

File No. 100691

Committee Item No. 7
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS
AGENDA PACKET CONTENTS LIST

Committee: Rules

Date June 18, 2010

Board of Supervisors Meeting

Date _____

Cmte Board

- Motion
- Resolution
- Ordinance
- Legislative Digest
- Budget Analyst Report
- Legislative Analyst Report
- Youth Commission Report
- Introduction Form (for hearings)
- Department/Agency Cover Letter and/or Report
- MOU
- Grant Information Form
- Grant Budget
- Subcontract Budget
- Contract/Agreement
- Award Letter
- Application
- Public Correspondence

OTHER

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Completed by: Linda Wong

Date June 15, 2010

Completed by: _____

Date _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Settlement of Lawsuit]
2

3 **Ordinance authorizing settlement of the lawsuit entitled Bayshore Sanitary District v.**
4 **City and County of San Francisco, et al., filed on November 21, 2007, in San Francisco**
5 **Superior Court, Case No. 07-469434. Pursuant to the proposed settlement, the City will**
6 **execute a revenue refund adjustment for the Bayshore Sanitary District's sewer**
7 **services billings in the amount of \$407,000. In return, the Bayshore Sanitary District**
8 **will implement measures to ensure that future errors in measuring wastewater flow are**
9 **promptly detected and corrected and limit its recovery of any overcharges due to**
10 **equipment error in the future.**

11 Be it ordained by the People of the City and County of San Francisco:

12 Section 1. Findings:

13 (1) On November 21, 2007, plaintiff Bayshore Sanitary District filed a lawsuit in San
14 Francisco Superior Court entitled "Bayshore Sanitary District v. City and County of San
15 Francisco et al." The complaint alleged causes of action for: (1) breach of contract; (2)
16 negligence; (3) money had and received; (4) money paid; (5) declaratory relief; and (6)
17 accounting. The lawsuit claimed that, due to a faulty meter at the Carlyle Pump Station, the
18 City overcharged plaintiff for sewer services from 1997 through 2006.

19 (2) In settlement of plaintiff's lawsuit, the parties have negotiated an agreement,
20 pursuant to which the City will execute a revenue refund adjustment in the amount of
21 \$407,000 for plaintiff's sewer services billings. In return, plaintiff, at its own expense, will
22 implement measures designed to ensure that errors in measuring wastewater flow are
23 promptly detected and corrected in the future. Plaintiff will also limit its recovery of any future
24 overcharges due to equipment error to one year prior to the date the error has been corrected.
25 A copy of the settlement agreement is contained in Board File No. 100691.

1 Section 2. The above-named lawsuit was filed in San Francisco Superior Court on
2 November 21, 2007, and the following parties were named in the lawsuit: Plaintiff Bayshore
3 Sanitary District; Defendants the City and County of San Francisco, and the San Francisco
4 Public Utilities Commission.

5 Section 3. The Board of Supervisors approves and authorizes the City's execution,
6 delivery, and performance of the settlement agreement.

7
8 APPROVED AS TO FORM AND
RECOMMENDED:

9 DENNIS J. HERRERA
10 City Attorney

11 

12 DANNY CHOU
13 Deputy City Attorney

RECOMMENDED:

SAN FRANCISCO PUBLIC UTILITIES
COMMISSION

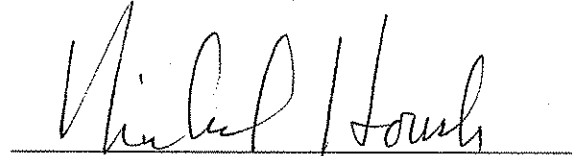
14 
15 EDWARD HARRINGTON
16 General Manager

17 FUNDS AVAILABLE:

18 
19 BEN ROSENFELD
20 Controller

21 Index Code: 470101
22 Subobject: 05312

APPROVED:

23 
24 SECRETARY
25 SAN FRANCISCO PUBLIC UTILITIES
COMMISSION

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

INTRODUCTION

This Settlement Agreement and Mutual Release ("the Agreement"), dated _____, 2010 ("the Reference Date"), is entered into between and among the City and County of San Francisco, on behalf of itself and the San Francisco Public Utilities Commission (collectively, "the City"), on the one hand, and the Bayshore Sanitary District ("the District"), on the other.

