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 BUILDING INDUSTRY ASSOCIATION – BAY AREA'S ANSWER TO THE AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitution

Statute

Page

Rule

Pursuant to California Rule of Court 8.200(c)(6) and the Court's order of March 4, 2016, Appellant Building Industry Association – Bay Area respectfully submits this answer to the amicus brief of the League of California Cities.

INTRODUCTION

The League relies on a hodgepodge of legal and policy arguments to defend Respondent City of San Ramon's Special Taxing Zone. But undergirding all of them is the theme that the Association's lawsuit, if successful, will cripple municipal services financing. That assertion is simply not true. None of the arguments that the Association has advanced against the Zone's levy would categorically prohibit the financing of any municipal facility or service. Indeed, absolutely nothing in the Association's interpretation of Section 53313 of the Government Code would have *any* impact whatsoever on Mello-Roos districts created by registered voters, or *any* district created to finance municipal facilities. Similarly, absolutely nothing in the Association's interpretation of the constitutional limitations on general taxation would preclude Mello-Roos districts from financing the full menu of standard municipal services, so long as the relevant constitutional procedures were observed. And absolutely nothing in the Association's challenge to the Zone's retaliatory Section H would preclude local governments from requiring homeowners to pay for a special service over and above what non-payors receive.

Thus, the League's objections are not about municipal financing. Yet they do reveal the League's real concern—electoral politics. Both the League and the City want municipal financing with no strings attached and without having to convince the voters of the soundness of their financing proposals. But the constitutional and statutory rights of Mello-Roos district homeowners and taxpayers will not let them have it.

ARGUMENT

I

REVENUE FROM A LANDOWNER-APPROVED MELLO-ROOS TAX MAY NOT BE USED TO PAY FOR THE SAME SERVICES THAT PRE-EXISTED A DISTRICT'S FORMATION, UNLESS THE NEW SERVICES ARE ENHANCED

The League argues vigorously against an interpretation of the Mello-Roos Act that would preclude revenue from a landowner-approved tax to be used to pay for the same type of services that pre-existed a district's formation. Amicus Br. 15-19. Whatever the merits of that interpretation, it is *not* the Association's argument. Indeed, as even the League recognizes, *see* Amicus Br. 14, the Association acknowledges that the Special Taxing Zone's levy would be permissible if it were used to pay for an enhanced version of the same municipal service. *See* Aplt. Br. 38 (explaining that the provision of a dedicated police officer or EMT unit would be permissible notwithstanding "pre-existing, uniformly available, police and emergency services").

But therein lies the rub. Revenue from the Special Taxing Zone's levy will not be used to pay for any enhanced services. Rather, the revenue will be used to pay for what parcels throughout the City always have received—namely, municipal services at a level adequate to meet the demand for those services. *See* Aplt. Br. 39-41. To use the League's nomenclature, Zone residents will not receive "augmented" services. Thus, the League's arguments against an interpretation of the Mello-Roos Act that would preclude revenue from being used to finance such services are irrelevant.

II

THE CHALLENGED LEVY IS A GENERAL TAX BECAUSE IT INDIRECTLY RAISES REVENUE FOR THE GENERAL FUND, IN ADDITION TO RAISING REVENUE DIRECTLY FOR A WIDELY DISPARATE MENU OF STANDARD MUNICIPAL SERVICES

The League contends that the challenged levy is not a general tax, principally because revenue for that levy will not be available for direct expenditure on any and all legitimate municipal purposes. *See* Amicus Br. 20-22. But the League has no response to the court of appeal's suggestion in *Neilson v. City of California City*, 133 Cal. App. 4th 1296 (2005), that a so-called "special" tax that is not technically levied for any and all governmental purposes may nonetheless become a "general" tax. *See id.* at 1311 (conceiving of a special tax "that permits expenditures for so many specific governmental purposes that the parts might swallow the whole"). Similarly, the League has

no response to the court of appeal's holding in *Weisblat v. City of San Diego*, 176 Cal. App. 4th 1022 (2009), that a tax directly levied for a "specific" purpose nevertheless is a general tax if it makes other revenue available for general governmental services. *See id.* at 1045 (holding as "general" a tax that indirectly raises revenue for any and all governmental purposes). Thus, the League implicitly acknowledges that the Special Taxing Zone's levy runs afoul of both *Neilson* and *Weisblat*. Its revenue will be used directly for widely disparate "specific" purposes. And it will indirectly make substantial revenue available to the City for expenditure on general governmental purposes. Aplt. Br. 53-57.

