

A. BARRY CAPPELLO

September 6, 2011

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Via Hand Delivery

Salud Carbajal, Supervisor
Janet Wolf, Supervisor
Doreen Farr, Supervisor
Joni Gray, Supervisor
Steve Lavagino, Supervisor
Santa Barbara County Board of Supervisors
105 East Anapamu Street
Santa Barbara, CA 93101

Re: ***Proposed Chumash Cooperative Agreement***

To the Honorable Members of the Santa Barbara County Board of Supervisors:

We represent Preservation of Los Olivos (“P.O.L.O.”), a grass roots citizen group in the Santa Ynez Valley.

We understand that the Santa Barbara County CEO has received, and intends to submit to you for approval, a proposed Cooperative Agreement (the “Agreement”) between Santa Barbara County and the Santa Ynez Band of Mission Indians (the “Tribe”).¹ The Board of Supervisors (“Board”) would be violating the law and corrupting the planning process if it signed the Agreement.

Here is why:

Background

The Santa Ynez Reservation (135 acres) disputably² held in trust by the United States for the Tribe is not subject to State or County laws or regulation.

¹ On Friday, August 12, 2011, our office called the office of the Santa Barbara County CEO to request confirmation that the CEO had received the proposed Agreement and intended to pass it to the Board. As of this date, the CEO’s office has not provided an answer to our request.

² See, e.g., *Preservation of Los Olivos, et al. v. Pacific Regional Director, Bureau of Indian Affairs*, U.S. Dept. of the Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals, Docket No. IBIA 05-050-1.

The Reservation includes the Chumash Casino complex on Highway 246, which is near both residential and school property. Because the Reservation is exempt from County planning, the casino complex, and the impacts it engendered, were and are outside of County planning jurisdiction or control. Yet the County is obligated to provide services, including but not limited to police, fire, water, medic and other services to this mega complex.

In or about April, 2010,³ the Tribe acquired approximately 1400 acres of real property located along Highway 154 and Armor Ranch Road (the "Property"). This area is almost the size of the town of Solvang. The Property contains five parcels, all zoned agricultural. It is not contiguous to the existing Reservation property.

The Tribe contends that it may annex property via a "fee-to-trust" transfer in one of two ways: through the Bureau of Indian Affairs ("BIA") administrative process, or through federal legislation. The Tribe has encountered community resistance in its attempt to annex, through the BIA process, a separate property comprised of approximately 6.9 acres. Now the Tribe is seeking the Board's approval of this Agreement to avoid the BIA process. It intends to use the Board's approval for an alternative process such as (but not limited to) direct legislation to place the Property into trust, once approval of this proffered "Agreement" is received from the Board.

The Proposed Agreement

A copy of the proposed Agreement obtained by P.O.L.O. is attached hereto. In brief, it provides the Tribe will make Agreed Payments in an uncertain amount, and the County will support and assist the Tribe in its attempt to annex the Property by any possible method. In short, take money and ignore your sworn duty to uphold the law, specifically the Santa Ynez Valley Community Plan of this County.

The Agreement provides:

Recitals (page 1):

- the Tribe "desires to expand Tribal housing opportunities and operate Tribal economic development projects."
- "proposed and future Tribal development are not County projects and are not subject to the discretionary approval of the County . . ."
- "given the scope of the proposed Tribal housing and economic development projects, specific impacts are not always subject to precise measurement . . ."

¶ 3. "The County shall support the fee-to-trust annexation of the Property to the Reservation by federal legislation, the administrative process by federal agencies, or any other possible way in existence now or in the future. Upon request of the Tribe, the County shall confirm such support by letter or resolution." (Page 3.)

³ The Agreement apparently incorrectly recites that the purchase date was April, 2011.

¶ 5: “The Santa Ynez Band and County acknowledge and agree that in consideration for Santa Ynez Band’s Agreed Payments above, any additional impacts to the County, including, without limitation, law enforcement, fire, and traffic/roads, will be mitigated solely by the County at no additional cost to Santa Ynez Band.” (Page 4.)

Apparently the Agreement contemplates Tribe development of the Property, unhindered by County review or requirements, prior to the date the Property is annexed (if ever).

