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14 City of San José

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF SANTA CLARA

17 CITY OF SAN JOSE, a California municipality,  
18 Plaintiff,

19 v.

20 ALL PERSONS INTERESTED IN THE MATTER  
21 of the validity of the proceedings, including the  
landowner election, forming the City of San José  
22 Convention Center Facilities District No. 2008-1,  
Santa Clara County, California; the validity of the  
23 special tax authorized by the Convention Center  
Facilities District; the validity of the bonds to be  
24 secured and repaid by the special tax; the  
establishment of the appropriations limit for the  
25 Convention Center Facilities District; the validity of  
all contracts and agreements related thereto; and the  
26 validity of the Ordinance levying the special tax,

27 Defendants.  
28

CASE NO. 109 CV 148458

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S APPLICATION FOR  
ENTRY OF VALIDATION DEFAULT  
JUDGMENT**

Date: March 8, 2010  
Time: 1:30 p.m.  
Dept: 18 (Old Courthouse – 161 N. 1st St.)  
Judge: Hon. William J. Monahan

1 **I. INTRODUCTION**

2 This case concerns a “convention center facilities district” in the City of San José  
3 (the “City”) that contains, and taxes, only hotel properties. It was established by the City  
4 Council (the “City Council”) of the City to provide public financing for the acquisition,  
5 construction, reconstruction, replacement, rehabilitation and upgrade of the San José Convention  
6 Center.

7 On March 10, 2009, the City Council completed its legal proceedings for  
8 formation of a convention center facilities district entitled “Convention Center Facilities District  
9 No. 2008-1, City of San José, County of Santa Clara, State of California” (the “Convention  
10 Center Facilities District”) and called a special election to obtain the required voter approval for:  
11 (1) the authorization to levy a special tax upon certain real property within the Convention  
12 Center Facilities District to finance specified facilities; (2) the authorization to issue up to \$750  
13 million in bonds for that purpose, which bonds are to be repaid by the proceeds of the special  
14 tax; and (3) the establishment of the appropriations limit (Article 13B, California Constitution)  
15 for the Convention Center Facilities District.

16 The Convention Center Facilities District formation and special election  
17 proceedings were conducted pursuant to Chapter 14.32 (the “Chapter”) of the San José  
18 Municipal Code incorporating the provisions of the Mello-Roos Community Facilities Act of  
19 1982 (Sections 53311, *et seq.* of the California Government Code), as they existed at the time of  
20 the adoption of the Chapter (the “Act”) and as modified by the Chapter. All code section  
21 references hereafter in this Memorandum are references to the California Government Code  
22 unless otherwise specified.

23 Five features of the subject proceedings are the subject of this validation action,  
24 brought by the City pursuant to Code of Civil Procedure 860, *et seq.* and Section 53359. First is  
25 the City’s legal authority to pursue this validation action. Second is the City’s determination that  
26 the creation of the Convention Center Facilities District, the levy of the special tax, and the  
27 authorizing and issuance of the special tax bonds are all municipal affairs of the City as to which,  
28 as a charter city, the City is competent to legislate using its charter powers. Third is the City’s

1 adherence to the procedure it established. The fourth feature addresses the City’s utilization, in  
2 modified form, of the landowner-voter mechanism of the Act to achieve satisfaction of the voter  
3 approval requirements of the California Constitution for the levy of a special tax for specified  
4 purposes within the Convention Center Facilities District, for the issuance of bonds secured by  
5 the special tax, and for the establishment of the appropriations limit for the Convention Center  
6 Facilities District. Fifth, the City seeks to validate the rate and method of apportionment of the  
7 special tax, which is *measured* as a percentage of hotel rentals and *collected* in the same manner  
8 as the transient occupancy tax, because it is nonetheless *levied* and *enforced* as a tax on real  
9 property in accordance with the Act.

10 **II. THE COURT HAS JURISDICTION OVER ALL PERSONS INTERESTED AND**  
11 **ENTRY OF THE REQUESTED DEFAULT VALIDATION JUDGMENT IS**  
12 **PROPER.**

13 Pursuant to Code of Civil Procedure Section 861 and this Court’s Orders of July  
14 30, 2009 and October 29, 2009, jurisdiction over defendants — all persons interested in these  
15 proceedings — has been obtained by repeated publication of the Summons in the *SAN JOSE*  
16 *MERCURY NEWS*, by the mailing of a letter describing this validation action, as provided in this  
17 Court’s Order of July 30, 2009, to all landowner-voters within the Convention Center Facilities  
18 District, and by the posting of copies of the Summons in two places within the City of San José.

19 There was a putative and tardy response filed to the Complaint by William J.  
20 Garbett, and the Plaintiff did not post the copies of the Summons for the full period of time  
21 ordered. These were the subject of the City’s “Motion for Order Striking Putative Response of  
22 William J. Garbett and for Entry of Clerk’s Default Against All Interested Persons” filed  
23 September 30, 2009. That Motion was heard on October 29, 2009. This Court granted the  
24 Motion by its Order filed the same date. It struck the putative answer filed by Mr. Garbett,  
25 excused the failure to post the Summons for the full period of time ordered, and found that the  
26 notice that was provided was “sufficient under Code of Civil Procedure Sections 861 and 862 to  
27 establish this Court’s jurisdiction over all persons and the subject matter of this action in this *in*  
28 *rem* validation action.” (Order, paragraph 6) The Order concluded by ordering the Clerk to  
“enter the default of all defendants in this matter.” Accordingly, the Clerk’s default as to “All

1 Persons Interested...” and William J. Garbett, was entered on November 2, 2009, and Plaintiff  
2 now seeks rendition of a default judgment.

