Filed 12/15/2023

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF HALF MOON BAY, Plaintiff, Cross-defendant and Appellant, v. GRANADA COMMUNITY SERVICES DISTRICT et al., Defendants, Cross-complainants and Respondents.	H049896 (Santa Clara County Super. Ct. No. 17CV316927)

In 1976, the City of Half Moon Bay, the Granada Community Services District, and the Montara Water and Sanitary District entered into a joint powers agreement (agreement), creating the Sewer Authority Mid-Coastside (authority) to develop a joint wastewater treatment and disposal system. Specific portions of the system which the two districts initially paid to construct, but which are operated and maintained by the authority pursuant to the agreement, have recently required, and will continue to require, replacement and repair. The parties now dispute whether the City must contribute to the funding of those improvements under the terms of the agreement.

All parties sought declaratory relief as to whether the replacement and repair work at issue constitutes "maintenance" or a new "project" under the agreement—the former requiring approval and funding from every member agency, the latter requiring funding only from each agency that elects to approve and participate in the project. The parties then filed cross-motions for summary judgment as to all the complaints; the trial court

granted the districts' motions and denied the City's, holding that the specified replacement and repair work constitutes "maintenance" under the agreement, so the City is required to fund its proportional share.

The City appeals. We conclude the agreement is ambiguous and capable of multiple reasonable interpretations regarding what constitutes "maintenance" or a "project," and that the extrinsic evidence is conflicting, thereby creating a triable issue of material fact precluding summary judgment. Accordingly, we reverse and remand with directions to enter a new order denying all parties' motions for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. History of wastewater challenges

For decades, the mid-coastal communities in San Mateo County have faced extensive wastewater management challenges in attempting to meet state and federal discharge standards, accommodate growth, and develop adequate facilities for treatment and delivery. In the early 1970s, after years of operating independent wastewater facilities, the City of Half Moon Bay (City), the Granada Sanitary District (Granada) and the Montara Sanitary District (Montara)[2] sought to form a joint powers agency and develop a regional facility to address the areawide wastewater problems and obtain state and federal grant funding. In 1972, the City was designated by the State Water Resources Control Board (SWRCB) as the lead agency for the proposed regional system, after the three agencies were initially unable to form a joint powers agency.

Over the course of the next several years, the agencies explored numerous alternatives for a regional system, from which two preferred plans emerged. "Plan A"

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[1] We draw the facts recited here from the parties' separate statements of undisputed material facts, evidence admitted in conjunction with the motions for summary judgment, and admissions in the parties' appellate briefs. (*Kim v. County of Monterey* (2019) 43 Cal.App.5th 312, 316 (*Kim*).)

[2] The districts were later renamed as the Granada Community Services District and the Montara Water and Sanitary District.

proposed retaining and upgrading the three agencies' existing independent treatment plants for a combined capacity of 2.0 million gallons per day (mgd), and constructing an "intertie" conveyance line connecting the three plants to a common ocean outfall and a reclamation line. "Plan F" proposed constructing a consolidated 2.0 mgd treatment plant in the City as well as an intertie conveyance connecting to a common outfall and a reclamation line. In January 1976, the agencies signed a letter of understanding (LOU), subsequently incorporated into their joint powers agreement, which LOU recognized the agencies' preference for Plan F as the best apparent alternative and provided for cost-sharing of roughly 50 percent to the City and 50 percent to the districts, "with modification of such share possibly being made based upon actual benefit and total past investments in existing plant facilities."

B. The agreement and relevant amendments

In February 1976, the agencies entered into the agreement pursuant to Government Code section 6500 et seq., thereby creating the authority.[3] The agreement recognized the agencies' mutual interest in developing a joint waste collection, transmission, treatment disposal and management plan for the Half Moon Bay Basin, "capable of acquiring, constructing, maintaining, managing, operating and controlling facilities for the joint collection, transmission, treatment and disposal of wastewater within said basin." It further provided that its purpose was for the agencies to jointly exercise their common power to "plan for, acquire, construct, reconstruct, alter, enlarge, replace, repair, maintain, manage, operate and control facilities for the collection, transmission, treatment

[3] The agreement has subsequently been amended seven times. Except where otherwise indicated, references in this opinion to "the agreement" are to the "Consolidated Joint Powers Agreement (JPA) Including Revisions Resulting From Amendments 1 Through 8 to the Original Agreement: An Agreement Creating the Sewer Authority Mid-Coastside," which the parties submitted to the trial court as part of their joint exhibits in connection with their cross-motions for summary judgment, and which they agree constitutes the current, fully amended agreement.

and disposal of wastewater for the benefit of the lands and inhabitants within their respective boundaries."

The agreement set forth the authority's "planning policy" and authorized studies and planning relative to the combined service areas of the agencies, "to develop regional solutions to the wastewater treatment and management problems… in accordance with all applicable federal, state and regional water quality control requirements, consistent with demographic studies… and planned so as not to result in unreasonable financial burdens on the member agencies whatever course future development of the area might take." The agreement defined the "present project" as the one set forth in the LOU, which it attached and incorporated by reference.

Two distinct categories of budgets are identified in the agreement. The annual "general budget" includes, among other things, administrative expenses and "the expenses of operating and maintaining any improvements operated or maintained by the Authority." Approval of the general budget requires consent of all member agencies. A "project budget," by contrast, pertains only to a specific project and may include administrative expenses, the cost of studies, planning, engineering and construction, and the allocation among the participating member agencies of the total project costs. A project budget does not require approval by all member agencies; instead, where a member agency does not approve, the remaining members may elect to proceed with the project, in which case the non-participating member "shall not be obligated for future debts of the project concerned nor shall it receive any benefits therefrom."

The agreement also provided that the authority must determine, prior to the construction of any project, "whether or not the authority shall maintain and/or operate such facilities." Where the authority will maintain and operate a facility, "it shall do so in an efficient and economical manner, and in a manner not detrimental to the member agencies."

The agreement was amended in June of 1976 to re-define the "present project," specifying that the member agencies agreed that "the initial project to be commenced by the Authority shall be the fully consolidated San Mateo County mid-coastside wastewater treatment and disposal system as envisioned in Plan F…."

The authority initially encountered obstacles moving forward with the project in the form of public opposition, delay-driven cost increases, and Coastal Commission permit denials. As a result, the Regional Water Quality Control Board (RWQCB) issued cease and desist orders and sewer connection bans for each of the three member agencies based on continuing violations of discharge standards.

Shortly thereafter, the attorney general brought an action in Santa Clara County Superior Court against the individual agencies and the authority, resulting in a preliminary injunction issued on May 10, 1979 (injunction). The injunction required each agency to comply with certain existing RWCQB orders, and required the agencies and the authority to construct and implement the consolidated wastewater project in two phases over a specified timeline. Phase I would consist of "construction of the deepwater ocean outfall at Half Moon Bay and conveyance, tie-in and pumping facilities," and Phase II would consist of "construction or upgrading of one, two, or three secondary treatment facilities…."

The injunction mandated that Phase I be fully constructed and operational by June 30, 1980. With respect to Phase II, the injunction required the agencies and authority to submit a proposed timeline for construction to the SWRCB by December 15, 1979, and reserved jurisdiction to the court to prescribe time schedules for implementation of Phase II. In any event, construction was to be completed, and the facilities operational, by July 1, 1983, and would be operated and maintained by the authority "in accordance with the rules and regulations applicable to the California Clean Water Grants Program."

Shortly thereafter, the agencies amended the agreement again. In a resolution adopted on May 24, 1979, the authority stated that, before the construction grant funding

application can be approved by the SWRCB, "it must further detail in the joint powers agreement the present project, together with the agreed-to capacity allocation and cost-sharing formulas attendant thereto." The authority therefore resolved to amend the agreement accordingly, which it did on July 2, 1979. The agreement thus redefined the authority's "present project" as: "a secondary wastewater treatment and disposal system, divided into four components, to service the combined needs of the member agencies to the year 2000." It also divided the project into two phases.

1. Phase I

Under the agreement, Phase I would include three components: (1) the intertie pipeline and pumping facilities connecting the Montara and Granada systems to a new ocean outfall, "shared equally between Montara and Granada"; (2) an ocean outfall pipeline and pumping facilities, discharging the combined treated effluents into the ocean adjacent to the existing Half Moon Bay outfall line, shared one-half by the City, and one-quarter each for the two districts; and (3) a reclamation pipeline and pumping facilities to carry effluent from the Half Moon Bay site south to the golf course, and being solely assigned to the City. Construction of Phase I was to proceed "on the time schedule as set forth" in the injunction.

