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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO**

CITY OF MILLBRAE,

Plaintiff,

v.

COUNTY OF SAN MATEO et al.,

Defendants.

Case No. 23-CIV-05426

**YES IN MY BACK YARD'S RESPONSE TO
PLAINTIFF CITY OF MILLBRAE'S OPENING
BRIEF**

Trial: April 3, 2024, 9:00am
Hon. Nancy L. Fineman, Dept. 4
800 N. Humboldt Street, San Mateo, CA 94401
Action filed November 13, 2023.

SUMMARY OF ARGUMENT

This action was filed by the City of Millbrae to invalidate the County of San Mateo's acquisition of real property. The County applied to the State last summer for a Homekey funding grant to convert the property, which currently houses a motel, into permanent supportive housing for families and seniors. Millbrae asserts that the County's land acquisition is subject to Article XXXIV of the California Constitution, which requires a local referendum on any "low rent housing project" that is "developed, constructed, or acquired" by any "state public body." (Cal. Const., art. XXXIV, § 1.)

Interested Party Yes In My Back Yard ("YIMBY") is the legal arm of the pro-housing movement. YIMBY supports the County's acquisition plan. YIMBY's brief

responds to Millbrae's argument as follows: (1) Millbrae's action is barred;

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[pages omitted for brevity]

1 **I. STATEMENT OF FACTS.**

2 The issues of fact in this case pose a paradox for trial. One potentially material fact—how a future
3 supportive housing project will be funded—remains unknown as of today’s filing, and unknowable
4 except with the passage of time. That said, YIMBY has no substantial quarrel with Millbrae’s
5 presentation of the facts past and present. (See Millbrae Br., at pp. 3–7. But see *infra* Part III [objecting
6 to hearsay evidence].) The substantial disputes of fact all concern the future.

7 YIMBY emphasizes five facts to inform the Court’s decision. First, the *res* in this validation action
8 is the September 12, 2023, resolution by the Board of Supervisors to acquire real property at 1390 El
9 Camino Real. (*Infra* § I.A.) Second, this case does *not* concern land use: Millbrae’s specific plan for the
10 Property allows supportive housing by right. (*Infra* § I.B.) Third, the County’s application for a
11 Homekey award was submitted to the state Department of Housing and Community Development
12 (“HCD”) pursuant to either of two June 13, 2023, resolutions that were adopted by the Board of
13 Supervisors. (*Infra* § I.C.) Fourth, HCD has yet to grant or reject the County’s application, and no funds
14 have been awarded. (*Infra* § I.D.) [REDACTED]
15 [REDACTED]

16 **A. This Action Would Validate an Acquisition Resolution.**

17 This is an *in rem* action, and the *res* is an acquisition resolution. (Trial Exhibit No. 2 [“Resolution”];
18 see, e.g., Affidavit of Publication (Jan. 4, 2024) at p.2 [“The Resolution that is the subject of this action
19 is . . . ”].) The Resolution, which the County adopted on September 12, 2023, declares the County’s
20 “intention to purchase the Property, located at 1390 El Camino Real in Millbrae . . . for a total purchase
21 price of \$33,000,000.” (*Id.* at p. 2:00006.) The Resolution also authorizes and directs “the County
22 Executive, or designee . . . to execute the Certificate of Acceptance, as well as any and all notices,
23 escrow instructions, and documents required to facilitate the purposes of the [Real Estate Purchase and
24 Sale] Agreement.” (*Ibid.*; see also Trial Exhibit No. 3 [“Agreement”].)

25 The Resolution does not say, or do, much more. (See Trial Exhibit No. 2.)

26 **B. Millbrae’s Downtown & El Camino Specific Plan Allows Supportive Housing by Right.**

27 If Millbrae prevails, it would subject a permitted land use to a vote. In December 2022, Millbrae
28 adopted the Millbrae Downtown and El Camino Real Specific Plan, which encompasses the Property at

1 1390 El Camino Real. (Trial Exhibit No. 34.) The specific plan recognizes that “the area . . . will
2 undergo the majority of change and development in the city over the next couple of decades.” (*Id.* at p.
3 34:00502.) The Property appears on the specific plan’s land use map as a trapezoidal parcel in orange,
4 on the Bayward side of El Camino Real, across from where Paramount Drive (if extended) would
5 intersect it. (*Id.* at p. 34:00503.) According to the plan’s land use table, the Property’s “Residential
6 Focused Mixed Use” or “RFMU” zoning designation permits supportive housing by right. (*Id.* at p.
7 34:00504.)