3 Mr. Garbett filed a “Petition for Reconsideration” which was heard and denied by  
4 this Court on December 10, 2009. Mr. Garbett has filed a Notice of Appeal as to both of the  
5 Court’s rulings.

6 As stated in Section 862 of the California Code of Civil Procedure: “Jurisdiction  
7 shall be complete after the date specified in the summons.” Therefore, this Court’s jurisdiction is  
8 complete and a default judgment is warranted in this action.

9 **III. STATEMENT OF FACTS**

10 Filed with this Court concurrently with the filing of this Memorandum of Points  
11 and Authorities are the declarations of Lee Price, City Clerk of the City of San José, and of  
12 Daniel Bort. Ms. Price’s Declaration sets forth the City’s proceedings to establish the  
13 Convention Center Facilities District, and the references to “Exhibits” in this Memorandum are  
14 to those attached to Ms. Price’s Declaration.

15 The City of San José is a charter city under Article 11, Sections 3, 5 and 7 of the  
16 Constitution of the State of California. On August 19, 2008 the San José City Council passed for  
17 publication, and on August 26, 2008 it adopted, its Ordinance No. 28387 which placed into the  
18 City of San José’s Municipal Code, Chapter 14.32 entitled “Convention Center Facilities District  
19 Financing Procedure” (the “Chapter”). The title of the Ordinance, as provided in the San José  
20 Municipal Code, was published in the *POST RECORD* on August 22, 2008. See Exhibit A.

21 Beginning in September 2008, the City Council undertook to form the Convention  
22 Center Facilities district pursuant to the Chapter. The name of the Convention Center Facilities  
23 District, as set forth on the recorded boundary map, is “Convention Center Facilities District No.  
24 2008-1, City of San José, County of Santa Clara, State of California.” It is being referred to in  
25 this Memorandum as the “Convention Center Facilities District.”

26 The Chapter, in its Section 14.32.700, made the adoption of local goals and  
27 policies under the Act “permissive and not mandatory.”

28 On September 30, 2008, the City Council adopted its Resolution No. 74604,

1 Resolution of Intention to form the Convention Center Facilities District, which, among other  
2 things, approved the Boundary Map of the proposed Convention Center Facilities District and  
3 authorized and ordered the Boundary Map to be recorded in the Office of the Santa Clara County  
4 Recorder. See Exhibit B.

5 The Boundary Map was recorded on November 4, 2008 in the Book of Maps of  
6 Assessment and Community Facilities Districts maintained by the County Recorder of the  
7 County of Santa Clara in Book 44 at Pages 32-46, as Instrument Number 20037072. See Exhibit  
8 D.

9 Also on September 30, 2008, the City Council adopted its Resolution No. 74605,  
10 Resolution to Incur Bonded Indebtedness. See Exhibit C.

11 Both the Resolution of Intention and the Resolution to Incur Bonded Indebtedness  
12 set public hearings for November 18, 2008.

13 On November 18, 2008 the City Council adopted its Resolution No. 74669  
14 (“Resolution Continuing Public Hearing”) that continued the Public Hearing to January 13, 2009.  
15 See Exhibit E.

16 On January 13, 2009, by its Resolution No. 74758, the City Council repealed  
17 Resolution No. 74604, but nonetheless re-approved the Boundary Map and ratified its  
18 recordation. See Exhibit F.

19 On February 3, 2009 the City Council adopted a new Resolution of Intention,  
20 with a list of authorized facilities and a rate and method of apportionment of the special tax that  
21 were different from those contained in the repealed Resolution No. 74604. This new Resolution  
22 of Intention to form the Convention Center Facilities District (Resolution No. 74783), set forth  
23 the proposed rate and method of apportionment of the special tax, the facilities authorized to be  
24 financed through the special tax, and the proposed appropriations limit for the Convention Center  
25 Facilities District. See Exhibit G.

26 That same meeting, the City Council adopted its Resolution No. 74784,  
27 Resolution to Incur Bonded Indebtedness, in which it proposed to authorize the issuance of up to  
28 \$750 million in bonds to be secured and repaid by the special tax. See Exhibit H. This

1 Resolution and the Resolution of Intention, will be collectively referred to as the “Preliminary  
2 Resolutions.”

3 The Preliminary Resolutions, as they were required to do, set a public hearing for  
4 the consideration of their contents not less than 30 nor more than 60 days later. The public  
5 hearing was set for March 10, 2009.

6 Proper notice of the hearing was given by publication as required by the Act. See  
7 Exhibit I. In addition, although it is not required by the Act, notice was mailed, first-class postage  
8 prepaid, to each owner of land within the Convention Center Facilities District except in cases  
9 where the land was owned by a public agency in which case the mailing was to the lessee of the  
10 public agency at their addresses as shown on the last equalized assessment roll or as otherwise  
11 known to the City Clerk. See Exhibits J and K. Finally, a Hearing Report conforming to Section  
12 53321.5 was filed with the City and made available to the public. See Exhibit L.

