



February 1, 2017

**VIA E-MAIL AND U.S. MAIL**

Michael J. Penrose  
Director, Department of Transportation  
County of Sacramento Planning and Development Services  
827 7th Street, Suite 304  
Sacramento, California 95814

Re: Comments on Proposed Revisions to Sacramento County's Standard  
Construction Specifications for Trench Restoration Requirements

Dear Director Penrose:

We are writing to follow up on several discussions between you and representatives of local public utility providers in Sacramento County. These entities use county rights of way to install their underground facilities and are very concerned about the Sacramento County Department of Transportation's ("Department") proposed modifications to the County's existing trench restoration requirements ("Proposed Modifications"). The undersigned attorneys serve as legal counsel to the named public utility providers, which are coordinating efforts as the Utilities Work Group ("Work Group"). The Work Group entities have statutory and contractual franchises to trench in County roads to install, operate, repair and replace their utility facilities, which include electric, telecommunications, and water facilities. We understand that Department staff plans to present the Proposed Modifications, as they were described at the Department's May 10, 2016 Pavement Maintenance Workshop, for consideration and approval by the County Board of Supervisors. As such, our clients have directed us to share our analysis of the significant legal defects in the Proposed Modifications.

**The Work Group Members' Statutory Franchises**

As a preliminary matter, we note that the Legislature has, by statute, specifically authorized the public agency Work Group members to place their facilities in, along, and underneath county roads. (See Public Utilities Code, § 12808; Water Code, §§ 31060, 71695, and 22431.) These

statutes expressly provide that the public agency Work Group members may use any county right-of-way to install, operate, repair and replace their utility facilities, provided that the agencies restore as nearly as possible to its former state any street, road, or other property affected by their construction or repair work, in a manner that does not unnecessarily impair the road's usefulness. (Public Utilities Code, § 12808; Water Code, §§ 31060, 71695, and 22431.) Similarly, the investor owned utilities' franchises with the County of Sacramento provide that the utilities shall "place said streets and alleys or so much thereof as may have been damaged thereby, in as good order and condition as that in which they were before being disturbed or excavated." (See e.g. Section 1(b) of County of Sacramento Ordinance Nos. 1158, 1223 1228, and 1254.) Simply put, the Work Group members' obligation with respect to restoring trench cuts means exactly what it says — to ensure that the County's streets, roads, and other rights-of-way are repaired and placed back in the condition they were in prior to the utility agency's commencement of excavation or trenching work. (See, Judgment, lines 2:23 - 3:6, issued September 14, 2000 in *Arcade Water District v. County of Sacramento, et al.*, Sacramento Superior Court Case No. 00CS00265 (copy attached for your reference).)

The Proposed Modifications go beyond this statutorily and contractually required standard of restoration and repair. Instead, they require Work Group members to undertake roadway improvements well beyond what would appear to be reasonably connected to the impacts caused by a member's trenching and excavation work. It is the County, and not the Work Group members, that is obligated to maintain and repair all streets and roads that have been accepted as part of the County's highway system. (Streets & Highways Code § 941.) In addition, the Department's proposal appears to be in violation of the binding 2000 Superior Court judgment that prohibits the County from requiring local franchise utility providers from making betterments and future guarantees of their trench cut restoration work. Consequently, we request that the Department provide us with full documentation providing the source of the County's authority for requiring Work Group members to undertake roadway improvements beyond those required by their individual franchises and otherwise enlarging the restoration provisions of such franchises.

### **Justification for the Proposed Modifications**

California courts have concluded that a franchise to lay utility facilities in a public street, whether it is owned by a private utility or a public agency, is a valid property interest, and that such a vested property right may not be damaged without payment or just compensation. (See *Northeast Sacramento County Sanitation Dist. v. Northridge Park County Water Dist.* (1966) 247 Cal.App.2d 317, 322 (citing *Stockton Gas & Electric Co. v. San Joaquin County* (1905) 148 Cal. 313, 321 and *Balestra v. Button* (1942) 54 Cal.App.2d 192); see also *So. Cal. Gas. Co. v. City of Los Angeles* (1958) 50 Cal.2d 713.) For the County to lawfully require a franchise holder to undertake the Proposed Modifications, which essentially are roadway improvements beyond those that would be required to restore a road to its former condition, the County must demonstrate that the Proposed Modifications have a direct nexus with, and are roughly proportional to, the impacts caused by the trenching and excavation work that the Proposed Modifications are intended to mitigate. (See *Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.) If these criteria are not met, the Proposed



Modifications, if adopted, would cause the County's rules to violate federal regulatory takings jurisprudence.

