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Raymond G. Alvarado,
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September 24, 2014

VIA OVERNIGHT MAIL

Scott Ochoa
General Manager, City of Glendale
c/o City Clerk
City of Glendale
613 E. Broadway Ave #110
Glendale, CA 91206-4393

Re: *Glendale Coalition For Better Government, Inc. v. City of Glendale*
Notice of Intent to File Litigation and Public Records Act Request

Dear Mr. Ochoa:

This law firm represents the Glendale Coalition For Better Government (the "Coalition"), a California non-profit 501(c)(4) (public benefit) corporation, with respect to the City of Glendale's ("City's") development, structuring, implementation, and enforcement of its 2014 Water Rate Structure, which is based on a 2014 Water Rate Study performed by Bartle Wells, following an August 5, 2014, public hearing regarding the newly proposed rate increases.

The purpose of this letter is to provide the City of Glendale with a good-faith opportunity to provide the Coalition and its member residents of the City with the back-up documentation and numerical/quantitative analysis showing that: (1) the inequality between the City's current residential water rate tiers (Tiers 1-4) is a product of higher cost-of-service at the higher tiers; and (2) the cost for the delivery of water increases as peak consumption increases in relationship to average or normal consumption; i.e., the higher a user category's peaking factor, the greater the cost of delivering the water, each of which is required by Proposition 218 (codified as Article XIIIID of the California Constitution). In addition, the Coalition requests that the City provide the financial cost-of-service justification for why: (3) the per-unit charge for normal or average consumption/demand for 15 categories of water users for which the City has consumption data is disproportionately higher than the charge for others; (4) the City' charges commercial and irrigation users a flat rate, while discriminating against residential users; (5) the City provides a 15% discount on fixed charges for recycled water customers compared to potable water customers; and (6) the City earmarks a portion of fixed charges to pay for fire services, including fire hydrants, when these services are available to any member of the public, each of which is also required by the Proposition 218 mandate.

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As you may be aware, building on the foundation laid earlier by Proposition 13 in 1978, Proposition 218 indeed is a further limitation on government's ability to impose taxes. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.) Growing weary of "special taxes" under the guise of "assessments" without a two-thirds electorate vote, California voters adopted Proposition in 218 curtailing assessments in these key ways (*Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 446; *City of Palmdale v. Palmdale Water District* 198 Cal.App.4th 926, 931; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640):

- (1) assessments could only be imposed on specific property-oriented "benefits" (Art. XIID, §§ 2, subd. (b), 4, subd. (a), subd. (i));
- (2) property-oriented assessments must be strictly proportional, with assessments not being imposed on any parcel "which exceeds the reasonable cost of the proportional special benefit conferred on that parcel," specifically separating the general benefits from the specific benefits for Proposition 218 purposes (Art. XIID, § 4 subd. (a));
- (3) "[r]evenues derived from the fee or charge shall not exceed the funds required to provide the property-related services" and "the amount of the fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of service attributable to the parcel" (Art. XIID, § 6, subds. (b)(1), (b)(3));
- (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," with "[f]ees or charges based on potential or future use of a service [not being, or as the statute says, 'are not'] permitted" (Art. XIID, § 6(b)(4)); and
- (5) shifted traditional presumptions that had favored assessment validity, making local agencies bear the burden "to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question" (Art. XIID, § 6, subd. (b)(5)).

In addition, Proposition 218 has crucial procedural requirements, including the germane requirement that the agency must conduct a public hearing that is "preceded by written notice to

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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' (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.) Likewise, California Constitution, Article XIID, section 6(a)(1) further requires that the advance notice to the public about water assessments like the one here must contain "the basis upon which the amount of the proposed fee or charge was calculated," because, otherwise, no member of the public would be able to appear and frame a meaningful objection to the calculation data unless that data is vetted in the public arena.

Importantly, a constitutional amendment like Proposition 218 "shall be liberally construed to effectuate its purposes of limiting the local government revenue and enhancing taxpayer consent." (*Silicon Valley*, supra, 44 Cal.4th at p. 448; *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, review denied.) This, however, does not mean that salutary conservation efforts, and even other constitutional provisions and regulations that encourage conservation (such as California Constitution, Article X, section 2, and the emergency drought regulations recently passed by the State Water Board), are somehow unable to be harmonized with Proposition 218.

Indeed, with respect to the imposition of any given water rate structure, conservation and allocation based principles may be utilized "so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel'" and there is adequate support "for the inequality *between* tiers, depending on the category of user." (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936-937, emphasis in original.)

CITY OF GLENDALE'S WATER RATES ARE PROPOSITION 218 NON-COMPLIANT

As documented in Tables 24 and 25 of the Bartle Wells Water Rate Study, one of the fundamentally flawed principles of the City's Water Rate Structure is the arbitrary and creative notion that there is one cost associated with meeting a given customer's average or normal demand for water and an increased cost when that user's demand spikes higher, as in the summer months. This spiking or peaking is expressed in the City's Water Rate Structure by a "peaking factor," where 1.00 represents average demand and anything above represents "peaking." For example, single family residential customers are assigned a peaking factor of 1.82 and irrigation customers are assigned a peaking factor of 1.84. Thus, the City's so-called "peaking demand" placed on the water utility by these customers is almost identical; however, these user groups are treated disproportionately in how they are charged for the delivery of water, with single family residential users being discriminated against in contravention of Proposition 218.

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More specifically, to capture the costs of supplying water to single family homes, Bartle Wells created a tiered system for monthly charges. The first 6 units of water fall in Tier 1 and for 2014/2015 are charged at \$2.31; the next 6 units in Tier 2 are charged at \$2.84; the next 13 units fall into Tier 3 and are charged at \$3.22; and Tier 4 covers anything over 25 units and the charge is \$3.90.

