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VIA E-MAIL AND FIRST CLASS MAIL
kbrogan@hillfarrer.com

Kevin H. Brogan, Partner
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Re: Apple Valley Subregional Water Recycling Plant

Dear Mr. Brogan:

The Town of Apple Valley (the "Town") received your letter dated July 11, 2014 concerning the Apple Valley Subregional Water Recycling Plant (the "Subregional Plant") currently being proposed jointly by the Town and the Victor Valley Wastewater Reclamation Authority ("VVWRA"). I am the Town Attorney and have been directed by the Town Council to respond to your correspondence.

The Subregional Plant is part of a larger project, which includes the construction of a similar plant in the City of Hesperia. In total, both plants are expected to cost approximately $51 million dollars. However, the project has secured over $12 million dollars in grant funding from Local, State and Federal agencies. This project will result in the creation of approximately 54 to 96 jobs in our community over 28 months. The Apple Valley Ranchos Water Company's ("AVR") letter appears to be an attempt to stop the project and deprive the public of millions of dollars in grant funding. The Town is perplexed by AVR's position and is sending this letter to further explain the many benefits of the Subregional Plant and to demonstrate that the Subregional Plant does not violate state or federal law.

As you may be aware, the State is in the midst of a historic drought, which has prompted Governor Brown to declare a state of emergency. The ongoing drought has been particularly severe in High Desert communities, including the Town. The water supply in the High Desert is primarily groundwater and this resource is in an overdraft condition. Although the Mojave Water Agency has an entitlement to State Water Project water, the State Water Project has

historically not been able to provide the Mojave Water Agency with its full entitlement. The Subregional Plant was specifically designed to alleviate the stress that the ongoing drought has placed on our community's limited water supply.

Specifically, the Subregional Plant will reduce the burden on our groundwater supply and the State Water Project by increasing the efficiency at which groundwater is used by offsetting some non-potable water demands. The Subregional Plant will provide enough recycled water to offset the use of ten thousand people each day in Apple Valley. We anticipate the recycled water from the Subregional Plant would be used on Town parks, recreational facilities and by school districts for irrigation. The use of recycled water in this manner will preserve potable (drinking water) to be used by the community itself and thus will prevent potable water from being wasted on irrigating government facilities.

Further, the Subregional Plant is an important step in preparing for population and industrial growth in in our region. Recycled water is less expensive than potable water and as such provides an economic benefit to the end user of the recycled water and to our community as a whole by freeing up public funds that would otherwise be spent on irrigation.

Recycled water is such a crucial resource to our community and to the State of California, especially during this critical drought that the California Legislature encourages the development of water recycling facilities so that recycled water may be made available to help meet the growing water requirements of the state. Wat. Code § 13512. The Legislature has specifically determined that "[t]he people of the state have a primary interest in the development of facilities to recycle water to supplement existing water supplies and to minimize the impacts of growing demand for new water on sensitive natural water bodies." § 13529 (c). Moreover, the Legislature has set a statewide goal of increasing the use of recycled water throughout the State. § 13560. Furthermore, the use of recycled water is so important, that for some nonpotable uses such as golf courses, landscaped areas and industrial and irrigation uses, the use of potable water is "an unreasonable use of the water" and a violation of the California Constitution when recycled water is available. § 13550.

Accordingly, the Town and VVWRA are complying with the directive of the State Legislature by bringing this much needed project to our drought ravaged community. Rather than using our precious and limited supply of drinking water on landscape and golf course irrigation, the Subregional Plant will conserve our limited water resources and allow our community to have beautiful and lush public parks, landscapes, golf courses, and appropriate agriculture. Additionally, the Subregional Plant will provide recycled water at discounted rates, to be used as cooling water for power plants, as well as industrial process water such as construction activities, dust control, concrete mixing, and artificial lakes which will greatly serve the economic engine of the High Desert.

