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S151370

IN THE SUPREME COURT OF CALIFORNIA

BONANDER et al.,

Plaintiffs and Appellants,

v.

TOWN OF TIBURON et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal,
First Appellate District, Case No. A112539

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE BRIEF

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT,

Leave is hereby requested to file the accompanying Brief of Amicus Curiae on behalf of the Howard Jarvis Taxpayers Association in support of Appellants, Jimmie D. Bonander, *et al.*, in this action.

APPLICANTS' INTEREST

The Howard Jarvis Taxpayers Association (HJTA) is a nonprofit public benefit corporation comprised of over 200,000 California taxpayers. HJTA has appeared several times before this Court as counsel of record or amicus in other cases.

HJTA considers litigation a last resort. Our resources are limited and litigation is expensive, for both sides (and usually, in our cases, both sides are funded by taxpayers). Not to mention the fact that California's courts don't need more work.

When we believe a governmental agency is violating public rights, therefore, we always try to negotiate a resolution without litigation. But out-of-court settlements are possible only when time allows. The increasing tendency of courts to sustain demurrers on grounds that taxpayer actions should have been commenced within 60 days under Code of Civil Procedure sections 860 *et seq.* is requiring us more and more to sue first, and ask questions later.

Such a rule drives up legal costs, increases the volume of frivolous lawsuits by requiring hasty action before a thorough investigation of the facts or law can be completed, makes compromises unlikely, leading to more polarization of communities, and results in many real and serious violations of public rights never being corrected because section 860's short statute of limitations expires before such violations are brought to the

attention of any group capable of acting on them.

HJTA has a direct interest, therefore, in this Court's interpretation of section 860 as it pertains to taxpayer litigation. Our interest is to protect the taxpayer's right to petition for redress, and to ensure that disputes regarding the exercise of government power are resolved according to the rule of law.

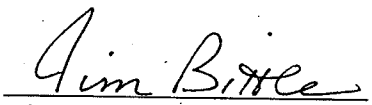
HOW THIS BRIEF WILL ASSIST THE COURT

HJTA's brief will examine Streets and Highways Code section 10601 in greater detail than did the Court of Appeal, considering factors and points of legislative history that have not been developed by the parties.

DATED: November 8, 2007.

Respectfully submitted,

TREVOR A. GRIMM
JONATHAN M. COUPAL
TIMOTHY A. BITTLE



Timothy A. Bittle
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THE COURT OF APPEAL MISINTERPRETED STREETS & HIGHWAYS CODE § 10601

This is an easy case. The question is whether a property owner who believes he has been unlawfully assessed under the Municipal Improvement Act of 1913 must sue the whole world through a validation action. As will be shown, the answer is no.

As explained by this Court in *City of Ontario v. Superior Ct.* (1970) 2 Cal.3d 335, 340-41, the validation statute may be used by public agencies as a shield, to *establish* the validity of a financial instrument or contract, or it can be used by taxpayers as a sword, to *challenge* the validity of a financial instrument or contract.

It is important to note, however, that no sane taxpayer would voluntarily choose to fashion his case as a validation action. The validation statute presents several traps for the unwary, with no advantage to be gained. Validation actions are procedurally unusual, which means the affected taxpayer should hire an attorney who is familiar with the validation process. But since the taxpayer himself probably does not know what a validation action is, or that his case must take that form, he also will not realize that he should hire a special attorney. The attorney he does hire may not remember from law school what an *in rem* action is, or realize that if the agency hasn't filed a validation action by Day 59, then he must file one tomorrow, or realize that the defendant is not the assessing agency but rather "all persons interested," or know that summons must be by publication, or that the newspaper must be adjudicated of general circulation, or that since the procedure is jurisdictional, any mistake will be irreversible. Besides this minefield of procedural pitfalls, there are the potential extraordinary costs

involved when you invite the whole world to answer your complaint. Because of the hardships presented when taxpayers must follow the validation procedures, this Court indicated in *City of Ontario* that it would construe narrowly the statutory instances requiring use of the validation action. 2 Cal.3d at 342.