13 On March 10, 2009, the public hearing was held as noticed.

14 After the close of the public hearing, and at the same meeting, the City Council  
15 determined to proceed, and thus adopted its Resolution No. 74826, the “Resolution of  
16 Formation,” that identified the types of facilities and incidental expenses to be financed by the  
17 Convention Center Facilities District and set forth the “Rate and Method of Apportionment of  
18 the Special Tax.” See Exhibit M. The Resolution of Formation indicated that the Special Tax  
19 could be used to finance the facilities and incidental expenses, including the repayment of any  
20 bonds. The Resolution specifically found that no majority protest had been submitted at the  
21 public hearing. The Resolution also proposed to set the annual appropriations limit of the  
22 Convention Center Facilities District at \$50 million for the 2008-2009 fiscal year.

23 Also, at the same meeting, the City Council adopted its Resolution No. 74827, the  
24 “Resolution Deeming it Necessary to Incur Bonded Indebtedness,” authorizing the City Council  
25 to issue, over the life of the Convention Center Facilities District, bonds in amounts not to  
26 exceed \$750 million. See Exhibit N.

27 Thereupon, also on March 10, 2009, the City Council adopted its Resolution No.  
28 74828, Resolution Calling Special Mailed-Ballot Election (“Resolution Calling Election”) in

1 which it appointed the City Clerk to be the official to conduct the election pursuant to Section  
2 53327(b), prescribed the form of the ballot, set June 9, 2009 as election day, and provided for the  
3 election procedures. See Exhibit O.

4 The Act (Section 53326(c)) authorizes an election by landowners, rather than  
5 registered voters, irrespective of the number of registered voters residing within a community  
6 facilities district, in cases where the special tax will, by its own terms, not be apportioned in any  
7 tax year on any portion of property in residential use in that tax year. Hotel property, and  
8 transient occupancy of hotel rooms, by definitions in the San José Municipal Code, are not  
9 residential properties or residential uses. The Resolution of Formation provided that the special  
10 tax will be levied only on hotel rooms. Thus the special tax will never be levied on property in  
11 residential use. Thus a landowner, rather than registered-voter, election is authorized by the Act.

12 The Chapter modifies the Act for purposes of convention center facilities districts  
13 in respect of landowner elections. Where the Act provides that each landowner may cast one  
14 vote for each acre or portion of an acre that the landowners owns, the Chapter provides that each  
15 landowner may cast one vote for each hotel room on its property. The Chapter further provides  
16 that when the property on which a hotel sits is owned by a public agency, then the “landowner”  
17 for purposes of voting is the lessee of the property.

18 Habib Isaac of Willdan Financial Services, a consultant the City retained to assist  
19 it with the process of forming the Convention Center Facilities District, submitted to the City  
20 Clerk his Certificate Re Landowners and Hotel Rooms executed on March 9, 2009. See Exhibit  
21 K. That Certificate set forth the names of the landowners within the Convention Center  
22 Facilities District, including the lessees of hotel properties where the underlying land was owned  
23 by a public agency, and the number of hotel rooms existing on each hotel property within the  
24 Convention Center Facilities District. This provided the City with the names of the qualified  
25 electors for the special election, and the number of votes each qualified elector was entitled to  
26 cast in the election. This Certificate was specifically approved by the City Council in its  
27 Resolution Calling Election.

28 As authorized by Section 53353.5 of the Act, the three questions – (1) the

1 authorization to levy the special tax for specified facilities, (2) the authorization of the bonds,  
2 and (3) the establishment of the appropriations limit – were combined into a single ballot  
3 proposition for submittal to the qualified electors of the Convention Center Facilities District.

4 Section 53326(a) of the Act provides that the City Council may submit the ballot  
5 measure to the qualified electors “in a special election to be held, notwithstanding any other  
6 requirement, including any requirement that elections be held on specified dates, contained in the  
7 Elections Code, at least 90 days, but not more than 180 days, following the adoption of the  
8 resolution of formation.” The Resolution Calling Election set the election date as June 9, 2009,  
9 which was 91 days following the adoption of the resolution of formation on March 10, 2009.

10 Section 53326(a) goes on to provide that if “the election is to be held less than 125 days following  
11 the adoption of the resolution of formation, the concurrence of the election official conducting the  
12 election shall be required.” The Resolution Calling Election named the City Clerk as the official to  
13 conduct the election pursuant to Section 53327(b), and the City Clerk consented to that schedule.  
14 See paragraph 18 of Lee Price’s Declaration.

15 On the basis of the Certificate Re Landowners and Hotel Rooms, the mailed-ballot  
16 election was conducted by the City Clerk, as permitted by Elections Code Sections 307 and 320,  
17 and as provided by the Resolution Calling Election.

18 The City Clerk, in accordance with the Resolution Calling Election, published the  
19 Notice of Election in the *SAN JOSE MERCURY NEWS* on March 16, 2009. See Exhibit P. The Notice  
20 contained the deadline for submittal of proposed arguments for or against the ballot measure. An  
21 argument in favor was submitted. No argument against was submitted. See paragraph 18 of Lee  
22 Price’s Declaration.

