IN THE COURT OF APPEALS
DIVISION ONE
STATE OF ARIZONA

RICHARD OGSTON, Plaintiff / Appellant, v. ARIZONA DEPARTMENT OF REVENUE, et al. Defendants / Appellees.	Court of Appeals, Div. 1 No. 1 CA-TX 24-0001 Maricopa County Superior Court No. TX2023-000342

APPELLANT'S REPLY BRIEF

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The Hospital District ("District") tries to avoid the voter-approval requirement clearly specified in A.R.S. Section 48-1907(A)(6) by arguing that Section 1907(A)(6) does not apply at all. It offers two grounds for this assertion: first, that the Tax was not for the "operation and maintenance of a hospital," and second, that the District did not "levy" the Tax, but instead, merely exercised its "right to receive the revenue of a tax imposed by another governmental body or sovereign"—namely, the County—and therefore, again, that it was not required to follow the voter-approval rule of Section 1907(A)(6). District's Answering Brief ("Ans. Br.") 22. These arguments both fail.

I. The District's only authority to impose secondary property taxes requires voter approval.

The District argues that because it "has never directly operated or maintained the Hospital itself," the Tax was not for the "operat[ion] and maint[enance] [of a] hospital," and therefore, it was not subject to Section 1907(A)(6)'s voter approval requirement. *Id.* at 14. But as Ogston has already explained at length, the District "operates" the hospital regardless of the fact that it contracts with another entity in doing so.

Moreover, if the District were correct that the Tax is not for the operation and maintenance of a hospital, then the Tax is void—because the *only* taxing authority the District has is to tax for the operation and maintenance of a hospital. It is not allowed to tax for any other reason.

In essence, the District attempts to recast the core issue in this appeal as a factual question about what precise budgetary needs the Tax was imposed to fund. But that is a red herring. The question here is a purely legal one: whether the District was authorized by statute to impose the Tax without voter approval. Section 1907(A)(6) is the sole and exclusive source of the District's taxing power. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona Dep't of Revenue*, 162 Ariz. 127, 136 n.4 (App. 1989) ("*Atchison*") ("[A]ny hospital district may impose a secondary property tax so long as the district complies with the provisions of § 48-1907[(A)](6).").[1] That statute requires voter approval. Voter approval is therefore necessary for *any and all* secondary property taxes the District might impose.

The reasoning here is straightforward: the District only has those powers given to it by statute. *See Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488 ¶ 10 (2003). The statute only empowers the District to levy the Tax "for the operation and maintenance of a hospital." Therefore, if the District were correct that the Tax is *not* for the "operation and maintenance of a hospital," then the logical conclusion

[1] The District tries to minimize this statement by observing that "*Atchison* never even mentioned § 48-1914." Ans. Br. 21 n.7. But Section 1914 is beside the point. *Atchison* confirms the longstanding recognition that Section 1907(A)(6) is the sole basis for a hospital district's taxing power, and any secondary property tax a hospital district imposes must "compl[y] with the provisions of … A.R.S. § 48-1907(A)(6)"—regardless of any other procedural provisions like Section 1914. 162 Ariz. at 133.

would be that the Tax *is not authorized at all*, because it falls outside the scope of the only statute that allows the District to impose secondary property taxes. The District's assertion that the Tax isn't for such purposes certainly cannot prove that the District need not follow the voter approval requirement as long as it adopts taxes for other (unauthorized) purposes.

In any event, the Tax—imposed to cover the District's "administration and defense, in particular for legal fees and public outreach costs" in two legal disputes concerning its hospital operator's "compliance with the terms of its agreements with the District" to lease and operate the hospital—certainly *was* for the "operation and maintenance of a hospital." *See* Ans. Br. 9.