The agreement included a paragraph regarding the "utilization, operation and maintenance" of Phase I, which provided that "[e]ach member agency hereby agrees to utilize the Phase I components as said components are completed and available for use, and to ensure the proper operation and maintenance of same in accordance with the requirements of the Regional Water Quality Control Board for the useful life thereof." The authority shall also "have the ultimate responsibility for the maintenance and operation of the Facilities constructed as part of the Present Project…."

2. Phase II

Phase II consisted of the fourth component of the project, in the form of one of two alternatives. The first alternative was a single treatment plant located at the site of

the existing Half Moon Bay treatment plant, designed to treat the combined flows from the individual collection systems of the member agencies. The second alternative consisted of three separate treatment plants—one for each agency. As with construction of the Phase I components, the agreement provided that the determination of the Phase II treatment facilities "shall be made within the time schedule established in the [injunction]."

The agreement also included a paragraph regarding the "allocation and reallocation of rights, costs and expenses" of Phase II, in the event that either of the two alternatives is selected. Selection of the single-plant alternative—Plan F—would trigger two provisions. First, "capacity rights and construction costs pertaining thereto shall be allocated in proportion to the member agencies' respective service needs as determined by the [applicable Land Use Plan]." Second, "capacity rights and construction costs previously allocated in the Phase I components shall be reallocated to be consistent with the treatment plant facility allocations, except that no member agency shall receive any capacity in, or ultimately be required to have paid any portion of, the cost of any Phase I component not utilized by that member agency [and the] total expenses of operation and maintenance of all the components of the Present Project shall be shared in a manner based on flows into the single consolidated treatment plant facility."[4] In its meeting minutes in June 1979, the authority described this provision as an agreement that "under the Plan F concept, [operation and maintenance] costs would be shared for all components of the project by all three agencies based on each other's respective flows in the treatment plant."

C. Initial construction and subsequent improvements

[4] Under Plan A, the alternative with three separate treatment plants, each agency would have shared operation and maintenance costs only of those components actually used by that agency, and then according to flows.

The authority received state and federal grant funding in July 1979, and proceeded to construct the intertie that year. The funding was projected to cover roughly 85 percent of the $8.5 million cost of construction of the intertie pipelines, pumping facilities, treatment facility, outfall and effluent pumping station, and reclamation line. The grants were conditioned on, among other matters, compliance with certain applicable regulations then in effect.

The intertie is a network of pump stations and pipelines, three mechanical force main segments,[5] and gravity pipes that deliver raw sewage from the member agencies to the consolidated treatment plant located in the City. Sewage from Montara enters the northernmost portion of the intertie system at two pump stations; from Granada via two pump stations at the mid-portion of the system; and from the City at the end of the system, all flowing directly into the authority's treatment plant.[6]

Since its initial construction, the system has undergone periodic maintenance and improvements, including repair and replacement of force main pumps, air release valves, and other intertie equipment. In addition, in the early 2000s, the authority constructed wet weather storage plants (WWSP) consisting of new tanks to store wastewater during wet weather events. As discussed further below, the parties disagree about the extent to which the funding source and character of these previous improvements support their respective interpretations of the agreement.

D. Needed intertie improvements and current dispute

In 2009, the authority retained a consultant to conduct an in-depth review of the intertie. The purpose of the work was to identify possible factors contributing to intertie

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[5] Where gravity alone is insufficient to carry wastewater, it must be moved with the assistance of pumps through "force mains," which use positive pressure to help move wastewater through the pipe.

[6] A map of the authority's wastewater system is attached to this opinion as Exhibit A.

force main failures, identify high-risk areas where force main segments will be prone to failure in the future, and develop short- and long-term strategies for minimizing the possibility of future failures.

The consultant's report (SRT report) summarized "several failure episodes" the intertie had recently experienced, which it attributed to the system's age coupled with low-flow velocities resulting in internal pipeline corrosion, a lack of redundancy in the system that precluded preventative maintenance, and corroded air and vacuum valves. It recommended short- and long-term plans for rehabilitating the intertie to minimize the potential for failure-related sanitary sewer overflow events, and extend its service life in the most cost-effective and efficient manner.

The report then presented three alternatives for intertie replacement or rehabilitation: (1) replacing all force mains, (2) rehabilitating all force mains using a method known as "rigid slip-lining," and (3) a "no-project" option that consisted of operational and maintenance activities over a 20-year period. The report also included probable costs over a 20-year period for the three alternatives: $25 million to $35 million for alternative 1, $15 million to $22 million for alternative 2, and $8.7 million to $13.1 million for alternative 3. The report ultimately recommended alternative 3, to be broken into three phases over roughly 20 years.

Between 2010 and 2017, the authority undertook various improvements to the intertie funded by the annual general budget, including air / vacuum valve replacements, pump station repairs, bypass station repairs, and force main repairs, rehabilitation and replacement. The authority's proposed annual budget for 2017-2018 included $1.5 million for infrastructure projects to replace specific portions of the intertie force mains and a pump station surge plant that had failed due to age and stress. However, the City objected to the proposed 2017-2018 budget and its proposed improvements to the intertie.

This litigation soon followed.

E. Procedural background

1. City's complaint

The City filed its complaint for declaratory relief on July 11, 2017 in Santa Clara County Superior Court (complaint). It alleged that an actual controversy exists between the City and the districts in that the City contends the agreement does not oblige it to fund any part of "the $4.4 million Intertie capital replacement projects disputed here," while the districts contend that "replacing portions of the intertie constitutes 'operation and maintenance' and is therefore a general budget expenditure for which the City must bear more than half the cost." Accordingly, it alleged, "[t]he City brings this action to clarify its financial obligations pursuant to the JPA" and the City "is entitled to a judicial declaration that capital projects such as large-scale pipe replacement do not constitute 'operation and maintenance' and the [agreement] therefore does not oblige the City to contribute to the cost of the $4.4 million in Intertie capital replacement projects via the general budget."

The complaint alleged that the agreement "anticipated this need to replace the Intertie, and obligates the agencies that benefit from it to pay for its replacement - Granada and Montara. The JPA does not obligate the City to fund any portion of the Intertie since the City derives no capacity rights or other benefits from it." According to the City, it "has no use for, no right to use, and no obligation to fund" the proposed improvements to the intertie. Granada and Montara have nevertheless taken the position that the City must contribute to the cost to replace the Intertie.

The complaint alleged that the "Intertie replacement project" is a project that requires a project budget, and is not "operation and maintenance" that would be funded by the authority's general budget. Further, "[m]any factors support the City's position - the age of the lntertie and its finite useful life, the replacement nature of that project is now in dispute, the significant cost of that project, the nature of the costs to be incurred,

the City's lack of benefit from the Intertie, and the [agreement's] distinction of 'construction' from 'maintenance and operation.' "

The complaint prayed for five specific judicial declarations: (1) the proposed "$4.4 million Intertie capital replacement projects" are projects that the agreement requires be funded by a project budget; (2) the agreement authorizes the City to withhold its approval of project budgets and to withdraw from a project to avoid further financial responsibility for that project; (3) the agreement authorizes the City to withhold its approval of the $4.4 million in "Intertie capital replacement projects"—avoiding any duty to fund those projects and foregoing any right to participate in their benefits; (4) the City has not benefitted and does not benefit from the intertie and therefore need not contribute to funding its replacement and reconstruction; and (5) the agreement obligates only Montara and Granada to fund replacement and reconstruction of the intertie.

2. Districts' cross-complaints

Montara filed its cross-complaint on August 24, 2017, alleging one cause of action for declaratory relief.[7] According to Montara, "[t]he present dispute arises from the City's refusal to approve [the authority's] 2017-18 General Budget which includes expenditures for replacement of certain portions of the [intertie] pipeline and repairs to the [intertie] attendant pumping facilities…, which the City contends it is not required to fund because it does not use or benefit from, or have capacity rights in the [intertie] and, thus, requires a separate Project Budget." It alleged it is entitled to a declaration that the proposed work "constitutes proper operation and maintenance expenditures under the General Budget."

Montara further alleged that, "[o]ver the years, numerous repairs, rehabilitation and replacement of segments of the pipeline and other [intertie] attendant facilities has

[7] Neither Montara nor the City sought summary judgment on Montara's cross-complaint, which Montara subsequently dismissed in May 2022, after the City filed the instant appeal.

[sic] consistently been interpreted as 'maintenance' and paid from the General Budget. The City has repeatedly contributed the cost of past operations and maintenance of the [intertie]. The most recent example is from the 2015-16 General Budget where [the authority] approved costs to rehabilitate the [intertie] pipeline by abandoning a failing segment of pipe and installing a new section alongside it, as well as replacing existing air valves along another segment." In addition, "[a]ll Member Agencies utilize and benefit from the [intertie], including the City."

