LEAGUE® OF CALIFORNIA CITIES

1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
www.cacities.org

September 26, 2014

Via Federal Express

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *City of San Diego v. Shapiro*
California Supreme Court, Case No. S221365
Fourth Appellate District, Division 1, Case No. D063997
228 Cal.App.4th 756
Request for Full Depublication or, Alternately, Partial Depublication (Cal. Rules of Court, rule 8.1125(a))

To the Chief Justice and the Associate Justices of the California Supreme Court:

The California State Association of Counties, the League of California Cities, the Association of California Water Agencies, and the California Special Districts Association (collectively, "Requesters") respectfully request that this Court depublish the Fourth Appellate District's decision in *City of San Diego v. Shapiro* in full or at least Part III.A of the decision that rests on the California Constitution. *Shapiro* holds that under the California Constitution a special tax on properties within a district created for the assessment of special taxes must be approved by two thirds of the registered voters in a city rather than by two-thirds of the landowners in the district against whom the tax is to be levied. But the Court of Appeal had no need to issue this sweeping constitutional holding because it also decided the case on an alternative local statutory ground. If allowed to stand, this holding threatens a critical and well-established means of financing public infrastructure projects and public services for much needed new housing and other development projects throughout California.

I. The Requesters' Interest in Depublication

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that depublication of the opinion in this case is a matter of grave significance to all counties.

The League of California Cities (League) is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has determined that this is a case of such significance.

The Association of California Water Agencies (ACWA) is a non-profit public benefit corporation organized and existing under the laws of the state of California since 1910. ACWA is comprised of over 450 water agencies in all areas of the state, including cities, municipal water districts, irrigation districts, county water districts, California water districts and special purpose agencies. ACWA's member public agencies are all local agencies specifically authorized to use Community Facility District financing to provide water and water management facilities and services. ACWA's Legal Affairs Committee, comprised of attorneys from each of ACWA's regional divisions throughout the state, monitors litigation that involves issues of significance to ACWA's member agencies. Upon recommendation of the Legal Affairs Committee, ACWA's board of directors has authorized joining with other statewide public agency organizations in this letter.

The California Special Districts Association (CSDA) is a non-profit association representing more than 1,000 special districts throughout California. These special districts provide a wide variety of public services to both suburban and rural communities, including fire suppression and emergency medical services; water supply, treatment and distribution; sewage collection and treatment; recreation and parks; solid waste collection, transfer, recycling and disposal; road construction and maintenance; mosquito and vector control; security and police protection; cemetery; library; airport services; harbor and park port services; and pest control and animal control services. California special districts routinely participate in the planning, design and construction of necessary public facilities and infrastructure that provide these valuable public services. CSDA has determined that the depublication of the opinion in this case is a matter of critical significance to all special districts.

This is a case of statewide significance because for more than 30 years governmental entities have relied on express provisions of the Mello-Roos Community Facilities Act of 1982 (Cal. Gov't Code §53311 *et seq.*) (the "Mello-Roos Act") for special tax revenue approved through landowner-only elections to fund publicly-owned infrastructure for new development projects and to pay for ongoing services. *Shapiro* would needlessly cast a cloud over this practice and jeopardize an important source of funding for critical projects. Therefore, the Requesters seek depublication of the opinion in full or at least Part III.A of the decision that rests on the California Constitution.

II. Introduction

Under California Rule of Court, Rule 8.1225(a), the Requesters respectfully ask this Court to order depublication of the decision of the Court of Appeal for the Fourth Appellate District in *City of San Diego v. Shapiro*, Case No. D063997, or at least to depublish the part of the decision that rests on the state constitution. The Court of Appeal filed its decision on August 1, 2014. It became final in the Court of Appeal on August 31, 2014. The City of San Diego decided on August 26, 2014 that it will not seek review in this Court.[1] This request for depublication is timely because the Requesters submit it within 30 days after *Shapiro* became final in the Court of Appeal.

III. Summary of Argument

In *Shapiro*, the Court of Appeal reversed a trial court decision in a validation action upholding a special tax levied in San Diego on hotel properties under an election limited to landowners of "real property on which a hotel is located and the lessees of real property owned by a governmental entity on which a hotel is located" (collectively, the "Landowners"). (*Shapiro*, *supra*, 228 Cal. App.4th at p. 761.) The Court of Appeal relied on two independent, alternative grounds to reverse the trial court decision: (1) the election to approve the special tax violated the California Constitution because the electorate was limited to the landowners rather than all registered voters in the City of San Diego; and (2) the election also violated the San Diego City Charter, which requires the approval of all registered voters to approve any special tax in San Diego.

