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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

GOLDEN STATE WATER COMPANY, a California Corporation,

Petitioner/Plaintiff,

vs.

CASITAS MUNICIPAL WATER DISTRICT, a quasi-municipal corporation, CASITAS MUNICIPAL WATER DISTRICT COMMUNITY FACILITIES DISTRICT NO. 2013-1 (OJAI), a purported community facilities district, ALL PERSONS INTERESTED IN THE VALIDITY OF CASITAS MUNICIPAL WATER DISTRICT RESOLUTIONS NOS. 13-12, 13-13, AND 13-14 and DOES 1 through 50, inclusive,

Respondents/Defendants.

Case No. 56-2013-00433986-CU-WM-VTA

(Case Assigned to Hon. Mark S. Borrell)

GOLDEN STATE WATER COMPANY'S REPLY BRIEF RE HEARING ON INVALIDATION OF CASITAS MWD'S MELLO-ROOS ACT FINANCING PLAN

[FILED CONCURRENTLY WITH GOLDEN STATE'S EVIDENTIARY OBJECTIONS]

Date: June 10, 2013
Time: 8:30 a.m.
Dept.: 43

Case Filed: March 26, 2013

INTRODUCTION: THE TWO CENTRAL QUESTIONS

After filing a large stack of paper and a computer disc, Casitas MWD has failed to answer either of the two central questions posed by this case:

> **1. What provision of the Mello-Roos Act confers on a Community Facilities District ("CFD") the power to finance a taking of property by eminent domain?**
>
> **2. Given that Casitas MWD's formal "List of Authorized Facilities" says the CFD will finance acquisition of "intangible property and property rights" and all potential damage awards in the eminent domain case, how can the scheme be deemed to comply with §53313.5 of the Mello-Roos Act, which restricts a CFD to financing the purchase of "real or other tangible property?"**

Absent legally sufficient answers to both questions, the financing plan is invalid.

As to Question One: Casitas MWD, the water district which formed the CFD, does *itself* have the power of eminent domain and could therefore pursue its audacious litigation plan to seize the assets of an operating water utility. But the CFD, a separate legal entity, is entirely a creature of the Mello-Roos Act, and its financing powers are governed and defined by the Act.

The Mello-Roos Act does not grant a CFD the power to finance *anything and everything* the legislative entity which formed it has the power to accomplish. Instead, the Act empowers an entity to create a CFD to finance only certain defined governmental *services* (Govt. Code §53313), and, as pertinent here, to finance the *purchase* of certain *real or other tangible property with a useful life of five years or longer.* (Govt. Code §53313.5).

Thus, the fact that Casitas MWD can itself lease property, or purchase intangible property (e.g. a license), or purchase short-lived property (e.g., pencils), does not mean those things can be financed by a CFD, since they are not authorized by §53313.5. A lease is not a "purchase," a license is not "real or other tangible property," and a pencil's useful life is not "five years or longer." Likewise, the fact that Casitas MWD can itself pay all the damages and litigation costs for an eminent domain lawsuit does not mean a CFD can finance those expenses.

Faced with a statutory scheme that allows financing the "purchase" of certain assets but is silent on the authority to finance a takeover by eminent domain, Casitas MWD tries to fill in the

legislative gap by falling back on §53315's direction that the Mello-Roos Act is to be "liberally construed in order to effectuate its purposes." This argument is entirely circular, since it presumes that one of the purposes of the Act is to allow the financing of an acquisition by eminent domain. Nowhere has the Legislature given any reason to accept that presumption. Numerous Courts have emphasized that "liberal construction" cannot be used as a license to rewrite a statute.

Courts have in fact recognized that statutory language must be **strictly** construed (1) where eminent domain authority is involved; or (2) where the power of statutory taxing districts is involved. As both situations apply here, the statute cannot be stretched as urged by Casitas MWD. The Mello-Roos Act does not allow the financing of a lawsuit to acquire property by eminent domain.

