S226622

IN THE SUPREME COURT OF CALIFORNIA

GOLDEN STATE WATER COMPANY,
Plaintiff and Appellant,

vs.

CASITAS MUNICIPAL WATER DISTRICT, et al.,
Defendants and Respondents.

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

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

ANSWER TO PETITION FOR REVIEW

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DISTRICT NO. 2013-1 (OJAI)

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I. INTRODUCTION.

Respondents Casitas Municipal Water District and Casitas Municipal Water District Community Facilities District No. 2013-1 (Ojai) (collectively, "Casitas") submit that Supreme Court review of this case is not "necessary to secure uniformity of decision" nor to "settle an important question of law." (Cal. Rules of Court, Rule 8.500(b)(1).) The Court of Appeal's unanimous decision provides a solid, well-reasoned, and common sense interpretation of the Mello-Roos Community Facilities Act of 1982 (Govt. Code §53311 *et seq.* ["Mello-Roos Act"]), consistent with the Legislature's command that that statute "shall be liberally construed in order to effectuate its purposes." (Govt. Code §53315.) Accordingly, Petitioner Golden State Water Company's ("Golden State's") Petition for Review should be denied.

II. REVIEW BY THIS COURT IS NOT NECESSARY TO SECURE UNIFORMITY OF DECISION.

Golden State repeatedly points out that this is a case of first impression, raising an issue that no court in the more than 30-year history of the Mello-Roos Act has ever been called upon to address. (Petition for Review, pp. 1, 2, 3, 4, 5, 11, and 20.) True enough. This admission establishes that review by this Court is not needed to resolve any conflicts in published appellate court decisions. (Cal. Rules of Court, Rule 8.500(b)(1).)

III. REVIEW BY THIS COURT IS NOT NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW.

While the Court of Appeal's decision is extremely important to the parties to this litigation and the residents of Ojai—*87% of whom voted to tax themselves up to $60 million in order to enable Casitas to finance the take-over of Golden State's water utility in that community*—it is of very limited importance statewide, a factor that bears upon whether this Court should devote its limited resources to undertaking review. (Cal. Rules of Court, Rule 8.500(b)(1).) If Golden State is to be believed, nothing like this fact situation has occurred in the more than 30 years since the Mello-Roos Act was first enacted. When will be the next time—another 33 years from today? This is an "activity vacuum" that contradicts any notion that the Petition before this Court presents a burning issue of widespread public interest.

Indeed, as the Court of Appeal noted, Golden State *concedes* that Casitas has the statutory power of eminent domain to acquire Golden State's Ojai water utility (see Water Code §71693), Golden State asserted below that it is "sure that [Casitas] can come up with other alternatives" to fund an acquisition by eminent domain, and Golden State suggests some of those other alternatives in its Petition for Review. (*Id.*, pp. 7, 8, Appendix A thereto ["Opinion"], p. 4.) The Court of Appeal mused that these

admissions by Golden State might even show that "the injury [Golden State] complains of—the imminent taking of its assets—does not turn on the resolution of this lawsuit," such that Golden State lacks the requisite standing to sue. (Opinion, p. 4.) Ultimately, the Court of Appeal elected to "not remand to the trial court to make the factual determination on which Golden State's standing turns," in part because the Court felt it could "resolve the appeal more easily by reaching the merits." (*Id.*, pp. 4-5.) For purposes of *this* Court's decision on whether this case is important enough to warrant a grant of review, however, the Court of Appeal's discussion of the standing issue highlights the fact that *whatever* the outcome in this case is it is *not* likely to have any appreciable impact on the condemnation of property in California or the number of public agency acquisitions of private investor-owned utilities. Even if this Court *were* to grant review and even if this Court *were* to reverse the Court of Appeal's decision, public agencies wishing to condemn private investor-owned utilities would simply use another "tool for the job." (*Id.*, p. 4; Petition for Review, p. 20.) Casitas suggests this Court has more important concerns than to resolve a unique statutory interpretation question of little or no widespread practical import.

IV. THE COURT OF APPEAL'S DECISION PROVIDES A SOLID, WELL-REASONED, AND COMMON SENSE INTERPRETATION OF THE MELLO-ROOS ACT. FURTHER REVIEW BY THIS COURT IS UNWARRANTED.

