Submitted by staff at 4/12/18 meeting
Item 2

MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

MISSION AND RESPONSIBILITIES
OF THE MPWMD
ORDINANCE 152 CITIZEN'S OVERSIGHT PANEL

Adopted by MPWMD Board 12/10/12

1. Primary Function

The Ordinance 152 Citizen's Oversight Panel (the "Panel") is a committee formed for the sole purpose of providing a forum for public involvement in the budgeting and expenditure of the District's annual Water Supply Charge. The Panel is directed to meet quarterly and review proposed expenditure of funds for the water supply activities of the District. The Board does not seek consensus from the Panel, but rather input on the ongoing budgeting and expenditure of revenues raised by the water supply charge on water supply related activities. The Panel will submit an annual report for consideration by the Board of Directors at its regular September meeting. The Panel is expected to visit District facilities – to be scheduled by the District – to become better acquainted with water supply projects and operations. The Panel will also, from time to time, be requested to provide community input with respect to water supply-related activities.

Pursuant to the Ordinance, proceeds of the water supply charge may only be used to fund District water supply activities, including capital acquisition and operational costs for Aquifer Storage and Recovery (ASR), Groundwater Replenishment (GWR), and desalination purposes, as well as studies related to project(s) necessary to ensure sufficient water is available for present beneficial water use in the main CAW system. In addition to direct costs of the projects, proceeds of this annual water supply charge may also be expended to ensure sufficient water is available for present beneficial use or uses, including water supply management, water demand management, water augmentation program expenses such as planning for, acquiring and/or reserving augmented water supply capacity, including engineering, hydrologic, legal, geologic, financial, and property acquisition, and for reserves to meet the cash-flow needs of the District and to otherwise provide for the cost to provide services for which the charge is imposed.

No more than fifteen (15%) of proceeds collected by reason of Ordinance No. 152 shall be used to fund general unallocated administrative overhead.

2. Process

The Panel will meet quarterly, beginning in January 2013. At each meeting, the Panel will receive a report from District staff on budget and expenditure of the water supply charge on water supply activities. Generally, the Panel's meetings will include these topics:

January: Review of actual December receipts and update on on-going spending

plans.

April: Review of actual April receipts (if available), discuss proposed budget and capital improvement plan for following fiscal year, and update on on-going spending plans

July: Overview of approved budget and proposed expenditure of funds on water supply activities, prepare prior year annual report, and update on on-going spending plans

October: Update on on-going spending plans.

The Panel meets the definition of a "legislative body" as defined by the Brown Act; therefore, all meetings shall be noticed and open to the public in compliance with the Brown Act.

3. Composition and Structure

a) The Panel is comprised of 9 members who shall reside within the boundaries of the Monterey Peninsula Water Management District. Members of the Panel shall serve at the pleasure of the District Board.

b) The Board shall appoint one member from a panel of three persons nominated by the Monterey Peninsula Taxpayers Association, and the Board shall appoint one member from a panel of three persons nominated by the Monterey County Association of Realtors, and

c) Each Director shall appoint 1 member to the Panel. Appointee must reside within the District boundaries and may be associated with a community group, but does not have to officially represent any community group.

d) Each appointee shall serve a term of two years, with terms expiring on January 1, or on the date the appointing Director vacates office as a member of the MPWMD Board of Directors, whichever shall occur first.

e) A quorum of five (5) Panel members shall be required for an official meeting to be conducted. Action may be taken by majority vote of those Panel members present.

f) The General Manager will serve as Chair to the Panel, for purposes of facilitating meetings. District staff will provide support to the committee as appropriate.

Submitted by staff at 4/12/18 meeting.
Item 4

Filed 4/11/18

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MONTEREY PENINSULA TAXPAYERS' ASSOCIATION, et al., Plaintiffs and Appellants, v. BOARD OF DIRECTORS OF THE MONTEREY PENINSULA WATER MANAGEMENT DISTRICT, et al., Defendants and Respondents.	H042484 (Monterey County Super. Ct. No. M123512)

In this appeal we review a referendum petition challenging an ordinance passed by the Monterey Peninsula Water Management District (the District), which imposed a water supply charge on properties located in the District. The Monterey Peninsula Taxpayers' Association and three of its officers (collectively, MPTA) sought a writ of mandate and declaratory relief to invalidate the ordinance and place its referendum on the ballot for the next local election. The superior court denied the requested relief. On appeal, MPTA renews its claims that (1) the referendum complied with the Elections Code and therefore should have been submitted to the voters, (2) the ordinance violates the District's enabling law, and (3) the ordinance violates article XIII D of the California Constitution. We will affirm the judgment.

Background

The District operates under the Monterey Peninsula Water Management District Law (District Law), enacted in 1977 to address the Legislature's concern that "water

problems in the Monterey Peninsula area require integrated management" and the concomitant "need for conserving and augmenting the supplies of water by integrated management of ground and surface water supplies, for control and conservation of storm and wastewater, and for promotion of the reuse and reclamation of water." (Wat. Code App. § 118-2.)[1] The Legislature declared that "within the Monterey Peninsula area which will be served by the public district created by this law, the water service is principally supplied by a privately owned water supplier which does not have the facilities nor [*sic*] the ability to perform functions which are normally performed by public agencies, including the ability to raise sufficient capital for necessary public works, contract with, or provide necessary assurances to, federal and state agencies for financing of water projects and supplying of water, and the regulation of the distribution of water developed within or brought into such service area." (§ 118-2.) It determined that it was "necessary to create a public agency to carry out such functions which only can be effectively performed by government, including, but not limited to, management and regulation of the use, reuse, reclamation, conservation of water and bond financing of public works projects." (*Ibid*.) The Legislature therefore found that "[i]n order to serve the people of the Monterey Peninsula efficiently, to prevent waste or unreasonable use of water supplies, to promote the control and treatment of storm water and wastewater, and to conserve and foster the scenic values, environmental quality, and native vegetation and fish and wildlife and recreation in the Monterey Peninsula and the Carmel River basin . . . this special law is necessary for the public welfare and for the protection of the environmental quality and the health and property of the residents therein." (*Ibid*.)

