Appeal No. D063997

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CITY OF SAN DIEGO, Plaintiff and Respondent, v. MELVIN SHAPIRO and SAN DIEGANS FOR OPEN GOVERNMENT, Defendants and Appellants.	Appeal No. D063997 San Diego County Superior Court No. 37-2012-00094831 (lead case no.) No. 37-2012-00097148 (instant matter)

Appeal from Final Judgment
San Diego Superior Court
Honorable Ronald S. Prager, Presiding

REPLY BRIEF OF

APPELLANT MELVIN SHAPIRO

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A. INTRODUCTION

The City Charter and state constitutional voting doctrine protects the electorate's right to vote on the proposed imposition of taxes. (Sections B & C) Landowners and businesses, on the other hand, are only allowed to vote on the implementation of assessments according to recently clarified Constitutional voting rules. City's attempt to merge weighted-landowner voting doctrine into the domain of taxes, special or otherwise, should be rejected by this Court on three principle grounds.

First, City's own Charter affirms and mandates this conclusion and provides a direct and independent basis for striking down the CCFD tax. (Section B) Second, City's attempt to rely on Mello-Roos to allow landowner vote, or alternatively vary or amend it under charter city home rule authority, is misplaced. (Sections C & D) Third, the Mello-Roos landowner voting provision of § 53326, subdivision (c) is an unconstitutional "tax" in the wake of recent Constitutional distinctions made to electorate-imposed *taxes* and weighted land and property owner voting for *assessments*. (Section E)

This Court should strictly interpret and uphold citizens' directives that taxation voter rights are vested in the people, and for the people, no

matter how desirous or sensitive we are about the difficulties involved for local governments to raise taxes and find other revenue sources.
(Section F)

B. THE CITY CHARTER DEFINES AND REQUIRES SPECIAL TAXES BE ENACTED BY VOTE OF THE GENERAL ELECTORATE – WITHIN THE ENTIRE CITY OR THE PORTION OF THE CITY OR DISTRICT WHERE PROPERTIES MAY BE TAXED

City claims that if the Charter is followed as Shapiro contends, any Mello-Roos district that is less than the whole city and not voted on city-wide will be invalid. (R.B. at 23.) City is mistaken on multiple grounds. First, the validity of other *possible* districts is not at issue here.[1] Second, in this case, City has made the district coterminous with the city limits and therefore has included all San Diegans and properties that maintain hotels now, or in the future. (R.B. at 2.) Third, City relies on City Charter § 76.1 for the proposition that Charter § 6 does not control Section 76.1 with respect to special taxes. (R.B. at 24.) City does this by confusing the use of the term "notwithstanding" in Section 76.1. A plain language reading of Charter § 76.1 shows that the

[1] Shapiro notes that City does not actually specify any districts it claims would be affected by this Court's ruling.

term “notwithstanding” is used to subordinate the remainder of Charter § 76.1 *to the rest of the Charter*. But even if it were assumed City’s interpretation of “notwithstanding” preempts the rest of the Charter for districts less than the entire city limits, City’s argument still fails because City Charter § 76.1 does not amend or nullify the Section 6 definition of “Qualified Elector” in any manner.

In full, “Qualified Elector” is defined under Charter § 6 as follows:

> The qualifications of an elector at any election held in the City under the provisions of this Charter shall be the same as those prescribed by the general law of the State for the qualification of electors at General State Elections. No person shall be eligible to vote at such City election until he has conformed to the general State law governing the registration of voters.

