E1

Law Offices of **Babak Naficy**

May 4, 2012

RECEIVED
MAY - 8 2012
NIPOMO COMMUNITY SERVICES DISTRICT

VIA U.S.MAIL & FACSIMILE

Michael LeBrun, General Manager
NIPOMO COMMUNITY SERVICES DISTRICT
148 South Wilson Street
Post Office Box 326
Nipomo, California 93444-5320
Fax: 805-929-1932

Re: Proposed Special Assessment for Supplemental Water Project

1504 Marsh Street
San Luis Obispo
California 93401

ph: 805.593.0926
fax: 805.593.0946

babaknaficy@sbcglobal.net

Dear Mr. LeBrun:

On behalf of Mesa Community Alliance ("MCA"), I urge you not to approve the Engineer's Report and authorize the formation of an Assessment District to finance the proposed Supplemental Water Project. The preliminary Engineering Report reveals significant and fatal flaws in the proposed assessment. As more fully explained below, the proposed Special Assessment violates California law because it will not provide any "special benefit" to any of the assessed parcels and the assessment amounts are not proportional to the purported special benefits. The NCSD, moreover -- as we explained in a previous correspondence-- has illegally expended public funds to perpetuate myths and falsehoods in an ill-advised effort to scare the public into voting in favor of the proposed Assessment. For all of these reasons, we urge you not to approve the proposed Assessment.

Overview of Proposition 218

The ballot argument in favor or Proposition 218 declared that "politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes "assessment" and "fee". Silicon Valley Tax Payers Association v. Santa Clara County Open Space Authority (2008) 44 Cal.th 431, 449, fn 5. ("Silicon Valley"). Proposition 218 was intended to tighten the kind of benefits assessments for which a fee may be levied. Id. Its provisions are to be construed liberally to "effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." Id., at 448, citing text of Proposition 218, §5, p. 109; . . .

Proposition 218 (which added Articles VIIIC and VIIID to the California Constitution) was intended to accomplish this goal by allowing only four types of local property taxes: (1) ad valorem tax, (2) a special tax, (3) an assessment, and (4) a fee or charge. Cal. Const. Arc. XIII d, §a (1)-(4). The Proposition places restrictions (analogous to those imposed by Proposition 13 on ad valorem property taxes) on assessments, fees and charges. Silicon Valley, supra, 44 Cal.4th at 443.

"[W]hile a special assessment may, like a special tax, be viewed in a sense as having been levied for a specific purpose, a critical distinction between the two public financing mechanisms is that a special assessment must confer a **special benefit** upon the property assessed beyond that conferred generally. [citations]" Id., at 442. (emphasis added.)

> Proposition 218 restricts government's ability to impose assessments in several important ways. First, it tightens the definition of the two key findings necessary to support an assessment: special benefit and proportionality. **An assessment can be imposed only for a "special benefit" conferred on a particular property.** (Art. XIIID, §§ 2, subd. (b), 4, subd. (a).) A special benefit is "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large." (Art. XIIID, § 2, subd. (i).) The definition specifically provides that "[g]eneral enhancement of property value does not constitute 'special benefit.' " (Ibid.) **Further, an assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel."** (Art. XIIID, § 4, subd. (a).) "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." (Ibid.) Because only special benefits are assessable, and public improvements often provide both general benefits to the community and special benefits to a particular property, the assessing agency must first "separate the general benefits from the special benefits conferred on a parcel" and impose the assessment only for the special benefits. (Art. XIIID, § 4, subd. (a).) Id.

Proposition 218 also changed the burden of proof in a legal challenge to the validity of the Assessment. Under Proposition 218, regardless of the legal theories that are pled in the complaint, the public agency bears the burden of demonstrating that a given assessment satisfies both the "special benefit" and "proportionality" prongs of Article XIII D. Beutz v. County of Riverside (2010) 184 Cal.App.4th 1516, 1535.

The standard of judicial review in any action challenging an assessment district favors the challenger. As the California Supreme Court has made abundantly clear, because compliance with Proposition 218 is now a constitutional question, courts must exercise their "independent judgment" to determine whether the assessment imposed by the public agency passes legal muster. Silicon Valley, supra, 44 Cal.4th at 448.

