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 OPENING 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

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION 2	Court of Appeal Case Number: A145575
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Damien M. Schiff, No. 235101 Pacific Legal Foundation 930 G Street Sacramento, California 95814 TELEPHONE NO.: (916) 419-7111 FAX NO. *(Optional)*: (916) 419-7747 E-MAIL ADDRESS *(Optional)*: dms@pacificlegal.org ATTORNEY FOR *(Name)*: Appellant Building Industry Association - Bay Area	Superior Court Case Number: MSC1400603 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Building Industry Association - Bay Area RESPONDENT/REAL PARTY IN INTEREST: City of San Ramon	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Appellant Building Industry Ass'n - Bay Area

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1) RASAP Franklin	owner-developer of parcels within the challenged
(2)	community facilities district
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 9, 2015

Damien M. Schiff
(TYPE OR PRINT NAME)

▶ 
(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION AND SUMMARY OF ARGUMENT

"No taxation without representation" is a founding principle of the American republic. A derivative principle in California law holds that "special" taxes—those levies designed to raise revenue for specific governmental purposes—must not compel one taxpayer inequitably to subsidize municipal services to others. *See City of Santa Barbara v. County of Santa Barbara*, 94 Cal. App. 3d 277, 287 (1979) (noting "a consistent state policy against subsidization of one group of taxpayers by another"); *Cal. Bldg. Indus. Ass'n v. Governing Bd.*, 206 Cal. App. 3d 212, 237 (1988) (interpreting the California Constitution generally "to preclude taxes which the electorate impose on others and not directly or indirectly on themselves").

Respondents City of San Ramon, *et al.* (collectively "the City"), seek to thwart these taxpayer protections through their creation of the City of San Ramon Community Facilities District No. 2014-01 ("Special Taxing Zone"), and their authorization for this Special Taxing Zone to levy a tax on targeted City residents. Contrary to its superficially benign official title, the Special Taxing Zone operates as an inequitable revenue-raising vehicle for the City's general fund. This regime forces the Zone's hapless residents—who will dwell in new homes and apartments on parcels within the Zone's non-contiguous, zigzagging territory—to pay a sizable special tax on their property tax bill each year for the benefit of the entire City. *See* Joint Appendix

(JA) Volume 3, page 365 (hereinafter 3:365) (City staff report estimating the annual special tax for Zone residents of single-family parcels to be $743.75). In exchange for paying this burdensome levy—which they have not voted upon—these targeted City residents will receive *no* special municipal service. JA 4:669 (Def. Opp'n Statement ¶ 19). Rather, they will receive just the same standard set of municipal services that the City always has provided to all parcels within its territory. JA 4:669-70 (Def. Opp'n Statement ¶¶ 18, 20).

Appellant Building Industry Association – Bay Area contends that the United States and California Constitutions, as well as various statutes, prohibit the City's unjust financing scheme. Specifically: (i) the Special Taxing Zone's levy violates the Mello-Roos Community Facilities Act of 1982, Gov't Code §§ 53311-53368.3, because it was approved by landowner-developer vote, yet its proceeds will not be used to pay for any new or enhanced type of service to the Zone's parcels, as the Act expressly requires, *cf. id*. § 53313; (ii) the Zone'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 Zone's tax, unconstitutionally retaliates against the Zone's residents who succeed in repealing the tax through the exercise of their rights, among them the right to initiative and referendum under the California Constitution.

Below, the superior court accepted the City's argument that the Special Taxing Zone and its levy are permissible. *See* JA 4:765-69. But neither the City's defense nor the superior court's ruling justifies the legality of targeted residents paying substantially more per year in property-related taxes than their un-targeted neighbors next door, yet receiving *absolutely nothing* in return for that extra payment, while their un-targeted neighbors—who do not pay the tax—still receive *the same services that are funded by the tax*.

Naturally, the City wants the flexibility and revenue-generating potential of a traditional, citywide property-related tax. And the Legislature is by no means indifferent to the City's needs. Indeed, California law authorizes the City to levy a special tax through a community facilities district to pay for specific municipal services, so long as two-thirds of the *district's registered voters*—that is, the citizens who ultimately control the elected officials who create and implement the district—approve. *See* Gov't Code §§ 53313, 53328. But the law forbids what the City wants through its Special Taxing Zone: all the advantages of a traditional property-related special tax, without any of the political costs that such a financing method entails. *Cf. Howard Jarvis Taxpayers Ass'n v. City of Roseville*, 106 Cal. App. 4th 1178, 1189 (2003) (a local government cannot misconstrue a tax in order to gain an electoral advantage).

Because the rights of California homeowners preclude the City's scheme, the judgment of the superior court should be reversed.

STATEMENT OF THE CASE

I

LEGAL BACKGROUND

A. Constitutional and Statutory Limitations on the Levying of Taxes, Assessments, and Fees

California law provides various rules governing financing mechanisms for local governments. The most traditional and basic financing mechanism is an *ad valorem* property tax, which applies a "property tax rate to the assessed value of property," Rev. & Tax. Code § 2202. *See Ingels v. Riley*, 5 Cal. 2d 154, 159 (1936) ("[T]he function of a property tax is to raise revenue. Such a tax does not impose any condition nor does it place any restriction upon the use of the property taxed."). *See generally* Sean Flavin, 1 Tax. Cal. Prop. § 1:2 (4th ed. 2015) (noting that the *ad valorem* property tax "is one of the oldest forms of taxation," dating as far back "as the records of the Old Testament"). The California Constitution limits *ad valorem* property taxes to one percent of the value of the real property assessed. *See* Cal. Const. art. XIIIA, §§ 1(a), 3(a). Such taxes are levied by the state's counties, *see* Rev. & Tax. Code § 2151, which in turn allocate the proceeds among various local governments according to "a series of complex state statutes." *See* Mac

Taylor, Legislative Analyst's Office, *Understanding California's Property Taxes* 18 (2012).

The law also recognizes "assessments" and "fees." An assessment, like a tax, is a levy or charge upon real property. *See* Cal. Const. art. XIIID, § 2(b). But unlike a tax, an assessment confers a special benefit upon the real property assessed. *See Riverside Cnty. Cmty. Facilities Dist. No. 87-1 v. Bainbridge 17*, 77 Cal. App. 4th 644, 657 (1999). *Cf*. Cal. Const. art. XIIIA, § 3(b)(1) (defining tax as not to include a charge imposed for a specific benefit conferred that is not provided to those not charged). Similarly, a "fee" is any levy or charge other than a tax or assessment that is imposed as an incident of property ownership. Cal. Const. art. XIIID, § 2(e). Such a fee cannot, among other limitations, exceed the proportional cost of the service attributable to the parcel. *See id*. art. XIIID, § 6(b)(4). Moreover, no fee or charge may be imposed for "general governmental services" where the service is provided to fee and non-fee payers on substantially the same basis. *See id*. art. XIIID, § 6(b)(5). *See also Howard Jarvis Taxpayers Ass'n v. Roseville*, 97 Cal. App. 4th 637, 650 (2002).