The Agreement Surrenders County Jurisdiction Over a City-Sized Property Already Subject to Specific Community Plan When the Anticipated Development Is Unknown and Adverse Impacts Cannot Be Assessed

On October 6, 2009, this Board adopted the Santa Ynez Valley Community Plan (“SYV Plan”), as an update to the County’s Comprehensive General Plan. Citizen involvement in the preparation of a community plan is required by State law, and is a cornerstone of the community plan process. The SYV Plan process took approximately nine years. It involved a concerted long-range effort by the community and the County which included targeted research; data collection and analysis; extensive public involvement; the drafting of goals, policies, and development standards; and numerous public hearings with the Planning Commission and the Board. (See, SYV Plan, pp. 5, 7.)

The SYV Plan augmented various elements of the County’s General Plan, including but not limited to, the Land Use Element goals,⁴ development policies,⁵ and Visual Resources Policies.⁶ The SYV Plan also augmented the Housing Element (“a comprehensive assessment of projected housing needs for all segments of the jurisdiction and all economic groups” [SYV Plan, p. 10]), as well as the Seismic Safety and Safety, Noise, Circulation, Conservation, Open Space, Agricultural, and Scenic Highways (“The Plan recognizes the suitability of design guidelines for protecting the scenic qualities of Highway 154 . . .” [SYV Plan p. 12]), Environmental Resources Management Elements, and the Clean Air Plan. (See generally, SYV Plan pp. 10-13.)

The SYV Plan specifically provides, among other things:

“The County shall oppose the loss of jurisdictional authority over land within the Plan area where the intended use is inconsistent with the goals, policies and developmental standards

⁴ One of the Land Use Element’s fundamental goals is the following: “Environmental constraints on development shall be respected. Economic and population growth shall proceed at a rate that can be sustained by available resources.” Another is that in “rural areas, cultivated agriculture shall be preserved . . .” (SYV Plan, p. 8.)

⁵ The Land Use Development Policies “establish guidelines for development in order to respect constraints posed by geology, biology, and other physical environmental characteristics. In addition, these policies require the availability of adequate services and resources to serve a project prior to development.” (See, SYV Plan, p. 9.)

⁶ The Visual Resources Policies “require structures to be compatible with the existing community and protect areas of high scenic value and scenic corridors.” (See, SYV Plan, p. 9.)

of the Plan or in the absence of a satisfactory legally enforceable agreement.” (Policy LUG-SYV-6, p. 22)

“The County shall pursue legally enforceable government-to-government agreements with entities seeking to obtain jurisdiction over land within the Plan Area to encourage compatibility with the surrounding area and mitigate environmental and financial impacts to the County.” (Action LUG-SYV-6.1, pp. 22-23.⁷)

The Agreement would surrender County control over an area the size of a small town, at a time when the adverse impacts on the community and the necessary mitigation needs for the development are completely unknown and cannot be assessed. This requested abdication of your duty to uphold the planning process and the law, in favor of money, is abhorrent.

The Property is comprised of five agricultural zoned parcels which are currently enrolled in the County’s Agricultural Preserve Program under the Williamson Act, and also situated along a designated Scenic Highway. The Agreement apparently would enable those parcels to be developed in any residential/commercial manner, without compliance with SYV Plan requirements. It would remove from the County an unknown amount of tax revenue from the Property as ultimately improved and developed, while leaving the County with obligations to provide support services to the developed Property and to deal with unmitigated impacts at its own cost. As the Agreement has no provision for County discretionary control over development, it provides no legally enforceable means of ensuring consistent use, compatibility, or mitigation.

In short, the Agreement vitiates the SYV Plan, which this Board adopted after nine hard years of work. It does this with absolutely no knowledge of what the Tribe’s development plans might be. The Agreement does not provide any legally enforceable avenue for the County to promote/encourage/ensure issues of compatibility or mitigation. To the contrary: it provides that the County has no control over development of the Property. Either the signing of this Agreement, and/or recommending its contents to another governmental authority, violates your specific mandate under the SYV Plan as set forth above.

This Board Cannot Approve the Agreement

There are several major reasons why the Board cannot legally approve the Agreement.