Qualifications for voters at General State Elections require a person must be a “United States citizen 18 years of age and resident in this State.” (Cal. Const. art. II, § 2; *see also* Cal. Elec. Code § 2000, subds. (a) & (b).) Charter § 76.1 does not define or in any way change the definition put forth in Charter § 6. Without a conflict in the provisions, there is nothing to “not-withstand.”[2]

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[2] It is telling that City only partially sets forth the language in Section 6. (R.B. at 23, fn. 10.) What City leaves out is “No person shall be eligible to vote at such City election until he has conformed to the general State law governing the registration of voters.” (City Charter, § 6). By allowing non-resident hotel landowner corporations such as Marriot to vote, City violates the

The conclusion reached by this Court should be that City has allowed both non-persons and non-residents to vote in violation of the City Charter and therefore the formation and taxation of the CCFD has been unlawfully enacted and should be struck down. In doing so, this Court need not go further into any other legal inquiry to resolve this case. However, to the extent that it does, City's taxing scheme is additionally violative of multiple provisions and purposes of State and Constitutional law.

C. FOR THE IMPOSITION OF SPECIAL TAXES, THE CONSTITUTION ONLY SUPPORTS AND ALLOWS ELECTORATE VOTING

In addition to the mandates of the City Charter, there is no authority or precedence in the State Constitution that voters for imposition of special taxes can be any other than the electorate.[3] City recognized this in a

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City Charter and State voter qualifications of being citizens and residents.

[3] One legal infirmity with City's arguments arises from its contention that the meaning of *qualified electors* is separate and apart from the meaning of *electorate*, with "qualified" meaning any person or entity that City rationally designates voter status to based on some connection with the Mello-Roos landowner voting exception. In the case of the CCFD, the voter "qualification" assigned by City is hotel owners and lessees who will collect, remit, and have the tax assigned to their private and public properties.

warning and press release issued by City Attorney, Jan Goldsmith:

> The California Constitution requires that taxes be approved by a two-thirds vote of the qualified electorate. To be clear, this IS a tax. But, this tax would not be submitted to all voters in the City

(O.R. 346.)

The term "electorate" is commonly defined in the Merriam Webster dictionary[4] as being "a body of people entitled to vote." Within the context of Proposition 218 and Constitution article XIII C, the "electorate" is a locality's electors as defined by the California Constitution and Election Code. (Neilson v. City of California City, 133 Cal.App.4th 1296, 1313.) Election Code § 321, subdivision (a) defines "Elector" to mean:

> [A]ny person who is a United States citizen 18 years of age or older and, except as specified in subdivision (b), is a resident of an election precinct at least 15 days prior to an election.

City incorrectly contends that variations and exceptions to the term "qualified elector" are allowed based on enactments of the State Legislature set forth in Mello-Roos. (Section 53326, subds. (b) & (c).) However, the definition of "qualified elector" in Mello-Roos is the same

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[4] Merriam-Webster.com: "electorate," http://www.merriam-webster.com/dictionary/electorate?show=0&t=1379274209, last accessed January 5, 2013.

"electorate" Shapiro argues herein. (Section 53326, subd. (a) ["shall submit the levy to the qualified electors of the proposed community facilities district" - meaning those qualified under Cal. Const., art. II, § 1].)

City relies on a principal found in a tort case to justify a different definition for qualified elector under California law. (R.B. at 15, citing San Francisco v. Industrial Accident Commis., (1920) 183 Cal. 273, 280). City argues the proposition that – if the Legislature enacts legislation based on a constitutional provision that is susceptible to more than one construction, the act of the Legislature is deemed to be constitutional until proven otherwise. (Id.)[5] City contends that since the Legislature enacted Mello-Roos after Proposition 13 was voted on by the electorate, that the legislatve intent was that the provision of Constitution, article XIII A, § 4, calling for "qualified electors" to vote on taxes, includes landowner voting based on acreage. Then, further, City attempts to extend this voting power to hotel lessees and weighted voting, based on revenues, under its home rule charter authority.

[5] Based on recent clarifications and Constitutional demands regarding electorate voting, the Mello-Roos voting provisions permitting landowner voting are now in question of no longer being "special taxes."

