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SUPERIOR COURT OF CALIFORNIA

COUNTY OF CONTRA COSTA

BUILDING INDUSTRY ASSOCIATION – BAY AREA, Plaintiff and Petitioner, v. CITY OF SAN RAMON, et al., Defendants and Respondents.	No. C 14-00603 **PLAINTIFF AND PETITIONER BUILDING INDUSTRY ASSOCIATION – BAY AREA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** Date: March 2, 2015 Time: 9:00 a.m. Judge: Honorable Laurel S. Brady Department 31 Complaint filed March 25, 2014

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INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiff and Petitioner Building Industry Association – Bay Area brings this lawsuit for judicial review of actions taken by Defendants and Respondents City of San Ramon, *et al.* (collectively "the City"). The Association seeks summary judgment to invalidate the ordinance and resolutions associated with the formation of the City of San Ramon Community Facilities District No. 2014-01 ("District"), as well as the levying of a tax, through the District, on property owners within the District.[1] The City estimates that this tax ultimately could earn it $2 million per year. Stipulated Exhibit ("Stip. Exh.") 4 (Feb. City Staff Rep.) at 4. Yet the landowner-developers who approve the tax are not the ones ultimately who will pay; that burden instead will fall on the homeowners who will occupy the new developments. *See* Pltf. & Pet'r's Separate Statement of Undisp. Material Facts ("Pltf. Statement") ¶ 21. These homeowners, however, will receive no special or enhanced benefit for their hard-earned dollars; instead they will receive precisely the same city-wide standard municipal services that their non-District neighbors receive who will not pay the District's tax. *Id.* ¶¶ 18-20.

The United States and California Constitutions and various statutes prohibit the City's unjust financing scheme. Specifically: (i) the District's tax violates Section 53313 of the Government Code because it was approved by landowner-vote, yet its proceeds will not be used to pay for any new or enhanced type of service to parcels within the District; (ii) the District's tax violates Article XIIIC, § 2(a), of the California Constitution because it is an impermissible "general tax"; and (iii) the City's Ordinance 448, which authorizes the levy of the District's tax, unconstitutionally retaliates against District property owners who succeed in repealing the tax. As set forth below, no genuine issue of material fact exists with respect to the Association's claims,

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[1] The Association's Complaint and Petition contains three causes of action, but the second and third causes of action (for declaratory relief and writ of mandate) are alleged only in the alternative to the Association's first cause of action for a declaration of invalidity pursuant to Code of Civil Procedure sections 860, *et seq.* These latter causes of action are simply alternative procedural vehicles for raising the substantive claims contained within the first cause of action. Hence, if the Court renders full judgment on the merits of the first cause of action, the Association's second and third causes of action either will not arise, or will be adjudicated in the same way as the first cause of action. Accordingly, the Association believes that a motion for summary judgment is proper. Nevertheless, if the Court disagrees, the Association moves in the alternative for summary adjudication of its first cause of action. *Cf.* Code Civ. Proc. § 437c(f).

and the Association is entitled to judgment thereon as a matter of law. *See* Code Civ. Proc. § 437c(c).

STATEMENT OF LAW

The Mello-Roos Act

To provide local governments a means of financing new municipal facilities and services consistent with the California Constitution, the Legislature passed the Mello-Roos Community Facilities Act of 1982, Gov't Code §§ 53311-53317.5. The Act authorizes a local government to form a "community facilities district." *See id.* §§ 53313, 53313.5. With a two-thirds approval of eligible voters, *see id.* § 53328, a district may levy "special taxes," *see id.* § 53325.3, and issue bonds, *see id.* §§ 53345-53365.7. As the Act's name implies, a district's purpose is to fund community facilities and services. *See id.* §§ 53313, 53313.5. Its tax can be authorized in two ways. If the district's proposed territory contains at least 12 persons who are registered to vote, then those registered voters comprise the relevant electorate. *See id.* § 53326(b). If, however, there are fewer than 12 such voters, then the electorate comprises the landowners within the district.[2] *Id.*

The Act contains broad authorization for facilities financing (whether approved by registered voters or landowners), including but not limited to: facilities for local park and recreational uses; elementary and secondary schools; libraries; child care facilities; water, electrical, and other energy transmission and communication facilities; and flood and storm protection facilities. *See id.* § 53313.5(a)-(f). In fact, the Act allows a district to finance "[a]ny . . . governmental facilities" that the initiating local government is otherwise authorized to construct, own, or operate. *See id.* § 53313.5(h). In stark contrast, the Act's authorization for financing, by landowner-approved tax, of the *services* needed to run these facilities is much narrower. For example, the Act provides that the proceeds from such a tax "may only finance the services authorized [by the Act] to the extent that they are in addition to those provided in the territory of the district before the district was created." *Id.* § 53313. Further, these "additional

[2] A landowner-approved tax is also permissible if it will not be levied on parcels in residential use. Gov't Code § 53326(c).