The very purpose of a hospital district is to effectuate the "operation and maintenance" of a hospital for the residents of that district. *See* Becky M. Brooks, *Local Health Care Districts Can Now Play Ball*, 30 McGeorge L. Rev. 769, 772 (1999) s("Health care districts were designed to address the medical needs of rural communities."). Here, the District does so by leasing its hospital facilities to a private operator and contracting with that operator to operate a hospital. *See* Op. Br. 21 (describing terms of the contract). But that does not make the District a mere "landlord" or property manager for the County. *See* Ans. Br. 16–17 & n.5 Nor does it make the District's expenses in administering that contract (including by ensuring compliance with the contract through litigation, "administration," and "public outreach," *id.* at 9) anything other than "fund[s]" for "the operation and maintenance of a hospital."[2] This is true in just the same way that a person still "operates" a restaurant or a bookstore even if she hires a manager to handle the day-to-day operations.

That was just what the Supreme Court said in *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234 (2019). It held that online travel brokers "operated" hotels, despite having no direct, on-the-ground role in actually running the hotels, because they engaged in "business activities that are central to keeping brick-and-mortar lodging places functional or in operation." *Id.* at 240 ¶ 18. While the facts in *Orbitz* differed from those here, the teaching applies with equal force: because the District leases the hospital to YRMC, and contracts with it to operate the hospital for the purpose of ensuring hospital access to District residents, it "operates" or "maintains" the hospital within Section 1907(A)(6)'s broad meaning. Therefore, the Tax is subject to that statute's voter-approval requirements.

[2] It is worth emphasizing again that Section 1907 uses an impersonal grammatical construction to cover just these sorts of situations: authorizing taxation "for the purpose and funding the operation and maintenance of a hospital," regardless of which entity directly does the "operating and maintaining." *See* Op. Br. 22–23. *Cf.* *Gold v. Helvetica Servicing, Inc.*, 229 Ariz. 328, 332 ¶ 24 (App. 2012) (holding statute's use of passive voice meant statute applied regardless of which entity did the action).

II. The District cannot save its Tax by hiding behind the County.

The District tries to draw a distinction between "the power to levy a tax" under Section 1907(A)(6) and "the right to receive the revenue of a tax imposed by another governmental body or sovereign" under Section 1914—namely, the County. Ans. Br. 22; *see also id.* at 24. Under this novel interpretation, the District attempts to bypass Section 1907(A)(6)'s requirements for "impos[ing] a secondary property tax" by arguing that it did not *impose* the Tax at all. Instead, it merely asserted "the right to *receive the revenue* of a tax imposed by another governmental body or sovereign" (namely, the County). *Id.* at 22.

Judicial estoppel bars the District from advancing this argument now, because it directly contradicts the District's defense of its taxing authority in the court below. "Judicial estoppel prevents a party who has assumed a particular position in a judicial proceeding from assuming an inconsistent position in a subsequent proceeding involving the same parties and questions." *In re Marriage of Thorn*, 235 Ariz. 216, 222 ¶ 27 (App. 2014) (alterations adopted, citation omitted).[3] Until now, the District claimed that *it* possessed the "authority to levy the Tax … under § 48-1914, which requires the County to levy a property tax *on behalf of the District*." IR.9 at 9 (emphasis added); *see also, e.g.*, *id.* at 9–10 ("This

[3] "Although [the doctrine] usually applies in the context of separate actions, there is no restriction on its application involving differing positions at trial versus on appeal." *Id.*

conclusion is especially apt considering § 48-1914's legislative history, cases interpreting the *District's* taxing authority, and Arizona special taxing district law generally." (emphasis added)); May 24, 2024 Transcript of Proceedings at 6:1–6:4 ("Most importantly to today's discussion, 1914, 48 section 1914, explicitly authorizes the hospital district to levy a tax without the affirmative vote of the electorate to cover the district's budgeted expenses … ."). It vigorously defended that position and prevailed on that argument in the Tax Court.

