No. A090584

In the Court of Appeal of the State of California

First Appellate District

Division 5

MICHAEL H. CLEMENT CORPORATION, et al.,

Plaintiffs and Appellants,

vs.

CITY OF ANTIOCH, et al.

Defendants and Respondents.

_____

APPELLANTS' OPENING BRIEF

_____

Appeal from Contra Costa County
Superior Court Case Nos. C 93-03437, C 95-03911
The Honorable Richard L. Patsey

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

CASES:

STATEMENT OF APPEALABILITY

This appeal is from a final judgment disposing of all issues between the parties. Code of Civil Procedure § 904.1(a).

INTRODUCTION

These consolidated cases seek to recover taxes that the City of Antioch ("City") illegally imposed on certain property owners for the years 1992 through 1995. Although the City proceeded under the guise of a special assessment pursuant to the Landscaping and Lighting Act of 1972, it made little effort to comply with the procedures mandated by the act, made no effort to determine that the properties in the assessment district received special benefits, and grossly overassessed the properties, resulting in an unconstitutional taxation on the property.

This Court should declare the assessments illegal and order the City to reimburse taxpayers for the illegal taxes collected over the years.

STATEMENT OF THE CASE

Beginning in 1991, plaintiff and appellant Michael H. Clement Corporation ("Clement Corporation") and other taxpayers annually protested assessments levied under the Landscaping and Lighting Act of 1972 by defendants and respondents City of Antioch, *et al.* (collectively, the "City").[1] The City rejected all protests, resulting in a series of five lawsuits covering fiscal years 1991-96.

The City won a summary judgment in the first suit, Contra Costa Superior Court Case No. C91-04123, which had challenged the formation of the special assessment district. This Court affirmed that decision in an unpublished opinion, *Clement Corp. v. Keller, et al.*, Appeal No. A065509, (Joint Appendix ("JA") at 202-220), but specifically limited its decision to "the validity of the assessment district formed for fiscal year 1991-1992," and refused to consider any evidence regarding the assessments in later years. (Opinion at 9, JA 210.)

While the initial action was pending, the Clement Corporation and other taxpayers filed Contra Costa Superior Court Case No. C92-04084, challenging the 1992-93 assessment. (JA 1.) The same group of taxpayers challenged the 1993-94 assessment in Case No. C93-03437,

[1]Defendants include the City's mayor and council members, as well as the City itself.

(JA 20-40), and the two actions were consolidated by stipulation on December 15, 1993. (JA 41-42.)

After plaintiffs filed Case No. C94-03211 to challenge the 1994-95 assessment, all pending actions were consolidated under Case No. C93-93437. On July 3, 1995 the Clement Corporation and Michael H. Clement individually filed a Second Amended Complaint consolidating all of the allegations in the actions pending at that time. (JA 46-71.) Clement Corporation and Mr. Clement thereafter filed Case No. C95-03911 challenging the 1995-96 assessment, (JA 72-88); that case was also ultimately consolidated for trial with Case No. C93-93437. (JA 282-284.)

On four separate occasions, the City sought summary judgment or summary adjudication, without success. The Honorable James J. Marchiano (twice), Ignazio J. Ruvolo, and Walter D. Rogers denied the motions, though Judge Ruvolo dismissed the Ninth Cause of Action for negligence, and Judge Rogers found that Mr. Clement individually did not have standing. (JA 128.)

Prior to trial, Judge Rogers ordered the case bifurcated, with the Eighth Cause of Action for declaratory relief to be tried first without a jury.

(9/29/97 Plaintiff's Supplemental Trial Brief, JA 153; 9/16/98 Defendant's Submission, JA 285.) The Honorable Richard L. Patsey, the ultimate trial judge, thereafter required the parties to proceed solely by written declarations and evidence, which the parties submitted on September 16-17, 1998. (Minute Order, JA 143; Defendants' Submissions, JA 285-361; Plaintiffs' List of Exhibits JA 362-432.)

On behalf of the City, City Attorney William G. Galstan submitted a declaration authenticating a boxful of documents submitted as collective Exhibit G as "the documentation submitted to the City Council for its consideration for the fiscal years 1991-92, 1992-93, 1993-94, 1994-95, and 1995-96, respectively." (JA 291-92.) Exhibit F, (JA 302-11), contains a list of the documents submitted as Exhibit G. (Defendant City of Antioch's Submission of Court-Ordered Written Evidence on Trial of Plaintiff's Eighth Cause of Action (Declaratory Relief) at p.5 n.3, JA 289.) The City also submitted a declaration of civil engineer Gary J. Mello, an employee of the firm that had submitted some of the Engineer's Reports, (JA 298-301), as well as a number of declarations of Lynne Filson, a City employee involved in the preparation of the

Engineer's Reports. (JA 296-97, 312-61.)

Plaintiff Clement Corporation submitted Exhibits 1-55, most of which duplicated the City's Exhibit G, along with four declarations. (JA 362-432.) The City objected to all of the declarations and many of the exhibits. (JA 435-42.) Judge Patsey sustained objections to many of the proposed exhibits and to the Declaration of Michael H. Clement In Lieu of Testimony at Trial of Declaratory Relief Issues ("First Clement Dec."), while overruling objections to other declarations. (JA 457.)

After briefing by both parties regarding the Eighth Cause of Action, (JA 459-514), the Court on February 25, 1999 issued its Announcement of Tentative Decision. (JA 515-522.) Applying the liberal construction standard set out in Streets & Highways Code § 22509, Judge Patsey found evidence in the record to support exemptions that had been granted to certain properties and, while determining that other exemptions may have been erroneously granted, found plaintiff's evidence "insufficient to raise an inference of fraud, gross injustice, or intentional wrongdoing by Defendants." (Tentative Decision at 2, JA 516.) The Trial Court also found evidence in support of the City's decision to cap assessment amounts, while determining that

plaintiff had failed to establish that the underassessments caused by the caps "had resulted in disproportionate assessment of properties within District 2A." (Tentative Decision at 3, JA 517.)

The Court found substantial evidence in the record to support the Clement Corporation's contention that the City had improperly and intentionally maintained surpluses in the 1992-93 and 1993-94 assessments, but found that those violations of the L&L Act did not invalidate the assessments for those years. The Court reasoned that, since the City could have maintained reserves under section 22569, and had thereafter instituted such reserves, there was insufficient proof of prejudice to overcome the presumptions of section 22509. (Tentative Decision at 3-4, JA 517-518.)

