



# City of Port Hueneme

*"The Friendly City By The Sea"*

September 3, 2012

The Honorable Vincent J O'Neill, Jr.  
Presiding Judge, Superior Court of California  
County of Ventura  
800 S. Victoria Avenue  
Ventura, CA 93009

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VENTURA COUNTY  
GRAND JURY

**Re: July 18, 2012 Civil Grand Jury Final Report - Port Hueneme Water Rates ("Report")**

Dear Judge O'Neill:

The City has reviewed the above-referenced Report and finds the "Facts" and "Findings" are erroneous in many instances and/or are lacking in support and the City will not be proceeding to implement the recommendations for the reasons set forth below. The City believes if the Grand Jury had met with the City to review the information it had collected the Report may have been unnecessary or the Report would have contained significantly different Facts, Findings and Recommendations.

## **I. Background**

The Grand Jury undertook a review of the City's 2009 water rate increase for the sole purpose of determining its effect on the City's Utility User's Tax ("UUT") on the increased water rates. The "Summary" of the Report states that:

*"Neither the voter-approved rate increase, nor the percentage (4%) of the 'Utility Users Tax,' was investigated.*

*The sole issue of the investigation is the inclusion of a previously untaxed 'water service charge' into the water service fixed rate. The 'water service charge' is now being taxed, creating a new tax, intended or not, by the City."*

Set forth below is an overview of Proposition 218 as it is relevant to water rate increases, the facts regarding the City's 2009 water rate increase, and the City's response to the Report.

## **II. Proposition 218**

### **A. Proposition 218 – Water Rate Increases**

#### **1. Overview**

In 1995 the California voters approved Proposition 218 which required specific and distinct processes for local agencies imposing new or increased taxes and property related assessments and fees. Initially, there were several court cases that held that Proposition 218 did not apply to water rate increases. In 2006 the California Supreme Court clarified that water fees are "property related fees and charges" subject to a Proposition 218 protest proceeding pursuant to Article XIII D ("Article 13D") of the California Constitution.<sup>1</sup>

In summary, Article 13D as originally written, required a public agency to provide all property owners subject to a proposed water rate increase with forty-five (45) days prior written notice before the agency could hold a public hearing to consider an increase in water rates. If a majority of the property owners filed written protests with the public agency regarding the increase, the agency could not impose the new fee.

Subsequent to the passage of Proposition 218, legislation has been passed which defines and arguably changes the water rate increase process set forth in Proposition 218.

#### **2. Specific Proposition 218 Water Rate Increase Requirements**

In relevant part, Article 13D provides as follows:

"Property Related Fees and Charges. (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 . . . [t]he 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

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<sup>1</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205.

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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 . . . . 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.*<sup>2</sup>

Despite what appears to be clear language approved by the electorate that the “record owners” of the property shall be sent the information relative to proposed fee increases and the same owners are the individuals that have the right to protest the fees increases, there was some disagreement amongst lawyers and members of the public whether Proposition 218 also gave tenants/utility customers the right to protest fee increases. This disagreement arises from the provision in Proposition 218 that defines fees and charges: A “fee or charge” “means any levy . . . 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.”<sup>3</sup> The term “property ownership” is defined “to include tenancies of real property where tenants are directly liable to pay the . . . fee, or charge in question.”<sup>4</sup>

In 1997, the California Legislature adopted the “Proposition 218 Omnibus Implementation Act”<sup>5</sup> as urgency legislation (the “Act”). Among other things, the Legislature intended that the Act clarify certain ambiguities within Article 13D. For instance, while the term “record owner” seems clear, it was less certain how local government would be able to determine ownership at any particular time. This problem arises because property can be bought and sold at any time and the only readily available report that identifies all property owners within a city at a given time is a County Assessor’s tax assessment roll that is generally only updated once or twice a year. From a practical and cost standpoint, it was too burdensome and expensive to run a title report on every property located within a City. Accordingly, the 1997 legislation defines “record owner” to mean “the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll...”<sup>6</sup>

In 2008, based upon additional concerns regarding potential ambiguities regarding Proposition 218, and for purposes of supplementing the Act, the Legislature adopted Government Code § 53755 (the “2008 Legislation”). It states as follows:

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<sup>2</sup> Emphasis added. Cal. Const., art. XIID, § 6(a)(1-2).