There are several problems with City's argument. First, City contends that the Legislature "*explicitly* defined qualified electors for purposes of community facilities districts." (R.B. at 15, emphasis added.) Taking City's argument at face value, by varying the definition of "qualified elector" from a per-acre (or portion thereof) landowner vote to a vote that is based on hotel revenue and includes non-landowners in the form of lessees, City has violated the *explicit* definition of qualified electors put forth by the Legislature.[6] (Section 53326, subd. (c).) Second, Shapiro provides case law precedence both predating and postdating the Mello-Roos exception cited by City whereby the authorities unanimously hold that the qualifications for electors are proscribed by Article II, Section 1 of the State Constitution and does not include landowner voting. (See, O.B. at 20-23.)[7] Third, subsequent *Constitutional* enactments by

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6 By making this point, City supports the argument of Shapiro that under home rule conflict analysis, the state has preempted charter cities and therefore determined that voter qualifications for imposing taxes is not a municipal affair. (*See* discussion in Section D, *post*.)

7 Historically, courts have consistently defined the term qualified elector as "a person who has certain qualifications (being the ones outlined in article II, section 1, of the Constitution.)" (McMillan v. Siemon, (1940) 36 Cal.App.2d 721, 725-726, *citing* Bergevin v. Curtz, (1899) 127 Cal. 86, 89, 90; Russell v. McDowell, (1890) 83 Cal. 70, 80.) The McMillan court goes on further to state that "the term 'qualified elector', as used in article II, section 1, of the Constitution, we think, is used in the same sense and means an

California voters have settled the issue that only the electorate votes on any and all taxes. Finally, under the plain language of Mello-Roos, the Legislature never made landowners "qualified electors." Read in pertinent part, Section 53326, subdivision (a) reads:

> The legislative body shall then submit the levy of any special taxes to the qualified electors of the proposed community facilities district or to the qualified electors of the territory to be annexed by the community facilities district in the next general election or in a special election to be held.

The term "qualified electors" as used in § 53326, subdivision (a) of Mello-Roos is synonymous with "the electorate." City errs in arguing:

> Under the Act, the qualified electors may be comprised of different constituents depending on the nature of the district and the special tax to be imposed. (Gov. Code § 53326.)

(R.B. at 15, citation in original.)

A more accurate way to read Section 53326, subdivision (a) is to recognize that it provides for a public vote by the qualified voters, or electorate. Section 53326, subdivision (b) accounts for a situation where

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elector who is entitled to vote." (Id. at pp. 725-726.) Other California cases stretching back almost one hundred years affirm the definition of a qualified elector as one who fulfills the requirements of Article II, Section 1 of the California Constitution and none other. (*See* Minges v. Board of Trustees, (1915) 27 Cal.App.15, 18 ["A qualified elector, then, is a person whose qualifications measure up to the constitutional standard."]; *see also* Schaaf v. Beattie, (1968) 265 Cal.App.2d 904, 909-910.) More recently, *see* Nielsen v. City of California City, (2005) 133 Cal.App.4th 1296, 1313.)

there are not enough registered voters to have a proper public election and subdivision (c) seeks to carve out an exception for taxes on commercial properties. However, after the passage of Proposition 218, both subdivisions (b) and (c) of Section 53326 are now more properly defined and considered to be assessments, despite being called "taxes" under the Mello-Roos statute. Regardless, neither subdivisions (b) nor (c) mention the term "qualified electors" as City insinuates.

City is correct, however, in that Proposition 218 did not change voting requirements for special taxes, but City is not correct in the way it portends. (R.B. at 20.) Instead, what Proposition 218 did was *affirm* the existing electorate voting requirement for special taxes. Enacted as part of Proposition 218, article XIII C, section 2(d) reads, in pertinent part:

> No local government may impose, extend, or increase any special tax unless and until that tax is **submitted to the electorate** and approved by a two-thirds vote."

(Const., art. XIII C, § 2, subd. (d), emphasis added.)