Montara prayed for the following judicial declarations: (1) the proposed intertie improvements are part of the operations and maintenance of the authority's facilities and required to be paid from the authority's general budget; (2) the agreement requires the City to approve the general budget and contribute its allocated share based on flows to the authority's treatment plant to pay for the "IPS Projects" as part of the operation and maintenance of the authority's facilities; (3) the agreement provides that the proposed intertie improvements do not require a project budget within the meaning of the agreement; (4) the proposed intertie improvements do not constitute a "project" within the meaning of the agreement; (5) the agreement does not authorize the City to withhold its approval of the proposed intertie improvements or to withdraw from said projects to avoid further financial responsibility; (6) the City is not authorized to withhold its approval of the general budget for future repair, rehabilitation and replacement work related to the intertie; (7) that the authority's wastewater delivery and treatment system, and its components, are owned by the authority and that the City is precluded from withholding its approval of the general budget for all liabilities, debts and/or obligations arising from the wastewater delivery and treatment system and its components; (8) that the City utilizes and/or benefits from the intertie; and (9) the agreement requires the City to be financially responsible proportionate to its allocated share for all liabilities, debts and/or obligations related to the authority's system.

Granada filed its cross complaint on September 5, 2017, also alleging a single cause of action for declaratory relief. Specifically, its cross-complaint alleged that, "[i]n June 2017, after nearly four decades of continual operation, the City decided that work on segments of the [intertie] had transformed into a 'new project,' although the [intertie] has not changed in shape, size, or capacity [and in] a reversal of its decades-long practice and in violation of the binding terms of the agreement, the City has now taken the position that it is no longer responsible to fund work performed on the [intertie], insisting that the other [agencies] must now shoulder the City's portion of this burden."

Further, Granada alleged that since the inception of the agreement, the authority has regularly and properly funded intertie work, including pipeline replacement, through the general budget, and the City "has long, and repeatedly," approved general budgets that include intertie infrastructure work, such as repair and replacement. In addition, because the intertie is owned, operated and maintained by the authority, and is an existing improvement, infrastructure work on the intertie does not fall under the "project budget" provisions of the agreement, and the proposed intertie improvements in the 2017-2018 budget would not alter, expand, or increase the service area or capacity of the intertie as it currently exists. Nevertheless, Granada alleged, the City expressly declined to approve the 2017-2018 general budget as it was submitted.

Granada prayed for the following judicial declarations: (1) the authority owns, operates and maintains the wastewater delivery and treatment system, including the intertie; (2) the 1979 amendment to the agreement established reallocated costs and expenses for all components of the wastewater delivery and treatment system, including the intertie, based on each member agency's flows into the wastewater treatment plant and the local coastal plan allocation; (3) the City continues to share responsibility for costs and expenses related to the intertie, including operations, maintenance, construction, and liabilities, and in proportion to the City's wastewater flows into the wastewater treatment plant and its local coastal plan allocation; (4) the City utilizes and

benefits from the intertie; (5) the proposed intertie improvements were properly placed in the 2017-2018 general budget; and (6) the intertie improvements proposed in the 2017-2018 general budget are not subject to the agreement's project budget provisions and procedures.

3. Motions for summary judgment

On September 30, 2021, the parties filed simultaneous cross-motions for summary judgment, pursuant to a stipulated schedule. The City moved for summary judgment as to its complaint, Granada moved for summary judgment as to its cross-complaint and the City's complaint against Granada, and Montara moved for summary judgment only as to the City's complaint against it. Montara and Granada also filed joinders in support of each other's motion.

In connection with the cross-motions, the parties stipulated to nine volumes of joint exhibits submitted as supporting evidence. Notwithstanding the joint exhibits, the parties also submitted extensive additional evidence in support of their respective motions. In their stipulation establishing the schedule for the cross-motions for summary judgment, the parties stated that they expected an eventual trial to take five days.

a. City's motion

The City argued that the agreement unambiguously distinguishes between construction and maintenance, defining the former to include reconstruction, replacement and reparation. In support of this argument, the City relied on the plain language of the agreement, such as its definition of "construction." That definition provides: " 'Construction' includes acquisition, reconstruction, alteration, enlargement, replacement or reparation as well as construction." It does not include the word "maintenance." Meanwhile, the City argued, the agreement regularly uses both terms—"construction" and "maintenance"—in the same sentence or section, suggesting that each has a distinct meaning under fundamental canons of contract interpretation. The City also relied on general case law and dictionary definitions, arguing that courts "consistently interpret

'repair' and 'maintain' in contracts as requiring upkeep or preservation, **not** replacement."

The distinction between "construction" and "maintenance" is relevant, the City argued, because the agreement distinguishes between funding requirements for those categories. Construction must be funded via a project budget, requiring payment only by participating member agencies who approve and benefit from the project, whereas maintenance of all of the authority's facilities is funded via the general budget, requiring approval and proportional payment by all member agencies. As support, the City relied on the plain language of the agreement, noting that it excludes construction costs from those that a general budget may fund, which are "unambiguously limited to general administrative, operating and maintenance expenditures." Moreover, the word "construction" only appears in the section discussing project budgets.

The City argued that the agreement does not require any member agency to fund construction that does not serve or "benefit" its customers. It claimed that all member agencies that benefit from a project must approve the project budget and fund construction; conversely, if a member agency rejects a project budget, it need not fund construction but also may not receive any benefit from the project. As it explained, "capital costs are assigned on a 'pay to play' basis – the agencies which benefit from a facility must fund it."

In addition, the City argued, the agreement itself assigns intertie benefits to the districts alone because it lists the agencies that use each component of the Phase I construction, stating that Montara and Granada equally use the intertie, but the City does not. By contrast, the agreement states that all three agencies benefit from, and paid to build, the ocean outfall. The City claimed that it "does not use, benefit from, or have any capacity rights in the Intertie – it serves the Districts' service areas uphill and upcoast from the City's sewer service area."

The City also argued that the proposed intertie improvements at issue constitute "construction" under the agreement because they will "replace parts of the intertie." The City relied on evidence that the authority's staff had "repeatedly referenced the Project as the 'replacement' of Intertie segments." It cited a 2010 report that estimated the 20-year costs to "rehabilitate the Intertie ranged from $8.7 to $35 million." Because such costs are "infrequent and expensive," the City argued, they constitute construction costs.

The City argued further that the intertie "reconstruction is not routine and general 'maintenance' of a capital asset, but a 'project' to replace an asset at the end of its design life – a capital improvement – from which the City does not benefit." It labeled the improvements as the "Intertie Replacement Project," which it argued "proposes to remove and replace three segments of the Intertie's pipeline, spanning a total of approximately 5,695 feet or 1.08 miles in length," and "essentially rebuild it in place" because the intertie has reached the end of its useful life. The City argued that, "[j]ust as it had no obligation under the [agreement] to fund the Intertie's initial construction, the City has no obligation to fund its replacement two generations later."

In addition, the City argued, even if the agreement could be considered ambiguous, extrinsic evidence supports its interpretation. For instance, the City contended that the member agencies "have long since acknowledged capital repairs are not operations and maintenance costs," citing a 1979 meeting at which a Montara representative noted that "items such as outfall breakage would likely fall under capital repairs rather than O&M [operation and maintenance]." According to the City, it was decided then that the definition of operations and maintenance would be "taken care of" in a future amendment; however, because such a future amendment never happened, "dispute about O&M costs has continued for decades." The City also cited a 1996 funding agreement for improvements to the authority's joint treatment plant, the terms of which allegedly show the parties "have always linked construction costs to allocated benefits." Similarly, the City relied on the authority's sewer collection system

maintenance agreement, which provides: "the term 'maintenance' shall not include capital improvements, replacement of collection system facilities, or major repairs requiring design by a registered engineer."

In support of its arguments, the City relied on the parties' joint exhibits; its separate statement of undisputed material facts; a declaration of John Doughty, the City's public works director; and a request for judicial notice of additional documents.

b. Montara's motion

Montara argued the plain language of the agreement provides that "maintenance" includes the repair and replacement of segments of the intertie. The "only interpretation" to which the agreement is reasonably susceptible with respect to responsibility for repairs to the intertie, it argued, is that the City must pay its fair share of the cost apportioned to flows in the authority's treatment plant.

According to Montara, "one single sentence of the [agreement] resolves this entire dispute: 'In the event the member agencies choose to construct a single consolidated treatment plant facility,' then the 'total expenses of operation and maintenance of all of the components of the Present Project shall be shared in a manner based on flows into the single consolidated treatment plant facility.' " Because the member agencies chose to construct a single consolidated system with only one treatment plant, all three members have shared financial responsibility for operation and maintenance of the intertie based upon flows, "including replacement and repair of [intertie] force main segments and pumps." Montara argued that the "plain meaning of 'maintenance' includes everything necessary to maintain [the authority's] treatment works in good condition," relying on the dictionary definition of the word.

