



**CITY OF LODI  
COUNCIL COMMUNICATION**

**AGENDA TITLE:** Introduction of Ordinance Amending Title 8 – Health And Safety, Chapter 8.24 – Comprehensive Municipal Environmental Response And Liability By Repealing and Reenacting Section 8.24.090 “Miscellaneous Provisions” – Subsections “D” and “E” and Adding Subsection “F” To The Lodi Municipal Code Relating to The Availability of Contribution

**MEETING DATE:** December 17, 2003

**PREPARED BY:** City Attorney

**RECOMMENDED ACTION:** That the City Council introduce Ordinance relating to the availability of contribution to apportion among Responsible Parties liability imposed under the City of Lodi’s Comprehensive Municipal Environmental Response And Liability Ordinance (“MERLO”), Lodi Municipal Code, Chapter 8.24.

**BACKGROUND INFORMATION:** On October 8, 2002, the U.S. Court of Appeals for the Ninth Circuit issued a decision in the matter captioned *Fireman’s Fund Insurance Company v. The City of Lodi, California*, 302 F.3d 928 in which the federal appellate court addressed the assertion that the City of Lodi’s Comprehensive Municipal Environmental Response and Liability Ordinance (MERLO) was preempted by federal and state law. After validating the vast majority of the MERLO, the Court indicated concern over the lack of any express provision in the MERLO providing a right of contribution (*i.e.*, an equitable right to allocation the joint and several liability imposed by certain provisions of the MERLO among the jointly and severally liable parties.) In response to this portion of the Ninth Circuit’s ruling, the City of Lodi sought review by petition for writ of *certiorari* before the U.S. Supreme Court. On April 7, 2003, the U.S. Supreme Court declined to take up this issue and denied the City’s petition for *certiorari*.

Since that time, the City Council and this office have carefully examined the implications of the Ninth Circuit’s decision on this issue, as well as the most effective means of addressing the Court’s concerns while effectuating the public health and environmental protection purposes of the MERLO. While the City’s ordinance did not expressly provide for contribution, the ordinance was crafted against the backdrop of existing general laws of the State that has long provided by well-established law for the apportionment of joint and several liability through an equitable right of contribution. As the Ninth Circuit ruled that the MERLO is preempted by federal law “to the extent that MERLO prohibited contribution action against the City even if the city was a potentially responsible party...” and as the MERLO was never intended to prohibit the assertion of such contribution claims, an amendment to the MERLO is appropriate to make clear that: (1) the right to contribution as it exists under the general laws of the State of California applies to any joint and several liability imposed by the MERLO; and (2) to the extent any court determines that state law contribution remedies do not apply to any joint and several liability imposed by the MERLO, the MERLO will set forth an express right to contribution as a matter of municipal law. This ordinance, if adopted subsequent to its introduction, would amend MERLO to achieve the two forgoing clarifications.

**FUNDING:** None.

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Randall A. Hays  
City Attorney

RAH/pn

APPROVED: \_\_\_\_\_  
H. Dixon Flynn, City Manager

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LODI AMENDING TITLE 8 – HEALTH AND SAFETY – CHAPTER 8.24, COMPREHENSIVE MUNICIPAL ENVIRONMENTAL RESPONSE AND LIABILITY, BY REPEALING AND REENACTING SECTION 8.24.090 – “MISCELLANEOUS PROVISIONS,” SUBSECTIONS “D” AND “E,” AND ADDING SUBSECTION “F” TO THE LODI MUNICIPAL CODE RELATING TO AVAILABILITY OF CONTRIBUTION

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BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LODI AS FOLLOWS:

**SECTION 1.** Section 8.24.090 – “Miscellaneous Provisions” Subsections “D” and “E” of the Lodi Municipal Code is hereby repealed and reenacted to read as follows:

D. Settlement Procedures and Consequences.

1. Settlement of Joint and Several Liability. Any person alleged by the city to be jointly and severally liable pursuant to this chapter, or any person who has been found to be jointly and severally liable pursuant to this chapter by a final and binding administrative order or final order of a court of competent jurisdiction, who has entered into an Effective Settlement, Administrative Settlement, or Judicially Approved Settlement shall not be liable for claims for contribution, equitable indemnity, or partial or comparative equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the other jointly and severally liable parties that have not settled by the amount of the settlement. Unless the settlement qualifies as an Administrative Settlement (the final action validating and approving which has neither been stayed nor reversed by a court of competent jurisdiction) or as a Judicially Approved Settlement (the final order validating and approving which has neither been stayed nor reversed on appeal by a court of competent jurisdiction) pursuant to this subsection, the status of any settlement of all or any part of any joint and several liability imposed by this chapter as an Effective Settlement may be challenged in a civil action by any person not party to the settlement agreement whose rights or interests are or may be adversely affected by the settlement and whose claims against the settling party are not otherwise barred by operation of law.