In addition to these substantive limitations on revenue-raising mechanisms, California law imposes substantial electoral limitations. For example, the Legislature may enact new taxes only by a two-thirds vote. Cal. Const. art. XIIIA, § 3(a). Similarly, local governments may levy ***special*** taxes, *i.e.*, those taxes levied for specific purposes, *id*. art. XIIIC, § 1(c); Gov't Code

§ 53721, only after two thirds of the electorate have approved, Cal. Const. art. XIIIC, § 2(d); *id*. art. XIIIA, § 4; Gov't Code § 53722. And local governments may levy ***general*** taxes, *i.e.*, those taxes levied for general governmental purposes, Cal. Const. art. XIIIC, § 1(a); Gov't Code § 53721, only after a majority vote of the electorate.[1] *See* Cal. Const. art. XIIIC, § 2(b), (c); Gov't Code § 53723.

B. Alternative Financing Mechanisms for Local Governments

Given the California Constitution's substantial restrictions on the use of traditional, *ad valorem* property taxes to fund local government activities, the Legislature has authorized a number of alternative financing mechanisms. These mechanisms allow local governments to raise additional funds to pay for important municipal services and facilities, while also respecting the constitutional protections of taxpayers and property owners.

One prominent alternative mechanism is the County Service Area Law, Gov't Code §§ 25210-25217.4. Through that law, the Legislature recognized that counties "need alternative organizations and methods to finance and provide needed public facilities and services to the residents and property owners of unincorporated areas." *Id*. § 25210.1(e). Accordingly, the Legislature authorized counties to create county service areas to provide a

[1] Many of these protections were added to the state constitution by Proposition 218, which generally limits 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).

wide variety of services and facilities, including those pertaining to law enforcement, fire protection, and recreation. *See id*. § 25213(a)-(z). To pay for these facilities and services, the Legislature authorized the levying of special taxes within such services areas. *See id*. § 25215.2. But the Legislature, undoubtedly aware of the potential for abuse, mandated that revenue from such special taxes be used only to provide those facilities and services that the county "does not perform to the same extent on a countywide basis." *See id*. § 25213.

The Legislature has provided other means for local governments constitutionally to levy special taxes. *See generally id*. §§ 50075-50077.5 (general rules governing local government levying of special taxes). But again, just as with the County Service Area Law, the legislative authorization for local government special tax levies has been accompanied by parallel legislative safeguards, to ensure that special taxes not result in unfair distribution of those taxes' burdens and benefits.

For example, the Legislature has authorized school districts to impose special taxes. *See id*. § 50079(a). But it has imposed a double-limitation on that power. Not only must such taxes, like all special taxes, be designed to pay just for certain special services or activities, they also must be levied "uniformly to all taxpayers or all real property within the school district." *Id*. § 50079(b)(1). The Legislature has imposed similar uniformity requirements on special taxes levied by local hospital districts, Gov't Code § 53730.01, park

and recreation districts, Pub. Res. Code § 5789.1(a), and community college districts, Gov't Code § 50079.1. *See generally Borikas v. Alameda Unif. Sch. Dist.*, 214 Cal. App. 4th 135, 159-62 (2013) (discussing the various uniformity mandates). These uniformity requirements highlight the Legislature's considered opinion that, although special taxes may not be subject to all the limitations that assessments or other property-related fees are, such taxes nevertheless must be cabined by the constitutional principles of fairness and uniformity.[2] *Cf. Cal. Bldg. Indus. Ass'n*, 206 Cal. App. 3d at 237 (supermajority voting requirement for special taxes designed to preclude one segment of the electorate taxing another segment); *City of San Diego v. Shapiro*, 228 Cal. App. 4th 756, 783-84 (2014) ("Giving Landowners the unilateral right to determine how to apportion the benefits that would flow from a tax whose burdens may well fall on others would be contrary to both the Constitution and ordinary principles of taxation.")

C. The Mello-Roos Act

As another method of financing municipal services and facilities consistent with the California Constitution, the Legislature passed the Mello-

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[2] California's concern for uniformity in taxation is longstanding. *See* W. Sumner Holbrook, Jr. & Francis H. O'Neill, *California Property Tax Trends: 1850-1950*, 24 S. Cal. L. Rev. 252, 270 (1951) ("From 1850 to 1900, the record of California was substantially perfect for strict compliance with fundamental rules of tax uniformity and equality . . . ."). *See* Flavin, 1 Tax. Cal. Prop. § 1:14 (discussing the Legislature's 1966 enactment of A.B. 80, the "Bill of Rights" for California taxpayers, the "main objective" of which was "to ensure equality and uniformity in assessment procedures").

Roos Act. That statute, like the laws discussed in the preceding section, follows the Legislature's practice of authorizing alternative financing mechanisms for local governments which nevertheless are constrained by safeguards to prevent those same governments from requiring one set of taxpayers to subsidize municipal services to another set of taxpayers.

Under the Act, a local government may form a "community facilities district." *See* Gov't Code §§ 53313, 53313.5. With a two-thirds approval of eligible voters, *see id*. § 53328, such a district may levy "special taxes," *see id*. § 53325.3, and issue bonds, *see id*. §§ 53345-53365.7. A district's 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.[3] *Id*.

As the Act's name implies, a district's purpose is to fund community facilities and services. *See id*. §§ 53313, 53313.5. But the Legislature crafted significantly different rules governing district special taxes, depending on two crucial questions. Will the revenue from the district's tax be used to finance facilities ***or*** municipal services? Will the tax be approved by the district's

[3] A landowner-approved tax is also permissible if it will not be levied on parcels in residential use. Gov't Code § 53326(c). This proviso does not apply here, as the Special Taxing Zone's levy will include residential properties. *See* JA 3:389 (City Council staff report setting forth the Zone tax rate for residential parcels).

registered voters ***or*** landowners? As will be shown below, the distinctions between (i) facility and services funding, and (ii) registered voter and landowner vote, are key to why the City's Special Taxing Zone violates the Act.

With respect to the former distinction, 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 municipal services is considerably narrower. *See id*. § 53313(a)-(g) (exhaustively listing those services which a special tax may fund).

With respect to services financed by *landowner-developer* vote, the Act's authorization is even more limited. First, a special tax to finance recreational program services, library services, and the operation and maintenance of museums and cultural facilities, may be levied by landowner-developer vote only where the tax will not be levied on residential parcels. *See* Gov't Code §§ 53313(c); 53326(c).

Second—and especially relevant to this case— the Act provides that the proceeds from a tax that is not approved by registered voters "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 (emphasis added). Further, these "***additional services shall not supplant services already available within that territory when the district was created***." *Id*. (emphasis added). In light of the Legislature's repeatedly expressed concern about uniformity and fairness in local taxation, it is not surprising that the Mello-Roos Act also should contain analogous protections for homeowners and taxpayers.