Montara also argued that "project budgets," as used in the agreement, are intended for *new* facilities only, and are not to be used for expenses relating to the intertie, treatment plant, and outfall. According to Montara, because the project budget process described in the agreement begins by approving a project "in concept," it signifies

approval of one not yet in existence. By contrast, responsibility for construction and ongoing maintenance of the "present project"—which is defined and already exists—is provided for in the agreement and "there is no need to determine these matters in a future project budget."

Montara noted that the agreement regularly uses the words "repair" and "replacement" in lists that also include "construction" and "maintenance." It contended that such language constitutes clear evidence that the intent was to allow for "some overlap between the concepts," thereby undercutting the City's argument that inclusion of "repair" and "replacement" within the definition of "construction" demonstrates those activities could never constitute "maintenance."

Similarly, Montara responded to the City's argument that the intertie is past its "useful life" so the City has no obligation to continue to support its maintenance, arguing that the "useful life of real property fixtures and improvements can be extended indefinitely through adequate maintenance, including periodic repair and replacement of component parts."

Lastly, Montara argued that, even if the agreement were ambiguous, Montara's position is supported by evidence of the context in which the agreement was drafted, the members' course of performance, definitions of terms in federal and state regulations that governed when the authority was formed, and public policy considerations. For instance, Montara argued that the City has historically funded operations and maintenance of the intertie, including repair and replacement of its components, as evidenced by the authority's general budgets between 2010 and 2017 which included several large capital items involving repair or replacement of intertie components, the cost of which was shared among all member agencies. In addition, it cited federal regulations in effect when the agreement was amended in 1979 which provided guidance to grant recipients to assist in the construction of waste treatment works and stated that "the term 'operation and maintenance' includes replacement."

In support of its arguments, Montara relied on the parties' joint exhibits, its separate statement of undisputed material facts, and its attorney's declaration with exhibits, including copies of the authority's budgets from 1996 to 2017.

c. Granada's motion

Granada's arguments in its motion for summary judgment largely mirrored those of Montara, although it moved for summary judgment as to both the City's complaint against it and its cross-complaint against the City. It also submitted a separate statement of undisputed material facts in support of its motion as to the City's complaint; a separate statement in support of its motion as to its cross-complaint; a separate statement in support of its joinder with Montara's motion and a request for judicial notice of additional documents.

d. Oppositions and replies

The City submitted a joint opposition to the districts' motions on November 23, 2021. It first argued that the districts concede the agreement distinguishes between construction and maintenance, but they improperly classify the intertie improvements as maintenance. Second, the City claimed that the districts "mischaracterize the events leading to the 1979 second amendment of the [agreement] and paint an incomplete picture of the Member Agencies' decision to share some costs." The City summarized what it characterized as the "lengthy history of [the agreement's] negotiation and amendment," and argued it does not support the districts' interpretation or their contention that the parties' decision to build a single treatment plant mandates that the City's contribute to all of its costs.

Third, the City disputed the districts' implicit argument that the 1979 preliminary injunction changed the relevant terms of the agreement. Instead, it argued, the injunction merely ordered the three agencies to construct a single treatment plant and established a compliance schedule, but did not amend the agreement. According to the City, "the 1979 second JPA amendment did not alter the original agreement which tied each agency's

obligation to fund construction of a project component to that agency's benefit from it. The amended [agreement] assigned the City no benefit from the Intertie because its collection system does not drain (uphill) to the Intertie, and the Intertie has no capacity for flows from that system."

Fourth, the City argued that the nature of the intertie improvements constitutes "construction," rather than maintenance. The City noted that the cost of the improvements will exceed $35 million over several years. The $4.4 million at issue for the initial stage of the improvements "will fund significant overhaul of a large length of the pipeline… [and] replace miles of force mains and all air / vacuum relief valves." The City argued that the nature of the work is not preservation of the intertie in its original condition, but rather replacement, and that "no repairs to date compare to the work now necessary." In the City's view, "the necessary reconstruction cannot be construed as mere maintenance." It pointed to the nature of the proposed work, including the necessary improvements identified in the 2009 SRT report, and argued the evidence shows "[t]his is not mere preservation of an existing system."

Fifth, the City disputed Montara's contention that the City had always contributed to the cost to repair and replace the intertie. The City admitted that it had funded small replacement projects as "maintenance," but noted it had objected to funding intertie capital projects on various occasions, which led to removal of the projects from the authority's general budget. In fact, the City argued, the evidence shows that the member agencies have acknowledged over time that capital replacement is not operations and maintenance.

Sixth, the City disputed the districts' arguments that the agreement limits project budgets to "new" facilities. It argued that nowhere does the agreement restrict project budgets to "new facilities," citing evidence of prior occasions when the districts approved project budgets to fund intertie capital projects.

Seventh, the City argued that the state and federal regulations cited by the districts do not support their interpretation of the agreement, as they were not incorporated by the agreement and, in any event, have since been repealed. Moreover, the City disputed the districts' characterization of the regulations, arguing, for instance, that they do not define "operation and maintenance" to include replacement beyond the useful life of infrastructure. Lastly, the City argued that it does not benefit from the intertie.

In support of its opposition, the City submitted an additional request for judicial notice, a second Doughty declaration, a separate statement of undisputed material facts in opposition to Granada's motion, and a separate statement of undisputed material facts in opposition to Montara's motion. In addition to setting forth dozens of additional facts, the City also disputed numerous purportedly undisputed facts asserted by the districts in their statements.

The districts filed their briefs in opposition to the City's motion on November 23, 2021, as well. Montara argued that the City failed to meet its initial burden of showing that the work required on the intertie is "something other than maintenance." It disputed the City's assertion that essentially a new intertie must be constructed to replace the existing intertie. Montara cited evidence showing that the intertie consists not only of force main segments, but also gravity pipes, pump stations and storage tanks, and that gravity pipes make up approximately 30 to 40 percent of the length of the intertie and do not currently require any repairs, and that most force main segments do not require repairs either.

It also argued that, even if a larger portion of the pipeline required replacement, the work would still constitute maintenance because federal, state and county regulators expect that treatment works will be maintained for their "useful life," which is the period during which the treatment works will be operated. According to Montara, the "useful life" of the intertie is indefinite, or "the period for which it will be operated, even if it requires repair, replacement or rehabilitation to keep it operating for the purpose for

which it was originally constructed." It argued the City had failed to carry its burden of establishing that the intertie had reached the end of its useful life.

In support of its opposition, Montara also submitted a declaration from Pippin Cavagnaro, its district engineer, a declaration from Clemens Heldmaier, its general manager, an attorney declaration with exhibits, responses to the City's statement of undisputed material facts, and an additional statement of undisputed facts. Montara also submitted objections to the City's proffered evidence.

Granada filed its opposition to the City's motion at the same time. Its arguments largely mirrored those set forth in its motion and in Montara's opposition. Granada also submitted responses to the City's separate statement of undisputed material facts, in which it disputed numerous facts, and set forth additional material facts of its own. Granada also filed its own objections to the City's evidence.

The parties filed simultaneous reply briefs on December 9, 2021. Each party also submitted additional responses to separate statements of undisputed material facts, additional material statements of their own, further objections to evidence, and requests for judicial notice.

4. Trial court order

The hearing on the parties' motions was held on January 18, 2022. On February 7, 2022, the trial court issued its order granting Montara's and Granada's motions in their entirety, and denying the City's motion.

The trial court's order began with Montara's motion. Determining that the "disposition of the instant motion rests on an issue of contractual interpretation," the court agreed with Montara that its interpretation of the relevant provisions of the agreement "with regards to the work to be performed" on the intertie is "more reasonable." First, the court found support for the notion that the drafters of the agreement intended the term "maintenance" to be understood in its broad and ordinary sense in the agreement, "particularly the categories of budgets created and the nature of

those budgets as per the language used to describe them." Because the process of approving a project begins with the authority approving a project "in concept," the court explained, it "signifies approval of one *not yet* in existence, i.e., *new* projects, as distinct from the project at issue here, which is defined, presently existing, and one that [the authority] came together to build and maintain." Accordingly, the trial court held, repair and replacement of the intertie constitute operation and maintenance, the costs of which are to be borne by all member agencies.

Second, the trial court rejected the City's reliance on the surplusage rule of contract interpretation to support its contention that the agreement's use of "construction" and "maintenance" within the same sentences and sections establishes that the terms have distinct meanings. According to the trial court, "there are instances of redundancy of terms in [the agreement] which suggest that the surplusage rule should not have ironclad application to the interpretation of its terms."