Even prior to the enactment of Proposition 218, it was the general electorate who voted to impose taxes ever since the inception of Proposition 13 and Article XIII A, § 4 requiring a "two-thirds vote of the qualified electors of such district." The Legislative Analyst's statement – that nothing in Proposition 218 changes the voter rules regarding special

taxes and voting – is consistent with appellants' contentions in this case. Proposition 218 merely restated and fortified the electorate voting requirement for special taxes. City cannot provide authority that voters or the Legislature ever intended any other construction or exception to Article XIII C of the Constitution.

Therefore, the only method by which a special tax may be enacted in California is a two-thirds vote of United States citizens who are 18 years of age or older and fulfill California residency requirements under Election Code § 321, subdivision (a), in other words: the electorate.

D. CITY CANNOT ESTABLISH THAT IT HAS HOME RULE AUTHORITY TO VARY STATE VOTING LAWS

Shapiro has made the case throughout this litigation that determining whether an act by a charter city is a "municipal affair" requires a home rule analysis. (O.B. at 38-45.) City has not done this analysis and, again in its Respondent's Brief, City does not go through the home rule elements. In short, City provides no new arguments on this point.

Instead of a home rule analysis, City misstates Shapiro's contention regarding local taxation issues by arguing the same line of cases stating

that a charter city's home rule authority gives it supremacy in municipal affairs.[8] (R.B. at 26.) Without going through the home rule analysis set forth in <u>State Bldg. and Trades Council v. City of Vista</u>, (2012) 54 Cal.4th 547, City apparently wishes to persuade by solely presenting the legal conclusion it wishes this Court to reach. In doing so, however, City ignores the important distinction that Shapiro makes between (1) home rule authority to enact local tax measures, and (2) Constitutional and statewide controls on how votes are to be conducted for special taxes and assessments. (See, Shapiro's O.B. at 33 ["While the *power to tax* remains a core municipal concern, the *manner* in which charter cities go about it are pervasively controlled by state law."]

City makes a further perplexing argument, that because state government does not utilize Mello-Roos, Mello-Roos cannot be a matter of statewide concern. (R.B. at 27.) It is irrelevant that state government does not utilize Mello-Roos; Mello-Roos was created as a special statutory framework for *local governments* to use. (*See* Gov. Code § 53311.5 et seq.)[9] While City misapplies the legislative intent of Mello-Roos with

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[8] City ignores the Constitutional restrictions on a city's home rule authority. (Cal. Const., art. XI, § 5.)

[9] The term "local" in the context of government or agency is used over 40 times in Article 1 of Mello-Roos alone.

regards to the term "qualified elector," here the statute clearly shows the legislative intent for Mello Roos to apply to local government. (Id.)

City cites Bellus v. City of Eureka , (1968) 69 Cal.2d. 336, 345, for the proposition that under home rule authority City may vary state voting laws for CCFD special tax as it sees fit. (R.B. at 28.) However, City has *still* not done the basic home rule analysis to determine if it may vary the Mello-Roos and Election Code voting rules which are now (and have long been) statewide controls that occupy the field.

Without a proper home rule conflict analysis, City avoids addressing the "voter qualification" issue so as to avoid both exposing the conflict and ultimate conclusion that elector qualifications are a statewide concern. (*See* Johnson v. Bradley, (1992) 4 Cal.4th 389, 409 ["We have no reason to doubt petitioners' major premise; the integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern."].)

Therefore, City lacks home rule authority to vary state voting laws for the enactment of taxes or Mello-Roos landowner assessments.

E. EXCEPTIONS TO ELECTORATE VOTING FOR SPECIAL TAXES ARE NOT PRESENT IN THIS CASE, IF EVER. BUSINESSES AND LANDOWNERS VOTE ON ASSESSMENTS AND OTHER PROERTY LEVIES, NOT SPECIAL TAXES. CITY'S RELIANCE ON AMENDING MELLO-ROOS VOTING PROVISIONS PROVIDES NO AUTHORITY OR SAFE HAVEN.