To effectuate this overall objective, the District Law broadly empowered the District, subject to specified limitations, "to do any and every lawful act necessary in order that sufficient water may be available for any present or future beneficial use or

[1] All further section references are to this uncodified law as reprinted in West's Annotated Water Code Appendix, except as otherwise specified.

uses of the lands or inhabitants within the district, including, but not limited to, irrigation, domestic, fire protection, municipal, commercial, industrial, recreational, and all other beneficial uses and purposes." (§ 118-325.) The District may accordingly "establish rules and regulations . . . to provide for the sale, distribution, and use of water" (§ 118-326, subd. (c).) It specifically is authorized to store, conserve, and reclaim water for present and future use; to declare and appropriate water rights and import water into the district; to control waste and exportation, and maintain proceedings to prevent interference with beneficial water use; and to approve the establishment or expansion of water distribution systems. (§§ 118-328, 118-363.)

With respect to its funding and expense management, the District is authorized "to adopt regulations respecting the exercise of its powers and the carrying out of its purposes, and to fix and collect rates and charges for the providing or the availability of any service it is authorized to provide or make available or for the sale, lease, or other disposition of water or other product of its works or operations, including standby charges and connection charges." (§ 118-308.) It is specifically empowered to "fix, revise, and collect rates and charges for the services, facilities, or water furnished by it." (§ 118-326, subd. (b).) The District may also provide that charges for any of its services or facilities may be billed together on a single bill issued either by it or on a bill from a private or public utility with which the District has contracted to perform that collection. (§ 118-326, subds. (d), (e).)

California-American Water Company (Cal-Am) is such a public utility; privately owned, it has historically drawn on two sources of water, the Carmel River and the aquifers of the Seaside Groundwater Basin,[2] to supply to property owners in the

[2] "A groundwater basin is '[a]n alluvial aquifer or a stacked series of alluvial aquifers with reasonably well-defined boundaries in a lateral direction and having a definable bottom.' (Dept. of Water Resources, California's Groundwater, Bulletin 118 (2003) p. 216.) An aquifer is '[a] body of rock or sediment that is sufficiently porous and permeable to store, transmit, and yield significant or economic quantities of groundwater

Monterey Peninsula area. (See *Monterey Peninsula Water Management Dist. v. Public Utilities Com.* (2016) 62 Cal.4th 693 (*MPWMD v. PUC*); *California American Water v. City of Seaside* (2010) 183 Cal.App.4th 471, 473.) The District works in collaboration with Cal-Am on various projects to maintain and augment water supplies to the area. Two of those are the Aquifer Storage and Recovery project (ASR), which allows the diversion of excess water from the Carmel River to the Seaside Basin, and the Groundwater Replenishment Project (GWR), which is designed to increase the water supply from the Seaside Basin by injecting it with treated wastewater purchased from a local treatment plant. The ASR was understood to be part of an effort to comply with the Mitigation Program, which was started by the District in 1991 and implemented by Cal-Am under orders from State Water Resources Control Board.

The District derives revenue through property taxes, permit fees, connection charges, grants, and mitigation payments by Cal-Am. For more than 20 years its principal source of funds was the "user fee," which accounted for 46 percent of its total annual revenue before it was discontinued. The user fee was collected on consumers' water bills from Cal-Am. In 2011, however, the California Public Utilities Commission (PUC) expressed concern that the user fee was "not in the public interest," as it appeared to impose an excessive burden on consumers without sufficient accountability by the District. The commission ordered Cal-Am to suspend collection of the user fee and find alternative measures to accomplish the objectives of the Mitigation Program—either by assuming direct responsibility for the mitigation measures or to undertake those measures as a joint project with the District.[3] (See *MPWMD v. PUC*, *supra*, 62 Cal.4th at p. 697.)

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to wells and springs.' (*Id.* at p. 214.)" (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1198, fn. 1 (*City of San Buenaventura*)

[3] This second alternative would entail "the District['s] charging the cost of its services to Cal-Am (rather than to Cal-Am's customers), and . . . Cal-Am recovering that additional expense by way of a special 'surcharge.' " (*MPWMD v. PUC*, *supra*, 62 Cal.4th at p. 697.)

In a subsequent order, the PUC rejected both Cal-Am's application for approval of a new method of funding the mitigation efforts and a settlement agreement between Cal-Am and the District in which they stipulated that the user fee could be collected by Cal-Am and remitted to the District.

The Supreme Court granted the District's petition for writ review, however, and overturned the PUC's decision, holding that the PUC had exceeded its jurisdiction by attempting to regulate the District's user fee. The court noted that any concerns of Cal-Am customers about the amount of the District's fees could be expressed in a legal action, and any allegations of its management inefficiency could culminate in an election of new board members. (*MPWMD v. PUC, supra,* 62 Cal.4th at p. 702.)

