S226622

IN THE SUPREME COURT OF CALIFORNIA

Golden State Water Company,
Plaintiff and Appellant,

vs.

Casitas Municipal Water District, et al.,
Defendants and Respondents.

After a published decision from the California Court of Appeal
Second Appellate District; Division Six, No. B255408

On Appeal from a Judgment of the Ventura County Superior Court
No. 56-2013-00433986-CU-WM-VTA
The Honorable Kent M. Kellegrew

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Respondent Casitas Municipal Water District (Casitas MWD) insists that the issues in this case are "of ***very limited importance statewide*** . . ." (Ans., p. 2; emphasis added.) Perhaps Casitas MWD should check with its own Amici Curiae. Four umbrella organizations — representing some ***2,000 local government entities*** — banded together to present the views "of their memberships" to the Court of Appeal precisely because (in their words) the issues have "statewide significance" warranting the appearance of ***all*** of them collectively to make their voices heard. (Application for Leave to File Amici Curiae Brief, p. 3.)[1]

Suffice it to say that the issues are important. As they are central to a major taxation scheme for financing large capital projects, they warrant this Court's attention before the opinion of the Court of Appeal is able to harden into precedent that expands the Mello-Roos Act ("Mello-Roos" or "the Act") beyond the plain words that the Legislature chose for it. After all, when the Legislature writes plainly, its words should be enforced as written. (*Ceja v. Rudolph & Sletten, Inc.* [2013] 56 Cal.4th 1113, 1119.) And, as Casitas MWD agrees, the issues present matters of first impression. (Ans., p. 1 ["True enough"].)

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[1] The Amici are the Association of California Water Agencies (450 members), the League of California Cities (472 members), the California State Association of Counties (58 members), and the California Special Districts Association ("in excess of 1000" members). That must account for virtually all local government entities in the State.

I.
THE ISSUES PRESENTED FOR REVIEW ARE IMPORTANT

As noted, a large group of governmental amici told the Court of Appeal how important the issues in this case are, terming their ability to use Mello-Roos taxes as an eminent domain financing mechanism (although their brief cited no illustrations of its actually having been so used) as "critical." (Application, p. 3.) Much of their brief was taken up lamenting that the sky would surely fall if Mello-Roos taxes were not available to fund eminent domain. They asserted that failure to approve use of the Act to fund eminent domain:

- "would eviscerate the Act." (AC Application 3.)
- "threaten to undermine . . . the viability of the Act itself." (AC 1.)
- "undercut [the Act's] ability to finance right-of-way acquisitions . . ." (AC 1.)
- "undermine the purposes of the Act." (AC 6.)
- "effectively eviscerate if not nullify the purposes of the Act generally . . ." (AC 7.)
- "interpret the Act in a manner that undermines its objectives." (AC 17.)

Golden State, of course, disagrees with these characterizations. But the intense difference of opinion shows the importance of the issues raised by this case, and their status as being more than the local issues asserted by Casitas MWD (see Ans., p. 2).

Moreover, both Casitas MWD and the Governmental Amici insisted that Mello-Roos is the "only viable" method by which to finance infrastructure acquisitions. (See Slip Op., p. 4.) Plainly, that is wrong, as the presence of other modes demonstrates. (See Pet. for Rev., pp. 11-12.) Nonetheless, if they are correct, then such an important financing vehicle is worthy of this Court's attention.

In addition to the Governmental Amici, others immediately recognized the importance and potential reach of the opinion below as soon as it was issued:

> "The case may ***open the door*** to a ***previously untapped*** — or at least ***questionable*** — method to finance condemnation actions supported by the creation of communities facilities districts, and ***has the potential for widespread effects***." (Bradford B. Kuhn & Rick Rayl, *Scope of Calif.'s Mello-Roos Now Includes Eminent Domain*, (emphasis added) http://www.law360.com/articles/646106/scope-of-calif-s-mello-roos-now-includes-eminent-domain)

> "From a broader perspective, the court's holding has potentially ***opened the door*** to use Mello-Roos financing for a variety of purposes — including the ***takeover of any private utility service***. (*Id.*; emphasis added.)

The issues here are important. They deserve this Court's attention.

II.
EVEN THOUGH THIS CASE PRESENTS FIRST IMPRESSION ISSUES UNDER THE MELLO-ROOS ACT, THE COURT OF APPEAL'S OPINION CONFLICTS WITH OTHER OPINIONS ON KEY LEGAL ISSUES

Acknowledging that this case involves first impression Mello-Roos issues, not considered by any courts during its 30-year existence, Casitas MWD asserts that "review by this Court is not needed to resolve any conflicts . . . ." (Ans., p. 1.) Wrong. As shown in the Petition for Review, the opinion below creates some serious conflicts.

