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Superior Court of California,
County of San Diego

10/09/2013 at 02:59:00 PM

Clerk of the Superior Court
By Calvin Beutler, Deputy Clerk

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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 SAN DIEGO COUNTY--HALL OF JUSTICE
9

10 SAN DIEGANS FOR OPEN GOVERNMENT,

11 Plaintiff,

12 vs.

13 CITY OF SAN DIEGO; and ALL PERSONS
INTERESTED IN THE MATTER OF THE
14 RENEWAL OF THE SAN DIEGO TOURISM
MARKETING DISTRICT, THE LEVYING OF
15 ASSESSMENTS UPON THE ASSESSED
BUSINESSES FOR A PERIOD OF THIRTY-NINE
16 AND ONE-HALF YEARS, AND THE
PRESCRIBING OF A METHOD FOR
17 COLLECTION OF ASSESSMENTS,

18 Defendants.
19

CASE NO. 37-2012-00088065-CU-MC-CTL

**THIRD AMENDED COMPLAINT FOR
RELIEF UNDER REVERSE-
VALIDATION STATUTES ETC.**

** IMAGED FILE **

Action Filed: December 19, 2012
Department: C-73 (Wohlfeil)

20 Plaintiff SAN DIEGANS FOR OPEN GOVERNMENT alleges as follows in this Third
21 Amended Complaint for Relief under Reverse-Validation Statutes etc.:

22 **Parties**

23 1. Plaintiff is a non-profit taxpayer and voter organization formed and operating under the
24 laws of the State of California. At least one of Plaintiff's members resides in and is a registered voter
25 of the City of San Diego, California. Plaintiff has an interest in ensuring open, accountable, responsive
26 government, and the protection of its members' rights as taxpayers and voters.

27 2. Defendant CITY OF SAN DIEGO ("CITY") is a charter city under the laws of the State
28 of California and is being sued in its capacity as a charter city.

1 **Background Information**

2 3. In November 2010, the voters of California approved Proposition 26. Proposition 26
3 amended several provisions of Article XIII C and Article XIII D of the California Constitution in order
4 to close a variety of loopholes that government agencies, including local governments like Defendants,
5 had been using to increase tax revenues without having to use the word “tax” and thereby escape the
6 requirement for voter approval of tax increases. Following the voters’ approval of Proposition 26, the
7 California Constitution now provides as follows:

8 A. Under Section 1(e) of Article XIII C, “tax” means any “levy, charge, or exaction
9 of any kind by a local government, except the following: (1) A charge imposed for a specific benefit
10 conferred or privilege granted directly to the payor that is not provided to those not charged, and which
11 does not exceed the reasonable costs to the local government of conferring the benefit or granting the
12 privilege. (2) A charge imposed for a specific government service or product provided directly to the
13 payor that is not provided to those not charged, and which does not exceed the reasonable costs to the
14 local government of providing the service or product. (3) A charge imposed for the reasonable
15 regulatory costs to a local government for issuing licenses and permits, performing investigations,
16 inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and
17 adjudication thereof. (4) A charge imposed for entrance to or use of local government property, or the
18 purchase, rental, or lease of local government property. (5) A fine, penalty, or other monetary charge
19 imposed by the judicial branch of government or a local government, as a result of a violation of law.
20 (6) A charge imposed as a condition of property development. (7) Assessments and property-related
21 fees imposed in accordance with the provisions of Article XIII D. The government bears the burden
22 of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the
23 amount is no more than necessary to cover the reasonable costs of the governmental activity, and that
24 the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the
25 payor’s burdens on, or benefits received from, the governmental activity.”