8 **C. The County Resolutions Approving a Homekey Application Were Adopted Last June.**

9 As Millbrae notes, “[t]he Resolution did not expressly commit the County to using a specific funding
10 source,” though “it did reference Homekey funds in its statement regarding the County’s purported
11 compliance with the California Environmental Quality Act.”¹ (Millbrae Br., at p. 4 [citing Trial Exhibit
12 No. 2:00506].) In fact, as Millbrae also notes, the County Executive’s memorandum to the Board of
13 Supervisors stated that “[a]n application for funding to help support the County’s acquisition,
14 rehabilitation, and operation of the Property for Permanent Supportive Housing for County residents
15 experiencing homelessness ha[d] been submitted to the State of California” before the Board adopted the
16 Resolution. (Millbrae Br., at p. 4 [quoting Trial Exhibit No. 1:00002–03].)

17 It appears that the County applied to HCD for Homekey funding on or about June 13, 2023. The
18 Board of Supervisors adopted two resolutions that day, each “approv[ing] and adopt[ing] a form
19 resolution from the State Department of Housing and[]Community Development . . . authorizing the
20 County’s application to the Homekey Program.” (Trial Exhibit Nos. 35:00511, 36:00518–19.) The main
21 notable differences relate to funding amounts. One resolution authorized an application for \$27.6 million
22 in grant money, an allocation of \$6.75 million for capital costs, and an allocation of \$8.1 million for five
23 years of operating subsidies in the form of “County Housing Vouchers.” (Trial Exhibit No. 35:00511.)
24 The amounts authorized in the other resolution were \$35 million, \$14.9 million, and \$17.3 million,
25 respectively. (Trial Exhibit No. 36:00519.) Both resolutions “authorize[d] and direct[ed] staff to file a
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27
28 ¹ Millbrae does not challenge the Resolution under CEQA, from which Homekey projects are statutorily
exempt. (Health & Saf. Code § 50675.1.4; see also Pub. Resources Code § 21080.10, subd. (b); 14 Cal.
Code Regs. § 15267.)

1 notice of exemption for the Property under [CEQA].” (Trial Exhibit Nos. 35:00511, 36:00519.) Both
2 resolutions also authorized and directed staff to

3 enter into a Memorandum of Understanding with a special purpose entity
4 owned and controlled by Episcopal Community Services of San Francisco
5 (ECS), a California nonprofit corporation, setting forth the terms and
6 conditions under which the special purpose entity as the County’s
7 co-applicant for the Homekey award will acquire, rehabilitate, manage,
8 operate and provide supportive services at the Property in the event the
9 County’s application for funds from the Homekey Program for the Property
10 is approved and the County acquires the Property.

11 (Trial Exhibit Nos. 35:00511–12, 36:00519.) The County Executive was authorized and directed in both
12 resolutions to “finalize the terms” and secure “evidence of site control,” and staff were likewise
13 authorized and directed “to take such further actions” as “necessary to complete the submission of the
14 Homekey 3.0 application” to HCD. (Trial Exhibit Nos. 35:00512, 36:00519–20.)

15 As the Board of Supervisors likely recalled three months later, when it adopted the Resolution at
16 issue in this case, “the Round 3 [Notice of Funding Availability]” was marked by a “shorter timeline and
17 increased competitiveness.” (Trial Exhibit Nos. 35:00510, 36:00518.) Having “previously leveraged the
18 HomeKey Program to acquire four hotels since December of 2020” in Redwood City and San Mateo
19 (Trial Exhibit No. 1:00002)—each time, presumably, without an Article XXXIV election—the County
20 now intends to leverage Homekey again. Both resolutions of June 13, 2023, accordingly declared that “it
21 is in the County’s interest to . . . finalize securing site control for the Property for the County’s Homekey
22 3.0 application so as to avoid further delays in submitting the application.” (Trial Exhibit Nos. 35:00510,
23 36:00518.)