— Item: When the Court of Appeal held that the word "purchase" included *compulsory* acquisition by eminent domain, it created conflict with (indeed, refused to follow) this Court's decision in *Harden v. Superior Court* (1955) 44 Cal.2d 630, 642, where this Court concluded:

> "***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." (Emphasis added.)

In rejecting this Court's *Harden* decision, the Court of Appeal said that *People v. Superior Court* (1937) 10 Cal.2d 288 was controlling. But that cannot be so because, in that case, the statute ***expressly*** said that eminent domain could be used to accomplish its purpose. Thus, in addition to creating conflict with *Harden*, the Court of Appeal created confusion by comparing Mello-Roos — which contains no mention of eminent domain — to a case that expressly uses that phrase, while rejecting a case that does not.

Harden should control here, not be shunted aside. If it does not apply, then that conclusion needs to come from this Court itself to eliminate any confusion about the interplay of these three cases.

— Item: When the Court of Appeal held that the word "or" actually meant "and," it created conflict with this Court's clear conclusion in *In re Jesusa V.* (2004) 32 Cal.4th 588, 622-623 that such an application of "or" was "unnatural" and should be avoided.

— Item: The Court of Appeal's perversion of the word "or" creates confusion in an area of the law that had appeared clear, i.e., the Legislature's standard use of the word "or" to signify that each of the words in a series was used in a disjunctive sense from the others. (See, e.g., statutes quoted at Pet. for Rev., p. 14, fn. 8.)

— Item: In broadening the application of the Mello-Roos taxing power, the Court of Appeal rejected this Court's holding in *Mulville v. City of San Diego* (1920) 183 Cal. 734. *Mulville* bears a strong kinship to the case at bench. In addition to the fact that the case dealt with a statute authorizing the funding of "a material structure," rather than "intangible benefits," the entity imposing the tax there was a municipal improvement district, not the municipality itself, just as here the taxing entity is the CFD, not Casitas MWD itself. This Court's words there resonate clearly here:

> "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 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." (*Mulville*, 183 Cal. at 740; emphasis added.)

III.
THE COURT OF APPEAL MISAPPLIED THE "LIBERAL CONSTRUCTION" PROVISION OF MELLO-ROOS AND CREATED A PRECEDENT THAT RE-WRITES THE ACT

Recognizing that the plain words of the Act do not authorize the result it reached, the Court of Appeal said it relied on a portion of Mello-Roos calling for "liberal construction." Casitas MWD's Answer supports that reliance. They are wrong. At its most basic, "liberal construction" requires neither abject deference nor relinquishment of the judiciary's time-honored (at least since *Marbury v. Madison* [1803] 5 U.S. 137) function of reviewing statutes to determine their legality. And there is more.

First, Mello-Roos was not designed to finance any and all projects desired by municipalities, but only "to effectuate [the Act's] purposes." (Govt. Code § 53315.) The "purpose" of the Act was neither to effectuate eminent domain litigation nor to finance anything that a municipality chose to do, including the takeover of an existing water utility. As the Act itself specifies, it "provides an alternative method of financing ***certain*** public capital facilities and services" (Govt. Code § 53311.5 [emphasis added]) — specifically, as to facilities, ***only*** those that involve the "purchase . . . of any real

or other tangible property with an estimated useful life of five years or longer" (*id.*).

Second, in a similar vein, there is nothing in the Act showing evident legislative purpose to facilitate the use of eminent domain by paying ***all costs*** of potentially protracted and difficult litigation. Yet that also seems to be built into the fabric of the Court of Appeal's opinion. Nowhere in the statute can any such payment for lawyers' and expert witness' litigation fees, abandonment, and goodwill damages and the like be seen. The closest the statute comes is to authorize the payment of minor costs (which it characterizes as "incidental" [Govt. Code § 53313, subd. [c]). From there, the Court of Appeal expanded the concept of "incidental" beyond all recognition. Eminent domain litigation can be expensive, especially where expensive property is being condemned. Here, where even Casitas MWD believed it necessary to obtain authorization to float $60 million in bonds to cover its costs, the litigation costs will be proportionately high.

It simply beggars credulity to believe that the Legislature would use a term like "incidental" costs to cover everything from office supplies to all potential damage awards and costs in a substantial litigation where the parties are tens of millions of dollars apart on their opinions of valuation. Even Casitas MWD's list of expenses to be financed includes such things as Golden State's lost business goodwill, relocation expenses, pre-condemnation damages,

intangible property rights,[2] along with the property owner's litigation costs and any other damages that might arise. (2-AA-359.)