23 The impartial analysis was prepared by the City Attorney; and it, and the argument  
24 in favor, and the list of authorized facilities and the rate and method of apportionment of the  
25 special tax were assembled into a ballot pamphlet. See Exhibit Q. This was done pursuant to  
26 Sections 9280 et seq. of the Elections Code. The ballots were prepared in the form approved by  
27 the Council in the Resolution Calling Election. These are required by law, as is necessary as a  
28 practical matter in the case of landowner voting, to have the name of the voter and the number of

1 votes to be cast printed on each ballot. It was done. Price Declaration, paragraph 19.

2 The ballot return envelopes were prepared by Willdan in accordance with the  
3 Resolution Calling Election and Elections Code Section 3011. See Exhibit R.

4 The ballots were prepared by Willdan in accordance with the Resolution Calling  
5 Election. See Exhibit S.

6 The ballots, ballot pamphlets and ballot return envelopes were required, by  
7 Elections Code Section 4101, to be mailed no sooner than the 29th day and no later than the 10th  
8 day before the election (no sooner than May 11, 2009 and no later than May 30, 2009). Jennie  
9 Carter of Willdan, “on behalf and at the direction of” the City Clerk, mailed the ballots, ballot  
10 pamphlets, ballot return envelopes and an explanatory letter from the City Clerk to the qualified  
11 electors on May 11, 2009, and executed a Certificate of Mailing Special Election Ballots. See  
12 Exhibit T. A copy of the City Clerk’s explanatory letter is attached to Exhibit T.

13 With the desire to make sure everyone affected was informed as to the conduct of  
14 the election, Willdan was also directed to mail a notification letter to all the hotel operators (as  
15 many of them are not the property owners and thus not the qualified electors) at the same time the  
16 ballots and ballot materials were sent to the qualified electors. Ms. Carter executed a Certificate of  
17 Mailing Notification Letter, with a copy of the Notification Letter attached, indicating she had  
18 mailed the notification letters on May 11, 2009. See Exhibit U.

19 The ballot pamphlet was intended to contain, among other things, the full text  
20 description, from Resolution No. 74826, adopted on March 10, 2009, of the facilities authorized to  
21 be financed and of the Rate and Method of Apportionment of the Special Tax. Resolution No.  
22 74826 included those provisions by reference to Resolution No. 74783, adopted on February 3,  
23 2009. When the ballot pamphlet was prepared, by inadvertence, the full-text descriptions of the  
24 facilities authorized to be financed and of the Rate and Method of Apportionment of the Special  
25 Tax were taken from Resolution No. 74604 which had been adopted on September 30, 2008 and  
26 then repealed by Resolution No. 74758 on January 13, 2009.

27 When the error was discovered, a Corrected Ballot Pamphlet was prepared and  
28 mailed, with an explanatory letter from the City Clerk and a form of Request for New Ballot to be

1 used in case a voter had already voted and the new information caused the voter to want to change  
2 its vote, to all of the qualified electors. Ms. Carter executed a Certificate of Mailing the Corrected  
3 Ballot Pamphlet, the Clerk's explanatory cover letter, and the Request for New Ballot form. See  
4 Exhibit V. The mailing of the Corrected Ballot Pamphlet materials was accomplished on May 20,  
5 2009.

6 The Resolution Calling the Election, as well as the Clerk's cover letter, the ballot  
7 pamphlet and the ballots themselves, all required that the ballots be returned to the City Clerk's  
8 office no later than 8:00 p.m. on June 9, 2009. The City Clerk received such of the ballots as were  
9 returned to her by the deadline of 8:00 p.m. on June 9, 2009. The City Clerk secured the ballot  
10 envelopes, and the next day, June 10, 2009 she provided the unopened ballot envelopes to Willdan.  
11 Robert C. Fisher of Willdan then, in the City Clerk's Office and with City Clerk's Office personnel  
12 present, tallied the votes cast on the returned ballots and reported the results to the City Clerk. See  
13 Price Declaration, paragraph 24, and Exhibit W. The City Clerk then executed her "Certificate of  
14 Clerk Re: Receipt of Executed Ballots, and Declaring Election Results" and submitted it to the  
15 City Council. See Exhibit X. Both Exhibits W and X indicate that out of 8,941 votes that could  
16 have been cast, 5,955 votes were cast "yes," and 1,708 were cast "no." Thus 1,278 votes were not  
17 cast, but of the votes cast, 78% were cast "yes." This is in excess of the two-thirds vote required.

18 The City Council then proceeded, at its June 16, 2009 meeting, to adopt its  
19 Resolution No. 75000, Resolution Declaring Election Results, in which it declared that the ballot  
20 proposition had been approved. See Exhibit Y. Under the Chapter, and under Article 13A of the  
21 State Constitution, the passage of the ballot proposition conferred upon the City Council authority  
22 to levy the special tax to finance the authorized facilities and to issue the bonds. Passage also  
23 established the appropriations limit of the Convention Center Facilities District.

24 Also on June 16, 2009, pursuant to Sections 53316, 53328 and 53340, the City  
25 Council passed for publication, and on June 23, 2009, the City Council adopted, its Ordinance  
26 No. 28605 "Levying a Special Tax for the Fiscal Year 2009-2010 and Following Fiscal Years  
27 Solely Within and Relating to Convention Center Facilities District No. 2008-1, City of San José,  
28 County of Santa Clara, State of California" (the "Tax Ordinance"). See Exhibit Z. The Tax

1 Ordinance was then published as required by law. See Exhibit AA.

2 The recording of the Notice of Special Tax Lien in the official records of the  
3 Santa Clara County Recorder, required by Streets and Highways Code Section 3114.5, was  
4 accomplished on June 30, 2009 at 11:56 a.m. as Document # 20320458. See Exhibit BB.