Despite the multiple conservation and economic benefits of the Subregional Plant, AVR, which provides potable water service to residential and commercial customers in the Town, asserts that the Subregional Plant will somehow harm AVR and the residents of the Town. Moreover, AVR now seeks to inappropriately invoke the California Service Duplication Statute in an attempt to prevent the construction of the Subregional Plant.

Although AVR appears to believe that it has been granted a monopoly on water service in our community, any action by AVR to block this critically important project directly conflicts with the California Constitution as an attempt to strip the Town of its constitutional right to provide water service. The California Constitution provides that a city "may establish ... and operate public works to furnish its inhabitants with ... water." Cal. Const., Art. XI , § 9. Moreover, the California Government Code states that "[a] city may acquire ... water, water rights, reservoir sites, rights of way for pipes ... and all other property and appliances suitable and proper to supply water for the use of the city and its inhabitants." Cal. Gov. Code, § 38730. Therefore, the Town has a constitutional right to move forward with this project.

As AVR is well aware, it provides its customers with potable water, whereas the Subregional Plant will only provide recycled water. Therefore, the Subregional Plant will not result in a duplication of service. The California Legislature defines and treats "recycled water" separately from "water" in general. Specifically, Water Code section 1000 defines "water" as including "use of water" and this definition makes no reference to recycled water. Wat. Code, § 1000. However, Water Code section 13050 defines "recycled water" as "water, which as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur." Wat. Code, § 13050(n). Further, recycled water is subject to different regulations pertaining to treatment, discharge, use and permitting than potable water. Compare Wat. Code, §§ 1200-1851 *with* Wat. Code, § 1210. Therefore, the Legislature's treatment of recycled water indicates that recycled water is a separate type of use.

To the extent that AVR continues to oppose this beneficial public project, the Town is prepared to defend the multimillion dollar investment it and VVWRA have made in providing clean and safe recycled water to the community. The Town is fully aware that the California Service Duplication Statute purports to provide a definition of "taking" and "just compensation" when service is duplicated. However, these terms are constitutional in nature and are not subject to arbitrary declarations by the Legislature. Further, the California Service Duplication Statute is a legislative declaration of constitutional law that contradicts existing takings case law. However, a legislative declaration of constitutional principles, such as the California Service Duplication Statute, is invalid, does not bind the judiciary and is unconstitutional. Therefore, AVR's reliance on the California Service Duplication Statute is misplaced.

The California Service Duplication Statute does not govern takings. The U.S. Constitution and the California Constitution govern the "taking" of property and the requirement to pay "just compensation." The Fifth Amendment of the U.S. Constitution provides, in part: "nor shall private property be taken for public use, without just compensation." Similarly, Article I, section 19, of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

Generally, courts have interpreted the U.S. and California Constitutions to provide for two general categories of takings, possessory takings and regulatory takings. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1026-32 (1992). The United States Supreme Court has held that the determination of just compensation is a judicial, not legislative function. *Monongahela Navigation Co. v United States*, 148 U.S. 312, 327 (1893). Likewise, the California Supreme Court provides that the "right to just compensation cannot be made to depend upon state statutory provisions." *Heimann v. Los Angeles,* 30 Cal.2d 746, 759 (1947). Further, California courts have held that "[t]he process of determining just compensation is purely a judicial function which cannot be circumscribed by the Legislature." *Baldwin Park Redev. Agency v Irving,* 156 Cal.App.3d 428, 439 (1984).

Takings law, especially regulatory takings, is developed by evolving case law. The California Service Duplication Statute is an arbitrary declaration of constitutional principles that uniquely and arbitrarily applies to a class of business, i.e. regulated water utilities. Further, the California Service Duplication Statute asks the court to find the existence of a "taking" and apply a new formula for "just compensation." In other words, the California Service Duplication Statute attempts to create two arbitrary classes of a constitutional nature: a per se taking based on the mere fact of competing service and an automatic payment of damages not based on the concept of fair market value, which is the foundation of just compensation developed in case law throughout the country. However, these concepts do not exist in case law and are not provided for by the U.S. or California Constitutions. Therefore, the California Service Duplication Statute is making a declaration of how the court should interpret and apply the Constitution. This declaration exceeds the province of the Legislature and is invalid.

