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April 13, 2012

VIA EMAIL: dave@laredolaw.net
AND U.S. MAIL

David C. Laredo
De Lay & Laredo
606 Forest Avenue
Pacific Grove, CA 93950

Re: Ordinance 152 – Authorizing an Annual Water Use Fee

Dear Mr. Laredo:

On behalf of the Monterey County Association of Realtors ("MCAR"), I am writing you today to express serious concerns related to the Monterey Peninsula Water Management District's ("District") Ordinance 152 authorizing an annual water use fee and the process by which the District proposes to adopt this Ordinance.[1] I also recommend that you share this letter with the Board of Directors and the General Manager of the District and that the District not have a first reading of the Ordinance, which is scheduled for April 16, 2012, until the issues addressed in this letter have been fully and carefully considered.

California Environmental Quality Act ("CEQA")

Finding 38 of the draft Ordinance 152 provides that "[t]his Ordinance is exempt from CEQA pursuant to CEQA Guidelines section 15273(a)(1) – Rates, Tolls, Fares, Charges." The problem with using this exemption is that 15273(b) provides that "[r]ate increases to fund capital projects for the expansion of a system remain subject to CEQA." Here, the purpose of this "use fee" is to build and maintain the Aquifer Storage and Recovery Project, the Groundwater Replenishment Project and a proposed future Desalination Project. While these projects may be designed to "protect District water resources, satisfy water quantity and water quality requirements, meet existing commitments for water demand, and provide sufficient water for present beneficial use," they, nevertheless, will result in the expansion of the District's water

[1] It should be noted that this letter does not address the District's past failure to comply with the Requirements of Proposition 218 in its imposition of a "use fee" through CAW. Nevertheless, the District should be aware that Pajaro Valley Water Management Agency was forced to refund over $11 million dollars to its rate payers after the Agency lost at the appellate court in *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364. In any event, MCAR may address the District's past failures to comply with Proposition 218 at a later date.

augmentation system. Thus, because this fee will be used "to fund capital projects for the expansion of a system," adoption of this Ordinance is not exempt from CEQA pursuant to CEQA Guideline section 15273, and the District needs to ensure that environmental review related to the adoption of this new "use fee" has been properly performed prior to adopting Ordinance 152.

Proposition 218[2] Election

Article XIII D, Section 6, Subsection (c), provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property-related fee shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the effected area."

It appears that based on the District's timeline provided in the document entitled "Process for Implementing Alternative Collection Mechanism for Use Fee" and based on the conclusion that you reached in your Memorandum to the Board dated March 26, 2012, that the District does not believe that a vote is required prior to adoption of its use fee because "[w]ater services are not included in voter approval requirements set by Article XIII D, Section 6(c)." This is incorrect.

There is no doubt that supplying water is a property-related service within the meaning of Article XIII D's definition of fee or charge. *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409. Indeed, for purposes of Article XIII D, "a fee for ongoing water service through an existing connection" is the type of fee that is exempted from the voting requirements contained in Section 6, Subsection (c). *Id.* Here, the District is not providing water service through existing connections.

Instead, the District proposes to charge a use fee that is most similar to the groundwater augmentation fee that the Pajaro Valley Water Management Agency attempted to charge operators of wells, within its jurisdiction,[3] for the purpose of funding projects detailed in the Agency's Revised Basin Master Plan, which evaluated problems of overdraft and sea water intrusion. *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364. In *Pajaro Valley*, the Court concluded that the augmentation fee was subject to the requirements

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[2] At the time of the drafting of this letter, I lacked a copy of the rate structure that is proposed to be approved. Indeed, the only thing I know is that the "annual water use fee shall be applied [to] all property served by the CAW system based on water use categories, including residential, multi-residential, commercial, industrial, golf course, and public agency water users, among other categories." It is possible that upon review of your water rate structure, MCAR may conclude that the District's categories violate Proposition 218. *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926 (holding, in part, that rate charges based on categories of use were not proportional to the cost of providing service in violation of Proposition 218).

[3] Unlike the fee in *Pajaro Valley,* where the fee is being charged to well operators, the fee here would be charged to customers of CAW. A question remains regarding whether the fee would actually be used to fund a service that would be used by the owner of the property being charged or would the fee fund a service that would be used by CAW (i.e., fund the augmentation of the water supply so that CAW may sell water). Article XIII D, Section 6, Subsection (b)(4); *Paland v. Brooktrails Township Community Services District* (2010) 179 Cal.App.4th 1358.