<sup>3</sup> Emphasis added. Cal. Const., art. XIID, § 2(e).

<sup>4</sup> Cal. Const., art. XIID, § 2(g).

<sup>5</sup> Sen. Bill No. 919 (1997-1998 Reg Sess.)

<sup>6</sup> Gov’t. Code § 53750(j).

"53755. (a) (1) The notice required by . . . Section 6 of Article XIII D of the California Constitution of a proposed increase of an existing fee or charge for a property-related service being provided to a parcel *may be given by including it in the agency's regular billing statement* for the fee or charge or by any other mailing by the agency to the address to which the agency customarily mails the billing statement for the fee or charge.

(2) The notice required by . . . Section 6 of Article XIII D of the California Constitution of a proposed new fee or charge may be given in the manner authorized for notice of an increase of a fee or charge if the agency is currently *providing an existing property-related service to the address*.

(3) If the agency desires to preserve any authority it may have to record or enforce a lien on the parcel to which service is provided, the agency shall also mail notice to the record owner's address shown on the last equalized assessment roll if that address is different than the billing or service address.

(b) *One written protest per parcel, filed by an owner or tenant of the parcel, shall be counted in calculating a majority protest to a proposed new or increased fee or charge subject to the requirements of Section 6 of Article XIII D of the California Constitution.*

(c) Any agency that bills, collects, and remits a fee or charge on behalf of another agency may provide the notice required by Section 6 of Article XIII D of the California Constitution on behalf of the other agency."<sup>7</sup>

The legislative analysis for Government Code § 53755, noted that the new law was intended to clarify

*"...how a public agency is to provide notice when proposing a new or increasing an existing property-related fee or charge. It also clarifies how to count any written protests that may be filed. The clarification is necessary to resolve the conflict that arises from the language of Proposition 218 and particularly the provision that defines property ownership to include tenancies where the tenant is directly liable for paying a fee or charge to a public agency."*<sup>8</sup>

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<sup>7</sup> Emphasis added.

<sup>8</sup> Emphasis added. Sen. Local Gov't Com., Analysis of Assem. Bill No. 126 (2007-2008 Reg. Sess.) as amended June 28, 2007, p.3.

As can be seen from the various emphasized language above, there is arguably some ambiguity in the law as to who should receive the 45 day notice regarding the public hearing at which fee increases will be considered. However, sending notices of proposed water rate increases both to the service address and to the last known address of the property owner and allowing both classes of persons (owners and tenant/customers) to file protests fulfills the requirement of Article 13D and the 2008 Legislation.<sup>9</sup>

In March 2009, the City of Port Hueneme adopted procedures for conducting Proposition 218 fee increases (attached as Exhibit "A") and the procedures require, amongst other things, that notices and protest forms be sent to all property owners and water customers.

#### **B. Proposition 218 Requirements for New or Increased Taxes**

Proposition 218 (Art. XIII C) requires that new or increased taxes be approved by the electorate with a majority vote necessary to approve new or increased general taxes and a two-thirds vote necessary to approve new or increased special taxes.

#### **III. Factual Background re City's Increase in Water Rate in 2009**

The City of Port Hueneme went through the Proposition 218 process in 2009 for the proposed water rate increase. On March 18, 2009, the City Council, at a noticed public meeting, directed staff to send out the Proposition 218 notices regarding the proposed increases (copies of the notice and ballot, as well as copies of the staff report, Power Point presentation, and consultant study are attached as Exhibit "B").

