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S225589

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

**ROLLAND JACKS and ROVE ENTERPRISES, INC.,**  
*Plaintiffs and Appellants*

SUPREME COURT  
**FILED**

vs.

AUG - 4 2015

**CITY OF SANTA BARBARA,**  
*Defendant and Respondent*

Frank A. McGuire Clerk  
Deputy

**NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE  
IN SUPPORT OF CITY OF SANTA BARBARA'S OPENING BRIEF**

After a Published Decision of the  
Second Appellate District, Division Six, Case No. B253474

Reversing a Judgment of the Superior Court of the State of California  
for the County of Santa Barbara, Case No. 1383959  
Honorable Thomas P. Anderle, Judge Presiding

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Attorneys for Defendant and Respondent City of Santa Barbara

**To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of the State of California:**

Pursuant to California Rules of Court, rule 8.520(g) and rule 8.252(a), and California Evidence Code, sections 452 subdivision (h) and 459, Respondent City of Santa Barbara hereby moves this Court to take judicial notice of the following document attached hereto as Exhibit A to the Declaration of Ryan Thomas Dunn:

- A. Pages 103, 107, and 109 from Coleman, The California Municipal Revenue Sources Handbook (League of California Cities 2014).

These pages are relevant to the appeal because they support the City's argument that the 1 percent increase in the city's franchise fee does not constitute a tax. The document shows that many cities support their general funds with fees for use of government property and fines and penalties and that cities generally do not restrict the use of revenues derived from franchise fees. This document was not presented to the trial court but the City seeks notice nonetheless because it is secondary authority addressing a relevant legal issue. The City provides this document to aid the Court's analysis.

This motion is based on the attached Memorandum, Declaration of Ryan Thomas Dunn, Exhibit A attached hereto, the complete records and files of this Court, and the accompanying proposed order granting this motion.

DATED: August 3, 2015

ARIEL PIERRE CALONNE, City Attorney  
TOM R. SHAPIRO, Asst. City Attorney

COLANTUONO, HIGHSMITH &  
WHATLEY, PC



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MICHAEL G. COLANTUONO  
RYAN THOMAS DUNN  
LEONARD P. ASLANIAN

Attorneys for Defendant and Respondent  
CITY OF SANTA BARBARA

## MEMORANDUM

### I. IT IS APPROPRIATE TO TAKE JUDICIAL NOTICE OF A SECONDARY RESOURCE ON CALIFORNIA MUNICIPAL REVENUES

#### A. GENERAL PRINCIPLES OF JUDICIAL NOTICE

A reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code, § 459.) The Court may notice “facts ... that are not reasonably subject to dispute.” (Evid. Code, § 452, subd. (h).) Judicial notice of such facts is mandatory in the trial court upon request where the opposing party is permitted to raise objections and the court has enough information about the facts to make a determination that they come within a category subject to notice. (Evid. Code, § 453, subd. (b).) A reviewing court is permitted to notice facts just as is a trial court. (Evid. Code § 459, subd. (a).)

“Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882, citations and quotations omitted.) “The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is **not reasonably subject to dispute.**” (*Ibid.*, original emphasis; Evid. Code, § 452, subd. (h).)

**B. THE COURT SHOULD NOTICE A HANDBOOK OF COMMON PRACTICES FOR TRANSFER OF FEES TO CITY GENERAL FUNDS**

Exhibit A is three pages from Coleman, *The California Municipal Revenue Sources Handbook* (League of California Cities 2014). The Court should judicially notice these excerpts from a published book whose existence is not reasonably subject to dispute. (Evid. Code, § 452, subd. (h); see also *Gallagher v. Boller* (1964) 231 Cal.App.2d 482, 489 [judicial notice of book]; *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1727 [judicial notice of handbook].) The pages provide context for the City's argument the 1 percent increase is not tax simply because it generates funds for the City. This is because many cities support their general funds with revenues from franchise fees, fees for use of government property, and with fines and penalties.

These pages are judicially noticeable as "facts ... that are not reasonably subject to dispute." (Evid. Code, § 452, subd. (h).) The League of California Cities (League) publishes *The California Municipal Revenue Sources Handbook* to inform those interested on substantive issues in local government finance. This book is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy: the League of California Cities and its website, which publishes and sells the book, as well as online retailers, such as Amazon, which also sell it.