As to Question Two: Casitas MWD tries to evade the consequence of its effort to use CFD financing for intangible property and property rights and litigation damages. It argues that Golden State has the burden at this juncture to prove the existence and value of its property rights that will be taken by eminent domain, as well as the damages that will be awarded in an eminent domain litigation. Wrong. For the financing scheme to be validated, it must be shown that the "facilities" which Casitas has formally resolved to finance through the issuance bonds and imposition of special taxes are, in fact, facilities that are financeable under the Mello-Roos Act. That showing has not been made. The inadmissible opinions from Casitas MWD's attorney about the unlikelihood of suffering the damage awards that are itemized in the "List of Authorized Facilities" does not cure this substantive, blatant violation of the Mello-Roos Act. (*see* §53343, allowing taxes to be collected only "for facilities and services authorized by this chapter"). Accordingly, this defect alone invalidates the financing plan.[1]

[1] As set forth in Golden State's Opening Brief, other critical defects in Casitas' adoption of the financing plan—defects which cannot all be reprised in the 10-page limit for this Reply Brief—also merit invalidation of the plan. Casitas MWD has violated the spirit, if not the letter, of the 25-page briefing limitation set forth in the Court's May 2, 2013 Order by filing, in addition to a 25-page brief, a 14-page argumentative declaration from the attorney who orchestrated this financing scheme. The declaration is inadmissible on several grounds (*see* Objections separately filed).

1. THE STATUTORY LANGUAGE IS DISPOSITIVE

This case involves a question of statutory interpretation: can the Mello-Roos Act be construed to authorize a CFD to finance (i.e., by issuing bonds paid with special taxes) a lawsuit to take property under the power of eminent domain?

To start with the obvious: the Mello-Roos Act nowhere states *explicitly* that a CFD may be used to finance an acquisition by eminent domain. This is significant, by itself. It is not as if the Legislature was unfamiliar with the power of eminent domain when it adopted the Mello-Roos Act. As pointed out by Golden State in its Opening Brief (but ignored by Casitas MWD), the Act *mentions* eminent domain—§53317.5 specifies what happens when a property which has been levied a special tax under the Act is *later* acquired by a public entity under eminent domain. If the Legislature had intended to allow a CFD to be used to finance an acquisition by eminent domain, it would have said so.

Because the explicit statutory authorization is absent, Casitas MWD repeatedly falls back on §53315, which provides in its entirety:

> "This chapter shall be liberally construed in order to effectuate its purposes. No error, irregularity, informality, and no neglect or omissions of any officer, in any procedure taken under this chapter, which does not directly affect the jurisdiction of the legislative body to order the installation of the facility or the provision of service, shall void or invalidate such proceeding or any levy for the costs of such facility or service."

The full text of §53315 shows that what the Legislature had in mind was avoiding frustration of CFD financing due to some "error" or "irregularity" in procedure, which is not what this case is about. Rather, we are here concerned with what is effectively a question of jurisdiction or the fundamental grant of power to a CFD.

The principle of "liberal construction" is not a license to rewrite a statute. *Dept. of Motor Vehicles v. Industrial Accident Comm.*, (1948) 83 Cal.App.2d 671, 677 ("Liberality of interpretation cannot go the length of accomplishing an end not within the terms of the statute, however desirable such a result might be in the view of the commission or of the court."); *Richardson v. City of San Diego*, (1961) 193 Cal.App.2d 648, 650 (notwithstanding liberal

construction, "[a] court may not rewrite the statute nor insert words in a statute under the guise of interpretation, nor enlarge the plain provisions of a law.").

And Section 53315 only directs liberal construction "in order to effectuate [the Act's] purposes." The Act's purposes are to allow the financing of certain carefully specified "services" or "facilities," under §§53313 and 53313.5 respectively. Where in the Act may it be divined that one of its purposes is to finance an eminent domain lawsuit? To merely *assume* that is one of the "purposes" of the Act is to assume the result that Casitas MWD desires.