The Court found that the City had "abused its discretion by combining and sharing costs and funds between different assessment districts in violation of the Landscaping and Lighting Act and California Constitution, Article XIII A, § 4," but further determined that plaintiff had not shown what damages had resulted from the illegal actions. (Tentative Decision at 5:4-7:1, JA 519-21.) Since the City had discontinued those actions, the

Court "decline[d] to order any remedial action." (Tentative Decision at 7:1-4, JA 521.)

Clement Corporation submitted its Proposals and Controverted Issues Not Included in Tentative Decision (JA 523). With the addition of one paragraph stating that the Court had found that the City had violated California Constitution, Article XIII A, § 4 and L&L section 22572(c), but not sections 22567 or 22568, the Tentative Decision became the Statement of Decision on March 26, 1999. (JA 534.)

Trial proceeded in the same fashion on the remaining First through Seventh and Tenth Causes of Action, with both sides submitting evidence and objecting in writing to the opposing evidence. (JA 536-538.) The Court overruled all objections to newly offered evidence, including the Second Declaration of Michael H. Clement In Lieu of Testimony ("Second Clement Dec."), but did not reconsider any of the objections it had previously sustained to evidence submitted for the trial on the Eighth Cause of Action. (JA 785.) The Court also refused to impose sanctions or strike the 9/23/99 Declaration of Lynne Filson, the former Traffic Engineer for the City, even though the City's attorney admitted that the signature on

the Declaration filed with the Court had been forged. (JA 703.)

Following written argument by all parties, the Trial Court on December 16, 1999 issued its Announcement of Tentative Decision, finding that the Clement Corporation had not "established any additional unlawful conduct ... or show[n] damages resulting from such conduct." (JA 810.) The only evidence cited by the Court was the disputed Filson declaration. (Tentative Decision at 2:11-15, JA 810.)

The Announcement of Tentative Decision became the final decision as to the remaining causes of action, and Judgment was entered on January 25, 2000. (JA 814-815.) Appellants timely filed a Notice of Appeal on March 23, 2000. (JA 820-821.)

STATEMENT OF FACTS

A. BACKGROUND

In May 1991, the City started proceedings toward the formation of a special assessment district pursuant to the Landscaping and Lighting Act of 1972, Streets & Highways Code §§ 22500 *et seq* ("L&L Act"). As part of that process, the City ordered an Engineer's Report which

recommended that the district be divided into 9 benefit zones. (Engineer's Report FY 1991-92, Exhibit 11, City Exhibit G-5.)[2] The City performed no studies or surveys to determine whether the properties within the district would receive any special benefit. (5/21/93 City Attorney Memorandum at p.2, Exhibit 26, City Exhibit G-36.) The district was formed to remedy unrelated shortfalls in the general budget. (6/30/95 Memorandum, City Exhibit G-88.)

On July 31, 1991, the Antioch City Council passed Resolution 91-168, ordering the formation of Assessment District 2A. (City Exhibit G-2.) In the years that followed, the City annually passed subsequent resolutions levying yearly assessments on the properties within District 2A, based on new Engineer's Reports filed for each fiscal year.

According to the various Engineer's Reports that have preceded the levying of each year's assessment, the only "improvements" funded by the assessments are the maintenance and servicing of "public landscaping and lighting facilities, ...; public medians and park sites; [and] weed abatement for publicly owned open space parcels." (Engineer's Report FY 1992/93 at p.6, Exhibit

[2]Unless designated as "City Exhibit," all references to Exhibits are to exhibits submitted by Clement Corporation.

12, City Exhibit G-18.)

These "improvements" are not confined to the 15 or 16 parks located in District 2A, but are located throughout the City, as shown by comparing the City budgets before and after the formation of the District. The City 1992-93 Budget at p. 201, (Exhibit 32, City Exhibit G-101) stated that District 2A provides "park and grounds services to the City's park system, which include: approximately 23 park sites ...." The identical description is used for the "Park and Median Maintenance" section of the last budget prior to formation of the District, the City 1990-91 Budget (City Exhibit G-99 at p. 67). (*See also* Engineer's Report FY 1992/93 at pp. 12-28, Exhibit 12, Exhibit G-18.)

The basic benefit unit used to measure the appropriateness of assessments within District 2A is the "single family equivalent" or SFE, which is the uniform benefit that it is assumed a residential parcel would receive. (Engineer's Report FY 1992/93 at p. 48, Exhibit 12, City Exhibit G-18.) The City concluded that industrial parcels do not receive the same benefits as do residential parcels and commercial parcels, but attributed one SFE to each 12,000 square feet of industrial parcel

areas. (Engineer's Report FY 1992/93 at p. 57, Exhibit 12, City Exhibit G-18.)

Since 1985, the Clement Corporation has owned real property located in the northeasternmost section of the City of Antioch. (Second Clement Dec.1:11,19-20, JA 598.) The Clement Corporation conducts a mechanical engineering and manufacturing company on the property, which since 1991 has been included within Assessment District 2A, Zone 3. (Second Clement Dec.1:7-8,16-17, JA 598.) As a result of the parcel's size, the Clement Corporation's assessment for, *e.g.*, 1992-93 was $1,158 in 1992, or approximately 20 times greater than the $53 a residential parcel of any size would pay. (4/7/97 Declaration of Lynne Filson, JA 361; Engineer's Report FY 1992-93 at p. 60, Exhibit 12, City Exhibit G-18.)

There are no "improvements" as described in the Engineer's Reports within a one and one-half mile radius of the Clement Corporation Property. The nearest street lighting and median landscaping to the Property is located two miles west on Wilbur Avenue, approximately where residential zoning begins. The only two parks in Zone 3 are Jacobsen and Meadowbrook Parks, located in residential areas more than one and one-half miles west of the

Property. The Property is zoned "heavy industrial," as are all of the properties surrounding the Property. (Second Clement Dec. 2:4-7,10-14, JA 599; 7/21/92 Protest Letter, Exhibit 4, City Exhibit G-20; 6/22/93 Protest Letter at p. 3, Exhibit 6, City Exhibit G-44; 4/11/94 Protest Letter at p. 2, Exhibit 7, City Exhibit G-57; 6/20/94 Protest Letter at pp. 7-8, Exhibit 8, City Exhibit G-63; 6/27/95 Protest Letter at p. 1, Exhibit 10.)

The City levied assessments on the Clement Corporation for each of the years 1992, 1993, 1994 and 1995, before inexplicably changing its status to zero assessment in 1996. (6/18/96 Letter, Exhibit 43; 12/27/96 Filson Dec., JA 358; 4/7/97 Filson Dec., JA 361; Second Clement Dec. 1:24-26, JA 598.)

