No. B255408

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

GOLDEN STATE WATER COMPANY,
Plaintiff and Appellant,

vs.

CASITAS MUNICIPAL WATER DISTRICT; CASITAS MUNICIPAL WATER DISTRICT COMMUNITY FACILITIES DISTRICT NO. 2013.1 OJAI; ALL PERSONS INTERESTED IN THE VALIDITY OF CASITAS MUNICIPAL WATER DISTRICT RESOLUTIONS NOS. 13.12, 13.13 AND 13.14 ET AL.,
Defendants and Respondents.

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

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, Plaintiff and Appellant knows of no entity or person that must be listed.

Respectfully submitted,

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By: 

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INTRODUCTION

In this statutory construction case, Respondent Casitas MWD is charged with abusing the language of the enabling statute in the State's Mello-Roos Act (Govt. Code § 53313.5). Invoking Mello-Roos, it convinced a large majority of voters at an Ojai election to agree that it should float $60 million in bonds so it could condemn all of the assets of Appellant Golden State Water and take over its business of supplying water to most of Ojai.

The fundamental charges against Casitas MWD's scheme are straightforward:

—*Item:* Although the enabling statute restricts the Act to financing the acquisition of any "real or other *tangible* property," Casitas MWD said that it plans to use the Mello-Roos bond proceeds to finance the acquisition of *intangible* property.

—*Item:* Although the enabling statute restricts the Act to financing the "purchase" of real property, Casitas MWD says it plans to use the bond proceeds to finance the *condemnation* of property, including all the potential costs and expenses of protracted eminent domain litigation — even the possible costs associated with abandoning the condemnation.

One expected Casitas MWD to explain in its Respondent's Brief how its scheme is not — by definition — beyond the bounds of the Act's enabling statute. If it did not (or could not) do that, its scheme is invalid and the judgment would need to be reversed.

However, where clarity was needed, Casitas MWD provided only equivocation and avoidance. The questions remain without substantive response. In brief summary, here is how Casitas MWD purported to address the central defects in its scheme.

First, Casitas MWD (a) simply *denies* that it intends to acquire any intangible property (e.g., RB 10), despite the fact that its formal resolution says that is precisely what it intends (3-AA-498); and (b) ducks the issue by saying that Golden State has not proved that it owns any intangible property (RB 10, 50), although Golden State has no such evidentiary burden at this stage of the proceedings. All that is at issue here is the *facial validity* of Casitas MWD's formal documentation providing that it *will* use Mello-Roos financing to condemn "intangible" property. (*Post*, pp. 17-20.) In that context, this court must take Casitas MWD's word (as set forth in the documents establishing its Mello-Roos district) that it intends to finance acquisition of intangible property and decide whether Mello-Roos allows that.

Second, Casitas MWD plays sleight-of-hand with the statute's language specifying the financing of "purchases." It evades the fact that Mello-Roos states that it is designed to finance a "purchase" by urging that its own organic law (Wat. Code §§ 71693, 71694) grants it the power of eminent domain (something Golden State never contested [see AOB 2]). The question is not the power to *condemn* but the power to *finance* the condemnation under a statute that applies only to a "purchase." (*Post*, pp. 20-30.)

The issues presented to this Court all involve application of a plainly worded statute. As Justice Frankfurter put it (albeit much more emphatically), the solution is to "read the statute!" (Quoted in *In re England* [D.C. Cir. 2004] 375 F.3d 1169, 1182; see also AOB 3.)

Rather than deal with these real issues, Casitas MWD chose to spend its time on diversionary tactics, like raising an issue on which the trial court ruled against it but on which it did not appeal, i.e., the trial court's exercise of discretion to hold that Golden State had "good cause" for the way that it

handled the republication of summons following issuance of a stay. Nonetheless, out of an abundance of caution, Golden State will explain why that is a non-issue.[1]

A FEW WORDS ABOUT THE FACTS

Before dealing with the substance of Casitas MWD's arguments, some factual corrections are in order.

First, Casitas MWD says it needs to "correct GSW's assertion that CMWD necessarily intends to use Mello-Roos financing to pay for *intangible* property owned by GSW." (RB 10 [emphasis in original].) This is a curious statement. Golden State based its "assertion" on the official "List of Authorized Facilities" adopted by the Casitas MWD Board as describing precisely what the funds raised by its Community Facilities District (CFD) were to be used for (as required by Govt. Code § 53321, subd. [c].). That document (one of the core documents required to establish a Mello-Roos CFD) says in its first line that Casitas MWD intends to use the funds "to acquire the real, personal, and *intangible* property and property rights" owned by Golden State. (3-AA-498 [emphasis added].)

One is entitled to ask whether Casitas MWD misrepresented the facts when it formally resolved to finance acquisition of Golden State's "intangible" property or is it misrepresenting the case to this Court now.

Second, Casitas MWD says: "Contrary to GSW's assertion (GSW Brief, p. 5), CMWD does not want—or need—to acquire GSW's 'service area.'" (RB 4.) Really? That is diametrically contrary to what Casitas MWD told Ojai's voters while convincing 87% of those who went to the

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[1] The Appellant's Reply Appendix contains only materials responsive to this issue that were omitted from the Respondent's Appendix.

polls to approve the attempted takeover. Here is Casitas MWD's ballot presentation:

> "Shall Casitas Municipal Water District Community Facilities District . . . incur indebtedness and issue bonds . . . to finance *acquisition of Golden State Water Company's Ojai service area* . . . ?" (3-AA-524 [emphasis added].)

Again, one is entitled to ask whether Casitas MWD misrepresented the case to the voters then or is it misrepresenting the case to this Court now. Any misrepresentation to the voters is particularly important in light of Casitas MWD's rather callous post-election observation that "[t]he voters have assumed the risk." (RB 49.)

Third, Casitas MWD actually began fudging the facts two years ago, when it drafted the foundation documents for its Mello-Roos invocation. Predicate to formation of a CFD was the requirement to describe the "facilities" to be bought with the bonded funds. (Govt. Code § 53321, subd. [c].) The "List of Authorized Facilities" attached to both Casitas MWD Resolutions 13-8 and 13-12 does not — contrary to the statutory directive — "list" any "facilities" to be acquired at all. Instead, it describes the "costs" that Casitas MWD expects to incur in the process, including *all* of the anticipated costs in the eminent domain litigation against Golden State — even the costs that would be incurred if the condemnation either failed in court legally or was abandoned by Casitas MWD because the price turned out to be too high. (2-AA-359; 3-AA-498; [quoted at AOB 7-8].) Starting with the title ("List of Authorized Facilities"), Casitas MWD evaded the Mello-Roos requirements by calling such things as personal property, intangible property and property rights, damages for loss of business goodwill, attorneys' fees, expert witness costs and the like the "facilities" for which Mello-Roos funds would be used. Casitas MWD needs to be held to the terms of the statute that it invoked, rather than

redefining standard English words to suit its desire. Nothing in the Respondents' Brief defends this transmogrification of the word "facilities."

