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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CAROLE BEATON,

Plaintiff and Appellant,

v.

CITY OF EUREKA et al.,

Defendants and Respondents.

A143621

(Humboldt County
Super. Ct. No. DR130058)

Plaintiff Carole Beaton sued the City of Eureka and the city's mayor, Frank Jäger (collectively, the City), claiming the City's policy allowing persons to offer invocations or prayers at council meetings violates provisions of the California Constitution regarding the separation of church and state. She appeals the trial court's order granting the City's motion for summary judgment and finding the City's written invocation policy to be valid. While this action was pending, the City replaced the contested invocation policy with a new one, purportedly based on a recent decision from the Ninth Circuit Court of Appeals. Because the policy plaintiff challenges in this appeal has been rescinded and replaced, we conclude her appeal is moot. We therefore dismiss the appeal.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Section 30.09 of the City's municipal code provides for the deliverance of an invocation at city council meetings: "The business of all regular meetings of the Council shall be transacted in the following order unless the Council, by a vote of at least a majority of the members present, shall suspend the rules and change the order:

[¶] (A) Closed session (if required); [¶] (B) Invocation; [¶] (C) Pledge of allegiance to the flag”

Prior to 2009, there was no formal policy regarding the delivery of invocations at city council meetings. Beginning in that year, anyone who volunteered was permitted to give an invocation.

On or about March 26, 2012, the City received a letter from the ACLU requesting that “in the future sectarian prayers will not be used in Eureka City Council meetings.” As a result of the correspondence, the City adopted a formal policy regarding invocations. Policy and Procedure 1.25 (the 2012 Invocation Policy) was adopted by the city council on May 1, 2012.

The 2012 Invocation Policy required anyone who desired to make an invocation at a city council meeting to fill out a “volunteer application.” The application requested that the volunteer refrain from making any sectarian references during the delivery of the invocation: “The invocation must be non-sectarian. The courts have ruled that the invocation may not reference a specific religion, prophet, or deity. The invocation may include only non-sectarian terms such as God or Creator.”

Following the adoption of the 2012 Invocation Policy, there had been only one request to deliver an invocation. That request was made by a follower of the Hindu faith who signed the volunteer application before making the invocation. The City did not review or censor his proposed invocation before its delivery. In addition, at one council meeting, a young man sang “God Bless America” at the request of the mayor during the time set aside for the invocation.

On January 28, 2013, plaintiff filed the operative first amended complaint (FAC) seeking injunctive and declaratory relief based on her assertion that, in permitting sectarian invocations at city council meetings, the City had violated the Establishment

Clause (Cal. Const., art. I, § 4)¹ and the No Aid Clause (Cal. Const., art. XVI, § 5)² of the California Constitution.

On May 3, 2013, the City filed a motion for summary judgment as to the entire FAC.³

On May 15, 2013, plaintiff filed a competing motion for summary adjudication on the invocation issue only.

On December 24, 2013, the trial court filed its order denying plaintiff's motion for summary adjudication and granting the City's motion for summary judgment. The court held that the practice of allowing invocations at city council meetings in general, and the 2012 Invocation Policy in particular, did not violate the California Constitution.

On July 15, 2014, the City approved a revised invocation policy (the 2014 Invocation Policy)⁴ in the wake of the Ninth Circuit Court of Appeals decision in *Rubin v. City of Lancaster* (9th Cir. 2013) 710 F.3d 1087 (filed Mar. 26, 2013).

On September 26, 2014, the parties filed a stipulation for entry of judgment.

On October 2, 2014, the trial court entered final judgment in favor of the City on the issue of legislative prayer.⁵

On November 5, 2014, plaintiff filed her notice of appeal from the judgment.

¹ Article I, section 4 of the California Constitution provides, in part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion."

² The No Aid Clause states, in relevant part: "Neither the Legislature, nor any . . . city . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose" (Cal. Const., art. XVI, § 5.)

³ The FAC also challenged the mayor's holding of prayer breakfasts in 2012 and 2013. The prayer breakfasts are not at issue in this appeal.

⁴ We grant the City's motion for judicial notice of the 2014 policy and the related city council agenda summary.

⁵ The judgment also resolved the issue of the mayor's prayer breakfasts, which the City agreed to discontinue.

DISCUSSION

The City contends plaintiff's challenge here is moot, as the 2012 Invocation Policy has been superseded by the 2014 Invocation Policy. Because this litigation challenged the constitutionality of the earlier policy, the City asserts this court can no longer grant plaintiff effective relief. Without considering the correctness of the trial court's determination that the 2012 Invocation Policy did not violate the California Constitution, we agree with the City that the 2014 enactment renders this appeal moot.

