Torres v. City of Montebello, et al.
BS 120272

Tentative decision on petition for writ of mandate: granted

Petitioner Torres applies for a writ of mandate voiding the waste services contract between Respondent City of Montebello ("City") and Real-Party-in-Interest Arakelian Enterprises, Inc. d/b/a Athens Services ("Athens"). The court has read and considered the moving papers, Athens' opposition and the City's response, and replies,[1] and renders the following tentative decision.

A. Statement of the Case

Petitioner Torres commenced this action on April 23, 2009, raising various issues with respect to a trash collecting contract between the City and Real-Party-in-Interest Athens. The Petition alleges in pertinent part as follows.

On July 23, 2008, the City Council held a noticed meeting at which it considered, as Agenda Item No. 17, the approval of the Amended and Restated Athens Services Agreement for Waste Collection. On that day, the City Council approved the July 23, 2008 version of the agreement, but with several amendments that were negotiated at the dais and subsequently confirmed by and agreed to by Athens (the "Athens Contract"). Because of the rushed timeline for approval of the Athens Contract and the confusion that occurred during the City Council meeting, numerous memoranda were drafted during July, August, and September 2008, to confirm the provisions of the Athens Contract.

Montebello Municipal Code ("MMC") section 8.12.020 governs the City's authority to contract for collection services and, prohibiting exclusive commercial waste hauling, provides that: "Any of the following methods, or any of them in combination, may be used to meet the needs of the citizens of the city for the collection and disposition of solid waste, recyclables and C&D debris: A. The city may use its own forces to collect, carry, convey or transport solid waste, C&D debris, and recyclables from all single-family residential, multiple-family residential, commercial, and industrial premises within the city. B. The city will enter into a non-exclusive franchise ("franchise") with one or more solid waste haulers, which have met the city's solid waste hauler licensing requirements and are duly licensed and permitted to engage in solid waste hauling as of March 31, 2004, to furnish commercial collection services in the city...

In 1996, California voters approved Proposition 218 ("Prop 218"), adding article XIII C, Voter Approval for Local Tax Levies, and article XIII D, Assessment and Property-Related Fee Reform, to the California Constitution. Prop 218 was intended to protect taxpayers by limiting the methods by which local governments may exact revenue from taxpayers without their consent. Prop 218 prohibits a local government from imposing taxes, assessments, fees or charges as an incident of property ownership except as provided in articles XIII C and XIII D. Prop 218 requires a local government to follow the mandated procedure set forth in Article XIII D, section 6, of the California Constitution before it may increase any property-related fee.

Specifically, XIII D Section 6(a) requires the local government to: (1) Identify the parcels upon which a fee or charge is proposed for imposition; (2) Calculate the amount of the fee

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[1] Given the unusual posture of this case, the court permitted Athens to reply to the City's response.

proposed to be imposed on each parcel; (3) Provide written notice by mail to the "record owner of each identified parcel"; (4) Conduct a public hearing on the proposed fee not less than 45 days after the mailing; (5) Consider "all protests against the proposed fee or charge," and; (6) If written protests against the fee are presented by a "majority of owners of the identified parcels," the fee cannot be imposed.

Further, the Proposition 218 Omnibus Implementation Act, codified at Government Code section 53750 *et seq.*, defines "increased" when applied to a property-related fee as a "decision by an agency that does either of the following: (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge. (B) Revises the methodology by which the tax, assessment, fee or charge is calculated, if that revision results in an increased amount being levied on any person or parcel." Gov't. Code §53750(h)(l).

The Petition alleges that fees charged pursuant to the Athens Contract are "property-related fees" that are set forth on Annual Property Tax Bills for the residents of the City under the line item of "City Rubbish," and the Athens Contract therefore violates Prop 218.