A. A Public Agency With Statutory Condemnation Authority May Fund a Condemnation Action With Mello-Roos Special Taxes or the Proceeds of Mello-Roos Bonds.

Casitas submits the Court of Appeal "got it right" and review of its decision by this Court is unwarranted.

Significantly, Golden State fails to mention that Casitas *does* have multiple express statutory grants of eminent domain power to acquire Golden State's Ojai water system (a key point which, as noted above, it conceded below). See Water Code §§71693-71694 and Code of Civil Procedure ["CCP"] §1240.110(a). It was on this basis that the Court of Appeal quite properly distinguished *Harden v. Superior Court* (1955) 44 Cal.2d 630 (see Opinion at p. 12, fn. 4), the case primarily relied upon by Golden State (Petition for Review, pp. 6, 12-13). Moreover, *Harden* dealt with the entirely different question of a public agency's extra-territorial condemnation authority, whereas here, unlike the situation in *Harden*, Golden State's entire Ojai service area is located within Casitas's boundaries *and*, in any event, Casitas *does* have an express grant of statutory authority to condemn outside its boundaries. (CCP §1240.125.)[1]

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[1] The extra-territorial condemnation issue addressed in *Harden* posed issues of potential conflicts and abuses in the exercise of governmental power that have nothing to do with this case. Local governmental boundaries are generally supposed to define and limit the authority of a

Casitas has no quarrel with Golden State's observation that "when the Legislature wants to authorize eminent domain as a mode of acquisition, it says so directly." (Petition for Review, p. 5.) The point here is that the Legislature *has* expressly granted eminent domain authority to Casitas for the very purpose Casitas now seeks to exercise that power.

Moreover, Golden State ignores the fact that the Mello-Roos Act is merely a *financing* statute. Golden State provides no explanation as to why Casitas—or any other public agency—should not be permitted to combine the use of its statutory eminent domain powers (set forth in the organic law pursuant to which it is formed, the Eminent Domain Law [CCP §1230.010 *et seq.*], or elsewhere) with its financing powers set forth in the Mello-Roos Act. While Golden State repeatedly states that the Mello-Roos Act *itself* does not expressly refer to the acquisition of property by eminent domain, Golden State fails to cite *any* court decision holding that a public agency's condemnation authority must be reiterated in each financing statute it may decide to use to carry out its public purposes. When the Legislature adopted the Mello-Roos Act it did not *need* to restate that local agencies

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governmental entity to act, including the exercise of its power of eminent domain. Should City X be allowed to reach out and condemn property in City Y? For what valid purpose of City X? What if City Y objects that City X is invading, duplicating, or overriding City Y's exercise of *its* authority? These concerns explain why, dating back at least to *Mulville v. City of San Diego* (1920) 183 Cal. 734, this Court has wisely required extra-territorial grants of condemnation authority to be explicit, a limitation now codified in CCP §1240.050.

have eminent domain authority to finance the acquisition of property for public purposes—*the law was already settled they do.* In this respect, the Mello-Roos Act and the various statutory grants of eminent domain authority to a variety of public agencies are "*in pari materia* [and] should be construed together so that all parts of the statutory scheme are given effect." *Levin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091.

Golden State's assertion that the "focus" of the Mello-Roos Act is on the "*voluntary* purchase" of property (Petition for Review, p. 3; emph. added) is a fiction and a blatant mischaracterization of the law. In fact, the word "voluntary" nowhere appears in the Mello-Roos Act--in association with the purchase or acquisition of property or otherwise.

