF transfers to the public safety and governmental agency funds, and from the 2014-2015 fiscal year to the present as to IUF transfers to the streets and roadways maintenance fund. Starr challenges over $34 million in IUF transfers made from the water, waste water, and solid waste disposal budgets to the public safety, governmental agency, and streets and roadways maintenance funds.

City argues that its methodology for calculating and implementing the IUF transfers is sound and reasonably represents the cost to the public safety, governmental agency and streets and roadways maintenance budgets associated with providing residents with water, waste water, and solid waste disposal utility services. City relies principally on a cost-of-service study provided by a consultant in 2012 to support City's calculation of the percentages upon which the IUF transfers are premised.

For the reasons stated below, the Court finds in favor of Starr and against City on the Petition. The Court finds City has failed to meet its burden of proving that the IUF transfers reasonably represent the cost to City's public safety, governmental agency and streets and roadways maintenance budgets of providing water, waste water and solid waste disposal utility services to property owners. Accordingly, the Court GRANTS Starr's Petition for Writ of Mandate and Prohibition IN PART: the Court enters its Writ of Prohibition enjoining City from transferring IUF revenue to its public safety, governmental agency, and streets and roadway maintenance funds based upon the current methodology. Further, the Court enters its Writ of Mandamus directing City to restore to the respective utility funds all IUF monies transferred to the public safety, governmental agency, and streets and roadway funds for the period from fiscal year 2014-2015 (beginning March 27, 2014) through and including the current fiscal year. The

Court enters its Declaratory Judgment that the IUFs violate Article XIII D, section 6, subdivisions (b) (1), (2), and (5). The Court enters its Permanent Injunction to the extent consistent with the Courts issuance of its Writs of Mandate and Prohibition.

The above ruling is without prejudice to City's establishment of an IUF transfer methodology which reasonably represents the actual cost to City's public safety, governmental agency, and streets and roadways maintenance funds of providing water, waste water and solid waste disposal services to property owners. It is possible there are indirect costs incurred by City providing these services which are attributable to City's providing water, waste water, and solid waste disposal utility services to property owners which are not paid for by rate revenue. Article XIII D does not prevent City from charging an IUF to cover such indirect costs. The Court simply finds that City has failed to prove its current method of calculating IUF transfers complies with Article XIII D.

The Court DENIES the Petition IN PART to the extent of Starr's claims for rescission of City's ordinances establishing the IUF transfer process and the Vehicle Code claim. The Court finds these claims are not supported by the law or the evidence. In particular, while the Court can declare City's ordinances to be unconstitutional to the limited extent identified above, the Court is without any authority to rescind City's duly enacted ordinances. Further, for reasons stated below, the Court finds the IUF transfers do not implicate or violate Vehicle Code section 9400.8.

The Court exercises its discretion to decline to bifurcate the issue of remedies contrary to the tentative indication the Court gave the parties at the hearing on the Petition. After further thought and reflection, including a careful review of the record and the parties' arguments, the Court concludes there is no need for a further hearing concerning the appropriate remedy(ies) in light of the Court's Orders granting the Petition in part and issuing its Declaratory Judgment and Writs of Mandate and Prohibition, including the entry of a Permanent Injunction.

REQUEST FOR JUDICIAL NOTICE

The Court GRANTS Starr's request for judicial notice of public records reflecting City's fiscal year 2019-2020 annual budget. (Evid. Code, § 452, subd. (c) and (h).)

EVIDENTIARY OBJECTIONS

The Court SUSTAINS Starr's objections 1 and 2 to the declaration of Christine Williams and accompanying Exhibit A to City's Compendium of Exhibits in Support of Opposition to the Petition. The documents comprising Exhibit A are hearsay without any identifiable exception or foundation.

STARR'S OBJECTION TO OPINION TESTIMONY OF JOHN FARNKOPF, P.E.