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services shall not supplant services already available within that territory when the district was created." *Id.*

These constraints on financing by landowner-approved tax are particularly striking given their close similarities to the limitations imposed on special assessments. *Cf.* Cal. Const. art. XIIID, § 2(b), (i) (defining "[a]ssessment" to mean any charge or levy for a "special benefit," *i.e.*, "particular and distinct benefit over and above general benefits conferred on real property"). Generally speaking, a property assessment cannot exceed the benefits that the assessed parcel receives in exchange for the assessment paid. *See Riverside Cnty. Cmty. Facilities Dist. No. 87-1 v. Bainbridge 17*, 77 Cal. App. 4th 644, 657 (1999). In contrast, no such proportional benefit need be shown with taxes. *See id.* Thus, perhaps unique in all California law, the Mello-Roos Act's Section 53313 imposes assessment-like limitations on a species of tax—namely, landowner-approved taxes.[3]

One of the likely reasons for this limitation is that landowner-approved taxes emerge from a significantly different political dynamic than registered-voter-approved taxes. As noted above, a landowner tax generally is only possible when the area to be taxed is by and large vacant. *See* Gov't Code § 53326(b). It follows that such taxes will most often be used to finance services for new development, as opposed to services for existing, occupied development. But developers of new housing rarely reside in their development, Pltf. Statement ¶ 21, and thus the individuals voting for a landowner tax will not be the ones who ultimately have to pay for that tax. Section 53313's limitations therefore serve two important purposes: (i) to protect against an electoral mismatch whereby homeowners are saddled with taxes they did not vote on (effectively taxation without representation); and (ii) to prevent local governments from imposing assessment-like levies *completely* free from the constraints normally attendant upon such levies.

Proposition 218

In 1996, the California voters approved Proposition 218, which added Articles XIIIC and

[3] Although the Act defines its taxes as "special taxes" rather than "special assessments," Gov't Code § 53325.3, that definition does not change the fact that the Act's constraints for services financing by landowner-approved taxes *do* bear many of the same aspects as those for special assessments, even if they are not their legal equivalent.

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XIIID to the California Constitution. *See Weisblat v. City of San Diego*, 176 Cal. App. 4th 1022, 1038 (2009). The Proposition's purpose was to limit local governments' ability to evade constitutional and statutory limitations on their taxing power. *See Bay Area Cellular Tel. Co. v. City of Union City*, 162 Cal. App. 4th 686, 692-93 (2008). Under the Proposition, a special tax—defined as "any tax imposed for specific purposes," Cal. Const. art. XIIIC, § 1(d)—may be levied only with the consent of two-thirds of the electorate. A general tax—defined as "any tax imposed for general governmental purposes," *id.* § 1(a)—may be levied only with the consent of a majority of the electorate, *id.* § 2(b). Special purpose districts are categorically prohibited from levying a general tax. *Id.* § 2(a).

Due Process of Law

In financing public improvements a local government naturally is bound by other constitutional provisions. Of particular relevance here, a local government is forbidden, under the Due Process Clause, U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7, to punish a landowner for exercising a constitutional or statutory right. *See People v. Puentes*, 190 Cal. App. 4th 1480, 1484 (2010).

STATEMENT OF FACTS

The City's Practice for Providing Standard Municipal Services to Its Residents

As will be demonstrated below, the City formed the District to increase revenue to pay for the annual operation, maintenance, and servicing of police, park, recreational, open space, landscaping, street and street lighting, flood and storm protection, and stormwater treatment facilities (hereinafter "standard municipal services"). *See* Pltf. Statement ¶ 9. The City's use of the District's revenue is best understood, however, in the context of the City's larger plan to provide standard municipal services to all parcels within its boundaries.

The City's practice is to provide such services throughout the City, whether or not the City can always fully satisfy the demand for those services. Stip. Exh. 12 (Phelps Depo.) at 28:1-9. For that reason, the City has no policy whereby it would make a deliberate effort not to provide standard municipal services to an area simply because its demand for those services is relatively

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higher than other parts of the City. *Id.* at 28:18-29:3. Rather, those areas "still get the same level as any other neighborhood." *Id.* at 29:5. Thus, most services are provided at a global—not neighborhood—level, and they are funded principally by *all* property owners' payment of their normal property and other taxes. *See* Stip. Exh. 1 (Fiscal Year 2012-2013 City Budget) at 4, 6 (sales and property tax make up 61% of the general fund revenue, which in turn is "primarily used to support public safety, parks and other administrative services"). It therefore follows that the undeveloped parcels within the City (which the City estimates to exceed 2,500, Stip. Exh. 4 (Feb. City Staff Rep.) at 4), will receive standard municipal services even if, for example, owing to chronic vandalism they may put a higher demand on police services than other areas of the City.

In contrast, the City currently operates various assessment districts whereby residents of those areas receive a benefit above and beyond their non-district neighbors in exchange for the additional levies that they pay. *See, e.g.*, Stip. Exh. 12 (Phelps Depo.) at 36:5-15 (explaining that the City's several special lighting/landscaping districts generate assessment revenues expended "just for that particular development"); *id.* at 43:8-24 (explaining that residents of Dougherty Valley, an annexed City neighborhood, receive for their special assessment "a higher service level," *e.g.*, "the park is mowed more often than a park in another area"); *id.* at 48:1-6 (same).