First, because the Agreement is on its face inconsistent with the SYV Plan, the Board cannot approve it without first amending the plan. This Board is comprised of elected officials whose duty is to protect the public need for a “healthy, safe, and prosperous environment.” (See,

⁷ It is uncertain whether this Agreement, or a different agreement containing the necessary planning and environmental provisions, would be legally enforceable under all relevant law. (See, e.g., 25 U.S.C. § 81.) It is incumbent upon the Board to ensure that any agreement with the Tribe would be legally enforceable under all relevant law. This letter addresses initial problems related to planning, only, without waiver of any additional arguments, including but not limited to those related to enforceability under federal law.

e.g., Board Mission Statement, posted at www.countyofsb.org/bos.) As part of its task, the Board was statutorily required to prepare and adopt the comprehensive general plan, including numerous mandatory elements. (Govt. Code § 65300.) Pursuant to statute, this Board authorized and undertook the nine-year long process of developing the SYV Plan, including providing opportunities for the involvement of citizens, agencies, utilities, etc., through public hearings and other means. (See, e.g., Govt. Code §§ 65351, 65352, 65919 et seq.) It then adopted the SYV Plan by resolution in October, 2009, along with related ordinances. The SYV Plan now constitutes the law of this County which this Board must uphold.

As set forth above, the Agreement is flatly inconsistent with the SYV Plan. It cedes County jurisdiction entirely, blindly authorizes unlimited development, and does not create any legally enforceable document under which the County could obtain compliance with any of the SYV Plan requirements.

Second, because the Agreement exempts the Property from any compliance with the SYV Plan, it would, at the very least, constitute a *de facto* amendment to the SYV Plan. However, the statutes governing preparation and adoption of the General Plan are also applicable to amendments. (Govt. Code § 65350 et seq.)

As applied here, the Board cannot “approve” the *de facto* amendment unless it first undertakes the statutory procedure to amend the SYV Plan, and complies with the requirements for limited amendments. Thus, the Board must ensure that the Agreement/amendment is consistent with the General Plan (See, e.g., Govt. Code § 65300.5; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 (consistent if furthers the objectives and policies of the general plan and does not obstruct them).) The Board must obtain appropriate planning department and public involvement and notice under the statutes cited above. Indeed, in order for the public to understand the potential impacts of this Agreement/amendment, the County would have to provide notice of the assessed impacts. The Board would have to give notice that the Agreement constituted an amendment to the Plan when placing it on the agenda and as otherwise appropriate, and the Board would ultimately have to make findings of consistency.

However, the amendment process has not been invoked, and the requisite information on consistency is unavailable. The Tribe has not proposed any specific projects, so no one may assess whether this Agreement is consistent with the Plan or what impacts will result which would require mitigation. This Board cannot amend the Plan by fiat, nor can it subvert the process by failing to provide notice to the public on the amendment or its anticipated effect. Yet approval of the Agreement would do just that.⁸

Third, approval of the Agreement would unlawfully surrender control of the County’s ability to control lands within its jurisdiction. It is settled law that a county cannot

⁸ Under an analogous theory, adopting the Agreement would constitute an impermissible ad hoc exemption from Planning and Zoning Law. See, e.g., *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997 (county cannot adopt ad hoc exemption without rezoning or other proper procedure).

constitutionally divest itself of, or impair, its delegated governmental power, or contract away its right to exercise its police power in the future. (See, e.g. *County Mobilehome Positive Action Com., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727 (lease with rent stabilization measures conditioned on county refraining from enacting rent control legislation was facially unconstitutional); *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716 (City could not adopt a Memorandum of Understanding (“MOU”) with other cities and county where the MOU conditioned further amendments of a general plan on parallel amendments by other agencies); *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800 (government may not contract away its right to exercise the police power in the future).)

The Agreement would void the County’s ability to control land use on the Property in perpetuity. The County would be without any authority to influence development along Highway 154, a designated Scenic Highway and critical gateway to the community. The County would have surrendered its ability to control all land use issues: design, circulation, noise, density, etc.

The approval of this Agreement will result in the loss of millions of dollars of land value, harm unknown thousands of Santa Ynez Valley residents who rely on the planning process, and make a mockery of your careful deliberative process which culminated in approving the SYV Plan.