Starr objects to the Court's consideration of expert opinions by John Farnkopf, P.E., the principal consultant who created the IUF transfer methodology which is the sole basis upon which City opposes the Petition. A timely demand for the exchange of expert witness information occurred in this action. Accordingly, each party was required to timely exchange expert witness information in conformity with Code of Civil Procedure section 2034.260. City did not designate Farnkopf as an expert witness.

The Court finds that the methodology Farnkopf and his team created for City to use in implementing the IUF transfer process at issue consists of information and concepts well beyond the common understanding of lay persons. Accordingly, Farnkopf's opinions as reflected in the consultant's report at issue, as well as those stated in his declaration and deposition testimony, constitute expert opinion within the meaning of Evidence Code section 801.

The Court, therefore, SUSTAINS Starr's objection to Farnkopf's expert opinion testimony in support of City's defense to the Petition. (Code of Civ. Proc., §2034.300.) The Court GRANTS Starr's motion to exclude that opinion testimony from the Court's consideration

of the evidence offered by City. Additionally, the Court excludes from its consideration the consultant's report upon which the IUF methodology is premised. (Pet. Ex. 9, HF&H, "Enterprise Fund Allocation Study") ("HF&H Report") The HF&H Report is hearsay without any exception, and no other witness testified by declaration, deposition or otherwise concerning the foundation or methodology reflected therein. The Court does, however, receive and consider the HF&H Report for the limited purpose of describing and explaining the basis of City's calculation of the IUF transfers to explain what City has done and why it has done it. The Court does not receive the HF&H report for the truth of the facts and opinions stated therein.

STATUTE OF LIMITATIONS

The Court finds that this Proposition 218 petition is governed by the three-year statute set forth in Code of Civil Procedure section 338, subdivision (a). Plainly, this is an "action upon a liability created by statute, other than a penalty or forfeiture." This phrase has been construed to mean a statutory obligation which did not exist at common law at the time the statute was enacted. (*Gardner v. Basich Bros. Constr. Co.* (1955) 44 Cal.2d 191, 194, 281 P.2d 521; *Winick Corp. v. General Ins. Co.* (1986) 187 Cal.App.3d 142, 145, 231 Cal.Rptr. 606.) A constitutional provision surely is afforded the same status as a statute for purposes of construing section 338; the former authorizes and enables the latter. Section 338, subdivision (a)'s three-year limitations period frequently has been applied by courts in mandamus proceedings. (*Pena v. City of Los Angeles* (1970) 8 Cal.App.3d 257, 262, 87 Cal.Rptr. 326.)

The Court concludes that Starr's petition is not governed by the one-year statute of limitations associated with an action subject to the Government Claims Act ("GCA"). (Govt. Code, § 911.2.) Starr's action is subject to the exception noted in Government Code section 905, subdivision (a), for claims related to "any tax, assessment, fee, or charge." Application of this exception to the one-year limitations period is not merely "arguable," as the City puts it; it is undisputed. Further, Starr's petition is not governed by the GCA at all: it does not seek relief in the form of money or damages. (Govt. Code, § 905.)

The Court further concludes that City's Municipal Code section 2-183 does not apply here; Starr's petition does not seek a refund of taxes or assessments. The Petition seeks relief in the form of mandamus, prohibition, injunction, and a declaratory judgment concerning violations of Proposition 218. Starr has not prayed for a refund of any IUF monies he has paid personally or that other taxpayers have paid individually or collectively.

Starr filed the Petition on March 27, 2017. The Petition raises Proposition 218 claims concerning IUF fund transfers for a period beginning no earlier than March 27, 2014, and encompassing fiscal years 2014-2015 through and including the present. Since the three-year statute of limitations applies here, Starr's Petition is not time-barred.

LEGAL PRINCIPLES

The parties largely agree on the legal standards governing this Court's review and determination of this Proposition 218 petition, with a minor dispute discussed below. The Court summarizes the framework of Proposition 218 actions, the standard of the Court's review of Starr's Petition, and the burden of proof governing this proceeding.

A. PROPOSITION 218 – HISTORICAL BACKGROUND

By the initiative process, the citizens of California enacted Propositions 13, 26 and 218. These legislative enactments made sweeping changes to the California Constitution the effect of which is to limit the authority of municipalities to enact general taxes, special taxes, and fees and assessments.