While review in the Supreme Court was pending, the District adopted a new means of resurrecting its user fee as a "necessary fall-back position," by enacting Ordinance 152. The ordinance provided for an annual "water service charge" to be imposed (with specified exceptions) on property connected to the main Cal-Am water distribution system. The charge was promoted as a means of funding "District water supply activities," including the operation of the ASR and GWR projects, and as a source of funds to cover other expenses necessary to ensure sufficient water and augment the cash reserves of the District.

The District's board directed the implementation of "a Proposition 218 process," including notification of affected property owners about the proposed fee. The District then held multiple hearings and postponements of its decision in order to address citizen protests before approving the ordinance. It created a Citizen Oversight Panel, limited the use of the proceeds for unallocated administrative overhead to 15 percent, and required the collection of the charge to be suspended whenever proceeds exceeded the funds necessary to achieve the purpose of the ordinance. On June 27, 2012, the District adopted the ordinance by resolution, with an effective date of July 1, and according to the parties, began collecting the charge.

MPTA began circulating a referendum petition targeting only section 4 of the ordinance. Voters received a mailing urging them to "STOP THE WATER TAX" by signing its petition to "force the District to either repeal the tax or put it to a vote we [*sic*] need your signature and that of other registered voters . . . ." On August 30, 2012, the county's Registrar of Voters found the number of signatures on the petition to be sufficient to qualify for a referendum. The District's board of directors, however, adopted the position (one of the options proposed by the District's general manager[4]) that "the petition is invalid because it is flawed."[5] At its September 17, 2012 meeting, after receiving comments in opposition, the board rejected the petition as invalid and declined to submit it to the voters.

On June 13, 2013, nine months after the rejection of the referendum petition, MPTA filed a petition for writ of mandate, alleging a violation of Elections Code section 9145 by the District's failure to repeal Ordinance 152 or submit it to the voters.[6]

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[4] The general manager offered the board four other "options" for action on the referendum petition: repeal the entire ordinance and establish a new fee through a new Proposition 218 process; repeal only the challenged portion, section 4 of the ordinance; suspend the entire ordinance and submit it to the voters at the next election; or take the same measures with only section 4.

[5] The general manager submitted five legal theories to support an invalidity finding: (1) the power of referendum does not extend to appropriations for "usual current expenses"; (2) Proposition 218 allows initiatives, but not referenda, to reduce or repeal local taxes and other assessments; (3) The petition did not provide sufficient information for the recipient to understand its impact and make an informed judgment; (4) the petition referred to specific portions of the ordinance that were "logically intertwined" with section 4 but were not included; and (5) the letter sent to voters by direct mail violated the Elections Code.

[6] Elections Code section 9145 dictates the procedure to be followed by a board of supervisors when a petition protesting an ordinance has been filed pursuant to Elections Code section 9144. Section 9145 of the Elections Code states: "If the board of supervisors does not entirely repeal the ordinance against which a petition is filed, the board shall submit the ordinance to the voters either at the next regularly scheduled county election occurring not less than 88 days after the date of the order, or at a special election called for that purpose not less than 88 days after the date of the order. The

On May 30, 2014, by court order based on stipulation by the parties, MPTA filed an amended petition and a complaint seeking a declaration that the ordinance violated not only Elections Code section 9145 but also the District Law and Proposition 218—specifically, article XIII D of the California Constitution. MPTA asked the court to order the District to submit the ordinance to the voters or to declare it invalid.

After extensive briefing and oral argument, the superior court determined that (1) the referendum petition was technically defective, the only basis on which the District's rejection of it was permissible; and (2) the water supply charge was authorized by both the District Law and the California Constitution. From the ensuing May 26, 2015 judgment denying both writ relief and declaratory relief, MPTA filed this timely appeal.

Discussion[7]

1. Sufficiency of the Referendum Petition

MPTA contends that the District improperly withheld the referendum petition from the voters, because the petition was procedurally and substantively sound. In the

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ordinance shall not become effective unless and until a majority of the voters voting on the ordinance vote in favor of it."

[7] MPTA has submitted three separate requests for judicial notice. The first consists of correspondence pertaining to Assembly Bill 1329, the bill that eventually became the District Law, primarily between consumers and the bill's sponsor, together with accompanying documents. MPTA believes that these documents support its position that voter approval is required for all District projects. We decline its request. "Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole*." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.) Accordingly, "the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. [Citations.]" (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062.)

In its first supplemental motion for judicial notice, MPTA offers the December 24, 1911 version of the California Constitution (exhibit S), the voter information guide for the 1911 statewide election (exhibit T), statutes pertaining to the organization and

superior court's view, however, the petition was technically deficient because it did not include the full text of the ordinance. The court acknowledged (and the District had conceded) that a portion of an ordinance can be referended under Elections Code section 9147.[8] In this case, however, the court found misleading the inclusion of only section 4: "[W]here an ordinance clearly pertains to a single subject, failing to provide voters with the context in which the portion of the ordinance to be referended exists will often deceive voters. Here, the Ordinance's sole purpose was to impose the Charge. Every other section in the Ordinance besides Section Four provides key information which either clarifies or affects the Charge. The Ordinance includes 22 findings of fact, explains the District's purpose in enacting the Ordinance, provides a formula for calculating the Charge, establishes an administrative review and appeal procedure, authorizes a 'Citizen's Oversight Panel,' and declares both an effective [date] and sunset

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management of municipal water districts and the powers of boards of supervisors (exhibits U and V), the PUC's request for comments on the Supreme Court's *City of San Buenaventura* decision (exhibit W), responses to the PUC's request from the District (exhibit X), a PUC ruling establishing procedures to conform to the *City of San Buenaventura* holding (exhibit Y), and an order by the State Water Resources Control Board amending its prior order regarding Cal-Am's diversion of Carmel River water (exhibit Z). While exhibits S through V are of questionable relevance to the issues we reach in this opinion, we grant MPTA's motion as to those documents. We deny the request, however, as to the PUC proceedings following the *City of San Buenaventura* decision.

