

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

MINUTE ORDER

DATE: 10/10/2023

TIME: 12:27:00 PM

DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal

CLERK: Calvin Beutler

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00029833-CU-WM-CTL** CASE INIT. DATE: 07/12/2021

CASE TITLE: **The Protect Our Communities Foundation vs City of San Diego [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 8/25/2023 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Petitioner's petition for writ of mandate is **GRANTED** in part as to the second cause of action and **DENIED** in part as to the third and fourth causes of action.

Preliminary Matters

The request for judicial notice by respondent City of San Diego ("City") and real party in interest San Diego Gas & Electric's ("SDG&E") of exhibits A through F is granted; petitioner The Protect Our Communities Foundation's relevancy objections to those exhibits are overruled.

The Court rules on petitioner's objections to James Baker's declaration as follows:

- Objection nos. 1 & 2 for lack of personal knowledge and lack of foundation: sustained.
- Objection nos. 3 -7: overruled.

Petitioner's objections to Hollie Bierman's declaration and exhibits are overruled.

Background

Petitioner brings its petition for writ of mandate under CCP section 1085 and asserts four causes of action: (1) violations of the California Environmental Quality Act ("CEQA"); (2) impermissible delegation of police power; (3) violation of competitive bidding mandates; and (4) unlawful imposition of special tax. The CEQA cause of action was bifurcated for hearing from the other causes of action. ROA # 55. On December 23, 2022, the Court denied the petition for writ of mandate on the first cause of action for violations of the CEQA. ROA # 62.

The Court requested supplemental briefing to respond to certain questions regarding the second through

fourth causes of action and scheduled a date for a continued hearing. ROA # 81. The Court thereafter held oral argument and took the matter under submission. ROA # 93. The Court discusses the remaining second through fourth causes of action below.

Discussion

In general, quasi-legislative acts are reviewed by ordinary mandate under CCP section 1085. *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848, citing CCP § 1085. Under section 1085, a court may issue a writ of mandate to compel an inferior entity or person to perform an act the law "specially enjoins" as a duty resulting from office, trust or station. CCP § 1085(a). The court reviews the public entity's decision for substantial evidence, and defers to the public entity's factual findings when they are supported by substantial evidence. *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 224. A court's review of an action by ordinary mandamus is "limited;" the court determines only whether the agency's action was arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. *Id.*

Impermissible Delegation of Police Power (2nd COA)

Petitioner alleges the City has a duty to set the franchises' terms and conditions to protect the public from adverse utility operation impacts. Pet. ¶ 62. Petitioner alleges the City impermissibly delegated its police powers in violation of the City Charter "by effectively giving SDG&E veto power and bargaining away the City's power to municipalize, to establish climate policy, to regulate the use and repair of public streets, and to otherwise protect the public from the harmful effects of SDG&E's operations." *Id.* ¶ 70. Petitioner alleges the City tied the hands of future Councils by approving terms that would make it harder for future councils to municipalize or terminate the franchises by requiring a two-thirds vote to terminate the franchises after 10 years, and by agreeing to termination requirements that would require monetary payments without ensuring the funds will be available. *Id.* ¶¶ 72, 74; Opening Brief ("OB") at 35-37; Reply at 20-22.

The City and SDG&E respond that the two-thirds vote agreement was permissible because the parties contractually agreed to it, the franchises were granted by a two-thirds vote, and the Charter does not prevent the Council from implementing higher vote thresholds. Joint Resp. Brief ("RB") at 12, 45-46. The City and SDG&E also argue that petitioner's position about the early termination financial terms ignores the contractual nature of the relevant terms and is based on speculation. *Id.*

The two Charter mandates at issue here provide that (1) all decision-making by the City Council proceed by majority vote unless expressly excepted from the majority vote requirement, and (2) that any franchise may be terminated whenever the City determines to acquire utility property necessary for the City's welfare. Charter §§ 15 ["Except as otherwise provided herein the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote..."], 104 ["...any franchise may be terminated by ordinance whenever the City shall determine to acquire by condemnation or otherwise the property of any utility necessary for the welfare of the City, such termination to be effective upon and not before payment of the purchase price for the property to be acquired"].

