

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

MICHAEL DENNY,

Petitioner/Appellant,

vs.

JOHN ARNTZ, Director of Elections;
DENNIS HERRERA, City Attorney,

Defendants/Respondents.

Case No. A160234

San Francisco County Superior
Court No. CPF-19-516970

**RESPONDENTS' NOTICE OF MOTION
AND MOTION FOR PREFERENCE**

The Honorable Ethan P. Schulman

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

- There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.
- Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: August 25, 2020

DENNIS J. HERRERA
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ANDREW SHEN
JENICA MALDONADO
Deputy City Attorneys

By: /s/ Jenica Maldonado
JENICA MALDONADO

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TABLE OF CONTENTS

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

MEMORANDUM OF POINTS AND AUTHORITIES 6

 I. INTRODUCTION 6

 II. STATEMENT OF FACTS 7

 A. Proposition A and Appellant’s Related
 Lawsuits. 7

 B. San Francisco’s Housing Crisis and the Impact
 of the COVID-19 Global Pandemic. 8

 III. ARGUMENT 9

 A. This Appeal is Entitled to Preference by Statute. 9

 B. The Public Interest Is Also Served by Granting
 Preference to this Appeal. 11

 IV. CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

Cases

Nguyen v. Sup. Ct.
(2007) 150 Cal.App.4th 1006..... 10

Statutes

Cal. Code Civ. Proc.
§ 35 6, 9

Cal. Code Civ. Proc.
§ 36 11

Cal. Code Civ. Proc.
§ 36, subd. (e) 6

Cal. Code Civ. Proc.
§ 44 6

Cal. Elec. Code
§ 16100 10

Cal. Elec. Code
§ 16500 8, 10, 11

Rules

Cal. Rules of Court
Rule 8.240 6, 10

RESPONDENTS' MOTION FOR CALENDAR PREFERENCE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Respondents John Arntz, the Director of Elections for the Department of Elections for the City and County of San Francisco, and Dennis Herrera, the City Attorney for the City and County of San Francisco, hereby move this Court for preference in the calendaring and in the setting of oral argument for this matter. This matter is entitled to preference on the Court's docket because it is an elections contest and because granting preference serves the interests of justice. (Code Civ. Proc. Code §§ 35, 36, 44; Cal. Rules of Court, rule 8.240.) This Motion is based on the accompanying Memorandum, the concurrently filed Declaration of Jenica D. Maldonado, the concurrently filed Request for Judicial Notice and the concurrently filed Proposed Order.

DATED: August 25, 2020

Respectfully Submitted,

DENNIS J. HERRERA
City Attorney
ANDREW SHEN
JENICA MALDONADO
Deputy City Attorneys

By: /s/ Jenica Maldonado
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G
Attorneys for Respondents JOHN
ARNTZ, Director of Elections;
DENNIS HERRERA, City Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondents John Arntz and Dennis Herrera (“Respondents”) seek preference for the appeal in this matter. This appeal concerns a challenge by Appellant Michael Denny (“Appellant”), acting in *pro per*, to invalidate a November 2019 bond measure passed by the voters in the City and County of San Francisco to support affordable housing (“Proposition A”).

Election contests “shall” be given preference on the Court’s calendar. (Code Civ. Proc. §§ 35, 44; Cal. Rules of Court, rule 8.240.) Accordingly, the Court can and should expedite this appeal because it concerns a challenge to a City ballot measure. The Court may also grant preference when doing so would be in the interests of justice. (Code Civ. Proc. § 36, subd. (e).) The need for more affordable housing in San Francisco has been well known for some time. The COVID-19 global pandemic has illuminated and intensified the City’s housing crisis. Any effort to reduce the time between the passage of Proposition A and when San Franciscans are able to access the affordable housing resources provided for under the measure, including faster resolution of related litigation, serves the interest of justice.¹

Respondents respectfully request the Court order as follows: Appellant files his opening brief within 30 days of the Court’s order granting this motion for preference; Respondents file their response within 30 days of the opening brief; Appellant files his reply within 30 days of the

¹ Counsel for Respondents conferred with the Appellant to determine his position regarding this motion. Appellant opposes the motion. (Declaration of Jenica Maldonado in Support of Respondents’ Motion for Preference (“Maldonado Dec.”) ¶ 2.)

response; and, consistent with Code of Civil Procedure section 44, the Court endeavors to hear oral argument in this matter within 90 days of the deadline for the reply brief.

