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TO: DIRECTORS OF SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT (FP-5 Expansion Protest), 157 West 5th Street, 2nd Floor, San Bernardino, CA 92415

RE: LEGAL BRIEF, SUBMITTING THAT THE PROPOSED $157 PARCEL TAX IS UNCONSTITUTIONAL IN MANY RESPECTS BUT SUGGESTING AN ALTERNATIVE THAT IF A FIRE TAX WERE BASED ON THE USE BEING MADE OF EACH PARCEL (INSTEAD OF ON THE UNCONSCIONABLE *PER-PARCEL FLAT-TAX* BASIS HERE), THEN SUCH A TAX WOULD BE FAIR AND REASONABLE AND CONSTITUTIONAL

Honorable Directors:

This Brief presents **25 OBJECTIONS** and a **SOLUTION**. The issue is not whether there should be **a tax**, but whether very different parcels must both pay **the SAME tax**. Thus, I write[1] **in protest**[2] against **this tax**, proposing to levy $157 per-parcel in a fixed amount, without any consideration of burdens/impacts or of special benefits conferred (if any), and without due compliance with the constitutionally-mandated 2/3-majority-vote procedures, on about 190,000 parcels, comprising 12,207,306 acres, covering 19,073 square miles.[3]

Is it constitutional ***as-applied*** to impose this tax, without a proper vote, on 190,000 people, where someone owning a parcel of barren sandy wind-swept desert land worth $1,000 with only one solitary weed bush on it, pays the exact same $157 flat tax as the owner of an urban paint factory worth $10,000,000 and stacked full of highly flammable solvents? The first guy loses "all" value of his property to this tax in only **6.3 years**, while the factory owner loses his factory to this tax after **63,000 years**. Is this "fair" or "reasonable"? Do these two both need the "same" level of fire protection services so as to justify imposing the "same" $157 tax on both? In this "***Case of the Burning Bush***", is it just to charge both the same $157 every year for protecting one desert bush against the "risk" of fire, as is charged for protecting a $10,000,000 paint factory? Does that sound "constitutional"? Can such an action even be considered without a proper vote and without a 2/3 majority? An **aerial photo** showing the "***Case of the Burning Bush***" is on the following page.

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[1] Dr. Gavin M. Erasmus, B.Comm, Ll.B., Ll.M.. D.Phil. (Oxford) (Law) is a California Attorney (State Bar # 125238.) He is admitted to practice before all Courts in California and also before the Supreme Court of the United States. His doctorate, conferred by the University of Oxford in England, is in the field of comparative constitutional law, with particular reference to eminent domain and inverse condemnation law, and to "just compensation" for "takings." Concurrently with his postgraduate research at Oxford, he held a Visiting Researchership at Harvard Law School. In 1990 he was the Chairman of the UKNCCL World Conference on Eminent Domain Law, held at Oxford University and involving representatives from more than 25 countries worldwide. His publications include being the editor of a two-volume treatise on eminent domain worldwide, as well as co-authoring chapters in the seminal encyclopedia, "*Nichols on Eminent Domain*", and several papers before the American Law Institute of the American Bar Association. On this basis, it is respectfully submitted that Dr. Erasmus is qualified to express the opinions which he states herein as to the constitutionality or otherwise of the proposed San Bernardino Fire District per-parcel special tax of $157.

[2] Dr. Erasmus protests here in his capacities as a citizen and resident of this County, and as a registered voter and a landowner, and as President of a corporation which owns many parcels throughout the County, and as an attorney. He himself has standing to litigate because of his ownership interest in an affected parcel, assessed at only $1,000, which will have all of its value entirely taken in only 6.3 years by this "unconstitutional-as-applied" "tax" of $157 p.a.

[3] Statistics provided in a telephone conversation on September 18, 2018, with County Fire Dept at (909) 387-5947.

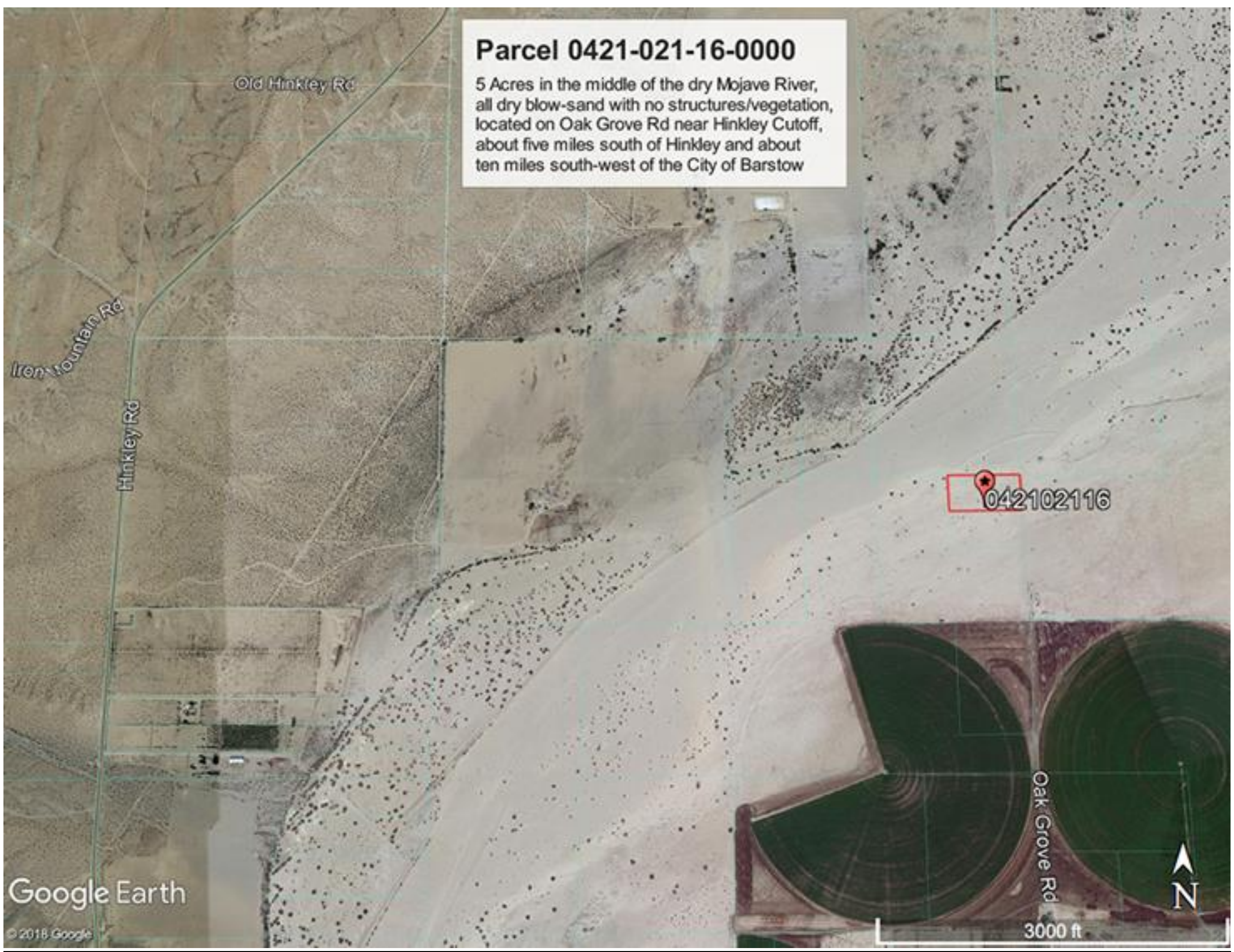
AERIAL PHOTOGRAPH: PARCEL 0421-021-16-0000

ASSESSED VALUE: ONE THOUSAND DOLLARS ($1,000)

FIRE TAX: $157/YEAR, TO PROTECT ONE WEED-BUSH (???)

TIME UNTIL ALL VALUE IS EATEN UP BY THIS TAX: 6.3 YEARS

"THE CASE OF THE BURNING BUSH"



Parcel 0421-021-16-0000

5 Acres in the middle of the dry Mojave River,
all dry blow-sand with no structures/vegetation,
located on Oak Grove Rd near Hinkley Cutoff,
about five miles south of Hinkley and about
ten miles south-west of the City of Barstow

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PART ONE: OBJECTIONS

Twenty-five objections are detailed within this Brief against the proposed $157 fire tax:

PART ONE: OBJECTIONS

This protest against the proposed $157 parcel tax is based on the following objections.

OBJECTION #1: THE PROPOSED IMPOSITION OF THIS TAX ON 190,000 PARCELS IS UNCONSTITUTIONAL BECAUSE IT LACKS THE APPROVAL OF A 2/3 MAJORITY

The objection here is that imposition of this parcel tax violates Art. XIII-C of the California Constitution because it is being imposed without the approval of 2/3 of those impacted. This tax is being imposed on 190,000 parcels or 12,207,306 acres or 19,073 sq. miles,[4] yet this is being done without the approval of 2/3 of the huge number of people impacted. Aggrieved citizens are clamoring this is unconstitutional taxation without representation. Proposition 218, adopted in 1996 by the voters of California pursuant to a voter initiative, added Article XIII-C (as to “special taxes”) and Article XIII-D (as to “special assessments”) into the California Constitution. In the case of a “special tax” such as the $157 “parcel tax” sought to be imposed here, Article XIII-C requires the strict procedural safeguard that a 2/3 majority of affected voters must support any such special tax before it can be levied.[5]

The Special Tax Area known as “FP-5” was first formed in 2006, pursuant to a local ballot in the tiny desert town of Helendale/Silverlakes. Covering an area of only 5.6 sq. miles (including 0.4 sq. miles covered by two lakes in the golf-course community of Silverlakes), the total population in the 2010 census was 5,623 (or in the 2000 census it was 4,936), with 2,238 households. Relative to the rest of the unincorporated county, this is a wealthy community with several lakefront mansions, and a median household income of $67,214.[6]

At the time of the FP-5 ballot on June 30th, 2006, there were 3,098 registered voters.[7] Of these, 1,527 (or 49.29%) turned out to vote on whether to adopt this FP-5 special tax. Of these, 1,022 (or 67.06%) voted for the tax, and 502 (or 32.94%) voted against the tax.

Therefore the FP-5 tax was **approved by yes-votes from only 1,022 registered voters**. They did have a 2/3 majority (of only 520 votes) over the 502 voters who voted against it. Thus, this 2/3 majority was considered by the County to bind the tiny town of Helendale (though no one asked if “registered voters” can impose a special tax on landowners, as the required procedure is for the landowners to impose any such tax on themselves.) However, the vote of 1,022 people in Helendale (12 years ago, and on the different issue of whether to improve one little fire station in Helendale) provides no constitutional basis now to impose the same $157 tax on 190,000 new landowners who never voted on this, spread out over 19,073 square miles throughout unincorporated San Bernardino County. The proposed imposition of this tax on 190,000 parcels is unconstitutional unless those impacted vote now in 2018 (not 2006) on this, and unless their 2/3 majority approves this.

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[4] Statistics provided in a telephone conversation on September 18, 2018, with County Fire Dept at (909) 387-5947.

[5] Some words used here are “terms of art” which have a special meaning in constitutional and taxation jurisprudence. For example, a “special assessment” necessarily involves an individualized correlation of the benefits and burdens, such that the amount of any “special assessment” must be proportional to the “special benefit” actually received. In contrast, a “special tax” may be levied without any individualized correlation of the benefits and the burdens.

[6] Statistics as stated in: https://en.wikipedia.org/wiki/Helendale,_California

[7] See **ATTACHMENT 1**, the “Official Statement of Votes Cast at the June 30, 2006 … FP-5 …Special Tax Election”

<u>OBJECTION #2:</u> EXPANDING THE BOUNDARIES OF THIS "<u>SPECIAL TAX AREA</u>" INVOLVES <u>FAR-MORE-RIGOROUS PROCEDURES</u> THAN FOR A "FIRE ZONE"

It is essential to note that the Fire District is doing not only one thing here but two things:
(1) First, it proposes to **<u>alter boundaries of the existing FP-5 Fire Zone</u>** to provide fire service to new parcels which were not previously included within that zone; **<u>and</u>**
(2) Second, it proposes to **<u>alter boundaries of the existing FP-5 Special Tax Area</u>** and **<u>impose a special tax</u>** on parcels not previously so taxed and which never so voted.

Analyzing these two actions separately, and not blurring the two misleadingly together as the District here tries to do, is essential because each requires very different procedures:
(1) Firstly, **<u>solely altering boundaries of an existing fire zone</u>** within a district may proceed pursuant to the procedures in **<u>Health and Safety Code §§ 13950-13951</u>** (provided **<u>all</u>** that is involved is an altering of the boundaries of an existing zone without also adversely impacting protected constitutional rights like due process or voting rights.)[8]
(2) Secondly however, where protected constitutional rights are impacted thereby, such as where (as here) it is proposed to **<u>impose a tax on new parcels</u>** which were never previously subject to this tax and which never voted upon this tax itself, then additional far-more-stringent procedural safeguards including a 2/3 majority are required pursuant to the constitutional rules specified in **<u>Article XIII-C of the California Constitution</u>**. Likewise, **<u>Government Code § 53978(a)</u>** provides: *"Any local agency which provides fire protection or prevention services ... may, by ordinance, determine and propose for adoption a special tax ... The legislative body may establish zones or areas within the local agency and may restrict the levy of the special tax to those zones or areas. Such proposition* ***<u>shall</u>*** *be submitted to the voters of the affected area or zone, or of the district, and shall take effect* ***<u>upon approval of two-thirds of the voters</u>*** *..."* (Emphasis added.)

This matter is not as simplistic as the District would have us believe, as the expansion of **<u>only</u>** a fire zone. Essentially what is involved **<u>also</u>** is the expansion **<u>of a special tax area</u>**, and for this type of expansion, far-more-rigorous procedures must be followed than the cursory and truncated procedures of Health and Safety Code §§ 13950-13951. Instead, because the expansion **<u>also</u>** of a special tax area is involved here, the **<u>2/3 majority vote</u>** procedures mandated by Article XIII-C and of § 53978(a) must govern the situation here.[9]

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[8] For example, if a "Zone" existed around, say, the desert town of Baker (which presently pays no special fire tax, but pays for and receives fire protection within its general levy tax), and if it were proposed to expand this "Zone" to include in the same "Zone" a nearby but more outlying area of the unincorporated County like Halloran Springs (which presently also pays no special fire tax, but pays for and receives fire protection within its general levy tax), then such an expansion of the existing zone would not impact protected constitutional rights pursuant to Art. XIII-C because no new tax is being imposed by the expansion, which could lawfully proceed under §§ 13950-13951 alone. However, where as here, a new special tax **<u>is</u>** being imposed on 190,000 parcels not previously taxed in this way, and protected constitutional rights pursuant to Art. XIII-C **<u>are</u>** impacted, the procedures of Art. XIII-C **<u>must</u>** govern.

[9] As Mr. Pat Jackson puts this point in his authoritative letter of October 2, 2018, at p.2: *"While Health and Safety Code Sections 13950 and 13951 do allow the County to "form one or more service zones" and "change the boundaries of a service zone," Health and Safety Code Sections 13950 and 13951 do not give the County the authority to impose a "levy" without voter approval. The imposing of local tax levies is limited by California Constitution Article XIII C Section 2(d) which states in pertinent part: 'No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.'"*

<u>OBJECTION #3:</u> THE BALLOT APPROVED IN 2006 BY HELENDALE VOTERS DOES NOT NEGATE THE CONSTITUTIONAL REQUIREMENT THAT APPROVAL BY 2/3 OF THE 190,000 <u>NEW</u> PARCELS IS REQUIRED BEFORE <u>THEY</u> CAN BE TAXED

Ballot papers approved by Helendale voters in 2006 are attached as **<u>ATTACHMENT I</u>**.

These papers include certification by the Registrar of Voters as to number of votes cast, the actual ballot papers themselves, as well as various accompanying Resolutions. These papers provide an essential context and should be read and reviewed closely.

What about the "argument" that Zone FP-5 was "*already approved by a 2/3 majority*"?

The certified statistics for the ballot forming FP-5 on June 30th, 2006, show that it was adopted by a 2/3 majority (1,527 actual voters among 3,098 registered.) On the different issue there,[10] 1,022 (or 67.06%) voted for the tax, and 502 (or 32.94%) voted against it.

Does this really mean that these 1,022 voters in Helendale can now a decade later bind 190,000 new people to pay this oppressive tax, firstly without any proper yes-or-no vote among the new 190,000, and secondly without a 2/3 majority among all those affected?

The Constitution is clear. No new special tax is consistent with the Article XIII-C mandates unless this new special tax has been approved a 2/3 majority among all those affected.

The caselaw is replete with decisions in which the Courts have chastised public agencies for all kinds of ruses[11] in an effort to sidestep constitutional requirements,[12] for example, renaming a "special tax" as a "fee" in an effort to avoid complying with the Constitution.[13]

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[10] In 2006, the voters of a registered-voter improvement district in Helendale, comprising a total of only 3,098 registered voters eligible to vote, were polled on the **<u>different issue</u>** of whether to convert their local paid-call fire station into a full-service 24/7/365 fire station. On **<u>that</u>** issue, a total of 1,527 actually voted to impose a special tax **<u>on themselves</u>** in Helendale, and expressly voted that boundaries of this FP-5 special tax area **<u>shall not be expanded</u>** in the future without then complying with **<u>all</u>** laws including the 2/3 majority vote procedures of Const., Art. XIII-C. The question here is whether those who voted yes in 2006 on that different issue, numbering about **<u>one thousand</u>**, can now in 2018 bind **<u>one hundred ninety thousand</u>** on this different issue, without another 2/3 majority vote.

[11] In <u>Silicon Valley Taxpayer's Association v. Santa Clara County Open Space Authority</u>, 44 Cal.4th 431, 446 (2008). the Court stated: "*Proposition 218's preamble includes an express statement of purpose: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."(Citations omitted) … In passing Proposition 218, the voters clearly sought to limit local government's ability to exact revenue …*"

[12] The <u>Silicon Valley</u> case, *supra*, at fn. 5, states: *"The argument in favor of Proposition 218 stated: "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes `assessments' and `fees.' [¶] ... [¶] Proposition 218 will significantly tighten the kind of benefit assessments that can be levied."* (Ballot Pamp., Gen. Elec., supra, argument in favor of Prop. 218, p. 76.) It also declared that *"Proposition 218 simply gives taxpayers the right to vote on taxes and stops politicians' end-runs around Proposition 13."* (Ballot Pamp., Gen. Elec., *supra,* rebuttal to argument against Prop. 218, p. 77.)"

