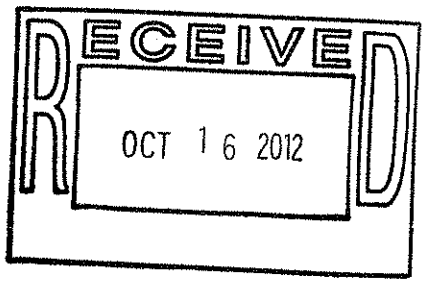
GT GreenbergTraurig



Scott D. Bertzyk
Tel 310.586.3823
Fax 310.586.0513
bertzyks@gtlaw.com

October 11, 2012

VIA OVERNIGHT COURIER

Honorable Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: ***City of Alhambra, et al. vs. Los Angeles County***
Case No. S185457

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

On behalf of the County of Los Angeles and its Auditor-Controller, Wendy Watanabe, we write to respond to the September 27, 2012, letter brief ("City Br.") submitted by the plaintiff cities ("Cities") concerning the significance, if any, of Revenue and Taxation Code section 97.68, subdivisions (e) and (f)(3), and section 97.70, subdivisions (d) and (f)(3) (for convenience, the "Flip/Swap Subdivisions").

INTRODUCTION

The Cities' Brief affirmatively concedes many of the points established in the County Defendants' September 28, 2012 letter brief ("County Br."). For example:

- The Cities expressly concede that a plain purpose for the Flip/Swap Subdivisions is to avoid a skewing of property tax allocations that would occur if Flip and Swap allocations were made a permanent part of the Cities' and County's section 96.1 base. (City Br. at 5 ["One reason for the exclusion is plain — it ensures that the in-lieu payments do not inflate the Section 96.1 base."]; see also County Br., § A.)

- The Cities also agree that, if Flip and Swap allocations were excluded from the calculation of "administrative cost apportionment factors" under Rev. & Tax. Code § 95.3, subd. (a), such an exclusion would, absent a limitation elsewhere, increase the PTAF shares of all recipients, including jurisdictions and agencies that enjoy no benefit from the Triple Flip and VLF Swap, such as special districts and schools. (City Br. at 7-8; County Br., § B.3.)

- The Cities even concede that the property tax revenues now allocated under the Triple Flip and VLF Swap would fall within the ambit of section 95.3, subd. (a). (Cities' Br. at 4, fn. 3 ["Section 95.3, subd. (a) would, of course, include Triple Flip and VLF Swap revenues in both the numerator and denominator of the fraction it defines because the denominator is merely the sum of all agencies' numerators — these are relative shares of a consistently calculated 'pie.'"].)

Despite these concessions, the Cities' Brief attempts to steer the Court back to *section 97.75* as somehow compelling the outcome the City desires. It does not.

LEGAL DISCUSSION

A. Like ERAF Shifts, Allocations Pursuant To The Triple Flip and VLF Swap Are "Article 3 Adjustments" Envisioned By Section 96.1 And Falling Within The Ambit Of Section 95.3.

Section 95.3, subd. (a), mandates that, to calculate PTAF allocation factors, county auditors "shall divide the sum of the amounts calculated with respect to each jurisdiction, Educational Revenue Augmentation Fund (ERAF), or community redevelopment agency pursuant to Sections 96.1 and 100, or their predecessor sections, and Section 33670 of the Health and Safety Code, by the countywide total of those calculated amounts." Of these three references, the relevant statute is section 96.1, which begins with the words: "Except as otherwise provided in Article 3 (commencing with Section 97)."[1] Unmistakably, this language sweeps into section 95.3 all Article 3 adjustments, including the original ERAF shifts, which all agree must be considered. Indeed, section 96.1 mentions no specific Article 3 adjustment (ERAF shifts included) by name, and draws no distinction between the various requirements of Article 3.

The Cities now concede this conclusion: "Section 95.3, subd. (a) would, of course, include Triple Flip and VLF Swap revenues in both the numerator and denominator of the fraction it defines because the denominator is merely the sum of all agencies' numerators — these are relative shares of a consistently calculated 'pie.'"

[1] The ERAF shifts, the Triple Flip and the VLF Swap all are found in Article 3.

(Cities' Br. at 4, fn. 3.) Nonetheless, the Cities offer two arguments to blunt their concession. We address each in turn.