II. STATEMENT OF FACTS

A. Proposition A and Appellant's Related Lawsuits.

On July 31, 2019, the San Francisco Board of Supervisors passed an ordinance submitting Proposition A to the City's voters on November 5, 2019. (Request for Judicial Notice in Support of Respondents' Motion for Preference ("RJN") Ex. 1.) The measure proposed the City incur \$600 million in bonded indebtedness to finance the construction, development, acquisition, improvement, rehabilitation, preservation, and repair of affordable housing improvements, including \$150 million for public housing, \$220 million for low income housing, \$60 million for preservation and middle income housing, \$150 million for senior housing and \$20 million for educator housing. (*Id.* at 1:3-7, 4:8 – 5:8.)

On August 27, 2019, after the examination period most of the voter information materials had lapsed, Appellant filed a pre-election challenge—a separate lawsuit that predates this proceeding—against Respondents, the City, and the Board of Supervisors challenging Proposition A. (RJN Ex. 2.) He alleged that Proposition A called for an unconstitutional use for bond proceeds and that the various parts of the ballot materials (including the ballot statement and digest) violated the Elections Code. (*Id.*) The court sustained Respondents' demurrer and entered judgment in their favor. (RJN Ex. 3.) Appellant did not appeal and that decision is now final. (RJN Ex. 6 at 5:9-13 [trial court's order acknowledging that Appellant did not appeal his first lawsuit].)

On November 5, 2019, Proposition A passed by 71.16%—well over the required two-thirds margin. (RJN Ex. 4.) On November 26, 2019, Director of Elections John Arntz certified the election results. (*Id.*)

On December 26, 2019, Appellant filed the lawsuit resulting in the current appeal, this time postured as a statement of election contest and cited Elections Code section 16500 as authorizing his action. (RJN Ex. 5.) His claims were substantially identical to those raised in his pre-election lawsuit. (*Id.*; *see also* RJN Ex. 6 at 1:12 [trial court’s order recognizing Denny’s post-election claims as “substantially identical to his pre-election claims”].) The court again dismissed his case, finding his allegations did not raise cognizable under the Elections Code, were *res judicata*, or that he had otherwise failed to state a claim. (RJN Ex. 6) The court entered judgment for Respondents and Appellant timely appealed.

B. San Francisco’s Housing Crisis and the Impact of the COVID-19 Global Pandemic.

While housing shortages and homelessness are not new to San Francisco, the City has experienced substantial increases in both over the last decade. Since at least 2011, “market-rate rental costs and homeownership prices have far outpaced income increases for most working households” in San Francisco, resulting in a substantial affordability gap. (RJN Ex. 7 at p. 8.) While San Francisco has among the highest average median (“AMI”) income per household nationally, “for many, it is still not enough to afford a market-rate apartment.” (*Id.*) In 2018, for example, the AMI was “\$94,700 for a two-person household, which translates to an affordable rent of approximately \$2,368 for a one-bedroom apartment.” (*Id.*) At that time, however, an average one-bedroom, market-rate apartment rented for \$3,450, resulting in an

affordability gap of approximately \$1,080. (*Id.*) This gap increased exponentially for larger households and for those earning less than 100% AMI. For a four-person household at 30% AMI, for example, the monthly shortfall in 2018 was nearly \$5,000. (*Id.*)

During roughly this same period, the rates at which persons living in San Francisco have experienced homelessness also substantially increased. Between 2013 and 2019, the number of San Franciscans experiencing homelessness rose from approximately 7,008 to 8,035 persons. (RJN Ex. 8 at p. 10.) The increase between 2017 and 2019 alone—6,858 to 8,035 persons—constituted a 17% increase. (*Id.*)

The COVID-19 pandemic has exacerbated these conditions. (RJN Ex. 9) The pandemic’s effects on housing insecurity are projected to be long term. The United States could see an up to 45% increase between 2019 and 2020 in persons experiencing homelessness as a result of job losses due to the COVID-19 pandemic, pushing the total number of persons experiencing homelessness nationwide from approximately 600,000 to 850,000. (*Id.* at pp. 285-286.) As such, the financial resources provided for under Proposition A are needed immediately.