The Petition also alleges claims for violation of MMC sections 8.12.020 and 3.21.060(A), conflict of interest under Gov. Code section 1090 *et seq.*, breach of fiduciary duty, declaratory relief, and due process. With respect to mandamus, Petitioner contends that the City has a mandatory duty to comply with provisions of the MMC and Prop 218 with respect to waste collection contracting and failed to comply with those provisions.

B. Clarification of Petitioner's Claims

Petitioner Torres has clarified that he is pursuing as mandamus the Petition's first through fourth and seventh causes of action. He acknowledged that the court accurately characterized these claims on August 7, 2009 as: (1) the Athens Contract award violated MMC section 8.12.020, (2) the Athens Contract violated MMC section 3.21.060(A), (3) the Mayor never signed the Athens Contract in violation of the MMC, (4) the City Council's vote was improper because Defendant Kathy Salazar ("Salazar") had a conflict of interest under Gov. Code section 1090 *et seq.*, and (5) the Athens Contract violated Prop. 218 because it provides for a property-related fee.

Petitioner seeks mandamus compelling rescission of the Athens Contract based on these failures. With his concurrence, the Petition's causes of action for breach of fiduciary duty and violation of due process, which are damages claims against Athens only, were ordered stayed pending outcome of mandamus.

C. Standard of Review

There are three general categories of agency decisions challenged by mandamus: (1) quasi-adjudicative decisions in which the agency exercised its discretion and which are challenged by administrative mandamus under CCP section 1094.5 for, (2) quasi-legislative decisions challenged by traditional mandamus under CCP section 1085, and (3) ministerial or informal administrative actions also challenged by traditional mandamus. *See* Western States Petroleum Assn. v. Superior Court, (1995) 9 Cal.4th 571-76. An agency decision is quasi-adjudicative where it concerns the agency's application of discretion in the determination of facts after a hearing is required. See Neighborhood Action Group v. County of Calaveras,

that the City Attorney acted in bad faith in this case.)

Athens relies on City of Orange v. San Diego County Employees Retirement Association, ("City of Orange") (2002) 103 Cal.App.4th 45, to argue that the purpose of section 40602 is to protect the public, not a private party, and enforcing against the City "would benefit only the party contracting with the municipality at the City's expense." Opp. at 12.

In City of Orange, a city sued a defendant retirement association for breach of a settlement agreement based on an oral option contract in which the association offered to settle the city's restitution claim in exchange for a delay in litigation. Id. at 45. The court distinguished Mezzetta because the oral agreement in that case imposed a financial burden on the city. Id. at 53. In contrast, the oral agreement was for a standstill in litigation while the offer was being considered. Id. at 54. It benefitted the city, which had much to gain and little to lose from the oral contract. Id. at 55. The court also distinguished Mezzetta as a case involving a private party seeking to enforce the contract, not the city. Id. at 54.

City of Orange has no bearing on this case. Here, Torres and the City seek to enforce the requirements of section 40602. The contract is not an oral contract from which the City stands much to gain, but a $150 million contract.

Thus, the Athens Contract was signed by some person who purported to sign as Mayor *Pro Tem* because the Mayor was "deemed absent." Even if the Contract was signed by the Mayor *Pro Tem* -- and the court has no proof that it was -- it was unlawful and void.[13]

Athens cannot claim that this results in great prejudice. As the City argues (Resp. at 5), Athens cannot claim that voiding the Contract will result in great hardship because "[p]ersons dealing with a public agency are presumed to know the law with respect to contracting procedures and act at their peril." Miller v. McKinnon, (1942) 20 Cal.2d 83, 88-89. Athens knew that the Contract was signed by someone deeming the Mayor to be absent, and knew that the Mayor did not agree with the Contract. Moreover, Athens has had the benefit of three years of contract performance. While it has incurred several million in costs to purchase trucks and garbage cans for residents, it also has garnered profits. Therefore, it is unknown what, if any loss Athens will sustain by a void contract.