The second supplemental motion seeks judicial notice of three documents postdating all briefing in this case: a January 23, 2017 PUC decision authorizing Cal-Am to continue collecting the user fee (exhibit AA), a March 29, 2016 resolution by the District board to reestablish the previously established 8.325 percent user fee in the wake of *City of San Buenaventura* (exhibit AB); and an October 27, 2016 resolution ordering Cal-Am to collect and remit that user fee (exhibit AC). We deny MPTA's request as to these documents, as they are not relevant to the issues considered in this appeal.

[8] Section 9147 of the Elections Code, subdivision (b), states: "Each section of the referendum petition shall contain the title and text of the ordinance or the portion of the ordinance which is the subject of the referendum."

date. . . . All of this information would be integral to a voter's decision whether to sign a petition to referend Section Four of the Ordinance."

Applying an independent standard of review to this finding, which required the application of law to undisputed material facts (*Lin v. City of Pleasanton* (2009) 175 Cal.App.4th 1143, 1151 (*Lin*); *Defend Bayview Hunters Point Committee v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 851 (*Defend Bayview Hunters Point Committee*)), we agree with both the result and the reasoning of the lower court in making this determination. Elections Code section 9147, subdivision (b), made applicable to District ordinances through Elections Code section 9340, does not displace the abundant authority interpreting comparable provisions for challenges to municipal legislation (see, e.g., Elections Code section 9238), indicating that a petition challenging an ordinance by referendum must include sufficient text to alert voters to the substantive provisions of the ordinance, including any documents or exhibits incorporated by reference where necessary to fully inform the public of the substance of the measure in dispute. (Compare *Defend Bayview Hunters Point Committee*, *supra*, at p. 858 [referendum petition inadequate for failure to include redevelopment plan incorporated into ordinance by reference]; with *Lin*, *supra*, at pp. 1151-1152 [petition complied with Elections Code section 9238 by containing full text and attached exhibits, thus averting voter confusion]; see also *Nelson v. Carlson* (1993) 17 Cal.App.4th 732, 739 [referendum petition fatally defective where it did not attach voluminous exhibit containing city's plan, as "individuals reviewing the petition had no way of informatively evaluating whether to sign it"].) The statute does not say that a petition is necessarily sufficient if only the challenged portion is set forth in the document; it says that the portion that *is the subject of the referendum* must be provided to voters. Here the subject of the referendum is the water supply charge; thus, in order to avoid misleading the public, it should have conveyed the purpose, scope, method of calculating the charge, procedural remedies, and other explanatory information. The petition here failed to include any of the important

details a voter would need to know in deciding whether to support the referendum or accept the charge; even the calculation method, to which section 4 explicitly refers[9]—is omitted. (Cf. *Billig v. Voges* (1990) 223 Cal.App.3d 962, 967 [voters must be "fully informed of the substance of the challenged measure so that the petition reflects the actual, informed will of the people"]; *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, 1231 [technical requirements for municipal referenda were intended to reduce "the confusion in the minds of the electors as to the true import of the referendum petitions they are asked to sign"].) The petition was properly deemed technically insufficient.

Nor can we agree with MPTA that it substantially complied with the procedural requirements of the statute.[10] Substantial compliance " 'means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.' [Citation.]" (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649.) "A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition." (*Id.* at p. 652; see also *Hebard, supra,* 65 Cal.App.4th at p. 1339 [omission of key words in title of ordinance fatal, as it failed to clearly inform voters regarding scope of planned

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[9] Section 5 of the ordinance contains the formula for determining the charge for each parcel. The calculation consists of the meter fee for the parcel plus the product of the water usage fee and the number of units. Table 1 allows the user to calculate the meter fee according to meter size and type of occupancy, while Table 2 lists the water usage fee per unit for different locations (e.g., residences, businesses, schools, and parks).

[10] In its reply brief MPTA suggests that once the referendum is placed on the ballot, "voters will be presented with arguments for and against the Referendum, and they will be notified where they may obtain a copy of Ordinance 152." This is not enough. As this court explained in *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, 1342 (*Hebard*), "it is the responsibility of the petition proponents to present a petition that conforms to the requirements of the Elections Code. Consistent with the objectives of section 9238, voters should not be required to resolve material ambiguities or to correct inaccuracies in a referendum petition."

development].) The petition here did not meet this standard. The superior court was therefore correct in denying MPTA's petition for writ of mandate.[11]

2. Validity of the Water Supply Charge

a. Authority under the District Law

In the second cause of action of its amended pleading MPTA alleged that the District Law permitted the District to charge users for authorized *services*, but not for "projects." In MPTA's view, Ordinance 152 required voter approval before the District was permitted to charge for District projects (such as ASR and GWR), to fund administrative expenses, or to impose a property-related special tax or assessment. The failure to obtain that voter approval thus constituted "acts outside [the District's] jurisdiction and a prejudicial abuse of [the District's] discretion by failing to proceed in a matter required by law."