Very truly yours,

CAPPELLO & NOËL LLP



A. Barry Cappello

cc: Dennis Marshall
County Counsel
Santa Barbara County

Chandra L. Wallar
Santa Barbara County CEO

Enclosure

COOPERATIVE AGREEMENT

This Cooperative Agreement (“Agreement”) is effective as of _____, 2011 by and between the County of Santa Barbara (the “County”) and the Santa Ynez Band of Chumash Indians (the “Tribe” or “Santa Ynez Band”) (referred to herein as collectively as “the Parties” and as to each as a “Party”). The terms “County,” “Tribe,” and “Santa Ynez Band” as used herein shall include the Parties’ governmental entities, departments and officials unless otherwise stated.

RECITALS

WHEREAS, the Tribe is a federally-recognized Indian Tribe and which is within the geographic boundaries of the County; and

WHEREAS, the Tribe desires to expand Tribal housing opportunities and operate Tribal economic development projects in a manner that benefits the Tribe, its members, and the community as a whole, and the County recognizes the mutual benefit that can be derived if those goals are achieved; and

WHEREAS, proposed and future Tribal development are not County projects and are not subject to the discretionary approval of the County and absent this Agreement the County has limited opportunity to influence mitigation measures or seek compensation for adverse environmental impacts; and

WHEREAS, the Parties acknowledge that given the scope of the proposed Tribal housing and economic development projects, specific impacts are not always subject to precise measurement and that the mitigation measures agreed upon below are intended as good faith approximate mitigation of identified impacts; and

WHEREAS, the Parties recognize that this Agreement is an important step in furthering a government-to-government relationship and building trust, and mutual respect

BACKGROUND

After Mexico took over California from the Spanish and the secularization of Mission Santa Ynez in 1834, the Santa Ynez Chumash neophytes at Mission Santa Ynez settled in the creek bed of the Zanja de Cota Creek;

The U.S. Congress adopted the Mission Indian Relief Act of 1891 which established the Smiley Commission to report on the status of the Mission Indians of California;

The 1891 Report of the Smiley Commission verified such occupation of the Zanja de Cota Creek by the Santa Ynez Chumash from before California Statehood in 1835 and verified the status of the Santa Ynez Chumash as a tribe of Mission Indians as of 1891;

Then President Benjamin Harrison by Executive Order adopted the conclusions of the 1891 Smiley Commission on December 29, 1891;

After such report, the Indian Agent from the Tule River Agency began negotiation with the Catholic Church, to establish a permanent reservation for the Santa Ynez Band of Chumash;

Such negotiations resulted in the 1901 settlement agreement between the Church and the federal government;

As part of such negotiation, the Indian Agent agreed on behalf of the Tribe to waive the rights of the neophytes to the entire 36,000 acre Canada de los Pinos Rancho (College Rancho) which the Church claimed to own in common with the neophytes in exchange for the conveyance by the Church of all of its right title and interest in Zanja de Cota Creek to the Tribe as the Santa Ynez Reservation;

To finalize the waiver of the claim by the Tribe to the College Rancho, the Church filed a quiet title action against the federal government, the then members of the Tribe and the entire world in *The Roman Catholic Bishop of Monterey v. Salmon Cota, et al.*, Case no. 3926 (1897);

Upon the conclusion of such litigation, the 99 acre Santa Ynez Reservation was conveyed to the United States in trust for the Tribe the size of which Reservation which was later increased by 26.89 acres in 1979 and 12.73 acres in 2004 (collectively the "Reservation");

The original 99 acre Reservation as extended consists of the Zanja de Cota creek and flood plain with the last third of the Reservation being covered in wetlands unable to adequately house the Members of the Tribe and their children, grandchildren and great grandchildren;

On or about April 1, 2011, the Tribe acquired approximately 1,400 acres of real property east of Highway 154 and north of Highway 246/Armour Ranch Road from Fess Parker Ranch, LLC (the "Property");

The "Property" is within the historic boundaries of the College Rancho and is specifically within the boundaries of the quiet title action filed against the Tribe by the Church;