The proposed Assessment violates both the Special Benefit and Proportionality Prongs of Article XIII D of the California Constitution

The proposed Assessment is unconstitutional because it violates both the "special benefit" and "proportionality" prongs of Article XIIID, §4. Any benefit from the proposed pipeline, i.e. replenishment of the aquifer, is not "special" in that it will be enjoyed by all water users on the Mesa. The assessment scheme, moreover, is not satisfy the constitutional "proportionality" requirement because it does not allocate the assessment on the basis of benefit enjoyed by each property.

A. The Proposed Assessment will not confer a "Special Benefit" on Assessed Properties

It is axiomatic that under Proposition 218, "only special benefits are assessable" (Article XIIID§4(a))." Silicon Valley, supra, 44 Cal.4th at 450. "Local governments may not impose assessments to pay for the cost of providing a general benefit to the community . . . [citations] If a proposed project will provide both general benefits to the community and special benefits to particular properties, the agency must impose an assessment solely based on the special benefits. It must separate the general benefits from the special benefits and must secure other funding for the general benefits." [citations]" Id.

A special benefit is "a particular and distinct benefit over and above general benefits conferred on real property in the district or the public at large, . . ." Article XIII D, §2(i) A project confers a special benefit when the affected property "receives a direct advantage from the improvement funded by the assessment." Town of Tiburon v. Bonander (2009) 180 Cal.App.4th 1057, 1077 ("Tiburon"), citing Silicon Valley, supra, 44 Cal.4th at 452.

The preliminary Engineer's Report ("ER"), the pipeline Environmental Impact Report ("EIR") and the NCSD's own publicity campaign makes it clear that the proposed assessment will not confer "particular and distinct" benefits on assessed parcels. As was the case in Silicon Valley, the properties in the proposed assessment scheme will receive no particular or distinct benefit beyond the benefits that will accrue to any other property owners in the Nipomo Mesa.

According to the ER, the special benefit to each property within the three assessment zones "is the ability of each property to have reliable sources of fresh water and available supplemental water and so [sic.] the threat of seawater intrusion from over-pumping the current fresh water supply is avoided." ER at 17. This claim quickly unravels upon careful consideration.

The proposed Assessment District represents a financial mechanism by which the NCSD intends to finance the "Physical Solution" stipulation to which it agreed in 2005. This "Physical Solution" was devised to address an alleged overdraft condition and the concomitant threat of saltwater intrusion. This was the message that the NCSD itself conveyed to the public in its fear-mongering brochures, and the ostensible reason offered

for the supplemental water project. The Assessment is intended to be this "physical solution", and to make future development possible. The notion that the supplemental water will specially benefit any subset of Mesa residents is simply a fiction created to justify the proposed Special Assessment.

This conclusion is consistent with the analysis in the NCSD's Water Intertie Final EIR, which admitted that primary objectives of the project are to (1) slow the depletion of above-sea-level groundwater in storage beneath the NMMA, (2) comply with the 2005 groundwater adjudication settlement and judgment, and (3) assist in stabilizing the groundwater levels in the NMMA by reducing pumping in the NMMA, etc. Final EIR at III-6. According to the FEIR, the supplemental water project would result in "the provision of additional water supplies thereby reducing or eliminating a potential constraint to future development within areas to be served by this additional water." V-11. The FEIR, therefore, supports MCA's contention that implementation of the supplemental water project will generally benefit all NMMA residents.

The ER's claim that the Assessment specially benefits the assessed properties by enabling "each property to have reliable sources of fresh water" is pure sophistry and post hoc rationalization of a plan – hatched during the Santa Maria groundwater litigation – to reduce the alleged overdraft of the groundwater on the Mesa. Each assessed property owner currently receives an adequate and reliable fresh water supply, even if continued pumping would cause an overdraft and potential saltwater intrusion. So the real function of the supplemental water is not to ensure reliable fresh water for each assessed parcel, but to mitigate the impacts of continued pumping of groundwater in the Nipomo Mesa.