In contrast to Golden State's wishful thinking, the Court of Appeal went to considerable lengths to summarize the legislative history of the Mello-Roos Act, demonstrating the Legislature gave no thought to prohibiting or restricting the use of eminent domain. (Opinion, pp. 10-11.)[2] In fact, in 1986 the Legislature adopted a bill amending multiple provisions

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[2] Casitas scoured nearly 10,000 pages of legislative history including the bills resulting in adoption of the original Mello-Roos Act in 1982 and no fewer than 12 amendments to the Act over the next 3 decades and found not a single statement, not a single word, not a single concern raised by *any* legislator, *any* member of the Legislature's staff, or *any* organization or individual commenting on any of the bills indicating the Legislature has ever been concerned with Mello-Roos funds being used to finance condemnation actions. (See Respondents' Appendix ["RA"] 0017-0018. The legislative history ["LH"] can be found on the disk provided at RA 0489.)

of the Mello-Roos Act and the Subdivision Map Act and one of those amendments expressly authorized Mello-Roos funds to be used to finance eminent domain actions to acquire property needed to complete offsite subdivision improvements—a change in the law that clearly contradicts Golden State's position and demonstrates the Legislature understood Mello-Roos funds *can* properly be used to finance eminent domain proceedings. (Statutes 1986, Chapter 1102; RA 0489, LH 002540, 002551, 002562-63, 002721-22, and 002730.)

Golden State interprets the word "purchase" in Government Code §53313.5 to be limited to a voluntary purchase and to necessarily exclude a purchase by eminent domain. Not so. As this Court noted nearly 150 years ago, the word "[p]urchase includes every mode of coming to an estate, except inheritance." *Greer v. Blanchar* (1870) 40 Cal. 194, 197. Dictionary definitions cited by the Court of Appeal are consistent with *Greer*. (Opinion, p. 6.) And contrary to Golden State's attempt to dismiss it (Petition for Review, p. 12), *People v. Superior Court* (1937) 10 Cal.2d 288, 294-295, the only reported decision Casitas was able to find on the issue of whether the word "purchase" encompasses a purchase by eminent domain, strongly supports this interpretation and has *everything* to do with this case. As the Court of Appeal noted, in *People v. Superior Court* this Court held that the word "purchase," as used in the statute there under review, includes an acquisition "by means of an action in the exercise of the

right of eminent domain. In other words, that the word 'purchase' is broad enough to include within its meaning [an acquisition by] any means other than by descent." (Opinion, pp. 6-8.) The law simply does not support Golden State's position.

Golden State's assertion that the Legislature has a "traditional" practice of using the word "purchase" to mean only "voluntary purchase, not eminent domain" (Petition for Review, p. 6) is untrue and Golden State's reference to other statutes in which the Legislature has listed the permitted means of acquiring property as including purchase "or" eminent domain (Petition for Review, pp. 14-15) proves nothing. As the Court of Appeal correctly noted, "[s]tatutes intended to define a concept expansively often list terms with overlapping meanings separated by the word 'or'" and, accordingly, such words (even when used elsewhere) "are not mutually exclusive." (Opinion, p. 9.)[3] For every example Golden State can cite in which the Legislature referred to purchase "or" eminent domain the Court of Appeal cited a contrary example in which the Legislature acknowledged that a purchase by eminent domain is simply *one alternative means* of purchase. See, *e.g.*, Opinion at p. 10, where the Court of Appeal cited Civil Code §798.80(e)(7) (providing that "[t]he purchase of a mobile home park

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[3] So, for example, a "grant" is also a "gift" (Govt. Code §53382, CCP §1240.130) and a "mortgage," "pledge," "lien," and "security instrument" all describe essentially the same thing. (Commercial Code §1201(b)(29).)

by a governmental entity under its powers of eminent domain" exempts the park owner from notifying the homeowners' association of its intent to sell), Civil Code §800.100(e)(7) (same for owner of floating home marina), and Education Code §19957.5 ("The terms 'purchase of land' or 'acquisition of land'. . . shall include, but shall not be limited to, the acquisition of land by eminent domain."). All that this mincing of words proves is that the Legislature does not always use the exact same verbiage when it legislates on similar topics. It is a gigantic—and unwarranted—leap, however, to focus on the single word "purchase" in the first sentence of Government Code §53313.5, as Golden State does, and attempt to tease from that one word in isolation some overarching and deliberate intent on the part of the Legislature to prohibit a public agency from financing the condemnation of property with Mello-Roos funds.