Arguably, such protections are even more important for community facilities districts in light of the Act's authorization for landowner-developer voting to approve a special tax. Typically, such voting occurs in connection with a project to develop vacant lots. *See Shapiro*, 228 Cal. App. 4th at 786 (noting that landowner votes usually occur "in the case of a predominantly uninhabited proposed district"); Taylor, *Understanding California's Property Taxes*, at 14 (explaining that "[l]ocal governments often use Mello-Roos taxes" because "landowners may approve Mello-Roos taxes," so that "a developer who owns a large tract of land could vote to designate it as a Mello-Roos district," resulting in "the new owners pay[ing] the Mello-Roos tax"). Also, typically, such a vote follows upon the decision of a developer who, through self-interest or perhaps local government pressure, agrees to establish a

community facilities district in order to obtain the necessary local permit approvals. That is precisely what preceded the creation of the City's Special Taxing Zone. *See* JA 4:704-05 (Pltf. Opp'n Statement ¶¶ 5-6); JA 3:365 (City staff rep.). And such acquiescence is not difficult to obtain: a developer rarely will be subject to the special tax that he has voted to approve. JA 4:670 (Def. Opp'n Statement ¶ 21). Hence, the Legislature wisely crafted the Mello-Roos Act's Section 53313 to blunt at least some of the danger that special taxes pose by focusing on a species of tax—namely, a landowner-approved tax—which raises an especially acute risk of misuse. That risk also explains why special taxes approved by landowner-vote receive close judicial scrutiny. *See Shapiro*, 228 Cal. App. 4th at 770-88 (holding that special taxes generally must be approved only by registered voters, not landowners).

II

FACTUAL BACKGROUND

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

As will be demonstrated below, the City formed the Special Taxing Zone 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* JA 3:369-70 (City staff rep.); JA 2:338-39 (Depo. of City Admin. Servs. Dir. Eva Phelps) (hereinafter Phelps

Depo. at 66:21-67:4). The City's use of the Zone'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 to the satisfaction of its existing residents and voters. JA 2:322 (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 higher than other parts of the City—even though the area in question does not generate sufficient revenue to the City to cover the costs of providing those services. *Id*. 2:322-23 (28:18-29:3). Those areas "still get the same level as any other neighborhood." *Id*. 2:323 (29:5). Thus, services are provided at a citywide—not neighborhood—level, and they are funded principally by *all* property owners' payment of their normal property and other taxes. *See id*. 3:354, 356 (Fiscal Year 2012-2013 City Budget) (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 (or underdeveloped/redevelopable) parcels within the City (which the City estimates to exceed 2,500, *id.* 3:399 (City staff rep.), 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.*, JA 2:326 (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"); JA 2:327 (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"); JA 2:328 (48:1-6) (same).

B. The City's Establishment of the Special Taxing Zone

1. The City's Budget Crunch and Its Dim View of New Development

In April, 2011, the City adopted its *General Plan 2030*, which sets forth a blueprint for development within the City. The Plan's many co-equal policies include Implementing Policy 2.3-I-20, which directs the City to "[e]valuate the ability of new development to pay for its infrastructure, its share of public and community facilities, and the incremental operating costs it imposes." JA 4:703 (Pltf. Opp'n Statement ¶ 1). The City, however, has never comprehensively determined whether or to what extent the City's existing property taxes are inadequate to ensure that new development pays its

"fair share," consistent with Implementing Policy 2.3-I-20. And provision of current municipal services is not the only draw on the City's General Fund revenues. Perhaps the most significant increasing cost for the City is the payment of City pensions and retiree health expenses. *See* JA 3:353 (City staff rep.) ("Significant factors impacting expenditures include . . . employee benefit costs . . . ."). The recent economic downturn has exacerbated the effect of these draws. JA 3:352.

It was within this context of straitened municipal circumstances that, at the City Council's July 23, 2013, meeting, then City Police Chief Scott Holder gave a presentation to the Council concerning the need to hire additional police officers. *See* JA 3:358 (City staff rep.). Chief Holder cited increases in response times, population, and crime as the reasons for this need. *Id.* Following the presentation, the City Council referred the request to the City Finance Committee. *Id.* At its October 21, 2013, meeting, the Finance Committee approved funding for more police officers and directed the City staff to present the request to the City Council. *Id.* At the latter's November 12, 2013, meeting, the City Council approved Resolution 2013-101, which authorized the additional hires at an estimated annual cost of $640,820. *Id.* 3:361.

2. The City's Plan to Solve Its Budget Problems with a Special Taxing Zone Created in the Context of a Single Developer's Project Approval

Two further significant events occurred at about the same time that the additional police expenditures were approved. First, the City's Finance Committee began considering the creation of "a public finance mechanism to offset annual impacts to the General Fund." *See* JA 3:364 (City staff rep.). Second, the City approved a development proposal by RASAP Franklin. This proposal, known as the Acre Project, entails the construction of 48 townhomes on two vacant lots within the City. *See* JA 4:703 (Plft. Opp'n Statement ¶ 2). As a condition of that approval, the City required that the developer provide a funding mechanism to mitigate the project's alleged negative fiscal impacts with respect to the provision of municipal services—the principal focus being police services. *See* JA 4:704 (Pltf. Opp'n Statement ¶ 5); JA 3:406 (City staff rep.). A mere ten days after the Finance Committee's December 9, 2013, meeting to discuss a "public finance mechanism," the developer submitted a petition to the City to form a communities facility district, JA 3:633-36.

3. Creation of the Special Taxing Zone

On January 14, 2014, the City adopted a resolution to form the Special Taxing Zone. JA 4:665 (Def. Opp'n Statement ¶ 7). On February 25, 2014, the City approved as proposed (with one exception not relevant here) the Zone's establishment. *See* JA 4:665-67 (Def. Opp'n Statement ¶¶ 8, 10). In addition, the City conducted the landowner-vote to approve the tax. JA 4:667

(Def. Opp'n Statement ¶ 12). The Zone's current sole landowner—the Acre Project developer—voted to approve the tax, JA 4:667 (Def. Opp'n Statement ¶ 13), the vast majority of its revenue being earmarked for general police services, *see* JA 3:406 (City staff rep.). That approval should not be surprising. As noted previously, the City essentially demanded the Special Taxing Zone as the price of its project approval, and it will be the Zone's future residents—not the developer—who will pay the tax that the developer approved. *See* JA 4:670 (Def. Opp'n Statement ¶ 21).

4. The City's Addition of a Poison Pill to Stifle Dissent from the Special Taxing Zone's Targeted Residents

Also at the February 25, 2014, hearing, the City introduced Ordinance 448, to implement the landowner-approved tax. *See* JA 3:441 (City staff rep.). On March 11, 2014, the City adopted Ordinance 448. JA 4:664 (Def. Opp'n 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 targeted property owners themselves), if the Special Taxing Zone's levy is repealed as a result of an action—such as referendum or initiative—brought by targeted residents. JA 3:421, 444 (City staff rep.).

5. The City's Future Plans for Using the Special Taxing Zone

Although the initial territory of the Special Taxing Zone comprises just two undeveloped parcels, *see* JA 3:397 (City staff rep.), the Zone's annexation boundaries—denoting those areas that may become part of the Zone—are generally co-extensive with the City's limits. JA 4:666-67 (Def. Opp'n Statement ¶ 10). Nevertheless, only those approximately 2,500 residential parcels currently undeveloped (or underdeveloped/redevelopable), and therefore requiring a building permit, will be annexed. *See* JA 3:397 (City staff rep.). Thus, the Zone's territory will resemble a checkerboard, reflecting not a neutral assessment of neighborhoods' varying needs, but rather the compelled acquiescence of developers needing project approvals.

