

Distributed
at 9/17/12 Board Meeting
Item 11

Arlene Tavani

From: Dave Stoldt
Sent: Monday, September 17, 2012 5:40 PM
To: Stephanie Pintar; Arlene Tavani
Subject: FW: SECOND READING AND ADOPTION OF ORDINANCE NO. 154 TOLLING WATER USE CREDITS AFFECTED BY SWRCB ORDER WR 2009-0060; MEETING DATE: SEPTEMBER 17, 2012

RECEIVED

SEP 17 2012

From: Tony Lombardo [<mailto:tony@alombardolaw.com>]
Sent: Monday, September 17, 2012 11:16 AM
To: district5@co.monterey.ca.us
Cc: leekm@co.monterey.ca.us; Dave Stoldt; dave@laredolaw.net; lewis4water@gmail.com; kristimarkey@gmail.com; Jeanne Byrne (jcbarchfaia@att.net); Bob Brower; sandcitymyr@aol.com; Donna Rovella; Debra Tipton
Subject: SECOND READING AND ADOPTION OF ORDINANCE NO. 154 TOLLING WATER USE CREDITS AFFECTED BY SWRCB ORDER WR 2009-0060; MEETING DATE: SEPTEMBER 17, 2012

MPWMD

Chair Potter and Members of the Board:

We represent Quail Lodge, Inc., Carmel Valley Ranch Housing, LLC and Baylaurel LLC. We are writing in regards to the Second Reading of Ordinance No. 154 scheduled for this evening.

At the last meeting, an email was received from Ms. Molly Erickson questioning the Initial Study and Negative Declaration that is proposed to be adopted concurrently with the Ordinance.

There were no specific allegations as to why the proposed Negative Declaration would be inadequate and as far as I am aware, no correspondence has been received since that email with any further explanation of that position.

Since all water use on the Monterey Peninsula is controlled by the terms of the Cease and Desist Order, any use of these water credits would also be subject to the terms of the Cease and Desist Order.

While my clients do not believe that the State Water Resources Control Board would ever agree to rescind the Cease and Desist Order until and unless a replacement water supply is found for the Monterey Peninsula, they have no objection to the Ordinance including a provision requiring both the resolution of the Cease and Desist Order and a replacement supply for the community as a condition precedent to the use of the extended credits.

In the event that either the Ordinance is not adopted by your Board or if it the adoption of the Ordinance is challenged by a third party, my clients would be forced to proceed with the current litigation involving the State Water Resources Control Board and the Monterey Peninsula Water Management District in order to either have the Court declare that the expiration of the water credits should be suspended during the period of the Cease and Desist Order or ask the Court to order the rescission of the water credits so my clients could be restored to the position they were in before the credits were issued.

It is well settled California law that a party to a contract has a right of rescission as an equitable remedy where in situations such as this there is a failure of consideration (in this case, the inability to use their water credits) (see, for example, *Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1144, citing *Runyon v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304).

The California Civil Code also recognizes the right of rescission. California Civil Code Section 1689(b)(4) states that a party may rescind a contract if the consideration bargained for fails in any material respect for any

cause. "Consideration" is also defined as a benefit conferred or any prejudice suffered (see Civil Code Section 1605; also the case of *Fox v. Ehrmantraut* (1980) 28 Cal.3d 127 at 136).

My clients have collectively spent millions of dollars to conserve water on their properties which have resulted in years of benefit to the community, the consideration for which was the issuance of the water credits. In the event they are prevented from using those credits as a result of either the Cease and Desist Order or actions taken to challenge the adoption of this Ordinance, my clients would have no alternative but to seek rescission of the agreement and the right to the use of the water which they agreed to forego based on the issuance of those credits.

My clients support the adoption of Ordinance No. 154.

Respectfully submitted,

Anthony L. Lombardo
ANTHONY LOMBARDO & ASSOCIATES
A Professional Corporation
450 Lincoln Avenue, Suite 101
Salinas, CA 93901
Phone (831) 751-2330
Fax (831) 751-2331
Email tony@alombardolaw.com

PRIVILEGED & CONFIDENTIAL -- ATTORNEY CLIENT PRIVILEGE -- ATTORNEY WORK PRODUCT

The information contained in this electronic transmission is legally privileged and confidential, and it is intended for the sole use of the individual or entity to whom it is addressed. If you are not the intended recipient, please take notice that any form of dissemination, distribution or photocopying of this electronic transmission is strictly prohibited. If you have received this electronic transmission in error, please immediately contact Anthony Lombardo at (831) 751-2330 or tony@alombardolaw.com and immediately delete the electronic transmission.