The superior court rejected this position. Reviewing the fundamental purpose of the Legislature's creation of the District under the District Law (see § 118-2), the court relied on several provisions of that enabling law to conclude that the District did provide water service, even though the water was ultimately delivered by Cal-Am. The governmental functions necessary to effect the "integrated management" of the Monterey Peninsula's water supply—including the regulation of the use, reclamation, and conservation of water—permitted the District to "do any and every lawful act necessary in order that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants within the district." (§ 118-325.) Those lawful acts included setting and collecting "charges for the services, facilities, or water furnished by

[11]We therefore find it unnecessary to reach the question—answered in the negative by both the District and amicus curiae, the California Special District Association—of whether the ordinance is subject to referendum in the first place. Even if referendum is permissible under Proposition 218, the technical requirements for placing it on the ballot were not met in this case. It is also unnecessary to address the District's claim that laches precludes MPTA's pursuit of the referendum.

it." (§ 118-326, subd. (b).) Were the District Law to be interpreted otherwise, the court added, it would, contrary to the canons of statutory construction, "undermin[e] the very purpose of the District, rendering it incapable of achieving the very goals for which it was created. Such a construction of the enabling law defies legislative intent . . . ."

We find persuasive the superior court's thorough analysis of the District Law and its application to the charge at issue. We likewise conclude that the authorizing legislation was intended to promote the provision of services for which the disputed charge was implemented by the District board.

We further agree that voter approval was not required before the ordinance could be adopted. The premise of MPTA's challenge is that this was a "zone project" which encompassed a single zone—i.e., "the entire territory of the District." The association cites sections 118-431, 118-432, 118-453, and 118-471 of the District Law for its position. Chapter 7 of the District Law, encompassing sections 118-431 through 118-438, provides for the determination and amendment of boundaries in any zone and for the levy of assessments "in any zone to pay the cost of carrying out any of the objects or purposes of this law performed or to be performed on behalf of the zone . . . ." (§ 118-435.) A "benefit assessment" may also be imposed, in an amount based on its "estimated benefit to the property," on each parcel "within any zone" to pay for "any or all works or projects established or to be established within or on behalf of such zone . . . ." (§ 118-438.) Improvement zones "within the district" may be established and delineated by resolution through section 118-431 and section 118-432.

Under section 118-453, the District board is authorized to "institute works or projects for single zones, and joint works or projects for participating zones, for the financing, construction, maintaining, operating, extending, repairing, or otherwise improving any work or improvement of common benefit to the zone or participating zones." After a public hearing on the resolution to adopt the work or project, the board may make changes to the proposed project or exclude from the zone or participating

zones all property that will not be benefited. (§ 118-454.) A written protest from a majority of the affected property owners may also result in termination of the work and a new hearing. (§ 118-455.) After the public hearing, the board must call an election "on the question of proceeding with the work or project." (§ 118-471.)

Under MPTA's reasoning, "[b]ecause a zone designates a geographic area that benefits similarly from a project and there is no limit on the physical size of a District zone, the zone for projects that are intended to benefit the whole District necessarily encompasses the entire territory of the District." In other words, the entire District can be "a single zone for each project that it determines provides a common benefit throughout the District, such as GWR."

To accept this logic, however, would undermine the purpose of the authority vested in the District. A "zone" is defined in the District Law as "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 the common benefit of such area, as specified in this law." (§ 118-18, italics added.) As discussed earlier, that authority is broad: The District has "the power as limited in this law to do any and every lawful act necessary in order that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants within the district, including, but not limited to, irrigation, domestic, fire protection, municipal, commercial, industrial, recreational, and all other beneficial uses and purposes." (§ 118-325.) Construing the entire District as a single zone would also render superfluous section 118-452, which empowers the District itself to decide whether an intended project is for the benefit of a single zone or participating zones *or* for "the common benefit of the district as a whole." The provisions of the District law thus distinguish adequately between work within a zone and work covering the entire District. Furthermore, as the superior court pointed out, "If the Legislature intended the District as a whole to constitute a zone, it could have added language [to the definition of "zone" in section 118-18] such as 'or the

entire District' after 'within the district' or omitted the 'within the district' language entirely. The Legislature could also have expressly stated that projects benefitting the entire District were subject to the public hearing, protest, and elections procedures set forth in the enabling law." We conclude that the superior court was correct in preserving the distinction between work for the District as a whole and work for the benefit of designated zones.

b. Authority Under the California Constitution

i. The Scope of Proposition 218

Articles XIII C and article XIII D were added to the California Constitution through the passage of Proposition 218 in 1996, in an effort to "plug certain perceived loopholes in Proposition 13." (*Silicon Valley Taxpayers' Assn. v. Garner* (2013) 216 Cal.App.4th 402, 405; see also *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1196 [main emphasis of Proposition 218 was on plugging the loophole in Proposition 13 that allowed assessments to be imposed without a vote].)[12] Article XIII D " 'allows only four types of local

[12] Proposition 13 was passed by initiative in 1978 "to assure effective real property tax relief by means of an 'interlocking "package" ' consisting of a real property tax rate limitation (art. XIII A, § 1), a real property assessment limitation (art. XIII A, § 2), a restriction on state taxes (art. XIII A, § 3), and a restriction on local taxes (art. XIII A, § 4)." (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 872 (*Sinclair Paint*).) The " 'principal provisions' " of the initiative " 'limited ad valorem property taxes to 1 percent of a property's assessed valuation and limited increases in the assessed valuation to 2 percent per year unless and until the property changed hands. (Cal. Const., art. XIII A, §§ 1, 2.)' " (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 836 (*Apartment Association*), quoting *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681 (*Howard Jarvis*).) " ' "To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. [Citations.]" ' (*Apartment Association*, at p. 836; see Cal. Const., art. XIII A, § 4.)" (*City of San Buenaventura, supra*, 3 Cal.5th at p. 1199; *Howard Jarvis*, *supra*, at pp. 681-682.)