The proceeds from the Special Taxing Zone's levy the City will use to pay for standard municipal services, as well as for the construction and repair of facilities. *See* JA 3:404-05 (City staff rep.). Although the City contends that it will use the Zone's revenue only for the benefit of the Zone's residents, *see, e.g.*, JA 3:460 (City Resp. to RFA at 3:16-18), that assertion is false legally and factually. It cannot be squared with the City's stated intent in how it will treat the Zone's revenues *vis à vis* tax revenue from non-Zone parcels, nor with how the City will provide uniform municipal services.

For example, the City has no binding policy or protocol in place to ensure that parcels within the Zone receive first-call on police services, or enjoy a dedicated officer. Nor does the City have a method whereby Zone parcels will receive a comparatively higher level of service then adjacent parcels that do not pay the special tax. *See* JA 2:334 (Phelps Depo. at 60:12-18) (answer of "not sure" in response to question whether the City will use special tax proceeds to provide police services exclusively for the benefit of property owners who will pay the special tax); *id.* (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 services; hence, those who pay the extraordinary annual special tax will receive nothing other than access to the very same standard municipal services that the City provides uniformly to all residents. *See id.* at 335 (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."). Similarly, the City has no binding policy or protocol such that the services to be provided will be better than what non-Zone parcels receive. *See id.* at 335-36 (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 Zone's tax will be used first, before other revenue sources,

to pay for standard municipal services to the Zone. JA 3:460 (City Resp. to RFA at 3:9-11); JA 2:340 (Phelps Depo. at 70:1-17). The City does not even have a method to ensure that Zone revenue will be used proportionately to benefit Zone parcels. *See* JA 2:341 (Phelps Depo. at 75:17-22). Consequently, there is no meaningful difference between the on-the-ground output of services for parcels outside the Zone as opposed to parcels within the Zone. *See* JA 4:669-70 (Def. Opp'n Statement ¶¶ 18-20).

6. The Association's Objections to the City's Taxing Scheme

During the City's adoption of this financing scheme, the Association repeatedly voiced its concern about the legality of the City's Special Taxing Zone. JA 4:667-68 (Def. Opp'n Statement ¶¶ 14-15). Among its objections, the Association asserted that the proposed Zone and levy 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." JA 3:438 (Feb. Ass'n Letter). The Association also objected to the levy 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*. 3:438 Further, the Association objected to Section H's unconstitutional retaliation against those property owners who successfully exercise their rights through litigation. *See*

JA 3:449 (Mar. Ass'n Letter). Because the City did not heed these objections, the Association brought this action.

C. Litigation in the Superior Court

The Association challenged the Special Taxing Zone's levy through a reverse validation action and, in the alternative, an action for declaratory relief and writ of mandate. *See* Gov't Code § 53359; Code Civ. Proc. §§ 1060, 1085. Following discovery, the Association and the City moved for summary judgment. The superior court ultimately granted the City's motion as to the merits of the Association's action.[4]

First, the court ruled that the Special Taxing Zone's levy does not violate Section 53313's limitation on landowner-approved taxes because the revenue from the Zone's tax will be used to "augment" existing municipal services. JA 4:767. The court did not explain, however, what it meant by augmented services, nor how a tax that is paid by a small set of homeowners and that benefits all City residents equally satisfies the Act's restrictions on landowner-developer-approved special taxes for municipal services.

Second, the court ruled that the Special Taxing Zone's levy is not an impermissible "general" tax because the Mello-Roos Act defines all taxes levied under its authority as "special" taxes. JA 4:767-78. But the court did not explain how a legislative declaration meant to distinguish taxes from

[4] Rejecting the City's arguments to the contrary, the superior court ruled that the Association has standing to bring its challenge, and that the challenge is ripe. JA 4:766-67.

assessments can trump a constitutional provision distinguishing among different types of taxes. Neither did the court explain how a single tax can remain "special" notwithstanding that its revenue will be used to pay for the disparate litany of services that a municipality otherwise provides to all its residents.

Third, the court ruled that the City's implementing ordinance does not unconstitutionally retaliate, on its face, against targeted residents within the Special Taxing Zone, for exercising their constitutional and statutory rights to challenge the ordinance. The court reasoned that the City might not retaliate and that any retaliation would not be self-executing. JA 4:768-69. But the court did not explain why the City would not follow the mandatory provisions of its own ordinance, including the apparently automatic imposition of financial liability on Zone landowners. Nor did the court explain how the mere existence of the poison pill provision does not unconstitutionally chill the exercise of targeted residents' rights.

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On May 21, 2015, the superior court entered final judgment in favor of the City. JA 4:763. On May 27, 2015, the City served notice of entry of judgment. JA 4:760-61. On June 25, 2015, the Association filed its notice of appeal to this Court. JA 4:770-71.

STANDARD OF REVIEW

The grant of summary judgment is reviewed de novo: the court of appeal "assume[s] the role of a trial court and appl[ies] the same rules and standards that govern a trial court's determination of a motion for summary judgment." *Bainbridge*, 77 Cal. App. at 653.

A motion for summary judgment must be granted if "there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. § 437c(c). This determination requires a three-step analysis. *See id*. § 437c(p). *See also Bainbridge*, 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 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 SPECIAL TAXING ZONE'S LEVY VIOLATES THE MELLO-ROOS ACT BECAUSE ZONE PARCELS WILL NOT RECEIVE ANY ADDITIONAL SERVICE IN EXCHANGE FOR PAYING A TAX APPROVED BY A SINGLE LANDOWNER-DEVELOPER

The Special Taxing Zone's levy, authorized by a single developer in exchange for the City's project approval, purports to pay for the cost of providing a menu of standard municipal services to parcels within the Zone. *See* JA 3:404-05 (City staff rep.). Yet the services that the Zone's tax will help pay for are the same services that the City is now providing to the parcels within the Zone and to those parcels that may one day be annexed to the Zone. JA 4:669 (Def. Opp'n Statement ¶ 18). And equally important, the City will not provide any enhanced service to Zone parcels, but merely will provide the same menu of municipal services that all parcels within the City enjoy. JA 4:669-70 (Def. Opp'n Statement ¶¶ 19-20). As shown below, the Zone's levy cannot be reconciled with the limitations on landowner-approved taxes that Section 53313 of the Mello-Roos Act imposes.[5]

[5] The Association is not aware of any published decision interpreting Section 53313's limitations on landowner-approved taxes. *Cf. Golden State Water Co. v. Casitas Mun. Water Dist.*, 235 Cal. App. 4th 1246, 1259-60 (2015) (declining to address the appellant's Section 53313 argument because it had not been raised below).

A. The Special Taxing Zone's Levy Cannot Be Reconciled with the Mello-Roos Act's Plain Meaning

The Special Taxing Zone's levy fails under a straightforward reading of Section 53313. 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 *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, after formation, the district's landowners could authorize a tax for a dedicated police officer or EMT unit to provide better response times *exclusively for the benefit of* 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 for the benefit of the properties paying the special tax (a dedicated officer and EMT unit in addition to pre-existing, uniformly available, police and emergency services).