California Constitution, Article XIII C, section 2, states the following:

> "(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved."

Article XIII C, section 1, provides in pertinent part as follows:

"(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

Article XIII D, section 2, subdivision (b), defines an "[a]ssessment" as being ". . . any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'"

Article XIII D, section 2, subdivision (e), defines a "[f]ee" or "charge" as ". . . any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."

Article XIII D, section 3, provides as follows:

"(a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

(1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.

(2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.

(3) Assessments as provided by this article.

(4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership."

Article XIII D, section 6, provides the following:

"(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in

determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section."

It is undisputed that the IUFs at issue here fall within the exception of Article XIII D, section 6, subdivision (c), exempting sewer, water, and refuse collection services from the requirement of a vote of City's residents prior to adoption. As is explained more fully below, Starr's challenge to the IUFs here implicates Article XIII D, section 6, subdivisions (b) (1), (2), and (5).

"Proposition 218, approved by voters in 1996, is one of a series of voter initiatives restricting the ability of state and local governments to impose taxes and fees." (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380, 247 Cal.Rptr.3d 619, 441 P.3d 870.) "The first of these measures was Proposition 13, adopted in 1978, which limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited annual increases in valuation to 2 percent without a change in ownership." (*Ibid.*) "To prevent local governments from increasing special taxes to offset restrictions on ad valorem property taxes, Proposition 13 prohibited counties, cities, and special districts from imposing special taxes without a two-thirds vote of the electorate." (*Ibid.*)

"But local governments were able to circumvent Proposition 13's limitations by relying on *Knox v. City of Orland* (1992) 4 Cal.4th 132, 141, 14 Cal.Rptr.2d 159, 841 P.2d 144, which held a 'special assessment' was not a 'special tax' within the meaning of Proposition 13." (*Id.*, 7 Cal.5th at p. 381, 247 Cal.Rptr.3d 619, 441 P.3d 870.) "Consequently, without voter approval,

local governments were able to increase rates for services by labeling them fees, charges, or assessments rather than taxes." (*Ibid.*)

"To address these and related concerns, voters approved Proposition 218, known as the "Right to Vote on Taxes Act," which added Articles XIII C and XIII D to the California Constitution." (*Ibid.*) "Article XIII C concerns voter approval for many types of local taxes other than property taxes. Article XIII D addresses property-based taxes and fees." (*Ibid.*)

"Article XIII D allows only four types of local property taxes: (1) an ad valorem tax, (2) a special tax, (3) an assessment, and (4) a property-related fee. (Art. XIII D, § 3, subd. (a).) Proposition 218 supplements Proposition 13's limitations on ad valorem and special taxes by placing similar restrictions on assessments and property-related fees. [citation]" (*Ibid.*)

"Article XIII D imposes distinct procedural and substantive limitations. (§§ 4, 6.) The procedures an agency must follow before 'imposing or increasing any fee or charge' are found in subdivision (a) of article XIII D, section 6.8 An agency seeking to impose or increase a property-related fee must hold a hearing and send written notice of the hearing to the owner of each affected parcel. (Art. XIII D, § 6, subd. (a)(1).) The notice must specify the amount of the proposed fee, the basis of calculation, and the reason for the fee. It must note the date, time, and location of the public hearing. [citation] At that hearing, 'the agency shall *consider all protests* against the proposed fee or charge.'" ([citation],§ 6, subd. (a)(2), italics added.) In addition to mandating that the agency 'consider' all protests, Proposition 218 establishes a majority protest remedy. 'If *written* protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.' ([citation]., italics added.) Article XIII D does not define the term 'protest' or explain what form a written protest must take." (*Id.*, 7 Cal.5th at pp. 381-82, 247 Cal.Rptr.3d 619, 441 P.3d 870.)