But now, the District takes a directly contrary position, arguing that it is not "levy[ing] a tax at all." Ans. Br. 22–23. That is barred by the judicial estoppel doctrine. Having prevailed on one theory below, the District cannot "swap horses in midstream," by pivoting to a fundamentally different, contradictory theory on appeal. *Otis Elevator Co. v. Valley Nat'l Bank*, 8 Ariz. App. 497, 504 (1968) (Molloy, J., concurring) (citation omitted); *see also* *Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.*, 244 Ariz. 234, 239 ¶ 16 (App. 2018) ("A party should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest." (alterations adopted, citation omitted)).

Not only is the District's argument barred; it's also wrong on the merits. The record makes plain that the District was *not* merely asserting a "right to receive the revenue of a tax imposed by" the County. Ans. Br. 22. Rather, it was relying on the claim that Section 1914 gives *it* the right to tax without voter approval (a claim that is incorrect for all the reasons Ogston has explained elsewhere).

While it is technically true that counties, rather than hospital districts, directly impose the secondary property taxes contemplated by Section 48-1907, under that Section and Section 48-1914, the County's role in "levy[ing] … a tax" is ministerial. These statutes empower the District to levy a tax for operating and maintaining a hospital, as long as it gets voter approval. A.R.S. § 48-1907(6). The way it does this is by furnishing an annual budget to the Board of Supervisors "together with an estimate in writing of the amount of money needed to be raised by taxation," A.R.S. § 48-1914(A), and then:

> [t]he board of supervisors … *shall thereupon levy* upon the taxable property of the district a tax which will, together with other funds on hand or which will accrue during the ensuing fiscal year, exclusive of reserves, provide sufficient funds to meet the financial needs of the district as provided under subsection A.

A.R.S. § 48-1914(B) (emphasis added). Upon being presented with an "estimate … of the amount of money needed," the Couty has one directive: to levy a sufficient tax to cover that amount.[4] *See Arizona Libertarian Party v. Schmerl*, 200 Ariz. 486,

[4] This is true under Ogston's view of the statute (establishing procedures for levying a tax once authorized by voters pursuant to Section 1907(A)(6)), as well as under the District's view (mandating that the County "levy" a tax when the District, on its own authority, requests one, Ans. Br. 22).

490 ¶ 10 (App. 2001) ("Ordinarily, the use of the word 'shall' indicates a mandatory directive from the legislature.").

Indeed, when the District sent the Board of Supervisors its 2023-2024 fiscal year budget, along with a cover letter informing the Board that "the District *require[d]* $1,811,300.00 to be immediately raised by taxation," IR.13 at 2–3 ¶ 11 (emphasis added), it was not simply asking the Board for a share in the County's tax revenue, or lobbying it to exercise its discretion to impose a tax. Rather, the Tax was imposed at the District's behest, for the specific purpose of raising revenue *for the District*, with no room for judgment by the County. This is the District's tax, not the County's.[5]

In any event, the District's attempted distinction is one without a difference. "It is axiomatic in law that what cannot be done directly may not be done by indirection." *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 396 (1923). Section 1907(A)(6) conditions the authority to impose a tax for a hospital district on voter approval. The District cannot bypass that requirement and *indirectly* impose a tax via the County Board of Supervisors, and then ascribe its

[5] In fact, the County has never even taken a position on the Tax's legality. *See* County's Ans. Br.; IR.5 at 1 (stipulation that the "County shall take no position on the merits of Plaintiff's claim herein, and that Plaintiff shall seek no award of taxable costs or attorney fees from Yuma County in this matter").

tax to the procedures in Section 1914 in order to evade the democratic protections provided in Section 1907.

III. The District offers no other response to many of Ogston's arguments.

The District's newly minted, formalistic distinction between "levy[ing] a tax" and "receiv[ing] the revenue of a tax imposed by another governmental body or sovereign" is its only response to several of Ogston's points. *See* Ans. Br. 22–26. For example, the District makes no other answer to Ogston's arguments that the *expressio unius* canon weighs against finding other taxing powers, Op. Br. 14–15, or that the Tax is barred by the principle that "the power to levy a tax is never implied, but must directly and specifically be granted," *id.* 16 (quoting *Vangilder v. Ariz. Dep't of Rev.*, 252 Ariz. 481, 488 ¶ 26 (2022)).

