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**EXEMPT FROM FILING FEES**  
(GOVERNMENT CODE §6103)

10  
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF ALAMEDA**

13  
14 GREGORY TARBET,

15 Petitioner,

16 vs.

17 EAST BAY MUNICIPAL UTILITY  
DISTRICT, aka EBMUD and DOES 1 through  
18 50, inclusive,

19 Respondent.

**Case No.:** RG12615347

**EBMUD'S OPPOSITION TO PETITION  
FOR WRIT OF MANDATE**

**Date:** June 4, 2013

**Time:** 1:30 p.m.

**Dept.:** 31

**Action Filed:** February 1, 2012

**Trial Date:** None Set

20 ASSIGNED FOR ALL PURPOSES TO  
JUDGE EVELIO GRILLO  
21 DEPARTMENT 31  
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**I. INTRODUCTION**

Under the plain text of Subdivision Map Act and local ordinances the District clearly did not have a legal duty to acquire an easement on Petitioner's property prior to his application for water service in 2009. As such, this Court need only determine if the District has acted arbitrarily and capriciously in the manner in which it proposes to serve Petitioner's property. The facts show that it has not and therefore the Petition must be denied.

**II. FACTUAL BACKGROUND**

The East Bay Municipal Utility District ("District") is a public entity established by East Bay voters in 1923 under the Municipal Utility Act (Public Utilities Code Section 11501, et seq.). (Declaration of Lynelle M. Lewis, ¶ 2.) It provides water to 1.3 million people and businesses in parts of Alameda and Contra Costa Counties. (*Ibid.*) The District maintains over 4,100 miles of pipeline to serve this water. (Declaration of Leann M. Gustafson ("Gustafson Decl."), ¶ 4.)

Applications for new water service are processed by the District's New Business Office ("NBO").<sup>1</sup> (See Declaration of Nancy T. Berchem ("Berchem Decl."), ¶¶ 1 – 6.) Upon receiving an application for water service, a representative of the NBO reviews it for completeness and then works with representatives of various District departments to determine how to serve water to the property in accordance with EBMUD Regulations and engineering standards. (See *id.*, ¶ 6.) The applicant is then required to sign one or more agreements for the provision of water service and submit a deposit for the preparation of final design drawings for water service to the property. (See *ibid.*)

All new water service connections are installed according to the District's Regulations. (Gustafson Decl., ¶ 5.) These are discussed in detail in the Legal Arguments below. A typical service connection consists of (1) a "main cock," which is a valve installed in the side of the water main, (2) a "service lateral," which is a pipe running from the main cock to the water meter, (3) a "curb cock," which is a valve installed within the meter box to allow meter repairs, and (4) the

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<sup>1</sup> A "Service" is defined as "the furnishing of water . . . to a customer through a service connection." (EBMUD Regulations Governing Water Service to Customers of the East Bay Municipal Utility District ("EBMUD Regulations"), Section 1, p. 1-C (AR 0539)). A "Service Connection" is "the necessary piping and equipment from the main to and including the meter." (*Ibid.*)

1 water meter itself. (*Id.*, ¶ 4 and AR 2268.) Under EBMUD Regulations and Standard Engineering  
2 Practices, service connections are installed at right angles to the water main to reach a meter box  
3 installed within the “principal frontage” of a property.<sup>2</sup> The District strives for standardization in  
4 the installation of new service connections for both operational and engineering reasons. (See  
5 Gustafson Decl., ¶¶ 5 – 11.) It requires a main extension onto private property when it cannot install  
6 a service connection to the principal frontage from an existing water main. (See Berchem Decl., ¶¶  
7 8 – 9.)<sup>3</sup> Where a main extension must be installed on private property to reach the property owner’s  
8 principal frontage, the District requires an easement for the installation of the water main extension.  
9 (See *id.*, ¶ 10.) Easements are necessary to allow EBMUD adequate room to install the pipeline and  
10 appurtenances. They are also necessary to provide access for any future maintenance and to operate  
11 the water system. (See *ibid.*)

12         Petitioner Gregory Tarbet owns property at 21603 Banyan Street in Hayward, California.  
13 (Second Amended Verified Petition for Common Law Writ Of Mandate and, in the Alternative,  
14 Second Amended Verified Complaint of Gregory Tarbet (“Petition”), ¶ 5.) He purchased this  
15 property in foreclosure in September of 2009. (*Id.*, ¶ 6.) At the time he purchased the property, it  
16 had no water service. (*Ibid.*)

