Case 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, et al.,
*Defendants and Respondents.*

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# RESPONDENTS' ANSWER TO PETITION FOR REHEARING

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

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DISTRICT NO. 2013-1 (OJAI)

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## I. INTRODUCTION

Golden State Water Company (GSW) addresses this Court with the same condescension and disrespect it previously directed to the trial court, Casitas Municipal Water District (Casitas), and the Ojai citizens who overwhelmingly voted to replace it. GSW identifies no factual errors in this Court's decision, it makes no legal arguments this Court has not already considered and rejected, and it provides no reason why this Court should change a word of its strong, comprehensive, and carefully written opinion. GSW's Petition for Rehearing should be denied.

## II. GSW'S ATTACKS ON THIS COURT ARE UNWARRANTED

This Court's references to King George and monopolists hit the nail on the head. The colonists opposed the king not because they were taxed but because they were taxed without representation. There is a fundamental difference between a for-profit monopolist with control over an essential public service (which GSW acknowledges it is) and an enterprise owned and controlled by the people themselves, through their elected representatives, and which will charge them less than half the rates charged by GSW. GSW's blindness to these truths only confirms the validity of the Court's descriptions.

GSW accuses this Court of being "glib," of "perpetuat[ing a] myth," of "ignoring" the law, of "capitulat[ing] to the electorate," and on and on. Rebukes substitute for reasoned (and focused) argument. Casitas trusts that

the Court is not disturbed that its opinion has provoked a response (rather mild, actually, and, notably, not to the merits of the Court's holding) from a single law school professor whose on-line bio reveals no experience or expertise whatsoever with respect to any issue remotely related to this litigation (GSW Brief, footnote 1), from a blogger who has an executive position with a well-known "property rights" and anti-eminent domain advocacy organization (the Pacific Legal Foundation) (*id.,* fn. 2), and from the very same law firm that authored the 2 amicus briefs that were filed in this Court on GSW's behalf (*id.* fn. 3). All this proves is that GSW has a rather small circle of friends.

## III. THERE ARE NO FACTUAL OR LEGAL ERRORS IN THIS COURT'S DECISION THAT WARRANT GRANTING A REHEARING OR CHANGING THE COURT'S OPINION.

The Court has already considered these points so Casitas will be brief.

### A. GSW's Pointless Request for Remand

It is odd GSW criticizes this Court for not remanding for a trial on the issue of whether GSW has standing to sue. As the Court noted, Casitas has conceded GSW ***does*** have standing and this Court assumed *arguendo* it does as well. Even if this Court were to remand for hearing on the standing issue and even if GSW were to prevail, GSW would still lose on the merits for all of the reasons set forth in this Court's opinion. In this situation, remand would serve no purpose.

Moreover, there already ***was*** a trial in this matter--not to mention a full hearing before the Casitas Board when the Community Facilities District (CFD) was first formed and a full election campaign before the voters--and GSW has had a full opportunity to advance its various arguments. As this Court correctly ruled--and GSW conceded until filing its Petition for Rehearing--this appeal (on the merits) raised purely legal issues. (See AOB, p.14 [asserting trial court's decision must be reviewed "de novo" insofar as it raised "a pure question of law"].) There is no need to remand to the trial court for a factual hearing or determination.

B. The Resolution Creating the CFD Adequately Describes the Facilities to be Acquired

Contrary to GSW's claim, Casitas's resolution forming the CFD ***did*** comprehensively identify the "facilities" it intends to acquire. As Casitas pointed out previously, the Mello-Roos law requires only that the list of facilities be "general" in nature to inform the taxpayers "what the funds of the district may be used to finance." (Gov. Code § 53321(c).) Casitas's resolution was not required to separately identify every pipeline, every pump, every valve and meter in GSW's Ojai system. GSW's real argument appears to be that the facilities list is over-inclusive--by referring as it does to certain incidental costs Casitas will or may incur to acquire GSW's facilities, an argument this Court properly rejected. Indeed, as Government Code § 53321(c) instructs, where the funds are proposed to be used for

completed facilities or incidental expenses, "the resolution shall identify those facilities or expenses." If Casitas's list had been under-inclusive--e.g., not warning voters that CFD taxes and bond proceeds could be used to fund appraisal costs, eminent domain attorney fees, business goodwill claims (if applicable), even potential "abandonment" costs--presumably GSW would be taking the very opposite tack, arguing Casitas violated Government Code § 53321(c), and claiming that Casitas misled the citizenry at the CFD election.