## CONCLUSION

The City respectfully requests this Court grant the City's Motion to notice Exhibit A to the Declaration of Ryan Thomas Dunn filed concurrently herewith. The City requests this Court consider this document in support of its Opening Brief.

DATED: August 3, 2015     **ARIEL PIERRE CALONNE, City Attorney**  
**TOM R. SHAPIRO, Asst. City Attorney**

**COLANTUONO, HIGHSMITH &  
WHATLEY, PC**



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**MICHAEL G. COLANTUONO**  
**RYAN THOMAS DUNN**  
**LEONARD P. ASLANIAN**

**Attorneys for Defendant and Respondent**  
**CITY OF SANTA BARBARA**

**DECLARATION OF RYAN THOMAS DUNN**  
**[Cal. Rules of Court, rule 8.54(a)(2)]**

I, RYAN THOMAS DUNN, declare as follows:

1. I am an attorney licensed to practice law in the State of California and before this Court and counsel of record for the City of Santa Barbara.

2. Attached hereto as Exhibit A is a true and correct copy of pages 103, 107, and 109 from Coleman, The California Municipal Revenue Sources Handbook (League of California Cities 2014). My firm received this book directly from its publisher, the League of California Cities. The book is available for purchase at <https://www.cacities.org/Special-Pages/E-Shop/Publications/Publications>.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 3, 2015 at Los Angeles, California.



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RYAN THOMAS DUNN

[Proposed]

**ORDER TAKING JUDICIAL NOTICE OF  
DOCUMENTS**

Good cause appearing, IT IS HEREBY ORDERED that Respondent City of Santa Barbara's Motion for Judicial Notice in Support of its Opening Brief is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

1. Pages 103, 107, and 109 from Coleman, The California Municipal Revenue Sources Handbook (League of California Cities 2014).

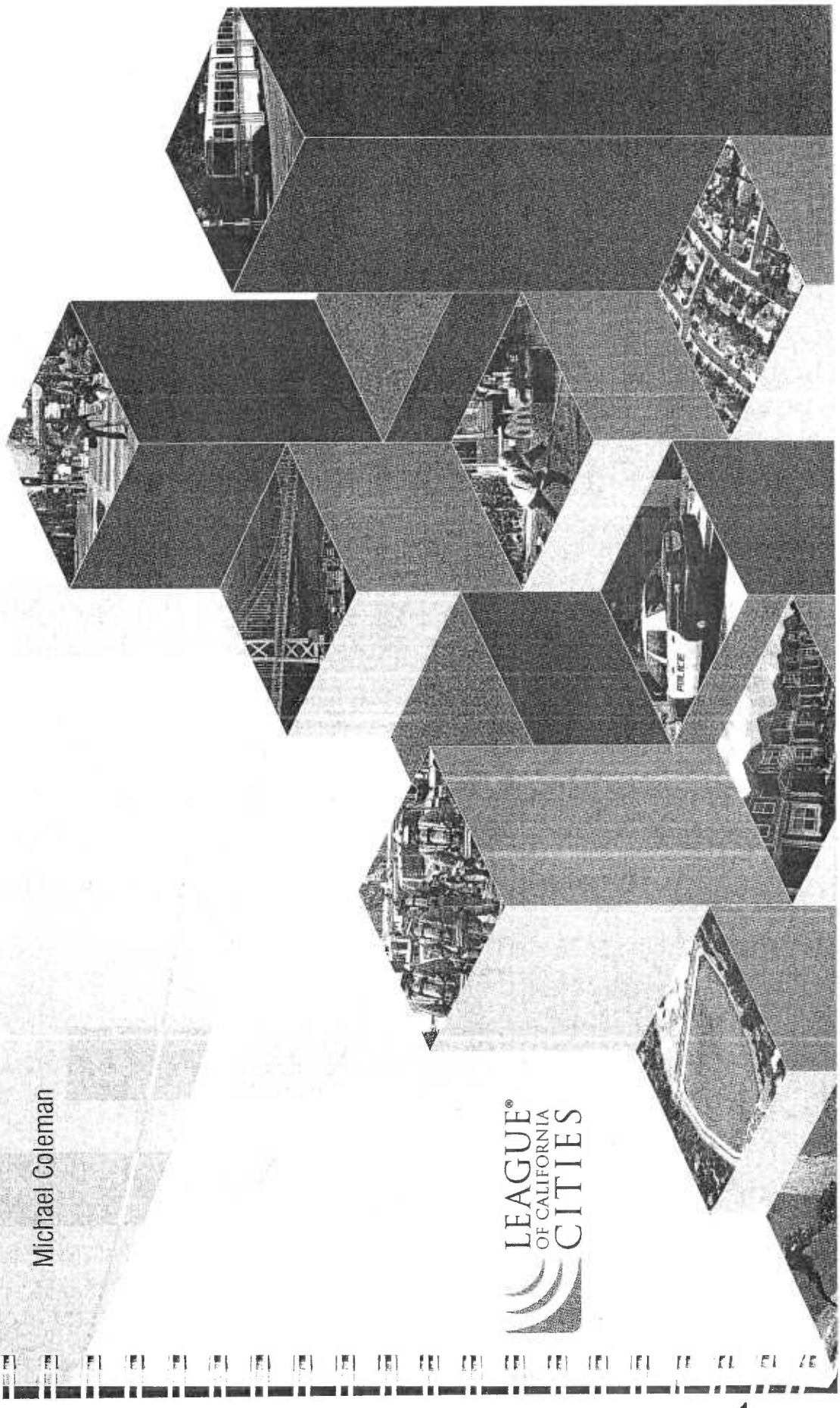
DATED: \_\_\_\_\_ By: \_\_\_\_\_  
Chief Justice





