Court of Appeal First Appellate District Electronically
RECEIVED by WORKFLOW SERVICE, Deputy Clerk 1/26/2016

Court of Appeal First Appellate District Electronically
FILED by I. Santos, Deputy Clerk 1/26/2016

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

No. A145575

BUILDING INDUSTRY ASSOCIATION – BAY AREA,
Plaintiff and Appellant,

v.

CITY OF SAN RAMON,
Defendant and Respondent.

On Appeal from the Superior Court of Contra Costa County
(Case No. MSC1400603, Honorable Jill C. Fannin, Judge)

APPELLANT'S REPLY BRIEF

PAUL B. CAMPOS, No. 165903
Building Industry Association –
Bay Area
1350 Treat Blvd., Suite 140
Walnut Creek, CA 94597
Telephone: (925) 951-6840
pcampos@biabayarea.org

*DAMIEN M. SCHIFF, No. 235101
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
dms@pacificlegal.org

Attorneys for Appellant Building Industry Association – Bay Area

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5

INTRODUCTION 8

ARGUMENT 9

I. THE SPECIAL TAXING ZONE'S LEVY IS ILLEGAL BECAUSE ITS REVENUE WILL NOT BE USED TO PAY FOR ANY ADDITIONAL SERVICE AS REQUIRED BY THE MELLO-ROOS ACT 9

A. Satisfying Increased Demand for Existing Services Does Not Provide an "Additional" Service 10

B. The Association's Interpretation, Contrary to the City's, Appropriately Uses Dictionary Definitions While Remaining Faithful to the Legislative Distinction Between Landowner-Approved and Registered-Voter-Approved Taxes 13

1. The City's Reliance on Dictionary Definitions Is Misguided 13

2. The City Cannot Escape Section 53313's Limitations Simply Because Those Limitations Could Have Been More Demanding 15

C. The *In Pari Materia* Canon Supports the Association's Interpretation 16

1. The County Service Area Law and the Mello-Roos Act Are *In Pari Materia* 16

2. The Legislature's Amendments to the County Service Area Law Support Rather Than Undercut the Association's Position 17

Page

a. The Legislature's Amendments to the County Service Area Law Do Not Moot the Analysis of the Court of Appeal in *City of Santa Barbara*, or of the Attorney General's Opinion Adopted Therein 17

b. That the Legislature Did Not Amend the Mello-Roos Act and Similar Statutes When Amending the County Service Area Law Demonstrates That the Mello-Roos Act's Safeguards Against Landowner-Vote Abuse Retain Their Full Vigor 19

II. THE SPECIAL TAXING ZONE'S LEVY IS AN UNCONSTITUTIONAL GENERAL TAX 20

A. The Court of Appeal's Decision in *Bainbridge* Does Not Support the City 21

B. The Mello-Roos Act's Description of Its Levies As "Special" Taxes Does Not Mean That They Are Special Taxes Under the Constitution 22

C. The Court of Appeal's Decision in *Neilson* Supports the Association's Position That a "Special" Tax Can Become a General Tax 23

D. The Association's Position Is Consistent with the Mello-Roos Act's Provisions for Municipal Services Financing 24

E. The Association's Rule for Distinguishing General from Special Taxes Is Workable 26

F. That the City Has Only One Bank Account Is Irrelevant 26

III. SECTION H OF THE SPECIAL TAXING ZONE'S ORDINANCE UNCONSTITUTIONALLY RETALIATES AGAINST ZONE PROPERTY OWNERS 27

A. Section H Threatens Targeted Property Owners with Substantial Financial and Other Liability 27

Page

B. The Association's Facial Claim Against Section H Is Good 29

C. Section H's Chilling Effect Alone Dooms It 30

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 32

DECLARATION OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Arvin Union Sch. Dist. v. Ross, 176 Cal. App. 3d 189 (1985) 22

Bd. of Supervisors v. Lonergan, 27 Cal. 3d 855 (1980) 20

Cal. Bldg. Indus. Ass'n v. City of San Jose,
61 Cal. 4th 435 (2015) 29

City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) 29

City of Santa Barbara v. County of Santa Barbara,
94 Cal. App. 3d 277 (1979) 17-19

Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996) 10

Fireman's Fund Ins. Co. v. Maryland Cas. Co.,
65 Cal. App. 4th 1279 (1998) 22

Howard Jarvis Taxpayers Ass'n v. City of Roseville,
106 Cal. App. 4th 1178 (2003) 24