As noted above, the City's financing scheme was the direct result of two factors: the perceived need for additional revenue to maintain existing services throughout the City; and the unproved, legally irrelevant, hypothesis

that new development necessarily becomes a revenue drain on the City's general fund. *See* JA 3:367 (City staff rep.). Thus, in crafting the Special Taxing Zone, the City has done precisely what the Legislature forbad: to provide the same type *and* quality of service, merely at ostensibly higher citywide quantities, that will benefit all City residents and taxpayers equally. *Cf.* JA 4:669-70 (Def. Opp'n Statement ¶¶ 18-20).

B. The Special Taxing Zone's Provision of a Level of Service That Is Merely Adequate to Meet an Increased Demand Does Not Constitute an Additional Service

Below, the superior court agreed with the City that the Special Taxing Zone's levy comports with Section 53313's limitation for landowner-approved taxes, because the tax's revenue would be used to pay for "augment[ed]" services. JA 4:757. But the record does not support the court's legal conclusion.

The type and quality of the standard municipal services that will be paid for using the Special Taxing Zone's levy will be precisely the same type and quality of services that the Zone's parcels received before the Zone was created. *See* JA 4:668-70 (Def. Opp'n Statement ¶¶ 16-20). *See also* JA 4:648 (City Resp. to Ass'n Mot. Summ. J. at 6:14-16) ("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."). Prior to the Zone's formation, the parcels within the Zone's territory received all standard municipal services at a level

generally adequate to meet existing demand. *See* JA 4:668-70 (Def. Opp'n Statement ¶¶ 16, 19, 20). In exchange for paying the Zone's tax, property owners within the Zone will receive the same services that their parcels have always received, *i.e.*, services at a level generally adequate to meet the demand. *See* JA 4:669-70 (Def. Opp'n Statement ¶ 20). *See also* JA 4:646 (City Resp. to Ass'n Mot. Summ. J. at 4:20-24) (arguing that once a parcel is developed for residential housing, the City provides "additional police services" in the sense of "satisf[ying] the increased demand").

To be sure, the City's population well may increase (whether by new development, increases in birth rate, or even socio-economic change[6]), and that increase in turn will put a greater demand on municipal services—indeed, precisely what the City's police chief testified to in 2013. *See* JA 3:358 (City staff rep.). Hence, it is certainly plausible that the demand for and thus the

[6] For example, so-called "millennials" may choose to live at their parents' San Ramon homes owing to the Bay Area's extremely high housing costs. *See* Urban Land Institute, *Bay Area in 2015: A ULI Survey of Views on Housing, Transportation, and Community in the Greater San Francisco Bay Area*, at 2 (Sept. 2015) ("Affordability is a key concern, especially for millennials, who strongly desire to be homeowners but lack confidence in their ability to afford the home they want."). Those housing costs, however, are ultimately driven by political not economic factors. *See* Mac Taylor, Legislative Analyst's Office, *California's High Housing Costs: Causes and Consequences*, at 3 (2015) (noting that housing is expensive because of lack of supply, which in turn is caused by "community resistance to housing, environmental policies, lack of fiscal incentives for local governments to approve housing, and limited land").

level of municipal service may increase within the Special Taxing Zone.[7] But under the City's services policy, the City will not stop providing services to one neighborhood simply because its demand for those services may be higher than other neighborhoods. *See* JA 4:669-70 (Def. Opp'n Statement ¶ 20). *See also* JA 2:322-23 (Phelps Depo. at 28:1-9; 28:18-29:3; 29:5). *Cf.* 57 Ops. Cal. Atty. Gen. 423, 428 (1974) (observing, in an analysis of the County Service Area Law, that "uniform law enforcement throughout the county normally requires more extensive enforcement in populated areas"). Consequently, revenue from the Zone's tax will inure equally to the benefit of all City parcels, so that those who pay the Zone's tax will not receive any service comparatively superior to that provided to those who do not pay the tax.

Accordingly, the City's funding scheme cannot be reconciled with Section 53313's limitations on landowner-approved taxes, or with the legislative aim to prevent a subset of taxpayers from subsidizing municipal services for all City residents. Similarly unreconcilable is the trial court's legal

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[7] Nonetheless, the development of vacant parcels does not necessarily result in an increased demand on standard municipal services. Vacant lots attract criminal activity, such as drug dealing or vandalism, that put a demand on municipal services. *See Redevelopment Agency of City of Chula Vista v. Rados Bros.*, 95 Cal. App. 4th 309, 314 (2001) (observing that a blighted area "is generally characterized by a combination of specified conditions, including . . . excessive vacant lots, high crime rates . . . ."). But once the lot has been developed with, for example, high-end condominiums, the incidence of illegal behavior will probably drop precipitously, thus saving the City considerable sums in police services.

conclusion that merely "augmenting" existing municipal services in the manner the City proposes—spending additional tax dollars to benefit all City residents uniformly—can satisfy Section 53313.

C. The Special Taxing Zone's Levy Cannot Be Reconciled with the Mello-Roos Act's Structure

Like many such laws establishing alternative funding mechanisms for local governments, the Mello-Roos Act contains several provisions revealing a legislative concern that taxpayers should not have to pay more than similarly situated citizens without getting anything extra in return. *See, e.g.*, Gov't Code § 53312.7(b) (requiring school districts that have formed Mello-Roos districts to have a priority access policy for students of the Mello-Roos districts' taxpayers); *id*. § 53313.1 (prohibiting levying of a "duplicate levy, impact fee, or other exaction"); *id.* § 53313.4 (providing a temporary exemption from other fees for parcels already paying for a school-facilities Mello-Roos tax). *Cf. Shapiro*, 228 Cal. App. 4th at 783-84 ("Giving Landowners the unilateral right to determine how to apportion the benefits that would flow from a tax whose burdens may well fall on others would be contrary to both the Constitution and ordinary principles of taxation."). That concern is particularly evident in Section 53313, with its distinctions among (i) the financing of *services* (as opposed to capital facilities), and (ii) taxes approved by *landowners* (as opposed to registered voters).

These particular legislative distinctions make sense. Special limitations (like those found in Section 53313) for financing of *capital facilities* (such as schools or police precincts) are generally not needed. Undeveloped areas that would be part of a Mello-Roos district are unlikely to have any capital facilities nearby. Thus, the homeowners paying the facilities tax will actually get a higher or better level of capital improvement. Similarly, there is little need for Section 53313's protections for *registered-voter*-approved taxes. Such taxes are akin to "traditional" local property-related taxes, in that the voters are essentially taxing themselves (in contrast to landowner-approved taxes). But these "built-in" safeguards do not apply to *services* financing by *landowner*-approved tax. Hence, Section 53313's limitations help prevent local government abuse: they force local elected officials to take tough public votes to place a tax measure on the ballot and then campaign in support of taxing the residents who are their existing constituents and may vote them out of office if they do not like the tax measure.

D. Interpreting the Mello-Roos Act to Authorize the City's Financing Scheme Would Violate the Canon *in Pari Materia*

The City contended below that the Special Taxing Zone's levy comports with Section 53313 because its proceeds will be used to pay for "additional" services to the Zone's targeted residents. But as noted above, by "additional" services the City means only that it will provide the same menu of services to the Zone's parcels which those parcels (and every other parcel

in the City) have always received—namely, at a level adequate to meet demand. That understanding of "additional" service directly conflicts with longstanding judicial construction of the County Service Area Law's similar scheme. Thus, the City's interpretation violates the canon of construction *in pari materia*.

