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City Attorney Wins Appeal in Undergrounding Case *Lawsuit could have ended program to bury utility lines*

The City of San Diego has prevailed in a court case that could have put an end to the City's ongoing program to bury utility lines underground.

On Friday, November 20, the Fourth District Court of Appeal found that the City's Utility Undergrounding Surcharge, which is paid by ratepayers to SDG&E, is a legally permissible fee. The appellate court's 62-page published opinion upheld the trial court's grant of summary judgment in favor of the City, effectively dismissing the suit before it got to trial.

A class-action lawsuit against the City alleged that the utility undergrounding surcharge was not permitted because it was not approved by the voters. Proposition 218, the Right to Vote on Taxes Act, was passed by the California voters in 1996 and generally requires that local governments obtain voter approval prior to imposing new taxes.

The Court of Appeal, however, upheld the original finding of San Diego Superior Court Judge Judith F. Hayes, who confirmed that the utility undergrounding fee was not a tax, and therefore Prop. 218 did not apply.

“This is a victory for all San Diegans, whose neighborhoods are improved by the removal of unsightly overhead power lines and poles,” City Attorney Mara W. Elliott said. **“This lawsuit not only threatened to derail our Utilities Undergrounding Program, but sought a huge payout to the plaintiffs, which would have come at the expense of programs that benefit our parks, streets, and public safety.”**

Had the lawsuit succeeded, it would have essentially stopped the neighborhood portion of the undergrounding program, and forced the City to return more than \$200 million collected by SDG&E from ratepayers and paid to the City for the Utilities Undergrounding Program. Much of that money had already been spent on undergrounding projects across the City, and most of the remainder was earmarked for specific neighborhood projects.

The neighborhood portion of the City's undergrounding program is financed from a special fund using money collected through a 3.53 percent surcharge that SDG&E imposes on ratepayers and then pays to the City for the express purpose of funding the neighborhood portion of the Utilities Undergrounding Program. The program uses no money from the City's General Fund, which pays for public safety, streets, parks, and libraries. Rather, SDG&E pays a fee to the City in exchange for the right to use the City's rights of way to transmit electricity.

Judge Hayes ruled that the funds are payment to the City of a regulatory fee to support the City's Utility Undergrounding Program whose purpose is to mitigate the environmental and aesthetic impact of SDG&E's

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overhead transmission system. The Court of Appeal concluded that Hayes properly granted the City's motion for summary judgment on the grounds that the undergrounding surcharge is compensation validly given in exchange for franchise rights.

The City was represented in court by Senior Deputy City Attorney Meghan Ashley Wharton.

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