Here, the City's decision to impose a two-thirds voting requirement on franchise termination violates the express terms of Charter section 15. Although the City argues it was permitted to do so by contractual agreement, the City does not cite in its opening or reply briefs authority to support its position. In contrast, and as pointed out by Petitioner, "[a]ny act that is violative of or not in compliance with the

[C]harter is void.'" (002509-10; *Howard Jarvis Taxpayers Assn. v. City of Roseville ("Roseville")* (2003) 106 Cal.App.4th 1178, 1186, citation omitted.)

For the first time in its supplemental joint opposition, the City and SDG&E argue the Municipal Code expressly contemplates a "supermajority" may be required to pass certain ordinances. Supp. Jt. Opp. at 2, citing Muni. Code § 22.0101, Rule 7.3.2.(b). The cited Municipal Code section and rule pertain to the City Attorney preparing a resolution or ordinance in response to a properly initiated Request for Council Action. Muni. Code § 22.0101, Rule 7.3. At the hearing, the Court asked why this Municipal Code section would be applicable. The response by the City and SDG&E was an example of legislative discretion. Even if accurate, this does not support imposing the two-thirds voting requirement at issue here.

As to the City's early termination financial terms, petitioner has not shown these terms run afoul of Charter section 104 or section 99. See Charter § 99 ["City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent..."]. The record does not show that any indebtedness or liability has been incurred by the terms.

Accordingly, the petition for writ of mandate as to the second cause of action is granted as to severing the two-thirds vote termination requirements in the ordinances awarding the gas and electric franchises in ordinance number O-21327 at section 13(c) and 13(d). As a result, the ordinances are consistent with the terms of Charter 15, which provides for a majority vote. The two-thirds vote termination requirement in section 13(e) remains. Petitioner's request as to the early termination financial terms is denied.

Violation of Competitive Bidding Mandates (3rd COA)

Petitioner alleges the City has a duty to ensure all contracts are competitively bid. Pet. ¶ 80. Petitioner alleges the City's invitations to bid ("ITB") violated the public bidding requirements under the City Charter because they attached "one ordinance for companies that have a 'constitutional franchise' and one ordinance for those that do not." *Id.* ¶ 83; OB at 31-35. Petitioner alleges this unfairly gave companies with a constitutional franchise a competitive edge. *Id.* Petitioner also alleges the ITB violated public bidding requirements because the City changed the criteria in the ordinance terms after the bids were unsealed. Pet. ¶ 86. The City and SDG&E argue no evidence supports petitioner's speculation that no other party submitted a bid because the process was anti-competitive. RB at 11, 41-44.

The Charter requires contracts to be "competitively bid," and that the City shall not "favor one bidder over another...." Charter §§ 94, 100. Additionally, grants for franchises are to be made after "an opportunity for free and open competition" has been given. *Id.* § 103.

At the hearing, the City argued Charter section 94 is inapplicable because it only applies to public works contracts. However, the language in section 94 includes more than that: "Contracts for the construction, reconstruction or repair of public buildings, streets, utilities and other public works, for the provision of goods or services ... shall be competitively bid." Charter § 94.

Under the standard of review acknowledged by the parties, "close judicial scrutiny" is required due to "the potential for abuse arising from deviations from strict adherence to competitive bidding standards." *Eel River Disposal and Resource Recovery, Inc. v. Humboldt* (2013) 221 Cal.App.4th 209, 225, internal marks omitted. Here, the parties disagree whether SDG&E had a constitutional franchise. OB at 33 (arguing SDG&E does not have a constitutional franchise), RB at 43 (arguing SDG&E does possess a

constitutional franchise). The City did not tilt the playing field in SDG&E's favor by simply acknowledging SDG&E may be differently situated on this basis. 005785–005786; 005913–005914 (bidders to diligently seek necessary government approvals and demonstrate it had resources to provide utility services). Additionally, although the City required that other potential bidders agree to either pay to acquire the existing infrastructure or litigate against SDG&E about the existing facilities, this too did not tilt the playing field. *Id.*; see also AR 7121, 7145. As the City and SDGE point out, petitioners do not point to any evidence in the record to show that any other potential bidders were actually dissuaded from submitting a bid on the basis that the procedures were anti-competitive. Accordingly, the petition for writ of mandate on the third cause of action is denied.