The City's Establishment of Community Facilities District No. 2014-01

On January 14, 2014, the City adopted a resolution to form the District. Pltf. Statement ¶ 7. On February 25, 2014, the City approved as proposed (with one exception not relevant here) the District's establishment. *See id.* ¶¶ 8, 10. In addition, the City conducted the landowner-vote to approve the tax. *Id.* ¶ 12. The District's current sole landowner voted to approve the tax. *Id.* ¶ 13. Also at the same hearing, the City introduced Ordinance 448, to implement the landowner-approved tax. *See* Stip. Exh. 6 (Mar. City Staff Rep.) at 1. On March 11, 2014, the City adopted Ordinance 448. Pltf. Statement ¶ 5. That Ordinance incorporates a "poison pill" provision—Section H—under which the City will cease to be obligated to provide the facilities and services for which the tax would be levied (the financial obligations thereby falling on the property owners themselves), if the levy of the District's tax is repealed as a result of an action brought by

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District property owners. *Id.* ¶¶ 31-33.

Although the District's initial territory comprises just two undeveloped parcels, *see* Stip. Exh. 4 (Feb. City Staff Rep.) at 3, the District's annexation boundaries---denoting those areas that may become part of the District—are generally co-extensive with the City's limits. Pltf. Statement ¶ 10. Nevertheless, it is likely that only those approximately 2,500 residential parcels currently undeveloped (and therefore requiring a building permit) will be annexed. *See* Stip. Exh. 4 (Feb. City Staff Rep.) at 3. The City will use the proceeds from the District's tax to pay for standard municipal services, as well as for the construction and repair of facilities. *See id.* ¶ 11.

The City asserts that it will use the District's revenue only for the benefit of District residents, *see, e.g.*, Stip. Exh. 9 (City Resp. to RFAs) at 3:16-18, but that assertion simply cannot be squared with the City's stated intent in how it will treat the District's revenues *vis à vis* tax revenue from non-District parcels. For example, the City apparently has no binding policy or protocol in place to ensure that parcels within the District get first-call on police services, or enjoy a dedicated officer. *See* Stip. Exh. 12 (Phelps Depo.) at 60:12-18 (response of "not sure" to whether the City will dedicate a police officer exclusive to the District); *id.* at 60:22 (noting that police assignments are done by "beats"). In fact, the City has no binding policy or protocol in place to provide *any* exclusively dedicated personnel. *See id.* at 61:13-17 ("Q. To your knowledge the City has not decided to dedicate City staff exclusively to provide standard municipal services to the parcels within the District? A. To my knowledge."). The City apparently has no binding policy or protocol that the services to be provided will be better than what non-District parcels receive. *See id.* at 61:23-62:2 ("Q. Do you know whether parcels within the District will receive better . . . standard municipal services than parcels outside of the District? A. Well, . . . I don't think they will receive better."). Neither does it have a binding policy or protocol to ensure that revenue from the District's tax will be used first, before other revenue sources, to pay for standard municipal services to the District. Stip. Exh. 9 (City Resp. to RFAs) at 3:9-11; Stip. Exh. 12 (Phelps Depo.) at 70:9-17. The City does not even have a method to ensure that District revenue will be used proportionately to benefit District parcels. *See* Stip. Exh. 12 (Phelps Depo.) at 75:17-22. Consequently, there is no meaningful difference between the on-the-ground output of services

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for parcels outside the District as opposed to parcels within the District. *See* Pltf. Statement ¶¶ 18-20.

During the City's adoption of this financing scheme, the Association repeatedly voiced its concern about the legality of the City's proposal. *Id.* ¶¶ 14-15. Among its objections, the Association noted that the proposed District and tax would violate Section 53313 of the Mello-Roos Act, because, under the proposal, "the residential units (and future residents) that will be paying the tax will not be entitled to receive new, enhanced, or special services not previously available to the area being developed." Stip. Exh. 5 (Feb. Ass'n Letter) at 4. The Association also objected to the District's tax on the ground that it constitutes an impermissible "general tax," because of the "widely disparate nature of the services and facilities" that the tax can finance, and as well as the City's "clear intent" "to raise funds to augment the City's General Fund." *Id.* Further, the Association objected to Section H's unconstitutional retaliation against those property owners who successfully exercise their rights through litigation. *See* Stip. Exh. 7 (Mar. Ass'n Letter). Because the City did not heed these objections, the Association brought this action.

STANDARD OF REVIEW

Section 437c of the Code of Civil Procedure provides that a motion for summary judgment shall be granted if "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] Code Civ. Proc. § 437c(c). This determination requires the Court to proceed through a three-step analysis. *See id.* § 437c(p). *See also Riverside Cnty. Cmty. Facilities Dist. No. 87-1*, 77 Cal. App. 4th at 653. First, the Court determines whether a triable issue as to any material fact exists, "material" meaning a fact pertinent to a claim or defense and essential to the judgment. *Id.* Second, the Court determines whether the plaintiff as moving party has shown that there is no defense to its causes of action because the plaintiff's evidence proves each element of the causes of action. *Id.* Third, the Court determines whether the defendant as opposing party has produced admissible evidence showing a triable issue as to one or more

[4] A motion for summary adjudication as to one or more causes of action in an action proceeds in the same manner as a motion for summary judgment on an entire action. *See* Code Civ. Proc. § 437c(f). *Cf. supra* n.1.

