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Memorandum

TO: Stan Yamamoto, Santa Clara Valley Water District

FROM: Adam Hofmann, Hanson Bridgett
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DATE: April 23, 2020

RE: **Options for COVID-19 relief for District Ratepayers**

The Santa Clara Valley Water District Board of Directors seeks to determine what authority, if any, it has to use District funds to assist individuals and water retailers within the District's jurisdiction who face economic hardship due to COVID-19. This memorandum outlines various types of relief the District could consider, the legal constraints on the District's ability to offer such relief, and the limits on use of the District's various funding sources to pay for relief programs.

I. Potential Forms of Relief

We have identified and analyzed the following options for relief, listed in order from the highest to lowest legal risk:

1. Direct Grants: Providing financial relief in the form of direct grants to individuals and water retailers within the District's jurisdiction.

2. Loans: Providing interest-free or low-interest loans to individuals and water retailers within the District's jurisdiction to help cover their water rates and charges, or using an intra-district transfer of revenue, or a District "loan" to itself.

3. Waiver or Reduction of Groundwater Charges: Reducing or suspending collection of groundwater charges and surface-water rates for all individuals and water retailers within the District's jurisdiction for a period of time.

4. Assist Customers' Operations: Paying for some part of the construction, maintenance, and operation costs of regional facilities the District does not own to ensure continued delivery of water to retail customers within the District's jurisdiction.

5. Contract for District Personnel Support: The District may also consider contractual arrangements for the pooling of resources and personnel.

6. Payment Plans: Providing temporary assistance by offering payment plans, waiving penalties and administrative charges, but continuing to charge its standard 1 per cent interest rate.

7. Reduce Operational Costs: Reducing the District's own operational costs in the immediate term, and reducing groundwater charges to pass those savings on to rate payers.

The following analysis will discuss the risks and limitations on each one of these options. Due to the constitutional constraints on gifts of public funds and limitations on the District's purposes and powers, we have concluded that reducing operational costs and providing payment plans are the District's least risky options. Reducing groundwater charges and assisting with retailer water projects may be legal, depending on the details of the arrangements. And direct grants and interest-free loans are likely prohibited.

Section II.A of this memo analyzes the District's legal authority to act. Section II.B will discuss the permissible uses of District revenue sources. Section II.C of this memo contains a more detailed summary of these principles as applied to each of the foregoing options.

II. Analysis

A. Limitations on the District's Power to Provide Assistance

1. The District's Authorities Are Defined by Statute and Provide Limited Flexibility

a. Santa Clara Valley Water District Act

Unlike states, counties, and cities, special districts do not have general police power and may make and enforce only those ordinances and regulations for which it has specific powers derived from statutes. (*Water Quality Assn. v. County of Santa Barbara* (1996) 44 Cal.App.4th 732, 741, see also *Trimont Land Co. v. Truckee Sanitary Dist.* (1983) 145 Cal.App.3d 330, 346 [discussing the strict limitations on implied powers conferred on special districts].) In interpreting the District's powers, the language of the Act must be "strictly construed and… the power is denied where there is any fair, reasonable doubt concerning the existence of the power." (*Id.* at p. 746, quotation omitted.)

The Santa Clara Valley Water District Act (the "District Act") establishes the authority of the District and restrains its use of funds. It specifies that the District is a flood control and water district. The District is empowered to take any actions to further the purposes of the District, which include the right to: protect Santa Clara County from flooding; "provide for the conservation and management of . . . water from any sources;" "increase and prevent the waste or diminution of the water supply in the district;" "obtain, retain, protect, and recycle . . . water from any sources . . . for any beneficial uses within the district;" and "preserve open space in Santa Clara County." (District Act, § 4, subd. (c)(1)-(8.))

In turn, the District is authorized to undertake a range of actions, tethered to the effectuation of its statutory missions. For example, it is authorized "to make contracts, and to employ labor, and to do all acts necessary for the full exercise of all powers vested in the district or any of the officers thereof." (District Act, § 5, subd. 12.) It may also pay a portion of the cost of water imported by local municipalities "into, for use within, and of benefit to" the District. (District Act, § 5, subd. 14.) And it has several options for funding those authorized activities. It is authorized to collect groundwater charges in order to fund activities for the benefit of

groundwater pumpers in the district's jurisdiction. (District Act, § 26.) It may levy taxes and assessments "to carry out any of the object or purposes of this act of common benefit to the district," and "construct[] or extend[] any or all works established within or on behalf of a zone or participating zones within the district. . . ." (District Act, § 13, subd. 1.) It may collect fees and charges for flood control and storm drainage systems. (District Act, § 5, subd. 9.) And it can incur indebtedness, issue bonds, and "cause taxes or assessments to be levied and collected for the purpose of paying any obligation or the district, and to carry out any of the purposes of this act. . . ." (District Act, § 5, subds. 10-11.)

b. Implied Authority

None of the foregoing authorities expressly permit the District to provide relief to individuals and water retailers within the District's jurisdiction impacted by COVID-19. However, the District's implied authorities may provide limited opportunities for creative problem solving.