Fourth, Casitas MWD asserts that, if this Court accepts Golden State's argument that Mello-Roos financing cannot be used for "intangible" property, that would severely hamper government agencies in their ability to acquire property. (RB 53.) There are two short responses. (1) If there is a problem resulting from the unequivocal language of the statute, the answer is to ask the Legislature to adjust the statute, not ask the courts to add words that the Legislature did not include. (See AOB 23-24; *post*, pp. 33-34.) In fact, however, there is nothing wrong with Mello-Roos. As shown in the following pages, it was designed for a purpose and it finances that purpose. That it may not cover everything that Casitas MWD would like it to finance is not the Legislature's fault, but the fault of an overreaching agency. (2) Mello-Roos is not the only way to finance property acquisition. It is merely one alternative.[2] If — as written — it is not the right tool for the job, then Casitas MWD needs to consider its alternatives. That, in its General Manager's words, Casitas MWD "is unable and *unwilling* to commit other possible sources of funds toward the acquisition . . ." (2-AA-409; emphasis added) cannot justify its unilateral re-write of the statute.

Fifth, Casitas MWD asserts that "contrary to GSW's allegation (GSW Brief, pp. 2, 5), CMWD does not "aim to invoke its eminent domain power to oust [GSW] by the forced acquisition of its property." (RB 9.)

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[2] Other evident alternatives include issuing its own revenue bonds (authorized by Wat. Code § 71853) or forming an Improvement District to issue bonds (authorized by Wat. Code § 71870). We are sure that Casitas MWD can come up with other alternatives — even though it may assert that they are not "practical." (RB 3, n. 1.)

Of course, it does. (1) As noted *ante*, the "List of Authorized Facilities," enumerating the things Casitas MWD says it intends to finance with its Mello-Roos funds, is replete with items "incurred with respect to any eminent domain action" (2-AA-359) — going so far as to cite statutes from the Eminent Domain Law regarding various elements of required compensation (2-AA-359). (2) That is an evident recognition that Golden State's property is not for sale. (See AOB 2, 5.) (3) Casitas MWD has acknowledged as much, both in this Court (see RB 9 and 9, n. 3) and the trial court (RT 23 ["it appears an eminent domain action will be necessary"].) Its denial here is simply a rejection of reality that does not aid in resolving this matter.

Finally, while conceding that it really does not know what the outcome of an eminent domain valuation trial would be (RB 6 ["best estimate"]; 50 ["no idea" what contractual water rights are involved]; 2-AA-411 ["not yet conducted a detailed inspection of GSW's physical plant and facilities"]), Casitas MWD nonetheless insists that the Ojai customers would be financially better off after it pays the eminent domain judgment for Golden State's assets and takes over the business (RB 5-6). This assertion, however, has neither factual nor legal basis. Casitas MWD's theory proceeds on the assumption that, although it does not know the price, it is confident that the price it would have to pay is less than the projected bond issuance. But the only analysis in the record is a financial projection based on Golden State's "rate base" that is used by the PUC in determining rates. Casitas MWD used the "rate base" as a surrogate for fair market value. (2-AA-410.) That, however, is an improper method of determining fair market value.

Casitas MWD's "rate base" assumption is unsupported in either its brief or in the record. Not surprising. It is black-letter law that a regulatory

rate base has little to do with the fair market value of a regulated utility. (See, e.g., *Petition of City of Riverside* [1973] 74 CPUC 563 [use of rate base "has little or no relationship to present market value"]; *Onondagha County Water Auth. v. New York Water Service Corp.* [N.Y. App. Div. 1955] 139 N.Y.S.2d 755 ["The lack of similarity between the original cost used in rate-making and the 'just compensation' for the purpose of taking needs no comment"]; 8 Nichols on Eminent Domain § G14A.06 ["A utility valuation, by whatever approach, that is premised on a regulatory rate base that excludes significant utility assets usually results in less-than-just compensation for all property taken"].). Thus, just compensation in eminent domain is bound to be a multiple of rate base (or book value).

As these illustrations demonstrate, the Court should view Casitas MWD's statements of "fact" with care and skepticism.

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO FIND "GOOD CAUSE" FOR THE TIMELINESS OF FILING AND SERVING THE PETITION

Casitas MWD argues that the trial court "abused its discretion" when it denied Casitas MWD's request to dismiss Golden State's petition. (RB 21.) The essence of this convoluted argument is that the petition was allegedly filed and served *too early*, but then should have been dismissed as served *too late* after the trial court's stay of the case expired. The argument does not hold water.

To unclutter it, the chronology of events must be deconstructed.

A. The Relevant Chronology

March 13, 2013: Casitas MWD adopted three resolutions: Resolution No. 13-12 (formally establishing the CFD, listing the

"Facilities" to be acquired, and authorizing the levy of a special tax against properties within the CFD); Resolution No. 13-13 (declaring the necessity to issue $60 million in bonds to finance the cost of the "Facilities"); and Resolution No. 13-14 (calling a special election to be held on August 27, 2013 on the question of issuing $60 million in bonds and levying special taxes to pay the bond debt.) (3-AA-494, 3-AA-511, and 3-AA-515.)

March 26, 2013: Golden State filed its petition/complaint challenging the validity of Resolution Nos. 13-12, 13-13, and 13-14 — less than two weeks after Casitas acted. (1-AA-1.) The case was assigned for all purposes to Judge Mark S. Borrell. Golden State's petition included (1) a petition for writ of mandate challenging the formation of the CFD based on its improper definition of "Facilities," (2) a reverse validation proceeding under Code Civ. Proc. § 863 challenging the levy of special taxes and bonded indebtedness, and (3) declaratory relief.

March 28, 2013: Because the petition included a reverse validation proceeding, Golden State immediately filed an *ex parte* application for approval of the summons and the proposed method of publication. (1-AA-48.) The proposed summons was attached to Golden State's *ex parte* application as Exhibit 2. (1-AA-107.)

March 29, 2013: The trial court (Judge Borrell) heard and granted Golden State's *ex parte* application (1-AA-120), ordering:

> "[S]ubject to proper completion of notice by publication in the Ventura County Star in conformance with Government Code section 6063, *no additional notice of the pendency of the proceeding by mail or other means is required pursuant to Code Civ. Proc. §861.*" (Emphasis added.)

The proposed summons was approved by the Court and filed. (ARA-1.)[3]

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[3] Appellant's Reply Appendix is cited "ARA."

April 26, 2013. The Proof of Service of Summons was filed, showing that the approved summons had been published in the Ventura County Star on April 5, 12, and 19, 2013, as required by Govt. Code § 6063, and in compliance with Judge Borrell's March 29 order. (ARA-8.)[4]

May 2, 2013: One week later, pursuant to stipulation, Judge Borrell entered an order regarding briefing and hearing, setting the matter for "trial/hearing on the merits" on June 10, 2013. (1-AA-175.)

June 10, 2013: As scheduled, the matter came on for hearing before Judge Borrell on the merits after it had been fully briefed. Although neither Golden State nor Casitas MWD asked the Court to delay the hearing until after the August 27, 2013 election, the Court decided on its own to do so. It determined that Golden State's action was "premature" based on provisions of the Mello-Roos Act that required reverse validation challenges to be brought "within 30 days after" voter approval. (Govt. Code § 53359.) (ARA-11.) The trial court declined to rule on the merits, and ordered:

> *"The action is ordered stayed*, and the court will set a status conference on a date in early September which is convenient to all counsel." (ARA-14, emphasis added.)