G. The Proposition 218 Claim

1. Governing Law

a. Prop 13

Under California law, locally imposed taxes are subject to a voter approval requirement. Proposition 13 ("Prop 13") was the genesis of voter approval requirements for locally-imposed special taxes. Cal. Const.,[14] Art. XIII A, §4. Adopted thirty four years ago in 1978, Prop 13 amended the State Constitution to restrict property tax increases. Prop 13 also gave local voters greater control over special taxes in order to prevent local governments from replacing lost

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[13]If it were authorized by law and actually signed by the Mayor *Pro Tem*, the court agrees with Athens that the alteration stating that the Mayor had been "deemed absent" for purposes of signing did not materially alter the Contract. *See* Opp. at 13.

[14]All further references to an "Article" are to the California Constitution.

property tax revenues by raising such taxes.

b. Prop 62

Local governments in subsequent years sought to circumvent the restrictions on imposing or increasing local taxes contained in Prop 13.

In response, in 1986 voters adopted Proposition 62 ("Prop 62"), a statutory initiative which sought to require local special taxes to be approved by two-thirds of local voters, and local general taxes to be approved by a majority of local voters. Santa Clara County Local Transportation Authority v. Guardino, (1995) 11 Cal.4th 220, 247-48 (upholding constitutionality of Prop 62).

c. Prop 218

Prop 218, passed in 1996, was one of several voter-enacted limitations on the power of State and local governments to increase real property taxes.

Prop 218 added Articles XIII C and D to the State Constitution. Prop 218 provides that "[a]ll taxes imposed by any local government shall be deemed to be either general taxes or special taxes." Art. XIIIC §2(a). A "general tax" is "any tax imposed for general governmental purposes." Art. XIIIC §1(a). A "special tax" is "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." Art. XIIIC §1(d). Prop 218 forbade any local general tax from being imposed without approval by a majority vote of the electorate in the affected jurisdiction, and any local special tax from being imposed without approval by a two-thirds vote of the electorate. Art. XIIIC §2(b), (d).

Article XIIID imposes certain procedural requirements before an agency adopts a property-related fee or charge. A "fee" or "charge" is "any levy other than an ad velorem 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." Art. XIIID, §2(e). A "property-related service" is "a public service having a direct relationship to property ownership." Art. XIIID, §2(h).

Before imposing a property-related fee or charge, the agency must identify all parcels upon which it will be imposed, and conduct a public hearing. The hearing must be preceded by written notice to affected owners setting forth, among other things, a "calculat[ion]" of "[t]he amount of the fee or charge proposed to be imposed upon each parcel ... ." Art. XIIID, §6(a)(2). If a majority of affected owners file written protests at the public hearing, "the agency shall not impose the fee or charge." Id. Moreover, unless the charge is for sewer, water or refuse collection services, the property-related fee or charge may not be imposed or increased "unless it 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, a two-thirds vote of the electorate residing in the affected area." Art. XIIID, §6(c).

Article XIIID further prohibits a public agency from adopting a property-related fee or charge 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; and (5) No fee or charge may be imposed for general governmental services. Art. XIIID, §6(b) (1)-(5).

The burden is on the agency to demonstrate compliance with Art. XIIID's requirements. Art.XIIID, §6(b)(5).

The Ballot Argument in support of Prop 218 stated that its provisions were intended to "guarantee" Californians the "right to vote on local tax increases—even when they are called something else, like 'assessments' or fees'." These restrictions were required because local politicians sought to exploit an apparent loophole in the law "that allow[ed] them to raise taxes without voter approval by calling taxes 'assessments' and 'fees'."[15]

The California Supreme Court has emphasized that, when understood in its historical context, Prop 218's purpose was to limit taxes on real property. *See* Apartment Assn. of Los Angeles County, Inc. v City of Los Angeles, ("Apartment Assn.") (2001) 24 Cal.4th 830, 838-39; Howard Jarvis Taxpayers' Assn. v. City of L.A., ("Howard Jarvis") (2000) 85 Cal.App.4th 79, 82-83 (Prop 218 extended the voter approval requirements for the enactment of a local tax to cities operating under a "home rule" charter, and also imposed voter approval requirements for property-related fees, charges, and assessments).