The only implied powers of a special district "are those essential to the limited, declared powers provided by its enabling act." (*Water Quality Assn*., *supra*, 44 Cal.App.4th at p. 746.) "Expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment . . . such executive officials are not free to spend public funds for any 'public purpose' they may choose, but must utilize appropriated funds in accordance with the legislatively designated purpose." (*Stanson v. Mott* (1976) 17 Cal. 3d 206, 213.) Nonetheless, in *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617, 623, the Court of Appeal overturned a lower court's judgment barring a joint powers agency (JPA) from placing a radio antenna in a city without complying with land use ordinances. The appellate court found that the JPA's member agencies, including a water district, community services district, community college district, and a transit district, each had the implied authority to construct and operate an emergency communications system, which could therefore be construed as a common power of the JPA.

Applying these principles, Section 5, subd. 5 of the District Act may provide some, limited flexibility for the District to respond to the Covid-19 crises. Under that provision, the District is empowered to take a variety of actions to ensure that water in the County is adequately stored, conserved, recycled, distributed, and managed. This power includes the right to "do any and every lawful act necessary to be done that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants within the district." In addition, Section 26.3 recognizes that District activities that protect and augment water supplies within the District "are necessary for the health, welfare and safety of the people of the State."

These provisions can be read to establish implied authority to undertake activities beyond those expressly contemplated by the District Act, so long as those activities are tied closely to the District's express purposes, such as ensuring that "sufficient water may be available" to individuals and water retailers within the District's jurisdiction or otherwise protecting or augmenting water supplies for their benefit. Under *Zack*, however, any proposed action will need to be carefully scrutinized, along with the District's reasons for taking action, to maximize the District's ability to defend against a related challenge.

In addition, the Governor, Public Utilities Commission, and Santa Clara County have recently issued executive orders recognizing the essential nature of water service. And the

Governor in particular has directed the State Water Resources Control Board to "identify best practices, guidelines, or both to be implemented during the COVID-19 emergency (i) to address non-payment or reduced payments, (ii) to promote and to ensure continuity of service by water systems and wastewater systems, and (iii) to provide measures such as the sharing of supplies, equipment and staffing to relieve water systems under financial distress." For now, however, no formal guidelines or legislation expanding the District's authority has been forthcoming. And the Governor's order expressly provides, "Nothing in this Order eliminates the obligation of water customers to pay for water service, prevents a water system from charging a customer for such service, or reduces the amount a customer already may owe to a water system." As a result, the State's response to the COVID-19 crisis has not yet expanded the District's authority to act.

2. The California Constitution Prohibits Gifts of Public Funds

a. Gift of Public Funds

Another limitation on the District's ability to spend public revenue is the California Constitution's prohibition on gifts of public funds, which prohibits government entities, including special districts, from making or authorizing any gift of public funds for private purposes. Article XVI, § 6 of the Constitution provides:

> the Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever.

Gifts include aid, the making of a gift, pledge of credit, or payment of liabilities, and any "thing of value." "The term "gift" in the constitutional provision 'includes all appropriations of public money for which there is no authority or enforceable claim,' even if there is a moral or equitable obligation." (*Sturgeon v. Cty. of Los Angeles,* (2008) 167 Cal. App. 4th 630, 637.) In this sense, a public agency that spends money in excess of its lawful authorities, in effect, makes a gift of public funds. A court has held that waiving interest charges that would otherwise be imposed on the holders of escheated property was an unconstitutional gift of public funds, and reversed a judgment exempting the taxpayers from payment. (*Westly v. U.S. Bankcorp* (2003) 114 Cal. App. 4th 577.)