RECITALS

A. The City and the District entered into a Joint Exercise of Powers Agreement (the "JPA") on July 31, 1995.

B. Pursuant to the JPA, the City agreed to treat and dispose of wastewater generated by the District. The District, in turn, agreed to pay the City sewer service charges based on a formula that includes the rate of flow of wastewater at the Carlyle pump station. Under the JPA, the rate of flow of wastewater is to "be measured by suitable metering equipment of standard manufacture, to be furnished, installed, maintained, and calibrated by" the District "at its expense."

C. Section 8 of the JPA further provided that "[i]n the event any meter fails to register or registers incorrectly," the City and the District "shall agree upon a period during which the meter failed to register or registered incorrectly and the quantity of the discharges during that period, and, upon Agreement, an appropriate adjustment based thereon shall be made in" the City's "billing."

D. The District has filed a lawsuit against the City in Superior Court for the City and County of San Francisco (*Bayshore Sanitary District v. City and County of San Francisco, et al.*, Case No. 469434) (hereinafter, the "Lawsuit"). In its "Complaint for Breach of Contract; Negligence; Money Had and Received; Money Lent; Declaratory Relief; Accounting; and for Damages," the District alleges that it overpaid the City for sewer service charges due to a defective meter at the Carlyle pump station and seeks to recover, among other things, the amount of the alleged overcharges.

E. The City and the District (collectively, "the Parties") wish to settle their differences and avoid further litigation;

NOW, THEREFORE, the Parties agree to fully settle their dispute on the following terms and conditions:

AGREEMENT

1. This Agreement shall be effective as of the date ("the Effective Date") on which this settlement has been approved by both the San Francisco Public Utilities Commission and the San Francisco Board of Supervisors in their sole and absolute discretion. Subject to the foregoing, each Party represents and warrants that it has the right and authority to execute this Agreement.

2. Settlement Terms

- a. The City shall initiate and execute a revenue refund adjustment for the District's sewer services billings in the amount of \$407,000 within 60 days of the Effective Date of this Agreement.

- b. Within 60 days of the Effective Date of this Agreement, the District shall pay to the City the full amount of any and all outstanding, unpaid billings for sewer services in excess of the revenue refund adjustment provided in Sec. 2(a) above.
- c. Notwithstanding section 8 of the JPA, pumped discharges by the District to the City's sewerage system shall be measured in accordance with the provisions of this subsection 2(c). The costs of performing the activities and actions required by this subsection shall be borne solely by the District.
 - i. The District and the City recognize that continuous and accurate measurement of sewage discharges from the District and maintenance of complete and accurate records of those measurements is necessary for the proper allocation of sewerage system costs and the accurate billing and payment for sewage system services.
 - ii. The District shall install, maintain and operate validation measuring and recording equipment at Bayshore's Carlyle Pump Station. The District shall also perform periodic volumetric draw down tests using the Carlyle Pump Station influent sump to verify pump operations, for the purpose of validating the District's meter readings. The tests shall be performed at least annually and at the District's sole expense. The first volumetric draw down test will be performed within 60 days of the effective date of this agreement. The City shall be notified 10 days in advance of commencement of any such test, and may attend and observe the test activities. The District shall provide a written report of the results of the test to the City, within 10 days of the conclusion of the test.
 - iii. The District shall contract with a qualified independent metering consultant to perform inspection, testing, servicing and calibration of the metering equipment required by section 8 of the JPA and this section. The inspection, testing, servicing and calibration of the equipment shall be performed at least semi-annually (during the month of July and January each year). The District shall provide a report of such activities to the City, within 30 days of the completion of inspection, testing, servicing and calibration of the equipment. The City's review, or failure to review, or failure to act upon any reports prepared by the District pursuant to section 2(c) of this Agreement, shall under no circumstances modify, limit or eliminate the District's duties and obligations under this Agreement and the JPA.
 - iv. The District shall prepare a Procedures Manual which will describe in detail the procedures for periodic inspection, testing, servicing and calibration of the measuring and recording equipment described in section. Upon request, the District shall provide a current copy of the Procedures Manual to the City.
 - v. If the District's measuring and recording equipment fails to register sewage flow or under records flows to the City's sewerage system, the District shall pay the costs of the under recorded services.
 - vi. If the District's measuring and recording equipment over records flows to the City's sewerage system, the City shall reduce the payments owed by the District, based on the amount of over recorded flows. Under no circumstances will the City provide billing adjustments for over recorded sewage flows for a period greater than one year prior to correction by the District of measuring and recording equipment flaws or failures that resulted in over recording flows.