On June 1, 2009, more than 45 days after the Proposition 218 notice and protest forms were mailed to all property owners and water customers, the City held a public hearing to consider the proposed water rate increase. The City sent by United States Postal Service mail a total of 11,660 notices and protests (attached as Exhibit "C"), both in English and Spanish. The City Council at a properly noticed public hearing introduced Ordinance No. 690 (attached as Exhibit "D"), that set forth a water rate increase schedule for a five year period. The City received 652 valid protests from property owners and customers. It would have taken 3,253 valid protests to preempt the Council from considering adoption of the proposed rate increase (copy of Council Resolution 3923 declaring the results of the protest process is attached as Exhibit "E"). The City did receive 433 notices and ballots returned as undeliverable by the United States Postal Service. It is likely that most or all of these were returned because of a change in property ownership or because the property owner had changed notification addresses

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<sup>9</sup> See Gov't. Code § 53755(a)(3).

without notifying the County Assessor's Office of the change. If it was due a to change in property ownership then the new property owner received a notice and protest form if the property owner was a water customer of the City. On June 15, 2009, at a noticed public meeting the Council held the second reading of the Ordinance and adopted the Ordinance. The Ordinance by its terms called for the rate increases to commence on August 1, 2009.

#### IV. The City UUT re: Water Rates

The City's UUT was first adopted in 1994 and was subsequently approved by the electorate on November 5, 1996 to comply with the Proposition 218 requirement which had taken effect on January 1, 1996. Such was codified in Section 5409 of the City's Municipal Code:

*"5409. Water Users Tax.*

*(a) There is hereby imposed a tax upon every person in the City using water which is delivered through mains or pipes. The tax imposed by this section shall be at the rate of four (4) percent of the charges made for such water and shall be paid by the person paying for such water.*

*(b) There shall be excluded from the base on which the tax is imposed in this section is computed, charges made for water which is to be resold and delivered through mains or pipes.*

*(c) The tax imposed in this section shall be collected from the service user by the person supplying the water. The amount collected in one (1) month shall be remitted to the Tax administrator on or before the last day of the following month."* (Emphasis added.)

The Code clearly states that the City shall impose a tax on all water customers at a rate of 4% on the charges made for such water. Thus, the City is imposing the 4% UUT on the water rates adopted in 2009. The Report states that it did not investigate the 4% rate and the Report also does not contain any analysis of the City's UUT Ordinance.

A review of the City's imposition of the UUT on water rates shows an inconsistent application of the tax. During the time period between 1994 and January of 1999, **the entire water bill was subject to UUT.**

From 1999 through 2003, for reasons that staff cannot determine, the UUT was only collected on approximately 85% of the bill. The UUT was not imposed on that portion of the water rate that was identified as a "service charge". From 2003 to 2006 a different definition of "service charge" was used to apply to UUT, which without reason or explanation reduced the tax collected to approximately 40% of the bill. From 2006 to 2008, the UUT was collected on approximately 45% of the bill. From 1994 to present,

the UUT has been charged on “usage”, “service charges”, and “fixed charges” on irrigation accounts.

There was no Council action taken to suspend imposition of any portion of the UUT on water rates, so it appears that somehow an error was made and some water customers were not charged the entire amount of the UUT that the City had the legal authority to impose and did previously impose subsequent to and after approval of the UUT by voters in 1996. While a long time customer might come to the conclusion that his or her UUT charge has been increased improperly, in reality it appears that some long-term customers were erroneously not charged the amount of the UUT that was authorized to be imposed. Thus, they actually benefitted from the City's error.

The City collected a total of \$83,900 from the water UUT in 2008. Subsequent to the 2009 water rate increase the City collected \$127,300 in UUT on water rates. This represents an approximate 50% increase in revenues, which is due to an increase in the underlying water rates and imposition of the UUT on 100% of the water charges in accordance with the City's voter approved UUT.

