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

PETITION FOR REHEARING

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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,

MANATT, PHELPS & PHILLIPS, LLP

By: *s/Michael M. Berger*
MICHAEL M. BERGER
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Golden State Water Company

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INTRODUCTION

Perception may not be everything, but perception of partiality is never a good thing.

Eschewing Justice Kaufman's insight that "ad hominem attacks . . . should play no part in the opinions of any member of the judiciary" (*Williams v. Superior Court* [1989] 49 Cal.3d 736, 748 [concurring opinion]), the Opinion at bench opens by comparing the actions of Appellant Golden State Water to "King George III's choke hold on government" (slip op., p. 1) — and does so with such "vigor and emphasis" that it appeared to one prominent California appellate law professor that the author of the opinion "believes respondents' position even more than they do . . . [and appears to be] affirmatively enthusiastic about it."[1] Other commentators described the opinion's opening as being an "inauspicious piece of judicial advocacy"[2] consisting of "questionable rhetoric suggesting a bias against investor-owned utilities."[3]

Even the comparison of Golden State to "unpopular" "monopolists" (slip op., p. 1) (tarring all "monopolists" with the same Sherman Antitrust Act brush) seems out of place in light of the fact that ***all*** utilities — regardless of whether they are owned by private investors or by public entities — are monopolies. That is by design, so as to avoid duplication of expensive facilities. Thus, if Respondent Casitas MWD succeeds with its scheme, the "monopoly" will not go away. It will simply be replaced by another monopoly. And publicly-owned utilities are no more universally beloved than investor-owned utilities.

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1 http://calapp.blogspot.com/2015/04/golden-state-water-co-v-casitas.html.

2 http://www.inversecondemnation.com/.

3 http://www.nossaman.com/Mello-Roos_Funding_of_Condemnation_Actiono_of_Water_Provider.

I.

THE OPINION CONTAINS SUPPOSED STATEMENTS OF FACT THAT ARE NOT SUPPORTED BY THE RECORD

In the course of concluding that there is no need for a trial (slip op., pp. 4-5), the Opinion appears to accept any factual assertion made by either Casitas MWD or Ojai FLOW (e.g., slip op., pp. 2-3). With no trial, the Opinion ends up with representations of "fact" that are not based on facts and seeks to justify that by saying that "we can resolve the appeal more easily by" not remanding for trial. (Slip op., p. 5.)

— Item: The Opinion says that Casitas MWD passed resolutions "listing the *facilities* to be acquired . . . ." (Slip op., p. 3; emphasis added.) Wrong. What Casitas MWD was supposed to do — what it was *required* to do by Govt. Code § 53321, subd. (c) — was to create a "list of authorized facilities." As Golden State pointed out repeatedly (AOB 7-8; ARB 4; Reply to Amicus Brief 8-9), there is no such list. The "list" created by Casitas MWD does not even purport to be a list of ***facilities***, but a compendium of anticipated ***costs***. Here is what the Casitas MWD Resolution (i.e., its purported "listing of authorized facilities") says it covers:

> "1. *All costs incurred* by the District to acquire the real, personal, and intangible property and property rights owned or held by the Golden State Water Company . . . . Said costs shall include. . . *legal costs, appraisal and expert witness fees, litigation expenses* incurred with respect to any eminent domain action . . . the amount of just compensation paid to Golden State Water (including without limitation the fair market value for the property taken, *severance damages*, if any, costs for loss of *business goodwill*, if any, *relocation expenses*, if any, *pre-condemnation damages*, *interest*, property *taxes*, and *litigation expenses payable to Golden State Water*, and any other *payments of any type or nature*, whether paid pursuant to negotiated agreement, settlement, judgment, or other court order), and, if for whatever reason,

> any eminent domain action initiated by the District is dismissed or abandoned (including, without limitation due to a judicial determination that the District does not have the legal right to take the Golden State Water property or due to the District Board's determination that the amount of just compensation awarded to Golden State Water exceeds the amount the District can responsibly pay for Golden State Water's property) the damages payable to Golden State Water pursuant to California Code of Civil Procedure Sections 1268.510 and 1268.610 et seq." (3-AA-498; emphasis added.)