17         On September 3, 2009, Petitioner submitted a Water Service Application for his property.  
18 (AR 0001.) The District prepared a Water Service Estimate for him on October 20, 2009, stating the  
19 District’s preliminary cost estimate for the installation of the service connection, based on the  
20 extension of 260 feet of water main into an easement 15 feet onto Petitioner’s property, as shown  
21 on included drawings included with the Estimate.<sup>4</sup> (AR 0006, AR 0481-0482.) On November 4,  
22 2009, Petitioner executed Water Main Extension Agreement No. 09-009 (“WMA 09-009”) for the  
23 installation of the main extension, which specifically stated , “No portion of the installation of  
24 mains, facilities or appurtenances provided for or required hereunder shall be made unless the areas

25  
26 <sup>2</sup> See EBMUD Regulations Governing Water Service to Customers (“EBMUD Regulations”), Section 3, p. 3-B (AR  
0544) and Section 4, p. 4-A (AR 0548); AR 0609.

27 <sup>3</sup> The process for installing water main extensions and acquiring easements for main extensions from property owners  
are explained in the manual “District Installed Water Mains” at AR 0560 (2005 version) and AR 0575 (2011 version).

28 <sup>4</sup> This easement was to be an extension of an existing utility easement crossing the prior undivided lot. (See Berchem  
Decl., ¶ 11.)



1 7, 2012, Petitioner filed a “First Amended Verified Complaint” adding a cause of action for  
2 “Petition for Common Law Writ of Mandate to Compel Performance of Ministerial Duty.” The  
3 District demurred to the causes of action for Unfair Business Practices and Property Damage, and  
4 moved to strike portions of the complaint, including references to the Subdivision Map Act. On  
5 September 12, 2012, the Court sustained the District’s demurrer. Though the Court did not address  
6 the substance of the demurrer, it granted Petitioner leave to amend his complaint to clarify whether  
7 it was a writ of mandate, or solely a claim for damages. The Court reserved for a future date the  
8 decision on whether the actions to which the District had demurred were valid.

9 On October 3, 2012, Petitioner filed a “Second Amended Verified Petition for Common  
10 Law Writ of Mandate and, in the Alternative, Second Amended Verified Complaint.” Because the  
11 complaint was essentially the same, the District filed the same demurrer and motion to strike.  
12 Petitioner opposed these motions, and also filed a motion to bifurcate and stay all causes of action  
13 save the Writ of Mandate. The Court granted Petitioner’s motion to bifurcate on December 12,  
14 2012, and dropped the District’s demurrer and motion to strike as moot. All causes of action in this  
15 case are now stayed with the exception of the Petition for Writ of Mandate.

#### 16 **IV. LEGAL ARGUMENT**

17 Petitioner’s primary claim is that the District abdicated a duty under the Subdivision Map  
18 Act to acquire an easement on his property in 2005. No such duty exists. Additionally, because  
19 legitimate operational needs support the District’s need for an easement on Petitioner’s property, he  
20 cannot prove that the District has acted in an arbitrary and capricious manner.

##### 21 **A. The Standard of Review in a Traditional Writ of Mandamus under Code of Civil 22 Procedure Section 1085 is a Review for “Abuse of Discretion,” in which Deference 23 Must Be Given to a Public Agency’s Actions.**

24 Petitioner has filed “a Common Law Writ of Mandate, pursuant to CCP 1085, ordering  
25 Defendant EBMUD to provide water service to Petitioner consistent with the laws and regulations  
26 pertaining to same.” (Petition at 6:2-4.) In reviewing a question of law in a traditional mandamus  
27 proceeding, the court exercises its independent judgment.<sup>7</sup> However, in reviewing an administrative

28 <sup>7</sup> See *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 849.

1 body's acts under Code of Civil Procedure section 1085, we turn to the deferential standard  
2 summarized in *Klajic v. Castaic Lake Water Agency*:

3 A traditional writ of mandate under Code of Civil Procedure section 1085 is a  
4 method for compelling a public entity to perform a legal and usually ministerial duty.  
5 The trial court reviews an administrative action pursuant to Code of Civil Procedure  
6 section 1085 to determine whether the agency's action was arbitrary, capricious, or  
7 entirely lacking in evidentiary support, contrary to established public policy,  
8 unlawful, procedurally unfair, or whether the agency failed to follow the procedure  
9 and give the notices the law requires. Although mandate will not lie to control a  
10 public agency's discretion, that is to say, force the exercise of discretion in a  
11 particular manner, it will lie to correct abuses of discretion. In determining whether  
12 an agency has abused its discretion, the court may not substitute its judgment for that  
13 of the agency, and if reasonable minds may disagree as to the wisdom of the agency's  
14 action, its determination must be upheld.<sup>8</sup>

10 Here, Petitioner asserts that the District has a (presumably ministerial) duty under the state  
11 and local laws to provide him with water service in the manner that he demands it, a claim that  
12 requires the Court's independent judgment to resolve under *Bunnett*. However, Petitioner also  
13 asserts as a matter of fact that the District has "abused its discretion" in the manner it will provide  
14 water service to his property. In addressing Petitioner's factual claims the court must give deference  
15 to the District under *Klajic*.