According to Bartle Wells, Tier 1 represents efficient *indoor* use of water for a family of 2.7, which translates to 135 to 148.5 gallons of water per day. Tier 2 represents efficient *indoor* use of water for a family of 5.6, which translates to 2.75 to 297 gallons of water per day. Efficient *indoor* use, according to Bartle Wells, is restricted to 50-55 gallons per person per day.

When it comes to Tiers 3 and 4, the Bartle Wells Water Rate Study states (p.49): "...peaking is estimated to occur in Tiers 3 and 4 which have been designated for *outdoor* water use and therefore, *additional costs are allocated* to these higher tiers. Likewise, peaking for multi-family residential occurs in Tier 2." (Emphasis added.) However, contrary to the Water Rate Study and the City's approval of its 2014 Water Rate Structure, Bartle Wells' customer consumption data actually shows that peaking on a per meter basis does not begin until 17.94 units of water is consumed, which is almost halfway through the Tier 3 allocation, yet the City applies a peaking charge to Tier 2.

While the City apparently believes that the foregoing methodology justifies the Tier 2, Tier 3, and Tier 4 charges, the Bartle Wells Water Rate Study does not provide any cost-of-service data to support the inequality of fees charged between the four tiers, and there is simply no Proposition 218 rationale for treating single-family/multi-family residential users and commercial/irrigation users so differently. Put simply, the residential tiered rates appear to be no more than an arbitrary financial penalty intended to penalize residents for exceeding the City-directed allocations of water.

Indeed, irrigation customers, whose peaking factor is a bit greater than for single family residential customers, use their *entire* water supply for *outdoor* use. However, in the Water Rate Study they are only charged \$2.95 for each unit of water while single-family residential customers are charged either \$3.22 or \$3.90 for outdoor use of water. Thus, the difference of \$2.95 compared to \$3.22 or \$3.90 appears to be more in the nature of an illegal penalty rather than a method for capturing the actual proportional costs of supplying water that is attributable to various customers.

Ultimately, the Bartle Wells Water Rate Study makes no allowance for normal or average outdoor water use for single-family residential customers. Rather, it relegates all water designated for outdoor use as peaking water use. What's more, rather than capturing costs, the charge for all outdoor water use – as if it were peaking use – appears to be a penalty designed to

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discourage outdoor water use by single-family customers while the Study does not do the same for irrigation and commercial customers' outdoor use. Likewise, there is no cost-of-service rationale for the City providing a 15% discount on fixed charges for recycled water customers compared to potable water customers. As such, the City's Water Rate Structure appears to violate Proposition 218.

What's more, a simple comparison of peaking factors and rates shows that the City's own data doesn't support the conclusions of its own Water Rate Study. Indeed, the City of Glendale, with one of the highest peaking factors (2.06), pays one of the lowest per-unit costs for water (\$2.86), while master-metered Residential customers with the lowest peaking factors (1.16) pay the highest per unit cost (\$3.51). The Proposition 218 violations are clear. Under 218, water fees shall not exceed the proportional cost of the service attributable to the ratepayer's parcel.

Curiously, the City did not adopt the exact rates specified in the 2014 Bartle Wells Water Rate Study. However, although the actual rates adopted by the City are not exactly as those noted in the Water Rate Study, they mirror those rates and the peaking multipliers are approximate. More specifically, the actual rates charged to single-family residential customers, beginning September 1, 2014, are \$2.27 (Tier 1), \$2.80 (Tier 2), \$3.18, and \$3.86 (Tier 4). In addition, multi-family users are charged \$2.38 (Tier 1) and \$3.52 (Tier 2), while irrigation users are commercial users are charge a flat rate of \$2.90 and \$2.81 per unit of water, respectively.

Further, the 2014 Bartle Wells Water Rate Study earmarks a portion of fixed charges to pay for fire services, including fire hydrants. These services are available to any member of the public at large whose life, limb or property is threatened by fire, irrespective of whether they are property owners within the meaning of Article XIID. However, Article XIID, section 6(b)(5) expressly provides that "no fee or charge may be imposed for general government services including, but not limited to,...fire...where the service is available to the public at large in substantially the same manner as to property owners." Thus, using a portion of the water fixed charge for fire service, on its face, is in direct conflict with Article XIID, section 6(b)(5).

PUBLIC RECORDS ACT REQUEST

PLEASE BE ADVISED that this letter shall also serve as a formal request under the Public Records Act (Gov't Code §§ 6250-6276.48) for any and all documents that form the basis upon which the amount of the water service fees or charges were calculated for the City of Glendale's 2014 Water Rate Structure.

Pursuant to Government Code section 6253(c), we request these documents, or confirmation that they do not exist, within 10 days (on or before October 6, 2014). If the City of Glendale cannot provide the Coalition with legitimate support for each of the five (5) requests

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outlined in the second paragraph of this Notice, then please be advised that the Coalition intends to commence legal action against the City of Glendale for Proposition 218 violations.

If you wish to discuss the foregoing, please call. If we do not hear from you on or before October 6, 2014, we will assume, as we believe to date, that no such back-up documentation or quantitative analysis exists and that the City of Glendale has no desire resolving these very important public interest matters without formal proceedings.

Sincerely,

ALVARADOSMITH
A Professional Corporation

A handwritten signature in black ink, appearing to read 'Ben B', with a long horizontal flourish extending to the right.

Benjamin T. Benumof, Ph.D., Esq.

cc: William M. Hensley, Esq.

BTB: hk