In re Do Kyung K., 88 Cal. App. 4th 583 (2001) 14

Manduley v. Superior Court, 27 Cal. 4th 537 (2002) 25

Neilson v. City of California City,
133 Cal. App. 4th 1296 (2005) 23-24, 26

Novato Fire Protection Dist. v. United States,
181 F.3d 1135 (9th Cir. 1999) 10

Pearson v. State Social Welfare Bd., 54 Cal. 2d 184 (1960) 14

People v. Clayburg, 211 Cal. App. 4th 86 (2012) 14

People v. Kennedy, 209 Cal. App. 4th 385 (2012) 15-16

People v. Murphy, 25 Cal. 4th 136 (2001) 14

Page

People v. Perez, 35 Cal. 4th 1219 (2005) 16

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) 29

Rider v. County of San Diego, 1 Cal. 4th 1 (1991) 22

Riverside County Community Facilities District No. 87-1 v. Bainbridge 17, 77 Cal. App. 4th 644 (1999) 16, 21-22

San Remo Hotel L.P. v. City & County of San Francisco, 27 Cal. 4th 643 (2002) 29

Senate of the State of Cal. v. Jones, 21 Cal. 4th 1142 (1999) 25

Smith v. Fruin, 28 F.3d 646 (7th Cir. 1994) 28

Tichinin v. City of Morgan Hill, 177 Cal. App. 4th 1049 (2009) 30

United States v. Salerno, 481 U.S. 739 (1987) 29

Walker v. Superior Court, 47 Cal. 3d 112 (1988) 17

Weisblat v. City of San Diego, 176 Cal. App. 4th 1022 (2009) 22-23, 26-27

Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408 (1989) 20

Wildlife Alive v. Chickering, 18 Cal. 3d 190 (1976) 15

Williams v. Superior Court, 5 Cal. 4th 337 (1993) 15

Statutes

Gov't Code § 25210.1(e) 12, 17

§ 25213 18-19

§ 53175.5 12

§ 53311.5 12

Page

§ 53313 . . . . 9-11, 15

§ 53313(a)-(g) 25

§ 53313.5 17

§ 53325.3 21

§ 53395 12

Pub. Res. Code § 13000 12

Sts. & High. Code § 36606(e) 12

§ 36703 12

§ 36705(a)(1) 12

Constitution

Cal. Const. art. XIIIC, § 1(d) 23, 26

Miscellaneous

57 Ops. Cal. Atty. Gen. 423 (1974) 18

Detwiler, Peter, *Serving The Public Interest: A Legislative History of SB 1458 and the "County Service Area Law"* (2008) 18

INTRODUCTION

Appellant Building Industry Association – Bay Area has brought this lawsuit to challenge the creation of the City of San Ramon Community Facilities District 2014-01 ("Special Taxing Zone") and the levying of its annual tax. The Special Taxing Zone and its tax are targeted solely at owners and residents of new development.[1] Respondents City of San Ramon, *et al*. (collectively "the City"), nevertheless contend that the Zone and its tax are consistent with the law's limitations on local governments' taxing powers. But the City's arguments violate fundamental principles of interpretation. They also ignore the constitutional and statutory protections for homeowners and taxpayers.

The City needs money to pay for citywide municipal services, in particular police services. *See* Aplt. Br. 26-29. But the City does not want to ask all its citizens to pay for those services. Instead, it seeks to saddle other individuals with that cost. These individuals are the future City residents who will have no say over the Special Taxing Zone's levy. And they are the future City residents who will receive no additional or higher level of service as

---

[1] Beginning in the first year, owners or residents (or both) of new single-family homes are subject to the additional tax in the amount of $743.75 annually; those of new condominiums or townhomes $595.00; and those of apartment units $446.25. *See* 3 JA 420. Without need for subsequent City Council action or voter approval, the amount of the tax for facilities will increase automatically 2% per year. *See id*. The amount for services will increase automatically at least 4% per year. *See id*.

compared to other City residents. The federal and state constitutions, as well as the Mello-Roos Act, forbid this unfair funding scheme.

ARGUMENT

I

THE SPECIAL TAXING ZONE'S LEVY IS ILLEGAL BECAUSE ITS REVENUE WILL NOT BE USED TO PAY FOR ANY ADDITIONAL SERVICE AS REQUIRED BY THE MELLO-ROOS ACT

The Mello-Roos Act restricts the type of municipal services that a landowner-approved tax may finance. Such services must be "in addition to those provided in the territory of the district before the district was created." Gov't Code § 53313. And they must "not supplant services already available within that territory when the district was created." *Id.*

The City, however, will not use the revenue from the Special Taxing Zone to pay for any new or enhanced service. Rather, the City will use that revenue to provide a standard menu of municipal services. The City will provide these services at a level adequate to meet their demand. This is what the City always has done for all its residents and neighborhoods. Aplt. Br. 39-41. Zone residents pay substantially more than their neighbors. But they get nothing extra in return. Therefore, the City's funding mechanism cannot be reconciled with Section 53313.