16 **B. The District Does Not Dispute that Extra-Record Evidence is Admissible in this  
17 Matter, Provided it Meets the Standards of Admissibility.**

18 In general, an "Administrative Record" consists of documents in a public agency's  
19 possession or considered by the public agency prior to that agency's decision on a matter or prior to  
20 the filing of a lawsuit on the matter, when the record presumably closed.<sup>9</sup> Here, Petitioner claims  
21 that "EBMUD has [improperly] sought to limit the documents included in the Administrative  
22 record," quoting cases supporting a right to "extra-record evidence."<sup>10</sup> Contrary to Petitioner's  
23 assertion, the District has not tried to limit the evidence in this case, and fully agrees that it is often  
24

25 <sup>8</sup> *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995 (internal quotations and citations omitted).

26 <sup>9</sup> See, e.g., *Consolidated Irr. Dist. v. Superior Court* (2012) 205 Cal.App.4th 697 (discussing the inclusion of  
27 documents in a writ of mandate under CEQA); *Montour v. Hartford Life & Acc. Ins. Co.* (2009) 588 F.3d 623, 632 n. 4  
28 ("In the ERISA context, the 'administrative record' consists of the papers the insurer had when it denied the claim.");  
*Haynes v. U.S.* (Alaska 2009) 891 F.2d 235, 238 (the administrative record consists of those materials in the BLM's  
record at the time its decision was made); *Thompson v. U.S. Dept. of Labor* (1989) 885 F.2d 551, 555.

<sup>10</sup> See Opening Brief at 9:10 – 9:21.

1 appropriate to admit evidence outside the Administrative Record in an action under Code of Civil  
2 Procedure section 1085.<sup>11</sup>

3 Extra-record evidence must comport with the Rules of Evidence, however. As set forth in  
4 the District's accompanying "Objections to the Declaration of Gregory Tarbet," much of  
5 Petitioner's extra-record evidence does not.

6 **C. Neither the Subdivision Map Act Nor Any County Ordinance Imposes a Duty on the**  
7 **District to Reserve a Pipeline Easement Prior to the Time a Subdivision Map is**  
8 **Approved by the County.**

9 Petitioner's primary claim is that that the District had a duty under the Subdivision Map Act  
10 to obtain a pipeline easement on Petitioner's property prior to the approval of Tentative Parcel Map  
11 PM-8743 by the County of Alameda in 2005. No such duty exists, and Petitioner's arguments  
12 represent a misreading of the relevant statutory authority.

13 (1) The Subdivision Map Act does not Impose a Duty on the District to Obtain an  
14 Easement During the Subdivision Map Review and Approval Process.

15 The District had no duty under the Subdivision Map Act to acquire an easement on  
16 Petitioner's property in 2005 both because the District's duty under the Act is limited to a review of  
17 the available water supply and because that duty does not apply to subdivisions the size of the lot at  
18 issue. Petitioner's argument that his rights have "vested" under the Act are irrelevant because the  
19 District is not a "local agency" under the Act.

20 a. It is Clear Under the Plain Text of the Subdivision Map Act that the District  
21 Had No Duty to Acquire an Easement on Petitioner's Property Prior To  
22 Approval of the Map in 2005.

23 There is but one provision in the Subdivision Map Act requiring a public water agency to  
24 review a proposed subdivision – Government Code section 66473.7. This section only requires a  
25 water agency to verify that a sufficient water supply exists to serve a proposed subdivision, and it  
26 only applies to "a proposed residential development of more than 500 dwelling units."<sup>12</sup> Petitioner's

27 <sup>11</sup> It is unfortunate that Petitioner is trying to paint the District in a bad light on this issue. During the meet and confer  
28 process over the creation of the Administrative Record, the District informed Petitioner in writing that certain  
documents Petitioner had created only after the filing of his complaint could be introduced under such authority as  
*Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, provided Petitioner complied with the rules of  
evidence.