CSAC, the League, ACWA, and CSDA request depublication of *Shapiro* in full or at least the part that rests on the State Constitution, for two reasons. First, the Court of Appeal should not have reached the constitutional question because it could have ruled on the validity of the tax relying solely on the San Diego City Charter.

---

[1] See City Council of the City of San Diego, The Special Closed Session Meeting Report for Tuesday, August 26, 2014 at http://dockets.sandiego.gov/sirepub/pubmtgframe.aspx?meetid=2489&doctype=Agenda.

Second, if allowed to stand, *Shapiro* will bind trial courts throughout the State to require that special tax districts, at least where they contain any electors, be created only through a vote of the entire local electorate and not through a vote of those who must pay the tax. This would dramatically change current practices. The Mello-Roos Act specifically authorizes landowner elections to approve special taxes within "community facilities districts" ("CFDs") in two circumstances: (i) where no residential parcels will be subject to the special tax (Cal. Gov't Code §53326(c)) and (ii) where fewer than 12 persons have been registered to vote within the territory of the CFD (Cal. Gov't Code §53325(b))[2].

Many extant special taxes throughout the state have been established under the Mello-Roos Act and similar charter city enactments to fund and operate important public infrastructure and to pay for ongoing public services that serve properties subject to the levy of the special taxes. *Shapiro* casts a cloud over the ability of the more than 482 cities, the 58 counties, and more than 2000 special districts throughout the state to rely in the future on this time-tested and vital means of financing vital public facilities and services. A decision of such import should come from this Court and not from a decision of a court of appeal that did not need to reach the issue under the California Constitution and that this Court did not even have the opportunity to review.

IV. Background

The San Diego City Council adopted an ordinance (the "San Diego Ordinance") imposing a local parcel tax for special purposes. Specifically, the San Diego Ordinance authorized the City to form a Convention Center Facilities District (the "CCFD") to finance the potential expansion of the San Diego Convention Center through the imposition of a special tax. The CCFD was unusual in that it would "compris[e] the entire City," but only hotels within the CCFD "would be subject to [the] special tax," which would be "based upon a percentage of [each hotel's] room revenues." (*Shapiro*, *supra*, 228 Cal. App. 4th at p 762.)

The San Diego Ordinance incorporates provisions of the Mello-Roos Act authorizing landowner-only elections for special taxes that will not be levied against any property in residential use. In such elections under the Mello-Roos Act only landowners are qualified electors, with each having one vote for each acre or portion of an acre of land subject to the special tax. Relying on its charter city powers over municipal affairs, the San Diego Ordinance

---

[2] The Court of Appeal decided that it would not consider the constitutionality of special taxes imposed under Section 53326(b) of the Government Code for districts with fewer than 12 registered voters, and, in any event, did not rule on a situation where there were no registered voters in the district. *See Shapiro*, *supra*, 228 Cal. App.4th at p. 786 n. 32. Nevertheless, the court's analysis of the meaning of the terms "qualified electors" in Proposition 13 and "electorate" in Propositions 218 could lead trial courts to apply that analysis in ruling on the validity of districts formed under Section 53326(b). For this reason this letter addresses the impact of the *Shapiro* decision on all Mello Roos districts in California.

modified the Mello-Roos Act's definition of qualified electors to allow each landowner to cast one vote for each dollar of special tax that would apply to that owner's parcel. (*Id.*)

In January 2012 the City Council formed the CCFD (San Diego Res. No. 307243), and authorized the issuance of revenue bonds, and called an election for approval of the special tax and bond authorization which were approved by a 92-percent majority vote. The City Council authorized a special election to submit the special tax and bond authorizations to a vote of the qualified electors within the CCFD. (*Id.* at pp. 763-764.)

On May 12, 2012 the City of San Diego filed the validation action at the center of the Shapiro decision. Melvin Shapiro and San Diegans for Open Government ("SDOG") each answered the City's complaint. These answers asserted that the tax was invalid under both the California Constitution and the San Diego City Charter because the special tax had not been approved by San Diego's "registered, natural-person voters." (*Shapiro, supra*, 228 Cal. App. 4th at p. 766.)