A. Satisfying Increased Demand for Existing Services Does Not Provide an "Additional" Service

Section 53313 forbids revenue from landowner-approved taxes to pay for the same services that all parcels—inside and outside a district—receive.[2] The City, however, contends that the Special Taxing Zone is consistent with Section 53313. The Zone is legal, the City argues, because its revenue is necessary to meet the increased demand for services from new development.[3] *See, e.g.*, Resp. Br. 21 ("The Mello-Roos financing is what will enable the City to continue to provide standard municipal services at levels commensurate with the increased service level demands of development within the District.").

The City's focus on demand is misguided. Section 53313's limitations are not a function of whether Special Taxing Zone residents *demand* more in services than other City residents who do not pay the Zone's tax. Rather, those limitations are a function of the type and quality of the *services* provided to

---

[2] Contrary to the City's contention, *cf.* Resp. Br. 26-27, the Association's interpretation of Section 53313 has remained consistent throughout this litigation. *See* 1 JA 13 (Compl. ¶¶ 68-72); 2 JA 188 (Mem. in Supp. of Mot. for Summ. J. at 9:19-20); 4 JA 683 (Opp'n to City's Mot. for Summ. J. at 3:3-23); Aplt. Br. 39-41.

[3] Requirements of nexus and proportionality govern development impact fees. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868 (1996). But they do not apply to Mello-Roos taxes. Hence, vigorous enforcement of Section 53313's limitations is all the more important. Those limitations prevent local governments from imposing impact fees that are disguised as landowner-approved Mello-Roos levies. *Cf. Novato Fire Protection Dist. v. United States*, 181 F.3d 1135, 1140 (9th Cir. 1999) (forbidding a local government to circumvent limitations on its taxing power by characterizing its levies as fees).

both sets of residents. *See* Gov't Code § 53313 (requiring that the "*services* [be] in addition to" pre-existing services and that the "additional *services* [not] supplant" those pre-existing services) (emphasis added). An increased overall demand for existing services does not convert those services into something "additional." It simply affects the cost of providing those *same* services for *all* City residents.[4] The Special Taxing Zone will not provide its residents a level of service "superior" to any other parcel in the City. Rather, Zone residents will receive municipal services at an "adequate" level. That is what *all* City residents always have received. And that is what *all* City parcels (including those currently vacant or under-developed parcels that will be annexed to the Zone upon future development) always have received. Aplt. Br. 39-41. *Cf. id.* at 41 n.7 (explaining how development of vacant or under-developed parcels can *reduce* demand for services).

The City also contends that the Association's interpretation of Section 53313 is unworkable. The City pleads that it does not know how to provide truly "additional" service in exchange for extra taxpayer payments. And it is incredulous that any local governmental agency could really ensure the provision of a comparatively higher level of service in exchange for a supplemental levy. *See* Resp. Br. 28-29.

---

[4] Development within the Zone will provide the City new sources of property, sales, and other tax revenue. This revenue will help pay for any increased demand on municipal services. That is true regardless of the fate of the Special Taxing Zone's levy.

But for years the City has been doing precisely that through its various assessment districts. Aplt. Br. 26. And not just the City. For example, improvement districts throughout the state provide a variety of municipal services over and above what non-district residents within the same city receive. And the districts provide these services in exchange for the payment of a supplemental levy. *See* Sts. & High. Code § 36606(e) (a subsection of the Property and Business Improvement District Law of 1994 authorizing the provision of "security, sanitation, graffiti removal, street and sidewalk cleaning, and other municipal services supplemental to those normally provided by the municipality"); *id.* § 36705(a)(1) (a subsection of the Multifamily Improvement District Law authorizing the provision of "security services supplemental to those normally provided by the city"). Whatever the City thinks, the Legislature believes that Section 53313's limitations are practicable. They implement the Legislature's longstanding policies of fairness and uniformity in taxation. Aplt. Br. 20 & n.2.

The City is correct that the Mello-Roos Act provides an "alternative funding mechanism," Gov't Code § 53311.5. *See* Resp. Br. 29. And so do other statutes. *See, e.g.*, Gov't Code § 25210.1(e) (County Services Area Law); *id.* § 53175.5 (Integrated Financing District Act); *id.* § 53395 (Infrastructure Financing District Act); Pub. Res. Code § 13000 (Resort Improvement District Law); Sts. & High. Code § 36703 (Multifamily

Improvement District Law). Yet that fact is no reason, as the City appears to suggest, to render Section 53313's protections useless.

The better approach is the Association's. Its construction preserves the Mello-Roos Act's funding mechanism. But it also, unlike the City's, respects Section 53313's limitations.