Judicial decisions after the passage of Proposition 13 held, however, that a "special assessment"—a charge "levied on owners of real property directly benefited by a

property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge," and it places certain restrictions on each kind of exaction. (*Apartment Association, supra*, 24 Cal.4th at p. 837, quoting *Howard Jarvis, supra*, 73 Cal.App.4th at p. 682.)

"The provisions governing fees and charges command that no fee or charge 'shall be assessed . . . upon any parcel of property or upon any person as an incident of property ownership' except '[f]ees or charges for property related services' that satisfy the requirements of article XIII D. (Cal. Const., art. XIII D, § 3, subd. (a)(4).) Article XIII D defines ' "fee" or "charge" ' to mean 'any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.' (*Id*., § 2, subd. (e).) A ' "[p]roperty related service," ' in turn, is defined as a 'public service having a direct relationship to property ownership.' (*Id*., § 2, subd. (h).) [¶] A '[p]roperty [r]elated' fee or charge within the meaning of these provisions is subject to several procedural requirements. (Cal. Const., art. XIII D, § 6.) Among other things, an agency that proposes to impose such a fee or charge must notify 'the record owner of each identified parcel upon which the fee or charge is proposed for imposition' and conduct a public hearing on the proposal. (*Id*., § 6, subd. (a)(1); *id*., § 6, subd. (a)(2).) 'If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge' (*Id*., § 6, subd. (a)(2).)" (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1203)

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local improvement to defray its costs"—was not a special tax, thereby allowing imposition of a special assessment to be imposed without a two-thirds vote. (*City of San Buenaventura, supra*, 3 Cal.5th at p. 1199.) Proposition 218 was adopted to close this loophole. (*Howard Jarvis, supra*, 73 Cal.App.4th at p. 682.) "It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges." (*Ibid*.)

An important exception to this mandate is contained in article XIII D, section 6, subdivision (c): "Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge 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 affected area." "Whether an exaction is a property-related charge for purposes of article XIII D 'is a question of law for the appellate courts to decide on independent review of the facts.' (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 874.) We construe the provisions of article XIII D liberally,' "to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." ' (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448.) The relevant government agency—here, the District—bears the burden of demonstrating compliance. (Cal. Const., art. XIII D, § 6, subd. (b)(5).)" (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1204; *Silicon Valley Taxpayers Assn., Inc. v. Santa Clara County Open Space Authority*, *supra*, at p. 450.)

Applying these parameters, our Supreme Court concluded in *Apartment Association, supra*, 24 Cal.4th at pp. 839-40, that an apartment inspection fee was imposed on landlords "not in their capacity as landowners, but in their capacity as business owners"; consequently, it was not a property-related fee—that is, imposed "as an incident of property ownership," within the meaning of Article XIII D, section 2, subdivision (e). Closer to the situation presented here was that of *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 (*Richmond*). There the high court determined that a water connection fee was not imposed as an incident of property ownership, but was "imposed as an incident of the voluntary act of the property owner in applying for a service connection." (*Id.* at p. 426.)

Notably, in *Richmond* the court agreed that "supplying water is a 'property-related service' within the meaning of article XIII D's definition of a fee or charge. In the ballot

pamphlet for the election at which article XIII D was adopted, the Legislative Analyst stated that '[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of property-related fee.' (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any delinquent service charges . . . [¶] This implication is reinforced by subdivision (c) of article XIII D, section 6, which expressly excludes 'fees or charges for sewer, water, and refuse collection services' from the voter approval requirements that article XIII D imposes on property-related fees and charges. Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements. (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 645 [reaching the same conclusion].) [¶] Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.' (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results

from the owner's voluntary decision to apply for the connection." (*Richmond*, *supra*, 32 Cal.4th at pp. 426-427.)[13]

Reinforcing its view of water supply services as subject to article XIII D, the Supreme Court in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (*Bighorn*) paid special attention to the exception to the voter-approval requirement in article XIII D, section 6, subdivision (c)—i.e., the exception for " '*fees or charges for sewer, water,* and refuse collection services.' " The Supreme Court easily concluded that article XIII D "expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges." (*Bighorn*, *supra*, 39 Cal.4th at p. 219.)

The Supreme Court summarized the voter-approval restrictions on property-related service fees in *City of San Buenaventura*, by stating, "The lesson that emerges from the text and cases is this: A fee is charged for a 'property-related service,' and is thus subject to article XIII D, if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property." (*City of San Buenaventura*, *supra*, 3 Cal.5th at p. 1208.) The facts presented in *City of San Buenaventura* compelled the high court to conclude that the groundwater pumping charge was not a property-related fee, as the district did not deliver water to any

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[13] As further confirmation of this distinction, the *Richmond* court explained, "Any doubt on this point is removed by considering the requirements that article XIII D imposes on property-related fees and charges. As with assessments, article XIII D requires local government agencies to identify the parcels affected by a property-related fee or charge. Specifically, it requires the agency to identify '[t]he parcels upon which a fee or charge is proposed for imposition.' (Art. XIII D, § 6, subd. (a)(1).) As we have explained, it is impossible for the District to comply with such a requirement for connection charges, because the District cannot determine in advance which property owners will apply for water service connection. As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are not subject to article XIII D's restrictions on property-related fees." (*Richmond*, *supra*, 32 Cal.4th at pp. 427-428.)