Golden State also ignores a key point made by the Court of Appeal—that "[t]hroughout the Mello-Roos Act the terms 'purchase' and 'acquisition' are used interchangeably." (Opinion, p. 10, citing references to the term "acquisition" in Government Code §§53313.4, 53313.5(f), and 53314; see also, §§53345.3, 53313.5(e), 53313.5(k).) Even Golden State must acknowledge that the term "acquisition" is a broad term that does (or at least may) include acquisition by eminent domain—after all, the statutes Golden State itself cites in its Petition for Review (at p. 14) themselves refer to eminent domain or condemnation as one means of "acquiring" property.

If the Legislature had deliberately chosen the word "purchase" in the first sentence of Government Code §53313.5 in order to *exclude* the use of eminent domain, presumably it would have used that same term in those other sections of the Mello-Roos Act as well. It did not.

Finally, Golden State would have this Court do what the Court of Appeal properly declined to do--ignore the Legislature's command that the Mello-Roos Act "shall be liberally construed in order to effectuate its purposes" and additionally ignore the Legislature's declaration that a public agency proceeding under the Mello-Roos Act "may take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of the [Act] and are not otherwise prohibited by law." (Govt. Code §§53315 and 53312.5. Compare Opinion at 8-9 with Petition for Review at 10.) Indeed, Golden State asks the Court to stand the Legislature's "liberal construction" command on its head by narrowly and *strictly* construing the meaning of the word "purchase" (in the one place it appears in Government Code §53313.5). But see *Prunty v. Bank of America* (1974) 37 Cal.App.3d 430, 440, interpreting the words "purchase" and "purchaser" in CCP §580b in an expansive fashion in order to provide a "liberal construction" consistent with the legislative intent underlying California's anti-deficiency laws.

To the extent there is any ambiguity in the term "purchase" in Government Code §53313.5, the Court of Appeal was right to "select the

construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [internal citations omitted].) One of the central purposes of the Mello-Roos Act is to provide a supplemental means of financing the acquisition and construction of public facilities. Only if the Mello-Roos Act is interpreted broadly, to permit Mello-Roos financing to be used to acquire property by condemnation (if necessary), will this legislative purpose be achieved.

The Court of Appeal properly noted that there is an "obvious practical need in certain circumstances of using eminent domain power to acquire property." (Opinion, p. 8.) So what if, instead, Golden State's narrow and strict construction of the Mello-Roos Act were adopted? What would happen if a public agency were to form a Mello-Roos community facilities district ("CFD") and sell bonds but a property owner whose property is essential to implementation of the project then refused to sell--must the public project be abandoned? What if the property owner, knowing the public agency has no condemnation power, were to jack up its asking price far above fair market value--must the public agency pay whatever price the owner (unreasonably) demands? 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. The Court of Appeal got it absolutely right; Golden State does not.

A public agency forming a CFD cannot be expected to enter into negotiated purchase/sale agreements with each property owner whose property is to be acquired *before* it has formed the CFD and held the required CFD election—it must have the funds in hand *before* it can make a purchase offer[4] and it must form the CFD and sell the Mello-Roos bonds in order to obtain the funds.

In short, Golden State's crabbed interpretation of the Mello-Roos Act would so hamstring public agencies that they simply be unable to use the Mello-Roos Act to finance public projects for which the acquisition of property is required. This would defeat, not advance, the legislative direction in Government Code §53313 that the Mello-Roos Act "shall be liberally construed in order to effectuate its purposes."

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[4] See Government Code §§7267.1 and 7267.2(a)(1), which require a public agency to first appraise the owner's property to determine its fair market value and then "make an offer to the owner or owners of record to acquire the property for the full amount so established"

B. The Mello-Roos Act Authorizes the Acquisition of Intangible Property that is Incidental to the Acquisition of "Real or Tangible Property With an Estimated Useful Life of Five Years or Longer."

GSW acknowledges that "Casitas MWD's plan is to condemn all of Golden State's pipes, pumps, reservoirs, wells," etc. in its Ojai service area. (Petition for Review, pp. 7-8.) True (assuming, of course, that Golden State persists in refusing to negotiate on a voluntary sale and the Casitas Board authorizes the filing of a condemnation action in accordance with the requirements set forth in the Eminent Domain Law). Apart from the eminent domain issue addressed in Section IV.A, *supra*, Golden State does *not* question Casitas's authority to acquire these assets using Mello-Roos funds. (Govt. Code §53313.5 and subd. (h) thereof.) What Golden State objects to is Casitas's use of Mello-Roos funds to also pay for the acquisition of incidental *intangible* assets Golden State may own (*e.g.*, alleged "water rights" and business goodwill) and to cover the incidental *costs* Casitas will incur in acquiring Golden State's property (*e.g.*, attorney fees, expert witness costs, and other litigation expenses). (Petition for Review, pp. 17-19.) Casitas submits that with respect to this second question posed by Golden State's Petition for Review (*id.*, p. 5) Golden State is not leveling with the Court.

