ALESHIRE & WYNDER LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: **BOARD OF DIRECTORS,**
MARINA COAST WATER DISTRICT

CC: **BRIAN LEE, INTERIM GENERAL MANAGER**
ROGER K. MASUDA, ESQ., GENERAL COUNSEL

FROM: **PATRICIA J. QUILIZAPA, SPECIAL PROPOSITION 218 COUNSEL**

DATE: **MARCH 3, 2014**

RE: **PROPOSITION 218 PROTEST PROCEDURES**

I. SUMMARY AND CONCLUSION

The Board of Directors has asked whether the Marina Coast Water District ("District" or "MCWD") is required by law to conduct a single combined Proposition 218 protest process for the District's entire service area, or whether the District may hold separate Proposition 218 protest processes for the Central Marina and Ord Community service areas.

The answer is: Proposition 218 *requires* a public agency to hold *one* single protest process for *all* parcels upon which the agency will impose a new fee, whether the fee is the same for all parcels or whether the fee consists of a group of rates (rate structure). The language of Proposition 218, specifically Section 6 of Article XIII D of the California Constitution, requires a single protest for the entire District. Moreover, the Court of Appeal has recently confirmed that interpretation, and explained that Proposition 218 not only envisions, but requires, a single protest process, regardless of the different rates or classes of rate payers who may be subject to a fee or charge.

II. THE DISTRICT'S SERVICE AREAS: THE CENTRAL MARINA AND ADJOINING ORD COMMUNITY AREAS

Today, the District provides water service and wastewater collection service to 36,000 - 40,000 residents through approximately 8,000 connections within the District's jurisdictional area, referred to as the "Central Marina" service area, and the area consisting of the former Fort Ord military installation, referred to as the "Ord Community" service area.

In 1998, as a result of a request for qualifications process, the Fort Ord Reuse Authority (FORA) and the District entered into an agreement "to establish the terms and conditions for FORA to plan and arrange for the provision of the [Fort Ord] facilities, and for MCWD to acquire, construct, operate, and furnish the facilities, to benefit mutually the service area and the area within MCWD's jurisdictional boundaries." (1998 Agmt., Sec. 1.3.) In other words, the 1998 Agreement provided the terms for the operation of the Ord Community sewer and water

systems and eventual permanent transition of the same to the District. The Agreement notes the Ord Community systems could not have continued in operation without the District's fiscal and operations capacity. (*See* 1998 Agmt., § 1.5.) Indeed, one of the purposes of the Agreement was for the District to update the Ord systems to insure the former military system's compliance with State requirements of civilian public water and sewer systems. (*Id.* at §§ 1.3-1.5.)

In 2001, FORA permanently transferred the water and wastewater facilities to the District, completing the main purpose of the 1998 Agreement. In 2005, the District physically interconnected both service areas' water systems, which has resulted in improved system reliability. In 2007, the District consolidated the two water system under a single Public Water System Permit issued by the California Department of Public Health. The two service areas' water and sewer systems are now completely within the District's operation and ownership.

III. DISCUSSION

A. Proposition 218 *Requires* a Single Protest Procedure for *All* Parcels Subject to a Proposed Fee or Charge for Water or Sewer Service

In 1996, the voters passed Proposition 218, titled the "Right to Vote on Taxes Act." The measure added Articles XIII C and D to the California Constitution to limit assessments on real property (Article XIII D, §§ 4, 5) and other property related fees and charges (Article XIII D, §6). (*Silicon Valley Taxpayers' Association, Inc. v. Santa Clara County Open Space Authority* ["*Silicon*"] (2008) 44 Cal.4th 431, 449, fn. 5, citing Ballot Pamp., Gen. Elec., p. 76.) California courts have confirmed water and sewer services are property related fees to which the requirements of Proposition 218 apply. (*See Howard Jarvis Taxpayers Ass'n. v City of Salinas* ["*Salinas*"] (2002) 98 Cal.App.4th 1351 [sewer]; *see also Bighorn-Desert View Water Agency v. Verjil* ["*Bighorn*"] (2006) 39 Cal.4th 205 [water].)

Proposition 218 limits the imposition of property related fees, *except* as authorized by Section 6 of Article XIII D. (Cal. Const., art. XII D, § 3; *see also, Bighorn, supra*, 39 Cal.4th at 217.) Specifically, the fees or charges for water or sewer services are subject to the following procedure at Section 6(a):

> **SEC. 6. Property Related Fees and Charges.**
> (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
> (1) *The parcels* upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon

> which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.
>
> (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge *to the record owners of each identified parcel upon which the fee or charge is proposed for imposition*. At the public hearing, the agency shall consider *all* protests against the proposed fee or charge. 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.

(Cal. Const., art. XIII D, § 6, subd. (a) [emphasis added].)