August 27, 2013: The election occurred. The voters were not asked to approve *formation* of the CFD; they were asked to, and did, approve three things: (1) the establishment of the CFD's appropriations limit under Govt. Code § 53325.7 (Res. No. 13-12, §12 [3-AA-496]); (2) the levy of the special tax, under Govt. Code § 53326 (Res. No. 13-12, § 12 [3-AA-496]); and (3) the incurring of bonded indebtedness, under Govt. Code §§ 53351(g), 53353.5 (Res. No. 13-13, § 7 [3-AA-512]).

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[4] Casitas MWD and the CFD it had purported to form had already been personally served with the petition on March 29, 2013. (ARA-6-7.)

September 16, 2013: Judge Borrell held the post-election status conference that had been set on June 10. Counsel for Casitas MWD asked to file an additional brief before the case's hearing on the merits; the Court allowed it do so and allowed Golden State to respond. (ARA-16.)

September 26, 2013: Casitas MWD filed a "Sur-Reply Brief re Hearing on Invalidation of Casitas MWD's Mello-Roos Act Financing Plan." In its Sur-Reply Brief, Casitas MWD argued for the first time that Golden State's petition "must be dismissed" because Golden State had failed to republish the summons after the election, and it was now too late to do so. (6-AA-1325.)

October 3, 2013: Golden State filed its response to the Sur-Reply Brief. (6-AA-1331.) Golden State argued that dismissal was improper because: (1) Casitas MWD had not made a motion, as required by Code Civ. Proc. § 863; (2) Golden State *had* already timely published the summons, and the court had ordered that no further publication was necessary; (3) if there were any irregularity in failing to republish the summons, "good cause" excused it because the court had *stayed* — not *dismissed* — the action; and (4) Golden State's challenge to the *formation* of the CFD was not subject to the validation statutes in any event.

October 15, 2013: The trial court (Judge Borrell) — treating Casitas MWD's Sur-Reply Brief as a motion — denied dismissal, finding "good cause" existed under Code Civ. Proc. § 863 to excuse Golden State's failure to republish the summons. The court ordered Golden State to republish the summons and file a proof of service by December 16, 2013. (ARA-21.) The trial court explained its ruling:

> "Here, the decision of Golden State's counsel to commence this action promptly after the resolutions were adopted, and before the special election was held, cannot be criticized. Neither the parties nor the court came forth with case law

> reconciling the *apparent inconsistency between Code of Civil Procedure section 860 and Government Code section 53341.* And neither side could have known in advance how the court would rule. To the extent that counsel erred, the error was made '*on the side of caution*' to the extent that the action was commenced too soon. On the other hand, had counsel waited until after the election, only to have the court find the earlier time limitation applied, Golden State would have been foreclosed from challenging the resolutions." (ARA-19-20; emphasis added.)

November 12, 2013: Golden State republished the summons. The Proof of Service of Summons by publication was filed, indicating republication of the summons on October 17, 24, and 31, 2013, in compliance with the court's order. (ARA-22.)[5]

February 24, 2014: Although Judge Borrell had heard all prior proceedings in the case, the hearing on the merits was transferred to Judge Kellegrew, who heard argument and later issued his ruling on March 13.

B. Having Failed to File An Appeal Or A Cross-Appeal, Casitas MWD Is Not Entitled To Argue That The Trial Court Abused Its Discretion

Casitas MWD argues that the trial court "abused its discretion" when it failed to dismiss the action pursuant to the request contained in its Sur-Reply Brief. But Casitas MWD filed neither an appeal nor a cross-appeal, thus eliminating its ability to appeal this order. (*Bonfigli v. Strachan* [2011] 192 Cal.App.4th 1302, 1317 n. 12 ["Generally, a respondent must file his own appeal in order to obtain affirmative relief by way of appeal"].) Although Casitas MWD does not cite Code Civ. Proc. § 906, that section, if applicable, might excuse the failure to file an appeal. Section 906 should not be applied here because the judgment which Casitas MWD seeks to

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[5] After republication of the summons, seven interested parties filed answers. The interested parties filed a motion for class certification, and Judge Borrell granted the motion on January 24, 2014. (6-AA-1465.)

affirm actually determined the validity of its Resolutions. (6-AA-1491.) If, as Casitas MWD now argues, the trial court should have dismissed the petition on procedural grounds, there would have been no substantive ruling on the merits to which such an appeal could attach. Further, the trial court's ruling on the good cause issue determined a question of fact. (*City of Ontario v. Superior Court* [1970] 2 Cal.3d 335, 346.) Non-appealing respondents who seek to take advantage of section 906 are bound by factual determinations. (*Elam v. Elam* [1969] 2 Cal.App.3d 1013, 1021). Thus, section 906 does not apply, and Casitas MWD's contention of error is foreclosed by its failure to file an appeal or cross-appeal.

C. The Trial Court Need Not Have Stayed the Action

Casitas MWD's claim that Golden State failed to republish the summons is based on the trial court's predicate June 10, 2013 ruling that the action was "premature" — a ruling that neither party had sought.

The trial court cited Govt. Code §§ 53341 and 53359, which together require a reverse validation challenge to the levy of a special tax or the issuance of bonds to be commenced "within 30 days after" voter approval. But these statutes provide a "not later than" deadline, as opposed to a "not earlier than" barrier. When the Legislature intended to impose a "not earlier than" barrier in the Mello-Roos Act, it knew how to do so. (See, e.g. Govt. Code §§ 53321[e] [". . . not less than 30 or more than 60 days . . ."]; 53326[a] [". . . at least 90 days but not more than 180 days . . ."]; § 53365 [". . . not less than 30 nor more than 90 days . . ."].) The "within 30 days after" deadline in sections 53341 and 53359 could reasonably be read to *extend* the otherwise applicable reverse validation deadline — which is 60 days after the existence of any matter which can be validated, under Code Civ. Proc. §§ 860 and 863. A reverse validation plaintiff *may*, but is not *required to*, wait until after the election to file a challenge.

To *require* Golden State to have waited until after the election to file creates an inconsistency between a reverse validation challenge which may be filed by an interested party and a direct validation action which may only be filed by the public entity. The "within 30 days after" deadline in section 53359 applies *only* to reverse validation challenges under Code Civ. Proc. § 863 to the validity of bonds or special taxes. If Casitas MWD had sought to validate its own CFD bonds, it would have been required to file "within 60 days" of its March 13, 2013 resolution authorizing their issuance, under Code Civ. Proc. § 864. That creates an asymmetry between the earliest date that a validation action may be filed, depending on the coincidence of who the plaintiff is.

The trial court could, and probably should, have harmonized Govt. Code §§ 53341 and 53359 with Code Civ. Proc. §§ 863 and 864 by finding that the former *extended* the deadline to file reverse validation actions, not that they erected a barrier to earlier filing. The trial court need not have declined to hear the fully-briefed matter on the merits on June 10, 2013, and the issue of republication of the summons would have been avoided.

D. Having Stayed The Action On June 13, The Trial Court Did Not Abuse Its Discretion When It Found Good Cause To Allow Republication Of The Summons

Even assuming, *arguendo*, that the trial court properly deemed the action premature, its later detailed ruling finding good cause to extend the time for republication of the summons (ARA-19-20) was proper. Code Civ. Proc. § 864 provides for dismissal of a reverse validation proceeding if the plaintiff "fails to complete the publication and such other notice as may be prescribed by the court in accordance with Section 861 and to file proof thereof within 60 days from the filing of the complaint." But Code Civ. Proc. § 863 also provides that dismissal is not required where "good cause for such failure is shown" by the plaintiff.