26 B. Under Section 2 of Article XIII C, “(a) All taxes imposed by any local
27 government shall be deemed to be either general taxes or special taxes. Special purpose districts or
28 agencies, including school districts, shall have no power to levy general taxes. (b) No local government

1 may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate
2 and approved by a majority vote. A general tax shall not be deemed to have been increased if it is
3 imposed at a rate not higher than the maximum rate so approved. The election required by this
4 subdivision shall be consolidated with a regularly scheduled general election for members of the
5 governing body of the local government, except in cases of emergency declared by a unanimous vote
6 of the governing body. (c) Any general tax imposed, extended, or increased, without voter approval,
7 by any local government on or after January 1, 1995, and prior to the effective date of this article, shall
8 continue to be imposed only if approved by a majority vote of the voters voting in an election on the
9 issue of the imposition, which election shall be held within two years of the effective date of this article
10 and in compliance with subdivision (b). (d) No local government may impose, extend, or increase any
11 special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.
12 A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the
13 maximum rate so approved.”

14 4. In 2001, the California Legislature enacted Streets and Highways Code Section 36660.
15 Since being amended in 2003, Section 36660(c) has provided as follows: “Upon renewal, a district shall
16 have a term not to exceed 10 years, or, if the district is authorized to issue bonds, until the maximum
17 maturity of those bonds. There is no requirement that the boundaries, assessments, improvements, or
18 activities of a renewed district be the same as the original or prior district.”

19 5. On or around November 27, 2012, CITY’s city council adopted that certain Resolution
20 R-307843, pursuant to which CITY renewed the San Diego Tourism Marketing District, levied
21 assessments upon certain businesses for a term of 39.5 years, and prescribed a method for collecting
22 the assessments (collectively, “TMD Approval”).

23 **Jurisdiction, Venue, and Exhaustion of Administrative Remedies**

24 6. Plaintiff is bringing this action and seeks review by and relief from this Court under
25 Code of Civil Procedure Sections 860 *et seq.* and 1060 *et seq.*, Streets and Highways Code Section
26 36633, and San Diego Municipal Code Section 61.2526, among other laws and as appropriate.

27 7. Venue in this Court is proper because the obligations, liabilities, and violations of law
28 alleged in this pleading occurred in the City of San Diego.

1 8. Plaintiff itself or at least one of Plaintiff's members falls into at least one of the
2 following categories:

3 A. Persons who are registered to vote in the City of San Diego.

4 B. Persons who (i) have attempted to make a room reservation at a hotel in the City
5 of San Diego and were told not only that they would be required to pay a "tax" imposed under the TMD
6 Approval as a condition of the booking contract, but also that the "tax" was not negotiable and was
7 being imposed on them (i.e., the persons making the reservation) by law; and (ii) opted not to make the
8 reservation because of the increased total cost of the room as a result of the "tax."

9 C. Persons who by law were subject to paying or required to be registered to pay
10 CITY's Transient Occupancy Tax as of June 2012, but were not given any opportunity to vote on the
11 TMD Approval.

12 D. Persons who were identified by CITY as being eligible to vote on the TMD
13 Approval but were not provided with ballot materials and thus were not given the opportunity to vote
14 on the TMD Approval.

15 E. Persons who were identified by CITY as being eligible to vote on the TMD
16 Approval and voted against it.

17 F. Persons who will benefit from the marketing expenditures that the TMD
18 Approval will allow but were not identified by CITY as being eligible to vote on the TMD Approval,
19 were not given the opportunity to vote on the TMD Approval, and are not required to pay the
20 assessment imposed under the TMD Approval.

21 G. Residents of the City of San Diego who book rooms at lodging businesses within
22 the City without being influenced directly or indirectly by any of the marketing that is made possible
23 as a result of the TMD Approval (e.g., residents who book rooms for out-of-town family and friends
24 on holidays or other special occasions because the residents do not have enough room in their own
25 homes to accommodate the visitors).

26 9. Supplementing the allegations in Paragraph 8, Plaintiff alleges that:

27 A. It has at least one member who (i) was identified by the CITY as being eligible
28 to vote on the TMD tax, was not provided with the ballot materials, and thus was not given the

1 opportunity to vote on the TMD tax, and (ii) was a member of Plaintiff before this lawsuit was filed and
2 continues to be a member of Plaintiff.

3 B. It has at least one member who (i) will be liable for the TMD tax but was not
4 given the opportunity to vote on the TMD tax, and (ii) was a member of Plaintiff before this lawsuit was
5 filed and continues to be a member of Plaintiff.