Finally, as Casitas has previously noted, the Mello-Roos Act simply does not ***permit*** GSW to attack the sufficiency of Casitas's list of the facilities to be acquired. As explained in greater detail in Casitas's opposition to Golden State's opening brief (see AA pp. 772-774), Resolution No. 13-12 forming the CFD contained the specific finding that "[a]ll prior proceedings taken by [Casitas's] Board of Directors in connection with the establishment of the CFD, and the levy of the special tax have been duly considered and are hereby found and determined to be valid and in conformity with the [Mello-Roos] Act." (AA, p. 772.) As a matter of law, that finding is deemed "final and conclusive" by virtue of Government Code § 53325.1(b), which reads:

> "In the resolution of formation adopted pursuant to subdivision (a), the legislative body shall determine whether all proceedings were valid and in conformity with the

requirements of this chapter. If the legislative body determines that all proceedings were valid and in conformity with the requirements of this chapter, it shall make a finding to that effect and ***that finding shall be final and conclusive.***"

(Emphasis added.)

The finding in Resolution 13-12 "to that effect" is deemed "final and conclusive" as a matter of law. (*Meaney v. Sacramento Housing & Redev. Agency* (1993) 13 Cal.App.4th 566, 578 [interpreting the phrase "final and conclusive" in Health & Safety Code § 33445 "to mean that the evidentiary basis for the findings is beyond the reach of judicial scrutiny; the courts may not inquire whether the findings are supported by substantial evidence or any evidence at all in the administrative record"]; *see also New Davidson Brick Co. v. County of Riverside* (1990) 217 Cal.App.3d 1147, 1151 n. 4 [citing § 53325.1 and other provisions of the Mello-Roos Act for the proposition that it is "clear that one of the Legislature's 'central objectives' with regard to the [Mello-Roos] Act is to constrain (within permissible limits) legal challenges to the Act."].)

C. Alternative Funding "Possibilities" Is Not the Test

The existence of possible ***alternative*** means for Casitas to finance the acquisition of GSW's Ojai water utility is not the test for determining whether financing that acquisition through use of the Mello-Roos Act is permissible. Casitas does not have to affirmatively ***disprove*** the availability

of all other possible means of financing before utilizing Mello-Roos financing as a "last resort." As Casitas pointed out (briefly) to this Court, it comes as no surprise that the means GSW "suggests" Casitas use--save up $60 million in petty cash or use revenue bonds that are secured by the rates paid by ***every ratepayer in Casistas's large district except the Ojai customers who are benefited by the GSW acquisition and are fully prepared to fund it***--are enormously burdensome, unfair and impractical at best. Casitas applauds the Court for not going down this rabbit hole as urged by GSW. Eighty-seven percent (87%) of the Ojai voters and a unanimous City Council and Casitas Board of Directors are satisfied that CFD financing is a good solution. That is surely enough.

D. Examples of Other Mello-Roos-Funded Facilities Acquired by Eminent Domain

The Amici's supposed "failure" to cite to other examples of Mello-Roos financing of eminent domain actions proves nothing. For one thing, Amici were not permitted to dump new factual allegations or "evidence" into their brief and they cannot be criticized for not doing so. Moreover, this Court refused to consider even the declaration testimony of Casitas's trial counsel about his prior experience in which CFD funds were used to finance condemnation actions, finding this case could be resolved solely on the basis of the language of the Mello-Roos Act and other guides to statutory interpretation. So GSW's complaint is beside the point.