Third, the trial court rejected the City's argument that it derives no benefit from the intertie. As the court explained, the agreement does not limit the City's responsibility to fund operations and maintenance work based on its perceived benefits and, even if benefit were a relevant consideration, the City does benefit from the intertie and its role in the authority's consolidated treatment system.

Finally, the court rejected the City's argument that it is not required to fund the intertie improvements because the pipeline has exceeded its useful life. The court relied on "a review of the statutory and regulatory environment" in which the agreement was drafted to conclude that " 'useful life' does not place an endpoint on the City's obligation to share in the cost of operating and maintaining the components of the [authority's]

wastewater system." The court then granted Granada's motion, and denied the City's motion, for the same reasons.[8]

5. Appeal

The City appealed the trial court's order on March 18, 2022. The trial court then entered a judgment on April 7, 2022. "[A]n order granting summary judgment is not an appealable order." (*Champlin / GEI Wind Holdings, LLC v. Avery* (2023) 92 Cal.App.5th 218, 223 (*Champlin*), citing *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761.) "However, when the order is followed by a judgment, we have discretion to deem the premature notice of appeal to have been filed after the entry of judgment." (*Champlin, supra,* 92 Cal.App.5th at p. 223, citing *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 288.) We exercise our discretion to do so here because judgment was actually entered and respondents have not been misled by the premature notice of appeal. (*Champlin, supra*, 92 Cal.App.5th at p. 223, citing *Mitchell v. Los Robles Regional Medical Center* (2021) 71 Cal.App.5th 291, 296.)

On appeal, the City also submitted multiple motions for judicial notice to this court, which the districts opposed. We deferred consideration of the motions for resolution with the merits.

II. DISCUSSION

A. Summary judgment principles and standard of review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) Only if the moving party carries that burden does it shift to the opposing party to show the

[8] The trial court also granted all requests for judicial notice and did not address any of the parties' evidentiary objections. We presume the objections were overruled and the trial court considered the evidence in ruling on the merits of the summary judgment motions. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

existence of a triable issue of material fact. (*Ibid.*) "We must independently examine the record to determine whether triable issues of material fact exist." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*); Code Civ. Proc., § 437c, subd. (c).)

Where a defendant has prevailed on summary judgment, " ' "we review the record de novo to determine whether [it has] conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial." ' " (*Saelzler, supra,* 25 Cal.4th at p. 767; *Genisman v. Carley* (2018) 29 Cal.App.5th 45, 49 [defendant moving for summary judgment bears " 'the burden of [showing] that . . . one or more elements of the cause of action [] cannot be established' "].) The moving defendant "bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850.) Upon a defendant's prima facie showing of the nonexistence of such an element, the plaintiff "is then subjected to a burden of production of [its] own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.) A plaintiff must prove each element of its cause of action. (*Id*. at p. 853; Code Civ. Proc., § 437c, subd. (*o*)(1).)

Like the trial court, in undertaking our independent review, " '[w]e examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to "decide whether the opposing party has demonstrated the existence of a triable, material fact issue." ' " (*Kim*, *supra*, 43 Cal.App.5th at p. 323.) " ' "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' " (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Aguilar*, *supra*, 25 Cal.4th at p. 843 [court must consider all of the evidence and all of the inferences reasonably drawn therefrom and must view such evidence and inferences in the light most favorable to the opposing party].)

Where both parties move for summary judgment, it does not conclusively establish the absence of triable issues of fact—the court must determine the motions independently. (*Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1375, fn. 1; see also Cal. Prac. Guide Civ. Pro. Before Trial, Ch. 10-G ["Because the court must draw inferences in favor of the opposing party in each case, both cross-motions may be denied."].)

B. Contract interpretation on summary judgment

Where, as here, the issue on appeal involves interpretation of a contract, summary judgment regarding the contract is appropriate only if the language is unambiguous, allowing for just one interpretation, or the language is ambiguous, but undisputed evidence shows the moving party's interpretation is correct. (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1499-1500 (*Niederer*). Where there are two equally plausible interpretations of a contract, it presents a question of fact precluding summary judgment if the evidence is contradictory. (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.)

A triable issue of fact does not arise if the language of a contract might reasonably support two different constructions, nor is a triable issue of fact created by the introduction of extrinsic evidence to explain an ambiguity, unless the proper interpretation of the contract depends on evaluating conflicting evidence. (*Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 390 ["[e]ven where uncontroverted evidence allows for conflicting inferences to be drawn, our Supreme Court treats the interpretation of the written contract as solely a judicial function"]; *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267 (*ASP Properties Group*) [when extrinsic evidence is not in conflict, construction of an agreement is a question of law for the court " 'even if the evidence is susceptible to multiple interpretations' "]; see also *Sprinkles v. Associated Indemnity Corp.* (2010) 188

Cal.App.4th 69, 76 ["[w]hen the facts are undisputed ... the interpretation of a contract, including the resolution of any ambiguity, is a question of law"].)

In reviewing a trial court's interpretation of a written contract, we begin "with the threshold question of whether the writing is ambiguous—that is, reasonably susceptible to more than one interpretation." (*Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 619 (*Adams*), citing *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166 (*Winet*).) "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360 (*Solis*).) "An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence." (*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.* (1968) 69 Cal.2d 33, 39-40.) "When an ambiguity is predicated on extrinsic evidence, special rules of interpretation apply." (*Solis, supra,* 94 Cal.App.4th at p. 360.) When the "extrinsic evidence points only one way, or is uncontested, the meaning of the language in question may be ascertained as a matter of law and may be reviewed by an appellate court de novo. However, where the extrinsic evidence does not eliminate the ambiguity, that is, make one candidate of meaning implausible, or where it is contested, an issue of fact arises. In such cases, after a court trial, the appellate court must defer to a trial court's assessment of the extrinsic evidence, as it defers to other factual determinations [citations]." (*Id.* at pp. 360-361.) However, where a court reviews a judgment following summary judgment, it does not defer to the trial court, as "[t]here are not supposed to *be* any disputed material facts." (*Id*. at p. 361.)

"When two equally plausible interpretations of the language of a contract may be made … parol evidence is admissible to aid in interpreting the agreement thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory." (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 158; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308,

317 [conflicting evidence interpreting lease provisions precluded summary judgment].) Where extrinsic evidence does not eliminate an ambiguity, or where it is contested, an issue of fact arises and the issue may not be resolved on summary judgment. (*Solis, supra,* 94 Cal.App.4th at pp. 360-361.)

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civil Code, § 1636.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civil Code, § 1641; *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 503 (*Boghos*).) In doing so, courts must interpret contract language in a manner that gives force and effect to every provision "and not in a way which renders some clauses nugatory, inoperative or meaningless." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.)

C. Analysis

1. The agreement is ambiguous

The crux of the parties' dispute is whether the intertie improvements at issue constitute maintenance or a new project under the agreement—the former requiring funding by all agencies, the latter only by those which approve it.[9]

The agreement provides that operation and maintenance expenses for any improvements operated or maintained by the authority are to be included within the annual general budget, which requires approval by all member agencies. By contrast, a project budget pertains only to a specific project and does not require approval by all member agencies. The parties do not dispute those aspects of the agreement. Instead, the question here is whether the agreement unambiguously specifies what type of work falls

[9] We refer to the "intertie improvements" generally as those which give rise to the parties' dispute in this lawsuit.

into which category. Summary judgment is appropriate here only if the relevant language is unambiguous, allowing for just one interpretation, or the language is ambiguous, but undisputed evidence shows the moving party's interpretation is correct. (*Niederer, supra,* 189 Cal.App.3d at pp. 1499-1500.)

As we explain below, we conclude the agreement is ambiguous as to whether specific repair or replacement work constitutes "maintenance" or new project "construction." No moving party carried its initial burden of showing there is no triable issue of material fact as to the relevant declaratory relief claims, so no party was entitled to summary judgment. (*Aguilar, supra,* 25 Cal.4th at p. 850.)

a. The City's proffered interpretation

The City argues that "construction" and "maintenance" are distinct terms under the agreement, and that repair and replacement work necessarily constitutes "construction," rather than "maintenance." In addition, the City contends, the agreement provides that all "construction" must be funded via a project budget, not the general budget. Because the intertie improvements constitute repair and replacement work, the City argues, they must be funded via a project budget which, under the terms of the agreement, the City is not required to approve. The City acknowledges that the agreement requires it to fund its proportional share of operation and maintenance of the intertie; it merely contends that it need not fund the intertie's replacement.

The City begins with the plain language of the agreement which defines "construction" as follows: " 'Construction' includes acquisition, reconstruction, alteration, enlargement, replacement or reparation as well as construction." As the City notes, the definition does not include the word "maintenance." Nor is "maintenance" itself defined anywhere else in the agreement.