Here, Golden State both completed publication of the court-approved summons and filed its Proof of Service within 60 days of the filing of the complaint. (ARA-8.) Hence, the predicates for dismissal under Code Civ. Proc. § 863 never arose.

Even if they had, there was surely good cause to permit Golden State to republish the summons. On the issue of good cause, "the proper decision of the case rests almost entirely in the discretion of the court below." (*City of Ontario*, 2 Cal.3d at 347.) In *City of Ontario*, plaintiff challenged a contract between the City and a nonprofit corporation the City had formed to finance and build a speedway. The plaintiff never even published summons under the validation statutes, and no prior reported case had made clear that the statutes would apply to challenges of *any* City contract. (*City of Ontario*, 2 Cal.3d at 346-347.) The trial court allowed the plaintiff to publish the summons long after the statutory deadline had passed, and the Supreme Court upheld the trial court's finding of good cause. It found that the question of applicability of the validation statute was a "complex and debatable issue"[6] and applied the test under Code Civ. Proc. § 473. The power "should be freely and liberally exercised to the end that cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure." (*City of Ontario*, 2 Cal.3d at 347.)

In *Community Youth Athletic Center v. City of National City* (2009) 170 Cal.App.4th 416, the Court of Appeal reversed the trial court's refusal to find good cause. The summons was published, but because the initial publication date was delayed due to problems with the newspaper, the stated response date in the published summons was three days too early.

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[6] Just as the trial court did here when it acknowledged the "apparent inconsistency" between Code Civ. Proc. § 860 and Govt. Code § 53341. (ARA-19-20.)

The Court held that good cause should be based on two factors: the nature of the attorney's mistake, and whether counsel was otherwise diligent in pursuing the claim. (*Community Youth*, 170 Cal.App.4th at 430.)[7]

Here, as in *City of Ontario*, there is *no case* dealing with whether a plaintiff must republish a summons when a validation action is stayed as premature. The trial court did not *dismiss* Golden State's lawsuit as premature; it *stayed* the case, indicating an intent to take up the matter on the merits after the election. (ARA-14.) A stay is "an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event." (*Holland v. Dave Altman's R.V. Center* [1990] 222 Cal.App 3d 477, 482.)

As in *Community Youth*, Golden State's counsel was obviously diligent in pursuing the action — the trial court found it was *too diligent*, having filed its case prematurely "on the side of caution." (ARA-20.)

Casitas MWD's cases on good cause are distinguishable. In each, the summons was defective on its face and failed to comply with clear statutory standards. In *County of Riverside v. Superior Court* (1997) 54 Cal.App.4th 443, plaintiffs published the wrong summons (a 30-day summons) and the summons failed to provide a precise response date. In *Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, the published summons contained no express response date, and improperly stated that a response was due 10 days after the date of publication, rather than 10 days after the notice period for publication. In *Community Redevelopment Agency v. Superior Court* (1967) 248 Cal.App.2d 164, plaintiff did not obtain a summons directed to "all persons interested in the matter," failed

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[7] Casitas MWD miscites *Community Youth* by describing it as a case where a defective summons "require[d] dismissal." (RB 18, n. 8.) In fact, the Court in *Community Youth* **reversed** dismissal, finding there was good cause to excuse the defective summons.

to publish *any* summons, and failed to specify a response date in the improper summons. In all cases, the form of the summons failed to comply with clear statutory requirements in Code Civ. Proc. §§ 861, 861.1 and 863.

By contrast, here there was no such defect in Golden State's published summons. As the Supreme Court wrote in *City of Ontario*, "Counsel are not expected to be omniscient." (2 Cal.3d at 346.) In the absence of *any* applicable case law regarding the propriety of properly published summonses in *stayed* cases, Golden State's counsel did not commit the sort of error that the courts have found to be inexcusable. All the more so when the trial court's original publication order clearly stated that "no additional notice of the pendency of the proceeding" would be required after initial publication of the summons. (1-AA-121.)

Finally, Golden State's challenge to the *formation* of the CFD — which contained an invalid list of "Facilities" (see AOB 7-9, *ante*, pp. 6-7) — was not even subject to the validation statutes. Only challenges to the validity of special taxes or bonds must be challenged by the validation statutes. (Govt. Code § 53359.) The challenge to formation of the CFD was properly asserted as a writ of mandate (Code Civ. Proc. § 1085), as Golden State did. (1-AA-15.) Where non-validation remedies are sought, the action is *in personam*, and publication of summons issues pursuant to the validation statutes do not arise. (*City of Ontario*, 2 Cal.3d at 344-345.)

The trial court properly exercised its discretion to reject Casitas MWD's summons issues.

II.

INTANGIBLE PROPERTY IS BEYOND THE SCOPE OF MELLO-ROOS

The specifically targeted subject of Mello-Roos financing is clearly set forth in the statute:

> ". . . any *real or other tangible property* with an estimated useful life of five years or longer . . . ." (Govt. Code § 53313.5 [emphasis added].)

And that is all. The fulcrum on which this case rests is Casitas MWD's demand that it be allowed to use this statute to float bonds and spend money on items that are plainly neither "real" nor "tangible" property. They broadcast that in plain English in their "List of Authorized Facilities" on which they propose to spend the money. (2-AA-359; 3-AA-498.) The List is a statutorily-required cornerstone for creation of a Mello-Roos financing district. (Govt. Code § 53321, subd. [c].)

How does Casitas MWD justify its actions? Essentially by running away from the statute.

First, Casitas MWD denies that it intends to take any intangible property. (RB 10.) We have quoted the "List of Authorized Facilities" often enough. It need not be repeated again. Moreover, whether Casitas MWD actually uses the money for that purpose[8] is not relevant to this proceeding. A "reverse validation" (or, more properly, an invalidation) proceeding is plainly designed to afford an immediate facial challenge to the government proposal. The speed with which it must be brought (and, as

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[8] See RB 10, where Casitas MWD coyly questions whether it "necessarily" intends to condemn intangibles.

the trial judge recognized, the penalty for not filing timely [ARA-19-20])[9] shows that what is presented for judicial review is the proposal *as made*, not some *post hoc* evaluation of the project as it develops over time. The short statute of limitations was designed to further "the important policy of speedy determination of the public agency's action." (*Embarcadero Mun. Imp. Dist. v. County of Santa Barbara* [2001] 88 Cal.App.4th 781, 790.) Such matters are entitled to preference for trial. (Code Civ. Proc. § 867.) Speed and time are plainly of the legislative essence.

Moreover, the "agency action" must perforce be the full scope of the action proposed in the supporting resolutions. Official government pronouncements (whether by statute, ordinance, or resolution) "are not inert exercises in literary composition. They are instruments of government" (see *United States v. Shirey* [1959] 359 U.S. 255, 260) and entitled to be taken seriously. For example, when a government agency passes a "resolution of necessity" to condemn property, the property is valued as though the agency *will actually make the maximum use called for* in the resolution, even if the agency urges in court that it has no intention of making such expansive use. (*County of San Diego v. Bressi* [1986] 184 Cal.App.3d 112, 121-122.) In *Bressi*, the County sought an avigation easement to expand the use of the Palomar Airport. Although Palomar was a small, satellite airport, the resolution adopted to justify the condemnation stated that the easement needed to be sufficient to accommodate "jumbo jets or any other contrivance yet to be invented for flight in space" regardless of the County's actual intent to so use the property. Absent any

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[9] See also *Embarcadero Mun. Imp. Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 789-793, where this Court collected numerous cases under the validation statute in which attempted actions brought more than 60 days after the agency took the action in question were held to be too late.

change in that underlying resolution, it set the bounds of the use being acquired (and, perforce, the scope of the litigation), regardless of the County's actual intent. That same assumption as to the intent of the underlying resolutions is appropriate here.