B. 1992-93 ASSESSMENT AND PROTEST

The City passed Resolution No. 92-171 for fiscal year 1992-93, (Exhibit 17, City Exhibit G-27), based on the Engineer's Report for Fiscal Year 1992/93. (Exhibit 12, City Exhibit G-24.) On behalf of the Clement Corporation, Mr. Clement objected to the resolution before the Antioch City Council on the grounds that the property did not benefit by any "improvements" instituted by the District,

that the 1992 Engineer's Report was deficient, and that, according to that Report, there was an improper commingling of funds among the various districts, resulting in overassessments. (7/21/92 Protest Letter, Exhibit 4, City Exhibit G-20.) Despite the objection, the Clement Corporation was assessed $1,158 in 1992, an increase of $148.42 over the 1991 assessment. (4/7/97 Declaration of Lynne Filson, JA 361.)

The Engineer's Report for Fiscal Year 1992/93 demonstrates that the City had begun commingling the benefit zones and calculated the annual assessment for eight of District 2A's benefit zones (Zones 1-6, 8, 9) by merging estimated improvement costs for each zone with at least one other benefit zone located in another assessment district. (*See* Engineer's Report FY 1992/93 at pp. 12-27, Exhibit 12, City Exhibit G-24.) The City did not allocate the estimated improvement costs among the benefit zones based on the actual improvements within each benefit zone, or on the usage of shared improvements such as street medians. During the first year of District 2A, July 1, 1991 to June 30, 1992, the District had produced revenues of $1,760,678 and expended $1,719,225, for a surplus of $41,453. (City Financial Report for FY Ended

6/30/92 at pp. 76-77, Exhibit 38, City Exhibit G-16.) During fiscal year 1992/93, District 2A generated revenues of $1,726,416 and expended $1,401,666, increasing the surplus to $366,203. (City Financial Report for FY Ended 6/30/93 at pp. 80-81, Exhibit 39, City Exhibit G-51; City 1994-95 Budget at p. 183, Exhibit 34, City Exhibit G-103.) As discussed in section C, however, that surplus dropped to $126,189 due to an unexplained "adjustment" of funds.

C. 1993-94 ASSESSMENT AND PROTEST

In April, 1993, prior to the City Council meeting considering the Engineer's Report for FY 1993-94, City Traffic Engineer Lynne Filson, the Report's co-preparer, admitted that many of the exemptions granted to particular properties were improper in that certain individuals had arranged to have their parcels either wholly or partially exempted in violation of the L&L Act. (Declaration of Ralph A. Hernandez in Lieu of Testimony at Trial of Declaratory Relief Issues ("Hernandez Dec.") at 1:20-2:2, JA 406-407.) Ms. Filson later denied making the statement. (11/8/95 Filson Dec. at 1:27-2:7, JA 355-356.)

The City nevertheless passed Resolution No. 93-133 for fiscal year 1993-94, (Exhibit 19, City Exhibit G-49),

based on the Engineer's Report for that year. (Exhibit 13, City Exhibit G-47.) The Engineer's Report combined Zone 3 of District 2A, where the Clement Corporation property is located, with Zone 2 of District 8 and Zone 2 of District 5. (Exhibit 13, City Exhibit G-49 at 9 and 33.) Mr. Clement again protested on behalf of the Clement Corporation, objecting to the Report itself because it had been available for review for only 4 days (over the Easter weekend) prior to the council meeting, and because it again evidenced improper commingling among the districts. (4/12/93 Protest Letter, Exhibit 5, City Exhibit G-33.)

Clement Corporation further objected to the assessment, on the grounds that there were violations of the L&L Act, improper notice had been given to property owners, there was an improper commingling among the districts, and the Clement Corporation derived no benefit from the improvements because there "are no parks, no median strips, no street lighting and no landscaping within the vicinity of [the Clement Corporation]." (6/22/93 Protest Letter, Exhibit 6, City Exhibit G-44.) Once again, Clement Corporation was assessed and paid $1,158. (Second Clement Dec.4:12-13, JA 601; 4/7/97 Filson Dec., JA 361.)

The Engineer's Report FY 1993/94 (Exhibit 13, City Exhibit G-47) demonstrates that the City expanded its commingling of benefit zones and significantly overassessed the zones in District 2A for that year. For example, Table 5 covers District 2A, Zone 1, District 4, Zone 2, and District 7, Zone 1. The Total Assessment Needed is $212,625.52, but the Amount Assessed is $260,448.09, providing an Ending Balance of $47,822.57. (Engineer's Report FY 1993-94 at p. 7, Exhibit 13, City Exhibit G-47; a true copy is appended to this brief as Appendix A.) Except for four vague notations -- "Park & Landscape Maintenance," "Electricity," "Eng. & City Mgmt. Fee (5%)," and "Legal Publication" -- there is no indication what "improvements" are to be funded with the money. Eight of the nine zones of District 2A are combined with at least one zone from another district. (Engineer's Report FY 1993/94 at pp. 7-15, Exhibit 15, City Exhibit G-47.)

Since the Engineer's Reports combine costs and assessments for benefit zones from other districts with District 2A, it is impossible to determine the costs and assessments attributable to District 2A and each of its nine benefit zones. (Declaration of Ralph A. Marcello in

Lieu of Testimony at Trial of Declaratory Relief Issues ("Marcello Dec.") at 2:18-20, JA 396.)

The City acknowledged that it had intentionally overassessed these zones on the grounds that "it would be more prudent to reduce the balance gradually over a number of years to account for possible fluxuations (*sic*) in contractor fees, etc." (3/21/94 Filson Declaration at 4:24-25, JA 337.) For the year 1993-94, the total amount of the overassessments was $266,027. (*See* Engineer's Report FY 1993/94 at p. 33, Exhibit 13, City Exhibit G-47 (combining projected Ending Balance for all District 2A zones).)

Although District 2A should have started the fiscal year that ended on June 30, 1994 with a surplus of $366,203, (City Financial Report for FY Ended 6/30/93 at pp. 80-81, Exhibit 39, City Exhibit G-51), the City without explanation deducted $240,014 from that figure, arriving at a beginning fund balance for that year of $126,189. (City Financial Report for FY Ended 6/30/94 at p.78, Exhibit 40, City Exhibit G-70.) District 2A generated revenues of $1,885,129, but expenditures rose nearly 50% from $1,401,665 to at least $2,102,448, (City Financial Report at p. 78, Exhibit 40, City Exhibit G-70;

cf. City 1994-95 Budget at p. 183, Exhibit 34, City Exhibit G-103 ($2,038,060) *and* City 1995-96 Adopted Budget at p. 212, Exhibit 35, City Exhibit G-104 ($2,458,231).) There was also a net transfer of funds out of the district of $42,580, leaving District 2A with a deficit of $133,710 at the end of the year.

