TO: BOARD OF DIRECTORS

FROM: BRUCE BUEL BSB

DATE: JUNE 10, 2008

AGENDA ITEM
E-2
JUNE 11, 2008

SUPPLEMENTAL MATERIALS

DESCRIBE OPTIONS IF BLACKLAKE/TOWN MERGER FAILS

ITEM

Describe Options if Blacklake/Town Merger Fails – Supplemental materials.

BACKGROUND

Ernest Conant, the attorney representing Blacklake, submitted the attached letter on June 9, 2008.

RECOMMENDATION

See previous staff note.

ATTACHMENTS

- Ernest Conant Letter

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THE LAW OFFICES OF
Young Wooldridge
A Limited Liability Partnership • Est. 1939
Ernest A. Conant, Partner

June 9, 2008

The Honorable Board of Directors of
Nipomo Community Services District
P. O. Box 326
Nipomo, CA 93444-0326

RE: BLACK LAKE PROPERTY OWNERS – NOTICE OF PROPOSITION 218 HEARING

Dear Ladies and Gentlemen:

Our Firm has been retained by the Black Lake Management Association ("BLMA"), to review the above-referenced matter. Reference is made to your "Notice of Public Hearing" (Notice) mailed on or about June 3, 2008, calling for a Majority Protest Hearing on July 23, 2008. I have met with members of the BLMA Board and other interested parties and the following represents their views.

For the reasons more particularly described below, we believe that the District has followed the incorrect procedure in presenting the proposed rate increase and the so called "Equitable Surcharge" or "Buy-In Charge" (Buy-In Charge) to the voters for approval. At a minimum, we believe that the District has erred by subjecting the Buy-In Charge to the majority protest process under Section 6 of Article XIII D of the California Constitution (Proposition 218) as compared to Section 4, the so called assessment ballot process.[1]

REQUESTED ACTION

On behalf of the BLMA, we specifically request that:

1. The District withdraw and cancel its Notice of Public Hearing of July 23, 2008, as set forth in the above-referenced notice; and

[1] We also note that the Buy-In Charge as presented creates significant issues related to whether it is properly categorized as a general or special tax thus subjecting it to the voter approval provisions found in Section 2 of Proposition 218. In particular, we note Section 1(d) of Article XIII C which provides that a "'Special Tax' means any tax imposed for a specific purpose, which is placed into a general fund. We also note the Supreme Court holding in *Rider v. County of San Diego* (1991) 1 Cal 4th 1.

2. The NCSD Board meet and confer with the Advisory Committee constituting the BLMA Board of Directors in accordance with your Resolution No. 96-592 in an attempt to develop consensus on a more equitable cost to be borne by the Black Lake property owners related to the merger of the two systems.

Although there was some discussion between the District and BLMA, and by letter dated April 11, 2007, the BLMA Board approved in principal the merger of the two systems, during those discussions I understand there was no mention of a "buy-in" fee. The BLMA Board believes that it is only proper and fitting that a discussion take place as to what the appropriate "buy-in" should be before the District unilaterally sends out the notice to the Black Lake property owners. The BLMA Board recognizes that it is appropriate that there be some form of "buy-in", particularly to pay for any costs related to connecting the two systems. The BLMA Board also appreciates the efforts of Director Trotter and others to consider alternatives and try to seek a more equitable solution, but they are of the firm believe that the proposal now "on the table" is inequitable and not justified, and wish to discuss this matter further with you.

Clearly the matter called for in the recent notice fits within the category of activities through Resolution No. 96-592 your District has agreed to meet with the BLMA Advisory Committee – and paragraph 2 specifically refers to "changes in rate and charges, and other matters of concern to Black Lake residents and property owners" as matters which would be subject to the Advisory Committee process. The BLMA Board appreciates that in recent years this Advisory Committee process may not have been formally followed to the extent envisioned by Resolution 96-592, but certainly the matters called forth in the notice is a significant matter which should have undergone more formal review and consultation between the District and the Advisory Committee.

We request that you withdraw and cancel the July 23, 2008 noticed hearing as soon as possible so that residents do not expend unnecessary efforts, further antagonizing the residents, in securing a protest for the scheduled hearing.