Second, Casitas MWD tries to shift the burden to Golden State, asserting that "GSW has completely failed to establish it even possesses any intangible property." (RB 10.) All that is known at this point is that Casitas MWD formally resolved to acquire — with Mello-Roos funds — whatever "intangible property and property rights [are] owned or held by the Golden State Water Company . . . ." (2-AA-359.) The question for this Court is: can it do that? That question must be answered now. If Casitas MWD is allowed to skate past the question on the suggestion that ***no*** intangible property exists, but it turns out later that, in fact, Casitas MWD ***is*** financing intangibles, there would be no remedy to challenge the illegal financing scheme because a reverse validation action is the only mechanism for making that challenge and the time to do so would have passed.

As already discussed, this is an action designed to be quickly determined based on the face of the government action, not based upon future circumstances. If it were to get that far, and if Casitas MWD wanted to challenge whether Golden State actually owns any intangible property, the place to raise that issue is the eminent domain valuation trial. The actual existence of intangible property is a premature and unnecessary inquiry at this point. The central point here is that the *face* of Casitas MWD's resolutions shows a failure to comply with Mello-Roos in numerous ways, including (1) the attempt to finance an eminent domain taking, (2) the attempt to finance acquisition of intangible property rights, (3) the attempt to wrap all litigation damages and costs into Mello-Roos financing, and (4) the failure to prepare a "List of Authorized Facilities" to

be acquired, instead listing only "costs" to be incurred. Casitas MWD's brief fails to deal forthrightly with these self-evident failings.

III.

CASITAS MWD EVADES THE CENTRAL ISSUE OF "PURCHASE" v. "EMINENT DOMAIN" BY SLEIGHT-OF-HAND

An important focus of this statutory examination is the clear specification by Mello-Roos of the particular type of action it supports: the "purchase" of property.[10] In its Appellant's Opening Brief, Golden State showed many illustrations of the Legislature using the terms "purchase" and "eminent domain" as describing *alternative* modes of property acquisition. Golden State provided nine illustrations from different statutes, believing that the variety should make the point. (AOB 27.) The point was that in using *only* the word "purchase" in Mello-Roos, the Legislature did not include "eminent domain" by silence or implication.

In reply, Casitas MWD denigrates these illustrations as "scattered examples." (RB 31.)[11] Golden State did not want to overwhelm this Court, and believed the number and variety provided at AOB 27-28 would suffice. They were, as we said then, examples. If needed, voluminous others could

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[10] The statute also lists "construction, expansion, improvement, or rehabilitation" of property, none of which is involved in this matter, which simply targets a complete takeover of Golden State's Ojai service area.

[11] It also purports to cite contrary examples. (RB 32.) However, the ellipses inserted by Casitas MWD into the quote from Educ. Code § 19957.5 delete the crucial language "as used in this chapter. . . ." Plainly that shows the Legislature using "purchase" as Casitas MWD would like only in an extremely limited sense, for the purpose of "this chapter" only. Moreover, this group of statutes does not grant any power, but explains what the statutes do not apply to. They are beside the point.

be provided.[12] They are not "scattered examples;" they are the way the Legislature generally does business. It knows how to segregate modes of acquiring property. Which brings us back to the case at bench.

The Legislature provided a clear statement of the kind of acquisition that could be supported by Mello-Roos. Purchase. Not eminent domain. Just purchase. If one needs to put that into Latin, call it *expresio unius est exclusio alterius*. Or, as this Court put it:

> "In other words, a statute that enumerates things upon which it operates is to be construed as excluding from its effect all those things not expressly mentioned. [Citation.]" (*Embarcadero Mun. Imp. Dist.*, 88 Cal.App.4th at 793.)

Thus, it is not a question of whether Mello-Roos needed to state specifically that local agencies with the power of eminent domain could finance eminent domain through this statute. This statute specified one

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[12] If needed, see Govt. Code § 50470 ["by purchase, condemnation, donation, lease, ***or*** otherwise"]; Pub. Util. Code § 6262 ["by purchase ***or*** condemnation"]; St. & Hwy. Code § 741.7 ["by purchase ***or*** by proceedings in eminent domain"]; Wat. Code § 11588 ["by purchase ***or*** condemnation"]; Wat. Code § 50930 ["by purchase, condemnation, gift, lease ***or*** other legal means"]; Pub. Res. Code § 5301 ["by purchase ***or*** by condemnation"]; Govt. Code § 54031 ["gift, lease, purchase, eminent domain, ***or*** other manner"]; Health & Saf. Code § 2041 ["by purchase, eminent domain, ***or*** other lawful means"]; St. & Hwy. Code § 27168 ["may purchase ***or*** condemn"]; Pub. Res. Code § 5006.2 ["by gift, purchase ***or*** condemnation"]; Govt. Code § 39731 ["by gift, purchase, or eminent domain"]; Pub. Res. Code § 5096.163 ["by purchase ***or*** by eminent domain"]; Govt. Code § 14038.2 ["by purchase, lease, ***or*** eminent domain"] [all emphasis added]. There are many others. Multiple sections of the Water Code Appendix, establishing various water agencies, uniformly authorize property acquisition "by purchase, condemnation, or other legal means". E.g., Wat. Code App. §§ 64-404, 127-410, 132-615, 126-415. These are illustrative.

mode of acquisition. Others are necessarily excluded.[13]

Clearly, Casitas MWD's scheme goes beyond using funds for "purchase" of property. Rather than deal with that issue head on, Casitas MWD engages in multiple examples of sleight-of-hand in an effort to divert the Court's attention from its distance from the statutory mandate.

A. Casitas MWD's First Sleight-of-Hand: It Possesses the Power of Eminent Domain

Casitas MWD says that it does not matter whether the Mello-Roos Act mentions eminent domain because Casitas MWD already possesses that power by virtue of Water Code §§ 71693 and 71694. (RB 21, 26.)

The issue here *is not* whether Casitas MWD has been delegated the power of eminent domain in general. That has never been an issue. If Casitas MWD wanted to condemn Golden State's property in Ojai *and fund the condemnation in some other way*, we would not be here on this issue. To be sure, Golden State would likely present other grounds on which to resist the condemnation,[14] but not because Casitas MWD chose an inappropriate financing mechanism. The legality of that financing mechanism is the only issue here.

Nor does it matter whether other agencies (Casitas MWD cites cities,

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[13] Casitas MWD's exposition on the statute's legislative history (RB 35-40) is much ado about nothing. Golden State's point about the original version of the statute was simply that the Legislature knew how to include eminent domain if it so chose but, when it scrapped the original bill and drew up a new one, it left it out. The rest is interesting history, but hardly relevant to the issues here, which deal with what the Legislature *did*, not what it failed to do.