6 10. Plaintiff submitted written opposition to actions challenged in this lawsuit prior to their
7 approval. By way of example and not limitation, Plaintiff caused written opposition to be delivered to
8 each member of CITY's city council and to CITY's mayor prior to the TMD Approval; the opposition
9 was also included in agenda back-up materials provided to the city council and to the public prior to the
10 TMD Approval.

11 11. Plaintiff has no plain, speedy, adequate remedy in the ordinary course of law, since its
12 members and other members of the public will suffer irreparable harm as a result of Defendants'
13 violations of the law, as alleged in this pleading. The TMD Approval also rests on Defendants' failure
14 to satisfy a clear, present, ministerial, public duty to act in accordance with those laws. Even when
15 Defendants are permitted or required by law to exercise their discretion in taking action under those
16 laws, they remain under a clear, present, ministerial duty to exercise their discretion within the limits
17 of and in a manner consistent with those laws. Defendants have had and continue to have the capacity
18 and ability to approve the challenged actions within the limits of and in a manner consistent with those
19 laws, but Defendants have failed and refuse to do so and have exercised their discretion beyond the
20 limits of and in a manner that is not consistent with those laws.

21 12. Plaintiff and its members also have a beneficial right and interest in Defendants'
22 fulfillment of all their legal and public duties, as alleged in this pleading.

23 **FIRST CAUSE OF ACTION:**
24 ***Violation of California Constitution***
25 **(Against All Defendants)**

26 13. The preceding paragraphs are incorporated into this paragraph by reference.

27 14. The levies and collections authorized by the TMD Approval constitute a "tax" within
28 the meaning of Section 1(e) of Article XIII C of the California Constitution and should have been
subjected to a vote by the electorate (*i.e.*, registered, natural-person voters in the jurisdiction).

1 15. The levies and collections authorized by the TMD Approval do not qualify for any of
2 the exceptions to the “tax” definition under Section 1(e) of Article XIII C of the California Constitution,
3 such as assessments and property-related fees imposed in accordance with the provisions of Article XIII
4 D of the California Constitution. Therefore, the levies and collections authorized by the TMD Approval
5 should have been subjected to a vote by the electorate (*i.e.*, registered natural-person voters in the City
6 of San Diego).

7 16. There has been no vote of the electorate of the City of San Diego on the levies and
8 collections authorized by the TMD Approval, in violation of the California Constitution. Non-natural
9 persons, legal entities, and natural persons not registered to vote in the City of San Diego were
10 improperly given the opportunity to vote on the TMD Approval while the whole of the electorate (*i.e.*,
11 registered natural-person voters in the City of San Diego) were not given the opportunity to vote.
12 Numerous supporters of the TMD Approval who reside or operate a business outside CITY’s
13 jurisdiction have informed CITY that the TMD Approval will provide substantial, specific benefits to
14 them even though they will not be paying any portion of the levies and collections authorized by the
15 TMD Approval.

16 17. Plaintiff is informed and believes and on that basis alleges: The TMD Approval includes
17 provisions that purport to make the levies and collections authorized by the TMD Approval the legal
18 responsibility of the hotels and other lodging businesses covered by the TMD Approval but that allow
19 the businesses to add the amount of the levies and collections as a separate line item on their guests’
20 bills. These provisions were intentionally developed by CITY and a majority of the lodging businesses
21 voting in favor of the TMD Approval (including non-natural persons, legal entities, and natural persons
22 who do not have the right to vote in the City of San Diego) as an artifice and contrivance that would
23 allow the businesses to claim that they were the only ones legally obligated to pay the levies and
24 collections (rather than the guests) and thereby further claim that only the lodging businesses were
25 entitled to vote on the TMD Approval; had it not been for the ability to add the amount as a separate
26 line item on their guests’ bills, a majority of the lodging businesses that voted in favor of the TMD
27 Approval would not have voted for it. At all relevant times, CITY and a majority of the lodging
28 businesses that voted in favor of the TMD Approval (including non-natural persons, legal entities, and