Nevertheless, the City argues that the meaning of "maintenance" can be discerned from the broader context of the agreement. For instance, the City points to the

agreement's statement of purpose, which provides: "The parties hereto have in common the power to plan for, acquire, construct, reconstruct, alter, enlarge, replace, repair, maintain, manage, operate and control facilities for the collection, transmission, treatment and disposal of wastewater… ." According to the City, the sequence of the words used in that statement shows the parties intended to define "maintenance" to exclude "replacement" or "reparation." The City's theory is that the words in the statement consisted of two portions: first, the words that define "construction," and second, the words that define "maintenance." The first portion largely mirrors the definition of "construction" expressly provided in the agreement—"acquire, construct, reconstruct, alter, enlarge, replace, repair"—so it follows that the remaining words in the statement comprise the implicit definition of "maintenance"—"manage, operate and control." Further, because each word has independent meaning, and "surplusage is to be avoided," the word "maintenance" cannot be read to include "reconstruction, alteration, enlargement, replacement or reparation."[10]

The City then argues that, because the word "construction" appears in the agreement's "project budget" section, but not in the "general budget" section, the parties intended that all construction be funded solely through project budgets. The City notes that the agreement specifies the categories of activities to be funded via the general budget: "general administrative expenses," "expenses of operating and maintaining any improvements operated," and revenue accruing to the authority "to cover the general administrative, operating and maintenance expenditures." According to the City, those activities do not include "construction."

By contrast, the City notes, the word "construction" *does* appear in the "project budget" section, which provides: "Each Project Budget may include the following: (1)

[10] Elsewhere, the City concedes that "maintenance" under the agreement includes *some* repair and replacement work. We address this concession below. In any case, we find the agreement ambiguous on this issue.

the Authority's administrative expenses allocated to the project; (2) the cost of studies and planning for the project; (3) the cost of the engineering and construction of the project; (4) the allocation among the participating member agencies of the total project costs including but not necessarily limited to administration, planning, design, construction and operation and maintenance; (5) any revenues accruing to the Authority for the project from whatever source."

In our view, the agreement does not unambiguously state that repair and replacement work necessarily constitutes "construction" that must be funded by a project budget. While the agreement appears to draw a general distinction between "construction" and "maintenance," it is not as clear a distinction as the City would have it. First, the agreement's "definitions" section begins with a qualifying preamble: "Unless the context otherwise requires, for the purposes of this agreement, the following words shall have the following meanings." Accordingly, context may dictate that the defined terms have different meanings in certain circumstances.

Second, the definition of "construction" itself is ambiguous. It provides that "construction" *includes* the words that follow, but it does not limit its definition to those terms and, as the City recognizes, also includes the word "construction." Third, merely because "construction" includes those terms does not mean they might not also be included within the scope of another word, such as "maintenance." The agreement does not define "maintenance," so it is not unambiguous that the term can never include repair or replacement.

Although the City is correct that interpretations which would render provisions of a contract "surplusage" are disfavored, that general maxim does not aid the City here. (See, e.g., *Boghos, supra,* 36 Cal.4th at p. 503.) As the districts argue and the trial court noted, the agreement is redundant in numerous sections. The City's argument that each word must have independent meaning also undercuts its own interpretation of the agreement. The agreement's statement of purpose, quoted above, provides that the

parties have the power to "plan for, acquire, construct, reconstruct, alter, enlarge, replace, repair, maintain, manage, operate and control." If each word must be given a distinct meaning as used in that section, "repair" and "replace" cannot be considered part of "construction" either.

We are also not persuaded by the City's argument that the agreement unambiguously provides that all construction—including all repair and replacement—must be funded by a project budget in all circumstances. It is true that the agreement specifies that "general budgets" are to include "the expenses of operating and maintaining any improvements operated or maintained by the [a]uthority," and does not include the word "construction." And the "project budget" section of the agreement does include the word "construction." However, it does not follow that the agreement mandates all repair and replacement work—or even all "construction"—be funded via a project budget.

First, the "project budget" section of the agreement provides that each project budget "may include the following," which then lists, among other things, "the cost of the engineering and construction of the project." Merely because a project budget *may* include the cost of construction does not mean that all construction must be funded via a project budget. Second, merely because a general budget must include operating and maintenance expenses does not mean such expenses cannot include certain activities that may also fall within the scope of "construction," like repair or replacement work. Instead, it begs the central question at issue here—when is certain repair and replacement work considered "maintenance" and when is it considered a "project" that requires its own budget? We view the plain language of the agreement as ambiguous on that issue.

The City also points to a provision added to the agreement in the 1979 amendment which reallocated capacity rights and construction costs previously allocated in the Phase I components upon selection of Plan A, the alternative with a single consolidated treatment plant. As summarized above in the factual background, that provision first provides that "capacity rights and construction costs pertaining [to a single consolidated

treatment plant] shall be allocated in proportion to the member agencies' respective service needs as determined by the [applicable Land Use Plan]." It then provides that "capacity rights and construction costs previously allocated in the Phase I components shall be reallocated to be consistent with the treatment plant facility allocations, except that no member agency shall receive any capacity in, or ultimately be required to have paid any portion of, the cost of any Phase I component not utilized by that member agency [and the] total expenses of operation and maintenance of all the components of the Present Project shall be shared in a manner based on flows into the single consolidated treatment plant facility."

The City argues this provision confirmed that member agencies "do not pay the capital costs of components or facilities from which they do not benefit… and share[] ("O&M") costs based on their respective flows to the plant." But even if we were to accept that interpretation, it would not resolve the central question of whether any particular improvements to the authority's facilities constitute "maintenance" or capital costs which must be funded by a project budget.

Lastly, the City argues that the intertie "has exceeded its useful life" and the agreement "treats the obligation to fund operations and maintenance as beginning before a component is constructed and ending with its 'useful life.' " Although the City concedes the agreement does not define "useful life," it argues the agreement specifies that the present project "was intended to operate until 2000, marking the end of its useful life." It relies on the section of the agreement that states: "The Present Project shall be a secondary wastewater treatment and disposal system, divided into four components, to service the combined needs of the member agencies until the year 2000."

In our view, the agreement does not unambiguously provide that the City's maintenance funding obligations ended in 2000 or at any other specific date that constituted the end of the intertie's "useful life." First, as the City acknowledges, the agreement does not define "useful life." Second, the language regarding the year 2000

appears in a different section than "useful life," suggesting the intent was not to define the latter with the former. And third, the language in the agreement regarding the year 2000 is itself ambiguous. It does not state that any maintenance funding obligation shall end in 2000—nor does it state that the system, or any of its component parts, is only intended to operate until 2000.

The districts argue that the intent of the "year 2000" language in the agreement was "to obligate the parties to design a system that would handle the anticipated needs at least to the year 2000, not to anticipate or design for needs after that time or to terminate the parties' obligations after 2000." We need not address the reasonableness of that interpretation, though, because it is sufficient for our purposes here that the City has not carried its burden of demonstrating the agreement unambiguously provides that the City's maintenance funding obligations ended in 2000, or at any other time.[11]

The City also relied on extensive extrinsic evidence, in particular the parties' course of performance, in support of its interpretation. For instance, it submitted other agreements between the parties which, it claimed, similarly distinguish between "maintenance" and "construction." First, it cited a 1996 funding agreement between the agencies that temporarily reduced Montara's flows to the treatment plant because it was unable to provide its share of the funding for planned improvements. According to the

[11] The City also argues that case law in other contexts confirms the distinction between "construction" and "maintenance," and shows that "maintenance is routine, regular, or typical work to return something to a fully functional state – it is not substantial improvement, upgrade, rebuilding, installation, or demolition." We find the cases unpersuasive. None of the cited cases purports to state a legal definition of "maintenance" with broad application, or even application in a context like the one at issue here—instead, the cases considered the term in the specific legal and factual contexts of those disputes. (See, e.g., *Chevron USA, Inc. v. County of Kern* (2014) 230 Cal.App.4th 1315 [challenge to county tax assessor's valuation of replacement oil wells as construction]; *ASP Properties Group, L.P., supra,* 133 Cal.App.4th 1257 [interpreting lease in unlawful detainer action].)

City, the 1996 funding agreement "shows the parties have always linked construction costs to benefits."

In our view, the 1996 funding agreement offers no support for the City's proffered interpretation of the agreement that repair and replacement work must be funded by a project budget. Even if the 1996 funding agreement can be interpreted as linking construction costs to benefits—a question we need not address—it does not necessarily follow that the agreement at issue here provided the same. More importantly, even if the agreement itself can be interpreted as linking construction costs to benefits, it merely begs the question again: when does specific repair and replacement work constitute maintenance and when does it constitute project construction that would be linked to benefits? The agreement provides that all member agencies will pay for the operation and maintenance of the intertie. If certain repair and replacement work constitutes maintenance of the intertie, it is immaterial which agencies the intertie benefits because all agencies agreed to fund its maintenance.