In analyzing whether the enabling language of §53313.5 authorizing a CFD to finance "the purchase, construction, expansion, improvement, or rehabilitation of any real or other tangible property with an estimated useful life of five years or longer" may be stretched to encompass the financing of an eminent domain lawsuit, the unique nature of eminent domain must be taken into account. Eminent domain has been characterized as the sovereign's "most awesome grant of power" (*City of Oakland v. Oakland Raiders*, (1985) 174 Cal.App.3d 414, 419), and **if the power of eminent domain is not expressly authorized by law, it will not be held to exist**. (*City of Oakland v. Oakland Raiders,* (1982) 32 Cal.3d 60, 64: "In contrast to the broad powers of *general* government however, 'a municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law.' [citations]")

Casitas MWD incorrectly states that "even GSW would have to acknowledge that the term 'acquisition' includes acquisition by eminent domain." (Opp, at 14:1-2.) Golden State acknowledges no such thing, because it is not true. In *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, the Court held that a statute granting the power to "acquire lands" does not confer the power of eminent domain, explaining:

> "A statutory grant of eminent domain power must be indicated by express terms or by clear implication. **Statutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is resolved against the entity.**" (*Id.* at 282-83; emphasis added)
>
> . . .
>
> ". . . the grant of power in paragraph 5 of section 8 of the Act '[t]o acquire lands ... to construct, maintain, and operate any or all works or improvements within or without the district necessary or proper to carry out any of the objects or purposes

of this act ...' does not expressly authorize the District's exercise of eminent domain in this case." (*Id.* at 284)

. . .

"[L]anguage purporting to define the eminent domain powers of a municipal corporation is to be strictly construed, **and the power is denied where there is any fair, reasonable doubt concerning its existence**. (*Harden v. Superior Court, supra,* 44 Cal.2d at p. 641.)" (*Id.* at 285; emphasis added)

The *Kenneth Mebane* decision quoted an older decision explaining why the power of eminent domain must be so carefully circumscribed:

" 'A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.' " (*Kenneth Mebane,* 10 Cal.App.4th at 286, quoting *City of Los Angeles v. Koyer* (1920) 48 Cal.App. 720, 725)

Thus, where eminent domain is involved, strict construction is the rule.[2]

Moreover, the law requires that the Mello-Roos Act's basic grant of taxing power to a CFD must be strictly construed. Like an assessment district, a CFD is a mere *taxing district,* not a separate municipal entity. Long ago, in *Mulville v. City of San Diego* (1920) 183 Cal. 734, the Supreme Court invalidated a bond measure by an assessment district because it was attempting to finance works not allowed by the terms of the Assessment District Act of 1915, explaining:

"**A liberal construction does not mean enlargement of the plain provisions of the law**. [citation]. It is clear that the words 'public improvement work,' and 'public utility,' as used in the statute do not refer to intangible benefits to be derived from a public work, but they obviously designate a material structure which is to be *constructed* or *acquired.* (Id. at 739, boldface added)

. . .

"Our conviction of the correctness of the above construction is reinforced by the fact that we are not dealing with a municipality or *quasi*-public corporation, for **the municipal improvement district authorized by the statute is nothing more than a *taxing* district within a municipality. The power of a municipality to form such a district arises solely from legislative grant. This grant, being a delegation to municipalities of control over local assessment proceedings, must be closely construed**, for it is well settled that the power of special taxation is restricted to and can extend no further than the plain language of the legislative enactment upon which it is based." (*Id.* at 740, boldface added)

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[2] Which is why the eminent domain power needs to be explicit. Note, for example, the detailed statutes that circumscribe Casitas MWD's own power to use eminent domain. (Water Code §71693 and §71694)

Casitas's CFD is nothing more than a taxing district formed by a municipal corporation. The *Mullville* decision is still the law, and it requires "close construction" of the Mello-Roos Act's grant of financing and taxing authority.