On the other hand, expenditures made for a public purpose are excepted from the prohibition against gifts of public funds. If a public purpose is served by the expenditure of public funds, the prohibition is not violated even though there may be incidental benefits to private persons. (*See Board of Supervisors v. Dolan* (1975) 45 Cal.App.3d 237, 243 [recognizing that statutorily authorized low-interest, long-term loans could be used to fight urban blight, even if they caused some purely private benefit].) The public purpose exception is liberally construed, and the "determination of public purpose is primarily a matter for the Legislature and will not be disturbed as long as it has a reasonable basis." (*County of Alameda v. Janssen* (1940) 16

Cal.2d 276, 281.) And public agencies may be afforded greater flexibility when responding to disasters and other urgent circumstances. (See *Goodall v. Brite* (1936) 11 Cal.App.2d 540, 551 [recognizing that county could admit and fund the care of financially solvent patients to public hospital without improperly gifting public funds in case of a natural disaster, including an epidemic].)

But the public-purpose exception is not without limits. In *Golden Gate Bridge etc. Dist. v. Luehring,* (1970) 4 Cal.App.3d 204, the court found that a special district may only dispose of funds to another agency to further the donor district's *specific purposes*. In that case, the Golden Gate Bridge District wished to distribute surplus bridge toll revenue to adjacent counties, whose taxpayers had helped establish the District. The Court found that it was not sufficient that the funds were used for a "public" purpose, but must be spent in furtherance of the *particular* public purpose of the donor agency. The court stated that the Constitution prevents "diversion to an extraneous purpose of public money raised for a limited purpose," and objected to the Bridge's proposal "to take money from one group of citizens—the tollpayers—and apply it to the benefit of another group—the county taxpayers." (*Id.* at p. 214.) And, while *Goodall* acknowledged some flexibility for a county—which exercises the general police power—to respond to epidemics and other disasters, that rule has never been applied to a special district.

Thus, the key to ensuring the lawfulness of any proposed action will be tying that action to the District's essential purposes of ensuring water supply and management. Specific options are considered below.

b. Consequences for Illegal Gifts of Public Funds

Districts and public officials face potential legal liability for an improper gift of public funds, including taxpayer lawsuits and civil and criminal penalties. In practice, modern courts have rarely had occasion to uphold a specific consequence after funds have been expended, because the expenditures have either been lawful, or the lawsuit secured a court order *before* funds were expended. However, in some cases, courts have vacated excessive settlements and arbitration awards on the basis of a violation of the gift of public funds doctrine. (*See Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal. App. 4th 431.) It is worth noting that personal liability can result from a misuse of funds. (See, e.g., Gov. Code, § 8314 [authorizing a civil penalty not to exceed $1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of resources]; Pen. Code, § 424 [permitting imprisonment for two, three, or four years, and disqualification from holding office].)

In a particularly extreme example, a taxpayer filed a lawsuit alleging that a state official had authorized an improper expenditure of public funds to promote the passage of a bond. (*Stanson v. Mott* (1976) 17 Cal.3d 206.) The taxpayer sought to require the official to repay the funds personally. The state official argued that the expenditure was lawful and that, in any event, he could not be held personally liable. The California Supreme Court disagreed, concluding that, in the absence of clear legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign. The Court also held that public officials may be held personally liable if they fail to exercise due care and reasonable diligence in authorizing the expenditure of public funds. Whether or not an official has acted with due care depends on various factors including, for example, whether the expenditure's impropriety was obvious or not, whether the official was alerted to the possible invalidity of the

expenditure, and whether the official relied upon legal advice in making the expenditure. (*Id.* at p. 227.) While this case stands as an outlier, it highlights the risk of ignoring the Constitution's prohibition on gift of public funds.

c. Intra-District Transfers

The gift of public funds prohibition only applies to transfers between one political subdivision and another party, not to transfers between funds of the same public entity. Legislation to assist a bankrupt county by reallocating its resources did not violate the prohibition, where the funds transferred were necessary to enable the county to recover from its financial crisis, and the transfer was required to preserve and protect the health, safety, and welfare of the residents of the county. (*White v. State* (2001) 88 Cal.App.4th 298, 304-305.) However, in that case the transfer was specifically authorized by the state legislature, and was not originated by the agency.