With that in mind, we turn to Streets and Highways Code section 10601, the section of the Municipal Improvement Act addressing the applicability of the validation statute. It states that a validation action "may be brought by the legislative body or by the contractor." "*Notwithstanding any other provisions of law*," it continues, "the action authorized by this section shall *not* be brought by any person other than the legislative body or the contractor."

This limitation on who may bring a validation action has, in one form or another, been part of this statute since the Act's adoption in 1913. *See West's Historical and Statutory Notes*, St. & Hy. Code § 10601. Since the State Archives do not house legislative history materials for statutes enacted prior to 1943, amicus was unable to find any extrinsic evidence of original legislative intent.

However, resort to external indicia of legislative intent is necessary only when the statutory language is ambiguous (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 407) and here, there is really nothing ambiguous about section 10601's plain language. The validation statute may be utilized by the legislative body or the contractor, but no one else.

The legislative body desiring to finance a public improvement, and the contractor who won the bid to build that improvement, are on the same side; each being interested in protecting the assessment, the bonds, and the contract from future lawsuits. The Legislature, wanting to allow the legislative body or

the contractor to use the validation statute as a *shield*, provided that such an action "may" be brought by one of them. However, perhaps in recognition of the hardships taxpayers face under section 860, the Legislature did not require challengers to use section 860 as a sword.

It is well settled that a construction which results in surplusage is disfavored. *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55. Since the first sentence of section 10601 already allows that "[a]n action to determine the validity of the assessment ... may be brought by the legislative body or by the contractor," the last sentence would be mere surplusage if it did no more than repeat the same authorization without also banning all other application of the validation statute. But that is what the Court of Appeal held.

The Court of Appeal listed its own policy reasons for rendering surplusage the Legislature's policy that "Notwithstanding any other provisions of law, the action authorized by this section shall not be brought by any person other than the legislative body or the contractor."

First, the Court argued that limiting the validation statute to its use as a shield under the 1913 Act "would lead to the odd result that the procedures in litigation to determine the validity of governmental acts would vary depending upon who filed the action. Whereas a public agency and a contractor would have to publish the summons in such an action, any other interested person could simply serve the summons on the public agency and any other named parties without having to comply with the publication requirements." *Bonander v. Town of Tiburon* (2007) 55 Cal.Rptr.3d 184, 199.

Despite the Court finding it "odd," there is an obvious good reason why the procedures should vary. As mentioned earlier, the public agency and

the contractor are on the same side. Their interest is in insulating the assessment, bonds, and contract from future attack. But since they have no idea who might bring a future attack, the only way to serve their lawsuit is by publishing summons for all to see, and inviting contestants to identify themselves by answering the complaint.

Not so, however, if a taxpayer challenges the validity of the assessment, bonds, or contract. He knows exactly who levied the assessment, issued the bonds, and executed the contract. It is not necessary for him to advertise for a defendant. Logically, he should be able to, in the words of the Court of Appeal, "simply serve the summons on the public agency and any other named parties without having to comply with the publication requirements." *Bonander*, 55 Cal.Rptr.3d at 199-200.

Although this policy may seem odd to the Court of Appeal, policy-making is the prerogative of the legislative, not the judicial branch of government. "As a court ... our task is to apply the laws that the Legislature has enacted, not those it could have enacted but did not. Thus, no matter how tempting, this court cannot ... stretch[] the language of [the] section." *People v. Bransford* (1994) 8 Cal.4th 885, 902.

Besides finding it odd that only the agency or contractor must publish summons, the Court of Appeal also complained that validation actions brought by an agency or contractor "would be conclusive and binding on everyone, whereas an action filed by any other interested person ... would yield a result binding only upon the parties to the litigation." *Bonander*, 55 Cal.Rptr.3d at 200.

The Court seems to be suggesting that the agency and the contractor could never have certainty because, even if they prevailed in litigation brought by one taxpayer, the contract, bonds, and assessments would remain

vulnerable to suits by other taxpayers who were not parties to, and therefore not bound by, the prior litigation.