"Even when an agency is generally authorized to impose or modify fees, so long as it complies with the notice and hearing requirements, Proposition 218 places other substantive limitations on the agency. Those substantive limitations on property-related fees appear in subdivision (b) of article XIII D, section 6. Under these limitations: (1) revenues derived from the fee may not exceed the cost of providing the property-related service (id., § 6, subd. (b)(1));

(2) those revenues may not be used for any purpose other than the one for which the fee was imposed (id., § 6, subd. (b)(2)); (3) the amount of the fee 'shall not exceed the proportional cost of the service attributable to the parcel' (id., § 6, subd. (b)(3), italics added); (4) a fee may not be imposed for a service unless that service is available to the property owner (id., § 6, subd. (b)(4)); and (5) a fee may not be imposed upon property owners for a general governmental service, like fire protection, if the service is available to the general public in substantially the same manner as it is to property owners (id., § 6, subd. (b)(5))." (*Id.*, 7 Cal.5th at p. 382, 247 Cal.Rptr.3d 619, 441 P.3d 870.)

B. STANDARD OF REVIEW

The Legislature (that is, the people through the initiative process) clearly expressed their intent that Proposition 218 should be liberally, not strictly, construed to make it harder, not easier, for local governments to implement taxes in the form of user fees without voter approval. (*Silicon Valley Taxpayers' Assn. v. Santa Clara County* (2008) 44 Cal.4th 431, 443-449, 79 Cal.Rptr.3d 312, 187 P.3d 37 ("*Silicon Valley*").) "Accordingly, courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIIID." (*Id.*, 44 Cal.4th at p. 450, 79 Cal.Rptr.3d 312, 187 P.3d 37.) Contrary to City's argument, the Supreme Court made crystal clear in *Silicon Valley* that this Court shall not defer whatsoever to City's decisions adopting and implementing the IUF calculation and transfer methodology. This Court must exercise its independent judgment based upon the record presented to it in deciding whether City's creation and implementation of the IUF transfers violates article XIII D, section 6, subdivisions (1), (2), and (5).

C. BURDEN OF PROOF

City bears the burden of proving by a preponderance of the evidence that the IUF transfers do not violate article XIII D, section 6, subdivisions (b) (1), (2), and (5). (Art. XIII D,

sect. 6, subd. (b) ["In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.]; *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1506-1507, 186 Cal.Rptr.3d 362; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 914, 167 Cal.Rptr.3d 687.)

City does not dispute it bears the burden of justifying the IUF transfers as permitted fees rather than prohibited taxes. Instead, City argues that Starr bears the initial burden of proving a prima facie case of a violation before City's burdens of production and proof are triggered. This contention is not settled in the law governing Proposition 218 challenges. The authorities upon which City relies for this contention leave the Court with little confidence in the accuracy of City's argument.

For example, the decision in *Morgan v. Imperial Irrigation Dist.*, *supra*, 223 Cal.App.4th 892, 167 Cal.Rptr.3d 687, does not address the question of whether a Proposition 218 petitioner bears any initial burden of production or proof before the municipality's burden of justifying a use fee is triggered. The decision in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 121 Cal.Rptr.3d 37, 247 P.3d 112, did not address a Proposition 218 challenge, but instead involved a contested water rights fee which the Court held was outside the scope of Proposition 13's prohibition on ad valorem real property taxes. The decision in *California Building Industry Association v. State Water Resources Control Board* (2018) 4 Cal.5th 1032, 232 Cal.Rptr.3d 64, 416 P.3d 53, involved a water use fee alleged to have been in violation of article XIII A, not a Proposition 218 challenge under article XIII D, section 6, subdivision (b).

Thus, the Court concludes that the decisions relied upon by City in support of its argument that Starr bears the initial burden of production and proof of a prima facie Proposition 218 violation are inapposite. To the extent Starr has any initial burden in this action, he has met it: the evidence in support of the Petition identifies IUFs embedded in water, waste water, and solid waste disposal utility user fees, which are transferred by City to its public safety, governmental agency, and streets and roadways maintenance funds. Starr has met any initial

burden the law places upon him. City's burden of producing evidence and proving that the IUFs and transfers comply with Proposition 218 is triggered.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Based upon the totality of the evidence presented, and all reasonable inferences which may be drawn therefrom, the Court makes the following findings of fact and conclusions of law:

(1) The evidence is undisputed that, since before fiscal year 2014-2015, City has charged its residents user fees to provide water, waste water (sewer), and solid waste disposal (trash and garbage) utility services. City has operating budgets into which these user fees are deposited and from which costs of providing these services are paid.