Section 6(a) refers to one procedure for the fee or charge an agency proposes for *all* parcels upon which it proposes to impose a fee. The first step required by subdivision (a) is the identification of *all* the parcels that will be subject to the fee. (Cal. Const., art. XIII D, § 6, subd. (a) (1).) Subdivision (a) makes no reference to an agency's jurisdiction, service, area, sphere of influence, or any other jurisdictional limitation. Indeed, the Proposition 218 Omnibus Implementation Act, which was enacted by the Legislature in 1997 and codified at Government Code Sections 53750 to 53758, explains the intent of the voters was to establish a single procedure for all of the parcels that are affected by an assessment or fee for a property related service. The Act explains that even where Proposition 218 makes reference to a "district," it does not intend a jurisdictional limitation. (Gov. Code, § 53750, subd. (c).) Instead, " 'District' means an area that is determined by an agency to *contain all of the parcels* that will receive a special benefit from a proposed public improvement *or service*." (*Id*. [emphasis added])

The next step in the process requires mailed notice "*to the record owners of each identified parcel upon which the fee or charge is proposed for imposition*." (Cal. Const., art. XIII D, § 6, subd. (a)(2) [emphasis added].) Again, the mandate directs the agency to provide notice to all the parcels it identified as the parcels that will be subject to the fee or charge. Therefore, Proposition 218 sets the parameters for the group of parcels who will be part of the notice and public hearing process.

Proposition 218 again confirms in the protest procedures that a single procedure is required for *all* the identified parcels. Section 6, subdivision (a)(2) prevents the imposition of the property related fee only "[i]f written protests against the proposed fee or charge are presented *by a majority of owners of the identified parcels* …," *i.e., all* the parcels the agency initially identified as being subject to the proposed fee. (Cal. Const., art. XIII D, § 6, subd.

(a)(2).) In *Salinas,* the Court of Appeal noted this language refers to "a majority of the *affected* owners." (*Salinas, supra*, 98 Cal.App.4th at 1354 [emphasis added].)

Thus, as noted in every step of the notice, hearing, and protest procedure, the group of property owners for which an agency must notice and hold a public protest hearing is defined by the parcels identified by the agency as the parcels *affected* by the proposed fee. The universe of the electorate for purposes of a public protest hearing is the group of parcels identified by the agency as those subject to the proposed fee, regardless of *how* the proposed fee will affect any particular parcel or class of parcels.

B. The Court of Appeal Recently Rejected the Argument that Proposition 218 Requires Separate Protest Procedures for "Similarly Situated Citizens"

On January 17, 2014, the Court of Appeal confirmed that Proposition 218 procedures require a single protest process for all parcels subject to a proposed fee or charge, regardless of whether the proposed fee consists of a uniform rate or a rate structure by class of users. The Court of Appeal held in *Morgan v. Imperial Irrigation District,* that a parcel owner does *not* have "the right to protest a fee or charge proposed for application to his land, *along with similarly situated citizens*." (*Morgan v. Imperial Irrigation District, et al.* 2014 Cal. App. LEXIS 115, *24-25.) To the contrary, the Court of Appeal reasoned the intent of Proposition 218 to apportion "fair share" of costs among parcel owners *requires* a single protest procedure to ensure the required proportionality.

In *Morgan, supra*, three individuals and the Imperial County Farm Bureau challenged the water rates adopted by the Imperial Irrigation District ("IID"). The rates IID adopted consisted of a rate structure under which the water rates differed among the types of customers, including agricultural, municipal, industrial, and residential, creating rate classes. Plaintiffs argued that Proposition 218 required IID to hold separate protest elections for each rate class, rather than the single protest election the District conducted, which considered the entire rate scheme. The Court disagreed with Plaintiffs, holding Proposition 218 requires instead a single protest election for *all* parcels subject to the proposed fee.

Plaintiffs' argument rested exclusively upon the use of the singular "fee" in Section 6(a) Article XIII D. (*Morgan, supra,* 2014 Cal.App. LEXIS 115, * 18-19.) Plaintiffs argued the use of the singular "fee" in the Proposition 218 procedures means parcel owners are entitled to separate protest hearings for each class of similarly situated ratepayers. (*Id.* at *24-25.) Each rate, they claimed, constitutes a "fee." In that case, plaintiffs argued the class of similarly situated ratepayers is determined by the type of rate class, which IID grouped by residential, irrigation, and commercial.