E. This Court's Acknowledgment of the Necessity of Eminent Domain for Public Projects

This Court did not "perpetuate a myth" by referring to the dangers of placing public agencies in the position of needing to acquire property without the ability to condemn if necessary. Property owners with the ability to refuse to sell are in the position of vetoing a needed public project, requiring it to be relocated (perhaps at great expense to the public), or forcing the public agency to pay whatever unreasonable amount the property owner demands. Inexplicably, GSW cites *People v. Jones* (1978) 22 Cal.3d 144, as an example of the "reality facing property owners in the path of government projects." *Jones* (a case decided several decades ago) dealt with allegedly unreasonable precondemnation delay/conduct--something that has no applicability here (since, among other things, it is GSW, not Casitas, that by its litigation tactics is delaying the acquisition). (*Id.* at 150-152.)

F. Pencils, Factories and GSW's Obtuse Literalism

GSW's critique of this Court's "pencils vs. pencil factory" analogy is a seemingly intentional distortion of the point the Court was making. The Court used the analogy to explain the difference between an acquisition of tangible property with a useful life of at least 5 years (the pencil factory)--permitted under the Mello-Roos Act--and an acquisition of something with a useful life of less than 5 years (the pencils)--not permitted by the Mello-Roos Act. GSW twists the Court's example by arguing that the taking of a

pencil factory would not be for a public use--a point the Court wasn't making in the first place. There is no question here that Casitas's taking would be for a legitimate public use--one for which it has the statutory power of eminent domain. All analogies are imperfect but GSW appears to want to score a semantic point even if it has nothing to do with the Court's reasoning or decision.

G. This Court Correctly Construed the Word "Purchase"

This Court's decision sets forth several reasons why the word "purchase," as used in Government Code Section 53313.5, is broad enough to include a purchase by eminent domain--dictionary definitions, statutory usage of the terms "purchase" and "acquisition" both within the Mello-Roos Act and elsewhere, legislative history of the Mello-Roos Act, and case authority. GSW now focuses on the single phrase "compulsory purchase," criticizing it as a rarely used phrase from old English law (a source often cited in other reported decisions, by the way). GSW's argument misses the forest for the trees.

H. This Court Correctly Construed the Word "Incidental"

GSW wrongly asserts this Court stretched the meaning of the word "incidental" "beyond either ordinary or legal English." It did not. The Court simply applied the broad definition the Legislature itself gave to the term in the Mello-Roos Act itself (Government Code § 53317(e) and 53345.3) and rejected GSW's attempt to have the Court give "incidental" an

absurdly narrow interpretation that flies in the face of the very words the Legislature used. As section 53345.3 makes clear, the amount of the bond indebtedness may include all "estimated costs ***incidental to, or connected with***, the accomplishment of the purpose for which the proposed debt is to be incurred." (Emphasis added.)

## I. This Court Properly Rejected GSW's Insistence on the Disjunctive "Or" as Used in Other Statutory Schemes

GSW takes exception with this Court's very reasoned explanation for why the word "or" is often used in the conjunctive where the Legislature intends to define a concept expansively with "overlapping meanings separated by the word 'or.'" (Slip Op., p.9.) As this Court explained, the word "or" may not be construed to mutually exclude the words separated by it, particularly where the conjunctive use of the term "or" is needed to carry out the intent of the Legislation. (Ibid.) Thus, for example, where the Legislature authorizes the acquisition of property by "grant, purchase, gift, devise, lease, or eminent domain," the legislation is obviously expansive in nature and is not intended to suggest that the terms are mutually exclusive. That is, an acquisition by "purchase" could also entail an acquisition "by grant," just as it could entail an acquisition by eminent domain. This argument was briefed extensively by GSW and this Court correctly rejected it according to sound and controlling rules of statutory construction.