[14] Whether, for example, this property — already devoted to a public use — could be acquired by Casitas MWD as being needed for a "more necessary public use" when the second public use is simply a takeover and continuation. Casitas MWD will not be entitled to a presumption of greater necessity. (Code Civ. Proc. § 1240.650, subd. [c].)

counties and school districts in bulk [RB 22]) with the power of eminent domain have used the Mello-Roos Act in some unspecified way (RB 22). *Casitas MWD cites no authority that they used Mello-Roos funds to finance eminent domain proceedings.* Nor will there be any. As at the time of the Appellant's Opening Brief, another search of both the Westlaw and Lexis databases seeking *any* case (published or not) containing both the phrase "Mello-Roos" and the phrase "eminent domain" came up empty. If the statute were, in fact, being used as Casitas MWD asserts, surely some case in the last three decades would have at least recited it as a background fact. But there is nothing.

Casitas MWD also must have found nothing, as it cites nothing. Recall that the only support it provided below was the "testimony" of its own litigation counsel that he and his office had done this before. When Golden State objected to such testimony by counsel (AOB 43), Casitas MWD tried another diversionary move, arguing that litigation counsel's declaration was no more than a description of "administrative agency practice" (RB 42) which has been approved before. First, this is not "administrative agency practice," it is the anecdotal courthouse experience of one law firm that (apparently) has not been challenged on the issue. Second, the authorities cited do not support this use of attorney testimony. *Marek v. Napa Community Redev. Agency* (1988) 46 Cal.3d 1070, 1085 dealt with testimony of a redevelopment expert who happened to be an attorney — but who was not counsel for any party in the suit — about general practice. *Ste. Marie v. Riverside County Reg. Park etc. Dist.* (2009) 46 Cal.4th 282, 292-293, n. 7 dealt only with the taking of judicial notice of various governmental plans and resolutions. Neither supports litigation counsel attempting to buttress his own case with his own testimony about the central issue in the case.

The issue here is whether Mello-Roos can be used to *finance* the use of eminent domain. For Casitas MWD to spend substantial time arguing that it has the general power of eminent domain does not help the Court to decide this case.

B. Casitas MWD's Second Sleight-of-Hand: 1986 Amendments to Mello-Roos and the Subdivision Map Act Supposedly Allow Eminent Domain Financing

In a related effort to divert attention from the clear words of Govt. Code § 53313.5, Casitas MWD points to 1986 legislation amending both Mello-Roos and the Subdivision Map Act (Govt. Code § 66411 *et seq.*) and asserts that they "prove beyond question the Legislature *did* intend to authorize CFD financing to be used for the condemnation of property." (RB 41; emphasis in original.)

That is both beside the point and wrong. Those amendments were designed to deal with ways for residential subdividers to finance the completion of physical improvements that a municipality had made conditions of approval of a tentative tract map.[15] The amendment to Govt. Code § 66462 merely added CFDs (which were then relatively new) to the list of methods by which a subdivider could agree to finance such improvements. And it, along with Govt. Code § 66462.5 provided some protection for developers by giving them a way to complete their subdivisions before all the required public improvements had been built and dedicated. Contrary to Casitas MWD's assertion, nothing in section 66462 deals with paying for "offsite" improvements (by condemnation or otherwise). (RB 41.) It is wholly consistent with the original statute. Thus, the 1986 amendment simply provided that Mello-Roos financing

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[15] As noted at AOB 15-16, the fundamental purpose of Mello-Roos was to deal with the financing of major public improvements (required to be constructed by the developers) in newly developed residential subdivisions.

could be used to build the "tangible property with a useful life of five years or longer" (Govt. Code § 53313.5) that the original Mello-Roos authorized.

Casitas MWD distorts the scope and content of the amendments. Not only does it erroneously contend that section 66462 deals with offsite property acquisition, it wants Govt. Code § 66462.5 to be read as authorizing the funding of eminent domain through Mello-Roos. (RB 41.) The amendment cannot bear that much freight. Section 66462.5 merely precludes the municipality from withholding issuance of final subdivision approval pending completion of all improvements required by the tentative map. This second statute thus provides alternative ways for a developer to fulfill its obligations after-the-fact and still receive its permits. Although it provides that the municipality may use eminent domain to acquire any property outside the project site needed for the improvements, the statute makes no mention of funding that eminent domain action via Mello-Roos. The latter, of course, is the issue here.

C. Casitas MWD's Third Sleight-of-Hand: The Statute Refers to "Acquisition" as Well as "Purchase" and That Should Be Enough

Another attempt at misdirection involves Casitas MWD's focus on the word "acquisition," concluding, for example, that "[e]ven GSW must acknowledge the term 'acquisition' includes acquisition by eminent domain as every statute it cites at pp. 27-28 of its Brief refers to eminent domain as one means of 'acquiring' property." (RB 33.)

Not so fast. The answer is both "yes" and "no." It is "yes" in the sense that the statutes cited by Golden State list *alternative* modes of property acquisition, and they include both purchase and eminent domain. But it is "no" in the sense that Casitas MWD argues, i.e., that using the word "acquisition" automatically invokes eminent domain as a mode of

acquiring. Plainly, a reading of any of the statutes cited at AOB 27-28 and *ante*, p. 21, n. 12 demonstrates that the Legislature had no intention of equating purchase and condemnation, otherwise it would not have joined them with the disjunctive word "or." The statutes use the terms as alternatives, not equivalents.

In its discussion, Casitas MWD slides away from discussing purchase and eminent domain into discussing "purchase" and "acquisition" (e.g., RB 33), as though that has anything to do with the "eminent domain" issue here. The statutes singled out by Casitas MWD do not mention eminent domain and have nothing to do with it. (See Govt. Code § 53345.3 [dealing with the "construction or acquisition" of buildings or "acquisition" of other property; Govt. Code § 53313.5(e) [use of funds to "acquire" facilities]; Govt. Code § 53313.5(f) ["acquisition" of property for flood control]; Govt. Code § 53313.5(k) ["acquisition" of property for hazardous material remediation]; Govt. Code § 53313.4 ["acquisition" of property for school facilities].) None of these statutes mentions "eminent domain" or states that it is an accepted form of acquisition in the context of Mello-Roos. Indeed, given the controlling language of Govt. Code § 53313.5, each use of "acquisition" in the subordinate paragraphs of the statute cited by Casitas MWD (RB 33) needs to be read as synonymous with "purchase" rather than "eminent domain."

Nor is there anything in the encyclopedic discussion of the possible interchangeability of the words "purchase," "acquire," and "acquisition" discussed at RB 34. Nothing in any of that discussion has anything to do

with the use of eminent domain as a means of acquisition.[16]

Moreover, sometimes the Legislature's use of the word "acquire" excludes the use of eminent domain. (See AOB 30-32.) Casitas MWD's effort to brush aside in a footnote the line of cases so holding (RB 26, n. 11) is not up to the task. There, Casitas MWD seeks to minimize and distinguish those cases on the ground that they deal only with the validity (or not) of extra-territorial condemnation and add nothing else to eminent domain jurisprudence.

Wrong. Here is why those cases are important. 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 automatically 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." (10 Cal.App.4th at 282-283.)

The same is true of *Harden v. Superior Court* (1955) 44 Cal.2d 630, where the Supreme Court concluded:

> "[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." (44 Cal.2d at 641.)

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[16] *People v. Superior Court* (1937) 10 Cal.2d 288, is cited at RB 29 for the proposition that the term "purchase or acquirement" in the title of a statute was sufficient to include eminent domain as a form of purchase. Wrong. That case decided only whether the *title* of the statute complied with a constitutional provision concerning the content of statutory titles. The body of the statute made it quite clear that eminent domain was contemplated, thus rendering the issue academic. It was clear that the Legislature had conferred the eminent domain power via the statute.