<sup>12</sup> Gov. Code § 66473.7(a)(1). The Act also does not apply to "any residential project proposed for a site that is within  
an urbanized area and has been previously developed for urban uses, or where the immediate contiguous properties

1 verified Petition alleges that the 2005 subdivision was into only three lots, not more than 500  
2 dwelling units.<sup>13</sup> Moreover, there are no provisions in the Act requiring a water agency to agree to  
3 serve individual customers, or to acquire an easement from property owners for the purposes of  
4 providing water service. Rather, the Act expressly states that, “Nothing in this section shall be  
5 construed to create a right or entitlement to water service or any specific level of water service.”<sup>14</sup>

6 In the absence of a specific statutory duty under the Subdivision Map Act, Petitioner cannot  
7 claim that the District violated the Act by failing to acquire an easement in 2005.

8 b. Case Law and Statutory Authority Related to Vesting Rights under the  
9 Subdivision Map Act is Inapplicable because the District is not a “Local  
10 Agency” Under the Act.

11 Petitioner’s argument that the District cannot obtain an easement on Petitioner’s property  
12 because his rights have “vested” represents a misreading of the Subdivision Map Act. As relied  
13 upon by Petitioner,

14 When a *local agency* approves or conditionally approves a vesting tentative map,  
15 that approval shall confer a vested right to proceed with development in substantial  
16 compliance with the ordinances, policies, and standards described in Section  
17 66474.2.<sup>15</sup>;

18 and,

19 The private sector should be able to rely upon an approved vesting tentative map  
20 prior to expending resources and incurring liabilities without the risk of having the  
21 project frustrated by subsequent action *by the approving local agency*, provided the  
22 time periods established by this article have not elapsed.<sup>16</sup>

23 Missing from Petitioner’s cited authority, however, are these provisions of the Subdivision Map  
24 Act: “The rights conferred by this chapter shall relate only to the imposition *by local agencies* of  
25 conditions or requirements created and imposed by local ordinances. . . .”<sup>17</sup> and “‘Local agency’  
26 means a city, county or city and county.”<sup>18</sup> The District is not “a city, county or city and county”

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27 surrounding the residential project site are, or previously have been, developed for urban uses, . . .” Gov. Code §  
28 66473.7(i). Petitioner alleges that his property is in Hayward. See Petition, ¶ 5.

<sup>13</sup> See Petition, 3:1-3.

<sup>14</sup> Gov. Code § 66473.7(m).

<sup>15</sup> Gov. Code § 66498.1(b) (emphasis added).

<sup>16</sup> Gov. Code § 66498.9(b) (emphasis added).

<sup>17</sup> Gov. Code § 66498.6 (emphasis added).

<sup>18</sup> Gov. Code § 66420.

1 and is thus not a “local agency” under the Subdivision Map Act. It did not “approve or  
2 conditionally approve a vesting tentative map” for Petitioner’s property, but rather merely provided  
3 a “will serve” letter.<sup>19</sup> (See Berchem Decl., ¶ 15.) It was the County of Alameda that approved  
4 Tentative Parcel Map PM-8743 through Alameda County Planning Director Resolution 05-15  
5 (“Resolution No. 05-15”).<sup>20</sup>

6 Therefore, the cases relied upon by Petitioner are inapposite. In *Bright Development v. City*  
7 *of Tracy*, for example, the court granted a developer’s petition for a writ of mandate against the City  
8 challenging the City’s own requirement that a developer place off-site utilities underground based  
9 on construction standards that did not exist at the time the City approved the vesting tentative  
10 map.<sup>21</sup> *Kaufman & Broad Central Valley v. City of Modesto* was likewise a case by a developer  
11 challenging fees imposed by the “approving local agency” itself – the City of Modesto – subsequent  
12 to the completion of the developer’s vesting tentative map application to the city.<sup>22</sup>

13 It is also apparent under case law that the approval of vesting tentative map by a “local  
14 agency” does not vest a developer with rights as to all public agencies. In *Pratt Construction v.*  
15 *California Coastal Commission*, the court held that if a development does not comply with state and  
16 federal laws, a city’s approval of a vesting tentative map does not grant a developer to proceed with  
17 construction.<sup>23</sup>

18 Importantly, in the instant matter we can actually read what the County as a “local agency”  
19 had to say about any vested rights conferred in association with the approval of Tentative Parcel  
20 Map PM-8743. Condition 20 of Resolution No. 05-15 states,

21 Water services is to be provided to each lot and are to be connected to the East Bay  
22 Municipal Utility District water system and installed at the expense of the subdivider

23 \_\_\_\_\_  
24 <sup>19</sup> In fact, the District never acquires easements for water main extensions until a property owner has applied for water  
25 service and entered into an agreement with the District to extend the water main. This would be difficult to do, because  
26 until a water service application is submitted, the District generally cannot determine the proposed layout of a  
27 development and, therefore, cannot determine how to serve. Furthermore, the District will not expend resources on  
28 acquiring property rights until a property owner has committed to proceeding with the development of the project by  
returning their executed agreements, required deposit, improvement plans, and final map. (Berchem Decl., ¶ 15.)

