



# Memorandum

**TO:** HONORABLE MAYOR AND CITY COUNCIL

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** SETTLEMENT WITH MELANIE GILL AND ROBERT DAY RE: SEWER BACKUP

**DATE:** July 25, 2008

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## **RECOMMENDATION**

Approval of payment to claimants, Melanie Gill and Robert Day, in the amount of \$75,000, pursuant to a Release, authorized by the City Council in Closed Session on June 17, 2008.

## **OUTCOME**

To settle a claim and potential litigation between the City of San Jose and Melanie Gill and Robert Day, husband and wife, regarding a sewer backup that occurred at their property on August 4-5, 2007, and which will result in claimants' release of the City of any liability arising from the backup.

## **BACKGROUND**

This case arises from a main line sewer back up that surcharged fluids into claimant's home located at 1059 Mazzone Drive (District 10) on August 4-5, 2007. On the date the back up first occurred (August 4), the owners of the two-story home, Melanie Gill and Robert Day, were away traveling. They did not discover the damage until they returned the next day, Sunday, August 5. At that time, the owners found that almost the entire first floor of their home was flooded with raw sewage emanating from the toilets and shower drains on the first floor. The sewage had affected the wood flooring, floor molding, drywall, cabinets, carpeting, rugs, shoes, appliances, furniture, and various personal items in the home's kitchen, entryway, hallway, laundry room, bathrooms, and office.

City staff later discovered that the damaged sewage pipe had been installed and sandwiched between two storm drains. Both drains were running perpendicular to the sewage pipe, with one above and one below. Over time, this configuration put vertical pressure on the sewage pipe, causing the top of it to crush. The crushed area began collecting grease that eventually blocked the flow of the sewage pipe and eventually led to the back-up. The faulty placement of the storm drains has since been repaired. The Mazzone's home did not have a backflow valve, which was required by the plumbing code at the time the house was constructed (1980) by a City Ordinance.

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Working with city staff, the owners spent the next four months repairing the damage. During that four month period, the owners declined the City's offer to pay for alternate housing, and instead basically lived in the garage with their two teenaged children.

The owners have claimed approximately \$122,000 in damages. The parties have tentatively agreed to settle the matter for \$75,000.

### **ANALYSIS**

The settlement is reasonable in light of the inherent risks and costs of litigation as well as Staff's conclusion that the initial cause of the backup was faulty placement of the storm drains. The City has worked with the property owners since the time of the backup to ensure that the proper repairs were made to their properties, and that the City was not being charged with "upgrades" to the original condition of the property. In agreeing to the settlement amount, the City also considered Claimants' potential contributory negligence for not installing a backflow valve. As part of the settlement, Claimants have agreed to install a backflow valve, and have recently confirmed that they have already done so. This settlement is made as a compromise of a disputed claim, and by settling, the City is not admitting that it is legally liable for the amounts claimed.

### **PUBLIC OUTREACH/INTEREST**

This memorandum is posted on the City's website for the August 5, 2008 Agenda.

### **COORDINATION**

The settlement has been coordinated with the Department of Transportation.

### **COST SUMMARY/IMPLICATIONS**

1. AMOUNT OF RECOMMENDATION: \$75,000
2. SOURCE OF FUNDING: 541-ESD: Sanitary Sewer Claims

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**BUDGET REFERENCE**

Fund #	Appn #	Appn. Name	Total Appn.	2007-2008 Adopted Budget (Page)	Last Budget Action (Date, Ord. No.)
541	3210	ESD: Sanitary Sewer Claims	\$250,000.	XI-76	N/A

**CEQA**

Not a project.

RICHARD DOYLE  
City Attorney

  
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ROBERT FABELA  
Senior Deputy City Attorney

For questions please contact Robert Fabela, Sr. Deputy City Attorney at (408) 535-1909.

Attachment: Unexecuted Release Form that Claimants have verbally agreed to sign as a condition to the receipt of the settlement funds.

**RELEASE**

The undersigned, being of lawful age, for the sole consideration of Seventy-Five Thousand Dollars (\$75,000), do hereby for themselves, and their heirs, executors, administrators, successors and assigns, release, acquit and forever discharge the City of San José, its officers, agents, servants, employees, successors and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have, or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage, and the consequences resulting or to result from the accident, casualty or event which occurred on or about the Fourth and Fifth day of August, 2007, at or near 1059 Mazzone Drive in San José, California, when and where claimant alleges that a sewer back-up caused certain damages to their residence and to themselves.

As part of this settlement, the undersigned acknowledge that they have installed a backflow valve at the residence located at 1059 Mazzone Drive, San Jose.

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released; and that the releasees deny liability therefor and intend merely to avoid litigation.

It is further understood and agreed that all rights under Section 1542 of the Civil Code of California and any similar law of any state or territory of the United States are hereby expressly waived. This section reads as follows:

"1542. Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The undersigned further agree to indemnify and save harmless the City of San José, its officers, agents, servants, and employees herein released from any loss, claim, expense, demand or cause of action of any kind or character which may ever be asserted or brought by any person or entity arising out of or in any way connected with the injury and/or the property damage of the undersigned from the accident, casualty or event which is the subject matter of this release.

The undersigned hereby declare and represent that the injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite, and in making this Release it is understood and agreed that the undersigned rely wholly upon the undersigneds' judgment, belief and knowledge of the nature, extent, effect and duration of these injuries and liability therefor, and is made without reliance upon any statement or representation on the part of parties hereby released or their representatives or by any physician or surgeon by them employed.

The undersigned further declare and represent that no promise, inducement or agreement not herein expressed has been made to the undersigned, that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Signed and delivered this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
WITNESS

\_\_\_\_\_  
Melanie Gill

\_\_\_\_\_  
Robert Day

Claim No.: C-13349-08