After reviewing all the materials and hearing oral argument the trial court validated the formation of the district, the levy of the special tax and the issuance of bonds that the special tax secured:

> All proceedings encompassed by this validation action by and for the City and the [CCFD] in connection with satisfaction of the voter approval requirement to authorize the [CCFD] special tax, to authorize the issuance of [CCFD] bonds, to levy the special tax, and to establish the appropriations limit for the [CCFD], were and are valid and legally effective and were and are in conformity with the applicable provisions of all laws and enactments at any time in force or controlling upon such proceedings, whether imposed by law, charter, constitution, statute or ordinance, and whether federal, state or municipal.

(*Id.* at p. 769.)

The Court of Appeal reversed the trial court's decision on both grounds that Melvin Shapiro and SDOG raised:

> Accordingly, we conclude that the City's special tax is invalid because it was not approved by a two-thirds vote of either the "qualified electors" (art. XIII A, § 4) or the "electorate" (art. XIII C, § 2, subd. (d)) of the City, as the California Constitution requires.
>
> . . . .

> Accordingly, we conclude that the City's special tax is invalid because it was not approved by a two-thirds vote of registered voters, as is required under the City Charter.

(*Id.* at pp. 789, 792.)

V. Reasons that Depublication Should be Granted

A. Court of Appeal's Decision Violated the Principle of Constitutional Avoidance and the Principle of Judicial Self-Restraint

The San Diego City Charter provided a fully adequate non-constitutional ground for the Court of Appeal's decision reversing the trial court's validation of the CCFD special tax. In reaching the constitutional issue the Court of Appeal violated the

> well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.. . . That principle is itself an application of the larger concept of judicial self-restraint, succinctly stated in the rule that 'we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us.' . . . As the United States Supreme Court reiterated, A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. . . . Applying that principle, the high court observed that if statutory relief had been adequate in the case before it, a constitutional decision would have been unnecessary and therefore inappropriate.

Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 230-31 (internal and parallel citations omitted).

This error alone warrants depublication, at least of the part of the decision that rests on the California Constitution. But the stunning breadth of the potential impact of the decision on a time tested means of financing public infrastructure and services throughout the State reinforces the need for depublication.

B. Pervasive Impact of *Shapiro* if it Remains Published

1. Legal Significance of *Shapiro*

Shapiro's holding on the constitutional issue will bind all trial courts in California. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state. . . . "].) And that binding authority will have significant and pervasive effect throughout California on frequently used Mello-Roos landowner elections and on similar procedures in charter cities that rely on landowner elections.

2. Practical Impact of *Shapiro*

To understand the practical impact of Shapiro, one must examine how local agencies use the Mello-Roos Act, primarily to finance publicly-owned infrastructure and public services for new development projects.[3] Proposition 13 in 1978 drastically reduced the capacity of public agencies to pay for the construction of public infrastructure and for public services from *ad valorem* property tax revenues. The Legislature adopted the Mello-Roos Act in 1982 to address this problem. The Mello-Roos Act would assist developers with the financing of public infrastructure related to new developments by authorizing local agencies to use special taxes to finance "the purchase, construction, expansion, improvement, or rehabilitation of any real or other tangible property with an estimated useful life of five years or longer." (Cal. Gov't Code §53313.5.) Local agencies most commonly rely on the Mello-Roos Act to finance public school facilities and publicly-owned streets, sidewalks and sewer and water improvements.

The Mello-Roos Act provides advantages for building public infrastructure that may not be easily replaced. From the perspective of developers, "landowner-approved Mello-Roos financing offers two main advantages. First, it provides a long-term fixed-rate source of tax-exempt financing. Second, the special tax formulas that support the CFD's expenditures can be designed to keep the holding costs on undeveloped property low.... From the perspective of local officials, landowner-approved Mello-Roos financing presents an opportunity to raise a large sum of capital at once, permitting needed public facilities to be installed more quickly than if construction were to wait for a sufficient amount of developer fees and other revenue to accumulate. Installing public facilities early in the development process [before residents or

---

[3] The Mello-Roos Act also gives public agencies the authority to levy special taxes to pay for certain privately-owned improvements that offer a significant public benefit, such as work deemed necessary to bring buildings or real property into compliance with seismic safety standards or regulations (Cal. Gov't Code §53313.5(i)) and installation of renewable energy, energy efficiency and water conservation improvements (Cal. Gov't Code §53313.5(l)). These improvements are almost always approved by landowner votes because the special taxes are almost always levied only on the benefited properties.

other beneficiaries move in] reduces the likelihood of future congestion problems and may even result in lower construction costs, to the extent that future rights-of-way disputes and eminent domain proceedings are avoided." (California Debt Advisory Commission, Mello-Roos Financing in California, Sept. 1991, at pp. 23, 24 (www.treasurer.ca.gov/cdiac/reports/m-roos/financings.pdf) (hereafter "Mello-Roos Financing").)

