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November 21, 2024

VIA ELECTRONIC MAIL (mswanson@clearlake.ca.us) AND HAND DELIVERY

Melissa Swanson
City Clerk
City of Clearlake
14050 Olympic Drive
Clearlake, CA 95422

Re: City Council Agenda Items 9 (Ordinance No. 275-2024, An Ordinance Adding Chapter 13-Clearlake Municipal Code Establishing Fire Hydrant Inspection and Testing Requirements) 10 (Ordinance No. 277-2024, An Ordinance of the City of Clearlake Amending Chapter VI Section 8.5 to Add Subsection 8.5-7 to Establish Standards for Relocation of Underground in the Public Right-of-Way)

Dear Mayor Claffey and Honorable City Council Members:

On behalf of our client, Highlands Mutual Water Company (Highlands), we submit these comments on the above-entitled agenda items for today's City Council (Council) meeting. As we only learned of the Council's hearing on the above-entitled ordinances recently, we reserve the right to provide additional comments, should there be additional opportunities to do so.

I. Comments on Agenda Item 9: Ordinance No. 275-2024, An Ordinance Adding Chapter 13-3 to the Clearlake Municipal Code Establishing Fire Hydrant Inspection and Testing Requirements ("Hydrant Ordinance")

- In the first recital of the proposed Hydrant Ordinance, the City of Clearlake (City) misconstrues its alleged responsibility for the protection of wildlife and animals, whose protection is attributable to the State of California under the Fish and Game Code (Fish & Game Code §703.5 [state policy on wildlife protection], §1600 [state responsibility on wildlife protection], §§2050 et seq. [California Endangered Species Act]), the Public Resources Code (Pub. Res. Code §§2100 et seq [CEQA elements provide protection for wildlife].) and the public trust doctrine (*National Audubon Society v. Superior Court* (1983) 33 Cal. 3rd 419; *Environmental Law Foundation v. State Water Res. Control Board (2018) 26 Cal.App.5th 844.)* For the City to believe it can usurp this State authority, it runs afoul of the California Constitution as the City's authority is preempted. (Cal. Constitution Art. XI, §7.)

- In the first recital of the proposed Hydrant Ordinance, the City mistakenly states that it is responsible for provision of water supply within the City. It is not. The City admits this fact in the third recital. The water supply for the residents of the City is provided through the water providers, including Highlands. Therefore, again the City is preempted by state laws regarding the provision of water by mutual water companies and water utilities prohibited from enacting the Hydrant Ordinance as it intends because the City has overstepped its authority. (Cal. Constitution Art. XI, §7; Cal. Corp. Code §§14300 et seq. [regulating municipal water companies])

- In the third recital, the city takes responsibility for wildfire, when such responsibility largely lies in the hands of the State through the Public Resources Code. Beyond small fires or its cooperation with CALFire, the City is preempted in its authority for regulating hydrants under the pretext of wildland fires. (Cal. Constitution Art. XI, §7; Pub. Res. Code §§4201 et seq. [regulating forestry and fire protection]; §§2100 et seq [regulating wildfire through CEQA].)

- Regarding Section 13-3.4 of the proposed Hydrant Ordinance, the record keeping requirements for hydrants for the water suppliers are established under California Code of Regulations Title 10 Section 260.140.71.8 (as acknowledged in the City's Staff Report) and, again, the City is preempted by general state law represented by these regulations and the regulation generally of mutual water companies in attempting to impose the provisions of the proposed Hydrant Ordinance on water suppliers such as Highlands. (Cal. Constitution Art. XI, §7; Cal. Corp. Code §§14300 et seq. [regulating municipal water companies]; Cal. Code Regs. tit. 10 §260.140.71.8 [regulating hydrant flow testing].)

- Regarding Section 13-3.5 and 13-3.6 of the proposed Hydrant Ordinance, the authority for regulating water quality for fire flow testing of hydrants is set by the Regional Water Quality Control Board under the authority of the California Water Code—not the City—and the City is preempted by State law for attempting to adopt the Hydrant Ordinance without proper authority. (Cal. Constitution Art. XI, §7; Cal. Water Code §§13000 et seq.[giving the State Water Board and Regional Water Boards authority regarding water quality standards and permitting])

II. <u>Comments on Agenda Item 10: Ordinance No. 277-2024, An Ordinance of the City of Clearlake Amending Chapter VIII, Section 8.5 to Add Subsection 8.5-7 to Establish Standards for Relocation of Underground Utilities in the Public Right-of-Way (Pipe Relocation Ordinance)</u>

- We believe that the City's current roadway maintenance activities and the actions it will take pursuant to the proposed Pipe Relocation Ordinance will constitute inverse condemnation with regard to Highlands. More specifically, because the City's activities in resurfacing their streets, which it admits is triggering the need for the Pipe Relocation Ordinance (Staff Report, at p. 1) it is requiring the municipal water companies—private entities—to relocate their facilities (pipes and mains, etc.) through the proposed Pipe Relocation Ordinance (§8-5.7(a)(2) or repay the City when the City relocates such facilities (§8-5.7(f).) (U.S. Const.

Amend. V, § 1, U.S. Const. Amend. IVX, § 1; Cal. Const. art. I, § 19; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal. 3d 110. We remind the City that Highland's private infrastructure predates the City's incorporation and that damage by the City of Highland's private property will incur liability by the City, inverse condemnation liability which Highlands will not waive along with any and all other legal remedies it may have for City activities that may occur as part of the street resurfacing projects.

- Moreover and in the alternative, for the City to demand in section 8-5.7(a)(2)of the proposed Pipe Relocation Ordinance that mutual water companies relocate infrastructure as part of the City's project to resurface street systems, amounts to a regulatory taking as it shifts the costs to the private water companies for the actions of the City. (*Lingle v. Chevron U.S.A.* (2005) 544 U.S. 528.)
- Section 8-5.8(b) of the proposed Pipe Relocation Ordinance describes a discretion permit process that will trigger CEQA, contrary to the City's statements about CEQA exemptions. (Pub. Res. Code §21080(a).)
- Moreover, it is likely that the replacement of infrastructure as proposed by the Pipe Relocation Ordinance will trigger growth inducing impacts (modernized and upsized infrastructure) under CEQA, invalidating the premise under Section 3 of the proposed Pipe Relocation Ordinance that CEQA would not apply as it would be a "project" under CEQA Guidelines Section 15378.

Sincerely,

Shanda M. Beltrán

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