<sup>20</sup> See Declaration of Gregory Tarbet (“Tarbet Decl.”), Exhibit B, Resolution No. 05-15 (Sept. 20, 2005). The District  
waives objection to Exhibit B.

<sup>21</sup> See *Bright Dev. v. City of Tracy* (1993) 20 Cal. App. 4th 783, 787, 789-90, 799.

<sup>22</sup> See, generally, *Kaufman & Broad Cent. Valley, Inc. v. City of Modesto* (1994) 25 Cal. App. 4th 1577.

<sup>23</sup> See *Charles A. Pratt Const. Co., Inc. v. California Coastal Comm’n* (2008) 162 Cal. App. 4th 1068, 1072.

1 *in accordance with the requirements of said District and the approval by the Director*  
2 *of Public Works.*<sup>24</sup>

3 Because the County directed water to be installed on Petitioner's lot in accordance with the  
4 District's requirements, Petitioner cannot claim a vested right that allows him to ignore those  
5 requirements.

6 (2) Alameda County Ordinance 16.20.030 Does Not Require the District to Set Forth  
7 Water Service Specifications for Each Newly Subdivided Property Lot Before a  
8 Final Map Is Approved Pursuant to the Subdivision Map Act.

9 Petitioner contends that Alameda County Ordinance 16.20.030, "Limitations for subdivision  
10 into four or less lots" requires that the District "set forth water service specifications for each newly  
11 subdivided property lot before a final map is approved pursuant to the Subdivision Map Act."<sup>25</sup>  
12 Ordinance 16.20.030 of the Subdivision Ordinance of Alameda County limits the improvements  
13 that an "advisory agency" can require of a developer for subdivisions of four lots or less.<sup>26</sup> Once  
14 again, however, the devil is in the details of the definitions. Here, "advisory agency" is defined  
15 under Alameda County's Ordinance as,

16 [A] designated official or an official body charged with the duty of making  
17 investigations and reports on the design and improvement of proposed subdivisions  
18 of real property, the imposing of requirements or conditions thereon, or having the  
19 authority by this chapter to approve, conditionally approve, or disapprove maps.<sup>27</sup>

20 Moreover, Ordinance 16.04.040 lists those agencies and officers having duties and  
21 responsibilities under the Subdivision Ordinance of Alameda County. They include: "The planning  
22 commission . . . The planning director . . . The board of supervisors . . . The planning  
23 department . . . The county engineer . . . The county health officer . . . The building official [and]  
24 The county surveyor . . ." <sup>28</sup> Some of these agencies and officers are specifically designated as  
25 "advisory agencies." None of them are the East Bay Municipal Utility District.

26 And finally, Ordinance 16.16.010 provides that, "[T]he design of the subdivision shall . . .  
27 conform to the . . . design standards adopted by the utility . . . districts in which the subdivision is  
28

24 Taret Decl., Exhibit B, Resolution No. 05-15, p. 4.

25 Opening Brief at 13:7-9.

26 See Respondent EBMUD's Request for Judicial Notice ("RJN") No. 4, "Alameda County Ordinance 16.20.030."

27 RJN No. 2, "Alameda County Ordinance 16.04.060."

28 See RJN No. 1, "Alameda County Ordinance 16.04.040."

1 located . . .”<sup>29</sup> The County thus directs a developer to comply with EBMUD design standards.  
2 Here, EBMUD Regulations and design standards call for installation of the water service in the  
3 “Principal Frontage” of Petitioner’s property, which requires a main extension onto his property.<sup>30</sup>

4  
5 (3) The Facts in the Record and in the Documents Provided by Petitioner Show that the  
6 District Provided All that Was Required of it By the County Under the Approval  
7 Process for Tentative Parcel Map PM-8743.

