SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - March 06, 2013

EVENT DATE: 03/13/2013 EVENT TIME: 10:00:00 AM DEPT.: C-71

JUDICIAL OFFICER: Ronald S. Prager

CASE NO.: 37-2012-00094831-CU-MC-CTL

CASE TITLE: BROWNING VS. THE CITY OF SAN DIEGO [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

The Court rules on the issue of validation as follows:

As a preliminary matter, the parties' requests for judicial notice are granted. However, the Court shall sustain the objection to the joinders filed by defendant San Diegans for Open Government ("SDOG") and defendant Melvin Shapiro ("Shapiro") to each other's opposition to plaintiff City of San Diego's ("City") moving papers.

The first issue is whether the City is entitled to judgment with respect to Shapiro due to his failure to file a verified answer.

In the City's moving papers, it noted that Shapiro was required, but failed, to file a verified answer, citing *DeCamp v. First Kensington Corp.* (1978) 83 Cal.App.3d 268. Shapiro did not address this issue in his opposition. Thus, it is assumed that he concedes the point. Nevertheless, the Court shall address Shapiro's substantive arguments in opposition to the City's moving papers despite his failure to file a verified answer.

The second issue is whether the Court has jurisdiction to hear this matter.

SDOG raises several arguments in support of their contention that this Court lacks jurisdiction. One, it contends that the Court lacks subject matter jurisdiction. However, San Diego Municipal Code section 61.2706 subd. (a) incorporated the Mello-Roos Community Facilities Act of 1982 ("Act") which includes Government Code section 53359 ("section 53359"). Section 53359 authorizes the City to validate Convention Center Facilities District ("CCFD") bonds and special taxes.

As to Government Code section 53511 ("section 53511"), SDOG contends that the City waived its reliance on this statute since it did not reference it in its brief. However, it was pled in the Complaint as a basis for jurisdiction. Furthermore, subject matter jurisdiction cannot be waived. (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 781.) In addition, SDOG incorrectly argues that section 53511 is inapplicable on the bases that there are no bonds to be validated at this point since a validation action confirms the legality of bonds, contracts, etc. before the agency takes action. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842-843; Code Civ. Proc. §§860, 864.)

SDOG also contends that the Court lacks validation jurisdiction over matters before March 11, 2012 and matters after the lawsuit was filed. As to the resolutions and/or ordinances that were approved before

March 11, 2012, the validation statute provides that any matter subject to validation is validated by law after 60 days. (Code Civ. Proc. §860, 863, 863; *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 851.)

As to the resolutions and/or ordinances approved after the lawsuit was filed, the Court notes that the City did not reference them in its Complaint.

The third issue is whether the City and/or CCFD acted appropriately with respect to the special tax.

Both SDOG and Shapiro contend that the registered, natural person voters within the City should have been given the opportunity to vote on the special tax and that the use of a landowner exception was improper.

With respect to the issue of who is a qualified elector, Article 13A, Section 4 of the California Constitution provides that "[c]ities, counties and special districts, by two-thirds vote of the qualified electors of such district, may impose special taxes of such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such city, county or special district." Under section 1 of Article 13C, a "special tax" is defined as "any tax imposed for specific purposes." (Cal. Const., art. 13C, §1(d).)

San Diego City Charter, section 76.1 states that "[n]otwithstanding any provision of this Charter to the contrary, a special tax, as authorized by Article XIIIA of the California Constitution may be levied by the Council only if the proposed levy has been approved by a two-thirds vote of the qualified electors of the City voting on the proposition; or if the special tax is to be levied upon less than the entire City, then the tax may be levied by the Council only if the proposed levy has been approved by a two-thirds vote of the qualified electors voting on the proposition in the area of the City in which the tax is to be levied."

Government Code section 53326 ("section 53326") of the Act establishes who or what is a qualified elector for voting purposes within a community facilities district ("CFD"). Section 53326 subd. (c) authorizes an election by landowners, rather than registered voters where the special tax will not be apportioned in any tax year on property in residential use. Thus, the Legislature established that, in certain situations, qualified electors means landowners. (See *San Francisco v. Indus. Acc. Comm.* (1920) 183 Cal. 273, 279.) Notably, section 53326 subd. (c) provides, "the legislative body may provide that the vote shall be by the landowners of the proposed district *whose property would be subject to the tax if it were levied at the time of the election."* (Emphasis added.) Thus, not even all landowners within a CFD must get a vote-only those whose property would be subject to the tax are eligible to vote. That is how the CCFD was structured. Hotel property and transitory occupancy of hotel rooms are not residential properties or residential uses. (See San Diego Mun. Code, §§61.2705, 35.0102.) The Act also provides for weighted voting allocation based on the amount of property owned, reflecting a legislative desire to allocate voting power in proportion to the special tax each owner would pay if approved. (See *Cal. Bldg. Indus. Assn. v. Governing Bd. of the Newhall School Dist.* (1988) 206 Cal.App.3d 212, 237-238 (hereafter "*Cal. Bldg.*").)