1. No California Court has Considered or Ruled on Whether Landowners or Business Owners May Vote to Enact a Special Tax

City asks this Court to validate a landowner vote based on arguments that Mello-Roos supports City's weighted landowner and lessee voting ordinance. Although this Court need not look any further than the City Charter to strike down the CCFD tax (Section B, *ante*), to the extent that the Court desires to resolve City's contention, Shapiro reiterates two important points.

First, City argues that Mello-Roos does not even apply to its efforts to enact the CCFD. (R.B. 27 [City argues that "[e]qually clear, the City was never required to utilize the Act, and it had the power to use some but not all of the Act."]) Shapiro has argued throughout the litigation that City, to the extent that it *is* substantially relying on Mello-Roos authority, is not properly following the provisions of Mello-Roos, even though as a

chartered local agency, it is bound by Mello-Roos. (Section 53317, subd. (h); 53315.) City departs from Mello-Roos in substantial regards by allowing landowners votes to and hotel operators, not basing votes on acreage, but on allocating weighted votes based on revenue, allowing lessees to vote, and creating a district that grows in size as new hotels are added without a subsequent vote.[10]

Second, where City attempts to gain support from the Mello-Roos framework by the landowner provision in Section 53326 subdivision (c), constitutional law no longer, if it ever, supports the proposition that a landowner vote can enact a special tax. Instead, Proposition 218 clearly delineates a bright line between taxes voted on by the electorate and assessments that are subject to a property or business owner vote. (*See* Cal. Const., arts. XIII C, § 1 and XIII D, § 4.) While City is correct in stating that Mello-Roos § 53326 subd. (c) provides for a landowner vote in in special situations, and that subdivision (c) Mello-Roos voting was previously considered to be a "special tax" (R.B. at 17), Section 53326 subdivision (c) voting methodology is now in question for imposing a tax

[10] *See* § 53326 subd. (c) [landowner's to receive one vote per acre or portion thereof]; § 53340.1, subd. (a) [lessees on exempt government land are subject to the tax but not granted a right to vote]; § 53325.5, subd. (b) [the legislative body may not include any territory not described in the notice of hearing to alter the boundaries of the district].

because we now know such weighted landowner voting schemes are assessments.

Since the enactment of Section 55326, subdivision (c) in 1986, there has been no reported need or occasion for any state court to visit or rule on the legality of a landowner only vote for a special tax pursuant to that section.[11] In this case of first impression, this Court should recognize that the Mello-Roos landowner voting structure pursuant to Section 53326, subdivision (c) is now controlled by the law of assessments under Constitution article XIII C.[12]

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11 City's reference to billions of dollars of Mello-Roos enactments. (R.B. at 16) is irrelevant to this case as confirmed by this Court's Order dated December 20, 2013 denying judicial notice of such "Mello-Roos Facts." Nothing in this case retroactively affects any prior bond issuances, nor would Mello-Roos landowner votes in the form of assessments or other real property levies be precluded by any resulting judicial opinion in this case.

12 Notably, City abandons and does not adopt Judge Prager's authorities for landowner voting authorized in the water district cases. (J.A. 3 [ruling, citing Philippart v. Hotchkiss Tract Reclamation Dist., (1976) 54 Cal.App.3d 797 and Salyer Land Co. v. Tulare Water Dist., (1973) 410 U.S. 719; Shapiro's O.B. at 25 ["Since the adoption of Proposition 218, water districts regulate and assess fees to service particular properties. These are not taxation matters, they involve assessments."].) City now limits its entire "landowner vote" argument to whether § 53326 (c) of Mello-Roos supports it, and whether City has authority to alter "qualified elector" definitions to its liking and needs.

Under either scenario, if the Court decides to examine the landowner voting provision of Mello-Roos in conjunction with this case, the CCFD is invalid. Either City is forging its own tax law in contravention of the Constitution and its own Charter, or City is misapplying § 53326 subdivision (c) of Mello-Roos, a provision which itself no longer applies to special taxes.