The Court rejected the argument, noting well-established rules of statutory interpretation provide that "Notwithstanding the use of the plural ('standby persons'), a general rule of construction is that words used in the singular include the plural and vice versa." (*Id.*) The

Court also explained, the plain language of Section 6 makes no reference to separate class or categories of users for purposes of the protest hearing. (*Id.*)

Notably, the Court added that Proposition 218's substantive proportionality requirements actually prohibit anything other than a single protest procedure for all parcels subject to the proposed fee. The requirement at Section 6(b) of Article XIII D mandates that parcel owners shall pay no more than their "fair share" of costs associated with the service. This requirement, often referred to as the substantive proportionality requirement, prohibits a protest procedure through which one section of the affected parcels could successfully protest an increase to their own rates to force the rest of the parcel owners to subsidize the cost of their service. Thus, separate protests by class or categories of rate payers would, as the Court noted, "create an almost unworkable system, where a minority of voters could frustrate the purposes of [Proposition 218]." (*Morgan, supra,* 2014 Cal.App.LEXIS 115, *33.) The Court explained:

> … we are concerned that if we adopt Farm Bureau's proposed individual protest procedure, it could provide a minority of parcel owners with an effective veto of an entire rate plan. A quick hypothetical demonstrates this point. An agency provides water to 100 parcels comprised of three different groups: single family residential customers, commercial customers, and irrigation customers. The agency calculates that the total amount of fees it needs to collect to cover the costs of providing the service is $500,000. To collect this amount, the agency further determines that single family residential customers consisting of 60 parcels would pay a rate of $3 per unit of measure; commercial customers encompassing 30 parcels would pay a rate of $5 per unit; and irrigation customers comprising 10 parcels would be a rate of $9 per unit. The agency also decides that these rates would cause each customer to pay the proportional cost of the service attributable to his or her parcel. If the agency uses an individual protest procedure as Farm Bureau argues it must, then the irrigation customers who only own 10 percent of the total number of parcels, could negate the entire proposed rate system if six of the parcels owned by irrigation customers voted against the increase. This protest procedure thus gives a minority of the parcels the power to reject any rate increase. Once the irrigation customers successfully protest their rate increase then the agency would not be able to collect the total amount of fees it deems necessary to provide service to all customers. Further, the irrigation customers' successful protest in this hypothetical also could call into question the proposed water rates for the other two customer classes. Under section 6, subdivision (b)(3), customers in the other two classes cannot pay more than their

> proportional share of the costs. The total costs would be altered if the agency had to reduce its services because the irrigation customers rejected their rate increase. The lower costs would make the proposed rate increases for the other customer classes disproportional because they were based on the entire system of rates and the cost of service assuming those increased rates. As such, the agency would have to start over in setting a new rate structure, which could prove incredibly costly and inefficient.

(*Morgan, supra,* 2014 Cal. App. LEXIS 115, * 26-32.)

The same unworkable and unlawful result prohibited in *Morgan* would occur if the District were to hold separate protest procedures for the District's separate service areas.

C. The District's Provision of Sewer and Water Service to the Central Marina and Adjoining Ord Community Areas Requires a Single Protest Process for the Adoption of Any New or Increased Fees Subject to Proposition 218

Plaintiffs' argument in *Morgan* that separate protests shall be held for each type of user was premised on the fact that the agency had set a different rate for each type of user. In other words, plaintiffs argued that those rate payers grouped together and charged the same rate constitute a class of rate payers with the right to their own protest process. The *Morgan* Court rejected that argument, explaining that the grouping of rate payers is a requirement of Proposition 218's "fair share" mandate and does not affect the single protest process requirement. (*Morgan, supra,* 2014 Cal. App. LEXIS 115, * 26-30, 33.)

Similarly here, the fact that rate payers subject to the District's rates and charges may be grouped by service area to ensure each group pays its "fair share" of the costs to provide the service does not create an obligation to hold separate protest processes for each group. The District is restricted from doing so, as explained in *Morgan*. Indeed, the combined Central Marina and Ord Community areas present precisely the case in which "a minority of voters could frustrate the purpose of [Proposition 218]." (*Id.*) The District's total service area consists of 3,647 parcels in the Central Marina area and 569 parcels in the Ord Community area. Thus, a majority of the Ord Community, 285 parcels could successfully protest a new fee or increase, if the District held separate protests for each of the areas. Moreover, it would take only a protest by those 285 parcels to require the 3,647 parcels in the Central Marina area to subsidize the costs the District incurs to provide the service to the Ord Community.

"[G]rouping similar users together for the same … rate and charging the users according to usage is a reasonable way to apportion the cost of service." (*Griffith v. Pajaro Valley Water Management Agency,* (2013) 220 Cal.App.4th 586, 601.) In *Griffith*, grouping customers did not result in any changes to the procedure required by the plain language of Proposition 218. Instead, grouping customers pursuant to similar cost factors merely ensured the substantive proportionality requirement that the *Morgan* Court also stressed.

Thus, as was the case in *Morgan*, the District is prohibited here from holding a protest procedure that deviates from the single protest procedure detailed in Proposition 218. Any other interpretation of Proposition 218 would "create an almost unworkable system, where a minority of voters could frustrate the purposes of [Proposition 218]." (*Morgan, supra,* 2014 Cal.App.LEXIS 115, *33.)

IV. CONCLUSION

Proposition 218 requires a public agency to hold a single protest process for *all* parcels upon which the agency will impose a new fee, whether the fee is the same or whether the fee consists of a group of rates (rate structure). The grouping of customers, in a reasonable manner either for rates or otherwise, does not change the Proposition 218 single protest requirement.

[END OF MEMORANDUM]