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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JEROME J. GHIgliOTTI, JR.,

Plaintiff and Appellant,

v.

NOVATO CITY COUNCIL,

Defendant and Respondent.

A132695

(Marin County
Super. Ct. No. CIV1101325)

Respondent Novato City Council (City Council) refused to place a proposed initiative on its municipal ballot. Appellant and initiative proponent Jerome J. Ghigliotti petitioned the Marin County Superior Court for a writ of mandate to compel the City Council to take action. His petition was denied, as was his motion for reconsideration. On appeal from the judgment,¹ Ghigliotti contends that both the superior court and the City Council erred. During the pendency of this appeal, a state law was enacted forbidding local entities from requiring that local employers take the action that the proposed initiative would require. (See Lab. Code, § 2812.) As we have no power to

¹ Ghigliotti filed a timely notice of appeal from the judgment denying his petition for writ of mandate. The judgment is appealable. (Code Civ. Proc., § 904.1, subd. (a)(1); see *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409.) Ghigliotti also filed an amended notice of appeal purporting to appeal from the trial court's order denying his motion for reconsideration. This is not an appealable order. (Code Civ. Proc., § 1008, subd. (g); see 9 Witkin, Cal. Procedure (2012 supp.) Appeal, § 165, p. 24.) We must dismiss this aspect of his appeal. (See *Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 369.)

compel the City Council to take an action that is no longer legal, we dismiss the appeal as moot.

I. FACTS

Appellant Jerome J. Ghigliotti, Jr. is a Novato resident and voter. He circulated an initiative petition proposing an ordinance that would prohibit certain Novato employers from hiring any new employee whose United States citizenship was not verified by means of a federal electronic verification (e-verify) system. (See Lab. Code, § 2813, subd. (a).) The proposed ordinance expands the range of employers required to use the e-verify system beyond those already required to do so by federal law. It would impose monetary and other penalties for employer noncompliance.

On May 10, 2010, a Marin County elections official certified that Ghigliotti had obtained sufficient signatures to qualify the initiative for the local ballot. Ghigliotti presented the initiative to the City of Novato, seeking to have the measure included on an upcoming municipal ballot. At its May 25, 2010 meeting, the initiative came before the City Council. Ghigliotti asked the City Council to either place the proposed ordinance on the municipal ballot or to adopt it. (See Elec. Code, §§ 9214, subds. (a)-(b), 9215, subds. (a)-(b).) The City Council referred the matter to city staff to obtain a report on the effect of the proposed ordinance. (*Id.*, §§ 9212, subd. (a), 9214, subd. (c), 9215, subd. (c).) On June 22, 2010, the City Council took no action on the request. In effect, it refused to place the proposed initiative on the local ballot or to enact it, because it concluded that the proposed ordinance would be preempted by federal law.

In March 2011,² Ghigliotti petitioned the trial court for a writ of mandate compelling the City Council to place his proposed initiative on the municipal ballot. The trial court issued an alternative writ, ordering the City Council to show cause why the requested writ of mandate should not issue. (Code Civ. Proc., § 1087.) In May, the City Council answered Ghigliotti's petition, opposing the underlying ordinance on federal preemption and other constitutional grounds. A hearing was conducted on May 17, on

² All subsequent dates refer to the 2011 calendar year unless otherwise indicated.

the petition. The trial court ruled that the City Council had the legal authority to refuse to take action on a proposed initiative and to require court review of its validity before an election if the electorate had no power to adopt a substantively invalid proposal. It also found that the City Council demonstrated inter alia that the proposed initiative was preempted by federal immigration law. (See 8 U.S.C. § 1324a(h)(2).)³ On May 25, a judgment was filed denying Ghigliotti’s petition and discharging its alternative writ. In August, Ghigliotti’s motion for reconsideration was denied.

II. MOOTNESS

Ghigliotti contends that the trial court erred by denying his petition for a writ of mandate to compel the City Council to place his initiative on the municipal ballot.⁴ A writ of mandate may be issued by any court to compel the performance of a legal duty. (Code Civ. Proc., § 1085, subd. (a); *Transdyn/Cresci JV v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, 752.) To be entitled to a writ of mandate, Ghigliotti must show inter alia that the City Council failed to act when it had a clear, ministerial duty to do so. In this matter, on undisputed facts and an appeal posing only questions of law, we exercise our independent judgment and review the trial court’s order de novo. (See *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224.)

The City Council defends the trial court’s denial order on various grounds, only one of which we need to address. We conclude that new state legislation prohibiting a

³ Federal law pertaining to the unlawful employment of aliens specifically “preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.” (8 U.S.C. § 1324a(h)(2).)

⁴ It is usually more appropriate to review challenges to initiative measures after an election, unless there is a clear showing of invalidity. Preelection judicial review is proper if the electorate lacks the power to adopt the proposal in the first place or if the substantive provisions of the proposed measure are legally invalid. (See *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1209-1210 [based on earlier version of Elections Code referendum provisions]; see also Elec. Code, §§ 9214, 9215, 9241.) The trial court cited this reasoning in its ruling that the City Council acted within its authority when refusing to enact the proposed initiative or place it on an upcoming ballot.

city from mandating that its employers use the e-verify system now renders the proposed initiative moot. (Lab. Code, § 2812.) The federal e-verify system is mandatory for all federal contractors and certain other employers. For most employers, it is a voluntary program. (See 8 U.S.C. § 1324a(a)(1)(B), (b), (d); see also Exec. Order No. 13465, 73 Fed.Reg. 33285, 33286 (June 6, 2008).) On January 1, 2012, a state law took effect, barring any California city from requiring an employer to use the e-verify system unless required to do so by federal law. (Lab. Code, § 2812 [Stats. 2011, ch. 691, § 2]; see Gov. Code, § 9600, subd. (a).) One purpose of this new state law is to allow private employers to retain the ability to choose whether or not to participate in the e-verify program. (See Stats. 2011, ch. 691, § 1(g).)

Since the time of the trial court's denial of the petition for writ of mandate, the action that would be required by the proposed initiative has become illegal under state law. (Lab. Code, § 2812.) Thus, the ordinance that Ghigliotti's initiative proposes—if enacted by the City Council directly or by Novato voters in a municipal election—would be illegal under state law. A writ of mandate must compel the performance of a *legal* duty. (Code Civ. Proc., § 1085, subd. (a).) We may not compel the City Council to undertake an *illegal* act. During the pendency of this appeal, without any fault on the part of the City Council, an event has occurred rendering it impossible for us to grant any effective relief to Ghigliotti. In these circumstances, we must dismiss the appeal as moot. (See, e.g., *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 862-863.)

The appeal from the judgment denying the petition for writ of mandate is dismissed as moot. The purported appeal from the order denying reconsideration is also dismissed.

Reardon, J.

We concur:

Ruvolo, P.J.

Rivera, J.