In fact, Golden State does not even *mention*, much less discuss, the provisions of the Mello-Roos Act—fully addressed in the Court of Appeal's

decision (Opinion, pp. 13-14)—that *expressly authorize* the use of Mello-Roos funds for these purposes. Casitas will briefly do so.

Government Code §53345.3 authorizes the amount of any Mello-Roos bonded indebtedness to include "*all* costs and estimated costs incidental to, or connected with, the accomplishment of the purpose for which the proposed debt is to be incurred, including, but not limited to, the estimated costs of . . . acquisition of building . . .; acquisition of land, rights-of-way. . .; architectural, engineering, inspection, legal, fiscal, and financial consultant fees. . . ." (Emphasis added.) The term "cost" is defined in §53317(c) to include "the expense of . . . purchasing the public facility and of related land, right-of-way, easements, including incidental expenses." The term "incidental expenses" is defined in §53317(e) to include "(2). . . costs otherwise incurred in order to carry out the authorized purposes of the district." Collectively, these statutory provisions encompass all costs Casitas intends to incur in its effort to acquire Golden State's Ojai water utility and, as the Court of Appeal correctly found, "[t]his comports with the Mello-Roos Act." (Opinion, p. 14.)

The Court of Appeal did nothing more than apply the broad definitions the Legislature gave to the terms "cost" and "incidental expenses" in the Mello-Roos Act.

Once again, if Golden State's narrow and strict construction of the Mello-Roos Act were accepted, public agencies would effectively be unable

to use that financing statute to acquire property at all. This Court has defined "tangible property" as referring to "things that can be touched, seen, and smelled." *Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 880, citing *Warner v. Fire Ins. Exchange* (1991) 230 Cal.App.3d 1029, 1034. In *Kazi*, the Court held that easements are intangible property. *Id.* at 881. So by this definition are leases, rights of mortgagees, water rights, business goodwill, and a host of other incidental rights in the "bundle of sticks" comprising real property. Virtually *any time* a public agency acquires real property it will acquire incidental intangible property rights that are appurtenant thereto. If the Court of Appeal's decision were to be reversed on this point and Golden State's position were to be accepted, CFD financing could never be used to acquire property (whether by voluntary purchase or eminent domain) unless it happened to be one of those rare properties with *no* easements, leases, mortgages, water or mineral rights, business goodwill, etc., etc. Such an interpretation would *severely* constrain use of the Mello-Roos Act, in violation of the Legislature's declaration that the Act "shall be liberally construed the effectuate its purposes" (Govt. Code §53315), the provision in the Act authorizing a local agency forming a CFD to "take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of this chapter and are not otherwise prohibited by law" (§53312.5), and the general rule that the Court must "select the construction [of the Act] that comports most closely

with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute." (*Day v. Fontana*, *supra*, 25 Cal.4th at 272.)

V. CONCLUSION

For the foregoing reasons, Casitas respectfully submits that Golden State's Petition for Review should be denied.

Dated: June 5, 2015

Respectfully submitted,

RUTAN & TUCKER, LLP

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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 3,748 words (a brief produced on a computer must not exceed 14,000 words, including footnotes).

Dated: June 5, 2015

RUTAN & TUCKER, LLP

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PROOF OF SERVICE BY MAIL

Golden State Water Company v. Casitas Municipal Water District, et al.
Supreme Court Case No. S226622
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 June 5, 2015, I served on the interested parties in said action the within:

ANSWER TO PETITION FOR REVIEW

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

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Executed on June 5, 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 Holl mer
(Type or print name)

(Signature)

PROOF OF SERVICE BY MAIL

Golden State Water Company v. Casitas Municipal Water District, et al.
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