1. Section 95.3(b)(1) Immunity Is Irrelevant.

For their lead point, the Cities observe that "Section 95.3, subd. (b) requires counties to bear the responsibility to fund PTAF as to property tax flows to schools and ERAF." (Cities' Br. at 3.) But, the Cities' oblique reference to this immunity sheds no light on the meaning of Flip/Swap Subdivisions enacted a decade later. And, to the extent this reference seeks immunity from PTAF recoupment because the Flip and Swap monies otherwise would have gone to schools or the ERAF, the Cities ignore how PTAF recoupment works.

Again, section 95.3, subd. (a), commands that allocation factors be determined based on dollars *actually allocated to* schools, the ERAF, special districts, cities, the County, etc. Only after all dollars have been accounted for does Section 95.3, subd. (b)(1), come into play and instruct that, except for PTAF shares so determined for schools and ERAFs, each recipient's PTAF share be deducted from the revenue calculated for that recipient. In short, Flip and Swap dollars allocated to cities and counties never become part of the numerator ***for ERAFs***, and hence, never become subject to immunity under section 95.3, subd. (b)(1).[2]

2. All Article 3 Adjustments Referenced By Section 96.1 Must Be Considered, Not Just Adjustments The Cities Select.

Next, the Cities concede that section 96.1 (and, hence, section 95.3, subd. (a)) requires that auditors account for Article 3 adjustments, but suggest that auditors should account only for those Article 3 adjustments that diminish County and City shares. (Cities' Br. at 4 [reading section 96.1, subd. (a), as requiring "***subtracting*** Article 3 adjustments"].) But, the only language in section 96.1 directing county auditors to any Article 3 adjustment is the introductory phrase: "Except as otherwise provided in Article 3 (commencing with Section 97) . . ." And, this introductory phrase commands a consideration of *all of Article 3*, not just those portions of Article 3 setting forth ERAF calculations; and the Triple Flip and VLF Swap are Article 3 adjustments, too. Once this is realized, it necessarily follows that the City is, in effect, asking this Court to rewrite either section 96.1(a) or section 95.3.

---

[2] Of course, there is no policy basis to extend immunity for schools and ERAFs to Cities. The purpose for the immunity — to ease the State's burden to fund education — simply does not apply here. (See County's Reply Merits Brief, Argument, § A.1.)

B. That Flip and Swap Dollars Are Excluded From "Base" And "Annual Tax Increment" Does Not Mean That They Are Irrelevant For Recoupment Purposes.

The Cities spend much of their letter brief arguing an uncontroverted point that the Flip/Swap Subdivisions should be read to exclude Flip and Swap dollars from the "base" allocated under Section 96.1, subd. (a)(1), and the "annual tax increment" allocated pursuant to Section 96.1, subd. (a)(2), and section 96.5. (Cities' Br., Argument, § C.)[3] The County wholeheartedly agrees that Flip and Swap dollars are not part of the "base" or the "annual tax increment," but that hardly means the Legislature intended county auditors to ignore them altogether, much less ignore them for purposes of calculating PTAF recoupment factors. Instead, it simply means that the Legislature intended to prevent skewing of revenue allocations that otherwise would occur if (i) Flip and Swap allocations from prior years became part of either the "base" or the "annual tax increment," and (ii) current year Flip and Swap allocations were made on top of that.

As explained in the County's opening letter brief, the "base" and "annual tax increment" work together to embody the traditional AB 8 calculations required to fairly allocate the reduced property tax revenues available to local jurisdictions and agencies after the enactment of Proposition 13. To that end: (i) a prior year's allocations provide the current year "base" starting point for allocating revenues; and (ii) the "annual tax increment" — which reflects current year changes in the supplemental tax rolls due to events like property sales and construction — is allocated within the current year, and hence, will become part of the next year's "base." (County Br. at 2-3.) Because new Flip and Swap allocations are made each year, double-dipping inevitably would follow without the Flip/Swap Subdivisions. (*Id.* at 3-4.)