D. 1994-95 ASSESSMENT AND PROTEST

Resolution No. 94-112 was approved for fiscal year 1994-95 based on the Engineer's Report for that year. (Exhibits 14, 21, City Exhibits G-66, 69.) Once again, the Engineer's Report combined the zones of District 2A with zones from other districts. (Engineer's Report FY 1994-95 at pp. 10, 34, Exhibit 14, City Exhibit G-66.) Once again, the Clement Corporation objected to the Engineer's Report on the grounds of inadequate review time, failure to provide the basis for its "benefit" determination, commingling of funds, and arbitrariness of assessment due in part to improper "capping" of the assessments. (4/11/94 Protest Letter, Exhibit 7, City Exhibits G-57.)

A June 20, 1994 Protest Letter further delineated the objections, including the illegal commingling,

arbitrariness of assessments, illegality of surpluses, lack of benefit to the Clement Corporation, and failure to comply with the L&L Act. (6/20/94 Protest Letter, Exhibit 8, City Exhibit G-63.) Once again, Clement Corporation was assessed and paid $1,158. (Second Clement Dec. 4:12-13, JA 601; 4/7/97 Filson Dec., JA 361.)

The City stated that it would stop the prior practice of commingling and overassessing the zones after the Trial Court, in ruling on one of the summary judgment motions, had indicated "it may not be proper to carry positive balances forward," and that the commingling was not authorized. (5/12/94 Staff Report at p.2, Exhibit 28, City Exhibit G-59; June 23, 1994 Memorandum at pp. 1, 3-4, Exhibit 29, City Exhibit G-64.)

The commingling could not be addressed until the next fiscal year, however, (6/2/94 City Attorney Memorandum at pp. 2-3, City Exhibit 62), and the City began imposing a "five month cash reserve," ostensibly pursuant to the provisions of section 22569 of the L&L Act, which typically resulted in large deficits. (*See, e.g,* Engineer's Report FY 1994-95, Table 6 at p. 8, Exhibit 14, City Exhibit G-66 (imposing $123,029.17 reserve and projecting $131,887.78 ending deficit).) When assessment

zones "had a positive balance after the above reserve amount, such balance is reduced to zero by making appropriate reductions in the proposed assessments." (5/12/94 Staff Report at p. 3, Exhibit 28, City Exhibit G-59.)

The City also expanded its practice of imposing "caps" on the assessments for the various zones. The capped assessment amounts varied arbitrarily from district to district and zone to zone. For example, for fiscal year 1994-95, the "calculated assessment amount" (the amount based on actual estimated improvement costs) for District 1, Zone 1 was $496.26 but was capped (in the "benefit unit assessment") at $216, while the calculated assessment amount for District 2A, Zone 8 and District 3, Zone 1 was $314.95, but was capped at only $129. (Engineer's Report FY 1994-95 at pp. 5, 15, Exhibit 14, City Exhibit G-66.) The calculated assessment for seven zones exceeded $216 but only one, District 1, Zone 1, was capped at $216. (*Id.* at pp.5-21.)

The ratio of actual assessment to the "cap" varied for different districts and zones, as shown in Exhibit 14, City Exhibit G-66 at pages 8, 10, and 11 -- District 2A, Zone 1 had a "calculated" (actual) assessment of $103 that

was capped at $69 for a 67% ratio; District 2A, Zone 3 had a calculated assessment of $99 that was capped at $53 for a 53.5% ratio; and District 2A, Zone 4 had a calculated assessment of $82 that was capped at $75 for a 91% ratio.

City Director of Public Works Stan Davis admitted at an April 12, 1994 City Council meeting discussing the Engineer's Report that the "capping" placed on benefits assessments was wholly arbitrary. After City Councilman Ralph Hernandez had questioned the inconsistent nature of the caps at that meeting:

> Stan Davis, the Director of Public Works (signatory to the E.R.), confirmed that the caps placed on the assessments varied inexplicably because they were "arbitrary."

(Hernandez Dec. at 2:28-3:9, and Exhibit 2 thereto (videotape of 4/12/94 City Council Meeting, JA 411a.)

In addition to the arbitrariness of the caps, the Engineer's Report further discloses that the City provided for a 25% assessment reduction for residential parcels on private streets on the grounds that there was no benefit from lighting at the parcel. (Exhibit 14, City Exhibit G-66 at 31-32.) Although the Clement Corporation also received no benefit from lighting, medians or parks in its vicinity, it received no assessment reduction solely

because the Property is on a public road. (Second Clement Dec. at 3:9-11, JA 600.)

The Engineer's Report FY 1994-95 and the 1994 Zero-Assessment Roll, (Exhibit 27, City Exhibit G-68), also disclose that properties are arbitrarily exempted, in whole or in part, from the assessment, or excluded from any of the assessment districts. For example, the 1994 Zero Assessment Roll at 5-6, (Exhibit 27, City Exhibit G-68), shows over 50 parcels owned by Ponderosa Industries, Inc. that are zero-assessed, yet do not fit the criteria provided by the Engineer's Report FY 1994/95. (Exhibit 14, City Exhibit G-66.)

District 2A once again generated significant revenues of $1,786,022, yet ended the year with an even greater deficit of $430,849. (City Financial Report for FY Ended 6/30/95 at pp.78-79, Exhibit 41, City Exhibit G-89.) According to that Report, expenditures had actually declined to $1,213,317. The further deficit was caused, however, by a net transfer of funds out of the district of $869,844, for which no explanation is given. (City Financial Report for FY Ended 6/30/95 at pp.78-79, Exhibit 41, City Exhibit G-89.) Disregarding that transfer of funds, District 2A would have had a surplus of $440,795.

E. 1995-96 ASSESSMENT AND PROTEST

The City Council next passed Resolution No. 95-135 for fiscal year 1995-96, (Exhibit 23, City Exhibit G-97), relying on the Engineer's Report for that year. (Exhibit 15, City Exhibit G-94.) Once again, Clement Corporation objected to the approval of the Engineer's Report, (5/9/95 Protest Letter, Exhibit 9), and to the assessment itself. (7/27/95 Protest Letter, Exhibit 10.) Once again, Clement Corporation was assessed and paid $1,158. (Second Clement Dec. 4:12-13, JA 601; 4/7/97 Filson Dec., JA 361.)

Clement Corporation was not alone in protesting Assessment District 2A. As shown by City Exhibit G-93 at page 2, the City received protests from 2,066 parcels within District 2A, representing 13.73% of parcels within the District. Protest letters from 1992-96 are compiled in City Exhibit G-112.

District 2A again generated significant revenues of $1,774,360, and expenditures further declined to $1,147,749, but once again the District ended the year with a huge deficit due to a net transfer of funds out of the District in the amount of $780,852. (City Financial Report for FY Ended 6/30/96 at pp.78-79, Exhibit 42.)