2. Discussion

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[15]Prop 218 did not explicitly define what constituted a "tax" and was subject to the measure's local voter approval requirements. Disagreements ensued regarding the difference between regulatory fees and taxes.

In Sinclair Paints v. SBE, ("Sinclair") (1997) 15 Cal.4th 866, the California Supreme Court addressed this issue. The Legislature had enacted a mitigation fee requiring paint manufacturers to pay a regulatory charge to both deter and offset the impact of their activity upon the environment. The court found that if regulation is the primary purpose of a fee, the mere fact that revenue is also obtained does not transform the imposition into a tax.

The Sinclair decision had the effect of making it significantly easier for state and local government to impose a fee for the regulation of a service which may result in incidental revenue to the government. In November 2010, Proposition 26 ("Prop 26") was enacted by initiative to amend Articles XIIIC, and XIIID to address "hidden taxes" and to overturn the Sinclair case. Prop 26 overturned the Sinclair case by requiring with respect to Legislature-imposed fees that any change in state statute which results "in any taxpayer paying a higher tax" must be enacted with two-thirds approval of the Legislature. With regard to fees imposed by local government, Prop 26 amends Article XIIIC (Prop 218) to broaden the definition of "tax""as used in this article," to mean "any levy, charge, or exaction of any kind imposed by a local government" unless the charge qualifies for one of seven exceptions. Art. XIIIC §1(e).

The Athens Contract predates the passage of Prop 26, and is not subject to its provisions.

The Prop 218 issue in this case is whether the Athens Contract imposes a "property related fee or charge." The City (and hence Athens) has the burden of demonstrating compliance with Prop 218.[16]

As pertinent, a fee or charge is any 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. Art. XIIID, §2(e).

Athens argues that the City does not "impose" a residential trash hauling fee for purposes of Prop 218, noting a Merriam Webster's definition of "impose" means "to establish or apply by authority." Opp. at 18.

But that is exactly what the City does; it uses its authority to impose a fee on persons for residential trash collection Pursuant to the Athens Contract, the City is responsible for billing and collecting the payments for residential trash collection. AR 163, §8.1(a). It does so by asking the County to include a direct assessment for trash collection on property tax bills, collecting the assessment from the County on a biannual basis from each property owner, and remitting these funds to Athens on the 15th day of each month. AR 163, §8.3. The payment is for Athens' entire monthly fee collected from residential customers in accordance with the established residential rates. AR 164, §8.3. Although the City does not retain the residential fee, it imposes the fee through the property tax bill. This meets the definition of "imposing" a fee within the meaning of Prop 218.[17]

The question becomes whether residential trash hauling is a property-related service. A "property-related service" is "a public service having a direct relationship to property ownership." Art. XIIID, §2(h). A fee is not "property-related" when it is levied on an activity or a business rather than real property, and when it is not imposed on property owners as an incident of their property ownership. *See* Apartment Assn, *supra*, 24 Cal.4th at 842. As the court in Apartment Assn stated, the requirements of Article XIII (D) apply when "they burden landowners as landowners." Id.

Athens relies on the fact that the residential trash fee is not charged by the parcel, but rather by the residential unit. Opp. at 18 (citing AR 24). It contends that this shows that the fees are not charged as an incident of property ownership, but rather as a measured use. *See* Howard Jarvis Taxpayers Assn. v. City of Salinas, ("Howard Jarvis") (2002) 98 Cal.App.4th 1351, 1354-

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[16]The City concedes that it violated Prop 218, and expressly concedes that the Athens Contract caused an extension of a property-related fee without complying with Prop 218. Resp. at 8.