Relatedly, the League objects to the Association's reliance on *Rider v. County of San Diego*, 1 Cal. 4th 1 (1991), for the proposition that legislative declarations are not determinative of the constitutional distinction between special and general taxes.[1] Amicus Br. 21-23. Although the League may not agree with that interpretive rule, our Supreme Court does. *See Rider*, 1 Cal.

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[1] The League relies on *Greene v. Marin County Flood Control & Water Conservation District*, 49 Cal. 4th 277 (2010), for the proposition that courts should take into account legislative declarations to construe constitutional taxing limitations. Amicus Br. 22-23. But the issue in *Greene* had nothing to do with the distinction between general and special taxes. Rather, the issue was whether fee elections require a secret ballot. *See Greene*, 49 Cal. 4th at 283-84. Because "Proposition 218 is silent on the secrecy issue," *id.* at 289, the Supreme Court naturally referred to legislative enactments that were "designed to clarify the implementation of Proposition 218," *id.* at 286. In contrast, here the constitutional limitations on general taxation by special districts are clear and express. *Cf.* Cal. Const. art. XIIIC, § 2(a). Thus, there is nothing for the Legislature to clarify.

4th at 14-15 ("[T]he Legislature's designation of the tax as a 'general tax' . . . is of minor importance in light of the realities underlying its adoption and its probable object and effect."). It is true that *Rider* used that principle to conclude that a purported general tax was in fact a special tax. *See id.* at 16. And in contrast here the Association relies on it to show that a purported special tax is in fact general. But that is a distinction without a difference. The larger point is that deferring to legislative construction of any limitation on the taxing power of local governments makes little sense. *See City of San Diego v. Shapiro*, 228 Cal. App. 4th 756, 788 (2014) (noting that deference "to the Legislature's purported intent in enacting [a provision of the Mello-Roos Act] to afford *local governments* flexibility in complying with this state's *constitutional* mandate is less than compelling").

Finally, the League complains that enforcement of the constitutional limitations on general taxation would be bad policy.[2] *See* Amicus Br. 23-24. Not so. Contrary to the League's strained suggestion, *see* Amicus Br. 23, nothing in the Association's argument would preclude the City or any other local government from expeditiously responding to floods or other natural calamities. To be sure, unforeseen or inadequately anticipated expenses may hurt the City's budget and require additional taxation. But "[e]xtraordinary

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[2] *Rider* rejected that argument too. *See Rider*, 1 Cal. 4th at 16 (expressing "sympath[y] to the plight of local government in attempting to deal with the ever-increasing demands for revenue," but concluding that "limitations on local taxation are constitutional mandates of the people which we are sworn to uphold and enforce").

conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).

III

SECTION H UNCONSTITUTIONALLY TARGETS PROPERTY OWNERS' EXERCISE OF THEIR CONSTITUTIONAL RIGHTS

The League argues that Section H is permissible in part because Special Taxing Zone property owners have no constitutional right to any given level of municipal service. *See* Amicus Br. 24-26. The League also picks up the City's theme that Section H merely requires Special Taxing Zone property owners to pay for what they are receiving. *See* Amicus Br. 25. These contentions miss the point.

First, the Association's argument against Section H is *not* based on whether property owners have a due process right to a certain level of service. Even if all municipal services were gratuitous,[3] the City still would be constitutionally prohibited from denying those services to its citizens in retaliation for the exercise of their rights. Aplt. Br. 60, 62. Thus, the problem with Section H is not that it results in the reduction of municipal services. The problem is its *reason* for that reduction—namely, property owners' successful

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[3] They are not. *See City of Hayward v. Bd. of Trustees*, 242 Cal. App. 4th 833, 843 (2015) ("[T]he obligation to provide adequate fire and emergency medical services is the responsibility of the city."). *See also* Cal. Const. art. XIII, § 35(a)(2) ("The protection of the public safety is the first responsibility of local government and local officials have an obligation to give priority to the provision of adequate public safety services.").

exercise of their right to seek redress for illegal and unconstitutional government action. *See* Aplt. Br. 61-62.