[13] The text of Proposition 26 (adopted in 2010) in Section 1 criticizes local governments for its ruses to circumvent the will of the people setting limits upon new taxes. In subsection (e) of Section 1, the people of California find and declare that: *"(e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and <u>local governments have disguised new taxes as "fees" in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements</u>. ..."* (Emphasis added.)

The Courts will pierce through any "disguises" or obfuscation on the part of the agency, such as where a special tax is disguised as a "fee",[14] to determine the essential nature of what is involved. Any attempt to deny the enshrined constitutional rights of 190,000 parcel owners by disguising the prior 2006 vote by about 1,000 as a binding 2018 supermajority, will be recognized as a failure to achieve a supermajority among the 190,000+ affected.

OBJECTION #4: THE BALLOT PAPERS APPROVED BY THE HELENDALE VOTERS EXPRESSLY REQUIRED THAT THE FP-5 TAX AREA "SHALL NOT BE EXPANDED" WITHOUT COMPLYING WITH "ALL" LAWS, INCLUDING A CONSTITUTIONAL VOTE

Significantly, the actual 2006 ballot papers setting up the new FP-5 tax area, stated: [15]

> *"... the Special Tax area **shall not be expanded** nor any tax increased beyond that specified by this notice without additional proceedings in compliance with **all** laws."*

(Emphasis added. Quoting from the "Special Tax Information" page accompanying and explaining the "Yes-No" ballot vote form mailed in 2006 to all of the voters in Helendale, which resulted in the adoption of the then-$117 tax.) [16] Clearly, the voters of Helendale understood they were voting whether to bind **themselves** and their tiny community, **only**. If this text was superfluous, then why was it even included? Specifically, they understood that the "Special Tax" which they were then imposing on themselves only, in the future "shall not be expanded" to burden anyone else other than their tiny little community, without strictly following the requirements of "all" laws, starting with the Constitution (with its 2/3 majority vote requirement) as well as including "all" the applicable statutory codes. By attempting to bootstrap 190,000 additional people, twelve years later in the future, into what about 1,000 people in a desert town voted for in 2006, is unconstitutional, especially when these 1,000 themselves in 2006 expressly instructed future FP-5 representatives not to do that exact "expand(ing)" which the Fire District is presently trying to do.

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[14] Likewise, Proposition 26, in subsection (f) of § 1, states that the people of California find and declare that: *"(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a "tax" for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as "fees."* See, for e.g., Beaumont Investors v. Beaumont-Cherry Valley Water District, (1985) 165 Cal.App.3d 227, 238 [special tax disguised as "facilities fee" for water hookup.] See also, Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, (2001) 24 Cal.4th 830, 102 Cal. Rptr. 2d. 719, 725 ["The ballot arguments identify what was perhaps the drafter's main concern: tax increases disguised via euphemistic relabeling as "fees," "charges," or "assessments."]

[15] Mr. Pat Jackson provides an alternative interpretation of this Ballot in his authoritative letter of October 2, 2018, at p.2, with the following original and persuasive interpretation of the word "in" as used there:

> **I. HEALTH AND SAFETY CODE SECTIONS 13950 AND 13951 DO NOT GIVE THE COUNTY THE AUTHORITY TO EXPAND SERVICE AREA FP-5**
>
> The COUNTY claims it is acting under the authority of Health and Safety Code Sections 13950 and 13951 to expand Service Zone SP-5.
>
> When Service Zone FP-5 was formed in 2006, the Special Tax Information provided to the voters with the ballots at that time stated in pertinent part:
>
> > *The Board of Supervisors retains the authority otherwise conferred by law to make changes **in** the boundaries of the proposed Special Tax area, the extent of the services to be provided and the amount of the Special Tax (including the amounts of any individual taxed); provided, however, **the Special Tax area shall not be expanded** nor any tax increased beyond that specified by this notice without additional proceedings in compliance with all laws.*
>
> [Emphasis added] The Special Tax Information of Service Zone FP-5 is clear. As a registered-voter district, Service Zone SP-5 cannot be expanded without voter approval.

[16] See **ATTACHMENT I**, being the actual 2006 ballot papers, accompanied by various implementing Resolutions.

<u>OBJECTION #5:</u> THE FORMATION IN 2006 OF THE FP-5 SPECIAL TAX AREA WAS FOR THE <u>PURPOSE</u> OF CONVERTING ONE SINGLE HELENDALE FIRE STATION, <u>IMPROVING</u> IT FROM A LOCAL PAID-CALL STATION TO A FULL-SERVICE BASIS, NOT FOR THE VERY DIFFERENT PURPOSE OF RECOVERING A HUGE DEFICIT. <u>TAXING TO MAKE UP A BUDGET SHORTFALL IS NOT TAXING FOR AN "IMPROVEMENT".</u>

FP-5 was formed as, and is, **<u>an IMPROVEMENT District</u>**, [17] therefore "*rais(ing) additional revenue for **<u>maintenance of existing services</u>**"* [18] is not within permitted taxing powers of this **<u>IMPROVEMENT</u>** District without another vote, so any such action is "*ultra vires*".

(a) As separately discussed in this Brief, the Special Tax Improvement District known as FP-5 was formed in 2006 for the specific purpose of converting Helendale's single local then-paid-call fire station into a 24/7/365 fulltime-firefighter-staffed fire station, and a special tax then-$117 (escalating 3% p.a.) was approved to fund this improvement.

(b) Now, for the wholly different purpose of making up a projected countywide budget deficit of almost thirty million dollars per year, the District seeks to "annex" an extra 19,073 sq.mi. into the jurisdiction of the original Helendale Fire Station, and fundamentally alter the essential 2/3 majority voter-approved purpose of this improvement district.

The California Supreme Court has established the rule that taxes which seek to make up for a budget shortfall, are not taxes for purposes relating to an "improvement." In a case involving an unconstitutional engineer's report (prepared by the same consultant, SCI, being used here by the Fire District), the Supreme Court stated:

> "*The* (SCI engineer) *report's proportionality analysis fails to satisfy Proposition 218 largely because the special assessment is based on OSA's projected annual budget of $8 million for its open space program rather than on a calculation or estimation of the cost of the particular public improvement to be financed by the assessment. . . [T]he purpose of an assessment is to require properties which have received a special benefit from a "public improvement" "to pay the cost of that improvement," and not to fund an agency's ongoing budget."* [19]

> *". . . [T]he* (SCI engineer) *report fails to identify with sufficient specificity the "permanent public improvement" that the assessment will finance, fails to estimate or calculate the cost of any such improvement, and fails to directly connect any proportionate costs of and benefits received from the "permanent public improvement" to the specific assessed properties. As the dissent below observed, "an assessment **<u>calculation that works backward by starting with an amount taxpayers are likely to pay, and then determines an annual spending budget based thereon</u>**, does not comply with the law governing assessments, either before or after Proposition 218."* [20]

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[17] See the original ballot papers from June of 2006, attached as **<u>ATTACHMENT I</u>**.

[18] In a news article at <u>https://www.dailybulletin.com/2018/08/28/san-bernardino-county-fire-moves-to-expand-coverage-property-owners-could-pay-157-a-year-in-new-tax/</u> County Fire Chief Mark Hartwig is quoted as saying: *"I think my focus, more than anything, is to maintain the services that we have."*

[19] <u>Silicon Valley Taxpayer's Association v. Santa Clara Open Space Authority</u>, 44 Cal.4th 431, at p. 457 (2008), citing <u>Ventura Group Ventures. Inc. v. Ventura Port District</u>, (2001) 24 Cal.4th. 1089, 1106; and <u>Knox v. City of Orland</u>, (1992) 4 Cal.4th. 132, 142.

[20] <u>Silicon Valley Taxpayer's Assn.</u>, *supra*, 44 Cal.4th 431, 457 (2008), emphasis added.

<u>OBJECTION #6:</u> THE FP-5 SPECIAL TAX AREA WAS FOUNDED AS, AND STILL IS, AN <u>IMPROVEMENT DISTRICT</u> WITH A SPECIAL PURPOSE LOCAL TO HELENDALE AND NOT A "GENERAL FUND" REIMBURSING HUGE BUDGET SHORTFALLS ON THE BACKS OF OTHER TAXPAYERS WHO HAVE NOT VOTED FOR THIS BURDEN

Founded as **<u>a local 'Improvement' District</u>**, which it still is, this District with its statutorily-limited powers may not transform into a funding source for huge projected Countywide budget shortfalls of about thirty million dollars each year, or one billion dollars by 2050, without a 2/3 majority vote on this specific issue, as mandated by the state Constitution. The Fire District cannot ignore and side-step the compelling mandate of Article XIII-C [21] of the California Constitution which requires a 2/3 majority vote by those affected before a special tax can be imposed on them. Note also, compliance with "all" laws is mandated even by the founding ballot papers before any "expansion" of the FP-5 area is undertaken.

The revenues raised by this tax will not be earmarked exclusively as special tax funds for the sole purpose of present fire "improvements" within Helendale, as originally intended and as is here required. Instead they will be in (or as if in) a District General Fund and will be used to maintain the existing level of services, not to build new improvements. Resolution 2018-99 [22] and Resolution 2018-100 [23] both specifically confirm this point. Moreover, they will be used to maintain the existing level of services through the entire County, and not limited in use to building new improvements within only Helendale itself.

<u>OBJECTION #7:</u> A TINY 5.6-SQ.-MILE "SPECIAL TAX" DISTRICT MATERIALLY <u>OVERREACHES</u> THE LIMITS ON ITS POWERS WHERE IT PURPORTS TO "ANNEX" 19,073 SQUARE MILES (AN AREA <u>3,400 TIMES ITS SIZE</u>) WITHOUT A 2/3 VOTE

In 2006, the community of Helendale, a tiny desert town of only 5.6 square miles in area with a 0.4 square mile lake in it and a total population numbering just over 5,000 people (only some of whom were voters), had voted by a 2/3 majority to form the FP-5 tax area. Now, this tiny District somehow imagines that it can "annex" an extra 19,073 square miles into its original 5.6-square mile jurisdiction, without the constitutionally-required support of a 2/3 majority of all the affected voters before a special tax can be imposed on them. (Note also that, where any expansion of the FP-5 Special Tax Area is contemplated, compliance with "all" laws was expressly mandated even in the founding ballot itself.) Yet here it is proposed, without any yes-no vote and without any 2/3 majority, to expand the original special tax area of only 5.6 square miles, by more than 3,400 times its area. Incredibly, this "annexed" area is almost ten times the size of the State of New Jersey. And all this, according to the District, is entirely proper and constitutional. Well, it is **<u>not</u>**. Clearly the District is overreaching the limits on its powers and is acting "*ultra vires*".

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[21] Proposition 218 was adopted by the voters of California in 1996. It added Article XIII-C and Article XIII-D to the Constitution, requiring a 2/3 supermajority of voters in support of any new special tax before it can be imposed.

[22] Resolution 2018-99 states: *"WHEREAS, the revenue projections for San Bernardino County Fire Protection District indicate that anticipated existing revenues are insufficient to **<u>continue the current level of service</u>** provided within San Bernardino County Fire Protection District. WHEREAS, the expansion of Service Zone FP-5 and the resulting revenues will **<u>enable the continuance of existing service levels</u>** within the expanded Service Zone FP-5 and provide for the future capital needs of Service Zone FP-5."* (Emphasis added.)

[23] Res. 2018-100 states: *"WHEREAS, the Board of Directors of the San Bernardino County Fire Protection District finds that current revenues are insufficient to **<u>maintain the current level of services</u>** and the capital needs of the District and an expansion of Service Zone FP-5 will raise additional revenues to **<u>maintain existing services</u>**."* (Emph. added.)

<u>OBJECTION #8:</u> THE HEALTH AND SAFETY CODE, IN <u>SECTIONS 13950-13951</u>, DOES NOT AUTHORIZE IMPOSITION OF A SPECIAL TAX ON 190,000 PARCELS WHERE THESE OWNERS HAVE NOT VOTED BY A 2/3 MAJORITY FOR THIS TAX

As its own Notice of the Hearing on October 16, 2018, expressly states, the District here is purporting to proceed pursuant to **<u>Health and Safety Code §§ 13950-13951</u>**. [24] [25]

As recited in the Notice, this code authority which purportedly here empowers the actions the District is undertaking, is unpersuasive. Even if §§ 13950-13951, as discussed above, empower the District to expand the boundaries of a <u>fire zone</u>, the truncated procedures of §§ 13950-13951 do <u>not</u> authorize the District to expand a <u>special tax area</u> without also complying with the far more-rigorous 2/3-vote constitutional procedures of Article XIII-C.

Nowhere do the cited code sections in Health and Safety Code §§ 13950-13951 empower the District to <u>ignore</u> other laws which <u>DO</u> apply (such as Article XIII-C of the California Constitution), nor do the cited sections empower the District to <u>hide behind</u> laws which <u>DO NOT</u> apply (such as Government Code §§ 57075-57076, discussed further below.)

Health and Safety Code § 13951 provides: *"A district board may change the boundaries of a service zone … by following the procedures in Section 13950."* Significantly, these "*procedures in Section 13950"* are limited to notifying affected owners and specifying what content must be included, etc. But nowhere does § 13950 specify the procedures for the **<u>vote</u>** required for expanding a special tax area. Obviously so, because whatever a code might purport to "specify" as to the voting procedures as to a special tax, is **<u>pre-empted</u>** by those procedures which are already mandated by Article XIII-C of the Constitution.

<u>OBJECTION #9:</u> THE TRUNCATED "PROTEST VOTE" PROCEDURES SPECIFIED IN GOVERNMENT CODE <u>§§ 57075-57076</u> DO NOT APPLY HERE: THEY GOVERN <u>ONLY LAFCO ITSELF</u> AND ARE NOT AVAILABLE TO THIS SPECIAL TAX DISTRICT

Both LAFCO and this District are "*creatures of statute*", in that they are created by statute; and their existence and their powers and the limits on their powers are all set by statute.

LAFCO is a different statutory entity from this District: the procedures governing LAFCO pursuant to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Government Code § 56000 et seq.) apply only to "*the commission*" (i.e. LAFCO itself), and not to this District, which is proceeding here under the H&S Code §§ 13950-13951.

Overstepping the limits on its powers, and acting "*ultra vires*" and without any statutory basis for doing so, the District unauthorizedly "imports" the "protest vote" procedures of LAFCO, as specified in Government Code §§ 57075-57076, into Sections 8, 9, & 10 of District Resolution 2018-100, [26] as if the §§ 57075-57076 procedures apply to the code pursuant to which the District is purporting to proceed, the H&S Code §§ 13950-13951.

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[24] The Notice of Hearing opens with these significant words: *"Pursuant to Health and Safety Code 13950-13951 (Fire Protection District Law of 1987) and Government Code Section 6061: the District is acting …"*

[25] Other than Health and Safety Code §§ 13950-13951, the only statute cited by the District to authorize its actions is Govt. Code Section 6061, which indicates that one notice published once in one newspaper is sufficient notice.

[26] District Resolution 2018-100, adopted by 3 votes to 2 on June 12, 2018, states in pertinent part:

This "*ultra vires*" "importation" by the District of the "protest vote" procedures of LAFCO is done **<u>without any authority</u>** because §§ 57075 and 57076 [27] both on their face state that their "protest vote" procedures are available for use by "*… the commission …*" (and thus only by "*the commission*"),[28] i.e., only **<u>BY LAFCO</u>** itself, and not by this District. [29]

Accordingly, an insurmountable problem for the District is that, as a matter of law, the truncated "protest vote" procedures of §§ 57075-57076 are not available here because those procedures govern only LAFCO, [30] and do not authorize any use by this District. Both being *creatures of statute*, their powers are only as extensive or as limited as the powers conferred upon them by whatever enabling statute empowers their functioning.

For this reason, the District cannot fit the "square peg" of its $157 tax into the "round hole" of § 57075 or § 57076. Accordingly, since the District for the purposes of this expansion of Special Tax Area FP-5 fails to qualify to apply the statutory "protest vote" procedures of §§ 57075-57076, it **<u>must</u>** use the constitutional procedures of Art. XIII-C or Art. XIII-D.

A 2/3 majority vote is constitutionally mandated before additional revenue can be raised from the 190,000 parcels now being added, many of which have never previously been burdened by a special tax for fire protection, instead paying this through a general levy.

"SECTION 8. Upon conclusion of the protest hearing, the District Board shall determine the value of written protests filed and not withdrawn. If at least 25% of the number of landowners within the affected territory who own at least 25% of the assessed value of land within the territory affected submit a protest, then the District Board shall order by resolution that the formation or change in boundaries of the service zone be submitted for confirmation by the voters.

SECTION 9. If protests constituting greater than 50% of the number of landowners within the affected territory who own at least 50% of the assessed value of land within the territory affected, submit protests, then the action to form or change the boundaries of a service zone will be withdrawn by the District Board.

SECTION 10. In the event that protests of less than 25% of the number of landowners of at least 25% of the assessed value of the affected area are received, then the District Board may, by adoption of the final resolution, form the new service zone or change the boundaries of an existing service zone."

(Quoting from District Resolution 2018-100, adopted by 3 votes to 2 on June 12, 2018, Sections 8 through 10.)

[27] Government Code § 57075 and § 57076 both use very similar language (emphasis added), as follows:

> *"… **<u>the commission</u>** … shall make a finding regarding the value of written protests filed and not withdrawn, and take one of the following actions, except as provided in subdivision (b) of Section 57002:*
> *(a) Terminate proceedings if a majority protest exists in accordance with Section 57078.*
> *(b) Order the change of organization or reorganization subject to an election within the affected territory if written protests that have been filed and not withdrawn represent either of the following:*
>> *(1) Twenty-five percent or more of the number of owners of land who also own 25 percent or more of the assessed value of land within the territory.*
>> *(2) Twenty-five percent or more of the voting power of landowner voters entitled to vote as a result of owning property within the territory.*
>
> *(c) Order the change of organization or reorganization without an election if written protests have been filed and not withdrawn by less than 25 percent of the number of owners of land who own less than 25 percent of the assessed value of land within the affected territory."*

(Quoting the same text in both Government Code § 57075 and § 57076, emphasis added.)

[28] The applicable rule of construction is *specificatio unius, exclusio alterius*: listing one thing excludes other things.