B. The Association's Interpretation, Contrary to the City's, Appropriately Uses Dictionary Definitions While Remaining Faithful to the Legislative Distinction Between Landowner-Approved and Registered-Voter-Approved Taxes

1. The City's Reliance on Dictionary Definitions Is Misguided

The City relies heavily on dictionary definitions to defend its interpretation of Section 53313's limitations on landowner-approved taxes. *See* Resp. Br. 25-26. This reliance is unavailing, for two reasons.

First, the City's position does not succeed even under the City's preferred definitions. For example, the City contends that an "additional" service is one that is "added, extra, or supplementary." *Id*. at 25 (quoting oxforddictionaries.com). But the revenue from the Special Taxing Zone will not be used to pay for any added, extra, or supplementary service. It will be used to pay for services at a level adequate to meet the demand for those services. Those are the *same* services that parcels throughout the City always have received from the City. Aplt. Br. 39-41.

Second, the City's focus on dictionary definitions impermissibly narrows the analysis. *Cf. People v. Clayburg*, 211 Cal. App. 4th 86, 88 (2012) (courts "should not resort to the 'dictionary school of jurisprudence' when construing a statute"). Although such definitions play a role in statutory interpretation, that role is not exclusive. *See In re Do Kyung K.*, 88 Cal. App. 4th 583, 592 (2001) (" 'The interpretation of a statute may well begin, but should not end, with a dictionary definition of a single word used therein.' ") (quoting *Pearson v. State Social Welfare Bd.*, 54 Cal. 2d 184, 194-95 (1960)). Statutory interpretation should take account of the larger structure of the law in question. *See, e.g.*, *People v. Murphy*, 25 Cal. 4th 136, 142 (2001) (courts do not consider "the statutory language in isolation" but instead "look to the entire substance of the statute" and "construe the words in question in context, keeping in mind the nature and obvious . . . parts of a statutory enactment" (citations and quotations marks omitted)).

The City's blinkered approach fails to abide by these interpretive rules. The City's interpretation would eliminate any meaningful distinction between landowner-approved and registered-voter-approved taxes. According to the City, a landowner-approved tax can finance just an increased demand on existing services. *See* Resp. Br. 27-28. But satisfying such increased demand is precisely when landowner-approved districts are typically used. *See* Aplt. Br. 23-24. Hence, under the City's interpretation, Section 53313's

limitations—which apply only to landowner-approved taxes—would never come into force.

The City's reading therefore ignores the larger statutory context. And it nullifies the careful legislative distinction between landowner-approved and registered-voter approved taxes. It should be rejected. *Cf. Williams v. Superior Court*, 5 Cal. 4th 337, 357 (1993) ("An interpretation that renders statutory language a nullity is obviously to be avoided.").

2. The City Cannot Escape Section 53313's Limitations Simply Because Those Limitations Could Have Been More Demanding

The City contends that Section 53313's limitations should be downplayed because they could have been broader. Specifically, the City correctly notes that Section 53313's limitations do not apply to the financing of municipal *facilities*. *See* Gov't Code § 53313. The City therefore argues that Section 53313's limitations on financing of *services* should be moderated. *See* Resp. Br. 34.

The City has it backwards. The Legislature added limitations to the one type of financing and not the other. Such a deliberate choice is a reason to preserve, not weaken, those limitations. *Cf. Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 195 (1976) ("[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."). It is not the Legislature's duty to anticipate and remedy every possible abuse of alternative funding mechanisms. *Cf. People v. Kennedy*, 209 Cal. App. 4th 385, 399

(2012) ("[T]he Legislature is permitted to engage in piecemeal approaches to statutory schemes addressing social ills and funding services to see what works and what does not."). That Section 53313 does not provide complete protection is no reason to do away with its existing safeguards. And those protections are especially critical here. After all, Mello-Roos Act levies are not subject to the many limitations applicable to assessments and similar charges. *See Riverside County Community Facilities District No. 87-1 v. Bainbridge 17*, 77 Cal. App. 4th 644, 657 (1999).

Hence, the Association's interpretation maintains the legislatively crafted distinctions between landowner-approved and registered-voted-approved taxes. That fact further supports the Association's construction. It also confirms that the City's contrary interpretation should be rejected. *Cf. People v. Perez*, 35 Cal. 4th 1219, 1230 (2005) (rejecting an interpretation that would produce "an anomalous result inconsistent with the overall statutory structure").