Under the applicable framework of strict construction, the authorization in §53313.5 to finance the "purchase" of certain assets cannot be stretched to include financing an eminent domain lawsuit. Casitas MWD cites *People v. Superior Court of San Bernardino County,* (1937) 10 Cal.2d 288 for an expansive interpretation of the word "purchase." That case decided whether the *title* of a statute, which contained the word "purchase," complied with a state constitutional provision concerning the content of statutory titles.[3] The opinion thus offered its observations about the expansive meaning to laypersons of the word "purchase," as used in the title of the statute. The case is irrelevant, as it did not involve the question of whether the eminent domain power had been conferred by the Legislature by use of the word "purchase."

Rather, the Supreme Court later decided that question in *Harden v. Superior Court,* (1955) 44 Cal.2d 630, in which the Court was called upon to decide whether a statute authorizing the city to "purchase, lease, or receive" property outside its boundaries thereby included the power to take property outside its boundaries by eminent domain. The *Harden* Court focused on the word "purchase," applied the rule of strict construction vis-à-vis a grant of eminent domain power, and held that ". . .if we are to follow the rule of strict construction. . . **we cannot say that the word 'purchase' expressly authorizes the city to take private property** for off-street parking outside its boundaries **by eminent domain proceedings**." (*Id.* at 642; emphasis added) The *Harden* decision thus held that the power of eminent domain is not conferred by a statute that allowed for the "purchase" of property.

Next, Casitas MWD argues that a CFD should be deemed to have the power to finance an eminent domain lawsuit because the Mello-Roos Act and the Municipal Water District Law of 1911 are "in pari material [sic] and should be construed together." (Opp Brief at 10:23-24) The argument doesn't pass the straight face test. Can the CFD finance the mere *leasing* of property, or

[3] The actual statute in question unquestionably conferred the power of eminent domain, permitting the commission to "institute condemnation proceedings for the acquisition of the site." (*Id.* at 291)

the payment of DMV fees, since Casitas MWD itself has the power to spend money on such things? The doctrine of in pari materia applies when two statutes "relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object." *Lexin v. Superior Court*, (2010) 47 Cal.4th 1050, 1091, citing *Walker v. Superior Court*, (1988) 47 Cal.3d 112, 124, fn. 4. However "different statutes should be construed together ***only*** if they stand in pari materia . . . [and] where the same subject is treated in several acts having different objects the statutes are not in pari materia." *Walker*, 47 Cal.3d 112, 124, fn. 4 (emphasis added).[4] Here, there is no indication that the financing restrictions in the Mello-Roos Act were meant to cover the same subject as Water District Law, passed 70 years earlier, nor of all the various other statutory schemes that govern municipal entities capable of forming CFDs.

Golden State's Opening Brief demonstrated that the initial version of Assembly Bill 3564 did expressly confer the power to acquire property by eminent domain, but the power was eliminated from the version of the Act that was adopted. The Opposition Brief argues that since the initial version was scrapped in its entirety, the Legislative history with reference to the initial version of the Act is not relevant. The original version of Assembly Bill is relevant to show that the Legislature knew well how to draft statutory language that expressly allowed the financing of acquisitions by eminent domain. It could have included—but did not—such express language in the version of the Mello-Roos Act it adopted.