The *in pari materia* principle requires that similar statutes be construed consistently. *Lexin v. Superior Court*, 47 Cal. 4th 1050, 1090-91 (2010). Statutes are *in pari materia* when they pertain to the same subject, or otherwise have the same purpose or object. *See id*. at 1091. The County Service Area Law and the Mello-Roos Act are such statutes. As previously noted, the Legislature enacted the former to provide counties with an alternative funding mechanism to pay for municipal services to persons residing in unincorporated areas of a county. *See* Gov't Code § 25210.1. But the Legislature also imposed limitations on that authorization to ensure that one set of county taxpayers would not end up subsidizing municipal services for another set of taxpayers. *See City of Santa Barbara v. County of Santa Barbara*, 94 Cal. App. 3d at 287. These legislative aims, central to the County Service Area Law, are equally key to the Mello-Roos Act. In that statute, the Legislature provided local governments with an alternative funding mechanism to pay for municipal services, *see* Gov't Code § 53311.5, but also cabined that power so as to protect taxpayers from electoral abuse, *see id*. § 53313. Thus, the two laws are *in pari materia*, and should be construed consistently.

The Association's interpretation of "additional" service is consistent with how the court of appeal has interpreted a similar provision in the County Service Area Law. Under the current version of that law, a county service area cannot provide any service or facility that the county itself "does not perform to the same extent on a countywide basis." *See* Gov't Code § 25213. A prior version similarly limited county service areas to providing "extended services." *See* former Gov't Code § 25210.4, *added by* 1953 Cal. Stats. Ch. 858, § 1, at 2190, *repealed and replaced by* 2008 Cal. Stat. Ch. 158, § 3, at 505. These concepts are closely analogous to Section 53313's limitation that revenue from landowner-approved taxes may be spent only on "additional" services.

In *City of Santa Barbara* the court of appeal addressed the meaning of the County Service Area Law's "extended services" limitation. *See* 94 Cal. App. 3d at 281-82 (quoting former Gov't Code § 25210.4). The city had argued that "extended services" meant a service "in excess of the level of service normally rendered," whereas the county had argued that the phrase meant "any service not being provided to the same extent on a countywide basis." *City of Santa Barbara*, 94 Cal. App. 3d at 284. The court of appeal, however, concluded that no "inherent incompatibility [existed] between the contentions." *Id*. at 286. In reaching that result, the court adopted in part the

reasoning of an Attorney General Opinion. *See id.* at 284-86 (quoting 57 Ops. Cal. Atty. Gen. 423, 427-29 (1974)).

In that opinion, the Attorney General addressed whether police services should be considered "extended" when, "because of concentrated population, more extensive patrolling and law enforcement services are being performed." *See* 57 Ops. Cal. Atty. Gen. at 428. In answering that question, the Attorney General first noted that the baseline for municipal services is uniformity, *i.e.*, providing the same type of service throughout the relevant territory. *See id*. But the Attorney General then cautioned that uniformity of service does not necessarily imply the same *quantum* of service throughout the territory. For example, police services "would normally be needed more in urban areas of concentrated population than in remote rural areas," which fact results in "more extensive patrolling and law enforcement . . . in populated areas than in rural areas." *Id.* But that varying level of service does not make the service any less uniform. Thus, "law enforcement" may still be "uniform" notwithstanding that "more extensive enforcement in populated areas" is required. *See id*. The Attorney General therefore concluded that a service can be considered "extended" only to the extent that it would alter a prior uniformity of service. *See id.*

Although not adopting the Attorney General's Opinion in its entirety, *see City of Santa Barbara*, 94 Cal. App. 3d at 286, the court of appeal nevertheless agreed that a service cannot be considered "extended" if it is

already "being provided throughout the [territory] on a uniform basis," *id*. at 287. And naturally, at the time the Legislature enacted the original version of Section 53313 (and thus also when enacting the current version), *see infra* Part I.E, it was aware of *City of Santa Barbara* and the court of appeal's construction of the County Service Area Law. *See People v. Superior Court*, 225 Cal. App. 4th 1007, 1015 (2014) ("[I]t has long been settled that [t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted, and to have enacted or amended a statute in light thereof.") (internal citations and quotation marks omitted).

That construction, as applied to Section 53313 of the Mello-Roos Act, supports the Association's position, not the City's. For, prior to the Special Taxing Zone's formation, the City provided a standard set of municipal services to all parcels both inside and outside the Zone, at a level adequate to meet the demand for those services. JA 4:668-70 (Def. Opp'n Statement ¶¶ 16, 19, 20). And after the Zone's formation, parcels within the Zone will receive the same set of municipal services *at the same level—namely, at a level adequate to meet the (possibly) rising demand for those services.* JA 4:669-70 (Def. Opp'n Statement ¶ 20). In short, the City will use the revenue from the Zone's tax to ensure *uniformity* of service to *all* City residents, both those targeted by the special tax, and those not so targeted. Such uniformity of service would not qualify as an extended service under the County Service

Area Law. There is no good reason why such uniformity of service should be considered an "additional service" under the Mello-Roos Act.

E. Interpreting the Mello-Roos Act to Forbid the Special Taxing Zone's Levy Would Be Consistent with the Act's Statutory History, as Well as Sound Policy Considerations

The history of Section 53313 buttresses the Association's interpretation of that provision's limitations. The existing 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 . . . ."). *See also Friends of the Library of Monterey Park v. City of Monterey Park*, 211 Cal. App. 3d 358, 376-77 (1989). The Association's interpretation of Section 53313 therefore serves the legislative purpose of safeguarding local taxpayers from special tax abuse particularly to be found in landowner-approved taxes. *See Shapiro*, 228 Cal. App. 4th at 783-84.

Moreover, the Association's straightforward reading of Section 53313 would not undercut any legislative policy of assisting local governments to fund community facilities and services. *Cf. Alejo v. Torlakson*, 212 Cal. App.

4th 768, 788 (2013) (authorizing the application of "reason, practicality, and common sense" in interpreting statutory language). Section 53313's limitations do not apply *at all* to the financing of community facilities, or to the financing of services by registered-voter-approved tax. Hence, the City could levy the Special Taxing Zone's very same levy for the very same purposes (to meet the cost of an anticipated increased demand for standard municipal services), so long as the Zone contained at least 12 registered City voters. Further, even a landowner-approved tax under the Association's interpretation could still be levied for *any* type of service that the Mello-Roos Act otherwise authorizes, so long as the tax's proceeds were used to pay for either a new service or an enhanced version of a service already provided.

And the Association's approach is workable. Indeed, the City already knows how to provide qualitatively superior services to certain neighborhoods in exchange for their assessment payments. *See* JA 2:326 (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 327 (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 328 (48:1-6) (same).