5 On June 16, 2009, the City Council adopted its Resolution No. 75001, authorizing  
6 this validation action. See Exhibit CC.

7 **IV. THE CITY PROPERLY BROUGHT THIS VALIDATION ACTION UNDER**  
8 **CODE OF CIVIL PROCEDURE SECTIONS 860, *ET SEQ.* AND GOVERNMENT**  
9 **CODE SECTION 53359**

10 Authorization for public agencies to institute validation proceedings with respect  
11 to a matter is limited by Code of Civil Procedure Section 860 to those matters for which another  
12 statute authorizes its use.<sup>1</sup> In the case of the Convention Center Facilities District, there is a  
13 statutory provision authorizing access to these validation proceedings: namely, Section 53359, a  
14 provision in the Act itself which authorizes a local agency to bring “an action to determine the  
15 validity of bonds issued pursuant to [the Act] or the validity of any special taxes levied pursuant  
16 to [the Act]. . . .”

17 The City is a local agency which seeks here to validate the special taxes being  
18 levied and to be levied with respect to the Convention Center Facilities District, and to validate  
19 the bonds of the Convention Center Facilities District to be issued upon the security of those  
20 special taxes.

21 **V. THE CONVENTION CENTER FACILITIES DISTRICT IS A MUNICIPAL**  
22 **AFFAIR AS TO WHICH THE CITY OF SAN JOSÉ, AS A CHARTER CITY, IS**  
23 **COMPETENT TO LEGISLATE.**

24 The City of San José is a charter city under Article 11, Sections 3, 5 and 7 of the  
25 Constitution of the State of California. On August 19, 2008 the San José City Council passed for  
26 publication, and on August 26, 2008 it adopted, its Ordinance No. 28387 which placed into the  
27 City of San José’s Municipal Code, Chapter 14.32 entitled “Convention Center Facilities District

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28 <sup>1</sup> Code of Civil Procedure Section 860 authorizes a public agency “upon the existence of any  
matter which under any other law is authorized to be determined pursuant to this chapter, and for  
60 days thereafter, [to] bring an action in the superior court of the county in which the principal  
office of the public agency is located to determine the validity of such matter.”

1 Financing Procedure.” The title of the Ordinance, as provided in the San José Municipal Code,  
2 was published in the POST RECORD on August 22, 2008. See Exhibit A.

3 The power to tax in support of local government, which has no impact outside the limits  
4 of the taxing municipality, is a core area of municipal concern. *Fisher v. County of Alameda*,  
5 (1993) 20 Cal.App.4th 120, 130-131. In *Fisher* a charter city’s transfer tax ordinance was  
6 challenged because the ordinance allegedly constituted a violation of Proposition 62. *Id.* at 126.  
7 The court acknowledged that under the constitution charter cities are granted sovereignty over  
8 municipal affairs, including taxation for revenue purposes, which are beyond the reach of  
9 legislative enactment. *Id.* at 125-126. Moreover, the court noted that the transfer tax at issue had  
10 “no impact outside the limits of the taxing municipality.” *Id.* at 130-131. Consequently, the  
11 charter city’s transfer tax ordinance was upheld notwithstanding Proposition 62’s prohibition  
12 against such taxes.

13 *City of Los Angeles v. A. E. C. Los Angeles* (1973) 33 Cal.App.3d 933, 939 held  
14 that “[t]he power of the City of Los Angeles to levy taxes derives from California Constitution  
15 Article 11, Section 5 which authorizes charter cities to ‘make and enforce all ordinances and  
16 regulations in respect to municipal affairs . . .’ Taxation for revenue is a municipal affair.  
17 [Citation.]”. The home rule provision of the California Constitution codified in Article 11,  
18 Section 5, subdivision (a), secures to charter cities the maintenance of charter provisions in  
19 municipal matters and deprives the Legislature of the power to interfere in the government and  
20 management of the municipality including the power of taxation. *California Fed. Savings &*  
21 *Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 11-12. Indeed, “the power to tax for local  
22 purposes clearly is one of the privileges accorded chartered cities by the home rule provision of  
23 the California Constitution.” *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 392.

24 **VI. THE PROCEEDINGS HAVE IN ALL RESPECTS BEEN CONDUCTED**  
25 **PROPERLY AND IN ACCORDANCE WITH THE LAW.**

26 The Declaration of Lee Price shows in detail the steps that were taken by the City  
27 to form the Convention Center Facilities District and to authorize the levy of the special tax upon  
28 the property within the Convention Center Facilities District and to authorize the bonds to be

1 secured and repaid by the special tax. Her Declaration also shows, as set forth in the Statement  
2 of Facts (Section II, above) that each and every step necessary to validly complete this process  
3 was performed as required by the Chapter and the Act.

4 **VII. THE ELECTION WAS VALID**

5 **A. The Voter Approval Requirement Of Article 13A Of The California**  
6 **Constitution Has Been Satisfied In The Authorization To Levy The Special**  
7 **Tax.**

8 Article 13A, Section 4 of the California Constitution reads as follows:

9 Cities, counties and special districts, by two-thirds vote of  
10 the qualified electors of such district, may impose special taxes of  
11 such district, except ad valorem taxes on real property or a  
12 transaction tax or sales tax on the sale of real property within such  
13 city, county or special district.