It is undisputed that even as the NCSD and other participating water purveyors reduce their groundwater extraction by incorporating the supplemental supplies from Santa Maria, other users on the Mesa will continue to extract groundwater for their own use. In fact, non-assessed users may feel they can pump more water to the extent that the net draw on the aquifer is reduced as a result of the supplemental water project. Overdraft of the aquifer negatively affects all groundwater users, not just the assessed properties. Thus, by reducing the NCSD and the other water purveyor's reliance on groundwater, the proposed project would directly benefit all groundwater users on the Mesa by effectively increasing the aggregate supply of groundwater that is available to all users, including non-assessed properties outside the jurisdiction of the participant water agencies. The supplemental water will not assure assessed properties of a reliable water supply any more than it guarantees the same for any other groundwater extractors on the Mesa. Guarantee of freshwater, therefore, is no special benefit. If it is a benefit at all, it is a benefit that is shared by all groundwater users on the Mesa, not just assessed properties.

This analysis is consistent with the ER's honest admission that the supplemental water project would benefit the assessed properties by avoiding "the threat of seawater intrusion from over-pumping the current fresh water supply". Much as we explained above, avoiding the threat of saltwater intrusion will benefit all water users, whether assessed or not.

The ER also suggests that receiving supplemental water benefits the assessed properties because only these parcels "will receive a special benefit from the work of improvements." ER at 17. It is not at all clear what these improvements may be. What is clear is that receiving molecules of water shipped from Santa Maria (as opposed to molecules of water from Nipomo Mesa groundwater), in itself, is not a special benefit. In fact, it is extremely unlikely that anyone within special assessment zones would notice the change in the source of the water that flows through their tap or shower-head.

The ER's cursory, one-paragraph, explanation of the project's "General Benefit" also supports MCA's contention that the project will not specially benefit anyone. The ER admits that the project may "convey public general benefit or special benefit beyond the properties within the Assessment District or to exempt properties with the Assessment District." ER at 16. The ER fails, however, to clearly explain how the project may benefit non-assessed properties. As explained above, it is clear that the Project will essentially benefit every property on the Mesa, regardless of the property's inclusion within any of the participating water agencies. It is also unclear how the proposed assessment can pass constitutional muster when the ER admits that some on the Mesa would receive a "special benefit" as a result of the project, without being assessed for the cost.

We also note that currently, Rural Water Company ("RWC") has no plans to construct a 1.5 mile pipeline needed to deliver supplemental water from the NCSD to its own customers. We are also aware that Woodlands may likewise decide not to physically deliver the supplemental water to its customers via a pipeline. These facts completely undermine the ER's contention that a special benefit of the Project "is the ability of each property to have "available supplemental water. . ." We by no means concede that having molecules of supplemental water run through your pipelines is a "special benefit", but to the extent that the NCSD claims it is, that contention is refuted by the fact that residents within RWC or Woodlands may never be connected to the NCSD and thus may never receive molecules of supplemental water. The benefit of the Supplemental Water Project enjoyed by these customers is qualitatively and quantitatively no different than the benefits enjoyed by any other non-assessed water users on the Nipomo Mesa. The benefit, therefore, cannot be considered "special" to the extent that is enjoyed equally by both assessed and non-assessed properties.

The ER essentially admits a glaring flaw in its special benefit analysis when it claims that properties outside the assessment zones or otherwise exempt from assessment are subject to the County's Ordinance No. 3090, which requires parcels within the Nipomo Mesa Water Conservation Area to pay a supplemental water development fee when applying for a general plan amendment or land division. This ordinance was codified at San Luis Obispo County Code §22.112.020(F)(1). Subsection (F)(1)(a) provides that an application for a general plan amendment within the Nipomo Mesa Conservation Area may not be approved if the estimated non-agricultural water demand resulting from the amendment would exceed the existing non-agricultural demand, unless the applicant can acquire water for the project from alternative source. No payment of fees would be required for a general plan amendment. Thus, the ER is simply wrong when it claims

that applicants for general plan amendment outside the jurisdiction of the NCSD must pay a supplemental water development fee.