8 Ultimately, the Record indisputably shows that the District provided the developer all that  
9 was required of the District by the County in conjunction with the approval of Tentative Parcel Map  
10 PM-8743. In addition the condition stated above requiring water service to be installed “in  
11 accordance with the requirements of [the] District,” Condition 21 of Resolution No. 05-15 stated,  
12 “A letter from the East Bay Municipal Utility District stating that it has agreed to provide water to  
13 each lot in the land division shall be submitted to the Director of Public Works.”<sup>31</sup>

14 On September 27, 2005 the developer requested a letter from the District “stating that water  
15 service is available for each lot in [Parcel Map PM-8743]” because “[t]his is one of the conditions  
16 contained in Alameda County Resolution No. 05-15 . . .”<sup>32</sup> On October 3, 2005, the District  
17 provided the developer with a letter stating “Water service to the subject property will be available  
18 contingent upon compliance with the District's Regulations governing water service and Schedule  
19 of Rates and Charges.” (AR 0058.) Contrary to Petitioner’s unsupported claims, there is nothing in  
20 the record that would indicate that anything else was required of the District during the approval  
21 process for Tentative Parcel Map PM-8743.<sup>33</sup>

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23  
24  
25 <sup>29</sup> See RJN No. 3, “Alameda County Ordinance 16.16.010.”

26 <sup>30</sup> See EBMUD Regulations, Section 3, p. 3-B (AR 0544) and Section 4, p. 4-A (AR 0548); Berchem Decl., ¶ 11.

27 <sup>31</sup> Tarbet Decl., Exhibit B, Resolution No. 05-15, p. 4.

28 <sup>32</sup> Tarbet Decl., Exhibit C. The District waives objection to Exhibit C, which was not included in the Administrative Record only because it was not provided to the District prior to lodging of the Record.

<sup>33</sup> Petitioner repeatedly mischaracterizes the Record. For example, there is no record or extra-record document that “required EBMUD to prepare water service plans for the Petitioner's property as a condition to obtaining an Approved Parcel Map.” (Opening Brief at 13:5-11.)

1 **D. The District has Not Acted in an Arbitrary or Capricious Manner in Requiring that**  
2 **Water Service on Petitioner's Property be Installed in Accordance with EBMUD**  
3 **Regulations.**

4 The Record confirms that the District has not acted in an arbitrary or capricious manner  
5 because it has applied its Regulations and Engineering Standard Practices out of engineering and  
6 operational necessity.

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9 (1) EBMUD Regulations Require that Water Service be Installed Along the Principal  
10 Frontage of Petitioner's Property, and that a Water Main Extension be Installed to  
11 Reach that Principal Frontage.

12 EBMUD Regulations provide that "When an application is received for a standard service to  
13 premises where a service connection does not exist . . . a standard service may be granted and  
14 installed provided the applicant meets the District's general requirements as stated elsewhere in  
15 these regulations, and . . . [t]he applicant agrees to meter the development as specifically approved  
16 by the District."<sup>34</sup> The District requires a service connection to be installed in the "Principal  
17 Frontage."<sup>35</sup> "Principal Frontage" is defined as,

18 [T]hat part of the perimeter of the major portion of the premises where the principal  
19 use of the property is located, which fronts on a public street or private road or  
20 driveway from which the premises generally receives access, public services and  
21 utilities, as determined by the District.<sup>36</sup>

22 The District has the final determination of what constitutes "Principal Frontage."<sup>37</sup> The  
23 EBMUD Regulations require the extension of a water main if an applicant's principal frontage does  
24 not front an existing main, and require an applicant to execute an agreement for that main extension  
25 prior to the installation of service.<sup>38</sup>

26 <sup>34</sup> EBMUD Regulations, Section 3, p. 3-A (AR 0543). The EBMUD Regulations are promulgated under the authority  
of Public Utilities Code § 11885.

27 <sup>35</sup> EBMUD Regulations, Section 18 (AR 0558).

28 <sup>36</sup> EBMUD Regulations, Section 1, p. 1-B (AR 0538).

<sup>37</sup> EBMUD Regulations, Section 2, p. 2-A (AR 0540).

<sup>38</sup> EBMUD Regulations, Section 3, p. 3-B (AR 0544) and Section 4, p. 4-A (AR 0548); Berchem Decl., ¶¶ 10 & 15.

1 When an extension of a main onto private property is necessary, the District requires an  
2 easement for the main on the property in order to allow the District room to install the pipeline and  
3 appurtenances, and to provide access for any future maintenance and to operate the water system.  
4 (See Berchem Decl., ¶ 10.) The easement is required for the full length of the pipeline, and it must  
5 extend just past the blowoff assembly, located at the end of the water main.<sup>39</sup> (See *id.*)

6 Here, District has applied EBMUD Regulations and Engineering Standard Practices to  
7 determine that the principal frontage on Petitioner's property is adjacent to Petitioner's driveway,  
8 that the water meter on his property needs to be installed off the driveway and next to a light  
9 fixture, that a 15 foot main extension onto Petitioner's property is necessary to reach this location,  
10 and that Petitioner will need to provide the District with an easement for that main extension. (See  
11 AR 0112-120, AR 0482; Berchem Decl., ¶ 11.) Petitioner signed WMA 09-009, acknowledging  
12 these requirements and agreeing to provide the easement. (AR 0015 & 0018-19.) Petitioner now  
13 rejects water service by refusing to comply with the District's requirements.