Moreover, AVR's reliance on the California Service Duplication Statute is not well taken because the law itself is unconstitutional based on the separation of powers doctrine. Both the state and the federal governments follow the principle of separation of powers and it is well established that the judicial power may not be exercised by the legislature. As often quoted, "the legislature cannot ... indirectly control the action of the courts, by requiring of them a construction of the law according to its own views..." *Plaut v. Spendthrift Farm*, 514 U.S. 211,

225 (1995) (quoting T. Cooley, *Constitutional Limitations* 94-95 (1868) (collecting cases). The California Service Duplication Statute does just that as it is a legislative declaration instructing the judiciary to apply and interpret the law of takings. The California Service Duplication Statute purports to define a "taking" and "just compensation" despite the fact that these concepts are defined by existing constitutional law. However, the process of determining these concepts "is purely a judicial function." *Baldwin Park, supra*, 156 Cal.App.3d at 439. Accordingly, the California Service Duplication Statute is subject to being struck down as unconstitutional because it represents a declaration by the Legislature of the meaning and construction of constitutional law. Therefore, the California Service Duplication Statute is a violation of the separation of powers doctrine.

Additionally, the California Service Duplication Statute is unconstitutional as an unequal grant of privileges because it provides an exception for certain areas of the state and not others. Legislation granting special privileges and imposing special burdens may conflict with the Equal Protection Clause of the U.S. Constitution and the California Constitution. The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Article I, section 7(a) of the California Constitution expressly prohibits the denial of equal protection of the laws.

The general principle involved in constitutional equality guarantees forbidding special privileges or immunities is that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of an immunity to those not subject to it. *Fountain Park Co. v. Hensler*, 199 Ind. 95, 104-105 (1927). Where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. *Champlin Refining Co. v. Cruse*, 115 Colo. 329, 333 (1946). If there are other general classes situated in all respects like the class benefited by a statute with the same inherent needs and qualities which indicate the necessity or expediency of protection for the favored class, and legislation discriminates against, casts a burden upon, or withholds the same protection from the other class or classes in like situations, the statute cannot stand. *Abrams v. Bronstein*, 33 N.Y.2d 488, 492 (1974); *Kurtz v. Pittsburgh*, 346 Pa. 362, 384-385 (1943); *McErlain v. Taylor*, 207 Ind. 240, 243 (1934).

There is no rational basis for the California Service Duplication Statute, which only applies to one class of business, i.e. regulated water utilities. Moreover, the statute arbitrarily applies in some parts of the State and not others. The need to use recycled water is critical throughout the State. Further, in light of the State's record breaking and ongoing drought preventing arid and dry counties, such as San Bernardino County, from making use of available recycled water has no rational basis. Accordingly, a court may likely find the California Service Duplication Statute is invalid.

To be clear, the Town has a constitutional right to develop and use recycled water. The Town specifically intends to use its recycled water on Town property. Moreover, the Town has an ownership interest in recycled water from the Subregional Plant. Therefore, a taking will occur if AVR attempts to prevent the Town from using its own recycled water on Town property. As a result, AVR would be required to compensate the Town.

In light of the benefits of the Subregional Plant to the entire community, the Town requests AVR withdraw its opposition and agree not to challenge the project under the California Service Duplication Statute. If AVR persists with its unfounded opposition to the Subregional Plant, the Town will take all legal action necessary to protect its multimillion dollar investment. Nonetheless, the Town welcomes the opportunity to meet with AVR to resolve this matter.

Sincerely,

John E. Brown
of BEST BEST & KRIEGER LLP
Town Attorney, Town of Apple Valley

JEB:lab

cc: Mayor, Town of Apple Valley
Town Council, Town of Apple Valley