§22.112.020(F)(1)(b) provides that, where the estimated non-agricultural water demand resulting from a land division exceeds the existing non-agricultural demand, the applicant must make a one-time payment of a supplemental water development fee not to exceed $13,200. The ER fails to explain how this fee provision supports the ER's contention that the project specially benefits assessed properties, or how the fee imposed by the County Ordinance compares to the proposed assessment fees. Nor does the ER make any effort to explain how the County may use the collected supplemental water development fees in the future, for example, to defray the cost of the construction of the pipeline. To the best of our understanding, the County currently does not have a mitigation program based on the supplemental water development fees and does not collect any supplemental water fees. Even if the County should decide to go forward and develop and implement a supplemental water project in the future, there is no mechanism by which to charge any current water users or any holders of development approval existing outside of the NCSD's jurisdiction. Such users will surely benefit from supplemental water but will never be assessed any fees for that benefit.

The ER claims that the general benefit accrued to the public and not covered by Ordinance 3090 "has been quantified to be much less than the contribution provided by the State water grant in the amount of $2,300,000." AR 17-18. The District has failed support this claim by describing its assumptions and revealing its calculations. As explained above, the District bears the burden of proving that the proposed assessment passes constitutional muster. The District may not carry this burden by simply positing the result of its calculations without transparency.

More fundamentally, we reject the District's attempt to use the State Water grant to cover the general benefit that will result from the assessment. As best as we can tell, the State grant was intended to reduce the overall cost of the supplemental water project, thereby assisting assessed property owners who may be unable to pay the cost of the assessment. At a minimum, the District owes the public an explanation as to why the benefit from the State grant should inure to the sole benefit of the public outside the NCSD and other water purveyor's jurisdiction, without any of the benefit accruing to the District's own existing customers who are stuck with paying 100% cost of the pipeline.

Recently the NCSD changed the originally proposed project by "upsizing the currently proposed Phase I waterline extension adjacent to Blosser Road from 18 to 24 inches and the elimination of the Phase III additional 18-inch parallel waterline or replacement 24-inch waterline." Supplemental Water Addendum. This change makes it crystal clear that the Project will largely benefit non-assessed properties by procuring a water source for future development. The proposed change to the Project would mean that assessed properties would pay 100 % of the cost of a pipeline which, in addition to nominally benefitting the assessed properties, will also benefit future developments on parcels that are not even currently within the jurisdiction of the NCSD.

B. The Assessment is Unconstitutional Because the Costs are Disproportionate to the Purported Benefits

The ER's methodology for assessing the benefit that purportedly accrues to assessed properties is deeply flawed, resulting in arbitrary and disproportionate benefit assessments. The methodology of the assessment is fundamentally flawed because each parcel is assessed, not based on the proportion of benefit received, but on the overall cost of the pipeline. The cost per unit of benefit is calculated, not based on the value of the purported benefit, but the portion of construction cost allocated to each of the four so-called zones of benefit. Thus, a "benefit unit" in Zone A costs $2,782.93 (ER at 34), while a "benefit unit" is worth only $837.82 in Zone B, $1,339.35 in Zone C, and $2,652.18 in Zone D. (ER at 35). These assessments, however, are not directly proportional to each parcel's share of supplemental water, or even to the percentage of supplemental water that is allocated to each of these zones. This evidence demonstrates that, contrary to the explicit constitutional mandate of Proposition 218, the fee assessed to each parcel is not directly related to benefit received by each parcel. Tiburon, supra, 180 Cal.App.4th at 1081.

The NCSD was a party to the Santa Maria groundwater adjudication litigation, Santa Clara Superior Court Case No. 97-CV-770214. In 2005, the NCSD entered into a stipulation with a number of "stipulating parties", pursuant to which, the NCSD agreed to purchase and transmit to the Nipomo Mesa Management Area (NMMA) a minimum of 2500 acre feet/year ("AFY"), referred to as "Nipomo Supplemental Water." The stipulation included a seemingly arbitrary formula, pursuant to which, NCSD, Woodlands Mutual Water Company, Golden State Water Company (GSWC) and Rural Water Company ("RWC") would each purchase a portion of the 2500 AFY. NCSD would purchase the lion's share of the water (66.68 %), followed by Woodlands (16.66 %), and SCWC and RWC, at 8.33 % each. The Santa Clara Superior Court subsequently incorporated the above-referenced stipulation into a "Judgment After Trial", dated January 25, 2006.