C. The *In Pari Materia* Canon Supports the Association's Interpretation

1. The County Service Area Law and the Mello-Roos Act Are *In Pari Materia*

The City argues that the County Service Area Law and the Mello-Roos Act are not *in pari materia*. The City relies on the former's authorization of "alternative[s] for governance of areas within unincorporated territory." *See* Resp. Br. 32. But the County Service Area Law also gives counties

"alternative . . . methods to finance and provide needed public facilities and services." Gov't Code § 25210.1(e). The Mello-Roos Act does the same. *See id.* § 53313.5. It is true that these statutes do not operate identically. *Cf.* Resp. Br. 32. But that is irrelevant. They both provide alternative funding mechanisms. Therefore, they are *in pari materia*. *See Walker v. Superior Court*, 47 Cal. 3d 112, 124 n.4 (1988) (statutes with "the same purpose or object" are *in pari materia*).

2. The Legislature's Amendments to the County Service Area Law Support Rather Than Undercut the Association's Position

The City contends that the *in pari materia* argument is misplaced because statutory amendments have mooted relevant judicial construction of the County Service Area Law. *See* Resp. Br. 29-31. *Cf.* Aplt. Br. 45 (noting that the relevant section of the County Service Area Law has been changed since the court of appeal's decision in *City of Santa Barbara v. County of Santa Barbara*, 94 Cal. App. 3d 277 (1979)). But these statutory changes actually support the Association's position.

a. The Legislature's Amendments to the County Service Area Law Do Not Moot the Analysis of the Court of Appeal in *City of Santa Barbara*, or of the Attorney General's Opinion Adopted Therein

In 2008, the Legislature substantially amended the County Service Area Law. The amendments included the repeal of the "extended services" requirement. And they included the addition of the prohibition on providing

services already " 'perform[ed] to the same extent on a countywide basis.' " Aplt. Br. 45 (quoting Gov't Code § 25213). But as the City's own cited authority explains, the reason for these amendments had nothing to do with the meaning of "extended services" as such. Rather, the reason was to avoid further controversy over the distinction between "extended services" and "miscellaneous extended services." *See* Peter Detwiler, *Serving The Public Interest: A Legislative History of SB 1458 and the "County Service Area Law"* 4 (2008) (observing that SB 1458 "[a]voids the archaic distinction between extended services and miscellaneous services").

Notably, this distinction was irrelevant to the court of appeal's decision in *City of Santa Barbara*. Under *City of Santa Barbara*, a county service area may not contribute to the disparate provision of any service. *See City of Santa Barbara*, 94 Cal. App. 3d at 288. And that holds true regardless of the type of service provided. *See id.* Also under *City of Santa Barbara*, a county service area must provide something above and beyond "a certain basic level" of municipal service, 57 Ops. Cal. Atty. Gen. 423, 428 (1974). *See City of Santa Barbara*, 94 Cal. App. 3d at 288 n.7 (adopting the Attorney General's understanding of "level" of service). This "basic level" of municipal service is "uniformity" of service. *See* 57 Ops. Cal. Atty. Gen. at 428. But such uniformity "normally requires more extensive enforcement in populated areas." *Id.* Thus, according to the Attorney General and the court of appeal

in *City of Santa Barbara*, services remain the same—uniform—even though their demand may vary throughout a territory.

These conclusions remain relevant to this case. The current version of the County Service Area Law still forbids the provision of services that are already "perform[ed] to the same extent on a countywide basis." Gov't Code § 25213. That is the holding of *City of Santa Barbara*. *See* 94 Cal. App. 3d at 286 ("[A] county service area may be established for extended police protection *where such service is not provided to the same extent on a countywide basis* . . . .") (emphasis added). Here, the City will use the Special Taxing Zone's revenue to pay for services at a level adequate to meet the demand for those services. These are the same services already available on a city-wide basis. *See* Aplt. Br. 39-41. Thus, the Special Taxing Zone's levy would not pass muster under the County Service Area Law. It should not under the Mello-Roos Act either.

b. That the Legislature Did Not Amend the Mello-Roos Act and Similar Statutes When Amending the County Service Area Law Demonstrates That the Mello-Roos Act's Safeguards Against Landowner-Vote Abuse Retain Their Full Vigor

For the sake of argument, one may assume that the City's characterization of the County Service Area Law amendments is correct. Therefore, one may posit that the Legislature has dispensed with the requirement that county service areas provide a supra-uniform service. But even with these concessions *arguendo*, the City's construction of the Mello-

Roos Act is still unsupportable. The Legislature did not amend the analogous limitations of the Mello-Roos Act. And the Legislature did not amend the analogous limitations of the many other alternative finance mechanisms. *See* Aplt. Br. 19-20 (discussing other financing mechanisms). These refusals show that the Legislature intended the Mello-Roos Act's limitations to retain their original operative effect. To hold otherwise would countenance a significant repeal by implication, which the law abhors. *See Bd. of Supervisors v. Lonergan*, 27 Cal. 3d 855, 868 (1980) ("[T]he law shuns repeals by implication . . . ."); *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal. 3d 408, 419-20 (1989) ("The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together."). Thus, the County Service Area Law amendments support the Association's—not the City's—construction of the Mello-Roos Act.