Also, as noted above, Proposition 13 significantly impaired the capacity of public agencies to generate sufficient ongoing revenue to pay for public services needed for new developments. The Mello-Roos Act directly addresses this problem by authorizing local agencies to use special taxes to finance a broad list of public services, including "(m)aintenance and operation of any real property or other tangible property with an estimated useful life of five or more years that is owned by the local agency or by another local agency...." (Cal. Gov't Code 53313(g).) Special taxes to pay for these public improvements and services are almost always approved by landowner votes in connection with the land use entitlement of the related private developments. "The fact that Mello-Roos special tax debt can be authorized by landowners and used as a development tool is the primary reason for its explosive growth during the 1980s." (Mello-Roos Financing, at p. ii.) "[L]andowner approved Mello-Roos financing permits landowners to borrow against the value and tax capacity of their land through the tax-exempt market to pay for the infrastructure needed to serve development. It is the only feasible method of raising a large sum of capital early in the development process to finance the construction of virtually any public facility, while isolating the cost of doing so on the developing area." (*Id.* at p. iii.)

The adoption of Proposition 218 in 1996 further enhanced the importance of the Mello-Roos Act. Proposition 218 limited the practical availability of special benefit assessments on property to finance public infrastructure and ongoing services because it allowed assessments against properties only to pay for the special benefits these properties receive from the improvements to be financed. Separating special from general benefit, particularly with respect to improvements and services that benefit both landowners and members of the general public, has become very difficult. Proposition 218 also shifted to the public agency the burden of proof in any challenge to a special benefit assessment. This heightened burden and the consequent enhanced judicial scrutiny have limited the usefulness to local agencies of special benefit assessments to finance infrastructure construction and ongoing public services.[4]

Shapiro calls into question the validity of the procedures that Mello-Roos establishes. Because of the cloud of uncertainty that *Shapiro* casts over Mello-Roos financing, bond investors

[4] See Cal. Const., art. XIIID, sec. 6(b)(5): "In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." See also *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431; *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057; *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516.

and underwriters may not be willing to proceed with landowner elections for Mello-Roos special taxes. Therefore, *Shapiro*'s curtailment of the ability of local agencies to use special taxes to pay for the public infrastructure and public services needed to serve new development will act as a barrier to new development approvals, a barrier that will often prove insurmountable.

But the *Shapiro* decision not only strikes at a vital financing tool going forward, it may also harm local governments that already have relied on the landowner-only elections to finance projects. There are at least hundreds of existing landowner-only approved Mello-Roos special taxes in California for which only a portion of authorized bonds have been issued. The future development of the projects these bonds were authorized to finance may be imperiled because bond investors, wary of *Shapiro* fallout, may stop purchasing bonds authorized by landowner-only elections. Ultimately, the lack of Mello-Roos tax revenues may interfere with or prevent development, leading to increased housing costs and reduced property and sale tax base in local communities.

The landowner election is an important financial tool of the Mello-Roos Act that cities, counties, water districts and hundreds of other special districts have relied on for more than 30 years. According to the California Debt and Investment Advisory Commission (the "Commission"),"The [Mello-Roos Community Facilities] Act [of 1982] has proven to be a popular financing mechanism with local governments and has been used to finance projects in communities throughout California including (but not limited to) school facilities, roads, and sewer and water systems." (California Debt and Investment Advisory Commission, CDIAC No. 13.07, California Mello-Roos Community Facilities Districts, Yearly Fiscal Status Reports, 2011-2012, at p. 1 (www.treasurer.ca.gov/cdiac/reports/M-Roos/2012.pdf).)

The State Legislature requires the Commission to collect data on Mello-Roos bond activity beginning as of fiscal year 1992-93. (*Id.* at 2; see also Cal. Gov't Code §8855.) For fiscal year 1992-93, the Commission received bond issuance reports for 17 Mello-Roos Act financings, for bond principal totaling $127,491,819. From fiscal years 1992-93 through 2011-12, it received 1720 reports, for bond principal totaling $20,083,057,906. (California Debt and Investment Advisory Commission, CDIAC No. 13.07, California Mello-Roos Community Facilities Districts, Yearly Fiscal Status Reports, 2011-2012, at p. 2). Although there was a downward trend in the size of bond issuances after fiscal year 2005-06 with the decline in the housing market, that trend began reversing itself in fiscal year 2010-11 with the growth in the housing market. (*Id.* at p. 3.)