[17]In contrast, the City does not impose a fee for purposes of commercial trash hauling. Although Torres tries to include the commercial trash portion of the Athens Contract within the scope of Prop 218, particularly the City's 7.5% share of gross commercial receipts (Mot. at 18), as of 2016 Athens will bill and collect directly from commercial customers. It will do so at a rate structure within industry standards and with increases tied to the Consumer Price Index. *See* AR 163, §8.1(b); 178, Ex.C. Torres has not shown that Athens' billing and collection from commercial customers on an exclusive basis beginning in 2016 is a fee "imposed" on commercial customers within the meaning of Prop 218.

56 (storm drainage fee was Prop 218 fee because was it was assessed against each parcel within the city and not based on measured use).

In Richmond v. Shasta, ("Richmond") (2004) 32 Cal.4th 409, the court considered whether a water service connection fee was subject to Article XIII(D). The court found that it was not. Among other reasons, the court relied on the fact that the fee was imposed on a person, not a parcel of real estate. Id. at 426. In addition, the court relied on the fact that imposition of the fee was based on the person's voluntary request for water service—and was not merely incident to an interest in the real property. Ibid.

The court revisited the "incident to property ownership" question in Bighorn-Desert View Water Agency v. Verjil, ("Bighorn") (2006) 39 Cal.4th 205. In that case, the court considered a proposed initiative to rescind local domestic water delivery charges and other fixed monthly fees imposed by a water agency which provided domestic water service to consumers. The court relied on Richmond in finding that the fees and charges were governed by Article XIIID. The court stated that "domestic water delivery through a pipeline is a property-related service...." 39 Cal.4th at 216-17.

In Apartment Assn, *supra*, 24 Cal.4th at 842, the California Supreme Court upheld an apartment inspection fee on landlords. The court found that the inspection fee, even though it was imposed on owners of real property, was not imposed as an incident of that ownership. Id. at 842. Rather, the court reasoned that the fee was imposed because of the business activity of the landlord—renting the property. Id. In so finding, the court made clear that the plain language of Article XIIID "applies only to exactions levied solely by virtue of property ownership." Id. The owners, as the court stated, did not have to rent their property. They paid the fee only if they decided to rent their property, but not otherwise.

In Pajaro Valley Water Management Agency v. Amrhein, (2007) 150 Cal.App.4th 1364, 1369, ("Pajaro"), the court considered a groundwater augmentation fee charged to well operators to replenish groundwater. The fee was attached to property tax bills on the assumption that the operators of wells situated on property would also be the property owner. Id. at 1382-83.

The Pajaro court relied on Bighorn, which it stated "flatly rejected the view that consumption-based delivery fees are beyond the reach of Article XIIID." Id. at 1388. The court noted that Bighorn did not even mention Apartment Assn, and questioned that case's "reach, if not the vitality." Id. at 1389. The Pajaro court determined that Bighorn held that water delivery fees are imposed as an incident of property ownership (Id. at 1393), whether or not based on usage even though Apartment Assn might suggest otherwise. Id. at 1391.

Prop 218 contemplates that garbage collection services will be property-related services. Thus, garbage collection, along with sewer and water services, are expressly excluded from the Prop 218 right to vote, either by a super-majority of the electorate or a majority of property owners. Art. XIIID, §6(c).[18] This exclusion from the right to vote strongly implies that garbage

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[18]Art. XIIID, section 6(c) provides: "*Except for fees or charges for...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." (Emphasis added).

services are property-related for purposes of Article XIIID section 6(a)'s procedural protection of notice and a hearing for "new" fees, and section 6(b)'s substantive protection that new, extended, or increased fees be based on the actual cost of service.

While Prop 218 contemplates generally that garbage collection will be a property-related service, the final determination must be made from the particular circumstances of the case. Nothing in the City's handling of residential trash hauling fees under the Athens Contract renders it distinguishable from the voters' general intent in Prop 218.