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of Proposition 218, but did not reach the question of whether such a fee was subject to the requirement that an agency hold a vote on the proposed augmentation fee. Subsequent to the decision in *Pajaro Valley*, the Pajaro Valley Water Management Agency published a paper entitled *Pajaro Valley Water Management Agency Proposition 218 Service Charge Adjustments – Frequently Asked Questions* in which the Agency provided as follows:

> Proposition 218 requires a Protest Hearing prior to the election authorizing the adjustment of charges. The augmentation charge, but not the delivered water charge, also is subject to voter approval by the affected property owners. If a majority of affected property owners do not protest the proposed delivered water charge adjustment, then the Agency may impose the revised charges. If a majority of affected property owners do not protest the proposed augmentation charge adjustment, the Agency may then proceed with a mail ballot election to adjust the Augmentation Charges. The Agency has determined that the Delivered Water Charge is a charge for water service and therefore exempt from voter approval under Proposition 218.

In 2010, the Agency had a vote on a new augmentation fee after the Agency had conducted a protest hearing. Most recently, the 6th District Court of Appeal noted in *Eiskamp v. Pajaro Valley Water Management District* (2012) 203 Cal.App.4th 97, that in establishing and increasing its augmentation fee "[t]he Board of Directors did not comply with the notice, hearing and ***voting*** requirements of Article XIII D, Section 6 of the California Constitution." [emphasis added.]

Thus, given that the District's "use fee," which is aimed at funding projects related to its "conservation and augmentation responsibilities," is most like the augmentation fee charged by Pajaro Valley Water Management Agency, and given the foregoing, the District should conclude that it is required to hold an election on the "use fee" after it holds the protest hearing on the "use fee." Failure to do so will result in a lack of compliance with the requirements of Proposition 218.[4]

Project Election

According to the District's enabling legislation as provided in California Water Code, Appendix section 118-453, the following shall occur:

> The board may institute works or projects for single zones, and joint works or projects for participating zones,[5] for the financing, construction, maintaining,

[4] It should be noted that Proposition 218 requires that "[r]evenues derived from a fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed." Thus, should the District properly adopt an augmentation or "use fee," no moneys raised through such a fee may be used for river mitigation, which has become a significant portion of the District's budget over the last ten years.

[5] Section 118-18 defines zone to mean "any area designated within the district created in order to finance, construct, acquire, reconstruct, maintain, operate, extend, repair or otherwise improve any work or improvement of common benefit to such area."

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operating, extending, repairing, or otherwise improving any work or improvement of common benefit to the zone or participating zones. For the purpose of acquiring authority to proceed with any such work or project, the board shall adopt a resolution [at a noticed public hearing] specifying its intention to undertake the work or project, incorporating estimates of cost of the work or project to be borne by the zone or participating zones.

Further, Section 118-455 provides as follows:

If, prior to the conclusion of the hearing, a written protest is filed with the board against the proposed work or project which is signed by a majority in number of the holders of title to real property, or assessable rights therein, or evidence of title thereto, within such zone or within any of the participating zones for which such work or project was initiated, or by the holders of title to a majority of the assessed valuation of the real property within the zone or any of the participating zones, the proceedings relating to such work or project shall be terminated and a new hearing shall be conducted before the board may proceed with the work or project. Such new hearing may not be held until at least six months following such termination.

Finally, Section 118-471 provides as follows:

If the board determines to proceed with a work or project in a zone or participating zones after the conclusion of the public hearing, it shall call an election to be held in the zone or participating zones on the question of proceeding with the work or project. Such election shall be called by the adoption of a notice of election, which shall state the date of the election, the proposition to be voted upon, the hours the polls will be open, and shall designate the election precincts, the polling place within each precinct and the names of the election officers consisting of one inspector, one judge, and one clerk for each precinct. Only registered voters within the zone or participating zones shall be entitled to vote at such election.

Here, the proposed "use fee" is designed to fund projects which benefit the zone "connected to CAW water Distribution System, excluding the Bishop, Hidden Hills, Ambler, and Toro Subunits." The reason that Bishop, Hidden Hills, Ambler, and Toro Subunits are excluded from the zone is because "[t]hose sub-units will not benefit from the District activities supported by the fee." Thus, prior to adopting a "use fee" to fund certain projects which benefit properties lying within a specific zone of the District, the District should hold a protest hearing and an election to determine whether the electorate residing within the zone in question approves of the District's proposed projects related to water conservation and augmentation.

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Conclusion

Thank you for the opportunity to comment on the Ordinance and for your consideration of this matter. This office and MCAR reserve the right to provide further written or oral comment on the Ordinance. MCAR and I look forward to continuing to work with the District to ensure that a legally adequate Ordinance establishing a "use fee" is what is ultimately considered by the District. Should the District fail to adequately address the issues raised in this letter, MCAR reserves the right to seek an appropriate legal remedy in a court of law.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

Jeffrey L. Massey

:JLM

cc: ***Transmitted PDF Via Email***
Kevin Stone, Director
Government & Community Affairs
Monterey County Association of Realtors

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