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material facts pertinent to a claim or defense. *Id.* In making these determinations, the Court strictly construes the evidence in favor of the moving party, and liberally construes that of the opposing party. *Id.*

ARGUMENT

I

THE DISTRICT'S TAX VIOLATES THE MELLO-ROOS ACT

The District's tax, authorized by landowner vote, purports to pay for the cost of providing a menu of standard municipal services to parcels within the District. *See* Stip. Exh. 4 (Feb. City Staff Rep.) at 9-10. *Cf.* Pltf. Statement ¶ 11. Yet the services that the District's tax will help pay for are the same services that the City is now providing to the parcels within the District and to those parcels that may one day be annexed to the District. Pltf. Statement ¶ 18. And equally important, the District will not provide any enhanced service to its parcels, but merely will provide the same menu of municipal services that all parcels within the City enjoy. *Id.* ¶¶ 19-20. As shown below, the District's tax cannot be reconciled with the limitations on landowner-approved taxes that Section 53313 of the Mello-Roos Act imposes.[5]

In interpreting statutory language, a court seeks to effectuate the Legislature's intent, the most reliable indicator of which are the words of the statute. *Tuolumne Jobs & Small Bus. Alliance v. Superior Court*, 59 Cal. 4th 1029, 1037 (2014) (citing *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 529 (2011)). Those words must be construed in context and in such a way so as to avoid "absurd results" or "surplusage." *Tuolumne Jobs*, 59 Cal. 4th at 1037 (quoting *People v. Loeun*, 17 Cal. 4th 1, 9 (1997)).

The language of Section 53313's double-limitation is plain: (i) a landowner-approved tax "may only finance . . . services . . . to the extent that they are in addition to those provided in the territory of the district before the district was created"; and (ii) the "additional services shall not supplant services already available within that territory when the district was created." If these two constraints referred to the same category of variable—*i.e.*, if they *both* referred to the *type* or

[5] The Association is not aware of any published decision interpreting Section 53313's limitations on landowner-approved taxes.

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quality of service—then they would be redundant, because every service that is not in addition to one already available must necessarily be a supplanting service. But basic principles of statutory construction command that these limitations should be construed instead so as to give each independent meaning and thereby to avoid surplusage. *Cf. Shoemaker v. Myers*, 52 Cal. 3d 1, 22 (1990) ("We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous.").

The only way to avoid such surplusage is to interpret Section 53313's limitation on additional services as pertaining to the *quality* of service, and Section 53313's limitation on supplanting services to the *type* of service. In other words, a landowner-approved tax may finance services that supplement existing services, but only if the new services provide homeowner-taxpayers a real and meaningful benefit that is over and above what non-District property owners receive as part of a standard menu of municipal services. For example, a district's territory prior to formation could enjoy normal police and emergency services, but then authorize a landowner-approved-tax for a dedicated police officer or EMT unit to provide better response times for the new district. Such a regime would be permissible because it would not substitute for a pre-existing service (no dedicated officer or EMT unit pre-existed the district), and because it would provide a new, qualitatively superior and supplementing—not supplanting—service (a dedicated officer and EMT unit in addition to normal police and emergency services).

But what is impermissible is what the City proposes: to provide the same type *and* quality of service, merely at higher quantities, that will benefit all City residents and taxpayers equally. *See* Pltf. Statement ¶¶ 18-20. Section 53313's limitations would be eviscerated if, as the City desires, new single-family homeowners within the District must pay an additional $743.75 tax, Stip. Exh. 4 (Feb. City Staff Rep.) at 3, collected on their property tax bill each year, only to receive the same level of services that the rest of City residents receive who do not pay the District's tax. Pltf. Statement ¶ 20.

Interpreting Section 53313 to preclude the City's financing scheme comports with good policy. *Cf. Alejo v. Torlakson*, 212 Cal. App. 4th 768, 788 (2013) (authorizing the application of "reason, practicality, and common sense" in interpreting statutory language). It is reasonable for

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the Legislature to have assigned more limitations on landowner-approved taxes than on registered-voter approved taxes. As noted above, a landowner-approved tax generally is only authorized if the proposed district is vacant or nearly vacant. *See* Gov't Code § 53326(b), (c) (landowner vote authorized if fewer than 12 registered voters or if the tax will not be levied on property in residential use). With most such districts, as is the case with the City's, the people voting on the tax will not be the ones ultimately paying the tax. *See* Plft. Statement ¶ 21. In contrast, registered-voter districts are relatively more likely to be built-out, such that the voters electing to impose the tax also will be the ones paying it. Hence, it makes sense that the Legislature would be especially chary of how and under what circumstances landowner-approved taxes may be used.

Section 53313's statutory history buttresses that conclusion. The current version of Section 53313's landowner-approved tax constraints was enacted in 1988. *See* 1988 Cal. Stat. Ch. 1365, § 4, at 4565-66. Prior to that, Section 53313 prohibited districts *generally* (whether registered voter or landowner) from financing services that were not in addition to pre-existing services. *See* 1984 Cal. Stat. Ch. 269, § 2.1, at 1409 ("A communities facilities district may only provide the services authorized in this section to the extent that they are in addition to those provided in the territory of the district before the district was created . . . ."). The Association's interpretation of Section 53313, which gives independent meaning to both limitations, serves the evident Legislative purpose of retaining especially strict limitations for landowner-approved taxes. Accordingly, for all of these reasons, the District's tax violates Section 53313.

II

THE DISTRICT'S LEVY IS AN IMPERMISSIBLE "GENERAL" TAX

The California Constitution forbids any "[s]pecial purpose district[] or agenc[y]" to levy a "general tax." Cal. Const. art. XIIIC, § 2(a). Because the District is a special purpose district and its levy is a "general tax," that tax is unconstitutional.