Addressing several of Ogston's other arguments, the District essentially repeats conclusory assertions that Section 1907(A)(6) does not apply, without elaborating further. Responding to Ogston's argument "that general grants of authority … cannot override specific voter protections," it asserts that Section "48-1907(A)(6) does not remotely apply to situations like those at bar." Ans. Br. 25–26. Likewise, responding to Ogston's observation that statutes implicating Arizonans' voting rights are construed "so as to uphold the citizens' right to vote," the District contends that Section 1907(A)(6) does not apply, and was instead imposed under Section 1914, which "impose[s] no voting requirement." *Id.* at 24–25.

These responses are inadequate, because as Ogston has explained in detail, Section 1907(A)(6)'s voter-approval requirement *does* apply to the Tax—since that provision is the sole source of the District's taxing authority. It must be, because any contrary approach would render Section 1907(A)(6) a nullity: if the District were right, hospital districts could *always* bypass voter approval requirements and impose taxes through Section 1914, which apply to financial needs for "all purposes required or authorized by this article." A.R.S. § 48-1914(A). That cannot be right, because courts never read statutes in ways that render them "idle and nugatory." *State Bd. of Tech. Reg. v. McDaniel*, 84 Ariz. 223, 236 (1958). Yet, the District *never responds to this argument at all*.

The closest the District comes to addressing this is on pages 29–30 of its Answering Brief, where it denies that its theory would "allow the District to 'impose a tax any time it wished,'" because the alleged taxing power Section 48-1914 would be "limited to the specific purposes required or authorized by A.R.S. § 48-1901 *et seq.* for the next fiscal year and may only be assessed where other funds on hand or expected to accrue during the next fiscal year will not cover the expenses." But this theory fails for three reasons.

First, those limitations (i.e., that taxation through Section 1914 can only be for purposes authorized by statute, and is limited to amounts a hospital district claims it needs for any lawful purpose) are so minimal as to be illusory.[6] Second, those limits do not save Section 1907(A)(6) from being rendered a nullity in the District's view, because the limitations do not show how a hospital district would *ever* be subject to Section 1907(A)(6)'s voter approval requirement when it could instead impose a tax through Section 1914. Third, the "specific purposes" limitation to which the District refers is drawn (as it says) from "A.R.S. § 48-1901 *et seq.*"—but Section 1907(A)(6) is *included* within that "*et seq*." In other words, the District's theory necessarily incorporates portions of Title 48 chapter 13 into Section 1914—but then omits, for no rational reason, the voter-approval requirement that is also found in Title 48 chapter 13. Thus, the only way the District can reassure the Court that its theory would not lead to carte blanche taxing power immune from voter control is by arbitrarily picking and choosing which portions of Title 48, chapter 13 it's willing to view as applicable to Section 1914. That's illogical. Either all of what it refers to as "A.R.S. § 48-1901 *et seq.*" is incorporated into Section 1914 or none of it is.

The District's responses to Ogston's arguments are also inadequate because they beg the question. That is, they *assume* Section 1907(A)(6) does not apply,

[6] Those limitations would also apply at least as strictly to taxation under Section 1907(A)(6), which can only be "for the purpose of funding the operation and maintenance of a hospital" or other health care facility, and would be subject to ordinary procedures for calculating and levying an annual secondary property tax. *See, e.g.*, § 1914(B), (C).

overlooking the fact that Ogston's textual-interpretation arguments are precisely about *whether* Section 1907(A)(6) applies to the Tax. The canon that statutes implicating voting rights should be broadly construed, and the canon that taxing statutes should be construed narrowly against the taxing power, indicate that Section 1907(A)(6) *does* apply to the Tax, because such a construction would (1) advance Arizonans' right to vote and (2) limit the government's taxing power to what is specifically granted by law. The District makes no response to these arguments about *why* Section 1907(A)(6) applies to the Tax, but instead simply repeats its assertion that these arguments are wrong because Section 1907(A)(6) does not apply.