In *Auerbach v. Board of Supervisors* (1999) 71 Cal.App.4th 1427, taxpayers sued a county for transferring money from funds designated as trust or agency funds to its general fund to cover cash flow deficits. The county was specifically authorized to make such transfers pursuant to Gov. Code § 25252, which allows counties to transfer money from one fund to another, as the public interest requires. The Court found that the county did not violate Government Code section 53724, which requires that revenues from a special tax be used only for the purpose for which the tax was imposed. "A reasonable construction of [the statute] is that the Legislature intended to preclude any use of the revenue that would permanently deprive the intended recipient project or program of the Funds." (*Id.* at p. 1438.) The plaintiffs made no showing that the transferred monies were not ultimately used for the purpose for which the tax was imposed, and there was no dispute "that the temporary transfer 'had no effect on any appropriation or expenditure.'" (*Id.* at p. 1439.) The court found that the county was not required to pay interest to the funds upon repayment because there was no statutory or other requirement to do so.

Unlike the county's statute in *Auerbach*, the District Act does not provide a broad authorization for intra-district fund transfers. The District Act does authorize limited intra-district loans as described in Section 13, subd. 1, which allows the District to use ad valorem revenue to fund particular construction costs, provided that the funds used are later replaced by taxes, assessments, or groundwater charges. There is no reciprocal *express* ability for the District to loan groundwater revenue, which is restricted in its uses, to Ad Valorem accounts, which can be used more broadly. No California case appears to indicate whether an express authorization is required, but since the District is a limited powers agency, such a transfer may be risky, especially given the statutory and constitutional limits on the expenditure of the District's revenue from special taxes, assessments, and groundwater charges. We recommend further legal review if the District wishes to pursue this option.

3. Validating District Actions

Depending on what relief options the District decides to explore, if any, it may be beneficial for the District to bring a validation action prior to finalizing a COVID-relief plan, if such an option is available. (See Code Civ. Proc., §§ 860-870.) Some of the options discussed in this memo could be subject to validation actions, but not all. The District Act provides that it may

seek validation of a contract. (District Act, § 32.) And California law authorizes validation actions to determine the validity of bonds, warrants, contracts, obligations or evidence of indebtedness. (Gov. Code, § 53510.) Therefore, the District could consider seeking judicial validation of contracts or other debts it undertakes to guard against a later finding of impermissible use. While this may prevent the immediate provision, it may be preferable to the risks and uncertainty of undertaking major expenditures that could later be found illegal.

B. Restrictions on Revenue Sources

Assuming for the sake of discussion that the District has some power to provide COVID-19 related assistance, it can only do so with a revenue source that permits such a use.

1. Groundwater Charge Revenue

The District derives substantial revenue through groundwater charges, authorized in Section 26 of the District Act, which states, "the board shall have the power, in addition to the powers enumerated elsewhere in this act, to levy and collect a ground water charge for the production of water from the ground water supplies within a zone or zones of the district which will benefit from the recharge of underground water supplies or the distribution of imported water in such zone or zones."

Section 26.3 provides that groundwater charge revenue "**shall be used exclusively by the board for the following purposes**: (1) to pay the costs of constructing, maintaining and operating facilities which will import water into the district which will benefit such zone or zones …."; (2) to pay the costs of purchasing water for importation into such zone or zones, including payments made under contract…"; (3) to pay the costs of constructing, maintaining and operating facilities which will conserve or distribute water within such zone or zones, including facilities for ground water recharge, surface distribution, and the purification and treatment of such water;" (4) to pay the principal or interest of any bonded indebtedness or other obligations incurred by the district on behalf of such zone or zones for any of the purposes set forth in paragraphs 1, 2, and 3 of this section." (emphasis added.) As a result, the District could only fund COVID-19 relief with groundwater charge revenues if the relief program would support the activities listed in Section 26.3 of the District Act.

Beyond the limitations established by the District Act, use of groundwater revenue is constrained by Proposition 26, Article XIII C of the California Constitution. (See *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1209-1210.) As a result, the District will bear the burden of justifying its expenditure of revenue from groundwater charges and showing that such expenditures meet the requirements of Proposition 26, that is, that they serve the benefit of groundwater pumpers.

2. Safe, Clean Water and Natural Flood Protection Program

In November 2012 the voters of Santa Clara County approved Measure B, the Safe, Clean Water and Natural Flood Protection Program, which implemented a countywide special parcel tax for 15 years. The expenditure of resulting revenues, however, is constrained by the purposes for which the tax was imposed; no other use is permitted. (Gov. Code, § 53724, subd. (e).)

a. The Measure's Existing Priorities

The measure, codified in Resolution No. 12-62, provides that the parcel tax funds "shall be used solely for the purpose of supporting the priorities" of the measure, which are as follows:

Priority A: Ensure a Safe, Reliable Water Supply

Priority B: Reduce Toxins, Hazards and Contaminants in our Waterways

Priority C: Protect our Water Supply from Earthquakes and Natural Disasters

Priority D: Restore Wildlife Habitat and Provide Open Space

Priority E: Provide Flood Protection to Homes, Businesses, Schools and Highways

Other: Six projects from the Clean, Safe, Creeks Plan have been carried forward into the Safe, Clean Water Program.

