

COURT RULING:

Building Industry Association of the Bay Area, fka Home Builders Association of Northern California, Inc., v. City of Santa Rosa (SCV-244441): Building Industry Association of the Bay Area, fka Home Builders Association of Northern California, Inc. (Home Builders Association) has facially challenged the constitutionality of a local city ordinance—Santa Rosa City Ordinance 3902. The targeted 2008 enactment requires certain nonexempt real property owners to vote in favor of annexation into a special municipal tax district if they want to obtain discretionary land-use permits for residential development.

Home Builders Association contends that this ordinance is a severe interference with a land owner's right to cast a no vote on the issue of annexation into a special tax district, eviscerating a fundamental right, denying them equal protection of law. In response, the defendant City of Santa Rosa (the City) procedurally questions plaintiffs' standing to sue and its statutory entitlement to pursue this invalidation action; the City also asserts that the ordinance passes constitutional muster.

Both sides have stipulated to the relevant facts, and there are cross-motions for summary judgment or for summary adjudication. Code of Civil Procedure section 437c. The case is ripe for a summary ruling, a ruling for or against the motions as a matter of law.

The association plaintiff does have standing to raise the constitutional challenges. *American Meat Institute v. Leeman* (2009) 180 Cal. App.4th 728, 739 n.11. Some of the members of Home Builders Association would have standing to sue as individuals, the constitutional issues championed through this lawsuit are relevant to the purposes of the association, and the facial attack upon the ordinance and the relief being requested do not require a different kind of action.

The case is not barred by any statute of limitations or by the reverse validation statute. Even if the controlling statute of limitations is a 30-day time period incorporated in the City's Special Tax Financing Code, this action was timely filed. Ordinance 3902 was adopted on December 2, 2008, becoming effective on December 31, 2008. Home Builders Association filed a pre-adoption protest letter on November 14, 2008, filing an invalidation complaint on January 30, 2009.

This is not a reverse invalidation action within the meaning of Code of Civil Procedure section 863, mandating prompt publication of summons as a jurisdictional matter (something not satisfied at the beginning of this litigation). Whether this peculiar, strict procedure applies to a particular complaint brought against a government entity depends upon whether a specific statute says it does. *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 31.

The solitary statutory candidate for this fact pattern appears to be Government Code section 50077.5. That statute makes the reverse invalidation protocol applicable to an action that would, *inter alia*, attack, review, set aside, void, or annul an ordinance approved by the voters that levies a special tax or that modifies or amends such an ordinance. The special tax is by definition levied for general revenue purposes within the authority of California Constitution Article XIII A, necessitating approval by two-thirds of the impacted city voters.

Ordinance 3902 was not enacted by city voters, and it does not levy a new, special tax by way of a real-life, future election. Instead, because of articulated budgetary problems, it creates a land-use condition that will affect only certain nonexempt property owners with developable land located inside the zone

of potential annexation, effectively forcing those would-be-developers to personally waive their rights to vote in a meaningful election, thereby acceding to being subjected to special taxation if they wish to be eligible for desired building permits. Thus, the local election contemplated by Government Code section 50077 will never occur. According to a City form, this so-called waiver or consent constitutes voter approval. The inferable design of the attacked ordinance is to deny an election to targeted municipal voters. Therefore, this is not at all a reverse validation action under section 50077.5.

Times are tough for cities, times are tough for builders; cities need to increase their general revenue, builders need to lessen their overall costs. The City, as a charter municipality, certainly does have an array of options for revenue generation, including the possibility of seeking voter approval for an augmented sales tax or of creating appropriate new fees on upcoming development within its jurisdiction. While this court acknowledges that all of the choices present unique difficulties, the real issue now is whether a land-use condition was inadvertently imposed in contravention of fundamental voter rights so as to not be able to withstand constitutional scrutiny, remembering that “[a] statute is presumed to be constitutional until the contrary appears.” *Fox Bakersfield Theater Corporation v. City of Bakersfield* (1950) 36 Cal.2d 136, 141-142. Has the contrary appeared? That is the question.

