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**TJPA: Ruling limits taxpayer liability
in Millennium Tower legal costs fight**

San Francisco - The Transbay Joint Powers Authority (TJPA) announced Monday that a court ruling last week may require the TJPA to pay in the future just a fraction of the legal costs sought by Mission Street Development (MSD), the developer of the sinking and tilting Millennium Tower.

On September 20, 2018, San Francisco Superior Court Judge Curtis Karnow rejected MSD's request that the Court require the TJPA to defend MSD in six lawsuits. Those lawsuits have been brought against MSD for the excessive settlement and tilt of the Tower, including numerous fraud claims asserted by Millennium Tower residents against MSD.

The ruling did not examine or determine who caused the excessive settlement and tilt of the Millennium Tower, which will not be determined until trial in June 2019. The ruling dealt only with the narrow issue of whether the TJPA has a duty to defend MSD (e.g., MSD's reasonable attorneys' fees) based solely on what has been alleged by plaintiffs in the various complaints. Any suggestion that the ruling opens the possibility that the TJPA must pay the plaintiffs' alleged damages due to the excessive settlement and tilt of the Tower is incorrect and a misreading of the Court's order.

MSD argued that the TJPA was required under an indemnity clause in a 2008 easement agreement to defend MSD in all six cases against all claims, including fraud claims that unit holders filed against MSD for failing to disclose the excessive settlement and tilt prior to the sale of units.

The Court rejected that argument and held that the TJPA only has a duty to defend MSD against two claims in one case filed by the Homeowners Association for the Tower.

MSD's claim for defense costs arose from an easement agreement granting rights to the TJPA to use a portion of the Millennium Tower property for the construction of the Salesforce Transit Center, on condition that the TJPA agree to the indemnity clause requiring the TJPA to pay MSD's defense costs if MSD was sued for the TJPA's work.

The Court made clear that "it is not a reasonable reading" of the indemnity clause in the easement agreement "to hold that TJPA agreed to defend and indemnify MSD from MSD's own fault in committing, e.g., fraud and failing to disclose facts to the plaintiffs," as MSD had argued.

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In its arguments to the Court, the TJPA submitted evidence showing that the excessive settlement and tilt of the Tower was caused solely by MSD's fatally flawed foundation design. The TJPA submitted a declaration from an expert engineer explaining that MSD and its geotechnical engineer, who originally calculated that the Tower would settle no more than six inches and would not tilt, committed egregious errors in their initial settlement design calculations. If the calculations had been done correctly, they would have predicted settlement more than the approximately 18 inches that has occurred to date and that such excessive settlement would likely result in tilt.

Discovery in the litigation has now shown that MSD's prior representation regarding the claimed non-existence of the settlement calculations was false, and that the calculations not only existed, but were fatally flawed.

Correcting for the errors in the flawed design calculations shows that the Millennium Tower would have suffered excessive settlement and tilt – and the same alleged damage – even if the TJPA had never built the Salesforce Transit Center. Internal emails produced by MSD in the litigation show that the Tower was already settling well more than what MSD and its geotechnical engineer had predicted long before the TJPA even began construction of the Salesforce Transit Center. Internal emails from 2008 before the easement agreement was signed also show that MSD knew that the Tower was tilting and settling well beyond its own projections. For example, an internal MSD email from October 2008 states: ***“[W]e are going to experience settlement for years to come. Wow, you are going to have to revisit your calculations . . . The latest information is the building is picking up speed and has settled 1” inch since July and is now leaning.”***

The TJPA also submitted evidence showing that MSD undertook an explicit strategy to blame the excessive settlement and tilt on the TJPA. As one example, when the TJPA began its construction, MSD proclaimed in an internal email that ***“This will be great – from now on we can just blame everything bad on [TJPA]!”***

The TJPA will demonstrate at trial that MSD and its flawed design are to blame for the excessive settlement and tilt and MSD cannot foist its own liability on a public entity. The evidence that the Tower settled and tilted excessively before the TJPA began construction, none of the other much lighter high-rise buildings around the Transit Center experienced the same excessive movement as the Tower, and the Tower is tilting away from, rather than toward the Transit Center, show that the TJPA is not responsible for the alleged damage to the Tower.

As the Court acknowledged in its order, any payment by the TJPA for defense costs will be subject to an allocation at a future date to ensure that any payment is limited to MSD's defense of only two of the many claims.

TJPA continues to contest any obligation to pay MSD's defense costs and “does not believe the taxpayers should have to shoulder the burden of defending a developer whose fundamentally flawed design is responsible for the excessive movement of the Millennium Tower,” said TJPA Executive Director Mark Zabaneh.

About the Transbay Joint Powers Authority and the Salesforce Transit Center

The Transbay Joint Powers Authority is a historic collaboration between Bay Area government and transportation agencies. The TJPA's eight-member Board of Directors is composed of representatives of the City and County of San Francisco, the Alameda-Contra Costa Transit District, the Peninsula Corridor Joint Powers Board, the California High-Speed Rail Authority, and Caltrans. The TJPA oversees the financing, design, development, construction, and operation of the Transbay Program, a visionary transportation program that has reached a pivotal milestone: the opening of the Salesforce Transit Center to the public on August 11, 2018. The new state-of-the-art Transit Center will enhance mobility for a growing city and region by ultimately connecting eleven transportation services, including Caltrain and California High-Speed Rail. The Transit Center features a 5.4-acre rooftop park and botanical garden, programmed public space, more than 100,000 square feet of shopping and dining, pop-up retail, and world-class public art.

Funding for the Transbay Program comes from the U.S. Department of Transportation, the State of California, the Metropolitan Transportation Commission, the San Francisco County Transportation Authority, the City and County of San Francisco, the San Mateo County Transportation Authority, and AC Transit. A Naming Rights Agreement with salesforce.com provides partial funding for operation of the Center.

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