14 (2) Petitioner Has Not Shown that His Property Qualifies for Any Exceptions to the  
15 District's Regulatory Requirements, and the District's Regulations are Clear that It Is  
16 the District that Determines How the Regulations Are To Be Applied.

17 The EBMUD Regulations contain several provisions waiving the principal frontage  
18 requirement in certain "unusual circumstances." Petitioner asserts that the District should apply  
19 these provisions to his property. But rather than support this assertion with any facts showing how  
20 his property might meet the District's regulatory definition of "unusual circumstances," he  
21 essentially reverts to the argument that the District is bound by the 2006 Approved Parcel Map.<sup>40</sup>  
22 As discussed at length in Section IV.C, above, the Subdivision Map Act is not applicable to the  
23 District's rights and obligations in this matter.<sup>41</sup>

24 Moreover, Petitioner overlooks those provisions in the EBMUD Regulations that make it

25 <sup>39</sup> District Engineering Standard Practice 517.1 lists the various criteria and considerations related to maintenance for  
26 establishing easements. (AR 0611.)

27 <sup>40</sup> See Petitioner's Opening Brief at 15:17 – 17:2, discussing EBMUD Regulations Sections 1 and 4.C.6.

28 <sup>41</sup> Petitioner has submitted photos of various East Bay properties that he contends show "exceptions" to the District's  
Regulations that justify that an exception be made for his property. As stated in the District's separate "Objections to  
the Declaration of Gregory Tarbet," those photos are inadmissible because they lack foundation and relevance and are  
hearsay. Importantly, many of them seem to show water main installations in cul-de-sacs, for which a different  
installation protocol applies than would be applicable to Petitioner's property, which is not at the end of a cul-de-sac.  
See Berchem Decl., ¶¶ 16 – 17.

1 obvious that it is the District, and not the applicant, that determines when exceptions to the principal  
2 frontage requirement will apply. “Principal Frontage” is “as determined by the District.”<sup>42</sup> “In  
3 determining whether the portion of an applicant's premises lying directly along a main constitutes  
4 principal frontage, the District's decision shall be final.”<sup>43</sup> Even the “unusual circumstances” text  
5 quoted by Petitioner requires that suitability for alternative to principal frontage be “determined by  
6 the District,” and only after “the District has determined that a main extension is not desirable  
7 because of geotechnical factors or not necessary to facilitate system operation.”<sup>44</sup> The phrase “as  
8 determined by the District” is ubiquitous throughout the EBMUD Regulations.

9 The District’s exercise of discretion, then, is necessarily built into the EBMUD Regulations.  
10 This Court must determine if the District’s exercise of discretion was arbitrary or capricious. As  
11 explained below, it was not.

12 (3) The District has Not Acted in an Arbitrary or Capricious Manner in Requiring that  
13 Water Service be Installed Along the Principal Frontage of Petitioner’s Property.

14 The District’s Regulations are based on legitimate operational and safety concerns, and  
15 there are no obstructions on Petitioner’s property that would cause the installation of the water  
16 meter along the Principal Frontage of Petitioner’s property to violate any regulation or ordinance.

17 a. The District Requires Installation of the Water Meter Along the Principal  
18 Frontage of Petitioner’s Property for Legitimate Operational and Safety  
Reasons.

19 The District’s actions have not been “arbitrary, capricious or entirely lacking in evidentiary  
20 support.”<sup>45</sup> Here, the requirement that water service connection be installed at a right angle to the  
21 main and that the meter be installed along the principal frontage of a property serves legitimate  
22 engineering and operational purposes – including safety considerations. As stated in detail in the  
23 Declaration of Leann Gustafson, the standardization of water service installations is necessary from  
24 an engineering standpoint and to save costs on stocking standard equipment. (See Gustafson Decl.,  
25 ¶ 11.) The District saves costs by following standard practices whenever possible, which means

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27 <sup>42</sup> EBMUD Regulations, Section 1, p. 1-B (AR 0538).

<sup>43</sup> EBMUD Regulations, Section 2, p. 2-A (AR 0540).

<sup>44</sup> EBMUD Regulations, Section 4.C.6, p. 4-H (AR 0555).

<sup>45</sup> *Klajic, supra*, 90 Cal.App.4th at 995.