[29] § 56027 defines "*commission*" as: *"`Commission' means a local agency formation commission."*

[30] Whether use of these voting procedures <u>by LAFCO</u> (although apparently so authorized by the <u>statute</u> in § 57075) is actually consistent with the <u>Constitution</u>, or conflicts with the Constitution, is far beyond the scope of this Brief. However, consistency of this statutory procedure with constitutional procedures should not be assumed, even in the case of LAFCO, and certainly not in the case of this District, because § 57075 does not apply to this District.

<u>OBJECTION #10:</u> THE TRUNCATED "PROTEST VOTE" PROCEDURES SPECIFIED IN GOVERNMENT CODE <u>§§ 57075-57076</u> ARE UNCONSTITUTIONAL, BOTH *PER SE* AND *AS-APPLIED*, BECAUSE THE PERCENTAGES ARE COMPUTED, NOT BASED ON THOSE WHO <u>ACTUALLY VOTE</u>, BUT ON THOSE WHO ARE <u>ELIGIBLE TO VOTE</u>

District Resolution 2018-100 of June 12, 2018, in Section 8 *et al.* thereof quoted above, in violation of constitutional standards, purports to set the rule as being whether or not:

"… *at least 25% of the number of landowners within the affected territory* …"

submit a protest. This spurious standard is unconstitutional, both *per se* and *as-applied*, because it purports to compute the governing percentages based upon those who are **<u>eligible to vote</u>**, instead of basing the results of the election (as required by law) solely upon those who actually turn out for the election and who **<u>actually vote</u>** in the election.

Consider, for example, the actual statistics in the ballot forming FP-5 on June 30th, 2006. There were 3,098 registered voters who were **<u>eligible</u>** to vote on forming the FP-5 area.[31] Of these, 1,527 (or 49.29%) **<u>actually turned out</u>** to vote whether to adopt the FP-5 tax. Of these, 1,022 (or 67.06%) voted for the tax, and 502 (or 32.94%) voted against the tax.

The constitutionally-mandated interpretation of these statistics, based on those who actually voted and not on those who were eligible to vote, is that this vote was therefore approved by a 2/3 majority (67.06%) of those who actually voted (1,022 out of 1,527.) However, if the spurious standard were applied here as to what percentage the prevailing voters constituted in relation to those **<u>eligible</u>** to cast a vote, then this **<u>actual 2/3 majority</u>** (1,022 out of 1,527, or <u>67.06%</u>), would immediately evaporate and would instead become 1,022 out of 3,098, or only <u>32.98%</u>, which is **<u>less than one third</u>** of the **<u>eligible</u>** voters. Applying the wrong standard will, therefore, turn the victory of an over-twothirds majority into a under-onethird defeat, as the actual FP-5 statistics themselves here demonstrate. The **<u>"fuzzy math"</u>** of the District's protest vote is apparently designed to circumvent the voters and to frustrate the will of the voters: it is actually **<u>also "unconstitutional math."</u>**

Let us take this analysis one step further. The constitutionally-correct math for elections is to consider a fraction (later converted to and expressed as a percentage), in which:

(1) **<u>the numerator</u>** is the number who actually voted for (or against) the measure; and

(2) **<u>the denominator</u>** is the total number who actually voted for or against the measure.

Therefore, in the above example, the numerator is 1,022 and the denominator is 1,527, so the fraction of 1,022/1,527 converts to and is expressed as a percentage of <u>67.06%</u>.

Had this been a "protest vote", with 502 no-votes cast but 0 yes-votes cast because only the protestors were invited by the District to vote, then the numerator would be 502 votes cast, and the denominator would be the 502 + 0 = 502 total number of votes actually cast. The denominator would NOT be 3,098, because "constitutional math" will DISREGARD the number of eligible voters, and consider as the denominator only the total number who actually voted. Therefore, according to the required "constitutional math", the fraction of 502/502 shows a **<u>100% no-vote</u>**, which again shows how absurd a "protest vote" is.

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[31] See **<u>ATTACHMENT 1</u>**, the "Official Statement of Votes Cast at the June 30, 2006 … FP-5 …Special Tax Election". Strangely, the certified math is "wrong": 1,022 + 502 = 1,524, not 1,527. And 1,022/1,527 = 66.92%, not 67.06%.

<u>OBJECTION #11:</u> THE TRUNCATED "PROTEST VOTE" PROCEDURES SPECIFIED IN GOVERNMENT CODE <u>§§ 57075-57076</u> ARE UNCONSTITUTIONAL, BECAUSE THEY DISTORT THE VOTE ON A <u>FLAT</u> TAX (WHICH IS LEVIED ON A PER-PARCEL BASIS, <u>REGARDLESS OF VALUE</u>), INTO A "RIGGED" VOTE PURPORTING TO <u>"WEIGHT"</u> THE EFFECT OF A PROTEST <u>BASED ON THE VALUE</u> OF THE PARCEL

District Resolution 2018-100 of June 12, 2018, in Section 8 *et al.* thereof quoted above, in violation of constitutional standards, purports to set the rule as being whether or not:

> "… *at least 25% of the number of landowners within the affected territory who own at least 25% of the assessed value of land within the territory affected* …"

submit a protest. This spurious standard is unconstitutional, both *per se* and *as-applied*, because it attempts to **<u>weight</u>** the vote on a <u>flat</u> tax (which is levied on a per-parcel basis, regardless of the value of the parcel), into a "rigged" vote which purports thereby to assign greater voting weight to parcels of higher value (which benefit from a flat per-parcel tax) than to parcels of lower value (which are disproportionately burdened by a flat parcel tax.)

Surely justice and fairness require that if parcels are to be subjected to the **<u>same</u>** flat tax regardless of their value, then the protest of disproportionately-prejudiced (i.e., low-value) parcels must be given **<u>at least the same</u>** (and certainly not less) weight in the total vote?

Prop. 218 addresses "weighting" of the vote,[32] providing: "*In tabulating the ballots, **<u>the ballots shall be weighted according to the proportional financial obligation</u>** of the affected property."* (Emphasis added.) Most significantly, this weighting is NOT according to the VALUE of the property (as the District would have it), but according to the FINANCIAL OBLIGATION being created by the tax. Therefore, where a flat-$157-tax per-parcel imposes an EQUAL financial obligation, all votes must have EQUAL weight because the financial obligation is EQUAL. The District's formula unconstitutionally skews the vote in favor of parcels which have greater value, imposing equal "obligations" yet not allowing "equal" weight for all votes.

The argument can also be made that the "financial obligation" of this flat-tax per-parcel is not "proportional" but instead is **<u>dis</u>**proportionally burdensome on low-value parcels. Therefore, in order to weight the vote according to the **<u>proportional</u>** financial obligation, the relationship of **<u>direct</u>** proportion being imposed by the District (of giving greater weight to properties of greater value) is the reverse of what is intended by the word "proportional", and instead what is fair and reasonable (if we are going to "weight" the vote at all) is to use a relationship of **<u>inverse</u>** proportion, giving greater weight to the vote of parcels of lower value, and lower weight to the vote of parcels of greater value, on the ground that the **<u>proportional</u>** financial obligation or burden is greater for parcels of lower value, and the **<u>proportional</u>** financial obligation or burden is lower for parcels of greater value.

Accordingly, either an equally-weighted vote, or an inverse-proportion-weighted vote, would be far more fair than the District's promulgated direct-proportion-weighted formula.

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[32] Cal Const., Article XIII-D, Section 4(e).

The proposed tax and the protest vote procedures which attend its implementation, add layer upon layer of constitutional indignity to how owners of low-value parcels are treated. First, they are subjected to the assault of a "parcel tax" which burdens them enormously in relation to their low-value parcel, relative to the negligible burden on high-value parcels. Then, they are denied the constitutionally-required procedure of a proper yes-no ballot. Then, they are denied the constitutional safeguard of a 2/3 majority before being taxed. And now they are told that their protest against a flat tax levied regardless of parcel value has less weight because their parcel is worth less even though their burden is far higher. This makes no sense at all, but, more significantly, such a procedure is **unconstitutional**.

OBJECTION #12: EVEN LAFCO ITSELF MUST SATISFY THREE PRE-CONDITIONS BEFORE IT CAN QUALIFY ITSELF TO USE THE TRUNCATED "PROTEST VOTE" PROCEDURES OF GOVT. CODE §§ 57075-57076. EVEN LAFCO ITSELF WOULD NOT SATISFY THESE THREE PRE-CONDITIONS HERE, NOR DOES THIS DISTRICT.

Government Code §§ 57075-57076 expressly limit use of the "protest vote" procedure by LAFCO, by specifying **pre-conditions** which must each first be satisfied. Each is a "gate" or "filter" through which LAFCO itself must pass before it qualifies to use this "protest vote" procedure, otherwise any purported use of this procedure even by LAFCO is disqualified.

As discussed above, the threshold requirement before voting procedure can be truncated pursuant to § 57075, is that the entity doing so must be LAFCO, not this District.

Then, assuming it is LAFCO itself (not this District) which is seeking to apply § 57075:

> (1) The first exclusionary "gate" or "filter" through which LAFCO itself must pass before it qualifies to use this "protest vote" procedure, is that the Directors of any District to which LAFCO applies the protest vote procedures, must be **elected** by the voters, not appointed. This condition is not satisfied in the case of this District.
>
> (2) The second exclusionary "gate" or "filter" through which LAFCO itself must pass before it qualifies to use this "protest vote" procedure, is that § 57075 may be used **solely** in four statutorily-specified situations, and none of these prongs apply here. Specifically, the first prong of "**annexation**" (as statutorily defined) does not apply, and the other three prongs are clearly of no application under the present facts.
>
> (3) The third exclusionary "gate" or "filter" through which LAFCO itself must pass before it qualifies to use this "protest vote" procedure in the context of "annexation", is the proposed "annexation" must be **small** in area and also **reasonable** in size in relation to the particular circumstances and needs of the District annexing it. Clearly, a 19,073 sq. mile annexation by a 5.6 sq. mile District fails at this "gate."

Each such exclusionary "gate" or "filter" is discussed separately in the Objections below.

<u>OBJECTION #13:</u> ANY POWER OF A PURELY-STATUTORY ENTITY TO TRUNCATE THE VOTING RIGHTS OF CITIZENS MUST BE GRANTED BY THE LEGISLATURE AND MUST NOT BE IN CONFLICT WITH THE CONSTITUTION. THIS DISTRICT <u>CANNOT "CONFER ON ITSELF"</u> POWER TO TRUNCATE VOTING PROCEDURES.

LAFCO itself has been granted the statutory power, by Govt. Code §§ 57075-57076, to truncate its voting procedures, <u>provided</u> the three required pre-conditions are satisfied. And yet, even having this statutory <u>power</u>, LAFCO does not here have the <u>right</u> to truncate the voting procedures of this District, because the three pre-conditions are not satisfied.

The situation of this District is far weaker than the position of LAFCO. Unlike LAFCO, this District has not been granted any statutory power to truncate voting rights. It cannot simply "confer this power on itself" as it has purported to do within Resolution 2018-100.

Moreover, this District cannot "waive" for itself the three pre-conditions that bind LAFCO.

If LAFCO, with its express statutory power to do so, still cannot exercise that power here because it cannot here satisfy the three conditions preceding any lawful use of that power, how can this District which has no statutory power and cannot satisfy the three conditions go ahead without any authority and purport to do what even LAFCO itself cannot do?

<u>OBJECTION #14:</u> THE DISTRICT FAILS TO PASS THROUGH THE <u>FIRST</u> "GATE" OR EXCLUSIONARY FILTER IN ORDER TO QUALIFY TO USE THE PROCEDURES OF §§ 57075-57076, BECAUSE ITS DIRECTORS ARE APPOINTED, <u>NOT ELECTED</u>

Pursuant to Government Code §§ 57075-57076, the **<u>first pre-condition</u>** before any use of the truncated "protest vote" procedures can be made is that the Directors of any District to which LAFCO applies the protest vote procedures, must themselves be **<u>elected</u>** by the voters, not appointed. This first pre-condition is not satisfied in the case of this District.

Here, the Directors are **<u>appointed</u>** by the County Board of Supervisors: [33] although the Supervisors are elected by the voters as Supervisors (but not as Directors), and although these Supervisors have self-appointed themselves as Directors, the Directors are not themselves elected by the voters. Therefore this District is not a "voter district."

As established by the definition in § 56081, [34] "voter" means <u>either</u> a "registered voter" [35] <u>or</u> a "landowner-voter", [36] one or the other, and these two are not the same.

[33] Health and Safety Code, Section § 13837, provides that a District Board may be appointed, as is the case here.

[34] § 56081 provides: *"'Voter' means a landowner-voter or a registered voter." (*Two separate and distinct classes.)

[35] § 56071 provides: *"'Registered voter' means any elector registered under, and pursuant to, the Elections Code."*

[36] § 56048 provides a definition of who is a "landowner", and § 56049 provides: *""Landowner-voter" means any person entitled to vote in a landowner-voter district, or the legal representative of that person or, in the case of an election, the proxy of that person if authorized by the principal act."* On this basis a "landowner" is thus separate and distinct from a "registered voter."

Section § 57075 is expressly limited to use by only "registered voter districts" or "cities." Clearly this District is not a "city." Nor is it a "registered voter district" [37] because the registered voters of the County do not themselves vote for its Board of Directors. [38]

Section § 57076 is expressly limited to use by only "landowner-voter districts" [39] but again this District is not a "landowner-voter district" because landowners in this District do not themselves vote for its Board of Directors.

Note that even though this "district" has mailed notices to affected "landowners" [40] and asked them to "vote" in a "protest vote" format on "… *any other district matter …*", this does not transform this "district" into a "*landowner-voter district*" because landowners in this District are not themselves "*entitled*" to vote "*upon the election of district officers*"; instead those Directors are appointed in the case of this District.

Therefore, this District **does not pass through the first** of the exclusionary gates or filters and may proceed no further toward use of the § 57075 or § 57076 procedures. It is thus disqualified from using the "protest vote" procedure it imposes on 190,000 landowners, to deny them their right to a "yes-no" 2/3-majority vote under the Constitution.

OBJECTION #15: THE DISTRICT FAILS TO PASS THROUGH THE SECOND "GATE" OR EXCLUSIONARY "FILTER" IN ORDER TO QUALIFY TO USE THE PROCEDURES OF §§ 57075-57076, BECAUSE NO "ANNEXATION" (AS DEFINED) IS INVOLVED

The **second pre-condition**, which is also not satisfied in the case of this District, is that the truncated "protest vote" procedures of § 57075 and § 57076 may be used "**solely**" [41] in four statutorily-specified situations, not others. [42] Three of these four prongs clearly do not apply, [43] so the District is left grasping at the straw of the "first prong (of the four),

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[37] § 56072 provides: *"'Registered-voter district' means a district whose principal act provides that registered voters residing within the district are entitled to vote for the election of district officers, incurring of bonded indebtedness, or any other district matter."*

[38] The fact that the registered voters of San Bernardino County do vote for the members of a different distinct separate local agency (the County Board of Supervisors), and the fact that those Supervisors may later self-appoint themselves to this Board of Directors, does not as a matter of law mean that "… *registered voters residing within the district are entitled to vote for the election of district officers* …" (§ 56072, emphasis added.) To the contrary, the opposite is the situation: registered voters residing within the district are NOT ENTITLED to vote for the election of district officers, because government officials (and not the votes) determine who are to be these directors.

[39] § 56050 provides: *"'Landowner-voter district' means a district whose principal act provides that owners of land within the district are entitled to vote upon the election of district officers, the incurring of bonded indebtedness, or any other district matter."*

[40] Although notices were mailed in 2018 to affected "landowners", notices were not mailed to "registered voters." Contrast, in 2006, the same District mailed notices re FP-5, not to landowner-voters but instead to registered-voters.

[41] Here, the *"specificatio unius, exclusio alterius"* rule of construction is reinforced by the statutory word, *"solely".*

[42] The four situations in § 57075 are as follows: "… *where a change of organization or reorganization consists solely of (1) annexations, (2) detachments, (3) the exercise of new or different functions or class of services or (4) the divestiture of the power to provide particular functions or class of services within all or part of the jurisdictional boundaries of a special district, or (1-4) any combination of those proposals …*" (§ 57075, **with numbering added**.)

[43] Obviously the facts here do not involve any "detachment" or any "divestiture of power", so the second and fourth prongs are eliminated. Likewise, expansion of Zone FP-5 is intended, according to the exact words of the Notice, "*… to raise additional revenue for maintenance of existing services …"* (emphasis added) so this is not "*… the exercise of new or different functions or class of services …", (emphasis added),* so the third prong is also eliminated.

hoping that this is an **"annexation"**. [44] As the first word on the sixth line of the Notice, the District uses the word "*annexed*" but merely calling its "pig in lipstick" a "beauty queen" does not make **this** an "annexation".

With only this one prong under which the District hopes it can qualify, if it can, to justify making any use of the "protest ballot" procedures in § 57075 (and falsely assuming that the "District is "*the commission*", which clearly it is not), the District thus puts its eggs in the basket of the ***first*** prong of **"annexation"**. But, "annexation" involves **adding new** territory to the **existing** jurisdiction of a **district**. Adding new territory to a **"zone"** entirely **within** a **"district"** is not an "annexation" because, first, **a "zone" is not a "district"**[45] and, second, any "annexation" requires the **external** enlargement of the "district" itself, not merely the **internal** expansion of a "zone", yet this twelve million acre **"expansion"** of **"zone FP-5"** adds not one square inch of enlarged **new** territory to the **existing** jurisdiction of the **District**. Accordingly, this purported "expansion" of a "zone" does not magically metamorphose into the requisite "annexation" into the "District."

Note also that whether some **previous** annexation of incorporated territory, [46] say in 2016, may **then** have annexed new territory to the FP-5 "zone" or to the then-existing jurisdiction of the District at **that** time in a separate noticed action in 2016 is irrelevant to whether **this** expansion in October 2018 adds territory to the now-existing jurisdiction of the District, for the District even to be able to start to argue that this present action is an "annexation". Yet the present action is **not** an "annexation", and it is **not** an annexation "by the District" itself of any new territory into the District. The present action is merely the "expansion" of a "zone" within the District and of a special tax area within the District, but the District is annexing no new territory to the existing District. Therefore, the District **fails under the "annexation" prong** to qualify to use the § 57075 procedures, and even LAFCO itself would likewise fail here to have authority to use the § 57075 procedures.