J. This Court Properly Responded to GSW's "Eminent Domain Risk" Hyperbole

The Court adequately and properly addressed the eminent domain litigation risk issue. There are risks in proceeding with public projects, including property acquisition, whether or not eminent domain is utilized. There is nothing unique to Mello-Roos funding in this regard--and therefore no reason to believe that the risks are such that the Legislature somehow ***must*** have intended to prohibit Mello-Roos funding being used for that purpose when Casitas could (in GSW's view) fund an eminent domain action using any of a number of funding sources. What if Casitas were to sell $60 million in CFD bonds with the need to acquire property and the property owner were to refuse to sell? What if, as is so often the case with a public agency seeking right-of-way for a roadway or a pipeline, it needs to acquire multiple properties? What if it acquires 19 of 20 properties needed for a public project by negotiated purchase and the 20th property owner says "sorry, my property is not for sale"? Is that result one that best ensures needed public facilities will be acquired and constructed and the taxpayers' interests will be protected? Of course not. This Court got it absolutely right; GSW does not.

K. This Court Properly Construed the Mello-Roos Act in Light of the Legislature's "Liberal Construction" Mandate

This Court went to considerable lengths in its decision to explain what it means to provide the Mello-Roos Act a "liberal construction."

Casitas addressed this issue in its Respondents' Brief, as did the Amici who filed a brief on Casitas's behalf. GSW's Petition for Rehearing makes no points the Court has not already rejected.

L. The Cases Discussed In GSW's Petition for Rehearing Fully Support this Court's Decision

*People v. Superior Court* (1937) 10 Cal.2d 288, is not irrelevant--it is the closest case on point that considers whether the word "purchase" includes, or may include, purchase by eminent domain. This Court did ***not*** "ignore" *Harden v. Superior Court* (1955) 44 Cal.2d 630--GSW's favorite case. This Court correctly noted (in footnote 4 of the slip opinion) that that case is irrelevant because its holding is simply that a public agency must have express statutory authority to condemn property. As GSW admits, Water Code § 71693 empowers Casitas to acquire property by eminent domain. (AOB, p.2 ["One thing that is not an issue is whether Casitas MWD has the power of eminent domain. It does."].)

## IV. CONCLUSION

GSW insults the Court by accusing it of simply "capitulating to the electorate." The Court has determined the law and explained it at considerable length and while it is not surprising GSW is not happy with the result, one would have expected it to address the Court with respect. Instead, GSW has shamelessly "showed its colors"--a complete lack of regard for the Court, for the democratic process, and for the opinions of its customers, the voters, and the community it is supposed to serve. Casitas

promises the residents of Ojai a better future. Thankfully, in light of this Court's decision, that future is one step closer to reality.

Dated: May 6, 2015

Respectfully submitted

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rule of Court 8.204(c)(1) the Respondents' Answer to Petition for Rehearing contains 2,658 words (a brief produced on a computer must not exceed 14,000 words, including footnotes).

Dated: May 6, 2015

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## PROOF OF SERVICE BY MAIL

*Golden State Water Company v. Casitas Municipal Water District, et al.*
Second District Court of Appeal Case No. B255408

**STATE OF CALIFORNIA, COUNTY OF ORANGE**

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On May 6, 2015, I served on the interested parties in said action the within:

**RESPONDENTS' ANSWER TO PETITION FOR REHEARING**

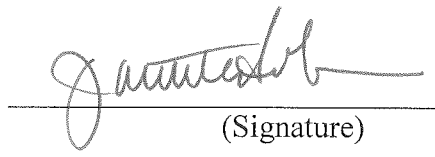
by placing a true copy thereof in sealed envelope(s) addressed as stated on the following page.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of 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.

Executed on May 6, 2015, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Janette Hollmer
(Type or print name)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## PROOF OF SERVICE BY MAIL

*Golden State Water Company v. Casitas Municipal Water District, et al.*
Second District Court of Appeal Case No. B255408

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