Unlawful Imposition of Special Tax (4th COA)

Petitioner alleges the City has a duty to avoid imposing taxes without a vote of the people. Pet. ¶ 89; see also *id.* ¶ 90 (alleging that under Charter Section 76, a special tax may be levied only if it has been approved by a two-thirds vote of the qualified electors). Petitioner alleges the "3% charge, the Electric Franchise Fee Surcharge, the Municipal Undergrounding Surcharge, and the Gas Franchise Fee Surcharge are charges that do not fall within any of the enumerated exemptions and thus constitute a 'tax' within the meaning of the Constitution." *Id.* ¶ 93. OB at 40-45; Reply at 10-13, 23.

The City and SDG&E respond that the franchises' fees are not taxes and fall within exemption 1 and exemption 4 of the Constitution. The City has the burden of proof to prove, by a preponderance of the evidence, that a levy, charge or exaction is not a tax, the amount is no more than necessary, and the manner in which the costs are allocated are fairly or reasonably related to the payor's burdens or benefits received from the government entity. Cal. Const. art. XIIIC, § 1.

Exemption 1

Under the first exemption, a "charge" is not a tax if imposed "for a specific 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 or granting the privilege." Cal. Const. art. XIIIC, § 1, subd. (e)(1). Here, petitioner argues this exemption does not apply because the privilege being granted (i.e., the franchises) is given to SDG&E but the residents pay the charges; and the specific benefit (i.e., the utility services) is being conferred on the residents yet the City has not shown the charges do not exceed the reasonable costs. MPA at 41-42, citing 002638 [budget analyst presentation]; 000062 [defining Electric Franchise Fee Surcharge]; 00019 [defining Gas Franchise Fee Surcharge]; 007023-007024, 007029, 007033 [CPUC Resolution E-3788]; 007079 [D.89-05-063: "surcharge should be billed and collected by the utility...from...customers..."]; and (007105 ["City has presented no evidence supporting the reasonableness of the 3 percent fees"] and 007107 [CPUC finding City's franchise fees are higher than average]).

The City and SDG&E take the position this exemption applies because the privilege or benefit is SDG&E's right to use the infrastructure to provide the services, and that SDG&E is the payor, not the customers. Opp. at 52, citing 000019; 000022–23 [bid amount]; 000062–63; 000066 [bid amount for electric franchise] [paying for 3% gross receipts and undergrounding costs]. The Gross Receipts for the 3% charge is defined as "all gross operating revenues received by Grantee from the sale of gas to Grantee's customers with points of service within the corporate limits of the City ... plus all revenues collected from CPUC-authorized surcharges rendered solely upon the ratepayers within the City..." 000019-000020. This indicates that SDG&E did not assume the burden to pay the surcharges; rather, the surcharges were imposed and paid by the residents. The City and SDG&E thus have not met their burden to show exemption 1 applies.

Exemption 4

Under the fourth exemption, a charge is not considered a "tax" if "imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." *Id.* § 1, subd. (e)(4).) Petitioner argues this exemption does not apply because the residents pay the charges but are not paying to use the City's streets, as the public already has the right to use City streets. OB at 42.

The City and SDG&E respond this exemption applies because the fees are paid in exchange for SDG&E's use of the public streets to distribute the utility services, which falls within the carve-out for use of local government property. RB at 50. The City and SDG&E's position on this exemption is adequately supported. (000016, 000018–000021; 000059, 000062–000065 (franchise fees paid for SDG&E's use of the public streets for facilities, pipes, poles, wires, conduits and appurtenances); *Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 795 (discussing cases in which exemption 4 applied to electric utility franchise fees paid for the use or lease of government property). Accordingly, the City and SDG&E have met their burden to show exemption 4 applies, such that the fees do not impose taxes and are not subject to constitutional requirements for taxes. The petition for writ of mandate on the fourth cause of action is denied.

Conclusion

For the reasons stated, petitioner's petition for writ of mandate is **GRANTED** in part as to the second cause of action and **DENIED** in part as to the third and fourth causes of action.

The minute order is the order of the Court.

Parties are directed to meet and confer about the contents of the proposed writ.

The clerk to serve notice.

IT IS SO ORDERED.



Judge Katherine Bacal