

DIABLO COMMUNITY SERVICES DISTRICT

P.O. Box 321
Diablo CA 94528

DATE: October 12, 2018

To: Diablo Residents

From: Diablo Community Services District (DCSD) Board

As you know, DCSD was sued by these residents of Calle Arroyo: Robert Tiernan, Jr., Robert and Marilyn Tiernan, Irvin Nicholas, Jr., Michael and Janet Scarpelli, and Kathleen Nicholson. These Plaintiffs claimed that Calle Arroyo is a strictly private street not subject to a public right-of-way, and that DCSD was obligated to try to prevent use of Calle Arroyo by non-residents. DCSD disagreed because: 1) DCSD's powers are limited by California Community Services District Law and the DCSD 1969 Formation Document, neither of which authorizes the District to prevent non-residents from using Diablo's roads; 2) DCSD's Formation Document clearly states that roads maintained by the District are *private with a public right-of-way*; and 3) DCSD obtained six legal opinions, ranging from 1967 to 2018, which all state that DCSD does not have the authority to prevent non-residents from using Diablo's roads.

Court Ruling on Friday, October 5, 2018ⁱ

The Contra Costa Superior Court agreed with DCSD and ruled that DCSD does not have the authority to prevent the general public, including cyclists, vehicles, and pedestrians, from using Calle Arroyo.ⁱⁱ

Furthermore, the court stated that the 1993 DCSD ordinance code provision that the Plaintiffs relied on (i.e., section 5-2-202 which states that Diablo roads are for Diablo residents and those with legitimate Diablo business) is illegal and unenforceable.ⁱⁱⁱ Since DCSD does not have the authority to exclude the public, it cannot enact ordinance code provisions that purport to do so. This ruling does not have any impact on ordinance code provisions pertaining to Diablo's private roads signage at the entrances, security or road maintenance.

Finally, the court ruled on the Plaintiffs' request that the court take judicial notice of several documents. The court stated that it was unnecessary to take judicial notice of documents already included in the pleadings, and that it would not take judicial notice of a declaration made by Robert Tiernan, Sr.^{iv}

Given this ruling, DCSD's involvement in the lawsuit should have concluded. However, the Plaintiffs requested that the court allow them to amend their complaint to add a new cause of action against DCSD (see below).

New Cause of Action Requested by Plaintiffs

Even though the court ruled in DCSD's favor, Plaintiffs requested that the court allow them to add a new claim to their lawsuit that asks the court to compel DCSD to close all pedestrian and bicycle cut-through paths, *which are on private property*, to both residents and nonresidents. The court granted Plaintiffs the right to add this new cause of action within 30 days, and Plaintiffs indicated at the October 5 court hearing that they plan to do so.

If Plaintiffs add the cause of action to their complaint and if the court later rules in their favor, residents who live on Mt. Diablo Scenic Blvd and others who use the cut-through paths may be impacted.

Non-DCSD Causes of Action

It appears that the Plaintiffs may be going to court in November to address the quiet title cause of action that has been challenged by Bike East Bay. DCSD is not involved in this cause of action and does not plan to participate in the hearing.

Summary

DCSD as a public agency must act according to law. In addition, in representing the community of Diablo, it has a fiduciary responsibility to ensure that its funds are used properly and fairly. Thus, DCSD was forced to respond to the lawsuit and to defend against the claim that Calle Arroyo deserved special treatment and exceptional security funding. DCSD had hoped that the ruling on October 5 would essentially end the lawsuit, but it now anticipates yet another claim by the Plaintiffs.

The DCSD Board will continue to keep you up-to-date on the status of the lawsuit as it progresses.

ⁱ All endnotes below are taken from the text of the court's ruling. A copy of the complete ruling is available on DCSD's website: *diablocsd.org*.

ⁱⁱ Page 17: "The District is an independent special district formed in 1969 under Government Code §§ 61000 et seq. The District is a creation of statute and "as a creation of statute, has only such powers as are bestowed on it by the Legislature [citations omitted]..."

Government Code § 61100 lists 32 powers that are given to a special district. Of these, however, the only one plaintiffs adduce as supporting the District's power to exclude outsiders from Calle Arroyo is § 61100(j): 'Provide security services, including, but not limited to, burglar and fire alarm services, to protect lives and property.' Plaintiffs argue that the District has the authority to prevent the general public from using Calle Arroyo under subdivision (j) because the District is providing security services.

Even looking only at the plain language of this subdivision, it would be a considerable stretch to read § 61100(j) as including a power to exclude people (such as motorists, bicyclists, or pedestrians) from using a roadway. The actual grant of authority is to 'provide security services'. The term is not self-defining, but guidance is found in the specific examples given, and the purpose stated – 'burglar and fire alarm services, to protect lives and property'. Those bear scant if any resemblance to excluding road users, which is more matter of avoiding congestion and promoting privacy and convenience. Granted, too-heavy traffic might pose something of a safety hazard; but it is apparently agreed all around that the District has the power to act for roadway safety, such as by enforcing the Vehicle Code."

ⁱⁱⁱ Page 19: "As framed in the third cause of action, plaintiffs' claim focuses on the District's own ordinances, which plaintiffs characterize as representing exactly the kind of attempted exclusion they seek here – a characterization that the District does not contest. But the District correctly points out that the ordinances are invalid, as *ultra vires*, to the extent that they purport to exercise a power that § 61100 does not grant to the District. This admittedly puts the District in the anomalous position of arguing for the illegality of its own ordinances. But the District is correct, and the Court is thus put in the position of agreeing with that confession of illegality. The District can enforce the ordinances only to the extent that they do not conflict with state law...Under the Government Code, the District can only adopt ordinances 'for the administration, operation, and use and maintenance of the facilities and services listed in Part 3 (commencing with Section 61100).' (Gov. Code § 61060.) Thus, local ordinances should be used to implement the powers given to the District in Part 3. Part 3 includes both sections 61100 and 61105. Therefore, to the extent the local ordinance give [*sic*] the District power to limit access to Calle Arroyo it conflicts with the powers given to the District in section 61100, et seq. and is therefore void."

^{iv} Page 20: "The Court rejects plaintiffs' proffered item 3, the Tiernan declaration. The declaration is already in the Court's file; so if it were properly cognizable on this motion, it would not be necessary to take judicial notice of it. It is not so cognizable. This is a motion for judgment on the pleadings, on which plaintiffs cannot offer testimony. Apparently they conceive the Tiernan declaration to be judicially noticeable as a species of legislative history, in that it recites Mr. Tiernan's subjective intention as to the meaning of certain language in the District's founding documents. But an author's or legislator's after-the-fact statements about the meaning of such language, in the form of a declaration (or, for that matter, in live testimony), is proper neither in form nor in substance."