- d. In the event and to the extent the terms of this Agreement conflict or are inconsistent with the terms of the JPA, the terms of this Agreement shall supersede the conflicting or inconsistent terms of the JPA.

3. Within 30 days after the Effective Date of this Agreement, the District shall dismiss with prejudice its Lawsuit – *Bayshore Sanitary District v. City and County of San Francisco, et al.*, San Francisco Superior Court Case No. 469434.

4. Each Party shall bear its own costs, expenses, and attorney's fees pertaining to the Lawsuit. Notwithstanding the foregoing, in any action to enforce any provision of this Agreement, the prevailing party shall recover its reasonable costs and attorney's fees pursuant to California Civil Code section 1717.

5. **Mutual Releases:** Except for any obligations imposed by this Agreement, the Parties hereby fully and forever release and discharge each other, and their respective assigns, successors, predecessors, partners, agents, attorneys, representatives, insurers, affiliated entities, officers, directors, trustees, beneficiaries, heirs and employees, and each of them, from any and all claims, demands, debts, losses, damages, obligations, warranties, costs, expenses, actions, rights of action, causes of action, suits and liabilities of any kind or nature whatsoever, whether based on contract, tort, statute, or other theory of recovery, legal, equitable, or otherwise, past or present, whether now known or not presently known, suspected or unsuspected, existing or claimed to exist, which arise out of or relate to any of the transactions, occurrences, acts or omissions set forth or facts alleged in the complaints or answers on file in the Lawsuit.

6. **Waiver of Unknown Claims:** Each Party acknowledges that it may later discover facts in addition to or different from those which such Party now knows or believes to be true with respect to the subject matter of this Agreement and arising out of any of the transactions, occurrences, acts or omissions set forth or facts alleged in the complaints or answers on file in the Lawsuit and that it is such party's intention notwithstanding, fully, finally and forever to settle and release all of the claims released by this Agreement, known or unknown, suspected or unsuspected, which now exist, may exist or previously existed between the Parties except as specifically reserved above or herein. In furtherance of such intention, the releases given in this Agreement shall be and shall remain in effect as a full and completed release, notwithstanding the discovery or existence of any such additional or different facts. The Parties further accept and assume the risk that such facts may turn out to be different from the facts now known or believed to be true by the Parties and agree that the releases given in this Agreement shall remain in all respects effective and shall not be subject to termination or rescission by reason of any such difference in fact.

7. **Waiver of Civil Code Section 1542:** In giving this release, the Parties each waive the benefit of Section 1542 of the Civil Code of the State of California, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR EXPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN TO HIM MUST HAVE MATERIALLY AFFECTED THE SETTLEMENT WITH THE DEBTOR.

8. The Parties agree and acknowledge that this Agreement is made in compromise of disputed claims and contentions, and none of the consideration exchanged in this settlement shall be construed as an admission of liability by the Parties or of the validity of any particular claim or contention in their dispute.