Accordingly, since the District for purposes of this expansion of Tax Area FP-5 fails to qualify to use the statutory "protest vote" procedures pursuant to § 57075, it **must** use the constitutional procedures of Article XIII-C and/or of Article XIII-D. Failure to do so tramples the constitutional rights of **at least** 190,000 parcel owners [47] and constitutes a compensable "unreasonable interference with investment-backed expectations." [48]

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[44] § 56017 provides: "Annexation" means the inclusion, attachment, or addition of territory to a city or district."

[45] § 56036(b) provides: "'District' … excludes all of the following: … (10) A zone of any special district."

[46] The Notice states: "… the city of Upland and the area of San Antonio Heights were previously annexed into Service Zone FP-5 …" Even if that were so, the unincorporated area of the County is not here being "annexed."

[47] Note that although 190,000 parcels are affected, the number of people affected will be a far higher number. Parcels do not have constitutional rights, people do. Bear in mind that many properties are owned by spouses or other situations of multiple ownership, so the number of directly-affected persons may approach half a million. Indirectly, too, owners pass costs on to tenants, so arguably every person in the County is impacted indirectly.

[48] Arguably this exposes the County and its officers to massive liability, in inverse condemnation and/or civil rights, or even a class action. If an uncompensated "taking" of "all" use and value is alleged where government conduct goes "too far", and many other constitutionally protected rights such as procedural and substantive due process and "as-applied" equal protection as well as related civil rights pursuant to 42 U.S.C. §§ 1983 and 1988 are violated, the liability could also include the attorney's fees of prevailing plaintiffs. See, Lockaway Storage v. County of Alameda, (2013) 216 Cal.Rptr.4th 161, where damages for a temporary taking of $989,640.96 were awarded, plus attorney' fees of $728,015.50. (Times 190,000?)

<u>OBJECTION #16:</u> THE DISTRICT FAILS TO PASS THROUGH THE <u>THIRD</u> "GATE" OR EXCLUSIONARY "FILTER" TO QUALIFY FOR §§ 57075-57076 PROCEDURES: THE "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA OF ONLY 5.6 SQ. MILES IS <u>NEITHER SMALL</u> IN AREA <u>NOR REASONABLE</u> IN SIZE

The <u>third exclusionary "gate" or "filter"</u> through which a District must pass before qualifying for LAFCO to allow it any use of the "protest vote" procedures within §§ 57075-57076 in the context of an "annexation", is that the proposed "annexation" should be **<u>small</u>** in area and also **<u>reasonable</u>** in size in relation to the particular circumstances and needs of the District annexing it. A 19,073 sq. mile annexation by a 5.6 sq. mile District fails this test.

The <u>legislative history</u> in California of reorganizations taking the form of an annexation evidences the <u>legislative intent</u> that, for an annexation to qualify for the truncated voting procedure of §57075, the area annexed should be **<u>small</u>** in area and also be **<u>reasonable</u>** in size in relation to the particular circumstances and needs of the District annexing it.

The <u>Sunset Beach</u> case [49] discusses this **<u>third qualifying "gate" or "filter</u>**" which applies where the form of reorganization being undertaken is an **<u>annexation</u>**. It sets forth the legislative history as to what was considered the maximum for "island" annexations:[50]

> Historically, in California law, starting in the year 1939, "island" annexations with constitutionally truncated voting procedures were first allowed when the annexed area was **<u>up to 3 acres</u>**, then later this increased to **<u>up to 12 acres</u>**. In 1977, the limit was raised to **<u>not exceeding 100 acres</u>**. A legislative backlash took place in 1985: the then-current legislative intent was that **<u>100 acres was "too big"</u>** so the limit was reduced to **<u>75 acres maximum</u>**. For almost two more decades, 75 acres remained the upper limit for "island" annexations, until it **<u>increased to 150 acres</u>** in 2004. As to "non-island annexations, §57075 addresses these in a context involving **<u>more than 150 acres</u>**. [51]

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[49] <u>Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Comm.</u>, (2012) 209 Cal. App. 4th 1182.

[50] There is some debate in the caselaw as to the exact parameters of what is and is not an "island": for example, does it have to be completely surrounded by the annexing entity; are situations of limited non-contiguity allowed, etc. The specifics of that debate are not the focus here, instead the point is that an "island" is always **<u>small</u>** in size.

[51] The <u>Sunset Beach</u> case, *supra*, states:

*"Involuntary annexations of **<u>relatively small</u>** parcels of territory have been a part of our state's statutory framework since 1939. (See <u>Weber v. City Council of Thousand Oaks (1973) 9 Cal.3d 950, 962 [109 Cal.Rptr. 553, 513 P.2d 601] (Weber)</u>.) Before 1939, annexations were only for uninhabited contiguous territory. (Ibid., citing Stats. 1899, ch. 41, p. 37; see Stats. 1939, ch. 297, § 1, pp. 1567-1568.) But beginning in 1939, the Legislature began amending annexation statutes to include territory with voters, first only three acres, then 12 acres, and in 1977 providing for involuntary annexations of territory not exceeding 100 acres. (See <u>Weber, supra, 9 Cal.3d at p. 962</u>; <u>I.S.L.E. v. County of Santa Clara (1983) 147 Cal.App.3d 72, 75, fn. 2 [194 Cal.Rptr. 854]</u> [quoting former § 35150 as it stood in 1978].) "The entire island concept was introduced into the statute to prevent piecemeal annexation of large surrounded or substantially surrounded areas, thus prohibiting the circumvention of the 100-acre limitation and/or the annexation of smaller areas within larger substantially surrounded areas." (<u>Fig Garden Park No. 2 Assn. v. Local Agency Formation Com. (1984) 162 Cal.App.3d 336, 343 [208 Cal.Rptr. 474]</u>.)*

The 100-acre threshold was cut back to 75 acres by legislation in 1985 (the original Cortese Local Government Reorganization Act of 1985) with the codification of section 56375. The legislation still provided for annexations of islands "without an election." (Stats. 1985, ch. 541, §3, pp.1920, 1950 [enacting § 56375].)

Care should be taken not to misinterpret the Sunset Beach case and not to misapply its holdings to the **different facts here**. Although the annexation in the Sunset Beach case was upheld and although the tax there was extended to cover those in the annexed area, that case is **distinguishable**, because it involved a very different factual situation. There:

> "In the Sunset Beach case, the **City** of Huntington Beach sought to **annex** the **small** adjoining strip of land known as Sunset Beach, '*… consisting of about 133 acres, … an unincorporated part of the County of Orange.*'"

(Id., at 1185, emphasis added.)

These facts are materially different from the FP-5 expansion.

Firstly, Huntington Beach is a **City** (which is one of only two statutorily-limited types of entity authorized by the empowering statute to use the procedures of § 57075.)

Secondly, the particular form of the reorganization being undertaken there was an **annexation** (which is one of only four statutorily-limited forms of reorganization qualifying to use the § 57075 procedures.)

Thirdly, the size of the territory being annexed was "**small**", in fact **so small** that it was less than the 150-acre threshold.

Therefore, unlike this Fire District, the City of Huntington Beach was successfully able to pass through each of the three "gates" or statutory "filters" specified at the beginning of § 57075, so as to qualify to use its "protest vote" procedures. And of course that case involved the Orange County **Local Agency Formation Commission** (as a named defendant) applying the protest vote procedures to the annexation by the City. In contrast, as discussed above, the San Bernardino Fire Protection District satisfies neither of these three gates or filters, and is thus blocked at each of these exclusionary "gates" or "filters" from qualifying to use the § 57075 "protest vote" procedures; moreover the District is not a LAFCO "commission" so it does not qualify to use § 57075 anyway.

In 1996, on the eve of Proposition 218, section 56375 still gave local LAFCO's the power to allow annexation of unincorporated islands that did not exceed 75 acres to cities surrounding, or substantially surrounding, those islands without an election. (Stats. 1995, ch. 91, § 55, pp. 287, 289.) The amendments of 2000 simply gave the island annexation law its own code section. (Stats. 2000, ch.761, §68.5, p.5046.) Finally, in 2004, the then existing 75-acre threshold was increased to 150 acres. (Stats. 2004, ch.95, §1.)

The island annexation statute works in combination with another statute, section 57330 (passed in 1993, three years prior to the passage of Prop. 218), which provides that "[a]ny territory annexed to a city or district shall be subject to the levying or fixing and collection of any previously authorized taxes ... of the city...." (Italics added.) Read together, the island annexation statute (in 1996, § 56375) and the automatic-taxation-of-annexed-territory-statute (in 1996, § 57330) would necessarily be repealed by any interpretation of Proposition 218 that required a vote whenever an "island" annexation involved a "taxpayer unfriendly" annexation. (Footnote omitted.) But more would be repealed than just these two statutes. Even non-island annexations would be impliedly repealed.

In non-island annexations (now those involving territory over 150 acres), a protest procedure, and sometimes a vote, is required when one local government annexes territory. (See § 57075.) If a majority of the voters residing within the territory to be annexed file written protests (see § 57078) the annexation automatically terminates. If less than 25 percent of the voters file written protests, the annexation automatically goes through. But if at least 25 percent but not more than 50 percent file written protests, there must be an election, and that election is only by majority vote. (Footnote omitted.)"

(Quoting, Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission, (2012) 209 Cal. App. 4th 1182, at pages 1192-1194, emphasis added.)

<u>OBJECTION #17:</u> THE PURPORTED "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA OF ONLY 5.6 SQUARE MILES IS FAR "<u>TOO BIG</u>" AN ANNEXATION TO QUALIFY FOR TRUNCATED PROTEST-VOTE PROCEDURES IN §§ 57075-57076. A 2/3 MAJORITY VOTE IS CONSTITUTIONALLY REQUIRED.

How small is "***too small***" and how big is "***too big***"? The question is appropriate in these words because in the parallel context of "regulatory takings" the question is framed as: when does the regulation go "***too far***"? What the legislature considers "small" and "big" has shifted over time since 1939, but it can be interpreted in the context of the present **<u>150-acre dividing line</u>** between "island" annexations and "non-island" annexations.

Essential questions here are the following:

(a) Is an annexation by a special tax area comprising only 5.6 square miles, of new territory covering about 19,073 square miles (or 12,207,306 acres), [52] an annexation that is "*<u>too big</u>*" to be undertaken without a 2/3 majority vote?

(b) Or can this annexation of 190,000 parcels be bootstrapped onto a 2/3 vote by about 1,000 people more than 12 years ago, as to the different issue of of whether to create a single full-service fire station, without a new 2/3 vote?

(c) Or is the new annexation "*<u>too big</u>*" to be bootstrapped onto the old 2/3 vote?

The overriding of protected constitutional rights in the interest of streamlined bureaucratic processing of a reorganization, is not a matter to be taken lightly. The public policy rationale for less-than-strict observance of constitutional requirements is an argument based on economic efficiency and economic expediency. Specifically, where only a **<u>small</u>** geographic impact is involved, the Courts essentially tolerate a departure from strict constitutional adherence, in the interests of economic efficiency and expediency. [53]

Where the area being annexed is **<u>not small</u>**, then as the area gets bigger and bigger, the Courts will increasingly disfavor any project which truncates constitutional rights merely in the interest of a streamlined bureaucratic processing for a reorganization. Where the particular form of reorganization is **<u>annexation</u>**, **<u>this third qualifying "gate" or "filter</u>**" discussed extensively in the <u>Sunset Beach</u> case disqualifies projects which are **<u>not small</u>** and will especially disqualify expansions which are **<u>enormous</u>**, as is the situation here.

The proposed expansion of the FP-5 Special Tax Area may be the largest purported "annexation" in the history of California: 190,000 parcels, comprising 12,207,306 acres,

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[52] This affected acreage is EIGHTY-ONE THOUSAND TIMES larger than the 150-acre annexation limit so carefully considered by the Legislature as being the present maximum for "island" annexations.

[53] This departure from strict constitutionally-mandated voting rules to allow the statutorily-created "protest vote" procedures of §57075 in the listed limited situations in the interest of economic efficiency and economic expediency is a **<u>utilitarian</u>** interpretation of constitutional mandates. It is analogous to the "Theory of Efficient Breach of Contract" introduced into our jurisprudence by Justice Oliver Wendell Holmes in *The Path of the Law,* 10 Harv. L Rev. 457, 462 (1897). There he reasoned that if it is more profitable (or "economically-efficient") to breach a contract than to honor it, then you not only can but SHOULD breach it, provided of course you realize thereby you will be held liable for the damages which the other party suffers from your breach of contract. In his words: *"[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else."* (Id., at 462.) Of course, this up-ended centuries of Anglo-American tradition in contractual jurisprudence that "a person's word should be their bond" and decimated the remedy of specific performance for breaches of contract.

covering 19,073 square miles, and raising more than $26 million in new taxes every year. An invasion of private property rights as mammoth as this cannot constitutionally occur without the 2/3 majority vote mandated by Art. XIII-C of the Constitution, no matter what may or may not be indicated by the constitutionally-inadequate § 57075 "protest vote."

OBJECTION #18: THE PURPORTED "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA WITHOUT THE CONSTITUTIONALLY-MANDATED 2/3 MAJORITY VOTE, MAY EXPOSE THE COUNTY AS WELL AS ITS OFFICERS (IN BOTH THEIR OFFICIAL AND PERSONAL CAPACITIES) TO HUGE LIABILITY

The scale of this "expansion" is jaw-dropping. So is the huge financial liability which the County as well as its Officers may face for, among others, an alleged "uncompensated taking" of "reasonable investment-backed expectations" on the part of up to 190,000 adversely-impacted property owners, or alleged ongoing abuses of civil rights, as well as related claims for attorney fees. [54] Very significant too is that fact that County Officers may face enormous unprotected liability in both their official, and personal, [55] capacities.

[54] The financial consequences for the County and its officers, even in their personal capacities, involve potential risk of exposure to devastating liability arising in the context of inverse condemnation and civil rights litigation. "More-old-fashioned" legal thought might prefer to overturn an unconstitutional tax as an oppressive "exaction" and refuse to allow it the light of day, but more modern jurisprudential trends (consistent with Oliver Wendell Holmes' "Theory of Efficient Breach of Contract", above) might favor allowing the legislative body to persist with its exaction if that's what it wants, but the financial impact may be huge. In eminent domain jurisprudence, too, the thinking is not to stop a public body from taking private property but merely to require it to pay compensation. For example, where, as here, an unconstitutional parcel tax levied on 190,000 parcels goes "too far" and crosses the line separating fair reasonable proportional taxation to become excessive exaction, this may result in a ruling that property owners who lose "all value" (say in 6.3 years) and/or who suffer excessive "interference with reasonable investment-backed expectations" are entitled to compensation and attorney fees for an uncompensated taking. Devastating financial consequences for the County and also its officers in both their official and personal capacities could result. These consequences may include but not be limited to: (a) damages for 190,000 uncompensated "takings" or "temporary takings" in violation of the Fifth Amendment "just compensation" clause; (b) attorney fees for 190,000 owners after successful prosecution of their inverse condemnation claim; (c) related causes of action for violation of the civil rights of affected persons by County officials, both in their official and personal capacities, where they have violated the civil rights of affected persons under color of state law, pursuant to 42 USC § 1983; (d) attorney fee claims by 190,000 owners in their civil rights claims, pursuant to 42 USC § 1988; (e) liability for continuing violation of civil rights, for as long as the unconstitutional tax endures (note: it is in perpetuity at 3% p.a.), (f) class action liability, on an enormous scale, involving 190,000 claimants, and (g) other liability. (See "inverse condemnation" / "civil rights" cases such as Lockaway Storage v. County of Alameda, (2013) 216 Cal.App.4th 161.)

[55] Consider specifically the **personal liability** which County officers may face. Let's say that a County officer while acting under color of state law uses disparaging racial slurs towards a member of the public while that person is at, say, a public counter in the Planning Department. Such racially-offensive behavior is obviously not approved of by the County as a proper part of the "course and scope of the employment" of that County official, so the County would be wholly within its rights if it refused to defend that County official against the litigation that might result, and would argue that the County official did not act in an official capacity but in a personal capacity in the racial slur. Now let us assume that the violation of the civil right in question was not the making of a racial slur, but the violation of another constitutionally-protected right, such as due process, or equal protection, or voting rights, or protection of private property against uncompensated takings, etc. If the County official violates those other civil rights instead of making the racial slur, surely those violations of civil rights would be as much outside the "course and scope of the employment" of the County official as if the substance of the civil rights violation had been a racial slur. Either way, the County official is on her own or his own, and not protected by employment or by the cloak of any official capacity, so this will mean that such County officials will have to pay to defend themselves, plus may be found liable in their personal capacity for damages for the civil rights violation as well as found personally liable for attorney fees. The liability in a case like this, with 190,000 persons whose civil rights are arguably being violated, is bankrupting.

<u>OBJECTION #19:</u> THE PURPORTED "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA WITHOUT THE CONSTITUTIONALLY-MANDATED 2/3 MAJORITY VOTE, <u>VIOLATES THE CIVIL RIGHTS</u> OF 190,000 PERSONS

Any person at the County who, acting under color of state law, violates the civil rights of any affected person, may face liability for damages pursuant to 42 USC § 1983, [56] and for attorney fees by 190,000 owners in civil rights claims, pursuant to 42 USC § 1988. [57] As noted above, liability of the County itself, as well as liability on the part of County officers, in both their official capacities as well as their personal capacities, not only for damages but also for attorney fees, may be enormous and potentially bankrupting.

<u>OBJECTION #20:</u> THE PURPORTED "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA WITHOUT THE CONSTITUTIONALLY-MANDATED 2/3 MAJORITY VOTE, <u>VIOLATES DUE PROCESS RIGHTS</u> OF 190,000 PERSONS

The Fifth Amendment and the Fourteenth Amendment, and parallel provisions in the state Constitution, guarantee the rights of the 190,000 affected owners, to due process of law.

The **<u>procedural</u>** due process rights, [58] as well as the **<u>substantive</u>** due process rights [59] of these owners, [60] have here been violated by the unconstitutional imposition of this tax.

