

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 07/02/2014

TIME: 03:45:00 PM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager

CLERK: Terry Ray

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: **37-2013-00052721-CU-MC-CTL** CASE INIT.DATE: 06/12/2013

CASE TITLE: **San Diegans For Open Government vs. City of San Diego [IMAGED]**

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

EVENT TYPE: Ex Parte

APPEARANCES

There are no appearances by any party.

The Court rules on plaintiff San Diegans for Open Government's (Plaintiff) motion for preliminary injunction as follows:

After taking the matter under submission, the Court confirms its tentative ruling.

Requests for Judicial Notice. The parties' requests for judicial notice are granted.

Plaintiff's Evidentiary Objections. Plaintiff objected to portions of the Down Declaration. Objection Nos. 1-4, 11-13 is sustained on the grounds of lack of foundation and personal knowledge. Objection Nos. 5-7, 10 is sustained on the ground of best evidence. Objection Nos. 8, 14 are overruled. Objection No. 9 is sustained on the ground of improper opinion.

Defendant City of San Diego's (City) Evidentiary Objections. The Court rules as follows:

Quiroz Declaration. The objections are overruled.

Faulds Declaration. The objections are overruled.

By this action, Plaintiff seeks to invalidate City Council Resolutions No. 308143 and 308144 (collectively Resolutions) approving the continuation of the City's Fiscal Year 2013-2014 Business Improvement District (BID) assessments. (Complaint, p. 2.) Plaintiff claims that the BID assessments are illegal taxes improperly imposed in violation of section 1(e) of Article XIII of the California Constitution without a vote of the electorate. (*Id.*, at p. 4.) Plaintiff asks the Court to invalidate the Resolutions and issue an

injunction prohibiting the City from levying, collecting, or spending any of the BID funds. It also requests the Court to direct the City to refund all BID assessments collection. (*Id.*, at p. 5.)

However, for the purposes of this motion, Plaintiff asks the Court to freeze expenditures of the BID-tax revenues in the City's possession until trial. (Moving Papers, p. 1.)

As a preliminary matter, the Court notes that it previously ruled that Plaintiff had standing to pursue this case pursuant to *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1047 and cited *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 209 for the proposition that a party need not establish standing as taxpayers under Code of Civil Procedure section 526a in order to assert a claim that the local government took actions without voter approval. Notably, it was only the Plaintiff that addressed the issue of standing in its moving papers. The City did not discuss this issue in its opposition. And when it raised the issue at oral argument, it stated the same arguments were raised and rejected by the Court in its demurrer to the Complaint.

To obtain a preliminary injunction, Plaintiff must show: (1) that there is a reasonable likelihood of prevailing on the merits and (2) that the harm it will suffer if there is no preliminary injunction is greater than the harm that Defendants will experience if the Court issues the injunction. (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 677-678.)

As to the first element, Plaintiff's argument fails at this juncture for two reasons. One, the City presented sufficient evidence to show that the assessments at issue are not a tax. The term tax ordinarily refers to a compulsory payment made to the government to raise revenue for the government. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1325.) However, subsection (1) of section 1(e) of the California Constitution states that an assessment, like the BID assessments here, are exempt from the definition of a tax because they are "charge[s] imposed for a special benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit..." (Cal. Const., Art. XIII C, §1(e)(1).)

The BID Act authorized the levy of assessments on businesses, not individuals, to fund property-related improvements and activities. (Sts. Hwy. Code, §§36501-36503, 36522, 36527.) By enacting the BID Act, the California Legislature determined it was in the public interest to promote the economic revitalization and physical maintenance of business districts in the State's cities to facilitate the creation of jobs, to attract new businesses, and to prevent erosion of the business districts throughout the States. (Sts. Hwy. Code, §36501(b), (d).) BID assessments, are, therefore, not taxes for the general benefit of the City; rather they are assessments imposed on businesses to fund activities which confer a special benefit upon the businesses assessed. (Sts. Hwy. Code, §36501(e); *Howard Jarvis Taxpayers Assn. v. City of San Diego* (1999) 72 Cal.App.4th 230, 233-234.) Thus, the BID assessments appear to meet the requirements of Article XIII, section 1(e)(1).

Two, Plaintiff contends that the BID assessments are taxes that should have been subject to voter approval. However, the City presented evidence that the 18 BIDs at issue were formed prior to the adoption of Proposition 26. In addition, Proposition 26 has no retroactive effect. Furthermore, the term "imposed" has been interpreted to mean "the first enactment" of the tax or assessment. (See *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Comm.* (2012) 209 Cal.App.4th 1182, 1194-1195 fn. 15; *NetJets Aviation, Inc. v. Guillory* (2012) 207 Cal.App.4th 26, 32; *Diageo-Guinness USA, Inc. v. Bd. of Equalization* (2012) 205 Cal.App.4th 907, 913; *Goldman v. Franchise Tax Bd.* (2012) 202 Cal.App.4th 1193, 1203.) Thus, it is reasonable to assume that the term, as set forth in Article XIII C, section 1 subd. (e) of the California Constitution, has the same meaning. Thus, the BIDs have been

effectively grandfathered and are not subject to challenge under Proposition 26 for the life of the BID or until the BID levy is increased or extended.

With respect to the City's annual BID approvals, Government Code section 53750 subd. (h) defines "increase" as (1) an increase to the rate used to calculate the assessment; (2) a revision of the methodology by which the assessment is calculated; or (3) an adjustment of the assessment amount in accordance with a clearly defined formula for inflation. (Gov. Code, §53750(h)(1), (2).) The evidence presented by the parties did not establish that the City's annual BID approvals involved an increase.

The evidence presented by the parties did not establish that the City's annual BID approvals constituted a BID extension. A tax or assessment is extended when there has been a decision by an agency to extend the stated effective period of the tax or assessment; where there has been a decision to amend the tax or assessment; or where there has been a decision to remove a sunset provision or expiration date. (Gov. Code, §53750(e).) *Here*, the BIDs do not contain a sunset provision or an expiration date and the respective resolutions of formation for the BIDs expressly states that the BIDs were to be "levied annually to pay for all improvements and activities." In addition, the court's analysis in *White v. State* (2001) 88 Cal.App.4th 298, 316, does not assist Plaintiff since it was reviewing language pertaining specifically to taxes. *Here*, the possibility that the BIDs at issue are not taxes cannot be eliminated at this juncture for the reasons stated above. Thus, Plaintiff has not met its burden of establishing that the City extended the BID levy.

However, the Court agrees with Plaintiff that Article XIII, section 32 of the California Constitution only applies to actions against the state or an officer of the state, not local agencies. (See *City of Anaheim v. Super. Ct.* (2009) 179 Cal. App. 4th 825, 828.)

Thus, Plaintiff has not shown that it has a reasonable likelihood of prevailing on the merits.

As to the second element, Plaintiff has not shown that it has paid the BID. Furthermore, any harm to the general taxpayer is speculative. Furthermore, the City presented evidence via the City of San Diego Council Policy 900-07 that monies collected are immediately disbursed to pay for authorized activities. (RJN, Exh. C, p. 3.) Thus, it is reasonable to assume that the type of injunction that Plaintiff seeks would cause an immediate disruption to authorized activities of the improvement programs that rely on BID funds. It is well-settled that the purpose of injunctions is to maintain the status quo. Given the above, it is clear that the injunction that Plaintiff seeks would not do this.

Based on the foregoing, the motion is denied.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager