

14
Tentative Ruling

Re: **Vagim, et al v. Fresno Redevelopment Agency, et al**
Superior Court Case No. 06CECG01795

Hearing Date: April 12, 2007 (Dept. 52)

Motion: Cross-motions for summary judgment

Tentative Ruling:

To deny both requests for summary judgment. To grant Defendants' objections to Declarations of Doug Vagim and Gary Lanfranco

Explanation:

The court first notes that the procedural posture of these cross-motions make it difficult to decide the issues the parties both agree can and should be decided by summary judgment. While the complaint includes three separate causes of action involving somewhat different essential elements, and while defendants' arguments relate to four separate affirmative defenses which defendants' contend operate as a complete defense to plaintiffs' claims, neither side has requested summary adjudication of any specific cause of action or affirmative defense.

While a finding that the 2006 Ordinance was not supported by "substantial evidence" might entitle plaintiffs to summary adjudication of their 1st and 3rd causes of action, it would not necessarily entitle them to judgment on their 2nd cause of action, which asks the court to declare that any attempt to employ the powers of eminent domain against Mr. Lanfranco's property in the absence of a valid determination of blight is a violation of Article I, §19 of the California Constitution.

Additionally, while both sides have offered a statement of facts supporting the arguments made in their respective motions, neither side has included in their opposition to the other side's motion a statement of facts responding to the facts offered by their opponents, as clearly required by CRC Rule 3.1350(h), and CCP §437c(b)(3).

It appears then that while the facts are not disputed, it is the application of the law to those facts on which the parties disagree. Based on the facts identified in each party's separate statement, as well as the administrative record that both sides have stipulated is the *only* evidence relevant to the issues in this case, the court is asked to decide whether, based on the nature of the 2006

amendment to the Chinatown Redevelopment Plan, additional findings were warranted and, to the extent that additional findings were warranted, whether the findings included in Ordinance 2006-40 were sufficient and were supported by substantial evidence.

As part of defendants' motion, the court is also asked to decide whether Doug Vagim has standing to pursue this validation action, whether both plaintiffs have exhausted all available and necessary administrative remedies, and whether this action is barred by the conclusive presumption "that the project area is a blighted area as defined by §33031 and that all prior proceedings have been duly and regularly taken."

Standing

On the "standing" issue, defendants concede that Mr. Lanfranco has standing and the only question is whether Mr. Vagim's status as a resident and taxpayer of the City of Fresno gives him standing to bring a validation action as well. The main case relied on by defendants in claiming that Mr. Vagim lacks standing is *Torres v. Yorba Linda* (1993) 13 Cal.App.4th 1035. But *Torres* is distinguishable because the plaintiffs there were found not to live in the city in which the redevelopment project was located and their alternative claim, that they paid sales tax in the City, was held unavailing because sales tax is considered to be paid by the business, not the customer.

Here, even without the declaration offered in support of plaintiffs' motion (to which defendants have objected, and which objections have been sustained, based on the parties' stipulation that the **only** relevant evidence is that included in the administrative record), the complaint alleges (and defendants do not appear to dispute) that Mr. Vagim is a resident and taxpayer in the City of Fresno, the same City in which the redevelopment project is located.

The standing of a plaintiff based on his status as resident and taxpayer of the subject city was upheld in *Regus v. City of Baldwin Park* (1977) 70 Cal. App. 3d 968, where the court explained its reasoning as follows:

Plaintiffs have standing to bring a validation action and a taxpayer's action to challenge the Project. In *Sweetwater Valley Civic Assn. v. City of National City* (1976) 18 Cal.3d 270, the California Supreme Court, without discussion of standing, entertained a civic association's attack on a redevelopment project for an area consisting of a golf course and vacant land, where plaintiff ownership of property within the project area was not alleged and where ownership was unlikely because another entity owned 115 of 130 acres within the project. In upholding suit the court noted that §33501 specifically authorizes judicial review of the validity of a redevelopment project by the procedure set out in CCP §§860 ff., and that CCP §863 allows "any interested person" to bring such an action. Plaintiff in *Sweetwater* alleged that its members were taxpayers, residents, and property owners of Sweetwater Valley, an allegation comparable to that of

plaintiffs at bench, who assert they are residents and taxpayers of the City in which the redevelopment project is located.