III. ARGUMENT

A. This Appeal is Entitled to Preference by Statute.

The Court should grant this motion because, as an elections contest, this matter is entitled to preference. Code of Civil Procedure section 35 states that “cases involving...elections contests shall be placed on the calendar in order of their filing date and shall be given preference.” (Cal. Civ. Proc. Code § 35.) Likewise, Code of Civil Procedure section 44 provides that election contests are also entitled to preference while on appeal. (Cal. Code Civil Proc. § 44 [“[a]ppeals...in contested election

cases...shall be given preference in hearing in the courts of appeal[.]”]; *Nguyen v. Sup. Ct.* (2007) 150 Cal.App.4th 1006, 1009 [recognizing that Code of Civil Procedure section 44 “gives priority (after criminal cases) in the appellate court to election contests.”]). While this section specifically recognizes a right to preference with respect to the setting of an appellate hearing, Rule 8.240 of the California Rules of Court provides that preference may also come in the form of an “expedited appeal schedule, which may include expedited briefing and preference in setting the date of oral argument.” (Cal. Rules of Court, rule 8.240.)

Accordingly, given the nature of the parties’ dispute, this matter is appropriate for expedited review and resolution. As reflected on the face of his Statement of Election Contest, Appellant filed his lawsuit pursuant to Elections Code section 16500. (Cal. Elec. Code § 16500 [“Within five days after the end of the time allowed for filing statements of contest, the clerk of the superior court shall notify the superior court of the county of all statements filed. The presiding judge shall forthwith designate the time and place of hearing, which time shall not be less than 10 nor more than 20 days from the date of the order.”]) Section 16500 relates to the specific types of elections contests codified in Elections Code section 16100. While the trial court found that Appellant failed to allege facts that supported any cause under this statute, Appellant’s lawsuit—by his own characterization—is an elections contest nonetheless. As such, this appeal should receive preference by statute.

Notably, before the trial court, Appellant supported an expedited resolution in principle, advising the court in his contest statement that it had a “mandatory dut[y]” to give his lawsuit “immediate attention” because it concerned an elections contest. (RJV Ex. 5 at 1:17-18 [“Your mandatory

duties under this special proceeding under Elections Code (“EC”) 16500 et seq. require your immediate attention”]; *see also id.* at 1:28-2:3 [“The Legislature commands the clerk of the superior court to perform its duties under EC 16500 et seq within 5 days. The Legislature commands that the presiding judge of the superior court set a hearing (trial) no sooner than 10 days and no later than 20 days after the notice by the clerk of the superior court.”]) Despite this, Appellant advised Respondents’ counsel that he opposes this motion. (Maldonado Dec. ¶ 2.)

B. The Public Interest Is Also Served by Granting Preference to this Appeal.

Additionally, granting preference for this matter would advance the interests of justice, which in this case means, more specifically, the public’s interest. Code of Civil Procedure section 36 provides, “[n]otwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.” (Code Civ. Proc. § 36, subd. (e).) It is well known that San Francisco has faced a substantial shortage in affordable housing for at least the past decade. (RJN Exs. 7-8) The COVID-19 pandemic has further exposed and further exacerbated this situation. (RJN Ex. 9) San Francisco voters supported Proposition A by a large margin, reflecting the community’s overwhelming interest in the City’s development of additional affordable housing resources. The public interest is served by any effort to expedite the steps between the electorate’s authorization of the \$600 million bond measure and the day that needy San Franciscans move into these properties, including resolution of related litigation. As such, the Court should also grant preference on these grounds.

IV. CONCLUSION

Accordingly, there is good cause to grant preference for this appeal.
Respondents request the court adopt the schedule proposed above.

DENNIS J. HERRERA
City Attorney
ANDREW SHEN
JENICA MALDONADO
Deputy City Attorneys

By: /s/ Jenica Maldonado
JENICA MALDONADO

Attorneys for Respondents JOHN
ARNTZ, Director of Elections;
DENNIS HERRERA, City Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 1,727 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 25, 2020.

ANDREW SHEN
JENICA MALDONADO
Deputy City Attorneys

By: /s/ Jenica Maldonado
JENICA MALDONADO

Attorneys for Respondents JOHN
ARNTZ, Director of Elections;
DENNIS HERRERA, City Attorney

PROOF OF SERVICE

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On August 25, 2020, I served the following document(s):

RESPONDENTS' NOTICE OF MOTION AND MOTION FOR PREFERENCE

on the following persons at the locations specified:

Michael Denny
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Plaintiff/Appellant, in pro per

Hon. Ethan P. Schulman
San Francisco County Superior Court
400 McAllister Street
Dept. 302
San Francisco, CA 94102
[VIA PERSONAL SERVICE ONLY]

in the manner indicated below:

- BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address: reyna.lopez@sfgov.org in portable document format
- BY ELECTRONIC-SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through **TrueFiling** in portable document format ("PDF") Adobe Acrobat.
- BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above location. – Hon. Ethan P. Shulman Only.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed August 25, 2020, at San Francisco, California.


REYNA LOPEZ