2. Administrative Settlement. The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this chapter (or any other liability that the city attorney is authorized to assert on behalf of the city or the people of the state of California related to protection of public health, welfare and the environment and which is not required by the general laws of the state of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this chapter) as an Effective Settlement may be determined by a final action of the city council validating and approving the settlement pursuant to the following methods that is applicable:

a. If at the time of the effective settlement there is not pending an administrative adjudicatory proceeding brought pursuant to this chapter to which the settling party is a respondent, by a resolution of the city council adopted at or following a properly noticed public meeting of the city council, provided that advance public notice of the council’s consideration of the settlement for purposes of validating it as an Effective Settlement has been published in the Lodi News-Sentinel for at least two consecutive two-day periods commencing at least two weeks in advance of the scheduled meeting of

the city council at which the settlement will be considered. The notice required by this subsection 2.a shall provide the public with notice of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval of the settlement as an Effective Settlement is granted, the date and time scheduled for city council meeting, and provide for an public comment period in advance of the council meeting of at least ten (10) days duration during which any person may submit written comments on the settlement to the city attorney for timely presentation to the city council, and of the opportunity of interested parties to attend the city council meeting and request time to present orally their views to the city council; or

b. If there is an administrative proceeding brought pursuant to this chapter to which the settling party is a respondent pending at the time of the effective settlement, by joint motion for approval of the settlement brought before the hearing officer by the city attorney and by the settling party or parties, provided that advance public notice of the motion has been published in the Lodi Sentinel for at least two consecutive two-day periods commencing at least two weeks in advance of the scheduled hearing before the hearing officer at which the motion for validation and approval of the settlement will be considered. The notice required by this subsection 2.b shall provide the public with notice of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval of the settlement as an Effective Settlement is granted, the date, time and place scheduled for hearing, and provide for a public comment period in advance of the hearing of at least ten (10) days duration during which any interested members of the public may submit written comments on the settlement to the city attorney for timely presentation to the hearing officer together with the written responses of the settling parties, if any, and of the right of any person whose interests are or may be adversely affected by the settlement to petition the hearing officer for permissive leave to intervene in the proceedings for the sole purpose of protecting their interests that are or may be adversely affected by the settlement, which leave, if granted by the hearing officer, may be conditioned as the hearing deems proper in the interests of justice and as appropriate given the nature of matter pending before the hearing office and its actual or threatened adverse impact on the public health, welfare or the environment, and the right of interested members of the public to seek leave from the hearing officer, which leave is committed to the sole discretion of the hearing officer, to address the hearing officer on the record regarding the merits of the motion at the scheduled hearing. If timely and properly objected to by any party to the administrative proceeding (specifically including any person granted leave to intervene in the proceeding), the hearing officer's report and recommendation regarding the motion for approval and validation of the settlement, which shall be rendered and filed by the hearing officer on an expedited basis, shall, together with any timely objections to that report and recommendation, be brought before the city council for final action at its next public meeting held pursuant to the regularly applicable notice requirements.

3. Judicially Approved Settlement. The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this chapter (or any other liability that the city attorney is authorized to assert on behalf of the city or the people of the state of California related to protection of public health, welfare and the environment and which is not required by the general laws of the state of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this chapter) as an effective settlement under this chapter may be judicially determined and finally resolved, as follows:

a. In an action brought by the city attorney in the name of the city pursuant to Part II, Title 10, Chapter 9 of California Code of Civil Procedure, Sections 860--870; or

b. If, at or within sixty days following the date of settlement, there is a judicial action pending between the settling party and the city in which the city has asserted one or more claims arising under this chapter, by joint motion brought in such pending action for judicial approval of the settlement, with such advance public notice, if any, deemed appropriate by the court of the availability of the settlement for public review, the general nature of the pending motion and its general effects if granted, the date and time scheduled for hearing of the motion, the available intervention procedures, and the opportunity for interested or affected members to submit comments on the settlement to the city attorney for timely presentation to the court, together with the city's response thereto.

4. Persons Not a Party to Settlement. If the city has obtained less than complete relief with respect to an Environmental Nuisance from a person who has resolved its liability to the city imposed pursuant to this chapter in an administrative or judicially approved settlement, the city may bring or continue an action against any person who has not resolved its liability imposed pursuant to this chapter with respect to such Environmental Nuisance.