A. The District Is a Special Purpose District

The Constitution defines a "[s]pecial district" to be "an agency of the State" that performs "governmental or proprietary functions with limited geographic boundaries." Cal. Const. art.

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XIIIC, § 1(c). The District is a creation of the City, *see* Gov't Code § 53325.1(a), which is a creature of the state, *e.g.*, *Webb v. Cal. Fish Co.*, 166 Cal. 576, 607 (1913), and thus itself is an agency of the state. The District (or the City sitting as the District) has the power to tax. *See* Pltf. Statement ¶ 30. *See generally New Davidson Brick Co. v. County of Riverside*, 217 Cal. App. 3d 1146, 1150-51 (1990) (observing how a district "*actually* levies species taxes"). That power is a classic governmental function. *See Watchtower Bible & Tract Soc'y v. Los Angeles Cnty.*, 30 Cal. 2d 426, 429 (1947). Further, the District has a defined geographic boundary that currently includes two parcels and may ultimately include most of the City itself. Pltf. Statement ¶ 10. Finally, the District's only purpose is, in the City's own words, to "serve as a financing mechanism," Ans. ¶ 8, by levying the tax that Ordinance 448 authorizes to pay for the City's services to the parcels within the District. *See* Stip. Exh. 4 (Feb. City Staff Rep.) at 18-19. *See also* Pltf. Statement ¶¶ 11, 29. Accordingly, the District is a "[s]pecial purpose district."

B. The District's Levy Is a General Tax

The Constitution defines a "[g]eneral tax" to be "any tax imposed for general governmental purposes," whereas a "[s]pecial tax" is a "tax imposed for specific purposes," even if its proceeds are placed in a general fund. Cal. Const. art. XIIIC, § 1(a). A levy "placed in the general fund to be utilized for general governmental purposes" is considered a general tax. *City & County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57 (1982). *See Howard Jarvis Taxpayers Ass'n v. City of Roseville*, 106 Cal. App. 4th 1178, 1185 (2003). In contrast, a levy for "*special* and *limited* governmental purposes" is a special tax. *Rider v. County of San Diego*, 1 Cal. 4th 1, 13 (1991).[6] *See Owens v. County of Los Angeles*, 220 Cal. App. 4th 107, 131 (2013). These categories, however, are not airtight. Taxes can be "hybrid"—they can have "characteristics of both a general and a special tax"—requiring an analysis of the tax's purpose and effect to determine its type. *See Weisblat v. City of San Diego*, 176 Cal. App. 4th at 1044-45.

Under these guidelines, the District's levy is an impermissible general tax. Although the District's tax arguably has special as well as general aspects, two characteristics confirm that,

[6] Although *Farrell* and *Rider* interpret Article XIIIA, not Article XIIIC, decisions construing the former are relevant to interpreting the latter. *See Owens*, 220 Cal. App. 4th at 131 n.13.

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despite any hybrid nature, the tax should be considered "general": (i) the tax may be used to finance a widely disparate menu of services and facilities; and (ii) the tax has a clear purpose of raising funds to augment the City's general fund.

1. The Widely Disparate Purpose of the Tax

The paradigmatic general tax is one to be used for "general governmental purposes." *Farrell*, 32 Cal. 3d at 57. The District's tax may be used to finance the acquisition, construction, and improvement of police and public safety facilities, park and recreational facilities, and open space facilities. Pltf. Statement ¶ 11. It may also be used to finance the annual operation, maintenance, and servicing—including repair and replacement—of police, park and recreational facilities, open space facilities, landscaping facilities, street and street lighting facilities, flood and storm protection facilities and storm water treatment facilities. *Id.* The common thread linking these broad-ranging purposes appears to be that they are all authorized by the Mello-Roos Act. Yet such a menu of services can hardly be a "*special* and *limited*" municipal project. *Rider*, 1 Cal. 4th at 13. Indeed, it is difficult to conceive of a broader "special" tax, especially given that the services covered encompass all that the City otherwise traditionally has provided. *See* Stip. Exh. 1 (City Fiscal Year 2012-13 Budget) at 4-5.

The remarkable breadth of those uses is even clearer when contrasted with the tax at issue in *Neilson v. City of California City*, 133 Cal. App. 4th 1296 (2005). There, a nonresident landowner challenged the city's levy of a "special" flat-rate parcel tax approved by two-thirds of the city's electorate. *See id.* at 1301. The tax's revenue was authorized to be spent on fire services, parks and recreation, police services, water services, and street improvements. *See id.* at 1303. The landowner objected to the tax on several grounds, among them that the tax was a forbidden "general" real property tax. *See id.* at 1309. *Cf. City of Oakland v. Digre*, 205 Cal. App. 3d 99, 109-11 (1988) (holding that Article XIII, § 1, of the California Constitution prohibits the levying of general property taxes that are not assessed *ad valorem*). The Court rejected the argument, reasoning that the "case law supports the proposition that police, fire, and parks and recreation services . . are not necessarily 'general governmental purposes.'" *Neilson*, 133 Cal. App. 4th at 1310 (quoting Cal. Const. article XIIIC, § 1(a), (d)). The Court further explained that the case law

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has upheld as "special" a tax that would "account for some 50 percent of the city's general fund budget," and that a "special" tax does not cease to be special simply because it can be used for more than one purpose. *Neilson*, 133 Cal. App. 4th at 1310-11. Finally, the court observed that the landowner had failed to "suggest a means for determining at what point a special tax becomes a general tax." *Id.* at 1311.