Harden is particularly important here because the Court was called upon to decide whether a statute authorizing the city to "purchase, lease, or receive" property thereby included the power to take property by eminent domain. As here, the focus was on the word "purchase" in contrast to the phrase "eminent domain." The conclusion there resonates here:

> "[I]f 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." (44 Cal.2d at 642.)

To be sure, as Casitas MWD notes (RB 26, n. 11), *Harden* spoke in the context of a claim of extraterritorial use of eminent domain power, which is a different issue than the one here. However, that case (along with the others discussed with it) illustrate the general rule that the power of eminent domain is strictly cabined by the courts, not allowed to run about at the pleasure of municipal entities. The precepts discussed in that opinion — particularly as they apply to the interplay between the concepts of "purchase" and "eminent domain" — are highly pertinent to the issue presented here. Indeed, they should control it.

The short of it is that Casitas MWD presented no authority that equates the terms "purchase" and "eminent domain" or "condemn." The entire discussion of the statute's use of "acquisition" is merely a misdirection ploy aimed to divert attention from the plain words of the statute.

D. Casitas MWD's Fourth Sleight-of-Hand: Mello-Roos and Statutes Granting Eminent Domain Power Are *in Pari Materia* and Therefore Operate Together

Citing no authority but its own *ipse dixit*, Casitas MWD insists that Mello-Roos and its own organic law (the Municipal Water District Law of 1911) are *in pari materia* and therefore must be read together as a unified

whole. (RB 27.) That over reads the doctrine, as explained by the Supreme Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050. The purpose of the doctrine is to ensure that "all parts of the statutory scheme are given effect." (*Id.* at 1090-1091.) What is at issue is giving meaning to a unified statutory program, by considering together statutes that "relate to the same person or thing, to the same class of persons or things, or have the same purpose or effect." (*Id.*) However, care must be taken and "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 v. Superior Court* [1988] 47 Cal.3d 112, 124, n. 4.) Other than Casitas MWD's say-so, there is nothing that ties together the Water District Law enacted 70 years earlier with Mello-Roos.

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 Govt. Code §§ 1090 and 87100 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 at 1091; emphasis added.)

By contrast, *People v. Chevron Chemical Co.* (1983) 143 Cal.App.3d 50 refused to find statutes *in pari materia* where the two statutes were in different codes (Fish & Game Code § 5650 and Wat. Code § 13350), had "different albeit similar goals," and were enacted 95 years apart. (143 Cal.App.3d at 56.)

Using the parameters of *Lexin*, *Walker*, and *Chevron* as guides, the

answer here is clear. Mello-Roos is simply a financing statute. It does not have the "same general purpose" as the Municipal Water District Act of 1911 (as asserted by Casitas MWD [RB 27]). In the words of *Chevron* the goals of the various statutes cited by Casitas MWD "albeit similar," are different. The Water District Act deals with the establishment and functioning of entities like Casitas MWD in general. Mello-Roos provides a specific kind of financing for some projects that municipalities might carry out. But not all of them. Hence, the Water District Act and Mello-Roos are not *in pari materia*.

IV.

BROAD LANGUAGE, LIBERAL CONSTRUCTION, AND ACCOMPLISHING THE PURPOSE OF THE PROJECT ARE NOT SUFFICIENT CONCEPTS TO SUPPORT CASITAS MWD'S POSITION

Casitas MWD seeks comfort from a provision calling for "liberal" construction of Mello-Roos, as well as from what it calls the "broad" language of the statute, and from the idea that it should be able to exercise "incidental" power to accomplish the purpose of the Mello-Roos financing. (RB 44-50.)

Wrong. On all Counts. The statutory language is not elastic enough to do Casitas MWD's bidding.

A. The Mello-Roos Language is Not "Broad" Enough to Stretch Where Casitas MWD Wants it to Go

Casitas MWD repeatedly urges that the Legislature drafted Mello-Roos in the "broadest possible terms" (RB 23, 28) and that "broad" umbrella is sufficient to allow bonds to be floated under its aegis to condemn property. Not so. The terms are not at all the "broadest possible." The statute at issue here says only that it may be used 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 . . . ." (Govt. Code § 53313.5.)

Unpacking that statute shows the following:

First, to the extent there is breadth in this language, it is in the kinds of actions that can be engaged in, i.e., "purchase, construction, expansion, improvement, or rehabilitation." Clearly, so long as such projects involve real or tangible property with an estimated life of five years or longer, then the kind of project that can be financed is pretty broad. But that is not at issue here.

Second, the mode of acquisition of property to be subjected to those various kinds of projects is narrow — in fact it is singular: purchase. Had the Legislature wanted to express the means by which property acquisitions could be financed under Mello-Roos in the "broadest possible terms," it could have used any of the formulations shown at AOB 27-28 or *ante*, p. 21, n. 12. As shown there, when the Legislature wanted to depict breadth, it used numerous alternatives, often using a series of terms ending with something like "or any legal means" (e.g., Wat. Code § 50930 ["other legal means"]; Health & Saf. Code § 2041 ["other lawful means"]) or some generically inclusive term like "or otherwise" (e.g., St. & Hwy. Code § 11101.5 ["or otherwise"]; Govt. Code § 54031 ["other manner"]). Here, by contrast, the Legislature provided one expressed mode of acquisition and included no catch-all generic to expand it to others. The plain intent was to use Mello-Roos bonds to finance the "purchase" of specific kinds of property.

Third, as already discussed, the statute plainly limits its application to "real or other tangible property," not intangibles. That is important here on the eminent domain level as well as the issue of what sort of property is

encompassed in the statute. There is no question that eminent domain may be exercised against intangible property. (*San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc.* [1999] 73 Cal.App.4th 517, 532.) It is also clear (as Casitas MWD undoubtedly knows) that an important — perhaps primary — asset involved in the condemnation of a utility is intangible, "namely, its franchise or right to do business." (*City of Oakland v. Oakland Raiders* [1982] 32 Cal.3d 60, 68.) If the Legislature had truly intended Mello-Roos to be used to finance the taking of a utility by eminent domain, it is hard to fathom why it would have excluded one of a utility's primary assets from the statute's reach by directly authorizing the financing of only real or tangible property.

The Mello-Roos financing authorization is not "broad" enough to justify such a wholesale change in the statute.

B. "Liberal" Construction Does Not Authorize Re-Writing the Statute

Recognizing that the plain words of the statute do not authorize what it wants to do, Casitas MWD repeatedly falls back on a portion of Mello-Roos calling for "liberal construction" in order to pave over the obvious places in the statute that do not directly authorize its actions. (E.g., RB 24, 27, 44, 53.) Casitas MWD is wrong for two reasons.

First, the plain words of the Mello-Roos provision calling for "liberal construction" limit its target 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.)

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 for the financing. That is not this case. The issues here go to the heart of the Mello-Roos financing structure.

Second, Casitas MWD is not asking for a "liberal construction." It seeks a substantial substantive re-write. That is something the courts have repeatedly said they will not do. No court is a stranger to some litigant asking for "liberal construction" that is, in reality, a request for the statute to be rewritten.[17] Nor is the tactic a new one.

Nearly a century ago, 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. The Court there 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.)