“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure ...” *Burdick v. Takushi* (1992) 504 U.S. 428, 433. Moreover, it is clearly conceded by the City that certain land owners’ rights to vote on the subject of special taxation are squarely impacted by Ordinance 3902, rights guaranteed by the California Constitution and earlier city ordinances, rights that were never repealed, rights that are therefore protected by the U.S. Constitution.

On March 11, 1992, the City of Portland passed an ordinance that required “nonresidents to consent to annexation as a condition of receiving a subsidy, or reduction in hook-up costs, for mandated sewer connections;” this was challenged by some homeowners as a violation of their right to equal protection under the Fourteenth Amendment due to the law’s distortion of the right to vote. *Hussey v. City of Portland* (1995) 64 F.3rd 1260. The Ninth Circuit Court of Appeals struck down the ordinance, finding that it was not simply a reasonable restriction that improved the integrity or reliability of the electoral procedures, holding that it distorted “the political process by granting substantial subsidies based solely on whether a voter consents to annexation,” doing all of that without the benefit of a compelling governmental interest and without the use of least restrictive means. *Ibid.* at 1265, 1266.

Like the homeowner-voters in *Hussey*, the land-owner-voters here are effectively being denied equal protection of law in regard to the right to vote against annexation into a special tax district. Their right to vote is being severely interfered with: “The right to vote would be empty indeed if it did not include the right of choice ...” *Zeilenga v. Nelson* (1971) 4 Cal.3rd 716, 721. The voter choice under Ordinance 3902 is dramatically warped. And there has been no sufficient showing that this ordinance is supported by a compelling government interest and that the deprivation of voting rights is the least restrictive means of achieving such an end.

Furthermore, it seems that the express conditioning of the receipt of land-use permits upon the surrender of voting rights amounts to an unconstitutional enactment under *Robbins v. Superior Court* (1985) 38 Cal.3rd 199, 213. The City has not justified that weighty exchange.

The court will grant summary judgment for Home Builders Association, denying the City’s cross-motion. Consequently, the court will provide both declaratory and injunctive relief as requested by the plaintiff; the prospect of a writ of administrative mandamus will be reserved.

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Judge not a fan of new home tax

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THE PRESS DEMOCRAT

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A judge has indicated he is inclined to rule against the City of Santa Rosa in a case challenging the constitutionality of a special property tax surcharge imposed on people who buy new homes.

Sonoma County Superior Court Judge Mark Tansil issued a tentative ruling Monday saying he planned to side with the Homebuilders Association of Northern California in its case to block the city's new tax.

After hearing additional arguments from attorneys in the case Tuesday, the judge postponed a final ruling until Sept. 28.

The case involves a 2008 city ordinance that seeks to raise revenue from new home communities by requiring developers to join a special taxing district before they can get development permits.

The goal is to ensure that the city raises enough revenue from new home construction to cover the additional cost of expanding city services to new neighborhoods. The ordinance would oblige the eventual homeowners to pay a property tax surcharge of \$430 a year.

But the homebuilders argued that the law unfairly coerces developers into voting in favor of tax increases.

Tansil agreed. He wrote that it appeared unconstitutional to require landowners to give up their voting rights in exchange for land-use permits.

"The City has not justified that weighty exchange," he wrote.

City officials cite the state Mello-Roos Act of 1982 as allowing cities to establish special districts "and levy special taxes approved by the voters to provide municipal services."

At the time the law was enacted, the city estimated that 14,000 new homes, condominiums and apartments would be built by 2020, generating \$4.8 million in additional surcharge revenue for the city.

But Tansil called "voter choice" under the ordinance "dramatically warped," and said the city had not shown that "the deprivation of voting rights is the least restrictive means of achieving such an end."

City Attorney Caroline Fowler said the judge's ruling is tentative and may change by next month. She said he requested both sides file additional briefs on four issues, including whether the builders followed the proper procedure for opposing a local ordinance.

Paul Beard, who represented the homebuilders, said he was heartened the judge agreed with the heart of their complaint, and believed he could prevail on the procedural issues, which include whether the suit was sufficiently noticed in newspapers.

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