In contrast here, the District's tax goes well beyond what *Neilson* upheld. The tax can be used not just for police, fire, and parks and recreation services, but also for open space facilities, landscaping facilities, street and street lighting facilities, flood and storm protection facilities and storm water treatment facilities. Pltf. Statement ¶ 11. Moreover, it may be used to finance the acquisition, construction, and improvement of police and public safety facilities, park and recreational facilities, and open space facilities. *Id.* Given that the City's general fund "is primarily used to support public safety, parks and other administrative services," Stip. Exh. 1 (City Fiscal Year 2012-13 Budget) at 6, it is not difficult to conclude that the standard municipal services that the City provides and that the District's tax will help to pay for well exceed 50% of the City's budget. Finally, even *Neilson* allowed that it could "conceive of a special tax that permits expenditures for so many specific governmental purposes that the parts might swallow the whole." 133 Cal. App. 4th at 1311. The District's levy is that tax.

2. The City's General-Fund-Augmenting Purpose

The City's principal purpose in forming the District and seeking approval for its tax is to raise revenue to supplement its general fund. *See* Pltf. Statement ¶ 9. It is true that the revenue from the tax will be allocated to Fund 204, which is not denominated a "general fund."[7] *See id.* ¶¶ 23-24. Nevertheless, the City's funding structure for standard municipal services both before and after the District is—other than Fund 204—identical. *See id.* ¶¶ 25-26. To be sure, that the District's tax raises revenue indirectly for the City's general fund is not dispositive of whether it is a general tax. *Cf. Weisblat*, 176 Cal. App. 4th at 1045 (holding as "general" a tax that indirectly

[7] Nevertheless, the revenues are effectively commingled because the City maintains only one actual bank account for its revenue. Pltf. Statement ¶ 27. The various "funds" the City maintains, *see* Stip. Exh. 11 (City Resp. to Sp. Interrogs.) at 7-8, are mere internal accounting protocols. Stip. Exh. 12 (Phelps Depo.) at 19:14-23; *id.* at 57:15-22.

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raises revenue for any and all governmental purposes). But this aspect of the District's tax distinguishes it from other, arguably more "special" taxes, that are not so obviously concocted as general fund revenue-raising schemes.[8] Under these circumstances, envisioned by *Neilson*, the District's levy is a general tax, both because of its widely disparate purposes, *and* because of its bald aim to augment general fund revenue. Accordingly, the District's tax is unconstitutional.

III

THE "POISON PILL" PROVISION OF ORDINANCE 448 UNCONSTITUTIONALLY RETALIATES AGAINST DISTRICT PROPERTY OWNERS

No government entity, such as the City, may deprive a person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7. Due process forbids the government from punishing a person for exercising a statutory or constitutional right. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.") (internal quotation marks omitted). As set forth below, the City has violated this basic due process protection by threatening landowners with loss of municipal services and financial ruin should they challenge the legality of the City's actions. *See* Pltf. Statement ¶ 36.

The City enacted Ordinance 448 to authorize the District to levy the landowner-approved tax. *See id.* ¶ 5. Section 1 of that Ordinance incorporates the "Rate and Method of Apportionment of Special Tax," which is Exhibit 2 to City's Resolution 2014-026, establishing the District. *See* Pltf. Statement ¶ 31. Section H of the "Rate and Method of Apportionment of Special Tax" provides that, if the District's tax is "repealed by initiative or any other action participated in by owners of Parcels" within the District, two things will happen to those owners. First, the City "shall cease to be obligated to provide the Authorized Facilities and Authorized Services for which the Special Tax was levied." Stip. Exh. 4 (Feb. City Staff Rep.) at 26. "Authorized Services" are defined as the "services authorized to be funded by the [District] as set forth in the Resolution of

[8] Indeed, since 2003, many California cities similar in size to San Ramon have obtained their electorate's consent, by a two-thirds approval, to levy special taxes to raise revenue for police, fire, and emergency medical services. Pltf. & Pet'r's Request for Judicial Notice.

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Formation." *Id.* at 21. In turn, the Resolution of Formation sets forth the municipal services, which are described *generally*, not in terms only of meeting an increased demand for services. *See id.* at 18-19. Hence, a deprivation of "Authorized Services" necessarily means a deprivation of all City services. *See* Pltf. Statement ¶ 32. Second, the obligations to provide the services and facilities that would have been funded by the District's tax "shall become the obligations of any property owners association established within the [District]," or if there is no such association, of the property owners themselves in proportion to the number of parcels owned within the District. Stip. Exh. 4 (Feb. City Staff Rep.) at 26. *See* Pltf. Statement ¶ 33.

The trigger for these responses is the repeal by initiative or other action of the District's tax. In other words, the trigger is District property owners exercising their right to petition the City for redress, U.S. Const. amend. I; Cal. Const. art. I, § 3(a), their right to seek repeal of municipal action through initiative and referendum, Cal. Const. art. II, § 11; *see Rubalcava v. Martinez*, 158 Cal. App. 4th 563, 571 (2007) ("[C]harter cities cannot deny their citizens the referendum powers reserved in the California Constitution . . . ."), and their right to seek relief through the courts to redress their grievances, *see* Code Civ. Proc. §§ 860, 863 (reverse validation action); § 1060 (declaratory relief); § 1085 (writ of mandate); Gov't Code § 53359 (judicial review of actions under Mello-Roos Act); *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115 (1999) (right to petition includes filing litigation).