According to the City 1995-96 Budget, the City actually anticipated revenues of $3,173,040 and expenditures of $2,018,950 for that year, which would have resulted in a balance of $794,361. (City 1995-96 Budget at p. 212, Exhibit 35, City Exhibit G-104.)

In an April 17, 1997 Staff Report, City Director of Public Works Stanford E. Davis acknowledged that "commercial and industrial parcels receive no 'special benefit' under Prop. 218 from park maintenance and therefore are not assessed for those costs." (4/17/97 Staff Report at p.1, Exhibit 45.) The City also acknowledged that "general benefits may no longer be assessed," and ultimately determined that non-residential parcels, including industrial parcels, received no "special benefit" from parks, community facilities, street lighting, or roadway landscaping for arterials, specifically admitting that maintenance of landscaped areas "is considered by this report to be a general benefit, or one that benefits the City as a whole." (Engineer's Report FY 1998/99 at pp. 2, 8 21, Exhibit 57, JA 554, 560, 573.)

F. DAMAGES

For each year from 1992 through 1995, the Clement Corporation paid $1,158 in assessments, for total special damages of $4,632. The total amount paid by all non-residential property owners for those years totaled in excess of $821,000. The total amount paid throughout District 2A by all property owners for those years totaled in excess of $6.4 million. (Engineer's Reports FY 1992-97, Exhibits 12-15, and 51, City Exhibits G-24, 47, 66, 94.)

By the end of 1996, the City had collected over $8,900,000 from Assessment District 2A, yet had expended only $7,584,405, leaving a surplus of over $1.3 million from District 2A, which simply went into the general fund. (Marcello Dec. at 4:9-23 and Exhibit 1, JA 398, 400; Audited Financial Statements 6/30/91-6/30/96, Exhibits 37-42, City Exhibits G-16, 51, 70, 89.) The City transferred approximately $1.7 million out of District 2A without setting those transfers up as loans or some sort of account receivable, and without indicating how the funds were used. (Marcello Dec. at 4, JA 398.)

Every year, the Clement Corporation objected on the grounds that it did not receive any benefit from the improvements. (7/21/92 Protest Letter, Exhibit 4, City

Exhibit G-20; 6/22/93 Protest Letter at p. 3, Exhibit 6, City Exhibit G-44; 4/11/94 Protest Letter at p. 2, Exhibit 7, City Exhibit G-57; 6/20/94 Protest Letter at pp. 7-8, Exhibit 8, City Exhibit G-63; 6/27/95 Protest Letter at p. 1, Exhibit 10.)

The City produced no evidence at the time the assessments were levied to demonstrate any special benefit flowing from the improvements to the Clement Corporation parcel or to industrial parcels in general. In support of one of its motions for summary judgment, it produced a later declaration of civil engineer Gary J. Mello, an employee of the firm that had submitted some of the Engineer's Reports, opining that industrial parcels did benefit. (JA 298-301.)

As set forth in the Declaration of William D. Hermann in Lieu of Testimony at Trial of Declaratory Relief Issues ("Hermann Declaration") at 2:26-3:6, JA 402-403, entities located on industrial properties are generally of such a nature that they do not require amenities such as parks to prosper. It is more likely that improvements such as public parks in the vicinity of industrial property create a liability for the business located on such property because of the potential for complaints to arise regarding

noise or traffic associated with the activities of the business. *Id.*

Regarding the effect on the Clement Corporation parcel itself, president and controlling shareholder Michael H. Clement gave uncontradicted evidence that the fair market value of the Property had decreased in value by approximately $100,000 as a direct result of the enactment of the Landscaping and Lighting Act Assessment. (Second Clement Dec. at 5:1-8, JA 602.)

ARGUMENT

A. OVERVIEW OF LANDSCAPING AND LIGHTING ACT OF 1972

The Landscaping and Lighting Act of 1972, Streets & Highways Code §§ 22500 *et seq* (the "L&L Act")[3], authorizes "local legislative bodies to establish benefit-related assessment districts and to levy assessments for the construction, installation and maintenance of certain public landscaping and lighting improvements." (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 136.)

[3]Unless otherwise indicated, all further statutory references are to the California Streets and Highways Code.

The formation of the district does not authorize annual assessments beyond the first year – "each annual assessment levied thereafter requires its own engineer's report and noticed public hearing prior to imposition. (§§ 22566, 22620-22631.)" (*Knox*, 4 Cal.4th at 136.)

The annual engineer's report must provide plans and specifications indicating the type of improvements and estimated costs for each assessment zone, (§§ 22567, 22568), set the net amount of the assessment by deducting the amount of any previous surplus from the estimated costs of the improvements, (§ 22569), and provide "a full and detailed description of the improvements, ... and the proposed assessments." (§ 22624.) The net amount of the assessment must be apportioned fairly among all assessable lots in proportion to the estimated benefit for each lot. (§§ 22572(c), 22573.)

B. SPECIAL TAX LEVIED UNDER GUISE OF SPECIAL ASSESSMENT VIOLATES UNITED STATES AND CALIFORNIA CONSTITUTIONS

An assessment properly levied under the L&L Act constitutes a "special assessment" rather than a tax. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 141-43.) A special assessment is a charge placed on real property

within a certain district for the purpose of "'defraying in whole or in part the expense of a permanent public improvement therein....'" (*Knox*, 4 Cal.4th at 142 (quoting *San Marcos Water Dist. v. San Marcos School Dist.* (1986) 42 Cal.3d 154, 161.)

A special assessment can only be levied on property that "'has received a special benefit over and above that received by the general public.'" (*Knox*, 4 Cal.4th at 142.) "A tax, on the other hand, is very different," in that a tax need not confer a special or peculiar benefit on an individual or a parcel of property, and may be imposed "upon a class or upon individuals who enjoy no direct benefit from its expenditure." (*Knox*, 4 Cal.4th at 142.)

While the assessment may under some circumstances be determined on an *ad valorem* basis, (*County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364, 380), there must be a determination of a benefit to each parcel, because the assessment can be levied "only on the specific property benefitted and not on all the property in the district." (*Anaheim Sugar Co. v. County of Orange* (1919) 181 Cal. 212, 216; 62 Ops.Cal.Atty.Gen. 747 (1979) [filed opn. pp. 11-13].)

If an assessment for improvements does not provide a special benefit to the assessed parcels, or if the assessment "exceeds the actual cost of the improvement," then it amounts to a special tax rather than an assessment. (*Knox*, 4 Cal.4th at 142-43 and n. 15 (citing *City of Los Angeles v. Offner* (1961) 55 Cal.2d 103, 108-09.)