A regulatory taking occurs when a government regulation goes "too far." (*Penn. Coal. Co. v. Mahon* (1922) 260 U.S. 393, 415-16.) In recent years, the United States Supreme Court has stated that such a taking occurs when a regulation effects a "functional equivalent" of a physical taking — that is, when the government actually physically invades the property and takes possession of it. (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 539-40.) Regulatory takings challenges that do not involve either a physical invasion or that leave the property owner with some economically beneficial use of the property are governed by the "ad hoc, factual inquiries" set forth in *Penn Central Transp. Co v. New York City* (1978) 438 U.S. 104, 124. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 261-262.) Primary among these *Penn Central* factors is "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." (*Shaw, supra*, at p. 261.) This inquiry turns in large part, although not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests. (*Lingle, supra*, p. 540.)

There is no question that the Proposed Modifications, if adopted, would interfere with and violate the Work Group members' statutory and contractual franchises and would have a significant impact on their ability to pay for capital improvement projects involving excavation and trenching work. For example, Sacramento Suburban Water District has stated that the Proposed Modifications could increase the cost of repairing or replacing a linear mile of water pipe by approximately \$75,000 per mile. San Juan Water District has indicated that the Proposed Modifications' impacts on its capital improvement projects could be as much as \$600,000 per mile of pipeline for a typical project. An analysis by Rio Linda-Elverta Community Water District determined that the agency's costs would increase by approximately \$172,000 per mile. These public agencies are funded by property-related fee revenues at rates that must reflect each agency's reasonable costs of providing the particular service, and which must not be used to provide general governmental services that benefit the general public. Although Sacramento Municipal Utility District raises revenue through a different funding mechanism (a non-property related fee for electrical energy service), it would incur an additional \$23,252 per mile, or \$1,848,600 per year for the 80 miles of right-of-way work forecast for years 2017 and 2018.

Requiring Work Group members to comply with the Proposed Modifications essentially would require them to subsidize the County's road maintenance and improvement efforts in violation of the applicable legal requirements. The Work Group members do not have either the capability or the authority to pay for "restoration" work that far exceeds their repair and replacement obligations under law, goes beyond any reasonable expectations they could have had during infrastructure planning, and interferes with the benefits of their capital investments based on their statutory and contractual franchises. (See *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 178-80.)

We understand that the Proposed Modifications were developed without conducting the analyses and study required to determine standards that would comport with the binding constitutional

and statutory mandates, which should have included quantifying actual utility trench impacts and evaluating factors such as the then-existing age of the pavement or existing pavement conditions. Indeed, we note that Department staff has yet to provide Work Group members with a study or report that provides the requisite justification for the Proposed Modifications, other than to make the conclusory statement during its May 10, 2016 workshop that such trenching work accelerates pavement deterioration.<sup>1</sup> We would like to review all reports prepared by the Department that address the nexus and proportionality issues described above in order to understand the County's legal justifications for pursuing the Proposed Modifications. Please either provide any such reports or advise us if no such documentation exists.

The 2000 *Arcade Water District v. County of Sacramento* case cited on page 2 of this letter involved a challenge by a former water district (now part of Sacramento Suburban Water District) to the County's standard specifications for trench restoration. In its judgment, the trial court noted that, by virtue of Water Code section 31060 (one of the statutes discussed above that grants county water districts a statutory franchise), the County has no authority to impose a continuing obligation for future repairs or maintenance of a street either through the payment of a street trench restoration fee or the execution of a pavement life warranty. While the Proposed Modifications take a slightly different form, they attempt to impose a similarly improper obligation: betterments of streets for which the Work Group members have no general legal obligation to repair or maintain. As such, we believe that the County remains bound by that judgment and therefore is precluded from imposing any new trench cut restoration standards that exceed what Judge Fall of the Sacramento Superior Court approved in the judgment.