In determining whether a government entity has unconstitutionally retaliated against a person, the case law asks the following questions. Is the person's conduct protected? Has the person suffered adverse action? Was the protected conduct a substantial or motivating factor in the government's action? Would the government have reached the same result in the absence of the protected conduct? *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). *See also Franklin v. Leland Stanford Univ.*, 172 Cal. App. 3d 322, 344 (1985) (discussing *Mt. Healthy* test). Under the *Mt. Healthy* test, Section H is unconstitutional.

First, filing litigation to challenge governmental action—in this case, the levying of a tax—is, as noted above, protected by constitutional and statutory provisions. Second, Section H is clear on its face that, as a result of participating in such protected conduct, property owners in

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the District will suffer two adverse consequences: the denial of municipal services, and the imposition of a financial liability to pay for those services. *See* Pltf. Statement ¶ 32-35. *See also* Stip. Exh. 12 (Phelps Depo.) at 91:3-6 ("A. So then any -- any obligation of the homeowner would be to pay for services on their own, or the City wouldn't be obligated to pay for – or to do anything that they were planning to do under this special tax."). Third, Section H also clearly establishes the causal relationship: the reason for the adverse action is precisely because the District's property owners successfully exercised their right to judicial review. Fourth, the only provision in Ordinance 448 and Resolution 2014-026 that authorizes the cessation of services and the shifting of financial liability is Section H; hence, but for Section H's triggering, these abovementioned adverse consequences would not occur. Accordingly, Section H violates due process.

IV

NONE OF THE CITY'S AFFIRMATIVE DEFENSES HAS MERIT

A. The Association Has Standing To Bring This Action

To have standing to sue, a party must be "beneficially interested in the controversy," as well as have "some special interest" in the matter that is "concrete and actual." *Iglesia Evangelica Latina, Inc. v. S. Pac. Latin Am. Dist. of Assemblies of God*, 173 Cal. App. 4th 420, 445 (2009). Contrary to the City's contention, Ans. at 9:1-3, the Association has standing to bring this action to challenge the District's formation and tax.

The Mello-Roos Act authorizes a validation action to determine the validity of taxes levied thereunder. Gov't Code § 53359. Section 863 of the Code of Civil Procedure authorizes such an action (which is called a reverse validation action) to be brought by "any interested person." A non-natural legal person (such as the Association) can qualify as an interested person under Section 863, so long as the entity has members who are or will be affected by the actions sought to be invalidated. *See Citizens Against Forced Annexation v. County of Santa Clara*, 153 Cal. App. 3d 89, 97-98 (1984). *See also Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968, 972 (1977). *Cf. Torres v. City of Yorba Linda*, 13 Cal. App. 4th 1035, 1044 (1993) (reading *Regus* for the proposition that standing is established if a validation action plaintiff "reside[s] in the city covered by the . . . project" sought to be invalidated).

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The Association meets this standard because it has members who are or will be directly affected by the District's formation and the special tax, Pltf. Statement ¶ 1, and because the Association itself has a direct organizational interest in the legality of the District's formation and tax, *id.* ¶¶ 2-3. Part of the Association's mission is to ensure the enforcement of the law governing housing and residential development. *Id.* ¶ 2. The Association believes that the District's formation and tax fail to strictly observe constitutional and statutory protections for home owners and taxpayers, including members of the Association. *See id.* ¶ 3. This organizational interest, which the City's actions directly impair, combined with the Association's members' direct interests, confirm that the Association has standing to sue. *Cf. Citizens Against Forced Annexation*, 153 Cal. App. 3d at 97 (a "composite interest" of its members and itself qualifies an association as an interested person under Section 863).

Finally, as a representative of the public interest, Pltf. Statement ¶ 2, the Association has "public interest standing," *Save the Plastic Bay Coal. v. City of Manhattan Beach*, 52 Cal. 4th 155, 166 (2011), to bring this action. *Cf. Torres*, 13 Cal. App. 4th at 1046 (observing that public interest standing "is usually applied in cases where an association sues on behalf of its members"). Such public interest standing requires only that the plaintiff be interested in the correct enforcement of the law and duty in question. *Bd. of Social Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 100-01 (1945). To successfully assert this "public interest standing," a party must show that the duty in question is "sharp" and the "public need weighty." *Reynolds v. City of Calistoga*, 223 Cal. App. 4th 865, 875 (2014).

The Association's lawsuit meets this standard. It asserts that the City's financing scheme violates both the federal and state constitutions, a fact that supports the "sharpness" of the issue and the "weightiness" of the public need. *Cf. City of Fresno v. Press Commc'ns, Inc.*, 31 Cal. App. 4th 32, 44 (1994) (enforcement of constitutional rights "necessarily affects the public interest and confers a significant benefit upon the general public"). Moreover, public interest standing is supported by the fact that the individuals ultimately responsible for paying the District's tax—new homeowners and other occupants of the new developments within the District—will not have an opportunity to challenge the tax, because their predecessors in interest will have already consented

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to it, the Mello-Roos Act's short 30-day limitations period will have passed, Gov't Code § 53341, or because Section H vigorously penalizes them for attempting to challenge it. Accordingly, for all these reasons, the Association has standing to bring this action.