## **V. City's Response to the Grand Jury Report**

**In addition to the information set forth above, the City is providing the following responses to the Report:**

### **A. City's Response to Report's Methodology**

The “Methodology” section of the Report details the sources and communications that the Grand Jury utilized to prepare the Report. It is noteworthy that the Report does not state that the Grand Jury asked to meet with or met with representatives of the City of Port Hueneme regarding the Report. In fact, to the City's knowledge the Grand Jury did not make any attempt to meet with the City to discuss the matters that are the subject of its report.

### **B. City's Response to Report's Facts**

**Fact FA-01** states that the notice of the proposed water rate increase was mailed to water rate payers.

**City Response:** This is only a partially accurate statement. In accordance with the legal requirements set forth above in Section II.A., the City sent out notices and protest forms to all property owners in the City and also to water customers that were not property owners.

**Fact FA-02** states that not sending the City a protest ballot represented a vote for the water rate increase.

**City Response:** This is an argumentative statement from the City's perspective that could lead a reader of the Report to infer that there was some misconduct by the City based upon the process the City utilized for the 2009 water rate increase. Also, it is speculation by the Grand Jury. It is true that the Proposition 218 process for water rates is the reverse of the typical process utilized for elections. That is, the process provides that a majority of the people eligible to protest the fee increase must protest the proposed fee increase to prevent the fee increase from being adopted.

As is set forth above, the protest process is set forth in the California Constitution and legislation. The City played no role in the drafting of Proposition 218 or the subsequent legislation. The City has no legal authority to conduct the process contrary to the manner proscribed by Proposition 218. The City not only followed the legal requirements of Proposition 218 but went the extra step of providing property owners and customers with a protest form to deliver to the City, which is *not* required by Proposition 218. Whether those that did not respond were in favor of an increase, opposed the increase but for some reason did not provide the City with a protest form, did not open and/or read the notice sent by the City, or did not care whether there was an increase or not, is not known by the City or the Grand Jury. It is only known that a majority of those eligible to file a protest did not do so.

**Fact FA-03 and Fact FA-04** collectively state that the Grand Jury reviewed a water bill from one customer from the City and that such included a 73% UUT increase from the previous bill. It is also set forth that the "service charge" line item "disappeared" from the City's water bills in 2009.

**City Response:** The above facts are misleading and argumentative. As set forth above, the City received an approximate 50% increase in UUT based upon the 2009 water rate increase (for an annual total of increase of approximately \$44,000). The UUT collected from the water rate payers did increase because (1) the City increased the water rates and UUT is imposed as a fixed percentage of the water bill, and (2) the City imposed the UUT on all water rates in accordance with the voter approved UUT.

The service charge did not "disappear" from the water rate. The City had a very detailed report prepared with respect to the City's proposed water rate increase (it is noteworthy that it is not attached to or referenced in the Report). The report outlined how the City would be completing the installation of water meters for all its water customers and was converting its previous flat rate system to a



combination of a fixed and variable rate charge once meters were installed. The amount of the variable rate increases over time such that those customers that consume larger quantities of water pay increasingly more for the water they consume than those customers who consume smaller amounts of water. The City was required by law to install water meters throughout the City and state law strongly encourages variable and tiered rate structures. Again, there is no discussion of these important facts in the Report. Rather, the Report just uses the inflammatory word “disappeared” as though the City did something without explanation or reason, neither of which is objectively true.

**Fact FA-16** states that the City “refused to accept proof via meetings, telephonic contacts and correspondence of the water ratepayers’ tax increase.

**City Response:** This is clearly a conclusion, and not a fact, as the Report contains absolutely no information regarding any specific or general attempt that was made to provide information to the city. It is also an ambiguous statement. The City did receive and accept communications of multiple forms from the Ventura County Taxpayers Association and a Mr. Allen Shute (See Exhibit F). The City not only accepted all the information and communications these individuals provided but also responded verbally and in writing and offered to meet with the VCTA and did meet with Mr. Shute. The City cannot respond further given the complete lack of information provided by the Grand Jury regarding this fact.