The Tribe desires to annex the Property by fee-to-trust transfer by either federal legislation or through the administrative process, and this Agreement is intended by the Parties to resolve the inter-governmental jurisdictional and other issues between the Parties;

**I. EFFECTIVE DATE AND CONDITIONS TO
EFFECTIVENESS OF AGREEMENT**

1. This Agreement shall become effective on the latest of the dates upon which each of the following conditions precedent shall be met:

- a) approval of this Agreement by the County of Santa Barbara Board of Supervisors and the General Council of the Santa Ynez Band; and
- b) conveyance of the Property to the United States of America to hold in trust for the Tribe; and
- c) Any other conditions precedent mutually agreed by the Parties.

2. Upon the satisfaction of all of the conditions precedent to effectiveness set forth in subsection 1, above, the parties shall execute an addendum to this Agreement memorializing the effective date of this Agreement in the form attached hereto as Attachment A.

II. FEE-TO-TRUST ANNEXATION OF THE PROPERTY

3. The County shall support the fee-to-trust annexation of the Property to the Reservation by federal legislation, the administrative process by federal agencies or any other possible way in existence now or in the future. Upon request of the Tribe, the County shall confirm such support by letter or resolution.

III. PAYMENTS IN LIEU OF TAXES

4. Agreed Payments:

- a) In addition to the promises and covenants otherwise contained in this Agreement, the Parties acknowledge that annexation of the Property may, in some cases, result in lost revenues and/or fees to the County.
- b) The Parties agree that the County does not have permitting authority over development on Trust Lands and that the payments made under this agreement do not constitute taxes, exactions, or fees.
- c) The payments agreed to below are approximate off-sets to the above-mentioned potential losses and impacts to the County and are intended to support an approximate level of County services to the Reservation, the Property, and affected communities.
- d) The amount of such Payments by the Tribe shall be as follows: Tribe to pay County flat annual fee in lieu of property taxes in the amount of \$_____ which amount shall be due in four (4) equal quarterly payments beginning on the first day of the Calendar quarter and

continuing each quarter thereafter. Such payments shall begin the first day of the next calendar quarter after the effective date of this Agreement and shall expire in full on December 31, 2020.

5. Acknowledgement of Additional Impacts.

The Santa Ynez Band and County acknowledge and agree that in consideration for Santa Ynez Band's Agreed Payments above, any additional impacts to the County, including, without limitation, law enforcement, fire, and traffic/roads, will be mitigated solely by the County at no additional cost to Santa Ynez Band.

6. Adjustment of Payments.

- a) Santa Ynez Band shall not be responsible for any construction cost overruns or any cost increases from any source, including, without limitation, those caused by inflation, labor, or material cost increases.
- b) In the event that the Santa Ynez Band does not successfully annex such Property to the Reservation by fee-to-trust transfer to the federal government within two (2) years after the effective date of this Agreement, the parties shall negotiate in good faith as to how much, if any, of the contribution made by Santa Ynez Band under this Agreement shall be returned to the Band. If the parties are unable to reach agreement on these issues, that dispute will be resolved under the dispute resolution procedures included in this Agreement.

7. Reimbursements/credits for contributions from third party sources.

County agrees to reimburse or credit Santa Ynez Band as follows:

- a) In the event that Santa Ynez Band receives funding from state or federal sources, and directs those monies to be paid directly to County, County shall accept 100% of such payment as if it were a payment paid directly by Santa Ynez Band.
- b) In the event County receives funding from the Special Distribution Fund or any other fund created under the current or any future Tribal-Compact, earmarked for mitigation of off-reservation impacts resulting from the Santa Ynez Casino, County shall accept 100% of such payment as if it were a payment paid directly by Santa Ynez Band.
- c) Any credits towards Santa Ynez Band's payment obligations pursuant to this Agreement shall be treated as the next payments in time to be paid by Santa Ynez Band.
- d) In the event funds identified in this section are received by the County after the payment from Santa Ynez Band has already been paid to the County, the

County shall reimburse Santa Ynez Band within 30 days from receipt of such funds.