Indeed, the Flip/Swap Subdivisions are perfectly calibrated to prevent such skewing. To elaborate:

- The first Flip and Swap allocations occurred in the 2004-05 fiscal year. (Rev. & Tax. Code, §§ 97.68(b)(1) [defining "fiscal adjustment period" as beginning with

[3] The Cities' discussion sows confusion by citing to wrong subdivisions and statutes. For example, in the last paragraph on page 5, the Cities posit that section 97.68 deals with VLF Swap revenues. But, section 97.68 deals with Triple Flip revenues, and section 97.70 deals with the VLF Swap. In that same paragraph, the Cities refer to subdivision (f)(3) as the portion of the statute excluding Swap allocations from the "base" amount; but, exclusions from the "base" amount are provided for in section 97.68, subd. (e) (Triple Flip), and section 97.70, subd. (d) (VLF Swap).

the 2004-05 fiscal year], 97.70 [applying "for the 2004-05 fiscal year and for each fiscal year thereafter"].) Thus, such revenues could not be part of the "base" for 2004-05, as the "base" would be defined by the revenues allocated for the "preceding fiscal year." (Rev. & Tax. Code, § 96.1(a)(1).) This is why the Triple Flip and VLF Swap exclude allocations from the "base" only starting with "the 2005-06 fiscal year and each fiscal year thereafter."

- Different considerations come into play when it comes to "annual tax increment" — which, as noted above, deals with certain changes within a current fiscal year. To avoid any suggestion that Flip and Swap dollars could be considered as part of "annual tax increment" in a current year, and then become part of the "base" in the next year, any exclusion from "annual tax increment" must take effect immediately. And so they do. Subdivisions (f)(3) of sections 97.68 and 97.70 provide that those statutes "may not" or "shall not" be construed to "alter the manner in which ad valorem property tax revenue growth from fiscal year to fiscal year is [otherwise] determined or allocated in a county." Thus, these two subdivisions remove the possibility that Flip and Swap revenues could be considered part of the 2004-05 "annual tax increment" that would be deemed part of the "base" for the 2005-06 fiscal year or the base in any later year.

The charts set forth at pages 3-4 of the County's Brief illustrate both how revenue allocations would be skewed without the Flip/Swap Subdivisions, and how, with them, Cities and the County simply receive their due, and no more. The Cities concede this "plain" purpose. (Cities' Br. at 5.) This purpose harmonizes with the rest of the statutory scheme. Adding on an additional, discordant purpose is unnecessary, and would violate settled rules of statutory interpretation.

Finally, as established in the County's opening brief, prescriptions such as those contained in the Flip/Swap Subdivisions are not unique. Rather, the Revenue and Taxation Code is replete with similar provisions tied to similar statutory departures from the traditional AB 8 rules for allocating property tax revenues.[4] Yet, none of the

[4] See County Brief at 1-2, fn. 1 (providing further examples). Some of the cited statutes mirror the circumstances present here — where new allocations are made each year, and hence, exclusion from base amount and annual tax increment is necessary to prevent double-dipping. (See, e.g., Rev. & Tax. Code, §§ 97.80 and 97.81.) Others make a one time-time adjustment and then provide for it to perpetuate by including the one-time adjustment in the base. (See, e.g., Rev. & Tax. Code, § 97.78.) Others ensure that allocations stop when they are supposed to. (See, e.g., Rev. & Tax. Code, §§ 97.71(d), 97.72(e), 97.73(e) [provisions to ensure that supplemental ERAF shifts for two specified fiscal years did not get carried over to base amounts for future years, and

property tax revenues specially allocated pursuant to those other statutes are considered exempt from the reach of the PTAF recoupment statutes. Instead, all such revenues are included for purposes of calculating the PTAF recoupment factors for property tax recipients, and immunity from PTAF recoupment (if any) is handled within section 95.3 itself, which exempts only school entities and ERAFs. The same outcome should follow here.

C. Section 97.75 Does Not Work An Implied Partial Repeal Of Section 95.3.

The Cities recognize that, absent some legislative edict somewhere: (i) Flip and Swap allocations would be included in Cities' and County revenue shares (i.e., the numerator) for purposes of calculating PTAF recoupment factors (Cities' Br. at 4); and (ii) if such dollars were consistently excluded from the PTAF recoupment calculation, the apportionment factors for Cities, the County and all other recipients would rise in a manner no party or county has ever advocated (*id.* at 7-8). So, the Cities fall back on the second sentence of section 97.75, claiming that, because it expressly allows "the County to collect **some** of its costs to operate the property tax system" it "necessarily precludes more general authority to collect **all** of that cost." (Cities' Br. at 9 [bolding in original].)