Second, contrary to the League's suggestion, Section H does not just return things to the status quo. Section H still would require that property owners fund the services even after the tax's repeal, Aplt. Br. 61, a point that the League acknowledges. *See* Amicus Br. 25 ("Stating that the repeal of the San Ramon's special tax *will require* private parties to step into the void is only to state the obvious.") (emphasis added). More fundamentally, Section H does not just ensure that Special Taxing Zone residents pay for what they receive. It charges them *more* for the *same* services that *all* City residents receive. Thus, Section H is not an innocuous "you break it, you buy it" provision. Instead, it makes Zone residents pay for what others have broken. Aplt. Reply Br. 28. Due process forbids such punitive action.

IV

THE ENFORCEMENT OF PROTECTIONS FOR HOMEOWNERS AND TAXPAYERS IS GOOD POLICY

The League argues that the Association's arguments threaten the existence of over a thousand taxing districts throughout the state. Amicus Br. 26-27. The League's hyperbole has no basis in fact. Because the validation statutes apply to Mello-Roos districts (and most if not all of the other districts, *see* Gov't Code § 50077.5), their levies are surely by now immune from any attack, regardless of what this Court holds. *See Hollywood Park Land Co.,*

LLC v. Golden State Transp. Fin. Corp., 178 Cal. App. 4th 924, 932-33 (2009) ("[M]atters which have been or which could have been adjudicated in a validation action . . . must be raised within the statutory limitations period . . . or they are waived." (quoting *McLeod v. Vista Unified Sch. Dist.*, 158 Cal. App. 4th 1156, 1166 (2008))). Moreover, the Association—as an organization of home builders keenly concerned with maintaining adequate municipal services and facilities—would not maintain this action if it were to undermine local government services.

The League contends that the Association's argument would make "greenfield" development extremely difficult and would result in greater developer reliance on assessments. *See* Amicus Br. 27. But what the City here proposed is not a regulation of greenfield development. It is a city-wide regulation of infill development projects which the City unilaterally has determined will not generate sufficient tax revenue. *See* Joint Appendix. vol. 3, pp. 407-08 (maps of the district and future annexation area). And with respect to assessments, greater reliance on them would *benefit* homeowners as it would guarantee that their properties would receive a special benefit in services and facilities. *See Arvin Union Sch. Dist. v. Ross*, 176 Cal. App. 3d 189, 200 (1985).

The League argues that taxing new residents more than existing residents is good policy because it will allow existing residents to stay in their homes. Amicus Br. 28. But the issue here is not about whether to prevent residents from being priced out of their own homes because of rising property values and ad valorem taxes. *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 12-13 (1992) (upholding constitutionality of limitations on property valuation for purposes of ad valorem taxation). Rather, the issue is whether municipal services financing should be decided by a city's residents, or instead by the city and individual coerced developers. The rights of homeowners and taxpayers demand the former.

Finally, the League somewhat badly declares that enforcement of the constitutional and statutory limitations on local governments' taxing power is not needed. Voters and property owners will make "intelligent choices when choosing to tax themselves or to buy housing [in a] Mello-Roos [district]." Amicus Br. 24. *See also id.* at 27 ("There is no need to protect future residents of developments from Mello-Roos taxes. Market forces are up to the task."). But the very existence of those limitations demonstrates that the people of California and their Legislature are of a different view.

CONCLUSION

The League's legal and policy defense of the Special Taxing Zone and its levy does not succeed. The judgment of the superior court should be reversed.

DATED: March 15, 2016.

Respectfully submitted,

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By /s/ Damien M. Schiff
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANT BUILDING INDUSTRY ASSOCIATION – BAY AREA'S ANSWER TO THE AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES is proportionately spaced, has a typeface of 13 points or more, and contains 2,171 words.

DATED: March 15, 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 March 15, 2016, a true copy of APPELLANT BUILDING INDUSTRY ASSOCIATION – BAY AREA'S ANSWER TO THE AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES 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.

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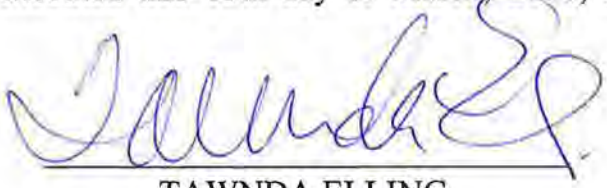
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 15th day of March, 2016, at Sacramento, California.



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