14 This provision, adopted by the California voters as part of an initiative measure in  
15 1978 (Proposition 13), applies to the special taxes of the Convention Center Facilities District  
16 authorized to be levied by the City Council of the City. Section 53317(b) of the Act, which was  
17 adopted in 1982 following passage of Proposition 13, as modified by the Chapter, defines a  
18 Convention Center Facilities district as “a legally constituted governmental entity established  
19 pursuant to [the Act] for the sole purpose of financing facilities and services.” As such, the  
20 Convention Center Facilities District constitutes a special district which may properly impose a  
21 special tax under the requirements of Article 13A.

22 Under Article 13A, the imposition of a special tax is subject to voter approval.  
23 Section 53326 establishes who or what is a “qualified elector” within a convention center  
24 facilities district for voting purposes. In addition to providing for a landowner election in cases  
25 where there are fewer than 12 registered voters residing within the district (subdivision (b) of the  
26 statute and not here relevant), the section, in subdivision (c) authorizes an election by  
27 landowners, rather than registered voters, irrespective of the number of registered voters residing  
28 within a community facilities district, in cases where the special tax will, by its own terms, not be  
29 apportioned in any tax year on any portion of property in residential use in that tax year.

30 Hotel property, and transitory occupancy of hotel rooms, by definitions in the San  
31 José Municipal Code, are not residential properties or residential uses. The Resolution of

1 Formation provides that the special tax will be levied only on hotel rooms. Thus the special tax  
2 will never be levied on property in residential use. Thus a landowner, rather than registered-  
3 voter, election is authorized by the Act and hence, by the Chapter.

4 The Chapter modifies the Act for purposes of convention center facilities districts  
5 in respect of landowner elections. Where the Act provides that each landowner may cast one  
6 vote for each acre or portion of an acre that the landowners owns, the Chapter provides that each  
7 landowner may cast one vote for each hotel room on its property. The Chapter further provides  
8 that when the property on which a hotel sits is owned by a public agency, then the “landowner”  
9 for purposes of voting is the lessee of the property.

10 In California, precedent exists for landowner votes. California Water Districts  
11 conduct their elections by landowner vote. *See* California Water Code Sections 35000 and  
12 following. California Reclamation Districts do as well. *See* Water Code Sections 50700 and  
13 following; *see also* *Philippart v. Hotchkiss Tract Reclamation Dist.* (1976) 54 Cal. App. 3d 797;  
14 and *Salyer Land Co. v. Tulare Water Dist.* (1973) 410 U.S. 719.

15 The legislature, in considering the Act, was competent to define “qualified  
16 electors” as it did in Section 53326, granting control to the landowners when land is primarily  
17 affected, and control to residents when they are primarily affected. The dividing line of 12  
18 registered voters is a reasonable legislative determination. This same dividing line for  
19 determining qualified electors has long been utilized in the context of city annexation  
20 proceedings in California. *See* Sections 56046 and 57075. This procedure has been utilized  
21 hundreds of times in California, and the special taxes thus approved have secured over \$20  
22 billion in public debt. *See* Declaration of Daniel Bort.

23 In this case, the Convention Center Facilities District does *not* have fewer than 12  
24 registered voters, but there is an alternative basis, in the Act, for holding a landowner vote. If the  
25 tax is structured so that it will never, in any year, be levied on any portion of property in  
26 residential use in that year then, under Section 53326(c), the tax may be authorized by landowner  
27 vote. The Convention Center Facilities District tax is not levied on residential property, where a  
28 registered voter would be subject to the special tax, but rather on business (hotel) property only.

1 To confine the vote on a special tax to those who are going to be subject to the special tax is as  
2 old as “no taxation without representation.” In fact, it is “no representation without taxation.”  
3 Where a citizen is not going to be asked to pay the special tax, it deprives him of no  
4 constitutionally protected interest that he is not permitted to vote on it. Confining the decision-  
5 making to those directly affected by the tax – those who will pay it – is the policy goal  
6 underlying all of the taxpayer protections embedded in the California Constitution and California  
7 law.

8 For the aforementioned reasons, the landowner vote of the “qualified electors,” as  
9 provided by the Act and utilized in the instant proceedings, satisfies the constitutional  
10 requirement under Article 13A.

11 **B. The Voter Approval Requirement Of Article 13C Of The California**  
12 **Constitution Has Been Satisfied In The Authorization To Levy The Special**  
13 **Tax.**

14 Article 13C, adopted by the California voters in 1996 through the initiative  
15 process as a portion of Proposition 218 reiterates the two-thirds majority voter approval  
16 requirement for special taxes as stated in Article 13A above. Article 13C specifically addresses  
17 voter approval for local tax levies by providing that “[n]o local government may impose, extend,  
18 or increase any special tax unless and until that tax is submitted to the electorate and approved by  
19 a two-thirds vote.” Cal. Const. Art. 13C, § 2(d).

20 Under Section 1 of Article 13C, a “local government” refers to “any county, city,  
21 city and county, including a charter city or county, any special district, or any other local or  
22 regional governmental entity.” Cal. Const. Art. 13C, § 1(b). Unlike Article 13A, Article 13C  
23 defines a “special tax” to be “any tax imposed for specific purposes.” Cal. Const. Art. 13C, §  
24 1(d).