IV. Section 1914 does not authorize the Tax.

The District argues that in *Maricopa County v. Southern Pacific Co.*, 63 Ariz. 342 (1945), the Supreme Court "found that language similar to that in [Section] 48-1914 provided a county with specific and direct taxing authority". Ans. Br. 24 n.9. The District is mistaken.

The statute in *Southern Pacific* is not "similar to" the provision here. Unlike Section 48-1914, the statute concerned in that case provided for taxes to cover county and school district bonds. It said:

> After said bonds are issued the board of supervisors … shall … annually levy and cause to be collected a tax, at the same time and in the same manner as other taxes are levied and collected upon all taxable property in such political subdivisions, sufficient to pay the

> interest on the same when due; and likewise, annually, levy a tax sufficient to redeem said bonds when the same shall mature.

63 Ariz. at 348.

One key difference is that the *Southern Pacific* statute presupposed a valid bond authorization, which comes with the authority to raise revenue to pay for the bonds (and, incidentally, often requires voter approval). *See, e.g.*, A.R.S. § 48-1912 (authorizing hospital districts to issue bonds with voter approval); Ariz. Op. Att'y Gen. No. I87-149, 1987 WL 121374 (1987) (analyzing hospital district statutes and noting that voter approval requirement "was not placed on bond servicing tax levies" as "a valid bond issue already includes voter approval"). Another difference is that the *Southern Pacific* provision directed counties to "levy … a tax … *in the same manner as other taxes are levied and collected*," (a provision absent from Section 48-1914), implying that there, unlike here, the tax derived from the County's own taxing authority and was subject to its general taxing powers and procedures. 63 Ariz. at 348 (emphasis added).

The statute in this case, by contrast, does not presuppose an already existing financial arrangement. Instead, it establishes the process for creating such an arrangement in the first place—that is, it sets out the mechanism for a hospital district to impose a tax for operating and maintaining hospitals. That mechanism includes a voter-approval requirement. Also, unlike the *Southern Pacific* statute, the process is governed not by the County's own taxing authority, but by a two-step process in which the District obtains voter approval, then provides a budget estimate to the County, whereupon the tax is levied.

While *Southern Pacific* involves a statute with some superficial similarities to Section 1914, it does not involve a provision like Section 1907(A)(6), which explicitly grants taxing authority *subject to voter approval.* Thus, it sheds no light on whether that latter provision required the District to obtain voter approval before imposing the Tax, which is the key issue in this appeal.

The District also argues that "for the first 32 years of the Act's existence, the sole authorization for hospital districts to receive tax levies was contained in § 13 of the Act, which is substantively similar to § 48-1914." Ans. Br. 27. This argument is unavailing for several reasons.

First, legislative history cannot "supersede the unambiguous words in [this] statute." *Qasimyar v. Maricopa Cnty.*, 250 Ariz. 580, 590 ¶ 33 (App. 2021). Here, the relevant statutory text is "clear and unambiguous," *id.* (citation omitted), that Section 1907(A)(6) grants the power to tax, while Section 1914 merely specifies procedures for exercising that power.

Second, the District's "legislative history" argument is a misnomer, as it never actually cites any legislative history. It offers no hearing testimony, fact sheets, or other contemporaneous statements about the legislation to show that the Legislature intended Section 1914 to create some taxing power other than the one provided by Section 1907. Instead, the District merely observes that some of the language in Section 1914 existed before the Legislature added Section 1907(A)(6)'s voter-approval requirement in 1981—and says that it "makes perfect sense" that hospital districts would have to obtain voter approval in some circumstances (i.e., when directly operating a hospital themselves), but not in others. Ans. Br. 33. Not only is this pure speculation; it misconstrues the statutes' plain language.