IV. MISCELLANEOUS

8. Tribal-State Compact.

County and Santa Ynez Band agree that Santa Ynez Band's contributions to County pursuant to this Agreement are not exactions or fees imposed as a condition of development, and therefore are not subject to the Mitigation Fee Act (California Government Code Section 66000 and following). County and Santa Ynez Band agree that Class III gaming facilities on reservation land are regulated by the Compact and that the County has no permitting authority over the Chumash Casino.

9. Notices.

All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the principal offices of the County and Santa Ynez Band. Notice shall be effective on the date delivered in person, or on the date when the postal authorities indicated that the mailing was delivered to the address of the receiving party indicated below:

Notice to Santa Ynez Band:

Santa Ynez Band of Chumash Indians
Attn: Tribal Chairman
P.O. Box 517
Santa Ynez, CA 93460

Notice to County:

County of Santa Barbara
105 East Anapamu Street
Santa Barbara, CA 93101
Attn: CEO

Such written notices, demands, correspondence and communications may be sent in the same manner to such other persons and addresses as either party may from time to time designate by mail as provided in this section. A party may change its address by giving notice in writing to other Party and thereafter notices shall be delivered or sent to such new address.

10. Applicable Laws.

This Agreement shall be construed and enforced in accordance with the laws of the United States and to the extent not inconsistent therewith, the laws of the State of California.

11. Consent To Jurisdiction: Limited Waiver of Sovereign Immunity and Exhaustion Of Tribal Remedies.

- a) Santa Ynez Band grants a limited waiver of sovereign immunity from suit exclusively to County, and to no other entity or person, for the sole purpose of enforcing this Agreement. For this limited purpose, Santa Ynez Band (i) agrees that any suit, action or other legal proceeding arising out of or relating to this Agreement may be brought in the federal courts of the United States, or in the event the federal courts refuse to hear such case for lack of jurisdiction, the State courts of the State of California (including any courts to which appeals there from are available); and (ii) waives its sovereign immunity in any such suit, action or legal proceeding by County for money damages, specific performance, injunctive relief and/or declaratory relief for Santa Ynez Band's breach of this Agreement. Santa Ynez Band does hereby unconditionally waive any claim or defense of exhaustion of tribal administrative or judicial remedies. In no instance shall any enforcement or judgment of any kind whatsoever be allowed or levied against any assets of Santa Ynez Band other than the limited assets of the Santa Ynez Band's distributed share of the revenue stream of the Chumash Casino and physical assets of the Chumash Casino, subject however, to prior existing liens or encumbrances on such assets. Specifically, this waiver shall not extend to any other accounts of Santa Ynez Band, the source of which includes distributions from accounts directly related to the Chumash Casino, so long as such distributions are in the ordinary course of business when the Agreement is not in default and are not done for the purpose of frustrating the County's remedies hereunder. Santa Ynez Band does not waive the defense of sovereign immunity with respect to any action by third parties, or extend its waiver to reach any assets of Santa Ynez Band other than those specifically set forth herein.
- b) County acknowledges and agrees that Santa Ynez Band may bring an action in the State Courts of California to enforce the terms of this Agreement as against Santa Barbara County for money damages, specific performance, injunctive relief and/or declaratory relief for County's breach of this Agreement. County acknowledges and agrees that State Courts with proper venue have jurisdiction to hear such disputes. For purposes of the Agreement, County hereby waives any immunity it may have from suit in order to permit Santa Ynez Band to enforce the provisions of the Agreement.

12. Entire Agreement, Waivers.

This Agreement constitutes the entire understanding and agreement of the Parties. This Agreement integrates all of the terms and conditions mentioned herein or incidental

hereto, and supersedes all negotiations or previous agreement between the Parties with respect to all or any part of the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the County or of the Santa Ynez Band.

13. Amendments.

This Agreement may be amended by mutual written agreement of the Parties duly executed by the lawfully authorized officers or officials of each party.

IN WITNESS WHEREOF, the Agreement has been executed by the Parties as of the day and year first set forth above,

TRIBE:

SANTA YNEZ BAND OF CHUMASH
INDIANS, a federally recognized Indian tribe

By:

Vincent P. Armenta
Tribal Chairman

COUNTY:

COUNTY OF SANTA BARBARA, a
political subdivision of the State of
California

By:
