Submitted by staff at 6/27/12 Board meeting. Item 4

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
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June 27, 2012

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

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

URGENT: FOR TODAY'S MEETING

Re: Revised Ordinance 152 – Authorizing an Annual Water Supply Charge

Dear Mr. Laredo:

On behalf of the Monterey County Association of Realtors ("MCAR"), I am writing to you today, as a follow-up to the letter that I sent to you on April 13, 2012 and the letter that I sent to you on June 11, 2012, to express some additional serious concerns related to the Monterey Peninsula Water Management District's ("District") ***now revised*** Ordinance 152 authorizing an annual water use fee (***now a water supply charge***) and the process by which the District proposes to adopt this now revised Ordinance. Please, again, share this letter with the District's Board and General Manager. For the reasons stated below, along with the reasons already provided in the previous letters, I recommend that the District immediately suspend the process by which it is proposing to adopt Ordinance 152.

Violation of Proposition 218 and Due Process Rights:

Proposition 218 requires a public agency that is setting a new fee to send a notice of the proposed new property-related fee forty-five (45) days before the hearing on the new fee or charge. As part of that notice, the public agency must provide the reason for the new fee or charge. The District did provide the reason for the proposed fee in its notice, to build water augmentation infrastructure for delivery of water to California American Water Company's customers: "Both ASR and GWR, collectively the "Projects," allow subsequent recovery of the injected water by CAW for delivery to its customers."

On June 12, 2012, the District held a hearing on the original proposed Ordinance 152 for which the notice had been disseminated. After public comment at the June 12th public hearing on the original proposed Ordinance 152, the District closed the hearing and continued

consideration on the adoption of original proposed Ordinance 152. Now, the District today is proposing to adopt a new, revised Ordinance 152 that provides a new, different reason for the fee: "The District engages in a variety of activities that supply water to properties within the District via a distribution system owned by California Water." Thus, the District now needs the fee (or supply charge) so that it may build water projects to augment the water of the Seaside Groundwater Basin so that *it* (not California American) may provide water to properties within the District.

Thus, setting aside the District's inaccurate and convoluted attempt to re-characterize itself as retail provider of water, when it is, in fact, a wholesale provider of water, the District's reason for imposing this fee (or supply charge) has now changed. The reason for the fee is no longer to build water projects to augment the water supply of the Seaside Groundwater Basin so that California American Water Company ("CAW") may provide water for delivery to its customers. Thus, the reason provided for the fee (or supply charge) contained in the new proposed Ordinance 152 is not consistent with the notice that the District provided in advance of the June 12, 2012 protest hearing. As such, should the District adopt the revised Ordinance 152, it will deny all of the potential rate payers their due process rights and be in contravention of the requirements of Proposition 218.

<u>Comments Regarding New Justifications:</u>

Additionally, I have some serious concerns regarding the new sections of Ordinance 152 as they relate to demand and the justification for the fee structure.

Section 3, in part, addresses water demand management which relates to peaks. The District is only providing supply and not designing to meet peaks. CAW's distribution system is designed to handle peaks. Section 5 also addresses potential demand on the water system which is again a CAW issue, not a District issue. Since the District only needs to provide supply, having a meter charge to address peaks is not consistent with cost of service. Interestingly, the District changed the justification for the meter charges by saying that "meter size is a measure of potential demand on a water system (i.e., the volume of service a utility must be prepared to supply)" instead of their peaking rationale provided in the BWA memo.

Section 5 of the ordinance provides that "because the fee is to be collected on the property tax roll, it is not feasible to use metered data to calculate the volume of water served to each property; accordingly, industry-standard estimates based on the use of each parcel are employed." This rationale is suspect. It is not clear how collecting the fee on the property tax roll makes it infeasible to use metered data, which would result in a fee proportionate to the cost of providing service. Additionally, at the end of Section 4, Ordinance 152 provides that the Board may change the method of collection. It follows that if the District's logic to not use metered data because the fees will be collected on the tax roll is correct, then when the District changes its method of collection, the District would be able to use the metered data. This seems like an odd reason to not use metered data.

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Conclusion:

Even though I have not had sufficient time to thoroughly analyze the revised Ordinance 152 because the District decided to spring the revised ordinance a couple days before its meeting, thank you for the opportunity to comment on it and for your consideration of this matter. This office and MCAR reserve the right to provide further written or oral comment on Ordinance 152. Should the District fail to adequately address the issues raised in this letter or any of the previous letters, MCAR and other property owners reserve 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/svc

cc: Kevin Stone, Director (via e-mail)
Government & Community Affairs, Monterey County Association of Realtors

Arlene Tavani
Monterey Peninsula Water Management District (via facsimile)