The City also relies on a series of "collection system maintenance agreements" between the City and the authority, which provide for the authority to maintain the City's sewer collection system, including a 2018 version which states: "the term 'maintenance' shall not include capital improvements, replacement of collection system facilities, or major repairs requiring design by a registered engineer." According to the City, those terms "reflect the need to draw the line between those repairs which constitute route 'maintenance' and those which amount to 'reconstruction.' " However, the fact that the parties elected to draw that line in a 2018 maintenance agreement regarding different facilities does not mean that the parties drew the same line in the original agreement which, by contrast, failed to include the same definition. Moreover, even if the agreement could be construed as including the same definition of maintenance as the 2018 collection system maintenance agreement, it would still not answer the question of

whether the improvements at issue here fall within that category, which would be a question of fact and not a matter of contract interpretation.

In its motion for summary judgment, the City also relied on meeting minutes from a 1979 authority board meeting, at which a Montara representative "noted that items such as outfall breakage would likely fall under capital repairs rather than O&M. After further discussion it was decided that definition of O&M would be taken care of in a future [agreement] amendment." The City argues that, because such a future amendment to address operations and maintenance never happened, "[the] dispute about O&M costs has continued for decades." The evidence does not support the City's interpretation and, in fact, undermines it, as it suggests the parties were unclear regarding the definition of maintenance at the time, but never resolved the matter.[12]

In sum, the City's extrinsic evidence does not eliminate the ambiguity; as a result, an issue of fact arises which may not be resolved on summary judgment. (*Solis, supra,* 94 Cal.App.4th at pp. 360-361.)

b. The districts' proffered interpretation

The districts argue the plain language of the agreement unambiguously provides that the intertie repair and replacement work constitutes "maintenance," which the City is obligated to fund.[13] First, they argue that "resolution of this dispute in favor of Montara and Granada follows from a single sentence in the [agreement]: In the event the member

[12] At times, the City appears to acknowledge the ambiguity as to whether particular repair and replacement work constitutes "maintenance" or "construction" under the agreement. For instance, it concedes that "some repair and replacement is routine maintenance." Elsewhere, it states that certain kinds of replacement "might or might not be maintenance," and recognizes that previous general budgets have included expenses for "repair and replacement" work. It acknowledges that the issue the parties have disputed is "the line between repairs which are operations and maintenance costs to be shared and capital replacements which are not." And it concedes that "[r]eplacing a part or two undoubtedly **is** operation and maintenance."

[13] Because Montara and Granada advance the same arguments on this issue, we address them here in the aggregate.

agencies choose to construct a single consolidated treatment plant facility, [then the] total expenses of operation and maintenance of all of the components of the Present Project shall be shared in a manner based on flows into the consolidated treatment plant facility."

We do not agree that the quoted sentence resolves the dispute in favor of the districts or resolves the ambiguity. Instead, as with the City's proffered interpretation, it merely begs the question of what "maintenance" means in that section, and whether the intertie improvements at issue fall within its scope. The City does not disagree that it is responsible, pursuant to the quoted language in the agreement, to pay its share of operation and maintenance costs for the intertie during its useful life. It argues only that the intertie improvements at issue do not constitute such operation and maintenance because they constitute "substantial improvements," and "non-routine" repair. The sentence in the agreement that the districts rely on does not offer any clarity on that question.

The districts also rely on the dictionary definition of "maintenance" to argue that it "include[s] everything necessary to maintain [the authority's] treatment works in good condition," including repair and replacement. We are unpersuaded. First, as the City argued, the agreement defines "construction" to include repair and replacement, but does not similarly define "maintenance" to include those terms. As we have explained, merely because "construction" includes "repair" and "replacement" does not mean those actions might not also be included within the scope of another word, such as "maintenance." However, the agreement is silent on that issue and the fact that it defines "construction" to include those terms, but does not similarly define "maintenance," creates ambiguity. The districts themselves argue, "the drafters intended to allow for some overlap between these concepts."

Second, the districts' proffered interpretation would impose no limit on the scope of repair or replacement work on existing facilities like the intertie, which the City would be required to fund. The parties acknowledge that the agreement required only the

districts to fund the intertie's initial construction; yet, under the districts' interpretation here, the City would be required to fund repair and replacement of the intertie possibly to the extent of its original construction. We also note the agreement provides that, where the authority will maintain and operate a facility, "it shall do so in an efficient and economical manner, and in a manner not detrimental to the member agencies." These provisions suggest the parties may have intended to impose some limits on the extent to which repair and replacement work will fall under the umbrella of "maintenance."

The districts also argue that project budgets are intended for "new" facilities only, so they cannot be used for repair and replacement of existing facilities, such as the intertie. Because the agreement provides for approving a project "in concept," they argue, it signifies approval of one not yet in existence. We agree that approval of a project "in concept" signifies the approval of a *project* not yet in existence—however, it does not follow that project budgets can only pertain to new *facilities*, as opposed to existing facilities. In other words, a project budget may be prepared for a new "project" on an existing facility. As the City argues, the language in the project budget section "applies as easily to the Intertie replacement as to something wholly new." In short, the "project budget" section of the agreement does not unambiguously provide that it applies only to new facilities not already in existence.

Beyond the plain language of the agreement, the districts also rely on extrinsic evidence to support their interpretation. They argue first that "circumstances surrounding the formation" of the agreement support its interpretation. Specifically, they point to meeting minutes from a June 1979 authority board meeting which allegedly confirm that the 1979 amendment to the agreement was a compromise to which the City agreed, to secure the districts' support for Plan F. According to the districts, the evidence shows that "the parties bargained for the City's commitment to help pay for ongoing maintenance of the [intertie], in exchange for the consolidated system that the City desired." Yet, even if the cited evidence supported the districts' assertion that the City

agreed to help pay for the ongoing maintenance of the intertie, it again merely poses the question whether particular repair and replacement work constitutes the kind of "maintenance" for which the City agreed to help pay—or, rather, whether it constitutes a new project such as the initial construction of the intertie, which only the districts funded.

Next, the districts argue that the parties' course of performance, "including the City's historical sharing of the costs of repair and replacement of [intertie] components," including several large capital expenditures, also supports its interpretation. The districts rely on the authority's annual general budgets from previous years which allegedly show the City funding its share of costs for intertie repair and replacement.

However, that evidence is controverted. The City acknowledged that it had funded some minor replacement work on the intertie as "maintenance," but had also objected to funding what it characterized as intertie capital projects on various occasions, which ultimately led to removal of the projects from the authority's general budget. For example, the City objected to inclusion of the intertie / Portola Pump Station project in the 2008-2009 general budget, which it claims led to a separate project budget that only the districts funded. The City also cited evidence allegedly showing that the member agencies have acknowledged over time that capital replacement is not operations and maintenance. For instance, it relied on the meeting minutes from July 1979 where the Montara representative noted that "items such as outfall breakage could likely fall under capital repairs rather than O&M."

Where extrinsic evidence does not eliminate an ambiguity, or where it is contested, an issue of fact arises and the issue may not be resolved on summary judgment. (*Solis, supra,* 94 Cal.App.4th at pp. 360-361.)

Lastly, the districts rely on state and federal regulations in effect when the agreement was drafted. They contend that the grant funding the authority received to construct the intertie and consolidated wastewater system was conditioned on compliance with the regulations. According to the districts, for instance, Environmental Protection

Agency regulations in effect when the agreement was amended in 1979 provided guidance to grant recipients "to assist in the construction of waste treatment works in compliance with the Clean Water Act." The districts argue these regulations showed that maintenance included equipment replacement, based on section 40 C.F.R. section 35.905, which defined "replacement" as: "Expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary during the useful life of the treatment works to maintain the capacity and performance for which such works were designed and constructed. The term 'operation and maintenance' includes replacement."

However, the definitions in the cited federal regulations expressly applied "[a]s used in this subpart." (40 C.F.R. § 35.905.[14]) The regulations did not mandate that the same definitions be used in all contracts regarding regulated wastewater facilities. Instead, the regulations established policies and procedures for grants to assist in the construction of waste treatment works in compliance with the Clean Water Act. The relevant provisions in the agreement at issue here, by contrast, assigned responsibility between the member agencies for funding "maintenance" and "projects."