#### E Contribution.

1. To the full extent authorized by, and subject to the terms and conditions set forth in, the general laws of the state of California, any person who is or may be liable to the City pursuant to this Chapter 8.24 for payment for, or performance of, some or all of an Abatement Action or other obligation imposed pursuant to this chapter, or for recovery of some or all of Abatement Action Costs incurred or to be incurred by the city, may seek contribution pursuant to the general laws of the state of California from any other person, specifically including the city, liable under this chapter for some or all of the same relief who has not obtained valid contribution protection that precludes by operation of law such contribution recovery from such person. Any contribution action brought under this subsection E.1 of this section 8.24.090, or concerning any liability arising pursuant to this chapter, shall be governed by the general laws of the state of California.

2. Notwithstanding the provisions of subsection E.1 of this section 8.24.090, if any court of competent jurisdiction determines that the general laws of the state of California do not provide for any legal process by which a person who is or may be jointly and severally liable to the city pursuant to this Chapter 8.24 for payment for or performance of some or all of an Abatement Action or other obligation imposed pursuant to this chapter, or for recovery of some or all of Abatement Action Costs incurred or to be incurred by the city, may seek contribution from any other jointly and severally liable parties, specifically including the city, then, and in that event only, such a contribution action may be commenced and maintained pursuant to this subsection E.2 of this section 8.24 .090 by: **(i)** any person who is or may be jointly and severally liable to the City pursuant to this Chapter 8.24 against any other jointly and severally liable or potentially liable party, specifically including the City, during or following any civil action commenced by the City Attorney pursuant to this Chapter 8.24; or **(ii)** a respondent to an administrative order issued pursuant to this chapter that has become final and binding and not subject to further direct judicial review who is in complete compliance with the requirements of that order against any other party who is also jointly and severally liable or potentially liable for some or all of the relief imposed by the order.

a. In any contribution action commenced or maintained pursuant to this subsection E.2 of this section 8.24.090, the court, in resolving contribution claims, may allocate Abatement Action Costs, the costs or performing Abatement Actions or other joint and several relief imposed pursuant to this chapter among liable parties using such equitable factors as the court determines are appropriate.

b. In resolving any contribution claims brought pursuant to subsection E.2(ii) of this section 8.24.090, the court shall give the highest priority to securing the expeditious and complete compliance with the terms and conditions of the final and binding administrative order and shall manage the proceedings in the contribution action so as to secure the uninterrupted, timely and complete compliance with the requirements of the final and binding administrative order.

c. Nothing in this subsection E.2 of this section 8.24.090 shall diminish the right, if any, of:

i. any person to bring an action for contribution under federal law or under the general laws of the state of California in the absence of a civil action commenced by the city attorney under this chapter; or

ii. a respondent to an administrative order issued pursuant to this chapter to bring an action for contribution under federal law or under the general laws of the state of California although such respondent is not in complete compliance with the requirements of that administrative order.

3. In any contribution action to apportion any liability arising under this chapter, the rights, if any, of a person who has resolved its liability to the city to recover contribution from other jointly and severally liable parties shall be subordinate to the direct rights of the city to seek and recover the relief authorized by this Chapter 8.24 from those same liable parties.

**SECTION 2.** Section 8.24.090 “F” – “Computation of Time” of the Lodi Municipal Code is hereby added to read as follows:

F. Computation of Time. In computing any period of time prescribed or allowed by this chapter, the day of the act, event, or default from which the designated period of time begins to run shall be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

**SECTION 3.** All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

**SECTION 4.** No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

**SECTION 5.** Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application. To this end, the provisions of this ordinance are severable. The City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof.

**SECTION 6.** This ordinance shall be published one time in the “Lodi News Sentinel”, a daily newspaper of general circulation printed and published in the City of Lodi and shall take effect thirty days from and after its passage and approval.

Approved this \_\_\_\_ day of \_\_\_\_\_, 2003

\_\_\_\_\_  
LARRY D. HANSEN  
Mayor

Attest:

SUSAN J. BLACKSTON  
City Clerk

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State of California  
County of San Joaquin, ss.

I, Susan J. Blackston, City Clerk of the City of Lodi, do hereby certify that Ordinance No. \_\_\_\_ was introduced at a regular meeting of the City Council of the City of Lodi held December 17, 2003, and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held \_\_\_\_\_, 2003, by the following vote:

AYES: COUNCIL MEMBERS –

NOES; COUNCIL MEMBERS –

ABSENT: COUNCIL MEMBERS –

ABSTAIN: COUNCIL MEMBERS –

I further certify that Ordinance No. \_\_\_\_ was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.

SUSAN J. BLACKSTON  
City Clerk

Approved as to Form:



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RANDALL A. HAYS  
City Attorney