Casitas MWD argues that 1986 amendments to the Mello-Roos Act and the Subdivision Map Act show that it is "beyond question the Legislature *did* intend to authorize the use of CFD financing for the condemnation of property." (Opp. Brief at 18:5-7). Wrong. First, there was no amendment to the Mello-Roos Act in 1986 which in any way implicates, much less expresses, that CFDs are presumed to have the power of eminent domain. What the Legislature did was to

[4] The Supreme Court's analysis in *Lexin* demonstrates the type of interwoven statutory relationship necessary for the doctrine to apply. In *Lexin*, the Court held Section 1090 and Section 87100 *et. seq.* of the Government Code were in pari materia because they "are two of the most important statutes in California addressing the problem of conflict of interest by public officials and employees. They both deal with a relatively small class of people, public officers and employees, and share the same purpose or objective, the prevention of conflicts of interests, and hence can be fairly said to be in pari materia." *Lexin*, 47 Cal.4th 1050; *See also, People v. Chevron Chemical Co.*, (1983) 143 Cal.App.3d 50, 56 (rejecting application of the in pari materia doctrine because the statutes at issue were from separate codes, passed 93 years apart, and had different albeit similar goals).

amend §66462 of the Subdivision Map Act to add CFDs (which were then relatively new) to the list of methods by which a subdivider could agree to finance the completion of improvements conditioned by a tentative map. But §66462 does not deal with the acquisition of offsite property (much less condemnation), as Casitas MWD asserts. (Opp. Brief at 18:16-19) Section 66462.5, a different statute, deals with the acquisition of offsite property—and that statute makes absolutely no mention of Mello-Roos financing. In short, neither the Mello-Roos Act nor §§66462 or 66462.5 of the Subdivision Map Act say or imply that CFDs may be used to finance a taking by eminent domain.

2. FINANCING THE ACQUISITION OF GOLDEN STATE'S INTANGIBLE ASSETS IS NOT PERMITTED BY THE MELLO-ROOS ACT

The California Supreme Court has explained that the *primary* asset acquired in the condemnation of a utility may well be the utility's *intangible* right to do business:

> "**[W]hen a private utility is taken in eminent domain by a municipality or utility district . . . the most valuable property acquired by condemnation of a utility may be intangible, namely, its franchise or right to do business.** Indeed, the primary value of any *tangible* assets, real or personal, acquired in such a taking may well be that they serve that primary *intangible* right." (*City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 68, boldface added; italics in original.)

So it is no accident that Casitas MWD has sought to authorize the acquisition of Golden State's intangible property. Casitas MWD admits that it intends to pay Golden State "for the value of its future profits," whether under the rubric of lost goodwill or otherwise. (Opp. Brief, 24:7-8.) Indeed, Casitas MWD proudly asserts its intent to acquire "*every* property interest GSW has in its Ojai service area." (Opp. Brief, 9:24, emphasis in original)

Casitas MWD attempts to complicate Golden State's argument about intangible property, in an effort to obfuscate a fundamental flaw in the resolutions that are being challenged in this proceeding. It's really quite simple: The Mello-Roos Act *only* allows the financing of "**real or other tangible property**." (Govt Code §53313.5, emphasis added.) Yet the List of Authorized Facilities attached to and incorporated into Casitas MWD's Resolution No. 13-12 (RJN 268-283) specifically purports to authorize the financing of "[a]ll costs incurred by the District to acquire

the real, personal, **and intangible property** and property rights" of Golden State's Ojai Service Area. (RJN 272, emphasis added.) Casitas MWD's resolution violates the Mello-Roos Act by its attempt to finance the acquisition of **intangible property** — which is ***not*** permitted by the law.

As to intangible property, the Mello-Roos Act and the Eminent Domain Law are diametrically opposed. The power of eminent domain clearly extends to intangible property. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.*, (1999) 73 Cal. App. 4th 517, 532: "We recognize the power of eminent domain extends beyond real property, to personal and even intangible property.") By contrast, the Mello-Roos Act carefully permits the financing of the purchase, construction, expansion, improvement, or rehabilitation only of "any real or other tangible property with an estimated useful life of five years or longer." (Govt. Code §53313.5.) Casitas MWD cannot rewrite the statute to pretend that when the Legislature said "real or other tangible property" it really meant to include "intangible property" as well.