2. **The CCFD Levy is More Accurately Classified as an Assessment**

Based on the development of assessment and taxation voting over the last quarter century, we now know that taxes are imposed by vote of the electorate and assessments are enacted by vote of affected property or business owners. The classes of voters may not be manipulated, weighted and otherwise designated at the whim of a local government unless the checks and balances of Article XIII D, § 4, subdivision (e) of the Constitution can be explicitly applied and strictly reviewed by the courts. (Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, (2008) 44 Cal.4th 431, 437.)

Proposition 218 has clearly defined what is and what is not an assessment. (*See* Const., art. XIII D, § 4.) Assessments have particular characteristics that make them different from special taxes. (*cf*. Const. art. XIII C, § 1.) After the passage of Proposition 218, assessments are now

defined by the benefit from the assessment to the properties or businesses being levied upon and the burden of the levy restricted to those same entities. Cal. Const. Art. XIII D, §§ 4(f) & (4)(g).) While City claims that the CCFD is a special tax (R.B. at 2), the CCFD levy mostly has elements consistent with an assessment. For this reason, Shapiro has requested this Court make a determination on whether the CCFD levy is even a "tax" at all.

As admitted by City in its "Fact Sheet for Hotel Property Owners," City answered the question - *what is the voting process for the special tax levy* - by responding "it is the same as the 2008 TMD assessment methodology." (O.R. 192-193.) Voting for the CCFD involved weighted burden and benefit styled voting rights based on distance from the site of the proposed convention center expansion. (*See* AR 20-21, 25 [map of district]; AR 14, 4226, 51 ["Zone 1 means all Assessor's Parcels within City that are not within Zone 2 or Zone 3."].) The substantial lot of hotel lessees and owners closer to the convention center were more likely to vote to approve the CCFD tax based on the greater benefit they would receive, whereas hotels tens of miles away within San Diego would have higher rates of assessment and burden relative to negligible or nonexistent benefit.

If the CCFD levy utilizes assessment style voting, then by City's own admission, it has violated the law. (O.R. 331-332 [admission by City's outside counsel as explained to the city council and hotel owners].)

3. **Voters Have Closed Landowner and Business Owner Voting Loopholes**

City's enactment of the downtown public convention facility does not comply with the strictures now encompassed and controlled by Constitutional taxation voting doctrine. City's explanation of the intent of drafters of the propositions following Proposition 13 is incorrect. City states that "[l]andowner votes authorizing community facilities district special taxes have always been constitutional under Proposition 13, and none of the subsequent voter initiatives Appellants discuss changed that conclusion." (R.B. at 19.) However, the voting history and the intent of subsequent propositions, as recognized by California courts, are very different. The drafters of Proposition 218 placed the measure on the ballot to "protect[] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Howard Jarvis Taxpayers Ass'n v. City of San Diego, (1999) 72 Cal.App.4th 230, 235.) The court in Howard Jarvis Taxpayers Ass'n

recognized that the intent of the drafters was to prevent local governments from exploiting loopholes to avoid public votes on tax issues. (Id. at p. 238 [citing the "Findings and Declarations" for Proposition 218].)

As noted in City of Rancho Cucamonga v. Mackzum, charter cities are subject to Constitution article XIII A. (City of Rancho Cucamonga v. Mackzum, (1991) 228 Cal.App.3d 929, 945.) In order to determine the meaning of an initiative measure, several rules are taken into consideration: (1) an initiative measure should receive a practical construction, (2) its literal language may be disregarded to avoid absurd results and to fulfill the intent of the framers, and (3) that ambiguities in the wording of the measure may be clarified by reference to the material presented to the voters in the ballot pamphlet and the contemporaneous construction of the measure by the Legislature. (City and County of San Francisco v. Farrell, (1982) 32 Cal.3d 47, 52.)