A review of these priorities does not appear to permit the use of District funds for COVID-19 relief. Most of the funds are earmarked for specific projects or programs. We could find no general exception for public welfare projects or programs.

b. Amending the Measure

The District may seek to amend the measure in the November 2020 election, to provide explicit authorization to use tax proceeds under the measure for COVID-19 relief. Even so, the District's ability to levy taxes will remain constrained by the District Act, which provides that the District may only levy and collect taxes "for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act…" (District Act, § 5, subd. 11.) Therefore, even with a voter-approved amendment, the District would need to clearly articulate how a tax measure would further the District's legislative purposes.

3. Other Revenue Sources

The District has a variety of other revenue sources that we did not examine in this memo. For example, the District receives an allocated share of countywide 1% Ad Valorem property tax receipts and a voter-approved levy for State Water Project obligations, in a combined amount of almost $120M in the 2019-20 budget. The District Act provides that Ad Valorem revenue can be used for administrative costs and "to carry out any of the objects or purposes of this act of common benefit to the district," among other uses. (District Act, Section 13). In other words, the District's use of tax revenues is limited only by the scope of its authorities, as discussed above, though the tax revenues it receives to cover State Water Project costs cannot be used for any other purposes under Proposition 13 (Cal. Const. art. XIII A).

The District also receives revenue from benefit assessments ($13.5M), which is used to pay off bonds associated with the benefit assessment program, and other water-related revenue, such as receipt of charges for treated water and surface/recycled water. These

revenues are strictly constrained by the requirements of Proposition 218 (Cal. Const. art. XIII D), and may be used only for the purposes for which they were charged.

In addition, the District receives intragovernmental and capital reimbursements, interest income, and other small sources of revenue, some of which may be unconstrained and others that may be subject to specific limitations. If the District decides to look to any of these resources, relevant limitations should be evaluated.

C. Application of Law to Potential Forms of Relief

The legality of COVID-19 relief depends on what form the relief would take and, in some cases, the reasons for providing relief and the facts supporting those reasons. As outlined in the introduction, we have explored the following options for relief:

1. Grants

Because the District does not possess general welfare powers, any direct grants to individuals and water retailers within the District's jurisdiction would risk implicating the prohibition against gift of public funds. The District may only transfer funds in a manner that furthers the public purposes of the District. However, a grant program might be permissible if it was designed to advance the District's purposes of protecting, managing, and ensuring water supplies in the District. For example, the District may be able to pay a portion of the costs local municipal retailers incur for the importation of water that benefits the District.

2. Loans

Although not expressly authorized by the District Act, the District may be able to provide loans to individuals and water retailers within the District's jurisdiction if doing so advances its legislative purposes. For example, loans to help local retailers maintain water service in the face of COVID-related financial difficulties may be permissible. However, failing to charge interest on those loans may constitute a gift of public funds, unless justified by purposes consistent with the District Act. (See *Westly v. U.S. Bankcorp*, (2003) 114 Cal.App.4th 577, 582 [holding that interest charges constitute a "thing of value" as provided in article XVI, Section 6 of the Constitution, and absent consideration, forgiveness of interest constitutes a gift of public funds].) Moreover, the District would have to be careful that any loan was funded with revenue that could be spent permissibly for that purpose.

3. Payment Plans

Special districts routinely provide assistance to distressed customers by offering payment plans, which extend the length of time a customer has to pay. Typically, payments are recovered with interest. (See *Westly*, *supra*, 114 Cal.App.4th at p. 583.) Moreover, the District Act states that for groundwater charges, the District "shall" charge interest at the rate of 1 percent each month on the delinquent amount of the charge. (District Act, § 26.9, subd. (b).) However, the District Act provides that the board "may adopt regulations to provide that in excusable or justifiable circumstances," penalty and administrative charges for failure to register or file water production statements may be waived. (District Act, § 26.9, subds. (b), (c).) Therefore, one potentially defensible option for relief would be to establish payment plans for

individuals and water retailers within the District's jurisdiction and charge the basic interest of one percent per month, while waiving further penalties and charges, if the board adopts regulations justifying the circumstances.