— **Item:** In concluding that there is no need for a trial on the "feasibility" of "alternative financing methods," the Opinion says that "respondents do not contest the issue . . . ." (Slip op., p. 4.) Wrong. That is something which Casitas MWD has steadfastly contested (e.g., RB 3, n. 1, 53), as did its multiple governmental amici curiae (application 3, brief 1 [three times], 6, 7, 11, 14, 17).[4] Indeed, earlier on the same page, the Opinion notes that "Respondents *dispute* this assertion [that there are viable financing methods available], arguing that 'Mello-Roos financing is the only viable tool for the job' and that other methods are impractical." (Slip op., p. 4; emphasis added.)

Golden State showed this Court there were alternatives. For example, in reply to the amicus brief supporting Casitas MWD, we noted that the City of Claremont is, at this very moment, seeking to condemn Golden State's operations in that city, financing the acquisition through revenue bonds, not Mello-Roos bonds.[5] The complaint was filed on behalf of the city by counsel here representing the Governmental Amici.[6] (Reply

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[4] In terms bordering on the shrill, the governmental amici insist that Mello-Roos financing is fundamental to eminent domain without citing a single instance in which such bonds were used to finance eminent domain.

[5] See http://www.smartvoter.org/2014/11/04/ca/la/meas/W/, describing the bonds for the electorate.

[6] See https://www.claremont-courier.com/articles/news/t13735-

to Amicus, p. 15.) Plainly, the issue was contested. To the extent the Court reached its result based on the impression that Mello-Roos bonds are the only way for Casitas MWD to finance its plan, such impression is plainly erroneous and rehearing is appropriate.

— **Item:** The Opinion perpetuates the myth of property owners "hold[ing] out" and taking advantage of condemning agencies. (Slip op., p. 7.) For the reality facing property owners in the path of government projects, see, e.g., *Jones v. People ex rel. Dept. of Transp.* (1978) 22 Cal.3d 144.

II.

THE OPINION CONTAINS ERRONEOUS STATEMENTS OF LAW

— **Item:** The Opinion asserts that, while Mello-Roos cannot be used to purchase pencils (as they are not tangible property with a useful life of more than five years), it "could be used . . . to purchase a pencil factory." (Slip op., p. 13.) Wrong. That glib comment ignores the fact that even real estate can only be condemned for a "*public use.*" (Cal. Const., art. I, § 19; U.S. Const., Amend. V.) There is no public use in a government agency purchasing the manufacturer of office supplies. Government does not operate that way; it simply buys the supplies it needs.

— **Item:** The opinion asserts that "eminent domain is sometimes referred to as 'compulsory purchase' [citing Black's Law Dictionary]." (Slip op., p. 6.) Wrong. Even the Court's source (Black's) says the term is used "rarely." Actually, it is a term used primarily in England (once the home of the aforementioned George III). (See, e.g., Victor Moore, *Compulsory Purchase in the United Kingdom*, Sec. A, ch. 1, in 1 COMPENSATION FOR EXPROPRIATION: A COMPARATIVE STUDY [G. M.

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claremont-files-eminent-domain-golden-state.

Erasmus, ed., Oxford 1990) There is nothing to indicate that the Legislature meant to use this English legal term when it drafted Mello-Roos. The term appears in no California statute and has certainly never been used in a reported California opinion.

— **Item:** The Opinion expands the meaning of "incidental" beyond either ordinary or legal English.