Initially, the argument does violence to the wording of section 97.75. The second sentence of section 97.75 places no limit on recovery of costs associated with the "services" addressed by the statute; instead, it allows recovery of **all actual** costs of covered "services." In other words, the amount to be recovered under section 97.75 turns not on a limitation on costs, but instead, on how one defines the term "services" — and, whatever the intended scope, the statute commands that the entire actual cost of covered "services" may be recouped. Further, the Cities' implied repealer argument clashes with every other argument they make. The Cities' remaining arguments presuppose (and all now agree) that section 97.75 is a statute of narrow application, yet this particular argument requires the Court to imply and assume that section 97.75 was crafted to address a much broader array of "services." The Cities cannot have it both ways.[5]

---

thereby become permanent].) Others involve allocations that change over time, but not necessarily each year. (See, e.g., Rev. & Tax. Code § 96.23.) The common denominator is this: In each instance, the language chosen by the Legislature is necessary to ensure that property tax recipients receive the allocations our Legislature intended, and no more.

[5] To be clear, no matter how many times the Cities claim otherwise, the County is not collecting "$10 million for services that cost only $35,000." (Cities' Br. at 9.) Instead,

D. The Cities' "Revenue Neutrality" Argument Ignores The Context.

As they have in the past, the Cities also proclaim that the Triple Flip and VLF Swap were intended to be "revenue neutral" and that the Flip/Swap Subdivisions should be interpreted as ensuring that the allocations "not affect property tax allocations in any other way." (Cities' Br. at 10.) As a threshold matter, to make the argument is to greatly oversimplify the budget bills of which the Triple Flip and VLF Swap were a part. As established in the County's prior briefing, the Triple Flip and VLF Swap were small elements of a much broader budget compromise having many component parts, including (i) supplemental ERAF shifts from local governments for a two-year period, (ii) negotiation for local government support of Proposition 1A (the less draconian alternative to Proposition 65, as a prohibition on further State raids of local revenues), and (iii) attempts to put teeth into the State's obligation to actually pay for mandates imposed on local government. In this context, the Triple Flip and VLF Swap simply were bargained for and intended to provide replacement revenue streams for other revenues being taken (sales taxes) or reduced (VLF fees).

Regardless, it is undisputed that the Flip and Swap have not been revenue neutral, and instead have resulted in the Cities receiving far more than they would have prior to the Flip and Swap, even after accounting for PTAF. (2 JA 452-457 [¶ 19 & Exs. 1-2 -- showing these 47 cities came out *over $85 million ahead* through FY 2006-08].) This is because, after the first year, VLF Swap allocations were based on property tax growth, rather than projections of lost VLF revenues. (See, e.g., Rev. & Tax. Code, § 97.70(c).)[6]

E. SB 1096, Section 48 Does Not Explain The Second Sentence Of Section 97.75.

Lastly, the Cities reason that the second "sentence" [of section 97.75] cannot have been intended to prevent a mandate claim because Section 48 of SB 10[9]6

---

the Cities are mixing apples and oranges. Simply, the total actual cost of assessing, collecting and allocating the Cities' Flip and Swap revenues is approximately $5 million per year (or $10 million over the two-year period examined in this record); the total actual cost of the added new services required to perform Flip and Swap calculations is $35,000 per year. ***Both figures reflect actual cost; the numbers simply change depending upon the "services" being measured.***

[6] Case law also makes clear that the Cities are confusing charges with revenues. (See *Community Redevelopment Agency of City of Los Angeles v. County of Los Angeles* (2001) 89 Cal.App.4th 719, 726-727 [rejecting argument that recoupment impermissibly reduced revenues allocated to redevelopment agencies.)

addresses that issue." (Cities' Br. at 11.)[7] Initially, to the extent the Cities intend, by this argument, to address the County's contentions at oral argument, they have missed the County's points entirely. The County's points were that: (i) the State's failure to pay for its mandates were on the Legislature's radar screen at this precise time; and (ii) the legislative history confirms that section 97.75 was driven, at least in part, by an intent to ensure that mandated services were paid for.