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

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[17] This Court has faced the issue repeatedly. See cases discussed at AOB 23 rebuffing, *inter alia*, an attempt by the Attorney General and the Coastal Commission to "stretch[] the [statutory] fabric too thin." (*Schneider v. California Coastal Commn.* [2006] 140 Cal.App.4th 1339, 1345.)

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. The Supreme 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.)

"Liberal construction" cannot save Casitas MWD's strained reading of Mello-Roos, regardless of whether anyone believes that the statute might have been better if written as Casitas MWD desires. (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."].)

C. Contrary to Casitas MWD's Evident Belief, the "Purpose" of Mello-Roos is Not to Facilitate Eminent Domain Actions

To the extent that the idea of "liberal construction" has meaning, it is only as stated clearly by the Legislature. The Mello-Roos statute calls for liberal construction only, and specifically, "in order to effectuate [the statute's] purposes." (Govt. Code § 53315.) Casitas MWD's approach does not comport with the statute.

First, Casitas MWD appears to believe that the purpose of Mello-Roos financing is to allow it to procure property when and as it chooses. Anything else, it asserts, "would severely constrain use of the Mello-Roos

Act . . . ." (RB 53.) That is only true if one views the world as Casitas MWD does, as a world in which making a list of "facilities" to be acquired via Mello-Roos bond funds includes not so much tangible property as the various "costs" and "damages" involved in obtaining the property. (Compare Govt. Code § 53321, subd. [c] with the "List of Authorized Facilities" [2-AA-359; 3-AA-498].) That, it seems, should be "strike one" against Casitas MWD's interpretation, as that use of "facilities" does violence to the English language.

Second, Casitas MWD has made up its own universe for this purpose, one in which prophesies are self-fulfilled. Thus, in arguing for an interpretation of the statute that solves its problem (i.e., paying all costs of a projected eminent domain litigation where there is no clear statement of such an intent in the statute), Casitas MWD simply assumes that is the purpose of the statute and, *ipso facto*, an interpretation that produces that result must comport with "liberal interpretation" of the Legislature's will. But there is no basis for that other than a plaint that anything else would not allow the project to go through. (RB 53.) Not enough. "Strike Two."

Third, nor could it be said that the evident legislative purpose was 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 Casitas MWD's argument. 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 trial court leaped to the unsupported conclusion that the statute "clearly contemplates the costs of anticipated litigation associated with the acquisition of property required for a CFD." (6-AA-1496.) Casitas MWD could not find a statutory basis for that conclusion either. None is cited in its brief.

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 costs in a substantial litigation where the parties are tens of millions of dollars apart on their opinions of valuation, and where even Casitas MWD's list of anticipated expenses includes such things as Golden State's lost business goodwill, relocation expenses, pre-condemnation damages, intangible property rights,[18] along with the property owner's litigation costs and any other damages that might arise. (2-AA-359.) That is another language abuse, and should be enough for "strike three" on this issue.

Fourth, "why?" asks Casitas MWD would the Legislature be concerned only with the risks associated with Mello-Roos condemnations and not all other kinds of condemnations that are subject to the same sort of vicissitudes? (RB 46.) Casitas MWD asserts that "GSW has no answer" for this question. (RB 46.) Wrong again.

The reason lies in who bears the risk. Remember that Casitas MWD does ***not*** propose to put its own coffers — or any of its other customers — at risk with this project. Rather, it chose a tool that places all the potential downside — including all of the costs attendant upon abandoning the condemnation if Casitas MWD proves wrong on its estimated cost or legal analysis — on the property owners of Ojai via decades of specialized property taxes secured by liens on only their properties. Casitas MWD knows that. In its own words, "The voters have assumed the risk." (RB 49.) Exactly. And that is the difference between this kind of eminent domain financing and financing that comes out of the condemning agency's general fund. Someone else is paying every penny of the bill, and it is specifically targeted citizens. Plainly, that differentiates this condemnation

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

from the run-of-the-mill. It also differentiates this type of financing: if it is used, the property owners must be assured of receiving something ***tangible*** in return. "Strike four," if needed.

V.

MELLO-ROOS WAS NOT DESIGNED SO THAT A GOVERNMENT ENTITY COULD SIMPLY TAKE OVER AND SUPPLANT AN EXISTING UTILITY SUPPLIER

Golden State and Casitas MWD agree on one thing: legislative intent should be gathered from the entire statute read as a whole. (See RB 34.) That was the impetus behind bringing Govt. Code § 53313 to the Court's attention. (See AOB 39.) Although not expressly invoked here, that part of the Mello-Roos Act (dealing with the provision of some kinds of services, rather than the purchase or improvement of property) sheds light on the issue at bench. It demonstrates the Legislature's clear intent that its new statutory scheme not be used merely to "supplant services already available within that territory . . ." but only to the extent that services "are in addition to those provided in the territory . . . ." (Govt. Code § 53313.)

In other words, the Legislature did not visualize this new taxing authority to be used for empire expansion by individual local entities, but to provide services that were not already extant, in addition to purchasing tangible property that was not yet publicly owned.

It is appropriate to consider here because it shows that the general focus of Mello-Roos was to provide financing to provide services not then being provided by either subsidizing some services themselves (Govt. Code § 53313) or by financing the purchase or rehabilitation of real or other tangible property (Govt. Code § 53313.5). Golden State believes that, together (not "in isolation," as Casitas MWD would have it [RB 55]), the

sections provide a broader understanding of what the Legislature was doing. By creating this financing device, the Legislature wanted to provide municipal services that did not yet exist (or were in need of substantial repair).

Citing *Andreini & Co. v. MacCorkle Ins. Serice, Inc.* (2013) 219 Cal.App.4th 1396, Casitas MWD urges this Court to ignore this sibling statute because the argument based on it was raised for the first time on appeal. (RB 54.) Wrong. Two ways.

First, in explaining the background of Mello-Roos below, Golden State noted the application of Govt. Code § 53313 to provision of services. (1-AA-195, 196.)

Second, and dispositively, Casitas MWD misreads both *Andreini* and the general legal precept for which it is cited. The basic rule stated in that case is that arguments cannot be raised anew on appeal only if they are "dependent on the production of additional evidence . . . ." (219 Cal.App.4th at 1404.) And that, indeed, is the long-standing rule:

> "The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.] Such is not the case here." (*Ward v. Taggart* [1959] 51 Cal.2d 736, 742.)

Such is not the case here either. There are no new facts. All that is involved is a question of statutory interpretation based on the words of the statutes and the facts already developed below.

CONCLUSION

Casitas MWD chose to see how far it could push a statute designed for the "purchase . . . of any real or other tangible property . . . ." The

answer should be that it pushed too far. This statute was not designed for Casitas MWD's stated purpose and nothing in its language even hints at the intent of the Legislature to allow it.

Golden State prays that the judgment be reversed.

Dated: Jan. 14, 2015

Respectfully submitted,

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CERTIFICATE OF APPELLATE COUNSEL

The foregoing Appellant's Reply Brief was produced on a computer. According to the word count of the computer program used to prepare the brief, it contains **11,677** words, excluding tables and this certificate.

Dated: Jan. 14, 2015

Respectfully submitted,

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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 **January 14, 2015,** I served the documents described as:

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and APPELLANT'S REPLY APPENDIX, 1 Volume

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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.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **January 14, 2015,** at Los Angeles, California.

BESS HUBBARD

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California Court of Appeal, No. B255408

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