

CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA

DEPARTMENT: 21

HEARING DATE: 04/23/15

14. TIME: 9:00 CASE#: MSC14-00603

**CASE NAME: BUILDING INDUSTRY ASSOCIATION vs. CITY OF SAN RAMON
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
FILED BY BUILDING INDUSTRY ASSOCIATION – BAY AREA**

*** TENTATIVE RULING: ***

The motion by Plaintiff Building Industry Association – Bay Area (“BIA”) for summary judgment, or in the alternative summary adjudication, is denied.

The cross-motion by Defendant City of San Ramon, et al. (the “City”) for summary judgment, or in the alternative summary adjudication, is granted.

The instant action arises out of the City’s formation of Community Facilities District No 2014-01 (the “District”) under the Mello-Roos Community Facilities Act of 1982 (Gov. Code §53311, *et seq.*). The City approved the levy of a special tax through the District on two parcels, known as “Acre Development,” for development of 48 residential townhome units. (Stipulated Exhibit 3, Jan. City Staff Re. at 2-3). The District’s annexation boundaries – those areas that may become part of the District – are co-extensive with the City’s limits.

Plaintiff’s Complaint states causes of action for 1) determination of invalidity pursuant to Code of Civil Procedure section 863; 2) declaratory relief pursuant to Code of Civil Procedure section 1060; and, 3) petition for writ of mandate pursuant to Code of Civil Procedure section 1085. Plaintiff alleges that the City’s actions in establishing the District and levying its tax violate Government Code section 53313 because despite being approved by landowner-vote, the proceeds of the tax will not be used to pay for any new or enhanced type of service to parcels within the District and rather will be used to pay for general municipal services within the District. Plaintiff also alleges the District’s tax violates article XIII C, section 2(a) of the California Constitution because it is an impermissible general tax. Finally Plaintiff contends the City’s Ordinance 448, which authorizes the levy of the District’s tax, violates due process by unconstitutionally retaliating against District property owners who succeed in repealing the tax.

The City claims that the Mello-Roos tax levied in CFD 2014-1 is a special tax, the services to be financed by the special tax are the same services identified in Mello-Roos as allowable for financing through levy of a special tax and that Plaintiff’s due process challenge is without merit and premature. The City also claims that BIA lacks standing to bring the instant action and that BIA’s action is not ripe with respect to the District’s future annexation area.

Standing

BIA has organizational standing to bring this action. (*See e.g., Citizens Against Forced Annexation v. Cnty. of Santa Clara* (1984) 153 Cal. App. 3d 89, 98 (finding that organization with interest in annexation procedures and indirect interest in particular territory being annexed was “interested person” and thus, had standing in CCP § 863 action)). The *Citizens Against Forced Annexation* court provides that standing derives in part “from an interest of some sort in a particular territory that is being annexed. Also, it derives, in part, from an interest in the annexation procedures themselves as applied to that particular territory.” (*Id.*) Here, BIA has an indirect interest in the City through its’ member Montair’s residence in the City. Further, BIA has a direct organizational

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interest in the laws and regulations affecting the building industry including an interest in property taxation procedures and, the validity of particular taxes.

Ripeness

The City contends that BIA's action is not ripe with respect to the District's future annexation area. This argument obscures the instant inquiry. As framed by the parties' motions, the Court is being asked to determine the validity or lack thereof of the Resolutions and Ordinance related to the formation and levying of special taxes within Community Facilities District 2014-1. Put differently, the resolutions and ordinance are either valid right now or invalid right now regardless of the area currently in the District. Under the relevant statutory scheme, "an agency may indirectly but effectively 'validate' its action by doing nothing to validate it; unless an 'interested person' brings an action of his own under [California Code of Civil Procedure] section 863 within the 60-day period, the agency's action will become immune from attack whether it is legally valid or not." "[A]s to matters which have been or which could have been adjudicated in a validation action, such matters . . . must be raised within the statutory limitations period in section 860 et seq. or they are waived." [citations omitted]" *Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp.*, (2009) 178 Cal. App. 4th 924, 932-933. BIA must challenge the validity of the Ordinance and Resolutions now or forever waive that right.

Plaintiff BIA challenges the validity, under Code Civ. Proc. § 863, of the City's actions on three grounds: 1) The District's tax is violative of the Mello-Roos Act; 2) the 2014-1 District's tax is really a general tax, impermissibly voted on as a special tax; and, 3) section H of Ordinance 448 – levying special taxes within the District - unconstitutionally retaliates against future district property owners.

Mello-Roos Compliance

The Mello-Roos Act, as specified in Government Code § 53313, permits a landowner-approved community facilities district tax to finance permissible services and facilities if such services are in addition to those already in the territory and do not supplant services already available. Plaintiff argues the District must receive additional services beyond the basic services currently offered by the City for the new taxes to qualify under the Mello-Roos Act. However, the express intent of the Act is to provide "an alternative method of financing certain public capital facilities and services, especially in developing areas and areas undergoing rehabilitation." (Gov. Code § 53311.5; *Friends of the Library of Monterey Park v. City of Monterey Park* (1989) 211 Cal. App. 3d 358, 376). In interpreting a statute, "the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . ." (Code Civ. Proc. § 1858). Furthermore, "in construing statutory language, it is fundamental, if possible, to give effect to each sentence, phrase and word thereof." (*Los Angeles Finance Co. v. Flores* (1952) 110 Cal. App. 2d Supp. 850, 852). Merriam-Webster's Dictionary defines "supplant" as "to take the place of and serve as substitute for especially by reason of superior excellence of power." The word "additional" is defined by the Oxford Dictionary as "added, extra, or supplementary to what is already present or available." The City will use the tax revenue to fund services and facilities in addition to those already present in the District, which are also specifically enumerated in Government Code § 53313. The District services will not supplant any current services already in the territory; it will simply augment them. Therefore, the tax complies with the Mello-Roos Act.