> "'Any substantial excess of assessment over cost would be general taxation of the particular district in disregard of all mandates of equality. A law which should direct or inevitably compel such a result would doubtless be held void anywhere in the United States as an act of confiscation.'"

(*City of Los Angeles*, 55 Cal.2d at 109.)

Assessments which are to be used to maintain improvements in areas outside the assessment district are therefore improper, (*City of Los Angeles*, 55 Cal.2d at 110), and where the property owner receives no benefit, or only a general benefit:

> then most manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal and ununiform.
>
> Therefore, the compensating benefit to the property owner is the warrant, and the sole warrant, for the legislature itself to impose the burdens of these special assessments.

(*Spring Street Company v. City of Los* Angeles (1915) 170 Cal. 24, 30.)

A special assessment imposed "without or in excess of a special benefit to the assessed property" is not only a tax but also results in a taking of property in violation of the Fifth Amendment to the United States Constitution. (*Knox*, 4 Cal.4th at 144 n.17; *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 874, *cert den.* 444 U.S. 976.)

For more than 150 years, the California Constitution has also required taxation to be "equal and uniform throughout the state." (1849 California Constitution, Article XI, § 13.) Any assessment not accompanied by a benefit violates Article XIII, § 1 of the current California Constitution, which provides that all property "shall be assessed at the same percentage of fair market value."

Since the passage of Proposition 13 in June 1978, assessments without benefits also violate Article XIIIA of the California Constitution, which precludes a municipal entity from imposing any "special taxes" without prior approval by two-thirds of the voters. (*Knox*, 4 Cal.4th at 140-41, California Constitution, Article XIIIA § 4.)

Proposition 13 prompted municipal entities to employ various new strategies to raise funds, including special assessment districts. While upholding the validity of one

such district, the Second District Court of Appeal issued the following warning:

> We add a word of caution to taxing entities which might be tempted to use the special assessment exclusion as a means to circumvent the tax limitation of article XIIIA. Our opinion excluding special assessments, including those assessed on a fixed, variable, ad valorem, or other basis, from the 1 percent limitation of section 1 applies only to true special assessments designed to directly benefit the real property assessed and make it more valuable.... Ordinarily, levies to meet general expenses of the taxing entity ... may not be transformed from general ad valorem taxes to special assessments by a mere change in the name of the levy.

(*Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 557.)

If the Court determines that no special benefit has been shown, the appropriate remedy is not to require reassessment but to declare the assessments on all properties within the district to be void or invalid, even though not all property owners are parties to the action. (*Harrison v. Board of Supervisors* (1975), 44 Cal.App.3d at 852, 864-65.) Injunctive relief is also available under the provisions of Code of Civil Procedure § 526a, which specifically authorizes taxpayers' suits to challenge the legality of taxing statutes. (*See San Miguel Consolidated Fire Protection District v. Weinberg* (1994) 25 Cal.App.4th 134, 145.)

C. THIS COURT SHOULD DECLARE DISTRICT 2A ASSESSMENTS VOID AS ILLEGAL TAX WHERE PARCELS RECEIVED NO SPECIAL BENEFIT AND ASSESSMENTS EXCEEDED THE COST OF IMPROVEMENTS

1. City Introduced No Evidence of Special Benefit to Parcel And Could Not Do So Where Assessments Paid for Improvements Outside District

In deciding whether the assessed property has received a special benefit or a mere "'general benefit' inuring to the public as a whole," (*Harrison,* 44 Cal.App.3d at 857) a court must: identify the benefit rendered by the improvement; determine "whether the property owner will receive a benefit different from that of the general public"; and then determine if the formula for assessments is based on the special benefit received. (*Harrison*, 44 Cal.App.3d at 857.)

A trial or reviewing court should invalidate a special assessment approved by a local legislative body if:

> "it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties."

(*Knox*, 4 Cal.4th at 146 (quoting *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 685.)

This Court may "look beyond the findings and conclusions of the trial court" to determine whether

substantial evidence supports the City's decision, and must of course independently decide questions of law. (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1305-06; *see also* Eisenberg et al, *Civil Appeals and Writs* (2000) 8:128.6 - 8:128.8.) The "'deference afforded to legislative findings does "not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law."'" (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 569.)

In *Knox v. City of Orland* (1992) 4 Cal.4th 132, 141, 147-49, the City of Orland had conducted a survey regarding park usage to determine equality of benefits, the plaintiffs had produced no evidence to contradict the City's determination of benefits, and the Court found no evidence of an absence of benefit or nonproportionality. The Supreme Court necessarily determined that the property had received a special benefit and that California Constitution, Article XIIIA, but also noted:

> Although the issue is not presently before us, we question whether a special assessment would be valid ... if there exists evidence in the record which contradicts the local legislative body's benefit determination and indicates that such determination was arbitrary, capricious, or entirely lacking in evidentiary support.

(*Knox*, 4 Cal.4th at 149 n. 26.)

That issue is now squarely before this Court. Unlike the City of Orland, the City of Antioch conducted no research prior to creating District 2A, and produced no evidence of any benefit to the Clement Corporation parcel when it levied assessments in 1992-96. The only evidence in Exhibit G, containing all of "the documentation submitted to the City Council for its consideration for the fiscal years 1991-92, 1992-93, 1993-94, 1994-95, and 1995-96, respectively," (JA 291-92), demonstrates that the Clement Corporation parcel received no benefit from the improvements, and that the City's determination, to the extent it made any, was necessarily arbitrary and capricious.

The arbitrariness of the City's benefit "determination" is further reinforced by the City's admissions (erroneously not considered by the Trial Court) that none of the improvements provided a special benefit to industrial parcels. (Exhibit 45; JA 554, 560, 573.)

The only benefits identified by the City are maintenance and servicing of landscaping and lighting facilities, public medians and park sites, and weed abatement. (Engineer's Report FY 1992/93 at p.6, Exhibit

12.) Such improvements are located throughout the City, rather than being confined to District 2A, (Engineer's Report FY 1992/93 at pp. 12-28, Exhibit 12; City 1993-94 Budget at p. 201, Exhibit 33), and they provide no benefit to the Clement Corporation's parcel because there are none anywhere near the parcel, as Mr. Clement stated each year in his Protest Letters. (7/21/92 Protest Letter, Exhibit 4, City Exhibit G-20; 6/22/93 Protest Letter at p. 3, Exhibit 6, City Exhibit G-44; 4/11/94 Protest Letter at p. 2, Exhibit 7, City Exhibit G-57; 6/20/94 Protest Letter at pp. 7-8, Exhibit 8, City Exhibit G-63; 6/27/95 Protest Letter at p. 1, Exhibit 10.)