The easy answer to this objection is that, if the agency and/or the contractor want certainty, they can bring a validation action under section 860! That's why it's there. Even if they do nothing, once the 30 day statute of limitations expires, assessments levied under the 1913 Act are safe (St. & Hy. Code § 10400), as are bonds if the agency makes an election under section 10600 to apply the provisions of the 1911 Act (see St. & Hy. Code § 5660).

The final reason offered by the Court of Appeal for requiring taxpayers to comply with the validation statute is that "section 863 of the Code of Civil Procedure ... provides that an interested party may file such an action in any case in which the public agency could have filed a validation action but did not. ... Because section 10601 authorizes a public agency to bring a validation action, an interested person may file a reverse validation action under Code of Civil Procedure section 863." *Bonander*, 55 Cal.Rptr.3d at 200.

The Court of Appeal completely ignored the most important part of section 10601: "*Notwithstanding any other provisions of law*," it says, "the action authorized by this section shall not be brought by any person other than the legislative body or the contractor." Section 863 is an "other provision of law." Notwithstanding section 863, then, no person other than the legislative body or the contractor may file suit under the validation statute.

The general existence of section 863 in the Code of Civil Procedure cannot be viewed as legislative intent that persons other than the legislative body or contractor may file suit despite the specific provision in the 1913 Act

barring such suits. Besides the rule that specific provisions trump general ones (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310), the 1913 Act was not linked to the validation statute until 1961. Prior to 1961, the 1913 Act contained its own validation procedure which only legislative bodies and their contractors could use. The Act contained no provision similar to section 863 authorizing other interested persons to use the same procedure.

In 1961, at the Judicial Council's request, the Legislature passed a series of bills, including AB 1462, deleting the unique validation procedures from several acts scattered throughout the code, and replacing them with authority to utilize Code of Civil Procedure section 860. AB 1462, however, which dealt solely with the 1913 Act, preserved the pre-1961 policy of limiting validation suits to legislative bodies and their contractors by coupling the reference to section 860 with a caveat that, "Notwithstanding any other provisions of law, the action authorized by this section shall not be brought by any person other than the legislative body or the contractor." Appellant's Request for Judicial Notice, Ex. C at 7-8.

Underlying the Court of Appeal's argument is an assumption that "the action authorized by this section" is an action under section 860, and therefore an action by an interested person under section 863 is a different action, not subject to the prohibition against other persons bringing such suits. What the Court failed to notice, however, is that a *contractor* is not a public agency. In order to exercise his authority under section 10601 to bring a validation action, a contractor would have to bring a section *863* action. For only a public agency may file suit under section 860. Thus, "the action authorized by this section" is an action by a public agency under section 860 *or* an action by its contractor under section 863. The statute must therefore

be read as follows: "Notwithstanding any other provisions of law, the action authorized by this section [whether 860 *or* 863] shall not be brought by any person other than the legislative body or the contractor."

For these reasons, the arguments for a different policy advanced by the Court of Appeal should be rejected, the policy set by the Legislature should be honored, and the decision of the Court of Appeal should be reversed.

DATED: November 8, 2007.

Respectfully submitted,

TREVOR A. GRIMM
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Counsel for Amicus

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 14(c) of the California Rules of Court, that the above brief, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 1,890 words.

DATED: November 8, 2007.

Tim Bittle

Timothy A. Bittle
Counsel for Amicus

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: 921 11th Street, Suite 1201, Sacramento, CA 95814.

On November 9, 2007, I served the foregoing document described as **Application for Leave to file Amicus Curiae** and **Brief of Amicus of Howard Jarvis Taxpayers Association** on the interested parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list. I caused such envelope to be deposited in the mail at Sacramento, California. The envelope was mailed with postage thereon fully prepaid to the following:

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I declare under the penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 9, 2007, at Sacramento, California.

Eric Scott Eisenhammer