24 **D. The State Has Yet to Grant (or Deny) the County’s Application for Homekey Funds.**

25 All parties recognize that no Homekey funds have been awarded yet. (See Trial Exhibit No.
26 6:00087–89 [Round 3 awardee list, updated Feb. 14, 2024]; see also Millbrae Br., at pp. 6–7 “[N]o
27 Homekey funding has been issued to the County to date for this project.”]; County Oppn. Prelim. Inj. at
28 p. 10, fn. 3 (Jan. 22, 2024) “[T]o date, the County has not yet received Homekey funds from the State
for the Project.”.) Conceding that the County intends to use Homekey funds, if awarded by the State
and not invalidated by this Court, it has yet to be determined what the County will in fact do with the
Property.

[pages omitted for brevity]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 **IV. YES IN MY BACK YARD’S ARGUMENT.**

7 YIMBY’s argument proceeds in three parts, all against invalidating the Resolution. First, the Court
8 can (and should) dismiss the action on the ground that it is barred by Section 36005 of the Health and
9 Safety Code. (See *infra* § IV.A.) [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 **A. Millbrae’s Claim Is Simultaneously Barred and Unripe Under Section 36005.**

20 Millbrae’s sole remaining claim⁵ cites Section 36003 of the Health and Safety Code as authority for
21 initiating the action. (Complaint (Nov. 13, 2023) ¶ 15. But see Answer of YIMBY (Jan. 8, 2024) ¶ 15
22 [denying jurisdiction].) This is because the Code of Civil Procedure “does not, in itself, authorize any
23 validation actions; rather, it establishes a uniform system that other statutory schemes must activate by
24 reference.” (*Davis v. Fresno Unified School Dist.*, *supra*, 14 Cal.5th 671, 684 [quoting *Bonander v.*
25 *Town of Tiburon* (2009) 46 Cal.4th 946, 656].) “[I]f no statute authorizes use of the validation statutes to

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27
28 ⁵ Millbrae’s second, third, and fourth causes of action have all been dismissed. (See Order Sustaining
Defs.’ Demurrer (Feb. 23, 2024) [citing *Davis v. Fresno Unified School Dist.*, *supra*, 14 Cal.5th 671].)

1 test a particular type of agency matter, then the validation statutes do not apply.” (*Id.* at p. 685.) In other
2 words, Millbrae must comply with Section 36003 in order to obtain the invalidation remedy it seeks.

3 Section 36003 is subject to a limitation:

4 No judicial action attacking or otherwise questioning the validity of . . . a
5 proposal or application which may result in housing assistance benefiting
6 persons of low income without obtaining prior approval pursuant to Article
7 XXXIV of the California Constitution shall be brought prior to the notice
8 of funding commitment by the state agency or the adoption of a resolution
9 or ordinance by the legislative body of the local public entity approving the
10 proposal or application, nor may any such action be brought at any time
11 after 60 days from the date of the notice of funding commitment or the date
12 of adoption of the ordinance or resolution approving the proposal, as
13 appropriate.

14 (Health & Saf. Code § 36005; cf. *id.* § 36003 [using parallel language].) The California Supreme Court
15 addressed this statute of limitation in *Davis v. City of Berkeley*, *supra*, 51 Cal.3d 227, 242 fn. 8, where it
16 noted that “the words ‘proposal’ and ‘application’ [as used in Section 36005] are terms of art in the
17 public housing field.” (*Ibid.*)

18 Section 36005’s words are fatal to Millbrae’s reverse validation action on the Resolution, as YIMBY
19 will show here. First, the County’s “application” for Homekey funding was submitted to HCD on or
20 about June 13, 2023—more than 60 days before Millbrae filed suit on November 13. Second, the *res*—a
21 Resolution to acquire real property at 1390 El Camino Real—is nothing more than an exercise of the
22 County’s lawful authority. Finally, no “proposal” to develop, construct, or acquire a “low rent housing
23 project” has yet been promulgated. (Health & Saf. Code §§ 36003, 36005; Cal. Const., art. XXXIV,
24 § 1.) The action is thus at once barred *and* unripe.