**Fact FA-17** provides that “a neutral third party administrative hearing could resolve the tax *and* ballot issues.” (Emphasis added)

**City Response:** Like FA-16, this is a conclusion and not a fact. The City also cannot reasonably interpret what a portion of this statement means. The fact refers to a tax *and* a ballot issue. The City understands that the Grand Jury believes there is an issue regarding the City imposing a tax on 100% of the water bill beginning in 2009. The City does not understand the reference to the “ballot issue.” Nowhere in the report is there any specific or general allegation that there was a problem with the protest forms that the City sent out or the manner in which the City conducted the Proposition 218 process.

### **C. City’s Response to the Report’s Findings**

**Finding FI-01** concludes that the City attracts scrutiny for having the highest water rates in the County and for Proposition 218 process that was conducted.

**City Response:** The City, based upon its review of Summary section of the Report (wherein it is clearly stated that the Grand Jury only investigated the UUT

on the prior water service charge and specifically did not investigate the voter approved water rate increase), is confused by this statement. The Grand Jury clearly did not by its own admission review the City's water rate increase process. Thus, even the Grand Jury did not scrutinize the process.

**Findings FI-02 and FI-03** state that there were multiple efforts to prove that the UUT charge by the City is unsupportable and the City failed to make a good faith effort to resolve the issue.

This is a Finding that is not and cannot be supported by facts. There is not a single piece of specific information set forth in the Report regarding any attempt made by any person or entity to communicate with the City regarding the City's UUT (in fact not even the Grand Jury attempted to meet with the City). As detailed in the City's response to Fact FA-16 above, the City knows of the communications it had with one individual (Mr. Shute) and one entity (VCTA). The City had numerous communications with this individual and entity. It is not known whether the VCTA continued to disagree with the City's position after the City communicated with the VCTA. The City does understand that Mr. Shute did not agree with the City's position. Given the Grand Jury does not detail what actions the City took that resulted in it concluding the City did not act in good faith, the City can only conclude that because the City did not agree with Mr. Shute's position that the Grand Jury concluded that the City did not act in good faith. Disagreement does not mean that the parties did not act in good faith.

**Finding FI-04** states that the tax calculation of the water rate is not transparent based upon the change in billing methodology.

**City Response:** The City accepts that there is some complexity to understanding the details of the water rate increase, which affects the amount, but not the rate, of the UUT. As is explained in response to Fact FA-04 above, the City made significant changes to its water rates based upon legal requirements, state water policies and the cost of operating the City's water system. The City prepared a comprehensive report, Power Point presentation, and notice of the proposed increase, which admittedly total over 35 pages of information. All of this information was made available on the City's website and was included in the public hearing process. All of the affected property owners and customers were given a written notice which summarized the proposed increase, informed them how to get additional information and explained how they could protest the proposed increase (See Exhibit "B"). It would be desirable if there was some way to distill all of the information into a couple of paragraphs or even pages – such is simply not possible.

**Finding FI-05** finds that a 73% increase on the City's October 2009 billings is evidence of a new tax.

**City Response:** The law and the facts do not support this Finding. The voters of the City approved a 4% UUT on all water charges. The City is imposing a 4% UUT on all water charges. Utility User Taxes and Transient Occupancy Taxes are generally fixed percentages that result in an increased amount of taxes being paid when the underlying utility or lodging cost increase. This is a customary and lawful manner in which these taxes are imposed and collected.

**Finding FI-06** states that the City is required pursuant to Proposition 218 conduct an administrative hearing because as of 2009 it imposed the UUT on 100% of the water rate.

**City Response:** There is no requirement anywhere in Proposition 218, including any of the subsequent legislation that was intended to augment or clarify Proposition 218, which suggests or mandates such an administrative hearing. The City Council held a public hearing with respect to the water rate increase, which is the only hearing that is required by Proposition 218. If the City was imposing a new tax for purposes of Proposition 218, such would require voter approval that would need to be conducted as part of a general or special election.