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[56] 42 USC § 1983 provides: *"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."* (R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

[57] 42 USC § 1988(b) provides: *"**(b) Attorney's fees:** In any action or proceeding to enforce a provision of sections <u>1981</u>, <u>1981a</u>, <u>1982</u>, <u>1983</u>, <u>1985</u>, and <u>1986</u> of this title, title IX of <u>Public Law 92–318</u> [<u>20 U.S.C. 1681</u> et seq.], the Religious Freedom Restoration Act of 1993 [<u>42 U.S.C. 2000bb</u> et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [<u>42 U.S.C. 2000cc</u> et seq.], title VI of the Civil Rights Act of 1964 [<u>42 U.S.C. 2000d</u> et seq.], or <u>section 12361 of title 34</u>, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."* (R.S. § 722; <u>Pub. L. 94–559</u>, § 2, Oct. 19, 1976, <u>90 Stat. 2641</u>; <u>Pub. L. 96–481, title II</u>, § 205(c), Oct. 21, 1980, <u>94 Stat. 2330</u>; <u>Pub. L. 102–166, title I</u>, §§ 103, 113(a), Nov. 21, 1991, <u>105 Stat. 1074</u>, 1079; <u>Pub. L. 103–141</u>, § 4(a), Nov. 16, 1993, <u>107 Stat. 1489</u>; <u>Pub. L. 103–322, title IV</u>, § 40303, Sept. 13, 1994, <u>108 Stat. 1942</u>; <u>Pub. L. 104–317, title III</u>, § 309(b), Oct. 19, 1996, <u>110 Stat. 3853</u>; <u>Pub. L. 106–274</u>, § 4(d), Sept. 22, 2000, <u>114 Stat. 804</u>.)

[58] **<u>Procedural due process</u>** centers on the fairness and impartiality of procedures used, as to two main aspects: (a) the constitutional adequacy or otherwise of the **<u>notice</u>** given in this matter; and (b) the constitutional adequacy or otherwise of procedures for the **<u>hearing</u>** in this matter.

[59] **<u>Substantive due process</u>** protects against "*ultra vires*" enactments which exceed the limits of governmental authority: as a result, courts may find that a majority's enactment is not law and cannot be enforced, regardless of whether the processes of enactment and enforcement were actually fair from a purely procedural perspective.

[60] For example, the California Supreme Court has stated: *"Defendants argue that because a weighted majority of property owners approved the assessment, it furthers Proposition 218's emphasis on voter consent, and we should accord deference to those voting owners' wishes. However, voter consent cannot convert an unconstitutional legislative assessment into a constitutional one."* <u>Silicon Valley Taxpayer's Association v. Santa Clara County Open Space Authority</u>, 44 Cal.4th 431, 449 (2008). Substantive due process rights prevail even over the will of a majority.

As explained below, both the original ballot of 2006, and the written protest procedures of 2018, deny procedural due process rights as well as substantive due process rights:

> <u>OBJECTION #20A:</u> IN **<u>2006</u>**, <u>PROCEDURAL DUE PROCESS</u> WAS DENIED BECAUSE THE BALLOT FOR THE PROPOSED "PARCEL TAX" WAS MAILED **<u>ONLY TO "REGISTERED VOTERS</u>**" LIVING IN HELENDALE/SILVERLAKES, THEREBY DENYING NOTICE AND A VOTE TO NON-RESIDENT PERSONS SUCH AS THE LANDOWNERS OF VACANT LAND PARCELS IN HELENDALE EVEN THOUGH A SPECIAL TAX WAS BEING IMPOSED ON THEIR PARCEL.
>
> See Official Ballot in 2006 for "County Service Area 70, Improvement Zone FP-5, Increased Fire and Emergency Medical Services Special Tax", which states that this Measure is "SUBMITTED TO THE **<u>REGISTERED VOTERS</u>**." (Emph. added.)
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> <u>OBJECTION #20B:</u> IN **<u>2018</u>**, <u>PROCEDURAL DUE PROCESS</u> WAS DENIED BECAUSE NOTICE WAS MAILED **<u>ONLY TO "LANDOWNERS"</u>** AFFECTED, THEREBY DENYING NOTICE AND A VOTE TO <u>REGISTERED VOTERS</u> WHO DO NOT OWN ANY AFFECTED LAND BUT MAY ALSO BE AFFECTED. [61]
>
> See the "Written Protest Form" in 2018, which requires a Declaration by the Voter, either that "I am a **<u>LANDOWNER</u>** …" (emph. in original) or "I am an **<u>AGENT</u>** authorized to protest on behalf of the landowner …" (emph. in original.) No other person may submit a protest form, not even a non-landowning "Registered Voter."
>
> <u>OBJECTION #20C:</u> <u>PROCEDURAL AND SUBSTANTIVE DUE PROCESS</u> ARE DENIED BY <u>ALLOWING ONLY "REGISTERED VOTERS" TO VOTE IN 2006</u>, AND <u>THEN ALLOWING ONLY "LANDOWNERS" TO VOTE IN 2018</u>.
>
> Elections in the **<u>same</u>** FP-5 Special Tax Area cannot be by the "registered voters" casting votes in 2006, then differently based on votes by "landowners" in 2018. [62]

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[61] Since the District is attempting to "import" the protest vote procedures which govern LAFCO, it should not do so piece-meal as it does, and must give Notice to "registered voters" also because they too may be affected by this tax. § 57026 provides: *"The notice required to be given by Section 57025 shall contain all of the following information: ... (g) If the subject territory is inhabited and the change of organization or reorganization provides for the submission of written protests, <u>a</u> **<u>statement</u>** <u>that</u> **<u>any owner of land</u>** <u>within the territory,</u> **<u>or any registered voter</u>** <u>residing within the territory,</u> **<u>may file a written protest</u>** <u>against the proposal</u> with the executive officer of the commission at any time prior to the conclusion of the hearing by the commission on the proposal."* (Emphasis added.) Likewise, §57025 provides in pertinent part: *"(b) The executive officer* ***<u>shall give mailed notice to all landowners</u>*** *owning land within any affected territory, consistent with Sections 56155 to 56157, inclusive. (c) If the subject territory is inhabited, the executive officer* ***<u>shall also give mailed notice to all registered voters</u>*** *residing within any affected territory, consistent with Sections 56155 to 56157, inclusive."* (Emph. added.) These subsections are not overridden by subsection (e). This "expansion" is not doing only one thing (not only expanding a fire zone), it is doing two things (i.e., <u>also</u> expanding a special tax area), thus the requirements of subsection (e) are <u>in addition to</u> those requirements stated in subsections (a) through (d). §57025(e) provides: *"(e) In the case of a proposed change of organization or reorganization that would result in the extension of any previously authorized special tax or benefit assessment to the affected territory, the executive officer of the commission shall give mailed notice to each landowner within the affected territory."* In overview, **<u>the statute itself requires notice to BOTH registered voters AND landowners</u>**.

[62] See discussion, above, as to whether this District is a "registered voter district" or a "landowner-voter district."

Multiple due process objections relate to the "Notice" that was (or was not?) mailed:

> OBJECTION #20D: DUE PROCESS IS DENIED BY FAILING TO MAIL NOTICE TO EACH AND EVERY PARCEL AND TO ALL 190,000 PARCELS AFFECTED. MANY OWNERS OR CO-OWNERS OF MULTIPLE PARCELS COMPLAIN [63] THAT NO NOTICE WAS MAILED TO OR RECEIVED BY MOST PARCELS. [64]

> OBJECTION #20E: DUE PROCESS IS DENIED BY FAILING TO INCLUDE IN THE MAILING AND INSTEAD ONLY REFERENCING THE 2-PAGE DOCUMENT KNOWN AS "ATTACHMENT A", [65] INSTEAD INSTRUCTING VOTERS TO VISIT THE FIRE DISTRICT WEBSITE IN ORDER TO VIEW THIS ESSENTIAL ITEM WHICH DEFINES WHETHER OR NOT A PARCEL IS OR IS NOT INCLUDED. FAILING TO INCLUDE A DEFINITION OF THE EXPANSION AREA WITHIN THE NOTICE ITSELF, ENTIRELY DEFEATS THE PURPOSE OF THIS NOTICE AND OF ANY "NOTICE", WHICH IS TO COMMUNICATE CLEARLY AND TO TELL AFFECTED PERSONS WHETHER & HOW THEY ARE OR MAY BE AFFECTED. THIS "NOTICE" IS NO NOTICE AT ALL. ALL IT DOES IS CONFUSE PEOPLE.

> OBJECTION #20F: THE DEFECTS OF DUE PROCESS RESULTING FROM THE INADEQUACY OF THE NOTICE, ARE NOT CURED BY THE INADEQUATE MAP STUCK INTO A TINY CORNER OF THIS FAILING "NOTICE". DEPICTING A COUNTY OF TWENTY THOUSAND SQUARE MILES USING A "MAP" OF ONLY TWELVE SQUARE INCHES (3 INCHES BY FOUR INCHES) COMPOUNDS THE FAILURES OF THIS NOTICE RATHER THAN CURES THEM. MANY TIMES A PICTURE CAN PAINT 1,000 WORDS, BUT AN INADEQUATE MAP [66] SUCH AS THIS GENERATES NOT A 1,000 ANSWERS BUT A 1,000 MORE QUESTIONS. THIS "NOTICE" IS NO NOTICE AT ALL. ALL IT DOES IS CONFUSE PEOPLE.

> OBJECTION #20G: THE "NOTICE" MENTIONS BUT OMITS "ATTACHMENT F", WHICH THE "INSTRUCTIONS" TELL US (IN CAPS) IS THE PROTEST FORM. WE NEED THE FORM ITSELF, NOT TO BE NOTIFIED (ALL IN CAPITALS) THAT THERE IS SUCH A THING AS A NON-INCLUDED "ATTACHMENT F", UNLESS

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[63] The "Written Protest Instructions" state: *"The APN is printed on the envelope."* What if there is no envelope because no Notice was mailed to a parcel, perhaps under a misplaced notion that "notice to one is notice to all"? How then does the owner determine whether or not a particular parcel is included or which parcel(s) are included. This shortcoming creates a material vagueness and uncertainty and defeats the essential purpose of a Notice, which is to communicate clearly.

[64] As an example, this protestor owns about twenty parcels countywide, many of which are now newly affected by this tax, but has received only one Notice, actually for the parcel to which the "**Case of the Burning Bush**" relates. Note that this "Burning Bush" parcel is not the "lowest numbered" APN owned by this protestor, so this protestor can offer no explanation of why it is the "Burning Bush" parcel and no other which is the only parcel here noticed.

[65] Spanish readers might also be scratching their heads wondering if there is any difference between the "*anexo a*" (no capitals) mentioned in the main text and "*Accesorio A*" itemized below; or why only part of the NOTICE seems to have been translated into Spanish but not the Address of the Hearing nor the Legend and Title of the Map.

[66] See http://www.vvdailypress.com/news/20180926/your-letters-9-26-2018 where Mr. Fred Stearn of Newberry Springs writes: *"Maps of affected areas are imprecise. … Seems like they intend to hit property owners in non-fire hazard areas, according to their inadequate map. … What if your property is not in a high fire hazard zone as mapped by the state's Teale Data Center?"* Mr. Stearn in his extensive correspondence has magnificently defended the small rural desert community of Newberry Springs, and his comments are hereby adopted and incorporated into this Brief.

WE ARE IMPLIEDLY BEING "INSTRUCTED" IN THESE "INSTRUCTIONS" THAT WE NEED TO REFER TO ATTACHMENTS B, C, D, & E (AT LEAST, OR MORE?) WHAT ARE THESE "OTHER" ATTACHMENTS? IF IT IS IMPORTANT FOR US TO KNOW ABOUT THEM, THE "NOTICE" FAILS TO TELL US WHAT THEY ARE.

OBJECTION #20H: AS TO THE MISSING "ATTACHMENTS B THROUGH E" (MY REPEATED REQUEST FOR "B THROUGH E" HAS TO DATE BEEN IGNORED: INSTEAD THEY SENT ME A AND F WHICH I HAD SAID I ALREADY HAVE??), THE ONLY THING WE GLEAN IS THEY ARE ATTACHED TO A "**PROPOSED**" RESOLUTION (NOT YET AN "ADOPTED" RESOLUTION BUT ONE THAT IS OSTENSIBLY ONLY "PROPOSED" AT THE SEPTEMBER 2018 MAILING DATE) (MY REPEATED REQUEST FOR THIS TOO HAS TO DATE BEEN IGNORED.) IS THIS "PROPOSED" RESOLUTION ONE WHICH IS DATED THREE OR FOUR MONTHS AGO (ON "JUNE 12, 2018")? IF INDEED IT IS "PROPOSED" AS AT "JUNE 12, 2018", THEN IS IT DIFFERENT FROM AT LEAST TWO OTHER RESOLUTIONS WHICH WERE ACTUALLY ADOPTED ON JUNE 12, 2018, NAMELY, DISTRICT RESOLUTION 2018-99 AND RESOLUTION 2018-100? IF THE PROPOSED RESOLUTION IS ACTUALLY AN ADOPTED RESOLUTION, THEN WHICH OF THE TWO (OR MORE) ADOPTED ON JUNE 12, 2018, IS IT? THIS "NOTICE" IS NO NOTICE AT ALL. ALL IT DOES IS CONFUSE PEOPLE.

As explained below, there are multiple further denials of procedural due process rights as well as substantive due process rights, attending the so-called "protest vote" of 2018:

OBJECTION #20I: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF REQUIRING RURAL VOTERS WHO ARE NOT "TECH-SAVVY" TO FIND A PROTEST FORM ON THE INTERNET, AND SOMEWHERE WITHIN A WEBSITE WHICH IS VERY DIFFICULT TO NAVIGATE, SO AS TO BE ABLE TO PROTEST. RURAL VOTERS ARE BEING DENIED THE OPPORTUNITY TO PROTEST. SINCE WHEN DID OUR COUNTRY DISQUALIFY NON-TECHSAVVY VOTERS?

OBJECTION #20J: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF REQUIRING RURAL VOTERS WITHOUT ADEQUATE INTERNET ACCESS TO PRINT THEIR OWN PROTEST FORM TO BE ABLE TO PROTEST. SINCE WHEN DID OUR COUNTRY DISQUALIFY VOTERS WITHOUT PRINTERS?

OBJECTION #20K: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF ALTERNATELY INSTRUCTING VOTERS TO "CALL 211" FOR A FORM, ONLY FOR 211 OPERATORS TO SAY THEY KNOW OF NO SUCH FORM. [67]

OBJECTION #20L: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF NOT INCLUDING ANY BALLOT FORM WHEN THE NOTICE WAS MAILED.

OBJECTION #20M: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF REQUIRING A VOTER TO HAVE "LEGIBLE" HANDWRITING, OTHERWISE

[67] See http://www.vvdailypress.com/news/20180926/your-letters-9-26-2018 where E. T. Snell of Newberry Springs writes: *"… The paper they sent me said to call 211 yet 211 never heard of any form available. …"*

THE THREAT IS THAT THE PROTEST WILL NOT BE "VALID." SINCE WHEN DID OUR COUNTRY DISQUALIFY VOTERS WITH BAD HANDWRITING? [68]

<u>OBJECTION #20N:</u> <u>DUE PROCESS</u> IS DENIED BY THE "CHILLING EFFECT" OF REQUIRING A VOTER TO STATE THE APN <u>AND A STREET ADDRESS</u>, [69] WHEN THE MAJORITY OF PARCELS IN THE UNINCORPORATED COUNTY ARE VACANT LAND WITH NO STREET ADDRESS, [70] ESPECIALLY WHEN AN APN ALONE IS EASILY SUFFICIENT TO READILY IDENTIFY THE PROPERTY, WHILE ALLOWING ONLY AGENTS (BUT NOT LANDOWNERS THEMSELVES) TO STATE INSTEAD A "DESIGNATION" (WHATEVER THAT MAY MEAN?) [71]

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[68] The "Written Protest Instructions" indicate that a written protest, by a voter whose handwriting (as determined presumably by a local fireman?) is not "legible", is not a "valid" protest. The Instructions state: *"Valid written protest by a landowner must be printed legibly or typed on the Protest Form …"* This may have the effect of disqualifying many providers of Emergency Medical Services, because is it not widely said that doctors have awful handwriting?

[69] See, <u>http://talkofthemountain.net/index.php/topic,2459.0.html</u> which states: *"I am a property owner in the proposed FP-5 expansion area, and the protest instructions provided to area residents are incorrect and misleading, and because of this may have the effect of discouraging responses. The protest form and accompanying instructions, specifically the instructions for landowners, imply that both an APN and a street address must be included. There are many parcels in the area which do not have street addresses, and there are almost certainly owners who have an address but may have difficulty determining the APN. 2.(c) of the LAFCO Protest Procedures Memo dated 31 May, 2016 says "For a valid landowner protest, **<u>an address or parcel number</u>** within the change of organization area must be provided." (See link: <u>http://www.sbcounty.gov/uploads/LAFCO/Publications/ProtestProceduresMemo_2016.pdf</u>) Note "address or parcel number". The memo is explicit that a protest may include **<u>one or the other</u>**, not necessarily both. While the supplied FP-5 Expansion instructions for agents goes into a bit more detail about 'designations sufficient to readily identify the property', it would be easy for someone without an agent acting on their behalf to skip that part. If landowners are (mis)led to believe that they are required to provide both and address and APN, and they cannot, it is very likely that they will refrain from filing what would have, in fact, been a valid protest. For the above reasons, I believe the FP-5 Expansion protest instructions and form must be revised for accuracy and clarity, resubmitted to owners in the affected area, and the deadline for submittal revised accordingly."* (Emphasis added.)

[70] Even though many parcels especially in the unincorporated areas have no assigned street address, the Instructions seem to require that a "STREET ADDRESS" "must" be included for a protest by a landowner to be "valid", stating: *"Valid written protest by a landowner must be printed legibly or typed on the Protest Form (ATTACHMENT F); include name, street address, city, state, zip code, APN (assessor's parcel number) of the property owned by the landowner, original signature and date signed."* Very confusingly, those who protest in the capacity as a "LANDOWNER" are required by the Form to state the "STREET ADDRESS", while those who protest in the capacity only as an "AGENT" on behalf of a landowner are required by the Form to state instead, "STREET ADDRESS or DESIGNATION SUFFICIENT TO READILY IDENTIFY THE PROPERTY." Why are only "Agents" as opposed to the Landowners themselves granted the extra right not given to landowners, to identify the property by a "designation" other than its street address?

[71] What is a "DESIGNATION"? Is this nonsense-word supposed to mean a "description": if so, why not just call it a "description" instead of confusing simple rural landowning folk (as well as even lawyers reading this Form) with pompous meaningless misleading words like "designation" when no one seems to know what the "designation" of a property is. Even the dictionary definition of "designation" casts no light on this mystery. See, for example, <u>https://en.oxforddictionaries.com/definition/designation</u> which states the following as the online definition of this word: "*designation (noun): 1. The action of choosing someone to hold an office or post. ('a leader's designation of his own successor'). 1.1. The action of choosing a place for a special purpose or giving it a special status. ('Dibden Bay's designation as a Site of Special Scientific Interest'). 1.2. An official name, description, or title. (quality designations such as "Premier Cru''). Origin: Late Middle English (in the sense 'the action of marking'): from Latin designatio(n-), from the verb designare (see designate). Pronunciation: designation/dɛzɪɡˈneɪʃ(ə)n/"* (The two-volume printed version of the 2,672-page "Shorter Oxford English Dictionary" likewise can shed no light.) When the Form asks the formal AGENT but not the lay LANDOWNER for a "designation", is the Form perhaps asking for a LEGAL DESCRIPTION: if so, this would impose an excessively onerous burden upon those seeking to protest, because no one (agents included) carries around or has easily assessible such esoteric things as legal descriptions.

OBJECTION #20O: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF REQUIRING A HUSBAND & WIFE WHO OWN A PROPERTY TOGETHER, TO HAVE TO FILL IN SEPARATE PROTEST FORMS OR OTHERWISE THEIR PROTEST WILL BE TALLIED AS ONLY A HALF-PROTEST BY THEIR PARCEL.

OBJECTION #20P: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF REQUIRING JOINT OWNERS TO FILL IN SEPARATE PROTEST FORMS OR OTHERWISE THEIR PROTEST WILL BE ONLY A "PARTIAL-PROTEST." AND WHAT ABOUT "EQUITABLE OWNERS" WITHOUT A RECORDED TITLE?

OBJECTION #20Q: DUE PROCESS IS DENIED BY THE "CHILLING EFFECT" OF DISQUALIFYING PROTESTS MADE BY UNSOPHISTICATED OWNERS, ON "**PICKY**" GROUNDS SUCH AS REQUIRING ALL THIRTEEN APN DIGITS (WHERE COMMONLY IN THE COUNTY PEOPLE USE ONLY THE FIRST NINE DIGITS BECAUSE MOST OFTEN THE LAST FOUR DIGITS ARE ALL ZEROES) OR, AS HAPPENED IN A SIMILAR BALLOT IN 2016, WHERE THE VOTE OF ONE OWNER WAS DISQUALIFIED AFTER HIS WIFE HAD INADVERTENTLY ADDED AN EXTRA ZERO AT THE END OF THE APN ON THE PROTEST FORM.

OBJECTION #20R: DUE PROCESS IS DENIED, AND/OR THE PERCEPTION IS THAT DUE PROCESS IS BEING DENIED, BY THE "CHILLING EFFECT" OF HAVING TO **SUBMIT** THE PROTEST FORMS TO THE FIRE DEPARTMENT INSTEAD OF TO THE REGISTRAR OF VOTERS. SHOULD THE FOX [72] BE PLACED IN CHARGE OF LETTING THE CHICKENS INTO THE HENHOUSE? MIGHT NOT SOME CHICKENS "GO MISSING" AS A RESULT OF DOING THAT?

OBJECTION #20S: DUE PROCESS IS DENIED, AND/OR THE PERCEPTION IS THAT DUE PROCESS IS BEING DENIED, BY THE "CHILLING EFFECT" OF HAVING THE FIRE DEPARTMENT INSTEAD OF THE REGISTRAR OF VOTERS **HANDLING** VOTES. AS OLD AS ANCIENT ROME ITSELF IS A FUNDAMENTAL PRINCIPLE OF PROCEDURAL AND SUBSTANTIVE JUSTICE: "*NEMO IUDEX IN SUO CAUSA*" OR "NO ONE SHOULD BE A JUDGE IN THEIR OWN CAUSE." SHOULD THE FOX BE PLACED IN CHARGE OF DISQUALIFYING VOTERS [73] OR IN CHARGE OF DECIDING "WHOSE CHAD IS (OR IS NOT) HANGING"?

OBJECTION #20T: DUE PROCESS IS DENIED, AND/OR THE PERCEPTION IS THAT DUE PROCESS IS BEING DENIED, BY THE "CHILLING EFFECT" OF HAVING A "THIRD-PARTY CONTRACTOR" CHOSEN BY THE FIRE DISTRICT INSTEAD OF HAVING THE REGISTRAR OF VOTERS **COUNTING** THE VOTES.

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[72] See http://www.vvdailypress.com/news/20180925/your-letters-9-25-2018 where Mr. Bill Tuck, Jr. of Phelan, asks the same question: *"…The office in San Bernardino, 157 W. Fifth St., is actually handling the vote. That office is the Fire Department Headquarters and Chief Mark Hartwig's office. Fire Chief Hartwig has said employees would lose their jobs if this fee is not voted in. Is it legal for these same employees to check mail and oversee the vote?"*

[73] See http://www.vvdailypress.com/news/20180920/your-letters-9-20-2018 where Mr. John Becker of Oak Hills asks whether the District is in favor of fire protection services or more interested in putting cash into its own coffers: *"County Fire wants more money but it seems to me that when the City of Victorville tried to raise money for fire services, the county fire union openly opposed it. Why would we now want to pay more to County Fire? If you think they are going use this money to better their response times in the rural areas then you have a surprise coming!"*

SHOULD THE FOX (OR THE FOX'S CHOSEN AGENT OF "SCI") BE ALLOWED DEEP INTO THE INNER SANCTUM OF THE HENHOUSE TO DO THE ACTUAL COUNTING OF THE CHICKENS ONCE ALL THE VOTING ACTION IS DONE? CAN WE TRUST A CERTIFICATION BY THE FOX OR ITS ***ALTER-EGO,* SCI,**[74] AS TO THE ACTUAL VOTE TALLY? AND WHY WILL THIS MYSTERIOUS "SCI" COUNT BALLOTS IN PLACE OF THE REGISTRAR OF VOTERS? PERHAPS IT NO LONGER MATTERS, BECAUSE **THE PERCEPTION OF INJUSTICE** IS ALREADY SO OVERWHELMING THAT THE GENERAL PUBLIC WILL HAVE ZERO FAITH IN THE CORRECTNESS OF WHATEVER TALLY IS ANNOUNCED. THE "CHAIN OF EVIDENCE" HAS BEEN SO DOUBLY TAINTED, FIRST, BY FUNNELING ALL VOTES FIRST THROUGH FIRE DISTRICT HANDS, THEN SENDING THE BALLOTS TO AN UNKNOWN THIRD PARTY FOR COUNTING.

For each of the above reasons, and on each of these grounds, there are multiple denials of procedural and substantive due process of law, attending this so-called "protest vote." No matter its outcome quantitatively, this results of this "protest vote" should be ignored as a matter of law, because procedurally and substantively it denies due process of law.

OBJECTION #21: THE PURPORTED "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA WITHOUT THE CONSTITUTIONALLY-MANDATED 2/3 MAJORITY VOTE, VIOLATES THE VOTING RIGHTS OF 190,000 PERSONS

The United States Constitution, and parallel provisions in the Constitution of California, guarantee the voting rights of the 190,000 owners affected by this tax. The voting rights of these persons have been violated by the unconstitutional imposition of this tax, in many ways, as have been discussed above in relation to the violations of due process of law.

Note that the substantive due process provisions (in particular) of the Constitution protect affected persons in a minority whose constitutional rights are being infringed, even by an ostensible majority. There is no "due process of law" where a majority purports to "vote"

[74] Although in San Bernardino there are three businesses called "SCI" (one is a crematorium [which admittedly might be really helpful in disposing of the "protest ballot" forms after the vote to avoid any messy prospect of a recount], the second provides "business coaching" services, and the third is a type of gun-toting hunting club), probably the mysterious "SCI" is the same "Shilts Consultants Inc." of Fairfield in Northern California who were previously hired by another public agency trying to over-tax property owners, in Silicon Valley Taxpayer's Association v. Santa Clara County Open Space Authority, 44 Cal.4th 431 (2008). In that case, the California Supreme Court overturned the **engineer's report prepared by SCI** (cited at page 439) as being unconstitutional and violative of the mandates of Cal. Const., Art. XIII-D, §4(b). The Fairfield SCI is a highly-talented and extensively-experienced group of tax **advocates** but this does not suit them to overseeing an impartial **election**. Perhaps SCI's track record of having its engineer's report rejected on multiple grounds (*Id.*, at pages 456 to 458) by the California Supreme Court as being violative of the constitutional rights of the affected landowners, impressed the Fire District as to the tenacity of SCI as its future advocate, and grounded the District's decision to hire SCI. But to hire an organization which is biased in favor of the public agency and biased against the chickens in the henhouse. to count the actual protest ballots of the chickens is inappropriate and itself violative of due process of law. As the would-be chicken-counter itself states in its website at http://www.sci-cg.com/about.php : "**Our goal at SCI Consulting Group is to help California public agencies …"** Hardly sounds an objective and unbiased position for a vote-counter, surely? Yes, your goal may be to "help" public agencies in any way you can, but **OUR goal as the voters is to have a FAIR election in which our constitutional rights as voters are respected**, not only with propriety as a guaranteed **fact** but also with the **appearance** of full propriety. By all means let SCI advocate the alternative tax proposed in Part Three of this Brief, in that role they will excel, but the submission of this Brief is that it wholly inappropriate for anyone but the Registrar of Voters to count the vote.

to deny constitutionally-protected rights of a minority. For example, if a majority or even a 2/3 super-majority of voters "voted" to return all African-American citizens (a minority) to their former slavery, substantive due process would protect this attacked minority and would absolutely invalidate any such gross attempt to infringe their fundamental liberties. Likewise, any purported "vote" which transgresses constitutionally-enshrined freedoms (such as the rights of affected landowners to due process, equal protection, freedom from being subjected to an "uncompensated taking", a 2/3 majority vote pursuant to Art. XIII-C and/or other constitutional rights), would be voided by substantive due process of law.

<u>OBJECTION #22:</u> THE PURPORTED "ANNEXATION" OF 19,073 SQUARE MILES INTO THIS SPECIAL TAX AREA WITHOUT THE CONSTITUTIONALLY-MANDATED 2/3 MAJORITY VOTE, <u>VIOLATES EQUAL PROTECTION</u> FOR 190,000 PERSONS

The Fifth Amendment and the Fourteenth Amendment of the United States Constitution, and parallel provisions in the Constitution of California, guarantee equal protection for all persons, including but not limited to the 190,000 parcel owners affected by this tax. Denial of equal protection here is <u>not "*per se*"</u> because on its face the tax seems to treat all owners "equally" by imposing an ostensibly "equal" tax on them in an "equal" amount. But this "appearance" of "equal treatment" is a smokescreen disguising what this tax is really doing, <u>*as-applied*</u>, and that is treating people in an extremely <u>unequal</u> manner. Thus, the denial of equal protection here **<u>is "*as-applied*"</u>**, and its extent is egregious.

In other distinguishable situations, the Courts have denied the equal protection claims of objectors to a flat parcel tax. The *in-pro-per* plaintiff in <u>Neilson v. California City</u> [75] has repeatedly challenged a Kern County special tax on equal protection grounds, and failed. His equal protection claim argued that "… *the scheme by which voter approval was obtained for Measure L violated equal protection because the City did not enfranchise nonresident property owners with the right to vote on the measure*. …" (Id, at p. 465.) Based on the legitimate interest that local municipalities may have in restricting local votes to local residents, the objection that non-residents were denied the vote was not upheld on grounds of equal protection. The Court did not, however, consider whether the result may differ if the basis of the claim on the same facts is a denial of substantive due process.

The "equal protection" argument of those here prejudiced is not centered on residency but on the disproportionate and discriminatory burden being imposed by this flat $157 tax, upon owners of vacant land of low value, such as in "***The Case of the Burning Bush,***" as-applied to their circumstances [76] and as opposed to the unnoticeable burden on others. Unless the revised special tax structure presents a framework based upon land USE which allows the owners of vacant land of low value to bear a lower obligation than the owner of a paint factory, the argument of denial of equal protection as-applied will stand.

[75] <u>N. L. Neilson (*in pro per*) v. City of California City</u>, (2005) 35 Cal.Rptr.3d 453, 133 C.A.4th 1296; see also the related but non-published and non-citeable decision F066007 in the Fifth District Court of Appeal on September 26, 2013. (In the unreported 2013 case the same *in-pro-per* plaintiff there revised his equal protection argument to argue that the tax violated equal protection because it was not computed based on assessed value, but that argument failed because an *ad-valorem* special tax conflicts with Proposition 13, accordingly he had failed to state a cause of action.)

[76] Another ground distinguishing the unreported 2013 case involving the same in-pro-per plaintiff is that Neilson was not contending that the tax was unequally applied. Instead he was arguing that there was a <u>*per-se*</u> denial of equal protection, because he alleged <u>the law itself</u>, exactly as written, is what was denying him equal protection.

OBJECTION #23: NO ADEQUATE FOUNDATION SUPPORTS THE "FINDING" THAT THE DISTRICT BOARD IS "ACTING IN THE PUBLIC'S INTEREST" BY EXPANDING SPECIAL TAX AREA FP-5, SO THIS CONSTITUTES AN ABUSE OF DISCRETION.

The Notice of Hearing conclusorily alleges, without adequate foundation and without any required Resolution or formally-adopted "Finding" to this effect, that: *"… the District Board is **acting in the public's interest** by proposing the expanding of Service Zone FP-5 to raise additional revenue for maintenance of existing services."* (Emphasis added.) This statement discloses multiple problems and issues, including but not limited to these:

(1) No adequate foundation exists to support the District's contention that it is "… ac*ting in the public's interest …"* here, nor does such basis justify this, if indeed it exists.

(2) No required Resolution as to this, and no related "Finding", have been adopted to the effect that the District (as contended by it) is "ac*ting in the public's interest"* here. For these reasons, the District's actions constitute an abuse of discretion on its part.

OBJECTION #24: SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS RESULT FROM EXTENDING THIS TAX BY 19,037 SQ. MI., ESPECIALLY ON THE HABITAT OF ENDANGERED SPECIES OF *FLORA* AND *FAUNA*, AS WELL AS ON HUMANS, PARTICULARLY AS TO THE ECONOMIC IMPACTS, BOTH DIRECT AND INDIRECT, RESULTING IN MANY SIGNIFICANT PHYSICAL IMPACTS ON THE ENVIRONMENT AND THEREBY NECESSITATING PREPARATION OF AN EIR PURSUANT TO CEQA

The CEQA Guidelines in § 15065(a)(1) (entitled "Mandatory Findings of Significance") require a finding of significant effect on the environment [77] where there is:

> *"… the potential to: substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels~~,~~; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species; or eliminate important examples of the major periods of California history or prehistory."*

(Code of Regulations, Section 15065(a)(1).)

§ 21083(b)(3) likewise requires a finding of significant effect on the environment where:

> *"(3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly."*

(Public Resources Code, Section 21083(b)(3).)

This $157 tax causes substantial impacts on plants and animals and humans, directly and indirectly, and through physical impacts on the environment, for example as follows:

(1) **Protected Habitats** of rare/endangered/threatened species of *flora* and *fauna* in outlying areas are directly threatened by this tax, in that imposition of this tax and its economic impacts on rural property will shift the population towards urban areas and away from outlying unincorporated areas, thereby reallocating fire protection resources away from outlying rural areas where most of these protected habitats are concentrated.

[77] The term "significant effect on the environment" is defined in Section 21068 of CEQA (PRC § 21068) as meaning *"a substantial or potentially substantial adverse change in the environment."*

Preparation of an EIR is mandatory in this situation, because "significant environmental effects" include actions, as here, that will significantly affect: (1) a rare or endangered species of animal or plant or the habitat of the species; (2) the movement of any resident or migratory fish or wildlife species; and (3) the extent of habitat for fish, wildlife or plants."

(2) **Human impacts** will be significant and include major diminution in the number of entry-level property owners, particularly in rural areas. This reduction in the broad base of property ownership will have destabilizing effects throughout the County, in economic and social respects. It will also shift the population towards urban areas, and stagnate inner cities even further, with an influx of rural poor seeking social services such as EMS services, thereby placing further stress on emergency services in underserved urban areas, and requiring the expansion of existing physical facilities in urban areas.

(3) **Economic impacts** will be substantial among the 190,000 affected by this tax. For example, the tax may cause many thousands of owners to lose their properties, or abandon them, or forfeit them to tax sales, which in turn will take those parcels off revenue-producing rolls and even result in a forfeiture to or confiscation by the state. As contemplated by §15131 of the CEQA Guidelines, these economic impacts will cause many significant physical impacts on the environment, such as: increased urbanization and decreased rural development; decreased allocation of fire protection resources to rural areas and intensified demands for fire and EMS services in urban areas; significantly increased fire risks in rural areas (and far higher fire insurance premiums) because of the increased distance to fire stations, with devastating physical impacts on natural habitats for protected species of animals and reptiles and birds and plants (such species may be wiped out altogether when their sensitive habitat is destroyed); a major intensification of adverse air quality impacts in urban areas, as populations shift towards urban centers and away from rural areas; and many other physical impacts, both direct and indirect.

(4) **Economically disadvantaged and severely economically disadvantaged communities** will be impacted significantly, to the level of **"environmental racism."**

The case law provides some helpful analysis and instructive examples:

(a) Examples of significant indirect physical impacts of an economic character include the increased traffic, fuel consumption, and air pollution as the potential results of a bus system fare increase, in Shaw v. Golden Gate Bridge District, (1976) 60 CA3d 699.

(b) Citizens Association for Sensible Development of Bishop Area v. Inyo, (1985) 172 CA3d 151, states: *"[E]conomic or social change may be used to determine that a physical change shall be regarded as a significant effect of the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment."* (Id., 151.) In this case, the Court held that an EIR for a proposed shopping center located away from the downtown shopping area must discuss potential economic and social impacts as the proposed center would take business away from downtown and thereby cause business closures and eventual physical deterioration of the downtown.

Where a physical change or a potential physical change such as these discussed above has been identified, and where, as here, substantial evidence exists indicating that the physical change will be significant, the preparation of an EIR is required by CEQA.

Before the District can proceed with this tax, preparing an EIR is therefore **mandatory**.