25 Both the City (see Section 6507) and the Convention Center Facilities District  
26 (see Section 53317[b]) constitute local governmental entities for purposes of Article 13C and  
27 must obtain the required two-thirds majority voter approval for the special tax to be levied under  
28 the authority of and within the Convention Center Facilities District. The special tax the City  
seeks to levy by and through its Convention Center Facilities District is a “special tax” for

1 purposes of Article 13C because the proceeds of the tax are specifically designated or targeted  
2 for the Convention Center. Accordingly, in imposing its special tax, the City must comply with  
3 the two-thirds majority voter approval requirements of Article 13C, section 1(d).

4 As stated above in Section V of this memorandum, the City Council sought and  
5 received a more than two-thirds affirmative vote from the landowner qualified electors within the  
6 Convention Center Facilities District. Thus, the City satisfied the voter approval requirement of  
7 Article 13C.

8  
9 **C. The Proposed Special Tax Does Not Violate Article 13, Section 1(a) Of The California Constitution.**

10 Article 13, Section 1(a) of the California Constitution provides as follows:

11 Unless otherwise provided by this Constitution or the laws of the  
12 United States:

13 (a) All property is taxable and shall be assessed at the same  
14 percentage of fair market value. When a value standard other than  
15 fair market value is prescribed by this Constitution or by statute  
16 authorized by this Constitution, the same percentage shall be  
17 applied to determine the assessed value. The value to which the  
18 percentage is applied, whether it be the fair market value or not,  
19 shall be known for property tax purposes as the full value.

17 Article 13, Section 1(a) establishes the constitutional rule for levying of  
18 traditional *ad valorem* taxes upon property. The special taxes of the Convention Center  
19 Facilities District are to be levied pursuant to independent constitutional authority contained in  
20 Article 13A, Section 4, which expressly authorizes special districts to impose special taxes,  
21 which *may not* be *ad valorem* taxes on real property.

22 In *Heckendorn v. City of San Marino* (1986) 42 Cal. 3d 481, the Court approved a  
23 special tax that was based on parcel area that was neither proportional to value nor *ad valorem*.

24 The distinction that must be drawn is that Article 13 applies to general property  
25 taxes, and Article 13A applies to *special* taxes. Therefore, special taxes must not be *ad valorem*.  
26 These are the conclusions reached by the State Attorney General (70 Ops. Cal. Atty. Gen. 153,  
27 156-157 [1987]) and the California Legislative Counsel (Ops. Cal. Legis. Counsel, No. 8471  
28 [1987] School District: Taxation). *See also City of Oakland v. Digre* (1st Dist. 1988) 205 Cal.

1 App. 3d 99, 252 Cal. Rptr. 99.

2 Proposition 62, passed by the voters on November 4, 1986, codified the  
3 definitions of “general” and “special” taxes first pronounced by the court in *City and County of*  
4 *San Francisco v. Farrell* (1982) 32 Cal. 3d 47, 57, 184 Cal. Rptr. 713, 718. Government Code  
5 Section 53721 sets forth the current definition:

6 All taxes are either special taxes or general taxes. General taxes  
7 are taxes imposed for general governmental purposes. Special  
8 taxes are taxes imposed for specific purposes.

9 As the Resolution of Formation makes clear, and as discussed above, the taxes  
10 involved in these proceedings are *special* taxes. They are for specific and limited purposes rather  
11 than for general purposes. Additionally, they are not *ad valorem* taxes but are based on a  
12 formula making no use of assessed value.

13 Therefore, Article 13, Section 1(a) does not apply to the special tax at issue in this  
14 case, which receives its constitutional imprimatur from Article 13A, Section 4.

#### 14 **VIII. THE SPECIAL TAX IN THIS CASE IS A PROPER SPECIAL TAX.**

15 The special tax for the Convention Center Facilities District is *measured* as a  
16 percentage of hotel room rents and *collected* in the same manner as the transient occupancy tax.  
17 But the Act does not authorize a transient occupancy tax, as such. This already-existing  
18 methodology was employed for administrative convenience, but the special tax is nonetheless  
19 *levied* and *enforced* as a tax on *real property* in accordance with the Act. As such it is a valid  
20 and binding special tax.

21 The Act makes clear that the special tax is a *property tax*. Section 53321(d) states:  
22 “...a special tax sufficient to pay for all facilities and services, secured by recordation of a  
23 continuing lien against all nonexempt *real property* in the district, will be annually levied within  
24 the area.” [emphasis added]

25 Government Code Section 53325.1 requires that the Resolution of Formation:

26 State that upon recordation of a notice of special tax lien pursuant to Section  
27 3114.5 of the Streets and Highways Code, a continuing lien to secure each levy of the  
28 special tax shall attach to all nonexempt *real property* in the district and this lien shall

1 continue in force and effect until the special tax obligation is prepaid and permanently  
2 satisfied and the lien canceled in accordance with law<sup>2</sup> or until collection of the tax by the  
legislative body ceases. [emphasis added]

3 The Resolution of Formation (Exhibit O) states, in paragraph 7 thereof:

4 If the election referred to below results in the approval of the ballot measure  
5 described herein, then upon recordation of a Notice of Special Tax Lien pursuant to  
6 Section 3114.5 of the Streets and Highways Code of the State of California, a continuing  
7 lien to secure each levy of the Special Tax shall attach to all nonexempt real property in  
8 the Convention Center Facilities District, which lien shall continue in force and effect  
until four years after the levy of the Special Tax by the City Council ceases and a Notice  
of Cessation of Special Tax is recorded in accordance with Section 53330.5 of the Act,  
should that ever occur.