Commentators noted this abuse of the word "incidental" soon after the opinion was filed:

> "Finding Golden State's 'goodwill' and 'water rights' as ***incidental*** expenses ***seems like a stretch*** depending on the value of these items. What if, for example, the target company's water facilities were worth $10 million, but its water rights and goodwill (which is essentially the value of the future income stream of customers' payments for its water services) were worth $100 million? ***Would those massive intangible assets that dwarf the value of the water facilities truly be 'incidental' expenses?***" (http://www.law360.com/articles/646106/scope-of-calif-s-mello-roos-now-includes-eminent-domain.)

Third, the plain words of the Mello-Roos provision calling for "liberal construction" do not provide *carte blanche* for ***any*** sort of statutory expansion that a court or litigant might think is desirable, but limit the concept to ***procedural***, not substantive issues:

> "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." (Govt. Code § 53315; emphasis added.)

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[2] In the teeth of a statute expressly limiting its reach to "real or other tangible property . . . ." (Govt. Code § 53313.5.)

Reading the "liberal construction" provision in context shows that the Legislature was concerned with some scrivener failing to dot all the procedural "i"s or cross all the procedural "t"s in the process of preparing the paperwork to implement the taxation and financing. That is not this case. The issues here go to the heart of the Mello-Roos financing structure and the specific uses for which the Act may be invoked, i.e., the "jurisdiction" of Casitas MWD to proceed.

Fourth, the parade-of-horribles conjured by Casitas MWD (Ans., pp. 11-12) actually demonstrates why Mello-Roos is not appropriate for this kind of project. Rather, the Act was designed to aid in the provision of major capital improvements to newly developing subdivisions, i.e., areas where title was essentially held by a single developer who would later spread the cost to new home purchasers:

> "The Mello-Roos Act is an important feature of the local fiscal landscape, providing local officials with a key tool for accumulating the public capital needed ***to pay for the public works projects that make new residential development possible.***" (*Azusa Land Partners v. Dept. of Industrial Relations* [2010] 191 Cal.App.4th 1, 24, fn. 12; emphasis added.)

Finally, the court below went beyond a "liberal construction." It engaged in a substantial substantive re-write. That is something the courts have repeatedly said they cannot do. No court is a stranger to some litigant asking for "liberal construction" that is, in reality, a request for a statute to be rewritten. Nor is the tactic a new one.

Nearly a century ago, this 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. In a case very much like this one, this Court explained that "liberal construction" does not mean changing the statute:

> "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*." (*Mulville v. City of San Diego* [1920] 183 Cal. 734, 739; emphasis, the Court's.)

"Liberal construction" cannot save the Court of Appeal's strained reading of Mello-Roos, regardless of whether anyone believes that the statute might have been better if written that way. (See *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."].)

CONCLUSION

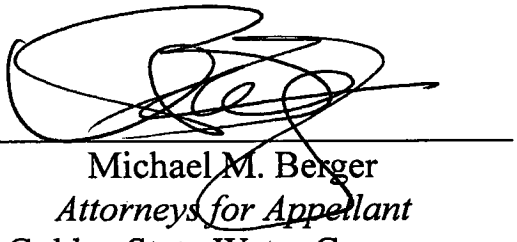
The Court of Appeal failed to apply Mello-Roos as clearly written. It has expanded the Act's reach far beyond anything the Legislature contemplated. That much is clear by examining the words the Legislature used.

Golden State prays that review be granted and the decision be reversed.

June 17, 2015

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By 

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CERTIFICATE OF WORD COUNT
California Rule of Court 8.504(d)(1),(3)

Pursuant to California Rule of Court 8.504(d)(1), I certify that this Petition for Review contains **2,404** words (as counted by the Microsoft® Office Word 2003 word processing program used to generate this brief), not including the tables of contents and authorities, the caption page, signature blocks, or this certificate of appellate counsel, and therefore complies with the 4,200 word limit.

June 17, 2015

By _____
Michael M. Berger

PROOF OF SERVICE

I, BESS HUBBARD, declare: I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 W. Olympic Blvd., Los Angeles, California 90064.

On **June 17, 2015**, I served the documents described as:

REPLY TO ANSWER TO PETITION FOR REVIEW

on the interested parties in this action addressed as stated on the Service List below.

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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 firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed on **June 17, 2015**, at Los Angeles, California.

BESS HUBBARD

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