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July 11, 2014

VIA E-MAIL

State Water Resources Control Board
Attn: Chairperson Felicia Marcus
c/o Clerk of the Board
1001 I Street, 24th Floor
Sacramento, CA 95814
commentletters@waterboards.ca.gov

Re: 7/15-16/14 BOARD MEETING (Emergency Regulations for Water Conservation)

Dear Chairperson Marcus,

Thank you for taking action on these very important issues confronting our State and for accepting public comment letters to (a) help guide the State Water Resources Control Board's ("Board") decision-making regarding the proposed emergency regulations and (b) promote water conservation transparently and in conformance with the California Constitution and published case law.

This comment letter is being submitted on behalf of Capistrano Taxpayers Association, Inc. ("CTA"), which is a San Juan Capistrano-based non-profit public interest organization made up of numerous residents and taxpayers, retired public officials, and businessmen living within City limits. CTA was formed by local residents in response to community concerns about issues such as the rising cost of water, property tax increases, and other taxes disguised as "fee" increases passed on to residents and businesses by the City, with a mission statement to educate and foster/advance interests of City taxpayers. CTA's mission is, in pertinent part, assuring that local governing bodies comply with State and Federal law.

As you may recall from my testimony at the July 1, 2014, Board meeting regarding emergency regulations geared towards senior/junior water right holders, I am the lead trial and appellate attorney in *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*, currently pending before the Fourth Appellate District, Division 3 (Case No. G048969), following a ruling by Judge Gregory Munoz declaring the City of San Juan Capistrano's tiered water rate structure unconstitutional under Proposition 218, which is codified in the California Constitution as Article XIIID. Based on the trial court's findings, Judge Munoz issued mandate ordering an abandonment of the City's water structure and restraining taxpayers from bearing non-compliant water fees under Proposition 218 because the City could not support the 366%

top-to-bottom percentage increase from its base tier (Tier 1) to its top tier (Tier 4). At the appellate level, CTA has garnered the support of Mesa Water District and Howard Jarvis Taxpayer Association, both of which recently filed amicus briefs supporting CTA.

The purpose of this comment letter is to educate the Board about potential Proposition 218 pitfalls with respect to certain language proposed in the emergency regulations being considered on July 15-16, 2014, namely Sections X.2(c) and X.2(e)(2). The following brief analysis explains why.

Building on the foundation laid earlier by Proposition 13 in 1978, Proposition 218 indeed is a *further* limitation on government's ability to impose taxes. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.) Growing weary of "special taxes" under the guise of "assessments" without a two-thirds electorate vote, California voters adopted Proposition in 218 curtailing assessments in these key ways (*Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 446; *City of Palmdale v. Palmdale Water District* 198 Cal.App.4th 926, 931; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 640):

- (1) assessments could only be imposed on specific property-oriented "benefits" (Art. XIIID, §§ 2, subd. (b), 4, subd. (a), subd. (i));

- (2) property-oriented assessments must be strictly proportional, with assessments not being imposed on any parcel "which exceeds the reasonable cost of the proportional special benefit conferred on that parcel," specifically separating the general benefits from the specific benefits for Proposition 218 purposes (Art. XIIID, § 4 subd. (a));

- (3) "[r]evenues derived from the fee or charge shall not exceed the funds required to provide the property-related services" and "the amount of the fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of service attributable to the parcel" (Art. XIID, § 6, subds. (b)(1), (b)(3);

- (4) "no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question," with "[f]ees or charges based on potential or future use of a service [not being, or as the statute says, 'are not'] permitted" (Art. XIIID, § 6(b)(4)); and

- (5) shifted traditional presumptions that had favored assessment validity, making local agencies bear the burden "to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the

> public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question" (Art. XIIID, § 6, subd. (b)(5)).

In addition, Proposition 218 has crucial procedural requirements, including the germane requirement that the agency must conduct a public hearing that is "preceded by written notice to affected owners setting forth, *among other things*, a 'calculat[ion]' of '[t]he amount of the fee or charge proposed to be imposed upon each parcel ....'" (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 594.) Likewise, California Constitution, Article XIIID, section 6(a)(1) further *requires* that the advance notice to the public about water assessments like the one here *must contain* "the ***basis*** upon which the amount of the proposed fee or charge was ***calculated***," because, otherwise, no member of the public would be able to appear and frame a meaningful objection to the calculation data unless that data is vetted in the public arena.

Importantly, a constitutional amendment like Proposition 218 "shall be liberally construed to effectuate its purposes of limiting the local government revenue and enhancing taxpayer consent." (*Silicon Valley, supra,* 44 Cal.4th at p. 448; *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, review denied.) This, however, does ***not*** mean that salutary conservation efforts, and even other constitutional provisions that encourage conservation (such as California Constitution, Article X, section 2), are somehow unable to be harmonized with Proposition 218, as some (such as the City of San Juan Capistrano) may argue.

Indeed, with respect to the imposition of any given water rate structure, the obvious answer to the competing policies advocated, time and again, by both City and its supporting amici is contained in *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 936-937: "so long as, for example, conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel'" (*Palmdale* at p. 936-937) and there is adequate support "for the inequality *between* tiers, depending on the category of user" (*Palmdale* at p. 936, emphasis in original) then Proposition 218/conservation policies can be easily harmonized with each other.

This is precisely the sort of language that needs to be added to Proposed Emergency Regulations Sections X.2(c) and X.2(e)(2). More specifically, while Section X.1 aims to prohibit common actions that lead to water waste, Section X.2 expands Section X.1 beyond its stated intent by adding vague and ambiguous language that, but for Proposition 218 (Article XIIID) and *Palmdale*, would allow urban water suppliers to enforce arbitrary and exponentially progressive rate structures as "another mandatory conservation measure or measures intended to achieve a comparable reduction in water consumption" to the proposed "two days per week" of outdoor irrigation (see X.2(c) and (e)(2)). Such unfettered discretion is completely at odds with

Proposition 218 and the failure to clarify the vague and ambiguous nature of the proposed regulations with respect to water rates would invite further litigation statewide.

So, what's the solution? It's easy. The Board should simply add qualifying language to Sections X.2(c) and X.2(e)(2) that reflects 218's mandate and the holding in *Palmdale*. For example, Section X.2(c) should state: "...limit outdoor irrigation by the persons it serves to no more than two days per week or shall implement another mandatory conservation measure or measure intended to achieve a comparable reduction in water consumption by the persons it serves relative to the amount consumed in 2013, so long as conservation is attained in a manner that 'shall not exceed the proportional cost of the service attributable to the parcel'". (*Palmdale* at p. 936-937.) Section X.2(c) should also clarify that any "comparable mandatory conservation measure" that includes a tiered water rate structure must have adequate, cost-based support for the cost differential *between* tiers. (*Palmdale* at p. 936.)

With respect to Section X.2(e)(2), the same qualifying language should be incorporated into the emergency regulations.

In summary, if such qualifying language is used in Sections X.2(c) and X.2(e)(2), Proposition 218/conservation policies can be easily harmonized with each other.

Sincerely,

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