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Special Tax

The taxes levied pursuant to CFD 2014-1 are special taxes. The Constitution of the State of California defines a “[g]eneral tax” to be “any tax imposed for general governmental purposes,” whereas a “[s]pecial tax” is a tax imposed for specific purposes,” even if its proceeds are placed in a general fund. Cal. Const. art. XIIC, § 1(a). A landowner based vote approved the levy on the District as a special tax. Plaintiff contends that a special tax cannot be used to “permit expenditures for so many specific governmental purses that the parts might swallow the whole.” (*Neilson v. City of California City* (2005) 133 Cal. App. 4th 1296, 1311). Plaintiff argues the new funding scheme, which is designed to cover a wide variety of services and goes directly into the City’s general fund bank account, is a general tax. However, “[a] tax imposed pursuant to this chapter [Mello-Roos Act] is a special tax. . .” (Government Code § 53225.3). “[T]he statutory scheme expressly set forth in the [Mello-Roos] Act and the undisputed material facts in this matter establish as a matter of law that those charges are special taxes levied under the [Mello-Roos] Act.” (*Riverside County Community Facilities District v. Bainbridge* (1999) 17 Cal.App.4th 644, 654). The services authorized by the creation of the District are included within the definition of authorized services under Mello-Roos. (See Stipulated Exhibit 4 (Exhibit 1 to Resolution No. 2014-026) at p. 18). Ordinance 448, which levies the taxes, specifies: “[a]ll of the collections of the special tax shall be used as provided for in the Act and in the Resolution of Formation. . .” (See Stipulated Exhibit 6, p. 4). The City’s taxing scheme is a special tax, formed in compliance with Mello-Roos and the Constitution of the California.

Ordinance 448, Section H

BIA argues Section H of the “Rate and Method of Apportionment of Special Tax”, incorporated into Ordinance 448, burdens District landowners in their Constitutional right to exercise the initiative power, petition the City for redress, or seek relief through the courts, because H would punish them for doing so. Section H states, “[i]f the levy of the Special Tax is Repealed by initiative or any other action participated in by the owners of Parcels in CFD No. 2014-1, the city shall cease to levy the Special tax and shall cease to be obligated to provide the Authorized Facilities and Authorized Services for which the Special Tax was levied. The obligations to provide the Authorized Facilities and Authorized Services previously funded by the repealed Special Tax shall become the obligations of any property owners association established within CFD No. 2014-1, and if there is no such association, they shall become the joint obligations of the property owners of Parcels within CFD No. 2014-1 in proportion to the number of Parcels owned by each such owner to the total number of Parcels within CFD No. 2014-1.”

Plaintiff challenges Paragraph H not in the context of an actual repeal of the special tax, but in a facial challenge. Specifically, plaintiff alleges that Paragraph H, on its face, amounts to unconstitutional retaliation. A plaintiff can only succeed in a facial challenge by establishing that there is no set of circumstances under which the ordinance would be valid, *i.e.*, that the law is unconstitutional in all of its applications. In determining whether a law is facially invalid, courts must be careful not to go beyond the statute’s facial requirements and speculate about “hypothetical” or “imaginary” cases. “Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.”

Washington State Grange v. Washington State Republican Party (2008) 552 U.S. 442, 449-50

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(internal quotations and citations omitted). Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation and thus, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. “Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” (*Id.* at 450-51 (internal quotations and citations omitted)).

A plaintiff claiming unconstitutional retaliation in violation of due process must demonstrate “that (1) he or she was engaged in constitutionally protected activity, (2) the defendant’s retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff’s protected activity. (*Tichinin v. City of Morgan Hill* (2009) 177 Cal. App. 4th 1049, 1062-63; *see also Jefferson v. Tuteur* (9th Cir. 2007) 261 F. App’x 10, 11). Here, plaintiff’s facial challenge asks this Court to speculate several “ifs” deep - if taxpayers in the District repeal the special tax and if the City stops providing services and if the City tries to impose liability on property owners in the District.

“Article XIII C, section 3 of the California Constitution expressly states that the initiative power cannot be limited or prohibited when an initiative proposes to reduce or repeal ‘any local tax, assessment, fee or charge.’” (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 212). However, Paragraph H contains no mechanism that prevents residents from the process of repealing the special tax and there is no evidence the City created the provision of Section H to retaliate. In their moving papers, Plaintiff even concedes it “does not deny the City’s good faith” and simply argues that certain bad things will happen if the tax is repealed. *See* Pltf.’s Opp. to City’s Mot. For Summ. J.; Ripy in Supp. of Pltf.’s Mot. for Summ. J. p. 12:14-17. Section H does not state the City must or will take any action and the potential liability on landowners is not self-implementing. It is not clear from the text of the statute precisely what and how potential liability will arise. Without an actual deprivation of a constitutional right, a section 1983 claim for retaliation fails. (*See e.g., Jefferson v. Tuteur*, 261 F. App’x 10, 11 (9th Cir. 2007)). Here, plaintiff has not demonstrated that paragraph H is unconstitutional in all of its applications. While certain circumstances in which the City implements H may rise to the level of due process violations, it is simply too remote and speculative here to determine that in all circumstances H is unconstitutional, thus the facial challenge to paragraph H fails.

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*** TENTATIVE RULING: ***

See Line 14.