### Conclusion

As discussed above, the Proposed Modifications would impose significant new burdens on Work Group members. Those burdens violate established federal and state constitutional principles, as well as the state franchise laws, franchise contracts, and Judge Fall's 2000 judgment binding the Department. We therefore respectfully urge the Department to refrain from submitting the Proposed Modifications for consideration by the Board of Supervisors, and to instead comply with the County's existing legally-approved trench cut restoration standards. While our clients, as public utilities and sister public agencies with similar budgetary constraints, sympathize with the County's predicament, the Department is prohibited from attempting to require our ratepayers to provide general benefits to the citizens of Sacramento County.

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<sup>1</sup> Indeed, what is particularly troubling about the Proposed Modifications is the lack of any supporting studies and the apparent implicit position of the Department that it can simply transfer the County's road maintenance and repair obligations to local utility agencies because the County lacks sufficient financial resources to satisfy its legal duties. (see, e.g., staff report and PowerPoint slide presentation by Department to Board of Supervisors at its May 10, 2016 meeting.)



Mr. Michael J. Penrose  
February 1, 2017  
Page 5

We look forward to your responses to this letter and our requests for information stated above.

Very truly yours,



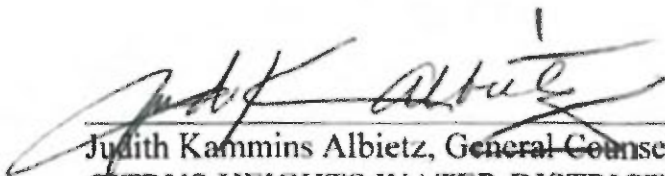
Joshua M. Horowitz, General Counsel to  
SACRAMENTO SUBURBAN WATER DISTRICT  
and SAN JUAN WATER DISTRICT



Anthony J. Cerasuolo, Vice-President, Legal  
CALIFORNIA-AMERICAN WATER COMPANY



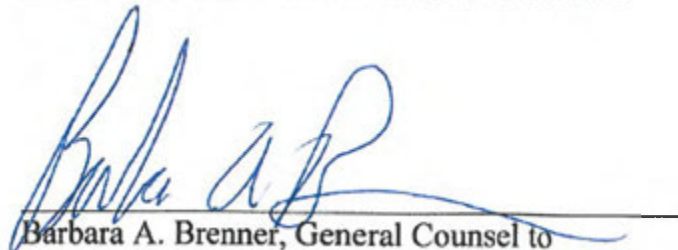
Joel S. Levy, General Counsel to  
CARMICHAEL WATER DISTRICT



Judith Kammins Albietz, General Counsel to  
CITRUS HEIGHTS WATER DISTRICT



Adam C. Brown, General Counsel to  
DEL PASO MANOR WATER DISTRICT



Barbara A. Brenner, General Counsel to  
RIO LINDA-ELVERTA COMMUNITY WATER DISTRICT

Mr. Michael J. Penrose  
February 1, 2017  
Page 6



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Joe Schofield, Assistant General Counsel to  
SACRAMENTO MUNICIPAL UTILITY DISTRICT

Cc: Phil Serna, District 1, Sacramento County Board of Supervisors  
Patrick Kennedy, District 2, Sacramento County Board of Supervisors  
Susan Peters, District 3, Vice-Chair, Sacramento County Board of Supervisors  
Sue Frost, District 4, Sacramento County Board of Supervisors  
Don Nottoli, District 5, Chair, Sacramento County Board of Supervisors  
Robyn Truitt Drivon, Sacramento County Counsel