Although it is doubtful that additional sources are needed to interpret the meaning of "qualified elector," "voter," and "electorate" as those terms relate to special taxes, the intent of the voters and proponents of Propositions 13, 218, 62 and 26, through the subsequent passage of initiatives clarify that it is the electors, making up the general electorate, who shall vote to enact special taxes. Landowner and business owner

voting is now fully encompassed in Constitutional voting doctrine regarding *assessments*. Voters in elections for special taxes are those who fulfill the requirements as set forth in California Elections Code § 2000 within a taxing district – not businesses, corporate entities, or property owners who may ultimately collect, remit, or be obligated to pay the tax.

Thus, as a matter of law and keeping in mind the intent of the drafters of Proposition 218 (and Propositions 13, 62 and 26), in order for a local government to pass a special tax measure for a district such as the CCFD, there must be a vote of the electorate (aka registered voters).

F. COURTS SHOULD STRICTLY ENFORCE AND RESTRAIN THE CCFD REVENUE RAISING SCHEME DESPITE ITS LAUDABLE GOAL AND NEED FOR A LOCAL REVENUE SOURCE TO BUILD PUBLIC FACILITIES

This case involves an important principle – that in a democracy, elections are held so that the people, as a sovereign, are able to choose between competing candidates or ideas by casting a vote.

City's attempt to alter Constitutional special taxes voting doctrine (and City Charter voter requirements) under the auspices of a legislative

prerogative of home rule and the Mello-Roos landowner exception defies the will of the people residing in both the city and this state.

Political power in America is based on the notion of "popular sovereignty" as noted by Justice Matthews in Yick Wo v. Hopkins:

> Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but, in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

(Yick Wo v. Hopkins, (1886) 118 U.S. 356.)

California law recognizes this principle. (*See* California Constitution, article II, § 1 ["All political power is inherent in the people... they have the right to alter or reform [Government] when the public good may require."]; Cal. Gov. Code § 100, subd. (a) ["The sovereignty of the state resides in the people thereof"].)

In other words, the purpose of democracy is to accomplish the objectives that best serve the interests of the people. City violated this fundamental principle.

Rather than attempt to build a coalition and, through an election of the citizens of San Diego, implement a tax to finance the expansion of the convention center, City has instead bypassed the people and orchestrated a vote that is undemocratic. Because it could not win on the strength of its

arguments, City instead redevised established provisions of California voting laws to fit the measure and issue that City wanted passed. California has a robust initiative system in order to maximize the voice of the people and City has turned that principle on its head.

When City carves out certain properties for voting on special taxes on a matter of citywide interest (a convention center), it defeats democracy. Rather than taking the issue to the voters, the City handpicked voters to fit City's desired result.[13]

This Court is being asked by City to pay no attention to what happens behind the curtain. In an effort to bolster its "landowner vote" argument, City touts a 92% voter approval rate for the CCFD. The San Diego public (the electorate) did not vote in this election, not because they were not present in the district, but because City excluded them from the vote and rigged the system. According to City, "[a]s certified by the City Clerk, 19,454,222.42 votes were cast, and of those cast 92% voted 'YES,' and 8% voted 'NO.'" (R.B. at 10, citing Tab 141, AR 7523; Tab 8, AR 78-81.)

[13] It did this by redefining Constitutional (arts. XIII A, § 4 and XIII C, § 2(d)) and Charter §§ 6 and 76.1 as those provisions use the term "qualified electors." (See discussion in Section C, *ante*.)

Voter approval rates over 90% are an aberration in a democratic system. City apparently misses the irony that such a high approval rate proves Shapiro's point that City is manipulating California law prohibiting local governments from increasing taxes without approval by registered voters in the district. (R.B. at 10 [argument of City].) The history of failed city-wide votes for taxes supporting a convention center expansion also contradicts City's argument that there is overwhelming support for the CCFD. (*See* Shapiro's O.B. at page 5 [failed electorate votes on special and general taxes for convention center expansion].)