****

In sum, the Special Taxing Zone will provide no additional service to Zone residents. It cannot be reconciled with Section 53313's limitations.

II

THE SPECIAL TAXING ZONE'S LEVY IS AN UNCONSTITUTIONAL GENERAL TAX

The Special Taxing Zone's levy is an unconstitutional general tax for two related reasons. First, revenue from the levy will be used to fund every standard municipal service that the City otherwise provides to all its residents.

Second, that revenue will be used to supplement expenditures from the City's general fund. *See* Aplt. Br. 52-59. Although the City counters that the Special Taxing Zone's levy is constitutional, none of the City's defenses has merit.

A. The Court of Appeal's Decision in *Bainbridge* Does Not Support the City

The City argues that the Special Taxing Zone's levy is a special tax for two related reasons. First, the City followed all the relevant procedures under the Mello-Roos Act. Second, the Act itself declares the taxes it authorizes to be "special." *See* Resp. Br. 14-15 (citing Gov't Code § 53325.3). The City contends that *Bainbridge*, 77 Cal. App. 4th 644 (1999), makes these facts determinative.

The City is incorrect. The decision in *Bainbridge* did not address the issue of what *type of tax* the Mello-Roos Act authorizes. The decision instead addressed the issue of whether the Mello-Roos Act levy in question constituted an *assessment*. *See Bainbridge*, 77 Cal. App. 4th at 656 ("Appellants contend the execution of the 1988 memorandum of understanding and the formation of [the community facilities district] in this matter resulted in the levying of special assessments, rather than special taxes, against their properties . . . ."). To be sure, the court rested its analysis on the Mello-Roos Act's repeated declarations that its authorized levies are "special taxes." *See id.* at 655-56. But determining the species of tax was unnecessary to *Bainbridge*'s holding

that the levy was not an *assessment*.[5] *Cf. Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1301 (1998) (observing that "statements of law . . . necessary to the decision" are precedential, whereas unnecessary "general observations" are not). Moreover, *Bainbridge* is distinguishable on another important ground. The case concerned the levy of taxes to pay for bonds issued for the construction of particular infrastructure projects. The levy did *not* concern the provision of widely disparate municipal services. *See Bainbridge*, 77 Cal. App. 4th at 648. Thus, the City's reliance on *Bainbridge* is misplaced.

B. The Mello-Roos Act's Description of Its Levies As "Special" Taxes Does Not Mean That They Are Special Taxes Under the Constitution

The City contends that the Mello-Roos Act's repeated description of its levies as "special taxes" compels the conclusion that they are such. *See* Resp. Br. 16. But the Legislature's designation of a tax's type "is of minor importance in light of the realities underlying its adoption and its probable object and effect." *Rider v. County of San Diego*, 1 Cal. 4th 1, 14-15 (1991). That such legislative designations carry little weight is borne out by *Weisblat v. City of San Diego*, 176 Cal. App. 4th 1022 (2009).

---

[5] For example, the court of appeal's analysis included a discussion of case law explaining how special taxes, unlike assessments, "need not . . . specifically benefit the taxed property." *Bainbridge*, 77 Cal. App. 4th 657 (quoting *Arvin Union Sch. Dist. v. Ross*, 176 Cal. App. 3d 189, 200 (1985)) (emphasis removed). That distinction applies equally to general taxes.

In *Weisblat*, the plaintiff property owners challenged a levy that the City had entitled a "Business Tax and Rental Unit Tax Processing Fee." *See id*. at 1029. The court of appeal concluded that the so-called "fee" was a tax. But the fact that the city ordinance enacting the tax labeled it a "fee" played no role in the court's conclusion that the levy was a tax, not a fee. *See id*. at 1041-44. The court also went on to hold that the levy was a general not a special tax. *See id.* at 1044-45. In reaching that conclusion, the court focusing solely on the tax's purpose and effect. *See id*. The court gave no indication that a formal legislative declaration would have affected its analysis. *See id*.

Accordingly, under *Rider* and *Weisblat*, the constitutional question cannot be resolved simply because the Mello-Roos Act refers to its levies as "special taxes."[6]

C. The Court of Appeal's Decision in *Neilson* Supports the Association's Position That a "Special" Tax Can Become a General Tax

The City relies on *Neilson v. City of California City*, 133 Cal. App. 4th 1296 (2005).[7] *See* Resp. Br. 19. In that case, the court of appeal rejected a

---

[6] That revenues will be expended only for services otherwise authorized by the Act, *see* Resp. Br. 16-18, means that the levy does not violate the Act for that reason. It does *not* mean that the levy is constitutional.