**Finding FI-07** states that the "Proposition 218 election was invalid, particularly by failing to notify owners of a new tax..."

**City Response:** The City must assume that the Grand Jury made an error in drafting this Finding, as the Finding seems to state that the entire Proposition 218 process was invalid. The Report specifically points out that the Grand Jury did not investigate the water rate increase process. Thus, the City interprets this finding to mean that imposing the UUT on 100% of the water charges was invalid since this is the only issue the Grand Jury investigated. Moreover, and more importantly, the law and the facts do not support this Finding. The voters of the City approved a 4% UUT on all water charges. The City is imposing a 4% UUT on all water charges.

#### **D. City's Response to Report Recommendations**

**Recommendation R-01** states that the City should conduct a third party administrative hearing to determine if the City's Proposition 218 process and certification of results was valid.

**City's Response:** The City does not accept this Recommendation for numerous reasons. First, the Report admits that the Grand Jury did not investigate the water rate increase process. Accordingly, there is no basis for the Grand Jury to make this recommendation. Moreover, the City not only complied with, but exceeded, the legal requirements of Proposition 218. Finally, the recommended process has no basis in the law and would not be binding and would usurp the Council's decision making authority. If a party wants to challenge the Council's determination (which is the legislative body responsible for implementing the water rates), then there is a process for filing such a challenge with the judicial branch of the state government.

**Recommendation R-02** states that the City should also have a third party administrative hearing to determine whether the City imposed a new tax on water customers as part of the 2009 water rate increases.

**City's Response:** There is no basis in fact or law for this recommendation. The City did not impose a new tax. The 4% UUT has been in existence since 1994 and the language is unchanged as it provides that the tax is to be imposed on all water charges. The fact that the City for a period of time did not impose the UUT on all water charges, but had the legal right to do so, does not now make imposing the same tax a new tax. Finally, the recommended process has no basis in the law and would not be binding and would usurp the Council's decision making authority. If a party wants to challenge the Council's determination, (which is the legislative body responsible for implementing the water rates), then there is a process for filing such a challenge with the judicial branch of the state government.

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**VI. Conclusion**

The City went beyond the minimum requirements of Proposition 218 when it adopted the 2009 water rate increase and it responded in good faith to the communications it received regarding the 2009 water rate increase. The City's imposition of the water UUT complies with the 1996 UUT approved by the City's voters. The City continues to make itself available to meet with the Grand Jury and with the public.

Sincerely,



Douglas A. Breeze  
Mayor

c: City Council  
City Manager  
City Attorney

Foreman, Ventura County Grand Jury  
800 S. Victoria Avenue  
Ventura, CA 93009

**Response to Grand Jury Report Form**

Report Title: Port Hueneme Water Rates

Report Date: June 18, 2012

Response By: Douglas Breeze

Title: Mayor

**FINDINGS**

- I (we) agree with the findings numbered: \_\_\_\_\_
- I (we) disagree wholly or partially with the findings numbered: FI-01, FI-02, FI-03, FI-04, FI-05, FI-06, and FI-07  
(Attach a statement specifying any portions of the findings that are disputed; include an explanation of the reasons therefore.)

**RECOMMENDATIONS**

- Recommendations numbered \_\_\_\_\_ have been implemented.  
(Attach a summary describing the implemented actions.)
- Recommendations numbered \_\_\_\_\_ have not yet been implemented, but will be implemented in the future.  
(Attach a timeframe for the implementation.)
- Recommendations numbered \_\_\_\_\_ require further analysis.  
(Attach an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or director of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.)
- Recommendations numbered R-01 and R-02 will not be implemented because they are not warranted or are not reasonable.  
(Attach an explanation.)

Date: 9/10/12

Signed: Douglas Breeze

Number of pages attached 13 + ATTACHMENTS

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GRAND JURY