Moreover, the agreement itself makes no reference to the regulations, and it expressly defines "construction" to include "replacement." Accordingly, even if the regulations applied, they would not resolve the ambiguity discussed herein. The districts argue that the regulations are "probative of the parties' intent." That may be true, but that is insufficient to resolve the ambiguity and prevail on summary judgment.[15]

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[14] As the parties recognize, these regulations were subsequently repealed. (79 Fed. Reg. 75871–01, 76055 (December 19, 2014).)

[15] Even if we were to determine the agreement is unambiguous in one party's favor, summary judgment would only be warranted if there were also no other triable issues of material fact. We note, though, that the parties disputed numerous facts set forth in each other's statements of undisputed material facts, including about the nature and scope of the intertie improvements, which comprise essential parts of the judicial declarations they seek. On appeal, Montara argues that, "despite the City's frequent (continued)

2. The parties appear to agree there is some ambiguity

Despite the parties arguing the agreement is unambiguous in their favor, they nevertheless appear to recognize that it does not clearly distinguish between maintenance and new project construction, or specify when particular repair or replacement work will fall in one category or the other. The districts acknowledge that there is "some overlap" in the concepts of construction, replacement, repair, maintenance and reconstruction. The City concedes that "some repair and replacement is routine maintenance," "[r]eplacing a part or two undoubtedly **is** operation and maintenance," and certain kinds of replacement "might or might not be maintenance." As the City argued below, the issue the parties dispute is "the line between repairs which are operations and maintenance costs to be shared and capital replacements which are not." In our view, the agreement is ambiguous as to where that line is—if the agreement even intended to define such a line at all—and summary judgment is therefore improper.

We recognize the length and expense of this dispute, as well as the parties' desire for a court to provide some clarity and finality. However, we also note that, even outside a summary judgment context, a court " 'does not have the power to create for the parties a contract which they did not make, and it cannot insert in the contract language which one of the parties now wishes were there. [Citations.] Courts will not add a term about which a contract is silent.' " (*California Union Square L.P. v. Saks & Co. LLC* (2021) 71 Cal.App.5th 136, 146, quoting *Levi Strauss & Co. v. Aetna Casualty & Surety Co.* (1986)

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suggestion that the needed [intertie] work amounts to the wholesale replacement of the [intertie] and the construction of a new project, the work merely contemplates the repair and replacement of limited portions of the [intertie] to maintain the [intertie] in operation." The City likewise recognizes that the districts dispute "how many feet of force mains must be replaced, or whether every part of the Intertie is broken."

At oral argument, however, counsel for both parties took the position that there are no triable issues of material fact regarding the nature and scope of the intertie improvements. In any case, we need not resolve this issue here because we determine that the agreement is ambiguous which, by itself, defeats summary judgment.

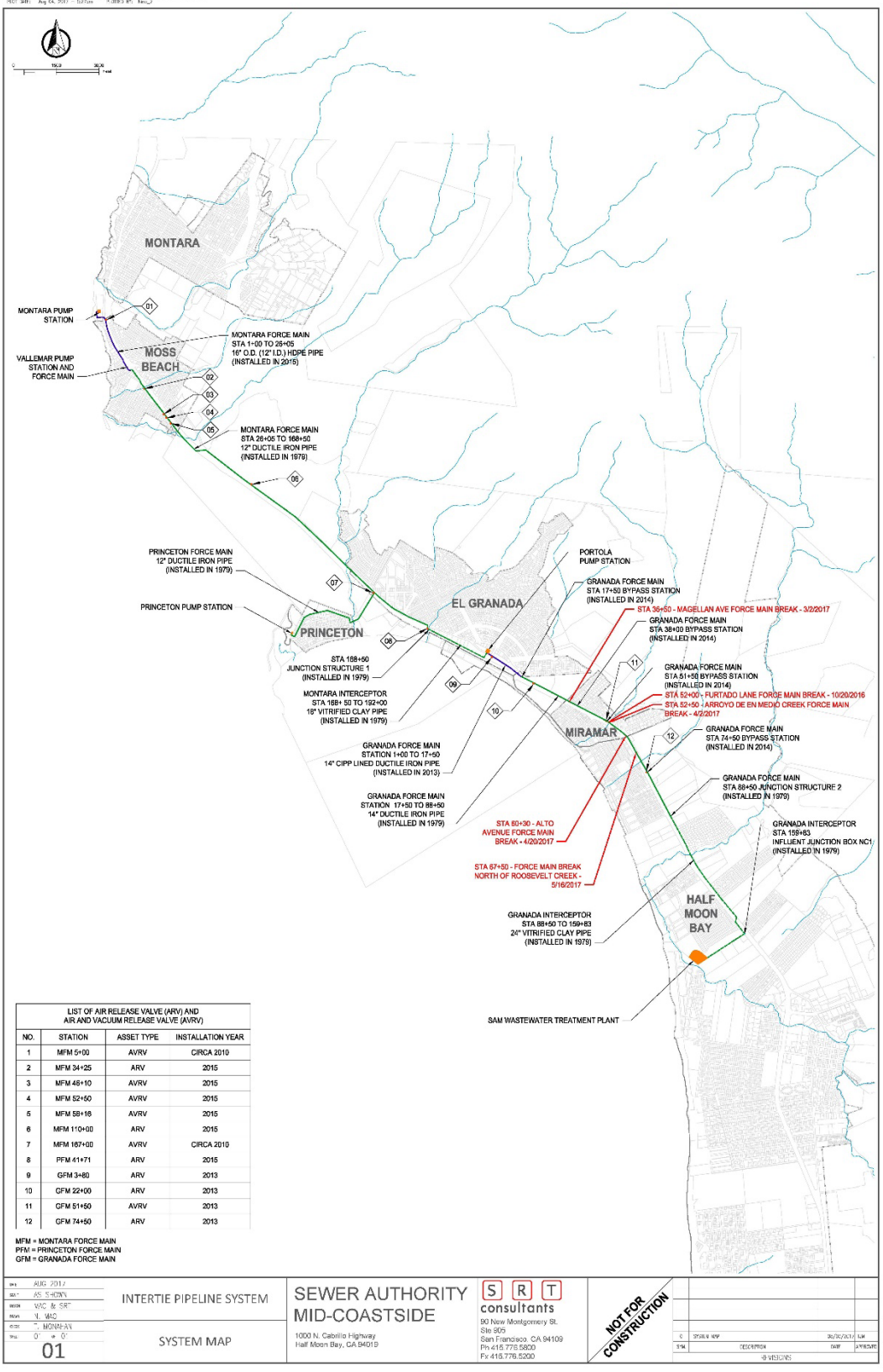
184 Cal.App.3d 1479, 1486.) " '[A] contract extends only to those things which it appears the parties intended to contract. Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted.' " (*Dameron Hospital Association v. AAA Northern California, Nevada & Utah Insurance Exchange* (2014) 229 Cal.App.4th 549, 569, quoting *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 58–59.)[16]

III. DISPOSITION

The judgment is reversed. The trial court is directed to enter a new order denying all the motions for summary judgment. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(5).)

[16] Because of our ruling, we need not address the parties' remaining arguments. For instance, the parties argue at length on appeal whether the City properly "paid under protest" to fund intertie improvements while this litigation proceeded, an issue not raised in the underlying pleadings. We also deny the City's motions for judicial notice, as the evidence was not before trial court on summary judgment and is irrelevant to our analysis. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 775, fn. 4.)

Exhibit A (System Map)



LIST OF AIR RELEASE VALVE (ARV) AND AIR AND VACUUM RELEASE VALVE (AVRV)

NO.	STATION	ASSET TYPE	INSTALLATION YEAR
1	MFM 5+00	AVRV	CIRCA 2010
2	MFM 34+25	ARV	2015
3	MFM 46+10	AVRV	2015
4	MFM 52+50	AVRV	2015
5	MFM 58+16	AVRV	2015
6	MFM 110+00	ARV	2015
7	MFM 167+00	AVRV	CIRCA 2010
8	PFM 41+71	ARV	2015
9	GFM 3+80	ARV	2013
10	GFM 22+00	ARV	2013
11	GFM 51+50	AVRV	2013
12	GFM 74+50	ARV	2013

MFM = MONTARA FORCE MAIN
PFM = PRINCETON FORCE MAIN
GFM = GRANADA FORCE MAIN

DATE: AUG 2017
SCALE: AS SHOWN
DESIGN: WAC & SRT
DRAWN: N. MAS
CHECK: T. MONAHAN
TITLE: 0" = 0"
01

INTERTIE PIPELINE SYSTEM

SYSTEM MAP

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NOT FOR CONSTRUCTION

NO.	DESCRIPTION	DATE	APPROVED
0	ORIGINAL ISSUE	08/30/2017	SJM

0 REVISIONS

HMB002252
AA02530

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Wilson, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

_____
Danner, J.

City of Half Moon Bay v. Granada Community Services District et al.
H049896