1 performing field operations on uniform installations. (See *id.*, ¶¶ 7 – 8.) The right-angle requirement  
2 makes it possible to minimize damage to property and the streets when replacing service laterals.  
3 (See *id.*, ¶ 10.) Importantly, the standardization of water service installations allows District repair  
4 crews to expect that the service installation will be installed and placed consistently, allowing for  
5 safer, quicker repairs – which is particularly important at night when visibility is low. (See *id.*, ¶¶ 8  
6 – 9.)

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10 b. There are No Obstructions that Would Preclude the Installation of a Service  
11 Connection on Petitioner’s Property in Compliance with the District’s  
12 Regulations.

12 Petitioner’s final argument is that the District has abused its discretion by requiring the  
13 installation of a service connection that will violate a “County Of Alameda Public Works Trenching  
14 Requirement,” the District’s own Regulations and a PG&E utility separation requirement.<sup>46</sup>

15 Petitioner has neither provided nor cited a “County . . . Trenching Requirement.”<sup>47</sup> While  
16 EBMUD Regulation 23 does require 30 inches of clearance around the meter box, Petitioner cites  
17 no evidence that the meter will be within 30 inches of a light post. Furthermore, the location chosen  
18 by the District for the meter box represents the best possible option on his property. (See Berchem  
19 Decl., ¶ 11.) And it is apparent under EBMUD Regulations that the District has the discretion to  
20 make exceptions where necessary.<sup>48</sup>

21 The only tenable “conflict” between the meter box and another utility that Petitioner has  
22 presented is a violation of the utility separation requirements of the PG&E “Joint Trench  
23 Configurations & Occupancy Guide.” However, immediately following the paragraph quoted by  
24 Petitioner is this paragraph:

25  
26 <sup>46</sup> See Opening Brief at 17:8-18:8.

27 <sup>47</sup> Petitioner’s record citation to this requirement is his own email containing none of the language quoted in his brief.

28 <sup>48</sup> For example, EBMUD Regulations, Section 3, p. 3-A (AR 0543) provides, “[I]f unusual conditions exist, the applicant will be advised of the terms and conditions which must be met before an application for service will be accepted.” References to “unusual conditions” and “as determined by the District” are found throughout the EBMUD Regulations.

1 If a 3' horizontal separation cannot be attained between "wet" utilities and Company  
2 dry facilities, a variance may be approved by the local Inspection Supervisor and  
3 submitted to the Service Planning Support Program Manager for approval.  
4 Separations of 1' or less are not permissible and will not be allowed. The Company  
5 may agree to waive the minimum 3' separation requirement at the request of an  
6 applicant if warranted and the need is justified. The request for a waiver must: • Be  
7 made in writing and submitted to the Company ADE during the planning and design  
8 phase of the project, • Clearly describe the conditions necessitating the waiver, •  
9 Include a proposed design, • And, include a design for a barrier between the "wet"  
10 utilities and Company dry facilities in the event 1' of undisturbed earth cannot be  
11 maintained. (AR 2244.)

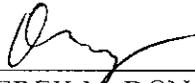
12 Petitioner first alerted EBMUD of the potential conflict with PG&E lines on May 6, 2011.  
13 (AR 0347.) On May 23, 2011, the District informed Petitioner that the District could coordinate  
14 with PG&E on the location of the meter box. (AR 0350.) On November 17, 2011, the District  
15 informed Petitioner that it had contacted PG&E and that PG&E would grant a variance to allow the  
16 meter box to be installed within 12 inches of the PG&E line. (AR 0427.) Petitioner essentially  
17 rejected the District's request that he obtain a variance. (See AR 0436, AR 0439-0443, AR 0446.)  
18 To date, it does not appear that Petitioner has applied for a variance from PG&E. (See Berchem  
19 Decl., ¶ 14.) It is therefore disingenuous for him to claim that the District's proposed meter location  
20 violates PG&E's separation requirements.

21 **V. CONCLUSION**

22 The law is clear that the District had no duty to acquire an easement on Petitioner's property  
23 prior to his application for water service in 2009. The record is clear that the District has not abused  
24 its discretion by requiring an easement from Petitioner in order to install a service connection. The  
25 record is also clear that Petitioner simply does not want an EBMUD easement on his property.  
26 However, if every property owner could dictate the manner of the installation of a service  
27 connection on his or her property, the District's Regulations would be meaningless, and the District  
28 would be unable to operate safely and efficiently. The Petition must be denied.

DATED: May 17, 2013

JYLANA COLLINS, General Counsel  
EAST BAY MUNICIPAL UTILITY DISTRICT

By: 

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