(2) As is relevant to the instant Petition, since March 27, 2014, in addition to the user fees charged to residents for water, waste water, and solid waste disposal, City has added IUFs, the purpose of which is to capture the indirect costs to City of providing public safety, governmental agency, and streets and roadways maintenance services to water ratepayers. The IUFs are embedded surcharges. Once the IUFs are paid by utility ratepayers, they are swept or transferred to City's General fund (for public safety and governmental agency services), and the Street Maintenance Fund (for streets and roadways maintenance services) on a monthly basis.

(3) Since fiscal year 2014-2015, City has swept or transferred a total of $34,431,058 in IUFs from the water, waste water and solid waste disposal utility operating funds to the General Fund and the Street Maintenance Fund. The IUF transfers to the General Fund ceased in fiscal year 2017. The IUF transfers to the Street Maintenance Fund have continued uninterrupted to this date.

(4) For the following reasons, the Court finds City has failed to meet its burden of production of evidence and proof that the embedded IUFs and IUF transfers from the water, waste water, and solid waste disposal utility operating funds to the General Fund and the Street Maintenance Fund comply with article XIII D, section 6, subdivisions (b) (1), (2), and (5):

(a) As mentioned previously, the Court has excluded the testimony of John Farnkopf, one of the principal authors of the HF&H Report, in the form of his deposition testimony and declarations, except the Court has received it for the limited purpose of explaining how City came up with the IUF embedded surcharge and fund transfer methodology (that is, its rationale for doing so). City's other expert, Mr. Joe Sbranti, was designated properly and deposed. Mr. Sbranti, however, did not participate in and offered no foundational testimony or other opinions about the research, analysis and methodology of the HF&H Report. Thus, no expert witness has offered any opinion testimony (in the form of a declaration, deposition or otherwise), based upon admitted evidence of foundational facts, to explain the complex methodology of assigning to the water, waste water, and solid waste disposal utilities the estimated reasonable, indirect costs to City's public safety, general governmental and streets and roadways maintenance budgetary units attributable to those utilities. The methodology employed by the HF&H Report, and upon which City pins its defense of the IUF transfers, can only be understood and justified by expert testimony; the HF&H Report's methodology and conclusions are well beyond the realm of lay opinion or common knowledge.

(b) Even if Farnkopf's opinion testimony and the HF&H Report were admissible, City has not produced any admissible evidence concerning the factual foundation upon which the HF&H report is premised. City's attorneys have argued at some length about the foundational facts. The arguments of counsel, however, are not evidence. (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 181, 53 Cal.Rptr. 129, 417 P.2d 673.) Many documents containing budgetary information were submitted by City without any foundational testimony to explain the circumstances of their creation, their authenticity, their accuracy or their reliability. This record is bereft of any evidentiary foundation of the facts which serve as the premise of the HF&H Report. Since the HF&H Report and Farnkopf's testimony have not been received as evidence, the City's defense of the IUF transfers evaporates.

(c) The Court finds that the HF&H Report's conclusion that a fixed, flat percentage attributable to the provision of water, waste water and solid was disposal should be assigned as the indirect cost to City of providing public safety, general governmental, and streets

and roadways maintenance services appears to be arbitrary, capricious, unsupported by any foundational facts, and entirely speculative. The Ottawa and Seattle studies upon which the streets and roadways maintenance percentage is premised do not bear any factual connection to the actual cost to City of street and roadway maintenance attributed to water, waste water, and/or solid waste disposal services and activities. City could have but elected not to present any evidence of the fact, frequency, and expense of demolishing and repairing its streets and roadways to operate underground water and sewer lines. City likewise failed to present any evidence of the frequency and pattern of solid waste disposal truck traffic on its streets and roadways. The HF&H Report and Farnkopf's opinions simply create IUF percentages without any showing of their factual connection to the reasonable estimated indirect cost to City's streets and roadways maintenance budget caused by operation of the water, waste water, and solid waste disposal utilities' services.