— **Item:** The Opinion's interpretation of the statutory word "or" to mean "and" is not only what the Supreme Court has termed "unnatural" (*In re Jesusa V.* [2004] 32 Cal.4th 588, 623), but it is contrary to the very narrow way in which such an "unnatural" construction is allowed to be used. As the Supreme Court put it in *Jesusa*, 32 Cal.4th at 623, that may only be done to "carry out the obvious intent" of a statute. There, the obvious intent was to have an otherwise incarcerated prisoner present in court. To interpret "or" to mean either the prisoner or his attorney could be in court would defeat the statute. Not so here, where the alternative — i.e., the natural — meaning of the word fits the statute precisely. The Opinion wholly misapplies *Jesusa V.*

— **Item:** The Opinion erroneously equates a court verdict on valuation with "a similarly excessive demand" made by a private party, concluding that a private sale can fail, just as a verdict can come in higher than anticipated and, "[i]n either case money will have been spent fruitlessly." (Slip op., p. 12.) Not so. In the event of a failed sale, the agency will retain the money. In the event of a final judgment, money will have to be spent or the government will have to formally dismiss the attempted condemnation and pay all of the owner's litigation expenses (Code Civ. Proc. §1268.610). Litigation expenses include the owner's attorney's fees (Code Civ. Proc. §1235.140).

III.

THE OPINION IGNORES LEGAL ARGUMENTS RAISED BY GOLDEN STATE

The Opinion ignores or overlooks legal arguments raised by Golden State, including:

— **Item:** In the course of "liberally" construing Mello-Roos (slip op., p. 8), the Opinion ignores or overlooks the Legislature's qualifying phrase, i.e., that the statute was to be liberally construed "to effectuate its purposes." (Govt. Code § 53315.) The "purpose" of Mello-Roos was neither to effectuate eminent domain nor to finance any and all projects that local government might want to accomplish. As the statute itself says, it "provides an alternative method of financing ***certain*** public capital facilities and services" (Govt. Code § 53311.5), not ***any*** or ***all*** public capital facilities and services. This issue was discussed at AOB 38-39; ARB 34-36.

— **Item:** "Liberal" construction requires neither abject deference nor relinquishment of the judiciary's time-honored (at least since *Marbury v. Madison* [1803] 5 U.S. 137) function of reviewing statutes to determine their legality. This issue was discussed at AOB 13; ARB 32-34.

— **Item:** The Opinion focuses on an irrelevant Supreme Court opinion (*People v. Superior Court* [1937] 10 Cal.2d 288) (see slip op., pp. 6-8), while ignoring a more recent Supreme Court opinion on point (*Harden v. Superior Court* [1955] 44 Cal.2d 630). *Harden* is discussed at AOB 30-32, ARB 28; Reply to Amicus 5.

— **Item:** Like the trial court, the Opinion's capitulation to the electorate allows the electorate to compel illegal action. The Opinion says only that it "will not set the will of the voters aside" (slip op., p. 15), without discussing the legality of their action or the necessity for judicial review. This is discussed at AOB 42-43.

— **Item:** The Opinion mis-states Golden State's argument by saying Golden State argued that "Mello-Roos financing is available only for investments with certain outcomes." (Slip op., p. 12.) What Golden State argued is that Mello-Roos was designed for purchases where the bond holders/taxpayers would actually acquire something. In other words, the statute's restriction to either "real or other tangible property with an estimated useful life of five years or longer" meant that the bond holders/taxpayers would actually acquire something concrete for their cash. That is why Golden State argued that the bonds could not be used for the acquisition of "intangible" property, something that would be the antithesis of the "tangible" property intended. By using the bonds to purchase intangible property, Casitas MWD will not provide its bond holders/taxpayers with the solid, concrete property the Legislature intended.

CONCLUSION

The facts and the law warrant a different result.

Dated: April 29, 2015

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

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CERTIFICATE OF APPELLATE COUNSEL

The foregoing Petition for Rehearing was produced on a computer. According to the word count of the computer program used to prepare the brief, it contains **1,891** words, excluding tables and this certificate.

Dated: April 29, 2015

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

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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 **April 29, 2015**, I served the documents described as:

PETITION FOR REHEARING

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

SEE ATTACHED SERVICE LIST

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 **April 29, 2015**, at Los Angeles, California.

s/*Bess Hubbard*
BESS HUBBARD

SERVICE LIST

***Golden State Water Co., v. Casitas Municipal Water District,* No. B255408**

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