Though not all of the districts accounted for in the Commission's Yearly Fiscal Status Report, 2011-2012, levy taxes approved in landowner-only elections, it is widely recognized among practitioners that the percentage of such levies is substantial. For example, in its 1991 report, *Mello-Roos Financing in California*, the Commission reported that of 132 Mello-Roos Bonds in existence at that time, 127 were approved by landowner-only votes. (*Id.* at 13, n. 1.) It

is therefore fair to say that a very substantial percentage of the billions of dollars in debt issued between 1993 and 2011-2012 is supported by taxes approved in landowner-only elections.

VI. Conclusion

In unnecessarily addressing the constitutional issue, the Court of Appeal in the *Shapiro* opinion violated the principles of constitutional avoidance and judicial self-restraint. Further, the decision will have a significant and pervasive effect throughout California on frequently used Mello-Roos landowner elections and similar procedures in charter cities that rely on landowner elections. For the foregoing reasons, CSAC, the League, ACWA, and CSDA respectfully request that this Court order the *Shapiro* opinion depublished in full, or at least Part III.A. of the decision that rests on unnecessary alternative holding under the California Constitution.

Very truly yours,

Patrick Whitnell/sl

Patrick Whitnell, SBN 184204
General Counsel, League of California Cities

Please see attached Proof of Service

PROOF OF SERVICE
(Code of Civil Procedure §1013)
STATE OF CALIFORNIA - COUNTY OF SACRAMENTO

I, the undersigned, declare that I am a citizen of the United States and am employed in the City and County of Sacramento, State of California. I am over the age of 18 and not a party to this action; my business address is: 1400 K Street, Sacramento, CA 95814.

On September 26, 2014, I served the document(s) described as: **REQUEST FOR DEPUBLICATION (Opinion Attached)** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] (**BY MAIL**) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Sacramento, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

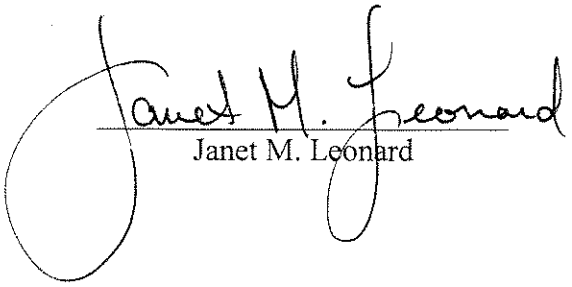
[ ] (**BY FAX**) I transmitted, pursuant to Rules 2001 et seq., the above described document(s) by facsimile machine (which complied with Rule 2003(3)), to the above-listed facsimile number(s). The transmission originated from facsimile phone number (916) 658-8240 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

[ ] (**BY PERSONAL SERVICE**) I caused such envelope(s) to be delivered by hand to the offices of the addressee(s).

[ ] (**BY OVERNIGHT DELIVERY**) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on September 26, 2014 at Sacramento, California.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Janet M. Leonard

City of San Diego v. Shapiro
California Supreme Court - Case Number S221365
Fourth Appellate District, Division 1 – Case Number D063997

SERVICE LIST

Party	Attorney
City of San Diego : Plaintiff and Respondent	Michael Travis Phelps Office of the City Attorney 1200 3rd Avenue, Suite 1100 San Diego, CA 92101 Michael Charles Weed Orrick Herrington Sutcliffe LLP 400 Capitol Mall, Suite 3000 Sacramento, CA 95814
Melvin Shapiro : Defendant and Appellant	Craig A. Sherman Law Offices of Craig A. Sherman 1901 First Avenue, Suite 219 San Diego, CA 92101
San Diegans for Open Government : Defendant and Appellant	Mekaela Marie Gladden Briggs Law Corporation 99 East C Street, Suite 111 Upland, CA 91786
NBS : Pub/Depublication Requestor Tim Seufert 32605 Temecula Parkway, Suite 100 Temecula, CA 92592	
California Court of Appeal Fourth Appellate District, Division 1 750 B Street, Suite 300 San Diego, CA 92101 Case Number D063997	
The Honorable Ronald S. Prager San Diego County Superior Court Hall of Justice - Department 71 330 West Broadway San Diego, CA 92101 Case Number: 37-2012-00097148-CU-MC-CTL	