(d) City's argument that the total of the IUF transfers can be covered substantially by non-rate revenue is not supported by any admissible evidence.

(e) City has not presented any evidence concerning the actual costs it has incurred from fiscal year 2014-2015 to the present for the provision of public safety, general governmental, and streets and roadways maintenance services directly or indirectly attributable to the provision of water, waste water, and solid waste disposal utility services. It appears to the Court that City has not even attempted to make such an actual itemization or a reasonably reliable estimation. The parties submitted substantial financial information concerning the revenues, expenditures, and budgets of the utilities, and non-utility agencies at issue. None of this mass of information hints at an attempt by City to itemize or reasonably estimate the actual costs of public safety, general governmental, and streets and roadways maintenance services attributable to City's providing the three utility services at issue.

(f) Assuming for the sake of argument that the HF&H Report and Farnkopf's opinion testimony were admitted into evidence other than on the limited basis noted above, the methodology of calculating the IUF transfer percentages for the public safety and governmental agency budgetary units is entirely lacking in foundation, speculative and deeply flawed. The

IUF percentages as to these budgetary categories are culled from the ratio of utility employees to the total of City's employees, the ratio of office space occupied by utility employees to all office space at City's governmental center complex, and a ratio derived from the respective budgets of the utilities and the general governmental services and public safety budgetary units. This methodology appears to meticulously have avoided making an actual calculation or a reasonable estimate of the general governmental services and public safety services indirectly connected to City's provision of water, waste water and solid waste disposal utility services to ratepayers. As to that aspect of the IUF which depends on the ratio of utility office employees and office space to the whole of the office space and employees at the main governmental center complex, the evidence suggests that the utilities have office space entirely separate from the civic center complex. No evidence was presented of any services performed by employees at the civic center complex which can be directly or indirectly attributed to providing water, waste water and/or solid waste disposal services. The resulting IUF transfer percentages are the definition of arbitrary; they do not bear a reasonable or meaningful connection to the actual cost to City of providing public safety, general governmental or streets and roadways maintenance services directly or indirectly connected to providing water, waste water and/or solid waste disposal services.

(g) The Court finds that the IUF transfer fees have remained remarkably consistent in successive fiscal years, even though the budgets of the respective City services as to which the IUF percentages calculated by the HF&H Report are premised fluctuate substantially. This strongly suggests that the IUF transfer fees are not connected to the actual cost or a reasonable estimate of the actual cost to City of providing public safety, general governmental and streets and roadways maintenance services directly or indirectly connected to providing water, waste water and solid waste disposal services. This creates a strong inference the IUFs are an improper use fee subsidizing general governmental services available to all of City's residents to the same extent as its utility ratepayers.

(5) Thus, the Court concludes that the IUF embedded charges and transfers at issue here violate article XIII D, section 6, subdivisions (b) (1) and (2) because City has failed to meet

its burden of proving that the charges and transfers do "not exceed the funds required to provide the property related service" and that "[r]evenues derived from the fee or charge [are] not be used for any purpose other than that for which the fee or charge was imposed."

(6) Moreover, the Court concludes that City has failed to meet its burden of proving that the IUFs have not been used "for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." (Art. XIII D, sect. 6, subd. (b)(5).) In fact, it is undisputed that the IUFs have been and are used for general governmental services which are available to the public at large in substantially the same manner as to property owners. City's attempt to justify these general governmental surcharges on property owners through the unfounded and speculative methodology outlined by the HF&H Report is unavailing for the reasons stated above.