1 natural persons who do not have the right to vote in the City of San Diego) specifically intended not
2 only that the ultimate effect of the levies and collections would be to generate marketing revenues
3 without having a net result on the businesses' income, but also to increase the "taxes" paid by the
4 lodging businesses' guests (as opposed to the taxes paid by the businesses themselves) without a vote
5 of the electorate of the City of San Diego. Alternatively and additionally, at all relevant times, CITY
6 and a majority of the lodging businesses were absolutely and unequivocally opposed to any provision
7 being added to or modified in the TMD Approval that would have explicitly imposed any levy or
8 collection directly on the lodging businesses' guests because they believed that such a provision would
9 have required a vote of the electorate of the City of San Diego. Alternatively and additionally, CITY
10 and a majority of the lodging businesses that voted in favor of the TMD Approval intended for the
11 levies and collections authorized thereby to be the functional equivalent of CITY's transient occupancy
12 tax, which is the legal obligation of the lodging businesses' guests, and to provide for the collection of,
13 payment of, and accounting for the two to be handled in essentially the same manner.

14 18. Plaintiff and its members have been harmed by CITY's failure to comply with the
15 California Constitution and the public duties it imposes on CITY. By way of example and not
16 limitation, the TMD Approval violates the California Constitution's requirement that it be approved by
17 a vote of the electorate (*i.e.*, registered natural-person voters in the City of San Diego) and the
18 requirement that there be no special benefit to anyone not paying the levies and collections authorized
19 by the TMD Approval. None of Plaintiff's members has been given the opportunity to vote on the tax
20 authorized by the TMD Approval, even though at least one of Plaintiff's members was registered to vote
21 in the City of San Diego at the time of the TMD Approval and desired to vote on it. The harm suffered
22 by Plaintiff and its members includes but is not limited to denial of the opportunity to vote on the tax.

23 **SECOND CAUSE OF ACTION:**
24 ***Violation of Streets and Highways Code***
25 **(Against All Defendants)**

26 19. The preceding paragraphs are incorporated into this paragraph by reference.

27 20. Defendants are subject to the Property and Business Improvement District Law of 1994
28 ("PBID Law"), Streets and Highways Code § 36600 *et seq.*

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C. *On the Third Cause of Action:*

1. A judgment determining or declaring that the TMD Approval violated the San Diego Municipal Code in some manner and is therefore invalid; and

2. Injunctive relief prohibiting Defendants (and any and all persons acting at the request of, in concert with, or for the benefit of one or more of them) from taking any action to levy or collect any of the taxes authorized by the TMD Approval in violation of the San Diego Municipal Code.

D. All legal fees and other expenses incurred in connection with this proceeding, including but not limited to reasonable attorney fees as authorized by the Code of Civil Procedure.

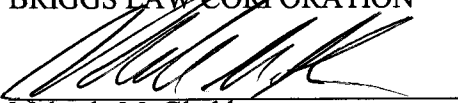
E. Any and all further relief that this Court may deem appropriate.

Date: October 8, 2013.

Respectfully submitted,

BRIGGS LAW CORPORATION

By:



Mekaela M. Gladden

Attorneys for Plaintiff San Diegans for Open Government

PROOF OF SERVICE

1. My name is Alison Greenlee. I am over the age of eighteen. I am employed in the State of California, County of San Diego.

2. My business _____ residence address is Briggs Law Corporation, 814 Morena Blvd., Suite 107, San Diego, CA 92110.

3. On October 9, 2013, I served _____ an original copy a true and correct copy of the following documents: THIRD AMENDED COMPLAINT FOR RELIEF UNDER REVERE - VALIDATION STATUTES ETC.

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

by personal service. I personally delivered the documents to the person(s) at the address(es) indicated on the list.

by U.S. mail. I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

_____ deposited the envelope/package with the U.S. Postal Service

placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of San Diego, California.

by overnight delivery. I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

by facsimile transmission. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

by e-mail delivery. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

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

Date: October 9, 2013

Signature: 

SERVICE LIST

San Diegans for Open Government v. City of San Diego et al.
San Diego County Superior Court case no. 37-2012-0088065-CU-MC-CTL

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