Pursuant to the Contract, a City employee developed a list of all properties having one or more residential units, including the number of residential units on each property. This property information is used to determine the properties which should be charged Athen's residential trash hauling fee, and the amount of such fee. Every residential property owner in the City is charged a residential waste collection fee; it is not billed to occupants. The City does not attempt to determine whether a residential property is vacant; the property owner is charged the residential waste collection fee even if the property is vacant. The fee is charged based on the number of residential structures. A property with two units will be billed two fees; a property with one unit will be billed one fee. A property owner cannot opt out of the system.

Thus, the amount of the residential trash fee depends on the number of residential units on a property, but every property having one or more residential units is charged a trash hauling fee. This is a fee imposed as an incident of property ownership (Pajaro). It is true that the amount of the fee is dependent on the number of residential units on the property. But Pajaro holds that usage is not the controlling factor per Bighorn. It is also true that a property owner can avoid imposition of a residential trash fee simply by not building any residential units on his or her property. However, the property owner cannot avoid the fee because the residential unit is empty and does not use trash services. The only way a property owner avoids a fee is by owning real estate that is unimproved with a residence -- either bare dirt or improved with a commercial structure governed by a separate part of the Athens Contract. *See* Howard Jarvis, *supra*, 98 Cal.App.4th at 1354 (fact that property owner could avoid storm drain fee by maintaining separate storm drain management facility on property did not make it a "user fee").

Under these circumstances, and given the express language of Art. XIIID, section 6(c), the residential trash hauling fee is incidental to the property. It is not imposed on a property owner because of a separate business activity (Apartment Assn.), because the fee is imposed whether the property owner rents a residential unit or not. It is not a fee imposed on a person, not a parcel of real estate (Richmond) because it is a direct assessment in the property tax bill. It is not a measured use (Howard Jarvis) in which the bill is dependent on the amount of services. While the fee increases depending on the number of units, actual use is irrelevant. Moreover, Pajaro and Bighorn indicate that usage is not determinative. Instead, the fee is imposed on each property on which one or more residential units exist and is a property-related service.

Athens also argues that the Athens Contract does not impose a "new" residential fee but rather continues the pre-existing fees. Opp. at 19.

This argument impacts Article XIIID section 6(a)'s procedural protection of notice and a

hearing for new fees,[19] but it has no bearing on Article XIIID section 6(b)'s substantive protection that new, extended, or increased fees be based on the actual cost of service. As the City contends, the Athens Contract at a minimum extended an existing fee. Yet, there were no facts presented to the City, and no City determination, that (1) revenues derived from the fee do not exceed the funds required to provide the residential trash hauling service, (2) revenues derived from the fee will not be used for any purpose other than that for which the fee was imposed, (3) the amount of the fee does not exceed the proportional cost of the trash hauling service attributable to the property, and (4) no fee is being imposed for trash hauling where it is not actually used by, or immediately available to, the property owner. *See* Art. XIIID, §6(b).[20]

In short, the Athens Contract violates Prop 218. The residential trash hauling fee is a a fee imposed by the City upon a person as an incident of property ownership. Art. XIIID, §2(e). The City did not comply with Article XIIID section 6(b) when entering into the Contract. This failure renders the residential hauling component of the Contract void.[21]

H. The Section 1090 Claim Re: Salazar

Torres contends that Salazar had a conflict of interest with respect to the Athens contract because she founded and received a salary from MELA which, in turn, receives regular financial contributions from Athens and Chiappetta.[22]

Government Code section 1090 ("section 1090") provides, in pertinent part: "[C]ity officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Government Code section 1091 provides: "(a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest."

" (b) As used in this article, 'remote interest' means any of the following:"

"(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation[.]"

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[19]Torres argues that the Contract potentially provides for fee increases approved by City staff (Reply at 10), but XIIID does not apply to potential fee increases.

[20]Items (3) and (4) have been affirmatively shown not to be true. Some properties have the residential fee imposed where no service is provided because the unit is vacant.

[21]Athens does not dispute that the City's violation of Prop 218 voids the Contract.

[22]The City purports to discuss the section 1090 issue, but mentions only Vasquez, against whom no section 1090 claim was made. Resp. at 7.