(7) The Court's findings and conclusions above are without prejudice to the City, at some point going forward, creating a credible and reasonable means of itemizing or estimating the indirect costs of providing public safety, general governmental, and streets and roadways maintenance services attributable to its provision of water, waste water and solid waste disposal utility services. The most rudimentary understanding of accounting leads to the conclusion that both direct and indirect costs are capable of being calculated or estimated reasonably. The Court's conclusion that City has failed to do so in this action should in no way be construed as a barrier to City doing so in the future.

(8) To the extent of the above findings and conclusions, the Court finds in favor of Starr and against City on the Petition.

(9) The Court finds against Starr on the Petition's claim that Vehicle Code section 9400.8 bars the IUF transfers to the Street Maintenance Fund. The Court finds the IUFs here are not prohibited fees or charges for hauling legal loads on streets. (See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1622, 27 Cal.Rptr.3d 28.) They are an unconstitutional attempt to capture the alleged reasonable, actual indirect cost to City of providing streets and roadways maintenance services attributed to water, waste water, and solid

waste disposal utility services. There is a reasonable possibility City could impose such an indirect cost-based use fee without offending article XIII D, section 6, subdivision (b). Any such constitutional use fee would not violate Vehicle Code section 9400.8.

(10) The Court finds against Starr on the Petition's prayer for prejudgment interest. Starr has not been awarded monetary damages. The Court's Judgment on the Petition directs that City reimburse its utility service budgets in the full amount of the IUF transfers from March 27, 2014, to the present without prejudice to an accounting adjustment later in the event that City develops a credible and reasonable means of calculating or estimating the actual direct or indirect unreimbursed costs to its public safety, general governmental and/or streets and roadways maintenance budgets attributable to providing water, waste water and solid waste disposal utility services. Thus, Starr is not entitled to prejudgment interest. (Civ. Code, § 3287.)

(11) The Court finds against Starr on the Petition's claim for rescission of City's ordinances enacting the IUFs and transfers. The Court has no authority to rescind a duly enacted municipal ordinance.

JUDGMENT

Based upon the above findings of fact and conclusions of law, the Court hereby ORDERS, ADJUDGES, and DECREES the following:

(1) The Court hereby enters JUDGMENT in favor of Starr and against City on the Petition to the extent set forth in the above Findings of Fact and Conclusions of Law.

(2) The Court hereby enters its JUDGMENT GRANTING Starr's Petition for Writ of Mandamus and/or Prohibition against City to the extent set forth in the above Findings of Fact and Conclusions of Law.

(3) The Court hereby enters its WRIT OF PROHIBITION directing City to immediately cease and desist imposing the embedded IUF in the rates paid by water, waste water, and solid waste disposal ratepayers, WITHOUT PREJUDICE to City developing and implementing a credible and reasonable means of complying with article XIII D, section 6,

subdivisions (1), (2), and (5) which rectifies the errors and omissions set forth in the above Findings of Fact and Conclusions of Law.

(4) The Court hereby enters its WRIT OF PROHIBITION directing City to immediately cease and desist transfers of IUFs from the water, waste water, and solid waste disposal utility operating budgets to City's General Fund, Street Maintenance Fund, or any other fund controlled by City, WITHOUT PREJUDICE to City developing and implementing a credible and reasonable means of complying with article XIII D, section 6, subdivisions (1), (2), and (5), which rectifies the errors and omissions set forth in the above Findings of Fact and Conclusions of Law. (See *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 237 Cal.Rptr.3d 179, 424 P.3d 268.)

(5) The Court hereby enters its WRIT OF MANDATE directing City to immediately reimburse to the water, waste water, and solid waste disposal utility operating budgets the total sum of all IUF transfers made to the General Fund and Street Maintenance Fund for fiscal years 2014-2015 (beginning March 27, 2014), 2015-2016, 2016-2017, 2018-2019, and 2019-2020. The Court intends this aspect of its writ of mandamus and prohibition to restore the status quo ante as to IUF transfers beginning no earlier than March 27, 2017. The issuance of this WRIT OF MANDATE is WITHOUT PREJUDICE to City developing and implementing a credible and reasonable means of complying with article XIII D, section 6, subdivisions (1), (2), and (5), which rectifies the errors and omissions set forth in the above Findings of Fact and Conclusions of Law. (See *Citizens for Fair REU Rates v. City of Redding*, *supra*, 6 Cal.5th 1, 237 Cal.Rptr.3d 179, 424 P.3d 268.)