25 **1. Time Has Expired to Invalidate the County’s Application for Homekey Funds.**

26 Before every “proposal” for a housing project comes an “application.” (*Davis v. City of Berkeley*,
27 *supra*, 51 Cal.3d at p. 242, fn. 8.) As the *Davis* court explained, an “application” under Sections 36003
28 and 36005 “refers to ‘a preliminary submission . . . which addresses local housing need and
development priority’ ” and is used by the granting agency “to determine . . . which of several
[competing public housing authorities] . . . should be given the first opportunity to submit a proposal for
developing a project.” (*Ibid.* [citing former 24 C.F.R. § 941.103].) This describes, precisely, the

1 application that the Board of Supervisors approved in their twin resolutions on June 13, 2023. (Trial
2 Exhibit Nos. 35–36; see also Millbrae Br., at pp. 3–4 [quoting Trial Exhibit No. 1:00002–03.] That
3 application is currently under review by HCD, which is determining on a rolling basis which of several
4 competing agencies will be granted Homekey funds. (See Millbrae Br., at p. 7 [discussing Trial Exhibit
5 No. 6:00087–89].)

6 As shown in section I.C, *supra*, the County applied to HCD for Homekey funding on or about June
7 13, 2023. Millbrae filed its complaint for validation on November 13, 2023—153 days after the County
8 finally approved its application by resolution. (See Health & Saf. Code § 36005 [60-day limitation].)
9 Any challenge to the County’s application was barred before Millbrae filed suit.⁶

10 **2. The County Has the Authority to Acquire Real Property.**

11 Courts are not ordinarily in the business of blocking county land acquisitions. California counties
12 have long been recognized to have the “power, among other things, to purchase and hold land within
13 [their] limits.” (*County of Colusa v. Welch* (1898) 122 Cal. 428, 432; accord, e.g., Cal. Const., art. XI,
14 § 1, subd. (b) [Legislature to provide for county powers by law]; *id.*, § 4, subd. (h) [charter counties have
15 all constitutional and statutory powers of general law counties]; Gov. Code § 25353 [county boards of
16 supervisors may “purchase, receive by donation, lease, or otherwise acquire . . . real . . . property
17 necessary for use of the county”]; San Mateo County Charter § 206 [reserving “all the powers . . . vested
18 in [the Board of Supervisors] by the Constitution, general law and this Charter”].)

19 The Resolution is thus presumptively lawful, and does not by itself constitute a “proposal” or
20 “application” within the meaning of Section 36005. It cannot be the basis for maintaining this action.

21 **3. The County Has Not Yet Been Selected to Submit a Proposal for a Homekey Project.**

22 *Davis v. City of Berkeley*, *supra*, 51 Cal.3d at p. 242, fn. 8, continued analyzing Section 36005 to
23 note that a “proposal” means “[a] detailed . . . submission . . . of all information, including identification
24

25 ⁶ Section 36005’s limitation was not tolled, to anticipate Millbrae’s reply, just because the County
26 resolutions did not identify a specific site. Unlike the typical Article XXXIV case, this reverse validation
27 action was brought neither by the acting state public body nor by an elector thereof. Millbrae is roughly
28 analogous here to a San Mateo County resident, or perhaps taxpayer, who would ordinarily oppose *the*
County’s intended outlay of funds. In this respect, Millbrae has no standing to complain of the
application’s indefiniteness as to *location*, the dispositive facts being that the County gave due public
notice and a hearing before finally approving the applications by resolution.

1 and evidence of site control, necessary for the [granting agency] to approve a public housing project.”
2 (*Ibid.* [citing former 24 C.F.R. § 941.103].)

3 The County’s application has simply not yet progressed to the proposal stage. As shown above (and
4 as recognized by all parties), HCD has neither granted nor rejected the County’s application for a
5 Homekey award. (See *supra* § I.D.) The Resolution at hand is intended to support the necessary
6 “evidence of site control” (*Davis v. City of Berkeley, supra*, at p. 242, fn. 8), but the record does not
7 indicate that “all information” (*ibid.*) has yet been assembled into a final “proposal” for which the
8 statutes would allow a validation claim. (Health & Saf. Code §§ 36003, 36005.) With respect to any
9 “proposal,” therefore, Millbrae’s claim cannot be ripe. (*Id.* § 36005.)

10 * * *

11 The Court can (and should) dismiss the action on the limitation grounds just discussed. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 **B.** [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]