parcel, but "instead conserves and replenishes groundwater that flows through an interconnected series of underground basins, none of which corresponds with parcel boundaries . . . . [¶] All this means that the District's services, by their nature, are not directed at any particular parcel or set of parcels in the same manner as, for example, water delivery or refuse collection services." (*Ibid.*, citing *Richmond, supra*, 32 Cal.4th at p. 426.) Consistent with our Supreme Court's view of property-related fees, we conclude that the District provides water service, which is therefore not subject to voter approval restrictions under article XIII D, section 6, subdivision (c).[14]

ii. Derivation of District Revenue

MPTA protested the amount of the charge in superior court with the argument that the ordinance allows for "project capital costs and up to 15% for 'general unallocated administrative overhead.' " The potential reserves generated, MPTA argued, could be used "for *any* cash-flow need of the District—the Ordinance does not place any restrictions on the expenditure of these excess funds."

The focus of MPTA's argument was section 3 of Ordinance 152, which stated: "Proceeds of the charge imposed by this Ordinance may only be used [*sic*] to fund District water supply activities, including capital acquisition and operational costs for [ASR] and [GWR] purposes, as well as studies related to project(s) necessary to ensure [that] sufficient water is available for present beneficial water use in the main [Cal-Am] system. In addition to direct costs of the projects, proceeds of this annual water supply charge may also be expended to ensure [that] sufficient water is available for present beneficial use or uses, including water supply management, water demand management, water augmentation program expenses such as planning for, acquiring and/or reserving augmented water supply capacity, including engineering, hydrologic, legal, geologic, financial, and property acquisition, and for reserves to meet the cash-flow needs of the

[14] Further references to section 6 are to article XIII D of the California Constitution.

District and to otherwise provide for the cost to provide services for which the charge is imposed. [¶] No more than fifteen [percent] (15%) of proceeds collected by reason of Ordinance No. 152 shall be used to fund general unallocated administrative overhead."

MPTA maintains that the ordinance violated article XIII D, section 6, in multiple ways. First, it argues, the fee is structured to exceed the costs necessary to provide the service, contrary to section 6, subdivision (b)(1). That provision states: "Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service." Likewise, subdivision (b)(3) of section 6 states: "The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel."

The court rejected MPTA's depiction of the ordinance. It agreed that the "property related service" was water supply; that service, however, "is not limited to discrete events," but "contemplates consistent, reliable service. Hence, the funds required to provide this service necessarily include overhead, capital acquisition costs, and the availability of a reserve fund for unexpected events." The costs of generating the water supply, added the court, "necessarily include personnel costs and the facilities required to support [those] personnel," as well as "capital acquisition and operational costs." The reserve fund likewise "ensures that the District's water supply projects will continue, and hence, that water service will continue."

The court thus found that the costs listed in the ordinance itself were justified. We agree with that assessment. As explained in *Roseville*, *supra*, 97 Cal.App.4th at pp. 647-648, "Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service." In this case, Ordinance 152 made it clear that the uses of the property-related charge were

limited to "water supply activities." The listed examples of permitted uses were confined to activities related to the remedy that the ordinance was intended to provide to alleviate the water-shortage condition of the area served by the District and Cal-Am. The ordinance also provided a review procedure "to remedy potential error in the allocation of the annual water supply charge imposed by this ordinance, to enable property to be reclassified to a different use category as appropriate, to consider unique circumstances, or to otherwise reduce or waive the water supply charge when warranted to ensure the charge is fair, reasonable and proportional to the cost of service attributable to the parcel on which the charge is imposed." Under section 10 of the ordinance, a public hearing is also required each year in its review of the District budget, including "the amounts collected and expended in relation to the purposes for which the charge is imposed." The board must also determine whether the purpose of the charge is still required and whether the amount "is still appropriate and less than the proportionate cost of the service" for each affected parcel. These provisions were designed to ensure that both the objectives and the implementation of the charge continue to adhere to the constitutional mandate. Specific factual challenges to the amounts imposed and the uses of the funds generated may be made through the procedures outlined in the ordinance for administrative hearing and, ultimately, judicial review.

With respect to the proportionality requirement of subdivision (b)(3) of section 6, MPTA contends that the charge at issue violates this provision because some parcel owners benefit from the service without being required to pay the fee. The superior court observed, however, that "[t]here is nothing in subdivision (b)(3) which prevents free riders from benefiting from projects paid for by the revenues derived from the Charge. That subdivision [requires only] that parcels that *are* charged not pay more than the cost to serve them." This view of the proportionality provision is supported by its plain text. It does not suggest a comparison between paying parcel owners and those who incidentally benefit; it demands a rational relationship between the amount charged and

the cost of the service provided to each parcel. The ordinance accommodates such proportionality by adhering to a calculation of the fee specifically set forth in section 5 of the ordinance, using a formula based on meter size and type of unit. This was sufficient to comply with the proportionality requirement of section 6, subdivision (b)(3).

MPTA, however, takes issue with this very calculation method by arguing that because the charge is based on "static factors"—meter size and type of property—the District is imposing a levy on land, unrelated to a specific activity, thereby violating subdivision (b)(4) of section 6.[15] It first renews its claim that the District is falsely implying that it delivers water. In fact, the District makes no suggestion, direct or indirect, that it delivers water; on the contrary, it readily acknowledges that Cal-Am performs this function. But that does not mean the District provides no water service. As discussed earlier, the Supreme Court, while rejecting the proposition that a water connection fee is imposed "as an incident of property ownership" (and thus a property related service) distinguished that circumstance from the supply of water to existing customers, which is a property-related service. (*Richmond*, *supra*, 32 Cal.4th at pp. 426-427; see also *City of Buenaventura*, *supra*, 3 Cal.5th at p. 1205 [acknowledging the exemption from voter approval requirements in section 6, subdivision (c), for water services].)