<u>OBJECTION #25:</u> THIS PURPORTED "TAX" GOES "TOO FAR" AND TURNS INTO AN UNCONSTITUTIONAL "LAND GRAB" BY THE FIRE DISTRICT TO RECOUP ITS ANNUAL OPERATING DEFICIT OF APPROXIMATELY THIRTY MILLION DOLLARS. UNDER GUISE OF A TAX, THIS UNCONSTITUTIONAL "EXACTION" INTERFERES WITH REASONABLE INVESTMENT-BACKED EXPECTATIONS OF LANDOWNERS, AND IN THOUSANDS OF CASES EFFECTS AN "<u>UNCOMPENSATED TAKING</u>" OF THE VALUE OF AFFECTED LAND, IN VIOLATION OF THE FIFTH AMENDMENT

This land-grab of almost thirty million dollars ($26.9M) each year, escalating at 3% p.a., will put **<u>about one billion dollars</u>** into the coffers of the Fire District by the year 2050. It goes "too far" and effects an uncompensated taking of all value of many parcels of land, and interferes with the reasonable investment-backed expectations of many landowners, to the extent that it is a compensable exaction and a prohibited uncompensated taking.

<u>Lockaway Storage v. County of Alameda</u> (2013) [78] provides a comprehensive overview of the principles of regulatory takings law. The analysis there is summarized as follows:

The Fifth Amendment prohibits government from taking private property for public use without just compensation. Note that it *"`does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' … In other words, it `is designed not to limit the governmental interference with property rights* per se, *but rather to secure* compensation *in the event of otherwise proper interference amounting to a taking.'"* (<u>*Lingle v. Chevron U.S.A.*</u> (2005) 544 U.S. 528, 536-537.) "*In this way, the takings clause precludes the `Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.'"* (<u>*Id.*</u>)

The Courts have long recognized that *"government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such `regulatory takings' may be compensable under the Fifth Amendment."* (*Ibid.*; see also <u>*Kavanau v. Santa Monica Rent Control Bd.*</u> (1997) 16 Cal.4th 761, 773.) More recently, the United States Supreme Court confirmed that a regulation may effect a taking requiring just compensation even if it does not deprive the owner of "all economically beneficial use" of his or her property, depending on the particular circumstances. (<u>*Palazzolo v. Rhode Island*</u> (2001) 533 U.S. 606, 617].)

A regulatory takings analysis rests on the principle that *"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."* (<u>*Penna. Coal Co. v. Mahon*</u> (1922) 260 U.S. 393, 415.) To assist courts in discerning **"how far is `too far'"** the United States Supreme Court has identified three distinct categories of regulatory takings and the tests for evaluating each. (<u>*Lingle,*</u> *supra,* at 538.)

(1) First, there is government action which requires a property owner to suffer "permanent physical invasion" of his or her property.

(2) Second there is regulatory conduct that does not result in any physical invasion but deprives the owner of "`all economically beneficial use'".

These two "relatively narrow categories" of regulatory action are subject to a categorical rule and are deemed <u>*"per se"* takings</u> for purposes of the Fifth Amendment.

[78] <u>Lockaway Storage v. County of Alameda</u>, 216 Cal.App.4th 161, 183-185 (2013).

A regulatory takings challenge that does not fall into one of these two narrow categories is evaluated under a set of standards first articulated by the Supreme Court in *Penn Central, supra,* 438 U.S. 104. (*Lingle,* at p. 538. The *Penn Central* inquiry is not a formula but an *ad hoc* factual inquiry that weighs several factors for evaluating a regulatory takings claim. (*Penn Central, supra,* 438 U.S. at p. 124; *Lingle, supra,* 544 U.S. at p. 538.) Courts conducting such an inquiry have identified three primary factors:

(1) the "economic impact" of the regulation on the claimant,
(2) the extent of interference with "distinct, investment-backed expectations," and
(3) the "character of the government action."

(*Shaw, supra,* 170 Cal.App.4th at p. 272; see *Penn Central, supra,* 438 U.S. at p. 124.) These *Penn Central* factors are "the principal guidelines" for resolving regulatory takings claims that do not fall within the two *per se* categories. (*Lingle, supra,* 544 U.S. at p. 539.)

The Penn Central inquiry is not a means-ends test; the question is not "whether a regulation of private property is *effective* in achieving some legitimate public purpose." (*Lingle, supra,* 544 U.S. at p. 542.) Instead, the goal is to assess the "*magnitude or character of the burden"* a particular regulation imposes upon private property rights, in order to determine whether its effects are "*functionally comparable to government appropriation or invasion of private property*." (*Ibid.*)

Under the standards articulated here, this Brief submits that this purported "tax" here goes "too far" and turns into an unconstitutional "land-grab" by the Fire District to recoup its annual operating deficit of approximately thirty million dollars, or a billion dollars by 2050. Under guise of being a "tax", this unconstitutional "exaction" interferes with the reasonable investment-backed expectations of up to 190,000 landowners, and in many thousands of cases results in an uncompensated taking (either *per se* and/or regulatory), with effects "*functionally comparable to"* a proscribed government appropriation of private property.

To avoid the clear liability of the governmental agency in inverse condemnation for the "uncompensated taking" of parcels where "all value" is eaten up by this tax in a short time, and especially to avoid attorney fees in those situations where clearly a taking is involved, there is **strong support in the journal literature for exempting parcels of low value**:

> *"… [C]oncer[ing] parcels with little value even though they are large … In such cases, the stream of future tax payments from (such) a parcel may exceed any reasonable expectation of future income from the parcel. The application of a parcel tax in this case **amounts to confiscating land**. **The appropriate policy for such parcels is to exempt them from taxation**."*

(Emphasis added.) (Sonstelie, Jon, "*California's Parcel Tax*", Lincoln Institute of Land Policy Working Paper WP14JS1 (2014), at 21-22.)

Accordingly, to avoid massive potential liability of the District to 190,000 affected persons, in inverse condemnation and in civil rights actions, low-value parcels such as the parcel involved in the "*Burning Bush*" case, along with all parcels with assessed values beneath some threshold level such as say $10,000, should be exempted from this oppressive tax. The remaining vacant or unimproved parcels should be taxed on a basis lower than improved parcels and on a basis far lower than parcels like very high risk paint factories, using a differential, graduated, sliding scale reflecting the particular land use involved.

SUMMARY OF THE ABOVE 25 OBJECTIONS

It is submitted that the power to tax is an invasion deep into the heart of private ownership and it should be exercised only with reverence for constitutional procedures and rights and with great respect for the rights of private property owners. True authority of any law **derives from the consent of the governed**, so the only way to uphold the rule of law is to ensure that those affected always have the opportunity to take part meaningfully in the processes by which the obligations of the law are imposed on them, not by sham votes:

> *"The power to tax is the power to oppress, and people have rebelled against that power ever since taxes have been imposed. The California voters are no different, and in November 1996, they passed Proposition 218, known as the "Right to Vote on Taxes Act." They demanded, and received, the right to approve any increase of a local tax before it goes into effect."*

(Opening words of Court of Appeal decision in AB Cellular LA, handed down in 2007.) [79]

ON GROUND OF EACH OF THE ABOVE TWENTY-FIVE STATED OBJECTIONS, this protestor respectfully requests the Board of the District to take the following actions:

(1) **disregard** the result of the unconstitutional "protest vote" in this matter; and

(2) **not adopt** the proposed Resolution implementing the proposed $157 tax;

and, as is discussed in Part Three below,
implement the proposed SOLUTION of:

(3) **direct Staff instead to prepare an alternative special tax based on the USE** which is being made of each parcel of land and with a sliding scale of tax amounts based on land use, ranging from the lowest tier of tax for vacant land or unimproved parcels, to the highest tier of tax for parcels needing substantial fire protection such as paint factories and other industrial facilities using highly flammable substances, noting the example of Ordinance 750-NS (2004) of the City of Huntington Park.

Now that these 25 Objections are entered within the public record of these proceedings, the door is open for affected persons to challenge the unconstitutionality of this proposed tax before the Courts in litigation based on any or all of the grounds of these Objections.

Prudence and caution therefore commend that consideration be made of the **solution** proposed in Part Three, below. If this solution is chosen by the District and implemented instead of the present tax which is so flawed by the constitutional and statutory objections, the effect of choosing this solution will be that all the above objections will be overcome because this solution of a tax based on **USE**, is fair and reasonable and constitutional.

[79] AB Cellular LA v. City of Los Angeles, (2007) 59 Cal.Rptr.3d 295, 150 CA4th 747, at page 747.

PART TWO: "*THE CASE OF THE BURNING BUSH*"

The "***Case of the Burning Bush***" discusses a specific example of one property [80] among thousands [81] of other parcels similarly-affected by the expansion of this special tax area. It is a parcel of barren sandy wind-swept desert land, reassessed by the County Assessor as at October 1, 2018, as having a current assessed value of $1,000, being five acres in the middle of the sandy bed of the dry Mojave River with a single solitary weedbush on it, and so sandy that any vehicle (even a 4WD) will get stuck in the sand trying to reach it. **PLEASE SEE THE AERIAL PHOTOGRAPH AT PAGE 2 OF THIS BRIEF.**

The District proposes to levy a special tax of $157 per year, escalating at 3% annually, to protect this parcel against fire. What exactly is being protected? Is it the blowsand (which is all non-flammable)? Is it the solitary desert weed-bush growing all alone there, in the middle of five acres of blowsand and surrounded by acres upon acres of nothing in any way "flammable"? Someone might mistakenly guess that this weed-bush is a rare or endangered species to justify spending $157 each year to defend it against the non-risk of fire in the middle of a riverbed surrounded by nothing that could even conceivably burn.

Is it fair or reasonable, in this hypothetical "***Case of the Burning Bush***", that this $1,000 parcel of wholly unburnable blowsand in the middle of a river, with zero possibility of ever catching on fire at any time within the next thousand years, or ever, should now be forced (without any constitutionally-required 2/3 vote) to pay the exact **same** $157 flat tax as the owner of a paint factory worth $10,000,000 and stacked full of highly flammable solvents? **The issue is not whether there should be a tax but whether both must pay the same.**

If this unconscionable $157-per-year tax is imposed in this "***Case of the Burning Bush***", the owner of this parcel loses "all" of the $1,000 value of his property to this tax in only **6.3 years**, while the factory owner loses "all" of his factory to this tax after **63,000 years**.

Is this "fair" or "reasonable"? Do these two both need the "same" level of fire protection so as to justify imposing the "same" $157 tax on both? Is it just to charge both the same $157 every year for protecting one desert bush against the non-existent "risk" of fire, as is charged for protecting a $10,000,000 paint factory? Does that sound "constitutional"? Can such an action even be considered without a proper vote and without a 2/3 majority?

Surely a school-child could answer these questions. Why are we even discussing this?

The Supreme Court of California has held it would lead to an **"unjust result"** to impose a tax on a small 9,000 square foot lot in an equal amount as on a huge 207-acre estate,[82] because the two properties are so different and cry out for a graduated non-flat tax:

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[80] The particular parcel selected here for discussion is **Parcel 0421-021-16-0000**, a parcel which **is** included in this inadequately defined project area, as evidenced by the fact that this APN is printed on the envelope in which a Notice of hearing was mailed. This parcel is owned by the protester here, through the corporation of which he is President.
[81] Representative too of other parcels similarly-affected by expansion of this special tax area, consider for example:
(a) Parcel 0424-171-29, being 7.50 acres, also in the riverbed, assessed on purchase in 2016 at $750, or $100/ac.
(b) Parcel 0488-121-33, being 4.11 acres, also in the riverbed, assessed on purchase in 2017 at $870, or $212/ac.
(c) Parcel 0421-011-55, being 5.00 acres, also in the riverbed, assessed on purchase in 2016 at $1,100, or $220/ac.
Not only parcels in the river, but thousands of other remote parcels of desert land, have similar very low values.
[82] The website of the Huntington Library (http://huntington.org/about/) states that its grounds are about 207 acres. This parcel is located at 1151 Oxford Road, San Marino, CA 91108. (http://huntington.org/map/)

"... [W]e interpret "parcel" in this statute[83] *broadly to **allow a graduated tax** based on the size of a parcel as in the City's ordinance. To construe the term parcel otherwise would lead to the **unjust result** that any special tax imposed on a parcel basis under this statute would have to be equal for a lot of 9,000 square feet and an estate the size of Huntington Library."* (Being 207 acres.)

(Heckendorn v. City of San Marino, (1986) 42 Cal.3d 481, 488 (emphasis added.))

Likewise, imposing a flat $157 tax upon the vacant land in "*The Case of the Burning Bush*" worth only $1,000, in the same equal $157 amount as upon a $10,000,000 paint factory, would likewise lead to the same **"unjust result"** as the Court in Heckendorn had noted.

Proposition 26 (2010) amended § 3 of Article XIII-A, by adding § 3(e), which provides:

"... *The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a **fair or reasonable** relationship to the payor's burdens on, or benefits received from, the governmental activity.* "

(Proposition 26 (2010) amending Cal. Const., Article XIII-A, § 3(e), emphasis added.)

Imposing the proposed $157 tax on a parcel such as this (and also upon many thousands or tens of thousands of other parcels similarly-situated) is **unconstitutional as-applied**, for a multitude of reasons and a multitude of grounds specified in the Objections above. This does not require finding this parcel tax unconstitutional "*per se*": we need not reach that issue here, because it is beyond dispute that this tax is **unconstitutional as-applied**.

As stated above, in order to avoid liability of the governmental agency in inverse condemnation for the "uncompensated taking of parcels in cases such as this where "all value" is eaten up by this tax in as short a time as 6.3 years, and especially to avoid attorney fees in those situations such as this situation where clearly a taking is involved, there is strong support in the law journals for exempting parcels of low value such as this:

*"… [C]oncer[ing] parcels with little value even though they are large … In such cases, the stream of future tax payments from (such) a parcel may exceed any reasonable expectation of future income from the parcel. The application of a parcel tax in this case **amounts to confiscating land**. **The appropriate policy for such parcels is to exempt them from taxation**."*

(Emphasis added.) Sonstelie, Jon, "*California's Parcel Tax*", Lincoln Institute of Land Policy Working Paper WP14JS1 (2014), at pp. 21-22.

The submission of this Brief is that parcels with a very low value (say, up to $10,000) should be exempted from this tax in order to avoid liability in inverse condemnation.

[83] The "statute" being construed in the Heckendorn case is Government Code § 53978(b).

PART THREE: SUGGESTED SOLUTION: ADOPT A TAX BASED UPON THE ACTUAL "LAND-USE" OF THE PARCEL

3.1: Focus on the SOLUTION: Levy a Special Tax based on USE of the parcel.

The discussion above has focused on multiple different aspects of **the PROBLEM** here, making 25 Objections. Now the discussion turns to focus on **the proposed SOLUTION**.

At the outset, let me state my opinion that **firefighters are true heroes of our republic**. They stand ready to lay down even their life in defense of our local communities. Without fear or favor, they help the weak and the infirm, the elderly and the young, the poor and those threatened with peril. They stand toweringly high in the respect and the affections of our community and our nation, for the dignity and selflessness of their service to us all.

This said, let us also reflect for a moment on the principle that **it takes a lifetime to build a reputation, yet only a moment to destroy it**. Do these men and women who are the proud firefighters of San Bernardino County really want to have any part of this abysmal tax which places back-breaking burdens on small rural landowners, whose low-value land may be their only asset? Do our dignified firefighters really want to squeeze many millions of dollars from rural people on low fixed incomes, retirees on social security and pensions, and folk living in an old trailer out there in the middle of the dusty desert who can ill-afford their next meal let alone what to many of them is a huge sum of money when it is $157?

Before the firefighters of our County break the backs of the people whom you so selflessly protect and serve, **I implore you to think why you are doing THIS to THESE people?** Are these small rural landowners out in the middle of nowhere really receiving $157 of added benefit from you for new services, over and above what they already pay you through the general *ad-valorem* levy, for the limited extended-wait service they receive? Surely a principled firefighter would far prefer that the owner of a $10,000,000 factory, who can so much more afford this financial burden, and who so much more benefits from the fire protection s/he receives, should pay a higher proportionate share of these costs?

At the outset, let me also state very clearly that **I am not opposed to a special tax itself** because fire protection services (and extended fire protection services) may well be and probably are essential throughout out County. **HOWEVER, what I am opposed to, and vehemently opposed to, is an UNFAIR special tax** which imposes gross back-breaking burdens on some (especially some who do not themselves even need any such service) and yet imposes tiny, almost-unnoticeable, "burdens" on others who benefit enormously from the fire protection being provided. Is it fair or reasonable for one owner to pay $157 yearly to protect his weed-bush growing on blowsand, while the owner of a paint factory pays only "**the same**" $157 yearly to protect his "very-different" risky $10,000,000 asset?

Please let us focus, as we go forward, on finding **a FAIR solution** instead of this grossly unfair tax, something which is **FAIR to everyone**, and yet which also provides the added revenues which the County Fire District so urgently needs. As is discussed further below, **the solution is a special tax which is based on the USE being made of a parcel**.

3.2: A fair Special Tax will involve a sliding scale, based on USE of the parcel.

As indicated in a recent news article in the San Bernardino Sun newspaper reporting on the hearing on June 12, 2018, the Board may be anticipating the constitutional and other deficiencies in its proposed expansion of the FP-5 tax rate area. As stated in the article:

> *"Separately* (at the meeting on June 12th, 2018)*, the board unanimously directed city* (sic) *staff to hire a consultant to explore placing a special tax on the March 2020 ballot, which would require a two-thirds vote."* [84]

This is exactly the way to go. Respectfully, the consultant is asked to design a FAIR tax, involving a special tax on a graduated or sliding scale, based on the **USE** of the Parcel.

So that the owner of a parcel of vacant land pays a FAIR tax which reflects the far lower level of fire protection which vacant land needs, while the owners of land covering a range of different land uses all the way up to an explosive paint factory pay a tax commensurate with their fire risk, the essential criterion for a FAIR Special Tax is that it must involve a **sliding scale**, which links the amount of the contribution to the actual **USE** of the parcel.[85]

Just as no one would ever seriously contend that it would be just for a multi-billionaire like Bill Gates to pay the same amount of taxes as a small-businessman like Joe the Plumber, likewise surely no one would ever seriously contend that it would be just for the owner of a parcel of vacant land worth $1,000 to pay the same $157 as a fire tax as the owner of a highly-flammable paint factory worth $10,000,000, because their **USE** is so different.