[7] The City also relies on the California Constitution's definition of a special tax. *See* Resp. Br. 20. Such a tax is one "imposed for specific purposes, which is placed into a general fund." Cal. Const. art. XIIIC, § 1(d). But the City's reliance merely begs the question of whether a tax is actually imposed only "for specific purposes" when its revenue will be used to pay for widely disparate services.

"general" tax challenge to a special flat-rate parcel tax. *Neilson*, 133 Cal. App. 4th at 1309-11. The court concluded that a tax is not necessarily "general" simply because "'there may be multiple specific purposes for which revenues may be spent.'" *Id*. at 1309 (quoting *Howard Jarvis Taxpayers Ass'n v. City of Roseville*, 106 Cal. App. 4th 1178, 1185 (2003)). But the court nevertheless conceded that "a special tax [may] permit[] expenditures for so many specific governmental purposes that the parts might swallow the whole." *Id*. at 1311. The court thereby strongly implied that such a special tax would then become general. The number and type of services for which revenue from the Special Taxing Zone's levy may be expended are substantially greater than the number and type of services at issue in *Neilson*. Aplt. Br. 55-56. That point suggests that the Zone's levy would run afoul even of *Neilson*'s generous standard. Thus, *Neilson* is of no help to the City.

D. The Association's Position Is Consistent with the Mello-Roos Act's Provisions for Municipal Services Financing

The City emphasizes that revenue from the Special Taxing Zone's levy will be expended on no service not otherwise authorized by the Act. The City therefore suggests that the Association's "general tax" argument indirectly attacks the Mello-Roos Act itself. *See* Resp. Br. 20-22. The charge is without merit. The Mello-Roos Act authorizes an alternative funding mechanism for

particular municipal services. *See* Gov't Code § 53313(a)-(g). That does not mean that the Act authorizes any and all conceivable combinations of those services wrapped into a single tax measure. Section 53313 bears out that fact. Under its limitations, some districts may be able to finance certain services that other districts are not able to. These differences could be the result of landowner as opposed to registered-voter approval. Or they could be the result of variation in the type and quality of pre-existing services. Either way, they undercut the City's extremely broad reading of the Act's services authorization.

Moreover, any constitutional difficulty is the City's own making, not the Association's or the Legislature's. Here, the City *chose* to "logroll" each and every type of municipal service into a single ballot measure. Aplt. Br. 56. But it need not have. The City instead could have asked the voters to approve a separate measure for each service to be funded. Such an approach would produce the City's desired outcome. But it would be more readily reconcilable with the constitutional rules of taxation. And it would avoid the dangers of logrolling. *Cf. Manduley v. Superior Court*, 27 Cal. 4th 537, 585 (2002) (observing that logrolling results in "'an unnatural combination of provisions . . . dealing with more than one subject . . . that have been joined together simply for improper tactical purposes'") (quoting *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 1160 (1999)). Hence, the Association's

position is fully consistent with the Mello-Roos Act's authorization for municipal services financing.

E. The Association's Rule for Distinguishing General from Special Taxes Is Workable

The City contends that the Association's understanding of the constitutional requirements for general and special taxes is unworkable. The City argues that there is no way to determine how many services is too many. *See* Resp. Br. 21-22. Although the City may toss up its hands, the court of appeal has not. *See Neilson*, 133 Cal. App. 4th at 1311 (acknowledging that a special tax may go too far); *Weisblat*, 176 Cal. App. 4th at 1044-45 (concluding that a levy was a general not special tax). The distinction between general and special taxes may in some cases be difficult to draw. But this is not one of those cases. Surely, a single tax measure that is levied to pay for each and every standard municipal service that a local government otherwise provides is not a levy imposed "for specific purposes," Cal. Const. art. XIIIC, § 1(d).

F. That the City Has Only One Bank Account Is Irrelevant

Finally, the City argues that there is nothing wrong in its having only one bank account. *See* Resp. Br. 22-23. Perhaps—but the point is irrelevant to the Association's argument. The reason why the Special Taxing Zone's levy is unconstitutional has nothing to do with the City's particular accounting practices. What matters is that the levy is specifically designed to augment

general fund revenue. *See* Aplt. Br. 56-57. That fact confirms that the levy is a general tax. *Cf. Weisblat*, 176 Cal. App. 4th at 1045 (holding as "general" a tax that indirectly raised revenue for any and all governmental purposes).