The primary focus of MPTA's complaint with respect to section 6, subdivision (b)(4), is the requirement that a fee be "actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. . . . ." According to MPTA, the violation

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[15] Section 6, subdivision (b)(4) states, in pertinent part: "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. Fees or charges based on potential or future use of a service are not permitted. . . ." The subdivision further provides that "[s]tandby charges" must comport with the procedural requirements of assessments, as outlined in section 4.

consists in the parcel owner's inability to "regulate his or her activity at the property to control the amount of the fee and cannot terminate the service; parcel owners are not customers of the District. And, because future projects funded with the charge are not built (and in the case of GWR, not approved for construction), they cannot be 'actually used by' or 'immediately available to' property owners as required by the Constitution."

The superior court cited *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 (*Griffith*) in concluding that the ordinance reflected an effort to provide a "supplemental water supply" to ensure "a consistent, reliable water service for those within its jurisdiction, a task which the District was expressly created to achieve." In *Griffith*, this court held that the water management agency's groundwater pumping charge fell within the provision exempting "fees or charges for sewer, water, and refuse collection services" from article XIII D's voter approval requirements. (Cal. Const., art. XIII D, § 6, subd. (c).) As to subdivision (b)(4) of section 6, the court pointed out that the defendant water management agency performed more than the service of water delivery; the challenged ordinance "authorize[d] defendant to levy groundwater augmentation charges to pay for purchasing, capturing, storing, and distributing supplemental water. Since one cannot rationally purchase supplemental water without identifying and determining one's needs, identifying and determining future supplemental water projects is part of defendant's present-day water service." (*Griffith*, *supra*, at p. 602.)

Griffith is of limited value to our analysis in the present case. First, it pertained to an ordinance directed at groundwater extraction, with broader powers accorded the defendant agency than those provided in Ordinance 152. Second, the Supreme Court disapproved *Griffith* in *City of Buenaventura* in reaching its conclusion that a fee for pumping groundwater was not a property-related fee within the meaning of article XIII D, section 2.

Nevertheless, we agree with the superior court that the ordinance does not conflict with section 6, subdivision (b)(4). The structure of the charge depends not merely on the "static" fact of property ownership, but on projected usage of the water delivered by Cal-Am. The District acknowledged in the ordinance that it does not have access to meter readings collected by Cal-Am, so "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 is a reasonable accommodation in view of the constraints on the District's ability to measure water use at each affected parcel. And to the extent that error occurs in the allocation of the charge, the ordinance provides for a remedy through an administrative review process to reclassify a parcel to a different use category, to allow readjustment of the charge in unique circumstances, to demonstrate that the water service is not actually being used or immediately available to the parcel involved, or otherwise to "reduce or waive" the charge when it is shown not to be "reasonable, fair, and proportional to the cost of service attributable to the parcel." The Citizen's Oversight Panel created by the board should offer an additional check on unjustified or excessive charges.

MPTA further asserts a violation of section 6, subdivision (b)(5), which prohibits charges imposed for "general governmental services." The provision specifically states, in pertinent part, "No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." "Viewed in conjunction with section 6(b)(1) and (2), the purpose of section 6(b)(5) is to require that a fee or charge collected from ratepayers be used to pay for the service for which the fee or charge was imposed and not general governmental services." (*Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 376 (*Moore*).)

MPTA points to the term of the ordinance allowing up to 15 percent of the proceeds to be used to fund "general unallocated administrative overhead."

The association contends that this provision means that the District could use the proceeds of the fee "to 'recoup' costs of providing general governmental services." We do not draw the same inference. The ordinance makes it clear in section 3 that the proceeds from the charge can be used only "to fund District water supply activities"; it did not allow for the diversion of the funds into police, fire, ambulance, library, or other general services. The anticipated maximum of 15 percent could be directed at "general unallocated administrative overhead"; but a reasonable interpretation of this phrase must be made in the context of the stated purpose of the law, its provision for administrative review, and termination should the purpose no longer be served by the charge. So viewed, we cannot agree that the words "administrative overhead" were intended to expand the scope of funding beyond, and unrelated to, the provision of the water supply service. (Compare *Roseville, supra,* 97 Cal.App.4th at p. 650 [finding violation of section 6 subdivision (b) where revenue from utility ratepayers' fee would be placed in city's general fund to pay for general governmental services without nexus to cost of the service] with *Moore*, *supra,* 237 Cal. App. 4th at p. 377 [no violation of section 6 subdivision (b) where general fund subsidizes sanitation fund and then is reimbursed for those costs, and fees did not exceed the cost of providing the service].) Moreover, the services funded by the charge are not "available to the public at large" but are expressly directed toward only those parcels that receive water through Cal-Am's water delivery system. We see no violation of section 6, subdivision (b)(5).

We thus conclude that no error occurred in the superior court's rejection of MPTA's cause of action for declaratory relief, as Ordinance 152 withstands the statutory and constitutional challenge brought by MPTA under article XIII D. And because the referendum was properly withheld from the ballot, a writ of mandate was also properly denied.

Disposition

The judgment is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

Monterey Peninsula Taxpayers' Association et al. v. Board of Directors of the Monterey Peninsula Water Management District et al.
H042484