# THE CALIFORNIA MUNICIPAL REVENUE SOURCES HANDBOOK

Michael Coleman



## 5.03 Electric, Gas, Water and Oil Franchises

**Description:** Payment to a municipality from a franchisee as "rent" or "toll" for the use of the streets and rights of way of a municipality.

**Authority:** California Constitution Article XI §7.  
General law cities and counties (for unincorporated areas):

- Electric, gas, water and oil;
- Public Utility Code §6001 et seq. "The Broughton Act"
- Public Utility Code §6201 et seq. "The Franchise Act of 1937"

Charter cities: California Constitution Article XI §5.

**Administering Agency:** City or county.

**Use of Revenues:** Unrestricted.

Although they may be referred to as "franchises," exclusive contractual arrangements to provide services on public properties such as off-street parking, catering or retail sales are "concessions." See Chapter 5, Section 5.05.

Franchise fees from state-issued gas, electric, telephone and oil pipeline franchises are limited to 2 percent of franchisee's gross annual receipts arising from the use, operation or possession of the franchise.

Cities and counties may grant franchises allowing public utilities engaged in the distribution and sale of gas, electricity or water to lay and maintain pipes, wires and appurtenances under, along or across a city's streets and public places. General law cities may grant franchises for this purpose either through a bidding process provided for in the Broughton Act<sup>6</sup> or without a bidding process under the Franchise Act of 1937.<sup>7</sup> A charter city may use either statutory scheme not in conflict with its charter.<sup>8</sup>

### ■ The Broughton Act Public Utilities Code §§6001-6092

If a city or county chooses to use the Broughton Act procedures, then upon submittal of an application for a franchise, the city must publish an advertisement that bids for the described franchise will

be accepted and the franchise will be awarded to the highest bidder and that the successful bidder will pay the city 2 percent of the gross annual receipts arising from the use, operation or possession of the franchise. The bid must be accompanied by a deposit of 10 percent of the bid and, if the bidder is successful, the remaining 90 percent must be deposited with the city within 24 hours of the award of the bid. A bond may also be required to be posted by the successful bidder.

The Broughton Act allows franchise payments of 2 percent of the gross annual receipts of the franchisee arising from the use, operation or possession of the franchise.<sup>9</sup> The Broughton Act applies to intrastate utilities, including electric and telephone poles and wires, as well as gas pipes but not to video or cable television services. The payment is calculated in proportion to miles of distribution system in the franchised area. Charter cities are not bound by the limitations in the Broughton Act, except as they pertain to oil pipeline fees (see below).

### ■ The Franchise Act of 1937 Public Utilities Code §§6201-6302

If a city or county chooses to use the Franchise Act of 1937 procedures, the applicant must file an application stating during the life of the franchise it will pay to the city 2 percent of the gross annual receipts of the applicant arising from the use, operation, or possession of the franchise, provided such amount is not less than 1 percent of the gross annual receipts of the applicant derived from the sale of the utility service within the jurisdiction. The city/county must publish a resolution of intention to grant the franchise and then to hold a public hearing prior to adopting the franchise ordinance.