(6) The Court issues its ORDER of PERMANENT INJUNCTION consistent with the WRITS OF MANDATE AND PROHIBITION set forth above. This PERMANENT INJUNCTION is WITHOUT PREJUDICE to City developing and implementing a credible and reasonable means of complying with article XIII D, section 6, subdivisions (1), (2), and (5), which rectifies the errors and omissions set forth in the above Findings of Fact and Conclusions of Law. (See *Citizens for Fair REU Rates v. City of Redding*, *supra*, 6 Cal.5th 1, 237 Cal.Rptr.3d 179, 424 P.3d 268.)

(7) The Court hereby enters its DECLARATORY JUDGMENT in favor of Starr and against City as follows:

(a) The IUF embedded charges and transfers at issue here violate article XIII D, section 6, subdivisions (b) (1) and (2), which prohibit "use fees or charges that exceed the funds required to provide the property related service" and that are "used for any purpose other than that for which the fee or charge was imposed."

(b) The IUFs violate article XIII D, section 6, subdivision (b)(5), because they are and have been used "for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners."

(8) The Court hereby awards costs of suit to Starr and against City in an amount to be determined by a timely served and filed cost memorandum in conformity with the Code of Civil Procedure and the California Rules of Court.

The Court reserves jurisdiction to enforce, modify, or vacate the above JUDGEMENT, WRIT OF MANDATE AND PROHIBITION, and PERMANENT INJUNCTION. This reservation of jurisdiction includes, but is not limited to, a later evidentiary hearing and adjudication, if necessary, concerning the extent to which, if at all, City rectifies the errors and omissions set forth in the above Findings of Fact and Conclusions of law concerning implementation of IUFs and IUF transfers, as well as concerning any necessary adjustments or modifications to the WRIT OF MANDATE directing reimbursement of IUFs to the respective utility services funds in compliance with article XIII D, section 6, subdivisions (b) (1), (2), and (5). Any such later evidentiary hearing and adjudication shall be upon noticed motion in conformity with the Code of Civil Procedure and the Rules of Court.

The Clerk shall give notice of this Tentative Decision and Proposed Statement of Decision. This Tentative Decision and Proposed Statement of Decision shall become the Court's Final Statement of Decision in this case, subject to the parties' rights to timely object and make further proposals concerning same pursuant to California Rules of Court, rule 3.1590. The Court will issue a Final Statement of Decision pursuant to the procedure described in rule

3.1590. Thereafter, the Court shall direct counsel of record for Starr to serve and file a proposed Order, Judgment, and Writs consistent with the Court's Final Statement of Decision and in conformity with the Code of Civil Procedure and the Rules of Court.

Dated: December 28, 2020

MATTHEW P. GUASCO
Judge of the Superior Court

PROOF OF SERVICE
CCP §1012, 1013a(1), (3) & (4)

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

Case Title: STARR V CITY OF OXNARD

Case Number: 56-2017-00494475-CU-WM-VTA

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 S. Victoria Avenue, Ventura, CA 93009. On the date set forth below, I served the within:

TENTATIVE DECISION AND PROPOSED STATEMENT OF DECISION

on the following named parties:

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Attorney for Respondent/Defendant

_____ **BY PERSONAL SERVICE**: I caused a copy of said document(s) to be hand delivered to the interested party at the address set forth above on _____at _____ a.m./p.m.

___X_ **BY MAIL**: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

_____ **BY FACSIMILE**: I caused said documents to be sent via facsimile to the interested party at the facsimile number set forth above with no notice of error at _____ from telephone number ____.

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on **December 28, 2020,** at Ventura, California.

MICHAEL D. PLANET, Ventura Superior Court,
Executive Officer and Clerk

By: _____
L. Jacques, Judicial Secretary