Under these circumstances, there is no need to evaluate the proportionality of the assessments, because no assessment would be proper, and the appropriate remedy is a judgment voiding the entire district. (*Harrison*, 44 Cal.App.3d at 864-65.) *Harrison* invalidated a storm sewer special assessment after the Court determined that the benefit was the prevention of flooding, there was no evidence of flooding on the assessed parcels, and there was evidence that those parcels had no excess water problem. (*Harrison*, 44 Cal.App.3d at 858.)

The *Harrison* court rejected the defendant's contention

that relief of traffic problems, or a general rise in property values, would constitute a special benefit. The facilitation of traffic was found to be a general benefit, while an increase in property values alone could not amount to a special benefit, "particularly in the absence of any cost-benefit analysis or evidence." (*Harrison*, 44 Cal.App.3d at 858; *see also* 62 Cal.Ops.Atty.Gen. 747, (1979) [filed opn. pp. 12-13](concluding that recreation and park district assessment was tax where no provision for assessing benefits to each parcel).)

The Trial Court here specifically found that the assessment was <u>not</u> proportional to the benefits, violating both California Constitution, Article XIII A, § 4 and L&L section 22572(c). (Tentative Decision at 6, JA 520, Statement of Decision at 2:3-7, JA 534.) The Trial Court's refusal to issue any remedy was a legal error subject to *de novo* review, which this Court should reverse. (*See Harrison*, 44 Cal.App.3d at 864-65; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

In Defendants' Opening Brief on Trial of Declaratory Relief Issues at 14-15, the City did not point to any evidence of special benefit, relying solely on this Court's determination, in resolving the prior appeal,

that:

> [T]he record establishes that the property within the special district will derive the benefits of greater public safety from properly maintained street lighting and enhanced property values from well-maintained park land and medians. The evidence impliedly demonstrates that any such benefits to the community as a whole will directly or indirectly benefit individual property owners.

(*Clement Corp. v. Keller*, Opinion at 12, JA 213.)

As previously noted, however, this Court had specifically limited its holding to "the validity of the assessment district formed for fiscal year 1991-1992," and refused to consider any evidence regarding later assessments. (Opinion at 9.) The holding therefore does not control the issue of special benefits for fiscal years 1992-96, each of which require separate engineer's reports and hearings. (*Knox*, 4 Cal.4th at 136.)[4]

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[4]Even if it were binding, the prior holding would seem to be at odds with the case law established by *Spring Street Company v. City of Los Angeles* (1915) 170 Cal. 24, 31, *Solvang*, 112 Cal.App.3d at 557, and *Harrison*, 44 Cal.App.3d at 858. Although *Knox*, 4 Cal.4th at 144, affirmed that a public park may constitute a special benefit, it did not hold that an implied, indirect benefit could constitute a special benefit to industrial property.

If the Court agrees that its prior ruling was erroneous and elects to treat that ruling under the doctrine of law of the case, it may disregard it to prevent manifest injustice. (*See England v. Hospital of Good Samaritan* (1939) 14 Cal.2d 791, 795; *Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 530.) Even under the less flexible doctrine of res judicata, a court may decline to apply the doctrine where the ends of justice or public policy require it. (*Hight v. Hight* (1977) 67 Cal.App.3d 498, 503; *but see Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642,

Although *Knox* refused to consider expert declarations executed after the assessments were levied, (*Knox*, 4 Cal.4th at 148 n.24), the Trial Court in this case did consider such expert declarations, and those declarations reaffirmed that there was no substantial evidence supporting a determination that the Clement Corporation parcel received any benefit from the improvements.

The Mello Declaration introduced by the City refers to safer traffic movement due to lighting and medians, and the lure of parks for potential residents and employees. (JA 299-300.) None of this would constitute a special benefit to the Clement Corporation parcel. (*Harrison*, 44 Cal.App.3d at 858.)

On the other hand, the Hermann Declaration established that industrial parcels do not benefit from the improvements for which the assessments were made, and the burden imposed by an additional tax outweighs any potential benefit. (JA 402-03.)

Therefore, even applying the substantial evidence

1647-48.)

In this case, the Court should enforce the policy espoused in *Solvang* and ensure that municipal entities do not use special assessment districts as a convenient way to circumvent the California Constitution. It would be a manifest injustice validate an illegal tax simply because the Clement Corporation, instead of a different taxpayer, has pursued the question of its illegality.

standard to the Trial Court's reason for ordering no remedy – the lack of evidence of any damages – the Trial Court should be reversed. (JA 519-21.) In addition to the Hermann Declaration, Clement Corporation president Michael H. Clement also provided evidence of damage in his declarations and, though the Court improperly refused to consider that evidence during the first trial, it was certainly a part of the record in the second. (JA 597-618.)

On the face of the record before the City, and on the face of the record produced in the Trial Court, it is clear that no special benefit was conferred on the Clement Corporation parcel by this assessment. This Court should declare Assessment District 2A and all assessments levied from 1992-96 void.

2. Clear Evidence of Severe Overassessment, And Trial Court's Findings of Statutory and Constitutional Violations, Also Require Invalidation of Assessments as Special Taxes

Even if there were evidence that the Clement Corporation parcel had received some special benefit from maintenance of the parks and other "improvements," the "substantial excess of assessment over cost" would still require the invalidation of District 2A. (*City of Los*

Angeles v. Offner (1961) 55 Cal.2d 103, 109.) In *City of Los Angeles*, the Court precluded the imposition of a sewer connection charge that was to be used in part for the cost of "maintaining sewers and furnishing services which benefit properties not in the subject assessment district." (*City of Los Angeles*, 55 Cal.2d at 110.)

There can be no doubt that the City of Antioch was spending funds levied in District 2A in other districts – the Engineer's Reports for 1992-93 and 1993-94 openly stated that the City was commingling the funds. (Engineer's Report FY 1992/93 at pp. 12-27, Exhibit 12, City Exhibit G-24; Engineer's Report FY 1993/94 at pp. 7-15, Exhibit 15, City Exhibit G-47.) The Trial Court made a specific finding that there had been commingling which violated section 22572(c). Based on that determination, the Trial Court made a legal error in refusing to order any sort of remedy.

The City was also receiving far more money from District 2A than was necessary. By the end of 1996, the City had collected over $8,900,000 from the District while expending only $7,584,405, leaving a surplus of over $1.3 million from District 2A. (Marcello Dec. at 4:9-23 and Exhibit 1, JA 398, 400; Audited Financial Statements

6/30/91-6/30/96, Exhibits 37-42, City Exhibits G-16, 51, 70, 89.) In the absence of any evidence contradicting the Marcello Dec., the Trial Court made a legal error in failing to invalidate the district. (*City of Los Angeles*, 55 Cal.2d at 109-10.)