“ ‘It is well settled that an appellate court will decide only actual controversies. Consistent therewith, it has been said that an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events. . . . [T]he appellate court cannot render opinions “ ‘. . . upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.’ ” ’ ” (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 226–227; see, e.g., *Wilson v. L.A. County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453 [“ ‘[A]lthough a case may originally present an existing controversy, if before decision it has, through an act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court.’ ”]; and *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 [where reversal of judgment will have no practical effect, appeal is moot].)

Generally speaking, where a disputed statute, order or ordinance is repealed before an appeal challenging it is concluded, the matter is rendered moot. (*Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 249 [taxpayer association's claim for injunctive and declaratory relief to prevent future collection of registration fee for persons engaged in home occupations rendered moot by city's

revocation of fee requirement].) “ ‘Repeal or modification of a statute under attack, or subsequent legislation, may render moot the issues in a pending appeal.’ ” (*Jordan v. County of Los Angeles* (1968) 267 Cal.App.2d 794, 799; see, e.g., *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704–706 [challenge to zoning ordinance based on inconsistency with general plan became moot when, during pendency of appeal, a new general plan was adopted with which the ordinance was consistent]; *O’Neal v. Seabury* (1938) 24 Cal.App.2d 308, 309–312 [ordinance superseded by regulation made pursuant to state statute]; *Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 141–142 [lower court held ordinance void; city appealed but ordinance repealed pending appeal].)

Countering the City’s mootness argument, plaintiff claims the broader issue of whether legislative prayers in general are void under the California Constitution is ripe for our adjudication. Her opening brief asserts that “[l]egislative prayer violates the constitutional rights of non-believers by showing a preference for religion over non-religion.” However, she acknowledges she brought this action after the City’s adoption of the 2012 Invocation Policy. She also references that policy in her arguments on appeal. For example, in asserting the City has violated the No Aid Clause, she argues the City’s “municipal code and prayer policy (which requires that prayers be non-sectarian) places prayer in a special, favored position at the beginning of the meeting, which amounts to government support for prayer in the intangible form of conferring prestige or power upon the prayer that it would not otherwise receive.” Further, she contends that even if narrower United States Supreme Court precedents apply,⁶ the City’s “legislative prayer scheme must still fail because it mandates non-sectarian prayer.”

The 2012 Invocation Policy also figures into the ruling below. The trial court framed its ruling as follows: “[A]pplying [*Marsh v. Chambers, supra*, 463 U.S. 783], [the City’s] allowing voluntary, nonsectarian invocations pursuant to [the 2012

⁶ Here, plaintiff references *Marsh v. Chambers* (1983) 463 U.S. 783 and *Town of Greece v. Galloway* (2014) 572 U.S. ____ [134 S.Ct. 1811], cases in which the United States Supreme Court found certain legislative prayer practices to be valid under the First Amendment of the United States Constitution.

Invocation Policy] does not violate the California Constitution.” Thus, the decision from which plaintiff appeals clearly pertains to the now-superseded 2012 Invocation Policy. We therefore conclude the 2012 Invocation Policy represented a significant aspect of this appeal. Because it has been superseded by the 2014 Invocation Policy, we deem the appeal moot as we can no longer grant plaintiff any relief with respect to the prior policy.

It is true, of course, that an appellate court has discretion to address the merits of an otherwise moot appeal if there may be a recurrence of the controversy between the parties or the case presents an issue of broad public interest that is likely to recur. (See, e.g., *White v. Davis* (2003) 30 Cal.4th 528, 537; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 746–747; *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479–480.) However, we decline to exercise that discretion in this case because both parties appear to agree that the 2014 Invocation Policy is significantly different from the prior policy.

As to plaintiff’s urging that we decide the broader issue of whether legislative prayer in any form violates our state constitution, considerations of judicial restraint counsel that “[c]onstitutional analysis should not be embarked on lightly and never when a case’s resolution does not demand it.” (*People v. Giles* (2007) 40 Cal.4th 833, 857 (conc. opn. of Werdegar, J.); see also *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1243 [“Our admonition is rooted in principles of judicial restraint, which have particular salience when courts are confronted with unsettled constitutional issues.”].)

DISPOSITION

The appeal is dismissed. The parties are to bear their own costs on appeal.

DONDERO, J.

We concur:

MARGULIES, Acting P.J.

BANKE, J.

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