9 The rate and method of apportionment of the special tax in the Convention Center  
10 Facilities District (the “RMA”) is included in the Resolution of Formation by its reference to the  
11 Resolution of Intention, Resolution No. 74783 (Exhibit G herein) in “exhibit d” thereof.<sup>3</sup> The  
12 RMA states:

13 The Special Tax authorized by Convention Center Facilities District No. 2008-  
14 1...shall be levied on all Assessor’s Parcels within [the Convention Center Facilities  
District] and collected as provided herein...” [p. 2 of ex. d to Exhibit G]

15 [E]ach Assessor’s Parcel classified as Hotel Property...shall be subject to a Base  
16 Special Tax.... [p. 5 of ex. d to Exhibit G]

17 The Base Special Tax shall be levied on each Assessor’s Parcel classified as Hotel  
18 Property.... [p. 6 of ex. d to Exhibit G]

19 “Assessor’s Parcel” means a lot or parcel shown in an Assessor’s Parcel Map with  
an assigned assessor’s parcel number. [p. 2 of ex. d to Exhibit G]

20 “Assessor’s Parcel Map” means an official map of the Assessor of the County  
designating parcels by assessor’s parcel number. [p. 2 of ex. d to Exhibit G]

21 Finally, the Act further provides, in 53340(e), that:

22 The special tax shall be collected in the same manner as ordinary ad valorem  
23 property taxes are collected and shall be subject to the same penalties and the same  
24 procedure, sale, and lien priority in case of delinquency as is provided for ad valorem  
25 taxes, *unless another procedure has been authorized in the resolution of formation  
establishing the district and adopted by the legislative body.*” [emphasis added].

26 <sup>2</sup> The right to prepay the special tax obligation is optional [§ 53321(d)], and is not included in the  
27 Convention Center Facilities District.

28 <sup>3</sup> Lower case letters are used to designate exhibits which are not themselves exhibits to Lee  
Price’s Declaration, but are exhibits to Exhibits to her Declaration.

1 The Resolution of Formation, Exhibit O, contains the following:

2 9. The Special Tax will be collected monthly through the same  
3 mechanism by which the City currently collects its Transit Occupancy Tax from hotel  
4 properties; however, the City Council reserves the right to utilize any other lawful means  
5 of billing, collecting, and enforcing the special tax, including billing on the secured  
6 property tax roll, supplemental billing, and, when lawfully available, judicial foreclosure  
7 of the special tax lien.

8 It is clear that, despite the use of the transient occupancy tax measurement and  
9 collection mechanism, the special tax is in fact levied on real property and enforced against real  
10 property.

11 Section 53325.3 adds:

12 A tax imposed pursuant to this chapter is a special tax and not a special  
13 assessment, and there is no requirement that the tax be apportioned on the basis of benefit  
14 to any property. However, a special tax levied pursuant to this chapter may be on or  
15 based on a benefit received by parcels of real property, the cost of making facilities or  
16 authorized services available to each parcel, *or some other reasonable basis as  
17 determined by the legislative body.* [emphasis added].

18 The Act thus explicitly allows the City Council to approve any reasonable  
19 mechanism for apportioning the special tax. The measurement of the special tax as a percentage  
20 of room rents, where the purpose of the special tax is to attract more groups to use the  
21 Convention Center which directly results in more users of hotel rooms, is eminently reasonable.

22 The Act also requires, in Section 53321 thereof, that the special tax be specified:  
23 “in sufficient detail to allow each landowner or resident within the proposed district to estimate  
24 the maximum amount that he or she will have to pay.” The ability to “estimate” maximum room  
25 rents necessarily includes the ability to estimate the maximum special tax. The special tax is  
26 thus even more reasonable in that it is only required to be paid when the revenue to pay it is  
27 present.

28 There is an element of the special tax called the “Additional Special Tax.” See  
pages 2 and 5-6 of exhibit d to Exhibit G. This is an additional 1% of room rents. It may only  
be levied under a specified condition (“the amount in the Revenue Stabilization Reserve is less  
than the Revenue Stabilization Reserve Requirement” [p. 6 of exhibit d to Exhibit G]), but is

1 otherwise measured, administered and collected in exactly the same manner as the Base Special  
2 Tax.

3 Thus all the requirements of the special tax are met. The special tax is levied on  
4 real property, the rate and method of allocation of the special tax is “reasonable,” and each  
5 property owner is able to estimate the maximum amount it will have to pay. The special tax is,  
6 therefore, in full conformance with the Act and is valid and binding.

7 **IX. CONCLUSION**

8 For all the foregoing reasons, the City respectfully requests that the Court grant  
9 the relief sought in its Complaint and enter a default judgment for validation in the form of the  
10 proposed judgment that is submitted to the Court herewith.

11 Dated: February 11, 2010

12 DANIEL C. BORT  
13 MICHAEL C. WEED  
14 ORRICK, HERRINGTON & SUTCLIFFE LLP

15  
16 \_\_\_\_\_  
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