9. This Agreement shall inure to the benefit of and bind the respective successors and assigns of the City and the District. The Parties agree that nothing in this Agreement,

expressed or implied, is intended to or shall confer any rights or remedies under or by reason of this Agreement on any person or entity other than the Parties and their respective permitted successors and assigns, nor is anything in this Agreement intended to relieve or discharge any obligation of any third person to any Party hereto or give any third person any right of subrogation or action over or against any Party to this Agreement.

10. Any evidence of the existence, terms, or negotiations of this Agreement shall be inadmissible in any litigation or other proceeding, except that such evidence may be offered in an action seeking solely to enforce the terms of this Agreement.

11. This Agreement shall be construed and enforced in accordance with the laws of the State of California. Any suit to enforce this Agreement shall be brought in the Superior Court for the City and County of San Francisco.

12. This Agreement represents the entire agreement and understanding among the Parties as of the Reference Date by each Party and supersedes all prior proposals, negotiations, agreements, and understandings relating to the subject matter of this Agreement. The Parties acknowledge, stipulate, and agree that no covenant, obligation, condition, representation, warranty, inducement, negotiation, or understanding concerning any part or all of the subject matter of this Agreement has been made or relied on except as expressly set forth in this Agreement. No modification or waiver of any provisions of this Agreement shall in any event be effective unless the same shall be in writing and signed by the Party against whom enforcement of the Agreement is sought.

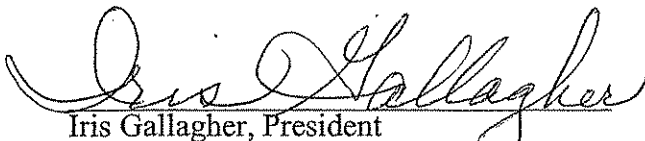
13. The failure by any Party to insist on performance of any of the terms or conditions of this Agreement shall not void any of the terms or conditions hereto, nor shall it constitute a waiver or modification of any of the terms or conditions hereto, nor shall it be construed as a waiver or relinquishment by such Party of the performance of any such terms or conditions.

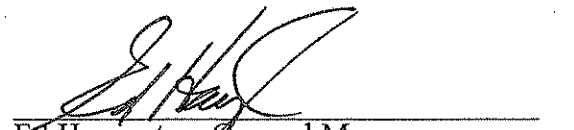
14. Initially capitalized terms used in this Agreement shall have the meanings given them in this Agreement. In the event of any conflict or inconsistency between the recitals and any of the remaining provisions of this Agreement, the remaining provisions of this Agreement shall prevail.

15. The Parties acknowledge they have read this Agreement and have been advised by counsel of their choice. Each Party understands each and every term, condition and provision of the Agreement. Accordingly, the Parties agree to waive any claim to apply, in the interpretations of any term, provision or condition of this Agreement, the rule of construction that ambiguities are to be resolved against the drafter of the Agreement. For the purposes of this Agreement, the Parties agree that any ambiguity shall be resolved as if the Agreement and each provision had been jointly conceived and drafted.

16. This Agreement may be executed and delivered in any number of counterparts or copies by the Parties. Delivery may be made by facsimile. When each Party has signed and delivered at least one counterpart to the other Party hereto, each counterpart shall be deemed an original and, taken together, shall constitute one and the same Agreement, which shall be binding and effective as to the Parties.

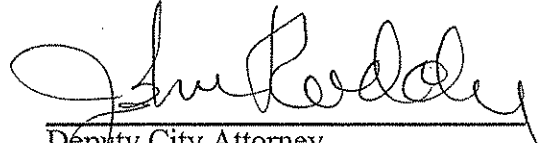
IN WITNESS HEREOF, each Party has caused this Agreement to be executed on the date opposite its or his/her signature block.


Iris Gallagher, President
Bayshore Sanitary District


Ed Harrington, General Manager
San Francisco Public Utilities Commission

Approved As To Form And Recommended:

Dennis J. Herrera
City Attorney


Deputy City Attorney