III

SECTION H OF THE SPECIAL TAXING ZONE'S ORDINANCE UNCONSTITUTIONALLY RETALIATES AGAINST ZONE PROPERTY OWNERS

Section H unconstitutionally retaliates against Special Taxing Zone property owners because it threatens deprivation of City services and substantial financial liability should those property owners successfully exercise their rights to overturn the tax. *See* Aplt. Br. 60-65. The City argues to the contrary, contending that the Association's characterization of Section H's consequences is overblown, the Association's claim cannot overcome the presumption against facial challenges, and the Association's claim is too speculative because no one knows how the City may apply Section H. As set forth below, none of these arguments has merit.

A. Section H Threatens Targeted Property Owners with Substantial Financial and Other Liability

The City argues that the Association's characterization of Section H's penalties is hyperbolic. *See* Resp. Br. 39-40. Not so. Section H clearly states that one consequence of its triggering is that the City will no longer provide "Authorized Services." Those services include all the standard municipal services that the City otherwise provides to the Special Taxing Zone's

residents. *See* Aplt. Br. 61. Indeed, the City itself acknowledges that a consequence of Section H's application is that "the things for which the tax was levied may not get done." Resp. Br. 39. Similarly, Section H clearly provides that, once it has been triggered, financial liability for providing the "Authorized Services" will fall on the property owners. *See* Aplt. Br. 61. The City disputes the likelihood that such financial liability will be imposed. But it notably does not dispute that the imposition is the consequence of Section H's triggering. *See* Resp. Br. 39-40, 47-48. The City also may dispute how substantial Section H's consequences are. But it cannot seriously contest that such consequences constitute "adverse action" for purposes of a retaliation claim. *Cf. Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994) ("[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures.").

The City protests that Section H merely implements the commonsense principle: "You break it. It's yours." *Cf.* Resp. Br. 39-40. Not so. Section H requires Zone residents to pay for what they have *not* broken. The City's budget is not broken by its residents availing themselves of standard municipal services. It is broken (if at all) because of the City's budgetary choices. Aplt. Br. 27. Or it is because of the Legislature's budgetary policies. *See id.* at 49-51. But, either way, the rights of the Zone's property owners have nothing to do with it.

B. The Association's Facial Claim Against Section H Is Good

The City argues that the Association's facial claim cannot withstand the "very high level of judicial scrutiny" to which such claims are subject. *See* Resp. Br. 49. The City contends that a successful facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *Id*. at 50 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The City's reliance on *Salerno* is misplaced.

To begin with, the City invokes the wrong standard. In California, the standard for facial claims requires only that the challenged statute be unconstitutional in the generality or great majority of cases. *See San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 673 (2002). *See also Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 466 (2015). But even under the federal standard, the City's position is without merit. Under *Salerno*, a court must consider "only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015). In other words, the "'proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.'" *Id*. (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992)). Hence, that property owners' rights may not be violated because the City may not enforce Section H as

written is beside the point. What matters is that their rights will be violated *if Section H is implemented*.

C. Section H's Chilling Effect Alone Dooms It

The City repeatedly contends that the Association's retaliation claim must fail because no one knows whether or how Section H will be enforced. *See* Resp. Br. 40, 46, 48, 51-52, 54. But this approach misperceives the facial analysis. Moreover, it improperly omits consideration of Section H's chilling effect. *Cf*. Aplt. Br. 64-65. Whether any property owner within the Special Taxing Zone has yet to suffer retaliation is irrelevant. It is enough that the ordinary Zone property owner will seek to avoid Section H's application by refraining to exercise his or her rights. *Cf. Tichinin v. City of Morgan Hill*, 177 Cal. App. 4th 1049, 1082 (2009) ("[I]n the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness.").

CONCLUSION

The Special Taxing Zone exceeds Section 53313's limitations. It impermissibly levies a general tax. And it unconstitutionally retaliates against its property owners. The judgment of the superior court should be reversed.

DATED: January 26, 2016.

Respectfully submitted,

PAUL B. CAMPOS
DAMIEN M. SCHIFF

By /s/ Damien M. Schiff
DAMIEN M. SCHIFF

Attorneys for Appellant Building Industry Association – Bay Area

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANT'S REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 5,505 words.

DATED: January 26, 2016.

/s/ Damien M. Schiff
DAMIEN M. SCHIFF

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On January 26, 2016, a true copy of APPELLANT'S REPLY BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

Paul B. Campos
Building Industry Association –
Bay Area
1350 Treat Blvd., Suite 140
Walnut Creek, CA 94597
Counsel for Plaintiff and Appellant

Allan Robert Saxe
Alicia Michelle Poon
Office of the City Attorney
2226 Camino Ramon
San Ramon, CA 94583
Counsel for Defendant and Respondent

Court Clerk
Contra Costa County Superior Court
Taylor Courthouse
725 Court Street
Martinez, CA 94553

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 26th day of January, 2016, at Sacramento, California.

TAWNDA ELLING