Consistent with the Act, the Division defined "qualified electors" as "Landowners" within the CCFD, those who own or lease land on which hotels operate. (San Diego Mun. Code, §61.2710.) The Division mandates that special taxes authorized under its provisions may only be levied on hotel properties (San Diego Mun. Code, §§61.2706(i), 61.2712), and that qualified electors "shall in all cases be the Landowners." (San Diego Mun. Code, §61.2710(a).) "Landowners" are defined in section 61.2705 of the San Diego Municipal Code as "the owner of the real property upon which a Hotel is located, except that if the fee owner of the real property is a governmental entity, Landowner means the lessee of the governmental entity."

Notably, California water districts and reclamation districts also conduct their elections by landowner vote. (See Wat. Code §§35000 et seq., 50700 et seq.; see *Philippart v. Hotchkiss Tract Reclamation Dist.* (1976) 54 Cal.App.3d 797 and *Salyer Land Co. v. Tulare Water Dist.* (1973) 410 U.S. 719.)

Finally, the cases cited by SDOG are inapposite and Shapiro's contention that Government Code section 53317 does not authorize a land owner to be a hotel lessee runs afoul of the home rule doctrine.

With respect to the issue of voting procedures, the Court notes that the Act established the mechanism of weighted, landowner votes to approve special taxes in CFDs. (Gov. Code §53326(c).) Furthermore, the City has plenary authority over municipal affairs pursuant to the home rule doctrine. Shapiro contends that the City violated the home rule doctrine because the CCFD voting procedures re-write or conflict with the Act. However, under the home rule doctrine, charter cities have plenary authority to legislate with respect to municipal affairs, which includes the power to adopt laws that conflict with state laws so long as the subject is a "municipal affair," not one of "statewide concern." (Cal. Const., art. 11, §5; *State Bldg. & Constr. Trades Council of Cal. v. City of Vista* (2012) 54 Cal.4th 547, 556 (hereafter "*State Bldg.*").) In *Ex parte Daniels* (1920) 183 Cal. 636, 639, the California Supreme Court stated the Constitution gives charter cities more than mere authorization to act in the area of municipal affairs-it gives charter cities supremacy. (See also *State Bldg., supra,* 54 Cal.4th at p. 556; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539.)

The Court agrees with the City's contention that the CCFD and the special tax are municipal affairs. *Cal. Fed. Sav. & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1 does not support Shapiro's contention that the Act legislates a statewide concern since it did not discuss the Act. Notably, in *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 345 (hereafter "*Bellus*"), the California Supreme Court states that "Charter cities which possess complete power over municipal affairs may adopt part of a general law in an ordinance governing a municipal affair without thereby being bound by all the provisions of that general law." Thus, the City had the power to define procedures that differ from the Act, while also adopting or incorporating some, but not all, of the provisions of the Act. (S.D. City Charter, art. 1, §2.)

With respect to the Shapiro's contention that the City should have adopted local goals and policies in accordance with Government Code section 53312.7, the City was not required to comply with this section pursuant to San Diego Municipal Code section 61.2716 and *Bellus.*

With respect to Shapiro's contention that the special tax is a transient occupancy tax ("TOT"), the Court notes that the special tax differs from a TOT in several respects. More specifically, unlike a TOT, it is a tax and creates a lien (Gov. Code §53321(d)) against real property and makes real property subject to foreclosure (San Diego Mun. Code §§61.2713, 35.0116, 35.0123). Furthermore, the City informed the Court that the provisions of the City's TOT ordinance that were incorporated into the Division relate to TOT mechanics, not levy. (San Diego Mun. Code, §§61.2712, 35.0112, 35.0114, 35.0115, 35.0117, 35.0118, 35.0122, 35.0136, 35.0137, 35.0138.)

With respect to Shapiro's contention that the special tax is a special assessment, the Court notes that Government Code section 53325.2 states that "[a] tax imposed pursuant to this chapter is a special tax and not a special assessment." The evidence shows that the City's actions were based upon constitutional provisions, statutes, and ordinances applicable to special taxes.