Standing to initiate a validation proceeding was likewise upheld in **Card v. Community Redevelopment Agency** (1976) 61 Cal.App.3d 570, on the stipulation that plaintiffs were citizens, residents, and taxpayers of the city and "interested in the matter of the amendments to the redevelopment plans for the Monterey Hills Project No. 1." (*Id.* at 575, fn. 6.) The stipulation in **Card** did not declare that plaintiffs owned property within the project area. *We think it unlikely the Legislature intended to limit review of such projects to actions initiated by the agency itself or by residents of the project area, given the presumptively disadvantaged and blighted condition of a redevelopment project area, which may be largely vacant or in a state of disrepair and disuse.* As taxpayers of the City of Baldwin Park and of the County of Los Angeles, plaintiffs have a financial interest in the outcome of this proceeding, in that the tax increment financing of the Project will divert tax revenues from the taxing agencies to which plaintiffs pay taxes to the treasury of the Redevelopment Agency. Such a financial interest is likely to motivate plaintiffs to prosecute the action vigorously and provides sufficient basis to give them standing. (Citation omitted.) Moreover, a validation action under CCP §§ 860 et seq., and a taxpayer's action under CCP §526a are not mutually exclusive. Both actions may be brought against a redevelopment project if suit is filed within the 60-day period prescribed for the validation action. (Citation omitted.) We conclude that plaintiffs as resident taxpayers of City and county, who allege illegal diversion of municipal and county funds to finance the Project, have standing to maintain the action.

Regus v. City of Baldwin Park, supra, 70 Cal. App. 3d at 971-973.

While neither side has identified whether the redevelopment authorized in the 2006 plan will involve expenditure of money raised from city taxpayers, **Regus** appears to be the most applicable authority on the issue of standing. Additionally, even if the court were to find that Mr. Vagim lacks standing, that would not be a complete bar to the action since they concede that Mr. Lanfranco has standing. Thus defendants are not entitled to summary judgment based on their 4th affirmative defense.

Exhaustion of Administrative Remedies

Defendant's fifth affirmative defense is that this action is barred by the failure of both plaintiffs to have exhausted all available administrative remedies. In relation to Mr. Vagim, they note that the record is devoid of any evidence that he participated at all in the administrative process leading up to the 2006 Ordinance, and in relation to Mr. Lanfranco, they claim that his failure to have sought either an "owner-participant agreement" or a "variance" as to his specific property prevents him from challenging the validity of the 2006 Amendments to the Redevelopment Plan.

In relation to Mr. Vagim, it appears undisputed that he did not offer any objections to the 2006 Amendment, either in writing or orally at the hearing. While plaintiffs cite *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137, as holding "an individual challenging a redevelopment plan need not have personally raised each issue at the administrative level, but may rely upon issues raised or objections made by others," in that case the plaintiff did participate in the hearings and protest before the plan was adopted even if she didn't personally raise each issue on which her lawsuit was subsequently based.

On the other hand in *Citizens for Open Government v. City of Lodi, supra* (2006) 144 Cal. App. 4th 865, 875, the court held that "the availability of judicial review is restricted to parties who have objected to the agency's approval of the project," and that "a petitioner need not have articulated every basis for objecting to the project, *but must have participated in the administrative process.*" Thus Mr. Vagim's failure to have participated in the administrative process bars him from seeking relief from this court. However again, his failure to have exhausted administrative remedies is not dispositive of this validation action, as long as Mr. Lanfranco's claims are not similarly barred.

While defendants also claim that Mr. Lanfranco's failure to have attempted to reach an "owner-participant agreement" or sought a variation from the mandates of the plan, they have cited no authority holding that a person objecting to a redevelopment plan must first seek a variance or an owner-participant agreement in relation to his or her specific property. The adoption of a redevelopment plan is a **legislative** act applicable to everyone in the covered area, not an adjudicative act applying a policy to a particular person or property.

Thus the "exhaustion" requirement would not include actions taken to exempt a particular property, since the validation action challenges the validity of the plan as a whole, not its application to the plaintiff's property. And under *Evans v. City of San Jose, supra*, 128 Cal.App.4th at 1137, all that appears to be required is that at least one of the plaintiffs raised the issue on which the validation action is based with sufficient specificity to put the public entity on notice and to address it during the administrative process.

Here the record shows that Mr. Lanfranco did raise the objections on which this action is based during the course of the administrative process. That is sufficient to satisfy the requirement that his administrative remedies be exhausted, and defendants are not entitled to summary judgment based on their 5th affirmative defense.