Casitas MWD tries to deflect attention away from its dereliction by asserting that Golden State has provided no evidence that it has any water rights or goodwill. (Opp. Brief, 23:18.) Of course Golden State has these rights, which Golden State would have to prove through evidence if this were an eminent domain case. But now is not the time for such evidence; this is not an eminent domain action. This is a proceeding contesting the validity of resolutions adopted by Casitas MWD — resolutions which expressly purport to authorize the financing of intangible property, in violation of the Mello-Roos Act. Casitas MWD argues that because it may never actually condemn intangible property of Golden State, the authorization to finance the acquisition of such property should be overlooked. That is like saying that a CFD could authorize the financing of 1,000 pickles in its resolution of formation and then defeat a challenge to the resolution by stating it might never actually acquire those pickles after all, or that the cucumber farmer failed to prove next year's harvest would come in. Casitas MWD cannot authorize the financing of the purchase of intangible property because the Mello-Roos Act prohibits it from doing so.

Casitas MWD also argues that its "List of Authorized Facilities" is not subject to judicial

review because the Casitas MWD Board found the List to be "valid" and such a finding is "final and conclusive" pursuant to Govt. Code §53325.1(b). (Opp. Brief, 8:7-9). Relying on *Meaney v. Sacramento Housing & Redevelopment Agency*, (1993) 13 Cal. App. 4th 566, it argues that the "final and conclusive" language set forth in §53325.1(b) means "the evidentiary basis for the findings is beyond the reach of judicial scrutiny." (Opp., 9:3-4) But Casitas MWD's citation to *Meaney* is incomplete and misleading. The full quotation states:

> "We read the provision making the determinations 'final and conclusive' to mean that the evidentiary basis for the findings is beyond the reach of judicial scrutiny; the courts may not inquire whether the findings are supported by substantial evidence or by any evidence at all in the administrative record. **This conclusion, however, does not preclude judicial review of the procedures followed by the agency and the local legislative body in making the determinations or of the question whether the determinations comply with [the statute].**" (*Meaney*, 13, Cal.App.4th at 578-79.[5])

Thus, while the *evidentiary basis* for Casitas MWD's findings in its Resolution adopting the List of Authorized Facilities (RJN, Ex. 8) may be beyond the scope of judicial scrutiny, the question of whether the content of the List of Authorized Facilities complies with the law is a matter that can be reviewed.

CONCLUSION

The Mello-Roos Act does not authorize the financing of an eminent domain action, much less one designed to seize all of the tangible and intangible assets of an operating utility business, lock, stock and barrel. Accordingly, the resolutions in question should be invalidated.

Dated: June 3, 2013

MANATT, PHELPS & PHILLIPS, LLP

By: _____

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[5] Casitas MWD also cited to *New Davidson Brick Co. v. County of Riverside*, (1990) 217 Cal.App.3d 1147. That case contributes nothing to the analysis. It dealt only with a provision of the Mello-Roos Act that involves the *timing*, not the substance, of legal challenges.

PROOF OF SERVICE

I, Carlyn Falls, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On June 3, 2013, I served the within:

GOLDEN STATE WATER COMPANY'S REPLY BRIEF RE HEARING ON INVALIDATION OF CASITAS MWD'S MELLO-ROOS ACT FINANCING PLAN

on the interested parties in this action addressed as follows:

See attached Service List

X **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

(BY OVERNIGHT MAIL) By placing such document(s) in a sealed envelope, for collection and overnight mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of overnight service mailing, said practice being that in the ordinary course of business, correspondence is deposited with the overnight messenger service, FedEx, for delivery as addressed.

X **(BY ELECTRONIC MAIL)** By transmitting such document(s) electronically at __:__ _._. from my e-mail address, cfalls@manatt.com at Manatt, Phelps & Phillips, LLP, Los Angeles, California, to the person(s) at the electronic mail addresses listed above. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 3, 2013, at Los Angeles, California.

Carlyn Falls

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