Although there was also uncontradicted evidence that the City had improperly exempted certain properties, the Trial Court again declined to order a remedy, finding that there was no evidence of "fraud, gross injustice or intentional wrongdoing" by the City, and no damage. (Tentative Decision at 2, JA 516.)

The Trial Court made two legal errors in so concluding. It first applied the wrong legal standard – plaintiffs need only establish "fraud, gross injustice or demonstrable mistake," (*Howard Park Company v. City of Los Angeles* (1953) 120 Cal.App.2d 242, 245), rather than "intentional wrongdoing," and the Court had found that the City had made a mistake in exempting certain properties. (JA 516.)

In addition, and despite the Trial Court's determination to the contrary, improper exemptions necessarily "resulted in the disproportionate assessment of other properties within District 2A," because some

other property will have to pay for the underassessment on the exempt properties. (JA 516.) As the Court held in *Todd v. Visalia* (1967) 254 Cal.App.2d 679, 689, "the illegal exclusion of these parcels of land necessarily prevented a just spreading of the assessment."

The *Todd* rationale also undermines the Trial Court's determination plaintiff had failed to establish that the City's decision to cap assessment amounts, which caused underassessments, "had resulted in disproportionate assessment of properties within District 2A." (Tentative Decision at 3, JA 517.) Once again, unless the City simply does not need the money, arbitrary underassessment of certain properties will create a shortfall that must be made up by the other properties. *Todd,* 254 Cal.App.2d at 689.

Finally, the Trial Court erred in finding substantial evidence in the record to support the Clement Corporation's contention that the City had improperly and intentionally maintained surpluses in the 1992-93 and 1993-94 assessments, yet refusing to invalidate the assessments for those years. (Tentative Decision at 3-4, JA 517-518.) Simply because the City could have required comparable reserves under section 22569 does not *ex post*

facto render the collecting of surpluses legal. As Justice Kennard has noted, the "city did not consolidate the district with another district, and is not entitled to benefit from a legal process it freely chose not to employ." (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 153 (Kennard, J., dissenting.))

The Trial Court's determination that no remedy was available, despite commingling and overassessments which violated California Constitution, Article XIII A, § 4, (Tentative Decision at 5:4-7:4, JA 519-521), was erroneous as a matter of law. The imposition of assessments beyond the value of the improvements, or without regard to the value of improvements, must be struck down. (*City of Los Angeles*, 55 Cal.2d at 109-14.)

D. OVERWHELMING NUMBER OF STATUTORY VIOLATIONS INTERFERED WITH DUE PROCESS RIGHTS OF PUBLIC AND DOOM ASSESSMENTS, AT LEAST FOR YEARS IN WHICH CITY ADMITTEDLY VIOLATED THE STATUTES

Under section 22509, assessments cannot be invalidated for failure to comply with the provisions of the L&L Act unless the failure has a substantial, adverse effect upon a person's rights, and all determinations are "final and conclusive in the absence of fraud or prejudicial abuse of discretion."

In this case, the City's breathtaking and wholesale violation of the procedures set forth in the Landscaping and Lighting Act violated the due process rights of the City of Antioch's citizens, compelling a reversal of the Trial Court's decision acquiescing in those violations.

As the Supreme Court explained in *Knox*, 4 Cal.4th at 145 n.19, California law provides a narrow scope of review in special assessment cases based on the assumption the local legislative body has made a determination "after a full hearing accorded to all interested persons to make objection as they see fit." *Knox* cites *City Council of the City of San Jose v. South* (1983) 146 Cal.App.3d 320, 332 for the proposition that "due process requirements of notice and hearing apply to special assessments," and *South* itself states:

> "The constitutional requirement of due process of law is not fulfilled, unless there is provided a notice and an opportunity to be heard to the property-owner, upon the question whether or not his property is in fact benefited by the improvement, ..."

In construing the notice requirements under a comparable statutory scheme, *Todd v. City of Visalia* (1967) 254 Cal.App.2d 679, 683-84, held similar notice requirements to be "mandatory and jurisdictional."

In this case, the City's wholesale trampling of the

statutory requirements made it impossible for citizens of Antioch to determine what assessments were actually being imposed, and for what purpose, in order to determine whether to file a protest. Section 22628 and 22629 provide a protest procedure to be followed every year, mandating that the "legislative body shall consider all oral statements and all written protests made or filed by any interested person." (Section 22629.)

The City undermined the rights provided by the statutory and constitutional schemes. For example, while the Engineer's Reports for 1992-96 provided certain criteria for exemptions, the City ignored those exemptions, violating sections 22628 and 22629 and interfering with the public's right to protest. Arbitrary caps were imposed on assessments, disguising the true amount of the assessments and potential liability, while lulling the public into complacency at the low level of assessments. The improper commingling of districts made it impossible for the public to determine what improvements were being paid for by what district, further impeding the ability to protest.

In addition to the due process violations, the City also repeatedly violated nearly every other requirement

under the L&L Act. Sections 22568-22569, for example, require the Engineer's Reports to describe the improvements and estimated costs, but the commingling and arbitrary caps made that impossible, and the City routinely gave only vague indications of the improvements, with the 1993 Engineer's Report completely lacking in information. (Exhibit 13, City Exhibit G-47 at pp. 9 and 33.) As the Trial Court properly determined, the City violated section 22572(c) by not properly apportioning the amount to be paid by each parcel based on its estimated benefits, and the City violated this section every year that it commingled funds (1992-94), and every year that it overassessed (1992-96).
Arbitrary assessment caps for 1992-95 also violated this section.

Section 22573 requires the legislative body to fairly distribute the assessments based on estimated benefits, and the City violated that section each year that it commingled, overassessed, arbitrarily capped, or improperly exempted.

The flexible review provided by section 22509 can only be stretched so far. When a local legislative body routinely ignores all of the required rules, it tramples

on the due process rights of its citizens, and any assessment must be invalidated.

CONCLUSION

When a municipal entity ignores the law in order to extract funds from its citizens, it becomes "the duty of the court to protect the citizen from robbery under color of a better name." (*Spring Street Company v. City of Los Angeles* (1915) 170 Cal. 24, 31.) The City of Antioch has ignored the warning issued in *Solvang Municipal Improvement District v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 557, yielding to the "tempt[ation] to use the special assessment exclusion as a means to circumvent the tax limitation of article XIIIA."

The Court should invalidate Special Assessment District 2A, and order the return of the funds that have been illegally extracted by the City of Antioch from its citizens.

SEPTEMBER 8, 2000 Respectfully submitted,

PAUL KLEVEN

Appendix A