The ER admits that the benefit ascribed to each assessed property is in part a function of the property's location within one of the four participating water agencies.

> "The cost of a benefit unit will be different for each Zone as each Zone has a different share in the project." ER at 21
>
> "Each zone has a different share in the total project costs based on their percentage established in the Stipulation . . ." ER at 17
>
> "Apportionment of the costs of the Project for each zone is based on the percentage of the projected quantity of available water due to the construction of the Project for such zone in relationship to the other zone's quantity of available water and constitutes the special benefit for such zone." ER at 17.

In addition to its location, the benefit (and therefore the cost assessed) ascribed to each assessed parcel is also a function of the parcel's size, zoning, current use, development status and development potential: Development potential is arbitrarily determined based on whether the parcel is currently vacant or developed with one or more residential dwellings. Initially we note that basing the assessment on developmental potential is inherently unfair to the extent that some property owners will never subdivide their property – and therefore not enjoy any additional benefit from the assessment—while other owners will subdivide and realize a greater benefit. The assessment is also unreasonable because it is based on a theoretical maximum development potential which, depending on other environmental constraints, the County may not permit approve. As such, while all properties may be assessed based on at the same theoretical formula, some property owners may be prevented from enjoying the full benefit of the assessment on account of the County's land use decisions.

The ER's formula for benefit assessment is flawed also because it is based on arbitrary and unfair assumptions. For example, parcels less than 2 acres with existing residential units are assessed solely based on existing use and not full build-out potential, while same sized parcels without an existing residence would be assessed based on the parcel's full development potential. The ER assumption that owners of two-acre parcels with an existing residence would not subdivide is not explained or justified. The fact that a parcel is currently developed with a single residential unit does not preclude future subdivision, while the fact that a parcel is currently vacant does not necessarily mean that the parcel will be subdivided in the future.

Likewise, developed commercial parcels less than two acres are assessed only for existing use, but undeveloped commercial parcels less than two acres are assessed for the parcel's full theoretical build-out potential. The ER makes no effort to justify this arbitrary assessment.

Irrigated, "recreational" lots and "open space" are assessed based on parcel size, and not actual water use. Thus a parcel that is irrigated only for landscaping around a public facility is assessed at the same rate as a golf course that is fully irrigated year around. By the same token, public facilities that are irrigated are assessed based not on the historical water use or the type of use, but by size. Assessment based on size alone is clearly arbitrary and fails to meet the proportionality requirement of Proposition 218.

Finally, we note that certain parcels are exempt from the assessment because they possess underlying appropriative water rights. ER at 25. As we have already explained, these parcels will nevertheless enjoy the full benefit of supplemental water because according to the NCSD, supplemental water will reduce the purported overdraft of the entire aquifer and will avoid the problem of saltwater intrusion. These exempt parcels will thus enjoy the benefit of avoiding saltwater intrusion as much as any of the assessed parcels. The owners of the exempt parcels may conclude, moreover, that they can safely increase their extraction of groundwater (up to the maximum appropriative limit) now that the NMMA groundwater supplies will be replenished by the supplemental water project. Any increase in groundwater use by such appropriative water rights holders within the

NMMA would essentially wipe out any benefit that the NCSD hopes would result from the supplemental water project. Accordingly, exempting appropriative water right holders violates Proposition 218's proportionality requirement.

Based on the foregoing, we urge you not to approve the proposed assessment. Please also note that by this reference, we also incorporate all of our previous comments and any other comments that may be made at the hearing scheduled for consideration of the proposed assessment

Sincerely,

Babak Naficy, Counsel for
MESA COMMUNITY ADVOCATES

cc: Jon Seitz, Esq.