3.3: A special tax structured on the basis of a sliding scale for different land USES by this Fire District does not violate the statutory rule of "uniformity" which applies only to "qualified special taxes" [86] levied by a School District pursuant to § 50079.

At first sight, this proposal of a special tax based on a sliding scale for different land USES, may appear to conflict with the holding in Borikas v. Alameda Unified School District. [87]

But Borikas is **distinguishable** because the statutory rule of "uniformity" in § 50079 which it addresses, applies only to a **School** District levying "**qualified** special taxes" pursuant to **§50079**. Rules for School District taxes differ significantly from rules for a Fire District:

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[84] See https://www.sbsun.com/2018/06/13/san-bernardino-county-supervisors-start-process-to-expand-tax-for-fire-services/ (article published on June 13, 2018, in the San Bernardino Sun newspaper.)

[85] See for example § 50079.1 which expressly authorizes special taxes by a community college district in which *"… unimproved property may be taxed at a lower rate than improved property."*

[86] "Qualified special taxes" pursuant to § 50079 mean *"… special taxes that apply uniformly to all taxpayers or all real property within the school district, except that 'qualified special taxes' may include taxes that provide for an exemption from those taxes for … [p]ersons who are 65 years of age or older [or] [persons with a] … disability ..."*

[87] Borikas involved different taxes based on land use: "Measure H … imposes different tax rates on residential and commercial/industrial properties, as well as different rates on different sized commercial/industrial properties." (Borikas v. Alameda Unified School District, (2013) 214 Cal. App. 4th 135, 139.) The Court's holding in Borikas is very specifically limited to "qualified special taxes" levied pursuant to § 50079 itself: *"We therefore conclude Measure H's property classifications and differential tax burdens exceed the District's taxing authority under section 50079 …"*

namely, § 50079 limits School Districts to levying only "qualified special taxes" which are "uniform" in character, while the power of a Fire District for raising revenue includes the power to levy <u>differential</u> taxes involving different payments by different taxpayers.

As the Court in <u>Borikas</u> noted, as to the required "uniformity" of "qualified special taxes":

> *"We begin by observing that if section 50079 did not include the language in question, there would be no question that school districts could create rational tax classifications and impose differential tax rates."*

(<u>Borikas</u>, at 151.) This Fire District is not limited by the § 50079 limits on the taxing power of School Districts, so a differential tax based on USE is lawful and constitutional here.

<u>3.4: A FAIR Special Tax is one that expresses principles of *"Justice as Fairness"* *(*enunciated by John Rawls), based on the particular USE being made of the parcel.</u>

One of the most profound contributions to jurisprudence and legal philosophy during the twentieth century is the book, "*A Theory of Justice*", by Harvard Professor John Rawls: [88]

> *"**'A Theory of Justice'** is a work of political philosophy and ethics by John Rawls, in which the author attempts to solve the problem of distributive justice (the socially just distribution of goods in a society) by utilizing a variant of the familiar device of the social contract. The resultant theory is known as **'Justice as Fairness'**, from which Rawls derives his two principles of justice (the `Greatest Equal Liberty' and 'Difference' Principles.) Together, they dictate that society should be structured so that the greatest possible amount of liberty is given to members, limited only by the notion that the liberty of any one member shall not infringe on that of any other."*

Rawls looks at social justice this way: He postulates that the only way to determine what is "just", is to consider what a "rational person", standing behind a "veil of ignorance" as to the (presently-unknown) position which s/he will assume in the society to be formed, would consider just and fair. Such a person would not know whether s/he will be Bill Gates or Joe the Plumber, therefore s/he will determine a system of broad "justice as fairness."

As to the "justice as fairness" of the tax here: a "rational person", who is standing behind a "veil of ignorance" as to the (presently-unknown) position which s/he will assume in the society to be formed, and specifically whether s/he will own vacant land or a paint factory, would not rationally consider a flat tax of $157 in these disparate cases to be just and fair. Instead, such a person would determine a system of justice as fairness, which would recognize that a FAIR Special Tax would involve a sliding scale, which links the amount of the contribution to the particular USE of the parcel, in order to yield justice as fairness.[89]

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[88] The quoted text and an informative synopsis can be found at <u>https://en.wikipedia.org/wiki/A_Theory_of_Justice</u>

[89] Defined as a tax imposed in such a manner that the effective tax rate decreases as the amount subject to taxation increases, a **<u>"regressive tax"</u>** "*… imposes a greater burden (relative to resources) on the poor than on the rich* …" (see, <u>https://en.wikipedia.org/wiki/Regressive_tax</u>) A parcel tax is thus a highly "regressive tax", and it fails to satisfy the "justice as fairness" criteria because such a tax so disproportionally burdens only some, thus it must be rejected.

3.5: A Special Fire Tax, based on the particular USE being made of the parcel, would overcome the above twenty-five Objections, and would be constitutional.

§ 53978(b) [90] authorizes a Fire District to submit for voter approval, one of **three forms** (or combination thereof) of special tax, each constitutionally-approved [91] by Article XIII-C:

- **(1)** it may be a **flat-tax per parcel** (such as the flat $157 parcel tax here), [92] **or**
- **(2)** it may be based on the **class of improvements** existing on the property, **or**
- **(3)** it may be based on the **particular land-USE involved** (vacant, improved, etc.)

That a parcel tax "may" be any one of these three different forms, does not establish that it is politically-appropriate or lawfully-constitutional-as-applied, simply to pick any one. [93] What "should" be chosen is a form of tax which is fair and proportional and just, and which does not disproportionately-burden and especially not financially-cripple some taxpayers yet at the same time impose almost unnoticeable 'burdens' on others who benefit greatly.

As discussed above, the California Supreme Court has criticized parcel taxes which impose an equal flat-tax burden on very different parcels, on the ground that to do so would lead to an **"unjust result"**. Instead the Supreme Court favors a **graduated tax**.[94] Moreover, statute authorizes [95] a lower tax in outlying areas suffering **extended delays**.[96]

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[90] § 53978(b) provides: *"The ordinance submitted to voter approval pursuant to subdivision (a), shall specify the amount of each of such special taxes. Each of such special taxes shall be **levied on a parcel, class of improvement to property, or use of property basis, or a combination thereof**, within the local agency to which fire protection services or police protection services are made available …."* (Emphasis added.)

[91] Note that a special tax **may not be based on VALUE** of the parcel, because to structure a special tax in such a way would be unconstitutional as being violative of Proposition 13 (1978) and also of Article XIII-A of the Constitution. Prop. 13 set a strict ceiling (1% of assessed value) limiting the total amount of ***ad-valorem*** tax which may be levied. In that the general tax levy already levies the maximum *ad-valorem* limit, no special tax may be based upon value.

[92] That a **flat parcel-tax** is approved by Article XIII-C, establishes only that such a tax is not unconstitutional ***"per se"***. This leaves open the question as to whether a **flat**-tax is unconstitutional **"as-applied"**. The submission of this Brief is that a flat parcel-tax **CAN BE** unconstitutional **as-applied**, and **IS** here, as "*The Case of the Burning Bush*" shows.

[93] The submission of this Brief is that a flat parcel-tax would be fraught with legal challenges, and a tax based on the class of improvements can lead to or create certain anomalies, so **a special tax based on land USE** is far preferable.

[94] As discussed above, the Supreme Court in Heckendorn stated:*"... [W]e interpret "parcel" in this statute* (§53978(b)) *broadly to **allow a graduated tax** based on the size of a parcel as in the City's ordinance. To construe the term parcel otherwise would lead to the **unjust result** that any special tax imposed on a parcel basis under this statute would have to be equal for a lot of 9,000 square feet and an estate* (of 207 acres) *the size of Huntington Library."* (Heckendorn v. City of San Marino, (1986) 42 Cal.3d 481, 488 (emphasis added.) Likewise, imposing a flat $157 tax upon the vacant land in "*The Case of the Burning Bush*" worth only $1,000, in the same equal $157 amount as upon a $10,000,000 paint factory, would likewise lead to the same **"unjust result"** as the Court in Heckendorn had noted.

[95] § 53978(c) provides: *"The amount of each such special tax established by the legislative body, and approved by the voters of the local agency, may be varied to each parcel, improvement, or use of property based on the degree of availability of fire protection and prevention services …"* **Low availability in remote areas should REDUCE the tax**.

[96] Chief Hartwig states that, if this tax is not approved, response times in outlying rural areas will INCREASE by an EXTRA seventy minutes (far less added delay in urban areas.) However, response times are ALREADY-SO-LONG that this added delay makes no difference. For example, the response in 2015 to the fire at 29001 Frontier Rd, Helendale (http://www.vvdailypress.com/article/20151216/news/151219816), was so slow that the house completely burned down before firefighters arrived. "Firefighters arrived and found a single-story home in flames", County Fire said. (Not surprising, when the response was more than an hour after the first call.) Imagine how long the delay would have been if this house was really outlying, not in Helendale. (This house is on the unincorporated side of the dividing line with FP-5 Helendale. Parcels on one side of Frontier Road pay the FP-5 tax, parcels on the other side do not. Yet both sides, under reciprocity agreements, can be served by Helendale or Barstow or the Yermo Marine Base.)

3.6: A 2004 Ordinance of the City of Huntington Park levying a special tax for street lighting and landscaping, provides an inspiring example of "*Justice as Fairness*".

The City of Huntington Park in 2004, to fund street landscaping and lighting, as well as its local parks, etc., adopted an eminently-fair and thoughtfully-detailed **SPECIAL TAX, BASED ON PARCEL USE**. Initiated as "Measure L" [97] and approved by a 2/3 majority,[98] Ordinance 750-NS is a model of fairness and justice, which the San Bernardino County Fire District should consider in framing its own special tax for fire protection services.

The Ordinance was structured on a thoughtful framework of 42 specific types of land use, with 18 different tax amounts, ranging from the lowest rate of $20.24 per parcel for vacant parcels (as they make little use of parks, etc.), up to the highest per parcel rate of $629.14 for hotels, et al. (which benefited substantially from street landscaping and lighting, etc.) Section 3-10.03 provided the details of this framework, as shown in the following Table:

Auto, Recreation/Construction Equipment, Sales and Service	*$395.50*
Banks, Savings & Loans	*197.74*
Bowling Alleys	*548.20*
Cemeteries, Mausoleums, Mortuaries	*59.56*
Churches	*157.28*
Clubs and Lodge Halls	*314.56*
Commercial - Miscellaneous	*197.74*
Department Stores	*629.14*
Five or More Apartment Units	*342.62*
Food Processing Plants	*431.38*
Heavy Manufacturing	*197.74*
Homes for Aged	*177.52*
Hotels and Motels	*629.14*
Industrial - Miscellaneous	*314.56*
Light Manufacturing	*471.84*
Lumber Yards	*197.74*
Mineral Processing	*157.28*
Mobile Home Parks	*629.14*
Office Buildings	*197.74*
Open Storage	*314.56*
Parking Lots (Commercial Use)	*177.52*
Parking Lots (Industrial Use)	*177.52*
Private Schools	*157.28*
Professional Buildings	*197.74*
Residential with Four Units	*284.22*
Residential with Three Units	*215.70*
Residential with Two Units	*147.18*

[97] The full text of Measure L of 2004 is online at http://www.smartvoter.org/2004/11/02/ca/la/meas/L/

[98] Measure L of 2004 was supported by 5,391 (69.20%) Yes votes and was opposed by 2,400 (30.80%) No votes.

Restaurants	*431.38*
Rooming Houses	*401.04*
Service Shops	*197.74*
Service Stations	*314.56*
Shopping Ctr. (Neighborhood)	*431.38*
Single-family Residential	*78.64*
Store Combinations	*314.56*
Stores	*314.56*
Supermarkets	*629.14*
Theaters	*431.38*
Utility	*20.24*
Vacant, Unimproved Lots	*20.24*
Warehousing, Distribution, Storage	*355.04*
Water Recreation	*548.20*
Wholesale and Manufacturing Outlets	*471.84*

3.7: The Huntington Park Ordinance includes certain specified EXEMPTIONS.

The actual amounts appropriate for a street landscaping tax (as shown above) clearly will differ from the amount appropriate for a fire tax (for example, "Water Recreation" should not pay $548.20 where a fire tax is involved) but the point is that FAIRNESS REQUIRES DIFFERENT USES SHOULD PAY DIFFERENT TAX based on the use involved. To say that the fire risks relating to a vacant parcel are the SAME as those relating to a hotel, thus vacant parcels and hotels should both pay the SAME $157, lacks rational foundation.

The Huntington Park City Ordinance incorporates some EXEMPTIONS of note:

(1) **Income-based and disability-based EXEMPTIONS should be considered.** The Huntington City Park Ordinance of 2004 [99] exempts some classes of elderly, low income, and disabled people from having to shoulder the burden of this tax.[100]

(2) **Other Exemptions** are also specified in Ordinance 750-NS of 2004.

Notably, the Huntington Park Ordinance does not itself exempt **LOW-VALUE PARCELS** though arguably it should have.[101] Instead it defines "undeveloped parcels" as having **"improvements"** (note: the test relates is to the value of "improvements", not land value) **up to $10,000**, [102] and places these "undeveloped" parcels along with vacant land in the same (lowest) tier of tax, so both pay an affordable $20.24 in special tax each year.[103] (This applies the second prong of § 53978(b), focusing on the "class of improvements.")

[99] Section 3-10.05 of Huntington Park City Ordinance 750-NS, enacting Measure "L" of 2004.

[100] Whether we as a community exempt the elderly and infirm is a political question: Do we as a community think it is just to tax a low-income blind person in a wheelchair the same $157 for fire protection, as the unnoticed $157 that we charge an urban industrialist who owns a highly flammable paint factory worth ten million dollars?

[101] This Brief has discussed elsewhere the liability risks of failure to exempt low-value parcels (say, up to $10,000.)

[102] Section 3-10.02 of Huntington Park City Ordinance 750-NS, enacting Measure "L" of 2004.

[103] A provision such as this is especially appropriate in relation to a FIRE tax, because the limited resources of fire departments necessitate that an "undeveloped parcel" will have a low priority in a large area fire, and resources will be assigned in a way that prioritizes structures of far higher value, so it is fair that those parcels having costly structures should justly pay a far higher special tax for fire protection.

3.8: Parcels with VERY LOW VALUE (say, up to $10,000) should be EXEMPTED.

As discussed above in relation to the Objection as to inverse condemnation liability, there is strong support in the journal literature for exempting altogether parcels of low value:

> *"… [C]oncer[ing] parcels with little value even though they are large … In such cases, the stream of future tax payments from (such) a parcel may exceed any reasonable expectation of future income from the parcel. The application of a parcel tax in this case* ***amounts to confiscating land****.* ***The appropriate policy for such parcels is to exempt them from taxation****."*

(Emphasis added.) Sonstelie, Jon, "*California's Parcel Tax*", Lincoln Institute of Land Policy Working Paper WP14JS1 (2014), at pp. 21-22.

It is respectfully submitted that, in the proposed alternative of a special tax based on use, parcels with **a value up to ten thousand dollars ($10,000)** (or other threshold amount) (whether vacant or unimproved or even improved) **should be exempted** from this tax. Above $10,000 in value, remaining vacant or unimproved parcels should be taxed on a basis lower than improved parcels and on a basis far lower than, say, a paint factory. Parcels should be taxed on a graduated sliding scale, where the amount of special tax being levied is consistent with the level of fire risk reasonably relating to present land use.

3.9: Full Text of the Huntington Park Ordinance is attached as ATTACHMENT II

The full text of the Huntington Park City Ordinance is attached as **ATTACHMENT II**.

3.10: OVERVIEW: The Huntington Park City Ordinance provides a model structure on which to base a San Bernardino Fire District special parcel tax based on USE. The issue is not whether there should be a tax, but whether very different parcels (such as the "Burning Bush" and the paint factory) must both pay the SAME tax. Parcels should be taxed on a graduated sliding scale, reflecting fire risk of that use.

In overview, the submission of this Brief is that the Board should reject a flat parcel-tax. Instead, **a special tax linked to land use** is superior and overcomes all objections.

The suggested solution is the alternative of adopting a special tax based on actual USE of the parcel, and modeled on Ordinance 750-NS adopted in the City of Huntington Park, appropriately adapted to the circumstances of the San Bernardino County Fire District. Such a tax will be fair and just, as well as consistent with the constitutional requirements.

CONCLUSION

The essential issue here is not whether there should be a tax, but whether this $157 tax is fair, reasonable, proportional and constitutional. It is submitted this tax fails these tests. The core of the many constitutional and statutory objections which are asserted here, is that very different parcels in very different situations and with very different burdens being imposed on their respective owners, should not have to pay the SAME $157 tax• and any tax (whatever its nature is decided to be) must be voted on and approved in accordance with all constitutional mandates and procedures and statutory requirements. The solution, it is submitted, is to adopt the alternative outlined in Part Three of this Brief.

This protestor respectfully requests the Board of the District to take the following actions. (1) disregard the result of the unconstitutional "protest vote" in this matter; and
(2) not adopt the proposed Resolution implementing the proposed $157 tax; and (3) direct Staff instead to prepare an alternative special tax based on the USE which is being made of each parcel of land and with a sliding scale of tax amounts based on land use, ranging from the lowest tier of tax for vacant land or unimproved parcels, to the highest tier of tax for parcels needing substantial fire protection such as paint factories and other industrial facilities using highly flammable substances, noting the example of Ordinance 750-NS (2004) of the City of Huntington Park.

This Brief (including the Attachments referenced herein, and other materials incorporated herein by reference) is herewith submitted into the record of the proceedings relating to the public hearing on October 16, 2018, before the San Bernardino County Fire District, in protest against the proposed $157 tax and in opposition to the adoption of this tax.

Prior to the public hearing on October 16, 2018, this Brief was hand-delivered or mailed to multiple recipients, including but not limited to the San Bernardino County Fire District and to each Director of the District, and to others, with each Brief signed as an original. Executed at Victorville, County of San Bernardino, California, on October 9, 2018.

Respectfully submitted,

DR. GAVIN M. ERASMUS
Attorney #125238 of the State of California, B.Comm, Ll.B., Ll,M., D.Phil. (Oxford) (Law), in his personal capacity as a citizen and as a resident of the County of San Bernardino, and as a registered voter and a landowner in San Bernardino County, as well as in his capacity as President of Eagle Desert Vista Corporation, the owner of multiple parcels located throughout San Bernardino County