Statute of Limitations

Defendants' second affirmative defense is that this action is barred by the statute of limitations, referring to the statement in Health & Safety Code §33368 that "the decision of the legislative body shall be final and conclusive, and it shall

thereafter be conclusively presumed that the project area is a blighted area as defined by §33031 and that all prior proceedings have been duly and regularly taken.”

It appears to be defendants’ position that because the City Council determined, first in 1965, and then again in 1986 and 1998, after review of extensive evidence and reports on the condition of the Chinatown Redevelopment Area, that the area was blighted and that the prior redevelopment plans were “necessary,” any challenge to those prior findings is time barred.

It is apparently also their position that since the prior version of the Plan included the possibility of use of eminent domain as a tool for acquiring properties, there was no significant change between the 2006 Amendments and the previous versions that would “warrant” new findings and require new supporting evidence pursuant to §33457.1.

The “undisputed facts” defendants offer in support of this affirmative defense include fact #14, that the previously adopted 1986 plan authorized the RDA to acquire all property (including Lanfranco’s) within the project area to be acquired by eminent domain, *subject to adoption of an acquisition and relocation plan*. See pages 689-691 of the stipulated record.

But fact #25 acknowledges that the 1998 plan limited the property that could be acquired by eminent domain to “vacant parcels, parcels with vacant buildings and/or, in the sole discretion of the Agency, severely blighting parcels as shown on acquisition plan map.” See also fact #28 at page 31 of the separate statement. And fact #29 acknowledges that while one of Lanfranco’s parcels was in the area that could be acquired, the tavern parcel was designated “property not to be acquired subject to owner participation.”

Fact #30 states that the 1998 plan extended the eminent domain power another 12 years to 2010. Fact #45 acknowledges that the 2006 amendment extended this power to 12 years from 2006, or 2018 (8 years longer than previously established). It also acknowledges that it extended the power to acquire property through eminent domain to all of the property in the 180 acre project area.

While the 2006 amendments state that the Agency will try to negotiate with the owner first, under *Redevelopment Agency of the City of Chula Vista v. Rados Bros.* (2002) 95 Cal.App.4th 309, the enactment of a valid Redevelopment Plan that includes the power to acquire unblighted property for redevelopment purposes means the City would be entitled to acquire Lanfranco’s property for transfer to a private developer, something it could not constitutionally do without a valid redevelopment plan in place.

Thus there does appear to be a "significant" change between the 1998 plan and the 2006 amendments. And while defendants suggest the holding in *Blue v. City of Los Angeles* (2006) 137 Cal.App.4th 1131 supports their position that the City had discretion to determine pursuant to §33457.1 that "new findings" were not "warranted," the *Blue* court held that an amendment to an existing redevelopment plan that did nothing more than extend the time in which the Agency could acquire, by eminent domain, property on which no one lawfully resided, **did** require new findings of continuing blight in the project area. It reasoned:

Health & Safety Code §33457.1 provides in relevant part: "To the extent warranted by a proposed amendment to a redevelopment plan, (1) the ordinance adopting an amendment to a redevelopment plan shall contain the [blight] findings required by §33367"

Reconciling §§ 33368 and 33457.1, *Boelts* explained: "original blight findings remain conclusive under §33368 until a timely validation action brought pursuant to an amendment (if such findings are warranted under §33457.1), but, by the very terms of §33368, only until then." (*Boelts v. City of Lake Forest* (2005) 127 Cal.App.4th 116, 131.)

Guided by *Boelts*, we conclude the original blight findings were no longer conclusive and that given the amendment to the redevelopment plan, *new findings were warranted*.

Blue v. City of Los Angeles, supra, 137 Cal. App. 4th at 1149.

Since this validation action was "timely" brought under §33500, the conclusive presumption that the project area is "blighted," and that all requirements for a redevelopment plan have been met, no longer applies, and since the changes in the 2006 Amendment are at least as significant as those considered by the City of Los Angeles in *Blue*, some new findings were "warranted."

The court therefore finds that defendants are not entitled to summary judgment on statute of limitations. The remaining issue then is the same as in *Blue*, i.e. whether the "findings" of the City Council at the 4/4/06 hearing were supported by "substantial evidence."

Validity of 2006 Ordinance

Even though the City's 2006 Ordinance asserts, at several places, that no new findings are "warranted" or necessary because previous findings of blight and of inability of private enterprise to resolve the problems were presumed under §33368 to be conclusive, it nevertheless notes that staff had presented substantial evidence of remaining blight in the existing and added acquisition area and claims that the 2006 report, the staff report, and documents submitted to the Council in support of the 2006 amendments "contain the elements under

§33352 warranted by the 2006 amendments.” See e.g. stipulated record at pages 8 and 14.