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SACRAMENTO

ARCADE WATER DISTRICT, a	)	CASE NO. 00CS00265
county water district,	)	
	)	<b>JUDGMENT ON PETITION FOR WRIT</b>
Plaintiff and Petitioner,	)	<b>OF MANDATE</b>
	)	
v.	)	Assigned for All Purposes to:
	)	
THE COUNTY OF SACRAMENTO, a	)	Honorable Judge Timothy L. Fall
charter county, and ROGER	)	Yolo County Superior Court
DICKINSON, ILLA COLLIN,	)	Department 2
MURIEL JOHNSON, ROGER	)	
NIELLO, and DON NOTTOLI,	)	
individuals, in their capacity as	)	
members of the Board of Supervisors	)	
of the County of Sacramento,	)	
CHERYL F. CRESO, an individual	)	
in her capacity as Director of County	)	
Engineering, and DOES 1 through 20,	)	
inclusive,	)	
	)	
Defendants and Respondents.	)	
	)	

The Petition for Writ of Mandate came on regularly for hearing on July 10, 2000 at 9:00 a.m.

1 before the Honorable Timothy L. Fall, presiding judge of the Yolo County Superior Court, to which  
2 it has been assigned pursuant to Code of Civil Procedure § 394. Janet Morningstar, McCormick,  
3 Kidman & Behrens appeared on behalf of Petitioner and Plaintiff Arcade Water District and Deputy  
4 County Counsel Krista C. Breuer, appeared on behalf of Respondents and Defendants, The County  
5 of Sacramento, Roger Dickinson, Illa Collin, Muriel Johnson, Roger Niello, Don Nottoli and Cheryl  
6 Creson.  
7

8 The cause was submitted upon a stipulation to undisputed facts, documentary evidence and oral  
9 testimony of expert witnesses presented at the hearing. The Court having heard the oral argument  
10 presented by counsel for the parties and the cause having been submitted for decision, the Court  
11 made findings and directed that judgment and peremptory writ of mandate should issue in the cause  
12 as follows:  
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14 1. The Court lacks authority to compel a legislative act, therefore it cannot compel the  
15 County to repeal or amend its Ordinance No. 1145.

16 2. There is a dispute among pavement experts as to the benefit of the "T-section" as a  
17 method of restoring a trench in a street made by a permittee in connection with the construction of  
18 works in the street. Because it is within the discretionary authority of the county to impose  
19 conditions in a permit as to the location and manner in which the work is to be done for the  
20 protection of the highway, the County has discretion to require permittee to restore trenches using  
21 a T-section as shown in the County Standard Specifications Detail 4-31.  
22

23 3. The provisions of Water Code Section 31060, because they are specific to the right of  
24 county water districts, supersede the provisions of Streets and Highways Code § 1462, which applies  
25 generally to permits for excavations in county highways. Water Code § 31060 does not impose an  
26 obligation on county water districts for the future repair or maintenance of the street after the initial  
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1 restoration of the street trench. The right of the County to impose conditions upon the location and  
2 manner in which the work is to be done under Streets and Highways Code § 1462 does not authorize  
3 the imposition of a continuing obligation upon a county water district for future repair or  
4 maintenance of the street either through payment of a street trench restoration fee or execution of  
5 a pavement life warranty.  
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7 4. Under Streets and Highways Code Section 1468 the county may not deny a permit to  
8 a county water district to construct works in county streets.

9 WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED

10 1. That Petitioners application for a writ of mandate commanding Respondents to repeal  
11 or amend Sacramento County Ordinance No. 1145 is denied.

12 2. That a peremptory writ of mandate issue commanding Respondents to issue permits to  
13 Petitioner Arcade Water District for the construction of works in county streets, which permits may  
14 provide reasonable conditions as to the location and manner in which the work is to be done,  
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1 including, but not limited to, requiring a T-section as shown in County Standard Specifications  
2 Detail 4-31, but shall not require Petitioner to pay Trench Restoration fees or sign a pavement life  
3 warranty.  
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5 Dated: 9/14, 2000

TIMOTHY L. FALL

Honorable Timothy L. Fall  
Presiding Judge

7 Reviewed and approved as to form:

8 On behalf of Defendants and Respondents  
9 County of Sacramento County

On behalf of Plaintiff and Petitioner  
McCormick, Kidman & Behrens, LLP

10  
11 By Krista C. Breuer  
KRISTA C. BREUER  
12 Deputy County Counsel

By Janet Morningstar  
JANET MORNINGSTAR

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