Like the Broughton Act, the 1937 Act provides for a franchise fee of 2 percent of the franchisee's gross annual receipts arising from the use, operation, or possession of the franchise but no less than 0.5 percent of gross annual receipts derived from the sale of electric franchises or 1 percent of gross annual receipts derived from the sale of gas or water, as the case may be, within city limits.<sup>10</sup> With the exception of oil pipeline fees, these fee restrictions are not applicable to charter cities.

## 5.05 Fines, Forfeitures and Penalties

**Description:** Revenues received and/or bail monies forfeited upon conviction of a misdemeanor or municipal infraction.

**Authority:** Penal Code, §1463 (distribution of revenues); Government Code §36900 (civil penalties for local ordinances). Proposition 26 (2010) which defines "taxes" stipulates that a "charge imposed for entrance to or use of local government property or the purchase rental or lease of local government property" is not a tax.

**Administering Agency:** City, county or other law enforcement agency.

**Use of Revenues:** Most revenue from fines and forfeitures may be expended for any legal municipal service. However, certain limitations may apply to vehicle code violations. California Constitution Article XIII(C) §1(e)(4).

Fines paid and bail moneys forfeited following conviction of a misdemeanor or infraction committed within city boundaries are allocated to the state, county and city in which the offense occurred according to various state laws depending on the nature of the offense. (Penal Code sections 1463, 1463.001, 1463.002.) Parking fine revenues are allocated according to California Vehicle Code §40200.3. A city establishes the bail amount for violations of its municipal code.

### Fines

The amount paid by a defendant includes the fine, and various penalties and assessments,<sup>23</sup> and may include restitution.<sup>24</sup> These "add-ons" are changed by the Legislature frequently and may exceed the amount of the fine. Unless modified by a judge (often pursuant to a plea agreement), the base fine is derived from the Uniform Bail and Penalty Schedule as adopted by the Judicial Council (infractions),<sup>25</sup> or county judges (misdemeanors and felonies).<sup>26</sup> Judicial Council Bail and Penalty Schedules are available online at [www.courtinfo.ca.gov/reference/documents/2007\\_jcbail.pdf](http://www.courtinfo.ca.gov/reference/documents/2007_jcbail.pdf).

### Bail Bonds

If a bail bond is forfeited, the amount collected by the county pursuant to the summary judgment is distributed pursuant to California Penal Code §1463.001.

### Parking Fines

Cities and other agencies which issue parking citations have the responsibility for administering and collecting parking fines. These agencies, rather than the county courts, are the primary administrative and adjudicative bodies. A city may contract with the county, another city or with a private vendor to perform these services.

Parking violations generally are violations of city or other local agency "no parking" ordinances. Each local agency establishes parking fine amounts and retains all of the parking fine revenue. However, counties may levy a parking penalty surcharge of \$2.50 per citation for courthouse construction and/or criminal justice facilities construction. For parking citations issued by the California Highway Patrol, the citation is processed and the money collected and retained by the local jurisdiction in which the citations are issued.

Local agencies must establish a process for administrative adjudication of contested parking tickets, which meets certain statutory criteria.<sup>27</sup> The citing officer is not required to attend the hearing. The burden of proof is modified from "beyond a reasonable doubt" to "preponderance of the evidence." A violator objecting to the determination is entitled to seek review by filing appeal with the municipal or justice court.

If a violator fails to pay the parking fine, the city may fail a hold upon registration with the Department of Motor Vehicles. The delinquent fine and penalties would then be collected by DMV prior to issuing the registration. If the delinquent fine and penalty exceed \$400, the city may pursue a civil money judgment from the court.

## 5.06: Rents, Royalties and Concessions

### 5.06 Rents, Royalties and Concessions

**Description:** Revenues from rental or use of city property and/or resources. Franchise fees, which are sometimes considered rent for the use of public property, are discussed in Sections 5.01, 5.02, and 5.03.

**Authority:** California Constitution Article XI, §7 gives cities and counties reasonable exercise of police power. Article XI, §9 gives cities authority to provide for certain public works including transportation, light, water, heat and power. Authority for various other types of leases is provided in various specific statutes. Proposition 26 (2010) which defines "taxes" stipulates that a "charge imposed as a condition of property development" is not a tax.