With respect to SDOG's contention regarding bond indebtedness, the Court notes that San Diego City Charter section 90 subd. (a) applies to general obligation bonds. The bonds authorized by the CCFD will not be debts of the City requiring a pledge of the General Fund or otherwise provide recourse against the City's general revenues.

The fourth issue is whether CEQA is applicable and, if so, whether the City complied with its requirements.

CEQA Guidelines section 15378 subd. (b)(4) states that a project does not include the "creation of a government funding mechanism or other government fiscal activities, which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment."

Here, the evidence indicates that in forming the CCFD, the City created a government funding mechanism that did not commit the City to any particular course of action and was not a project within the meaning of CEQA. (See e.g., *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 476; *Sustainable Transp. Advocates of Santa Barbara v. Santa Barbara County Assn. of Govs.* (2009) 179 Cal.App.4th 113, 117 (hereafter "*STASB*"); *Citizens to Enforce CEQA v. City of Rohnert Park* (2005) 131 Cal.App.4th 1594, 1597-1598, 1601.)

Save Tara v. City of West Hollywood (2008) 45 Ca1.4th 116 (hereafter "*Save Tara*") is distinguishable. Unlike *Save Tara*, the City did not approve a development agreement and did not commit significant assets to the project prior to final approval. The City authorized the appropriation and expenditure of up to $1 million for the City's General Fund for the purpose of advancing the design of the Project only after the Port District had approved the project on September 19, 2012. Furthermore, the City did not authorize the tax to be levied until October 16, 2012, and even then conditioned the act on a validation judgment and Coastal Commission approval of the project. (Tab 16, AR 0116-117.)

In addition, *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55 (hereafter "*City of Santee*") does not support SDOG's position that an agency may not have a preferred location for a prospective project without first performing environmental review. In fact, the Court of Appeal upheld this Court's decision, thereby rejecting the argument that a siting agreement constitutes a commitment to a project. The issue is not site preference but commitment to the project. (See *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150; *STASB, supra; Save Tara, supra,* 45 Cal.4th at p. 122.)

As to SDOG's contention that the City should have been the lead agency, the evidence indicates that the Port District was the proper lead agency. In response to union arguments that the City was the proper lead agency, the Port District pointed out the following: (1) the Expansion Hotel component is proposed by a non-governmental entity, (2) the entire project site is located within the jurisdiction of the Port District, (3) the Port District is the owner of the land and structures which comprise the Convention Center, including the Convention Center Expansion, (4) the Port District is the public agency responsible for approving the Port Master Plan amendment and Coastal Development Permits required to carry out the Proposed Project, and (5) the Port District remains the public agency with the greatest responsibility for supervising or approving the Proposed Project as a whole." (Tab 18, AR003235.) It also noted that it was the lead agency because it was the first to act (CEQA Guidelines, §15051(c); Tab 18, AR003235-3236) and by way of agreement with the City (CEQA Guidelines §15051(d)). In addition, the Lead Agency decision is final and conclusive for all persons because SDOG did not timely challenge the EIR. (CEQA Guidelines, §15050(c); see also Pub. Res. Code §21167(c), (e); Tab 178, AR008311.) No one challenged the EIR. Thus, the EIR has a conclusive presumption of correctness. (Pub. Res. Code §21167.2.)

Finally, with respect to the issue of mootness, the Court agrees with the City that the issue is moot since CEQA was not implicated for the reasons stated above. Even assuming it was, the CEQA argument is moot because a complete environmental review has been conducted and not challenged. The Port District (the lead agency) completed an environmental review under CEQA for the proposed Convention Center expansion. (Tab 17, AR000120-002644; Tab 18, AR002645-4052; Tab 19, AR4053-4158; Tab 20, AR4159-4216; Tab 21, AR4217-4244.) On September 19, 2012, the Port District certified the FEIR and approved the proposed project. (Tab 19, AR4053-4158; Tab 20, AR4159-4216; Tab 21, AR4217-4244.) The Port District issued a Notice of Determination on September 20, 2012. (Tab 178, AR008311.) Thereafter, on October 1, 2012, the City, as a responsible agency under CEQA, reviewed and approved the FEIR. (Tabs 208 & 209, AR008580-8591.) The Defendants have not and cannot challenge the FEIR because the time period to file a challenge has expired. (Pub. Res. Code §21167.)

Based on the foregoing, the Court finds that this action was properly brought under Code of Civil Procedure section 860, that the CCFD was properly formed, and that the election regarding the special tax at issue in this action conformed with all applicable constitutional provisions, statutes, and ordinances. Thus, the City's request for a validation judgment is granted. The City shall prepare a

Judgment in accordance with this ruling.

IT IS SO ORDERED.