It then makes specific findings that:

- 2.3 significant blight continues within the existing and added acquisition area;
- 2.4 the combination of blighting conditions within the Project Area continues to cause a reduction of, or lack of, proper utilization of the properties and affects the added acquisition area and the existing acquisition area to such an extent that it constitutes a serious physical and economic burden on the City that cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment; and
- 2.5 authorizing the power of eminent domain in the added acquisition area and extending the time for exercising the power in the existing acquisition area will help the Agency effectively implement the Redevelopment Plan to carry out the goals and objectives of the Project area by providing a necessary tool for site assembly, as needed, to complete public improvements and to implement and continue redevelopment programs necessary to help alleviate the remaining blighting conditions and to promote and stimulate new private investment in the Project Area.

The “continuing conditions of blight” are described in §3.3 of the 2006 report, beginning at page 23. This section of the report describes the June, 2005 “windshield” study, summarizing and providing specific examples of several categories of “blight” as defined in §33031. Specifically the 2006 Report focuses on three categories of “physical” conditions of blight included in §33031(a), and one category of “economic” blight included in §33031(b). §3.3.1 of the report addresses “deterioration/dilapidation;” §3.3.2 addresses “obsolescence;” §3.3.3 addresses “incompatible uses;” and §3.3.4 addresses “vacancies.”

However while the Report offers some anecdotal examples of properties that appear to fall into one or more of these categories, it lacks any quantification of how many severely blighted, abandoned or vacant parcels remain, it fails to quantify the increase or decrease in property values or compare the resale price or lease rates of properties in the Redevelopment Area to comparable properties in non-blighted areas of the City, it fails to offer information on the number of permits for new construction or rehabilitation of existing structures that had been pulled since the last Project Amendment, and it fails to offer any statistics concerning crime rates, building code violations or numbers of properties that no longer conform to amended zoning ordinances.

Plaintiffs object to both the use of the “windshield survey” and the lack of quantification or in depth examination of buildings, claiming the report is too general to satisfy statutory requirements. They claim that use of “windshield

surveys" is per se inadequate, citing *Graber v. City of Upland* (2002) 99 Cal.App.4th 424, 440-441, and *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (200) 82 Cal.App.4th 511, 539, fn. 8.

While neither of those cases specifically disallowed evidence gathered from exterior observations, in both cases reliance on such evidence was criticized because a visual inspection of the outside of buildings, using vague criteria such as peeling paint, lack of maintenance, etc., was found to be insufficient to establish that a building was "defective" or "unsafe." See, e.g. discussion in *Graber v. City of Upland, supra*, 99 Cal. App. 4th at 440-442.

See also *Beach-Courchesne v. City of Diamond Bar* (2000) 80 Cal.App.4th 388, where the court held that "incompatible use" within the meaning of §33031(a)(3) must "prevent the economic development of those parcels or other portions of the project area," and that mere examples of incompatible use without documentation of such an effect cannot support a finding of blight. It explained:

[A]fter scrutinizing the city council's findings and the Agency's report to council, we reach the same conclusion as the court in *County of Riverside*. "[A]fter sifting through the general commentary that comprises much of the redevelopment report, we discover there is little substantive material to be gleaned. Although the report speaks in the statutory language used to define blight, the report offers little concrete evidence of actual conditions of blight." (*County of Riverside, supra*, 65 Cal. App. 4th at 626-627.) The asserted conditions of physical blight are set forth in conclusionary and summary terms. The purported physical blight is discussed only in generalities, without any showing of the extent to which the alleged blighting conditions have prevented or substantially hindered the economically viable use of the properties.

80 Cal. App. 4th at 403.

And here, unlike in *Blue v. City of Los Angeles, supra*, 137 Cal.App.4th 1131, there is no specific evidence offered to support the finding that "private enterprise acting alone cannot reasonably be expected to eliminate blight and redevelop the project area." There, the court noted that the evidence showed that there had been relatively few building permits issued for project in which the Redevelopment Agency was not involved, that office vacancies in the project area were high and lease rates low, and that properties in the project area were selling for less than similar properties elsewhere.

Based on such evidence the *Blue* court was able to find that substantial evidence supported the City's conclusion that "the project area is still not sufficiently desirable or compelling to private enterprise and that continued efforts by the CRA are needed to eliminate blight in the project area." 137 Cal.App.4th at 1153. No similar evidence was before the City Council in this case.