**Administering Agency:** City, county or other public agency.

**Use of Revenues:** Unrestricted unless indicated otherwise by agreement.

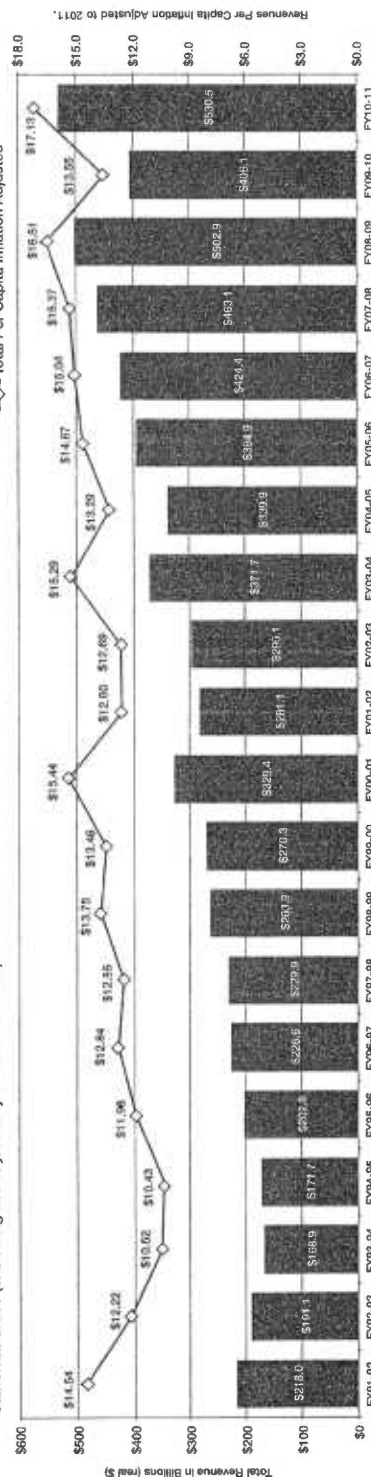
A charge, such as rent, that is payment for use of local government property, is not a tax and therefore voter approval is not required. California Constitution Article XIII, section 1(e)(4).

Municipalities receive revenue from a variety of payments for the use by a private person or enterprise of public property. For instance, a local agency may rent, lease or license its real and personal property, such as allowing advertisements on sides of publicly owned buses or wireless communications companies may lease public property for their facilities. State law establishes the maximum terms for many types of leases.<sup>28</sup>

Some cities receive royalties from natural resources that are extracted from public property by private companies. Many cities receive payment from concessionaires operating under contract on city property. Local agencies may be entitled to some royalties or concessions through statute although some revenues may be capped. However, most of this revenue can be negotiated by a local agency at its own discretion.

Leases and licenses of city property must be by written agreement that includes certain basic terms: a description of the property; the term; the rent or other payment due; the permitted and prohibited uses; the allocation of risk of loss between the city and the lessee (indemnification); insurance requirements; incidents of default; and termination.

**Rents & Royalties (not including facility use fees such as from marina berths or parking lots)**  
California Cities (excluding the city/county of San Francisco)



Source: CaliforniaCityFinance.com; computations from data from California State Controller (revenues), California State Department of Finance (population, CPI)

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**PROOF OF SERVICE**

Rolland Jacks, et al. v. City of Santa Barbara,

Supreme Court Case No. S225589

Appellate Court Case No. B253474

Santa Barbara Superior Court Case No. 1383959

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 300 S. Grand Avenue, Suite 2700, Los Angeles, California 90071.

On August 3, 2015, I served the within document(s):

**NOTICE OF MOTION AND MOTION FOR JUDICIAL NOTICE  
IN SUPPORT OF CITY OF SANTA BARBARA'S OPENING BRIEF**

- BY FACSIMILE:** By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.
- BY ELECTRONIC MAIL:** By transmitting via electronic mail the document(s) listed above to those identified on the Proof of Service attached.
- BY MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth on the attached service list.
- OVERNIGHT DELIVERY:** By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Postal Service for overnight delivery, caused such envelope to be delivered to the office of the addressee(s) on the attached service list via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.
- PERSONAL SERVICE:** I caused such envelopes to be delivered by hand to the addresses indicated on the attached list.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on Aug. 3, 2015, at Los Angeles, California

  
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SERVICE LIST

*Rolland Jacks, et al. v. City of Santa Barbara*  
Supreme Court Case No. S225589  
Appellate Court Case No. B253474  
Santa Barbara Superior Court Case No. 1383959

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Second Appellate District, Division 6  
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Re: Case No. B253474

California Supreme Court  
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San Francisco, CA 94102

By Federal Express Overnight Delivery