To the extent that it is difficult for the City to pay for standard municipal services to all its residents, the problem lies not with the Mello-Roos

Act but rather with the independent funding decisions of the Legislature. The California Constitution requires that a certain minimum amount of the state's revenue be spent on education. *See* Cal. Const. art. XVI, § 8. The budget crises of the early 1990s made it exceedingly difficult for the state to satisfy this requirement with the then-existing revenue allocation. Consequently, the Legislature passed the Educational Revenue Augmentation Fund law, Rev. & Tax. Code §§ 97.2, 97.3. *See Los Angeles Unif. Sch. Dist. v. County of Los Angeles*, 181 Cal. App. 4th 414, 419 (2010). This legislation shifted some property tax revenues previously allocated to local governments to education, in order to satisfy the Constitution's funding requirements. *See County of Sonoma v. Comm'n on State Mandates*, 84 Cal. App. 4th 1264, 1275-76 (2000). "The overall result of these statutes is that the tax revenues of the counties [and other local governments] are decreased." *City of Scotts Valley v. County of Santa Cruz*, 201 Cal. App. 4th 1, 14 (2011). Hence, one may grant for the sake of argument that the City has a funding problem: school districts receive a significant portion of property tax revenue generated by new development that otherwise would be available to the City to pay for the municipal services to that new development. But the source of this revenue misalignment is the Legislature's budget policy decisions, not the rights of homeowners and taxpayers. Hence, the remedy to any such problem is not to

be found in an unjustified reinterpretation of existing law, but rather in a budgetary policy change from Sacramento.

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Although the City has capacious authority to raise revenue to fund a variety of services to its residents, the Mello-Roos Act's plain terms, as well as the policy undergirding its provisions, forbid what the City has done here: to completely eliminate any distinction between landowner- and registered-voter-approved taxes, and thereby strip local taxpayers of their statutory protections. The Special Taxing Zone's levy violates Section 53313.

II

THE SPECIAL TAXING ZONE'S LEVY IS AN UNCONSTITUTIONAL 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 Special Taxing Zone is a special purpose district and its levy is a "general tax," that tax is unconstitutional.

A. The Special Taxing Zone 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. XIIIC, § 1(c). The Special Taxing Zone is a creation of the City, *see* Gov't Code § 53325.1(a), which is a creature of the state, *e.g.*, *People ex inf. Webb v. Cal. Fish Co.*, 166 Cal. 576,

607 (1913), and thus itself is an agency of the state. The Zone (or the City sitting as the Zone) has the power to tax. *See* JA 3:443-45 (Ordinance 448). *See generally New Davidson Brick Co. v. County of Riverside*, 217 Cal. App. 3d 1146, 1150-51 (1990) (observing how a district "*actually* levies special 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 Zone has a defined geographic boundary that currently includes two parcels and may ultimately include most of the City itself. JA 4:666-67 (Def. Opp'n Statement ¶ 10). Finally, the Zone's purpose is to serve as a financing mechanism by levying the tax that Ordinance 448 authorizes to pay for the City's services to the targeted residents within the Zone. *See* JA 3:413-14 (City staff rep.). Accordingly, the Zone is a "[s]pecial purpose district."

B. The Special Taxing Zone'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), (d). A levy, the revenues from which are "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 at 1185. 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).[8] *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 1022, 1044-45 (2009).

Under these guidelines, the Special Taxing Zone's levy is an impermissible general tax. Although the Zone's tax arguably has special as well as general aspects, two characteristics confirm that, 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 Tax Will Finance a Widely Disparate Set of Municipal Services

The paradigmatic general tax is one to be used for "general governmental purposes." *Farrell*, 32 Cal. 3d at 57. The Special Taxing Zone's levy can be used to finance the acquisition, construction, and improvement of police and public safety facilities, park and recreational facilities, and open space facilities. JA 3:404-05 (City staff rep.). It also can be used to finance the annual operation, maintenance, and

[8] 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.

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* JA 3:354-55 (City Fiscal Year 2012-13 Budget).

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. art. XIIIC, § 1(a), (d)). The court further explained that the case law 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 Special Taxing Zone's levy 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 services. JA 3:404-05 (City staff rep.). 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," JA 3:356 (City Fiscal Year 2012-13 Budget), the standard municipal services that the City provides and that the Zone's levy will help to pay for well exceed 50% of the City's budget. Finally, even the *Neilson* court 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. That tax is the Zone's levy.

Preventing the levying of a single tax to pay for such disparate services provides an important protection to the Special Taxing Zone's targeted residents, as well as their neighbors. When broadly different subjects are treated within a single legislative action, there arises a significant risk of logrolling, "whereby certain group[s] of voters [or legislators], each constituting numerically a minority, but in aggregate a majority, may approve a measure which lacks genuine popular support in order to secure the benefit of one favored but isolated and severable provision." *Brosnahan v. Brown*, 32 Cal. 3d 236, 250 (1982). Requiring that each service be paid for by a separate special tax approved separately by the voters will avoid this danger. Moreover, it will ensure that the Mello-Roos Act will be applied constitutionally.

2. The Purpose of the Special Taxing Zone's Levy Is to Augment the City's General Fund Revenue

The City's principal purpose in forming the Special Taxing Zone and seeking approval for its tax is to raise revenue to supplement its general fund. *See* JA 3:367 (City staff rep.); JA 2:338-39 (Phelps Depo. at 66:21-67:4). It is true that the revenue from the tax will be allocated to the City's "Fund 204,"

which is not denominated a "general fund."[9] *See* JA 4:670 (Def. Opp'n Statement ¶¶ 23-24). But the City's funding structure for standard municipal services both before and after the Zone is—other than Fund 204—identical. *See id*. 4:671 (Def. Opp'n Statement ¶¶ 25-26). That the Zone'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 raises revenue for any and all governmental purposes). Yet this aspect of the Zone's tax distinguishes it from other, arguably more "special" taxes, that are not so obviously concocted as general fund revenue-raising schemes.

Thus, 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.

C. Taxes Purportedly Levied Under the Mello-Roos Act Are Not Exempt from the Constitutional Limitations on General Taxes

Although acknowledging that the Special Taxing Zone's levy "is designed to cover a wide variety of services," the superior court nevertheless affirmed the constitutionality of the Zone's tax. *See* JA 4:767. The court explained that the tax necessarily must be a special not a general tax because

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[9] Nevertheless, the revenues are effectively commingled because the City maintains only one actual bank account for its revenue. JA 4:671 (Def. Opp'n Statement ¶ 27). The various "funds" the City maintains, *see* JA 3:478, are mere internal accounting protocols. JA 2:319 (Phelps Depo. at 19:14-23); *id.* at 332 (57:15-22).

the Mello-Roos Act provides that a tax levied under its auspices is "a special tax and not a special assessment," Gov't Code § 53325.3. *See* JA 4:767. But Section 53325.3 cannot save the Zone's tax, for two reasons.