No matter how beneficial and needed City's creative finance and voting mechanism may be to attain convention expansion, this Court should not allow City to re-construe the two-thirds qualified electorate voter requirements of the Constitution, state law, and City's own charter. Although sympathetic to the difficulties of local governments in raising new local revenues for such praiseworthy public projects, our High Court has recognized the need to uphold and enforce the popular voting mandate:

> We are sympathetic to the plight of local government in attempting to deal with the ever-increasing demands for revenue in the post-Proposition 13 period, and we are especially reluctant to interfere with sorely needed projects for new and improved courtrooms, criminal detention facilities, and other justice facilities. Yet Proposition 13 and its limitations on local taxation are constitutional mandates of the people which we are sworn to uphold and enforce. Any

> modification of these mandates must come from the people who, by constitutional amendment, may adopt such changes by a simple majority vote.

(Rider v. County of San Diego, (1991) 1 Cal.4th 1, 16, citations omitted.)

Since the decision in Rider, California courts have continued to defer to the will of the people when it comes to enacting new taxes. In Borikas v. Alameda Unified School Dist., the court refused to allow a local taxing authority from unlawfully expanding upon Government Code § 50079, stating:

> We are aware that we are being called on to interpret statutory language enacted in a different economic era and in the wake of two of the most far-reaching tax constraining measures ever passed by the state electorate (Propositions 13 and 62), that the state has since faced crippling economic conditions, and that school districts and other local governmental entities are more dependent than ever on the revenues from special taxes. The courts, however, cannot recalibrate the taxing power statutorily delegated to local entities; any adjustment in that regard must be made by the state Legislature.

(Borikas v. Alameda Unified School Dist., (2013) 214 Cal. App. 4th 135, 140.)

Similarly, although sympathy may lie with City's effort to obtain an expanded convention center to compete with other markets, provide increased commerce and in turn increase general fund sales tax revenues, the role of this Court in upholding the law should not be deterred in rejecting City's new special taxes voting scheme.

G. CONCLUSION

For the above foregoing reasons, and those set forth in Shapiro's opening brief, reversal of the trial court is warranted, and this matter should be remanded to the trial court for entry of a judgment in favor of Shapiro.

Respectfully submitted,

Dated: January 7, 2014

Craig A. Sherman, Esq.
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MELVIN SHAPIRO

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant Melvin Shapiro, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.204, subd. (c), that the above *REPLY BRIEF OF APPELLANT MELVIN SHAPIRO* has been produced using 13-point Roman type, and contains 5,451 words (including footnotes, headings, and citations), which is less than the 14,000 words permitted by this rule, as counted by the word counter of the computer program used to prepare the brief.

Dated: January 7, 2014

LAW OFFICE OF CRAIG A. SHERMAN

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Attorney for Appellant
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DECLARATION OF SERVICE

Appeal No. D 063997
Court of Appeal, Fourth District, Division One
San Diego Superior Court - Case No. 37-2012-00094831 (lead case)
CITY OF SAN DIEGO v. MELVIN SHAPIRO

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years, my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA, and I am currently the attorney to this action; that I served the below-named person(s) the following document(s):

REPLY BRIEF OF APPELLANT MELVIN SHAPIRO

On January 7, 2014 on the following person(s) in a sealed envelope or package, addressed as follows:

**** SEE ATTACHED SERVICE LIST ****

in the following manner:

1) ☐ By sending via carrier Norco Delivery Service for second-day business delivery.

2) ☐ By hand delivering or having delivered by courier, during usual business hours, copies to the office(s) of the above-named addressee(s), and leaving said package or envelope with the person who was apparently in charge.

3) ☒ By placing a copy in a separate envelope, with postage fully pre-paid, for each person and address named above and depositing each in the U.S. Mails at San Diego, California.

I declare under the penalty of perjury under the laws of the State of California that the above foregoing is true and correct.

Executed on January 7, 2014 at San Diego, California.

Paul Best

SERVICE LIST

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SERVICE LIST (continued)

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