The District Act also provides that the District *may*, but not *must*, bring a suit for collection of any delinquent ground water charge. (District Act, § 26.14.) As a result, the District Board could simply refrain from initiating collections actions during the COVID-19 crisis. This would also seem consistent with the direction provided by Governor Newsom, restricting the ability of water retailers to suspend water service based on non-payment of water bills and may prove to be consistent with the guidance the State Water Resources Control Board has been asked to prepare.

4. Using Groundwater Charges to Assist Customers' Operations

The District Act specifies that groundwater charge revenue may be used for the cost of constructing, maintaining, and operating facilities to import or distribute water. (District Act, § 26.3.) It does not require that the facilities be owned or operated by the District. Therefore, using groundwater charge revenue to invest in regional water infrastructure owned or operated by a water retailer within the District's jurisdiction may be a legal use of funds. However, the District would still need to demonstrate that such an investment does not result in merely a private benefit to that retailer, and thus constitute a gift of public funds. The District's expenditure would need to further a public purpose, such as ensuring the security and reliability of the region's water supply. To avoid a claim of an unlawful gift, the District should consider what benefit the District would receive (such as acquiring a new asset by fee title or bill of sale), or again consider whether the District's expenditure could be repaid over time with interest.

5. Providing District Personnel and Resources to Struggling Retailers

Yet another option is available for assisting retailers in the District's jurisdiction. Public agencies routinely pool resources and achieve operational efficiencies by entering into agreements for the joint management of a project or program. For example, joint powers agreements allow public agencies to exercise any power common to the parties, and are often used to share resources, finance construction projects, and operate facilities. Similarly, mutual aid agreements allow parties to share personnel and resources during an emergency. And the District Act expressly permits the District to enter into contracts to advance its legislative purposes. These are some examples of agreements the District could propose with retailers in the District's jurisdiction to help both parties achieve operational efficiencies or provide personnel support in the event of illness or temporary financial difficulties, so long as the District is receiving valuable consideration in return.

6. Waiving or Reducing Groundwater Charges

The District may also want to explore waiving collection of all charges for some period of time or uniformly reducing the amount of the charges. The District's ability to collect groundwater charges is permissive, not mandatory. Section 26.5 of the District Act requires the District to prepare an annual report that recommends "as to whether or not a groundwater charge should be levied in any zone or zones of the district during the ensuing water year, and, if any groundwater charge is recommended, a proposal of a rate or rates per acre-foot . . . ."

Section 26.7, subd. (b)(1) states "the board may also impose *or adjust* any groundwater charge, and the rate of any charge, on or before January 1 of each water year whenever the board determines that the imposition or adjustment of the charge is necessary." (emphasis added.) The board must prepare a supplemental report to the annual report, explaining the reasons for the imposition or adjustment of the charge, which must be filed with the clerk of the board at least 45 days before the adjusted charge is proposed to take effect, and must comply with other requirement, like public notice and a hearing.

Nothing in the District Act directly prohibits the District from temporarily waiving collection of charges or reducing the amount charged, and the word "adjust" in Section 26.7 implies that the charges may be decreased between ordinary rate cycles. However, Proposition 26 is implicated in the District's rates and charges. As a result, the District would need to ensure that any waiver or reduction does not result in some groundwater users cross-subsidizing others. Thus, for example, the District could not waive charges for some groundwater users and require others to make up the difference. The District must also be mindful of what funding source may be used to make up any shortfall between the amount charged and the true cost of service. Ideally, the District could tap into some unrestricted source of funds (for example, ad valorem tax revenue, contract revenue, or potential COVID-related federal assistance[1]) to make up the difference.

7. Reduce Operational Costs

The least risky approach to customer relief would be for the District to reduce its operational costs in the immediate term, and reduce groundwater charges accordingly. The amount of any rate reduction will depend on the extent to which operational costs are fixed, debt service covenants, and other factors. While this does not provide immediate relief to ratepayers, it will provide some longer-term relief, and is clearly legal.

III. Conclusion

Although well-intentioned, there is risk involved with providing financial relief to the public or to water retailers due to the COVID-19 pandemic. The level of risk will depend on what form of relief the District wishes to provide, and from what funding source. We are happy to discuss any specific plans as the District weighs its options.

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[1] The CARES Act does not currently provide financial relief to water districts based upon revenue decreases, but there is an effort to obtain specific government relief for water and other utilities in a future bill. FEMA's Community Disaster Loan Program offers loans to local governments that suffer loss of revenues as a result of a major disaster.

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