First, the purpose of Section 53325.3 is not to distinguish *special* from *general* taxes but rather to distinguish special *taxes* from *assessments*. *See* Gov't Code § 53325.3 ("A tax imposed pursuant to this chapter is a special tax and not a special assessment . . . ."). As noted above, the crucial distinction between a tax and an assessment is that those who pay the latter have the right to expect a special and proportional benefit in exchange for the assessment. *See supra* Statement of Case I.A. In contrast, such a showing of proportional benefit is generally not required for taxes. *See Shapiro*, 228 Cal. App. 4th at 782. Importantly, however, the Mello-Roos Act—specifically Section 53313—*does* impose assessment-like limitations on landowner-approved taxes, in that revenue from such taxes may only be used to pay for services not otherwise being provided. Hence, the Legislature evidently thought it prudent to include Section 53325.3 to ensure that, notwithstanding their assessment-like limitations, Mello-Roos levies would be still construed, for constitutional purposes, as taxes. *Cf. Bainbridge*, 77 Cal. App. 4th at 655-59 (holding that a community facilities district levy was a "special tax" rather than a "special assessment"). But that concern has no bearing here on the Association's challenge to the Zone's levy as an impermissible *general* tax.

Second, it would be inappropriate to rely on Section 53325.3 to construe the constitutional prohibition on special purpose districts levying general taxes, because a legislative interpretation of a constitutional provision governing the taxing power carries little weight. *See Rider v. County of San Diego*, 1 Cal. 4th at 14-15 (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"). *See also Shapiro*, 228 Cal. App. 4th at 788 (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"). The constitutional distinction between general and special taxes for special purpose districts (such as the Special Taxing Zone) was not added to the California Constitution until 1996, *see* Prop. 218, § 4 (approved Nov. 5, 1996), many years *after* the Legislature passed Section 53325.3. *See* 1984 Cal. Stat., ch. 269, § 15.5, at 1415. The views of a subsequent legislative enactment on a prior law do not control a court's interpretation of the prior law. *See Cal. Teachers Ass'n v. Cory*, 155 Cal. App. 3d 494, 506 (1984). It therefore follows *a fortiori* that the supposed views of the Legislature on a constitutional provision that did not even exist at the time of the legislative enactment should be similarly disregarded.

III

THE SPECIAL TAXING ZONE'S ENABLING ORDINANCE UNCONSTITUTIONALLY RETALIATES AGAINST THE ZONE'S RESIDENTS

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* JA 3:421 (Section H).

The City enacted Ordinance 448 to authorize the Special Taxing Zone to levy the landowner-approved tax. *See* JA 4:664 (Def. Opp'n Statement ¶ 5). Section 1 of that Ordinance incorporates the "Rate and Method of Apportionment of Special Tax," which is Exhibit 2 to the City's Resolution 2014-026, establishing the Zone. *See* JA 4:672 (Def. Opp'n Statement ¶ 31). Section H of the "Rate and Method of Apportionment of Special Tax" provides that, if the Zone's tax is "repealed by initiative or any other action

participated in by owners of Parcels" within the Zone, two things will happen to those targeted homeowners.

First, the City "shall cease to be obligated to provide the Authorized Facilities and Authorized Services for which the Special Tax was levied." JA 3:421. "Authorized Services" are defined as the "services authorized to be funded by the [Special Taxing Zone] as set forth in the Resolution of Formation." *Id.* 3:416. 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.* 3:413-14. Hence, a deprivation of "Authorized Services" necessarily means a deprivation of all City services. *See id.* 3:421.

Second, the obligations to provide the services and facilities that would have been funded by the Special Taxing Zone's levy "shall become the obligations of any property owners association established within the [Zone]," or if there is no such association, of the property owners themselves in proportion to the number of parcels owned within the Zone. JA 3:421.

The trigger for these responses is the repeal of the Special Taxing Zone's levy by initiative or other action of the Zone's targeted residents. In other words, the trigger is Zone 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 enquires into whether: (a) the person's conduct is protected; (b) the person has suffered adverse action; (c) the person's protected conduct was a substantial or motivating factor in the government's action; and (d) the government would 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 Junior Univ.*, 172 Cal. App. 3d 322, 344 (1985) (discussing *Mt. Healthy* test); *Tichinin v. City of Morgan Hill*, 177 Cal. App. 4th 1049, 1062-63 (2009) (reciting similar factors). 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, targeted property owners in the Zone

will suffer two adverse consequences: the denial of municipal services, and the imposition of a financial liability to pay for those services. *See* JA 3:421. *See also* JA 2:345 (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 Zone's targeted 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.

The superior court reached a contrary conclusion. Focusing on the fact that the Association challenges Section H on its face, the court concluded that the facial claim cannot succeed for two reasons: Section H does not compel the City to act in a certain way; and Section H's penalty is not "self-implementing." *See* JA 4:769. Neither argument has merit.

First, Section H is couched in mandatory, not discretionary terms. Under those terms, once the triggering activity of a Zone resident has occurred, the City "shall" cease to provide standard municipal services, and the financial responsibility for such services "shall" fall upon the Zone resident. The

general rule is that "shall" is mandatory unless the context requires otherwise. *Walt Rankin & Assocs., Inc. v. City of Murrieta*, 84 Cal. App. 4th 605, 614 (2000). Here, there is *no* indication, other than suggestions in the City's briefing below, that the City will *not* take the actions that Section H makes mandatory. Indeed, to assume otherwise would violate the presumption of regularity. *See* Evid. Code § 664 ("It is presumed that official duty has been regularly performed."); *County of San Diego v. State*, 164 Cal. App. 4th 580, 607 n.24 (2008) ("We must presume that governmental agencies will obey and follow the law.").

Second, a claim of unconstitutional retaliation does not turn on whether the retaliation is "self-implementing." *Cf. Tichinin*, 177 Cal. App. 4th at 1062-63 (noting, as an element to a cause of action for unconstitutional retaliation, that "the defendant's retaliatory action caused the plaintiff to suffer an injury [for engaging in] protected activity"). Although the precise manner in which Section H's penalties will be implemented may not yet be determined—for example, how the services will be shut off or the financial liability recorded against a Zone resident—the ultimate penalty remains.

Moreover, even if Section H were not "self-implementing" in the sense intended by the lower court, the mere uncertainty of when or how Section H will be implemented undoubtedly creates a present chilling effect. As a result, targeted residents may decline to exercise their rights because of a reasonable fear of retaliation. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So

long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.").

Accordingly, Section H is unconstitutional.

CONCLUSION

The Legislature has established many methods for the City to raise revenue to pay for municipal services to its residents, while respecting the rights of the City's homeowners and taxpayers. But the Special Taxing Zone is not one of those methods.

The judgment of the superior court should be reversed.

DATED: November 9, 2015.

Respectfully submitted,

DAMIEN M. SCHIFF
PAUL CAMPOS

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 OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 12,591 words.

DATED: November 9, 2015.

/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 November 9, 2015, a true copy of APPELLANT'S OPENING 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.

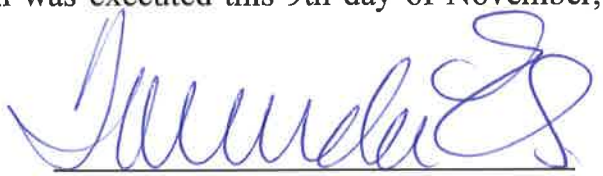
Paul B. Campos
Building Industry Association
of the Bay Area
1350 Treat Blvd., Suite 140
Walnut Creek, CA 94597
Counsel for Appellant

Allan Robert Saxe
Alicia Michelle Poon
Office of the City Attorney
2226 Camino Ramon
San Ramon, CA 94583
Counsel for 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 9th day of November, 2015, at Sacramento, California.



TAWNDA ELLING