The County never would have argued that section 48 of SB 1096 spoke to the second sentence of section 97.75, and, it would be nonsensical to read it that way because section 48 covers the State's obligation to pay for services not reimbursed elsewhere, and the second sentence of section 97.75 allows fee-reimbursement from cities. In other words, section 48 would have dealt, if at all, with the first sentence of section 97.75, which forbade recoupment from cities of the cost of certain services for a two-year period.

In other words, section 48 actually serves to further defeat the Cities' hopeful reading of section 97.75. Simply, section 48 confirms that the State intended the County to be reimbursed for its "services" in all years and that section 97.75 simply fixed the identity of the payor by time. In the first two years: (i) the County could not recoup its costs from Cities, which over that precise period were being required to make large supplemental ERAF contributions; and (ii) reimbursement would have to come from the State through the mandate process.[8] Thereafter, with supplemental ERAF shifts ended, recoupment could come directly from cities. But, in all years, the County could be reimbursed. To posit, as the Cities do, that a statute recognizing recovery from someone in all years should be read primarily as a statute of exclusion goes too far.

---

[7] The City erroneously cites to SB 1076. Section 48 of SB 1096 provides:

> Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

[8] Although the cost of new services has proven to be extremely modest, section 48 (which provides for differing treatment based on ultimate amounts) confirms that, when it enacted section 97.75, the State had no idea what mandated costs ultimately would be.

CONCLUSION

For all these reasons, and those noted in the County's initial letter brief, the Flip/Swap Subdivisions provide no impediment or prohibition to PTAF recoupment; instead, they simply prevent distortion of the settled process for accounting for property tax growth. The Cities do not offer contrary interpretations of the Flip/Swap Subdivisions themselves; indeed, the Cities concede the Subdivisions' anti-skewing purpose, and even acknowledge that, absent section 97.75, Flip and Swap revenues would be subject to PTAF recoupment.

Nothing in section 97.75 expressly bars recoupment of anything from fiscal year 2006-07 forward, and the legislative history expresses an awareness that recoupment would increase as a result of the Flip and Swap. Thus, the Cities' claim is reduced to strained contentions that:

- the Legislature impliedly intended to foreclose all but negligible recoupment, but rather than take a direct and unambiguous route by amending section 95.3, or even adding a fourth exception to subdivision (f) of sections 97.68 and 97.70, the Legislature chose to leave it to courts to imply a disfavored partial repeal of section 95.3;

- rather than craft the Flip/Swap Subdivisions in a fashion to avoid the distorted PTAF calculations that would follow by excluding Flip and Swap dollars from the formula for calculating PTAF factors, the Legislature simultaneously set up the Flip/Swap Subdivisions to provide such distortions, and section 97.75 to remove them; and

- the Legislature intended county auditors, going forward, to (i) pretend that Flip and Swap allocations are "trees falling in a forest that no one hears," and (ii) make calculations based on numbers at odds with reality.

Truly, the Cities ask too much.

It hardly is a windfall to the County, or a burden to the Cities, to have the Cities bear their actual pro rata share of the administrative costs associated with the property tax revenues collected for their benefit — every penny of which must be used for property tax administration. Indeed, since 1990, our Legislature has expressed that this

is what should happen. This mandate action has shown no reason to depart from that policy, and we respectfully request that the Court so rule.

Respectfully submitted,

GREENBERG TRAURIG, LLP

Scott D. Bertzyk
Attorneys for COUNTY OF LOS ANGELES AND WENDY L. WATANABE, ITS AUDITOR-CONTROLLER

cc: Attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1840 Century Park East, Suite 1900, Los Angeles, CA 90067.

On October 12, 2012, I served the **LETTER BRIEF** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

Benjamin P. Fay
Rick W. Jarvis
Jarvis, Fay, Doporto & Gibson, LLP
492 Ninth Street, Suite 310
Oakland, California 94607

Holly O. Whatley
Colantuono & Levin, PC
300 South Grand Avenue, Suite 2700
Los Angeles, CA 90071-3137

☒ (BY MAIL)

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

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

Executed on October 12, 2012, at Los Angeles, California.

JESSE RODRIGUEZ