B. A Validation Action Is Not the Exclusive Vehicle for Judicial Review of Mello-Roos Issues Pertaining to a District's Formation or Its Taxes

The City contends (citing *Katz v. Campbell Union High School District*, 144 Cal. App. 4th 1024 (2006)), that a validation action is the exclusive remedy for challenging the District's formation and the levy of its tax. Therefore, the City argues, the Association cannot maintain causes of action in the alternative for declaratory relief and writ of mandate. *See* Ans. at 8:6-14. The City is mistaken.

In *Katz*, a property owner challenged a special parcel tax levied not under the Mello-Roos Act but rather under Article 3.5 of the Government Code, "Voter-Approved Special Taxes," Gov't Code §§ 50075-50077.5. *See Katz*, 144 Cal. App. 4th at 1028, 1033. The court concluded that the property owner's causes of action for declaratory and injunctive relief were not authorized, because Section 50077.5 expressly provides that the validation action provisions of the Code of Civil Procedure apply to "any judicial action or proceeding" that seeks to overturn a special tax levied pursuant to Article 3.5. *See id.* at 1033-34. But the provision of the Mello-Roos Act that authorizes judicial review by validation action—Government Code section 53359—is quite different from Section 50077.5. The former section provides that an "action to determine . . . the validity of any special taxes levied pursuant to this chapter *may* be brought" as a validation action. Gov't Code § 53359 (emphasis added). It does not say that the validation action provisions *shall* apply to *every* action challenging a Mello-Roos tax. Rather, Section 53359 makes clear that the validation action is just one of many avenues of judicial review open to a party seeking to determine the validity of Mello-Roos taxes.

Even if that were not the case, the Association would still be entitled to litigate its causes of action for declaratory relief and writ of mandate as applied to its contention that Section H of the "Rate and Method of Apportionment of Special Tax" is unconstitutionally retaliatory. That claim has nothing to do with "the validity of any special taxes," Gov't Code § 53359, but rather

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concerns only what happens *if* the District's tax is "repealed." Prevailing on this claim would not call into question the legality of the District's formation or its tax. Hence, the Association's claims are permissible even under the City's reading of *Katz*. *See Katz*, 144 Cal. App. 4th at 1034 (conceding that the property owner could have proceeded with his non-validation-action causes of action if he had sought "relief unrelated to the parcel tax").

C. Judicial Review of Mello-Roos Actions Is Not Limited to Procedural Irregularities in a District's Formation or the Levy of Its Tax

The City's second and third affirmative defenses argue that (1) only Mello-Roos Act procedural irregularities are subject to judicial review, (2) the Association has no claim because it does not allege a procedural irregularity, and (3) even if the Association did advance such a claim, review would still be foreclosed because the City made a finding under Government Code section 53325.1(b) that all its proceedings actions were proper, which finding is "final and conclusive." *See* Ans. at 8:16-26. None of these arguments has merit, for several reasons.

First, the Mello-Roos Act, as a mere act of the Legislature, cannot constitutionally foreclose judicial review of the Association's claims under the United States and California Constitutions. *See, e.g.*, *County of Los Angeles v. Comm'n on State Mandates*, 150 Cal. App. 4th 898, 904 (2007) ("A statute cannot trump the constitution."). Second, the only reported decision of which the Association is aware that even cites Section 53325.1 actually undercuts the City's interpretation, as the case concerned a substantive challenge to a Mello-Roos district's formation under the California Environmental Quality Act. *See Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unif. Sch. Dist.*, 9 Cal. App. 4th 464 (1992). Third, the more reasonable interpretation of Section 53325.1(b) is that its reference to the legislative body's finding being "final and conclusive" means simply that the proceedings of formation are deemed complete and that the legislative body cannot reopen them. A contrary interpretation would lead to the absurd result of rendering inoperative *all* the substantive provisions of the Act, including Section 53313's limitation on landowner-approved taxes.

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D. The Association's Action Is Ripe

The City contends that the Association's claims are not ripe with respect to the District's future annexation area, because by definition parcels within the annexation area are not currently within the District itself. *See* Ans. at 9:5-13. The City is incorrect. A legal controversy is ripe when the pertinent facts are concrete enough to enable the court to decide the case intelligently. *Pacific Legal Found. v. Cal. Coastal Comm'n*, 33 Cal. 3d 158, 171 (1982). In making that determination, a court looks to the fitness of the issues for judicial decision and the hardship to the parties of refraining from issuing a decision. *Id.* Here, the legal issues that the Association's lawsuit raises need no further factual development and are appropriately set up for judicial review. The District has been formed and will soon begin levying its tax. Although the impact of the City's actions on the District's future annexation area will not be felt until some point in the future, determining the legality of those impacts can be ascertained now. Withholding judicial review would create a severe hardship: without the Association's action the interests of future homeowners within the District will not be vindicated, for the same reasons justifying the Association's public interest standing. *See supra* Argument Part IV.A. Hence, the Association's claims against the District and its tax are ripe for review.

CONCLUSION

For the foregoing reasons, the Association is entitled to judgment on all of its claims as a matter of law.

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Respectfully submitted,

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