Again, Section 1914's procedures are for "money needed … for *all purposes* required or authorized by this article." A.R.S. § 48-1914(A) (emphasis added). If the District were correct that Section 1914 gives it a second taxing power (one not subject to voter approval), that would mean Section 1914 allows for taxes for "all purposes"—which would necessarily include the direct costs of running a hospital as well as administrative expenses. But that would completely subsume Section 1907's voter approval requirement, which would mean that no tax levies would need to be voter-approved. And the District has offered no legislative history to show that the Legislature meant Section 1914 as a broad grant of taxing authority—let alone one that would render Section 1907 a nullity. In fact, courts presume the opposite: "Legislative intent may be presumed constant within the statute, and this court must harmonize the different parts of the statute." *State v. Pinto*, 179 Ariz. 593, 596 (App. 1994). The District has offered no reason to conclude that the Legislature intended to create the inconsistency between Sections 1907 and 1914 that the District's argument depends upon.

Without any actual statements of legislative intent, it is entirely unclear what inference to draw from the mere fact that some of Section 1914's language predates Section 1907(A)(6), particularly since the Legislature fundamentally restructured the hospital district statutes in the intervening decades. Indeed, this history provides at least as much support for precisely the opposite conclusion: that while hospital districts may have been able to levy taxes on their own authority *before* 1981, the Legislature decided to provide additional taxpayer protection and democratic accountability for *all* hospital district taxes by including a broad voter approval requirement in Section 1907(A)(6).[7] *See Pijanowski v. Yuma Cnty.*, 202 Ariz. 260, 263 ¶ 11 (App. 2002) ("In the event of a clear conflict between statutes enacted at different times, the later statute is usually presumed to accurately reflect the intent of the legislature and will therefore be found to have modified the earlier statute.").

[7] For these reasons, *Prescott Newspapers, Inc. v. Yavapai Community Hospital Ass'n*, 163 Ariz. 33, 35 (App. 1989) and *Roberts v. Spray*, 71 Ariz. 60 (1950), which do not interpret Section 1907(A)(6) or address the Legislature's addition of a voter-approval requirement to the laws governing hospital districts, shed no light on the issue here.

V. Other special district statutes are irrelevant to the Tax's legality.

The District claims that "[n]o voter approvals are required for district expense tax levies" for several other types of special taxing districts. IR.9 at 13. But even if true, that is irrelevant to the question before this Court. While the District identifies several other special taxing district statutes with similar language to Section 1914 (directing boards to "estimate the amount of money necessary to be raised by taxation" and "levy a tax sufficient to raise the amount"), Ans. Br. 34–35, it appears that none of these other statutory schemes involves the kind of broader taxing authority subject to voter approval that Section 1907(A)(6) creates. Moreover, because the District cites no case law applying these statutes, it is unclear what they mean: specifically, whether they vest districts with independent taxing authority not subject to voter approval, or if instead (as here) they simply lay out procedures for calculating financial needs and levying taxes *where that authority already exists*.

As the relevant statutes and case law expressly prohibit what this District has done, the Court should decline the invitation to rewrite the law for hospital districts based on how the Legislature has chosen to govern "county television improvement district[s]" and other unrelated entities. Ans. Br. 35.

CONCLUSION

The Court should reverse and enter judgment in favor of Ogston on both his claims. The Court should also award Ogston costs and fees pursuant to A.R.S. Sections 12-341 and 12-348 and the private attorney general doctrine.[8]

Respectfully submitted February 27, 2025 by:

/s/ *John Thorpe*
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[8] Ogston seeks an award of costs and fees only from the District, not from the County or the Department of Revenue.

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Appellants' Reply Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 4,282 words, excluding table of contents and table of authorities.

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 27, 2025, she caused the attached Appellant's Reply Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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