DISCUSSION OF MAJORITY PROTEST PROCESS BEING IMPROPER

Following is our analysis of why the majority protest process prescribed in the notice for the July 23, 2008 hearing is improper and unlawful.

The California Supreme Court has found that once someone has become "a customer of a public water agency, all charges for water delivery incurred thereafter are charges for a property-related service" regardless of whether the charge is a flat rate or consumptive based. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 217.)

The Notice explicitly provides that the "equitable surcharge (now known as the 'Buy-In Charge') [shall] be paid by Blacklake water customers to account for the ***capital contribution*** . .

." According to the Notice the Buy-In Charge is calculated based upon a determination of ***the benefits provided*** to Blacklake water customers. The Notice further provides that the rate increases shall go to various ***capital costs including the construction of a new intertie.*** Additionally, the Notice provides that the proposed increased rates would be used to:

- Provide sufficient funds for ongoing ***operations and maintenance*** for the District Water System.
- ***Rehabilitation, replacement and upgrade of facilities*** needed to provide services for the District Water System.

Given the above cited portions of the Notice which demonstrate the capital nature of the proposed increases, it is readily apparent that the election provisions found in Section 4 rather than Section 6 of Article XIII D are applicable in this matter at a minimum.[2] In particular, we make note of the following definitions found in Section 2 of Article XIII D:

> (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "***benefit assessment***," "***maintenance assessment***" and "special assessment tax."
>
> (c) ***"Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement*** by an agency.
>
> (f) ***"Maintenance and operation expenses" means the cost*** of rent, ***repair, replacement, rehabilitation,*** fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

Additionally, we note the Proposition 218 Omnibus Implementation Act (Implementation Act) and more specifically we point your attention to Government Code section 53750(b) which provides that an:

> ***"Assessment" means any levy or charge*** by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is ***imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided.***

Furthermore, we note the following found in Section 5 of Article XIII D:

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[2] We again make note that the Buy-in Charge as presented in the Notice appears to be properly categorized as either a special or general tax subject to the voter approval provisions found in Section 2 of Proposition 218.

> . . . all existing, ***new, or increased assessments*** shall comply with this article.
>
> (a) Any assessment imposed exclusively to ***finance the capital costs or maintenance and operation expenses for*** sidewalks, streets, sewers, ***water***, flood control, drainage systems or vector control. Subsequent increases in such assessments ***shall be subject to*** the procedures and approval process set forth in ***Section 4***.

Finally, we note Section 4 of Article XIII D itself which specifically provides the following:

> The ***proportionate special benefit*** derived by each identified parcel shall be determined in relationship to ***the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided.*** No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. ***Only special benefits are assessable,*** and an agency shall separate the general benefits from the special benefits conferred on a parcel.

Given the above cited definitions and text found in both the Constitution and the Implementing Act it appears readily apparent that the general rules of statutory construction require a finding that the proposed rate increase and the Buy-In Charge be subjected to the voter approval process found in Section 4 rather than Section 6, at a minimum, because the increases are admittedly aimed at providing capital for public improvements.

In representing a number of public agencies, we have often encountered the question of "drawing the line" between what charges and fees are subject to the Section 4 Assessment Ballot Process and which are subject to the Section 6 Majority Protest Process. Admittedly, the case law supporting these judgments is very limited given the fairly recent enactment of Proposition 218 and the recent developments created by the *Bighorn* ruling. However, given the general tenure of the limited case law, the above citations and the general rules of statutory construction, we feel confident that the proposed rate increase, including the Buy-In Charge, should be subjected to the Assessment Ballot Process, at a minimum. We also note that given the current uncertainty in the statute of limitations for a violation of Proposition 218, an agency is best served by acting in an abundance of caution when choosing which section to follow as there is the potential that an agency may be required to refund up to 4 years worth of an improperly collected increase.

In closing, we respectfully request that you cancel the July 23, 2008 hearing and majority protest process and engage in the meet and confer process with the BLMA, as more particularly described above.

Respectfully submitted,

Ernest A. Conant
Special Counsel for
Black Lake Management Association

EAC:bg

cc: Bruce Buel, General Manager
Jon Seitz, General Counsel
Nancy Fleming, President, Black Lake Management Assoc.

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