

Case No.: S 207173

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF TUOLUMNE,

Respondent,

WAL-MART STORES, INC., JAMES GRINNELL,
AND THE CITY OF SONORA,

Real Parties in Interest.

**After a Decision By the Court of Appeal,
Fifth Appellate District
Case No. F063849**

**Hon. James A. Boscoe, Superior Court Judge
Superior Court of the State of California, County of Tuolumne
Case No. CV56309**

**CITY OF SONORA'S NOTICE OF INTENT TO RELY ON
COURT OF APPEAL BRIEF**

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SUPREME COURT
FILED

MAR 14 2013

Frank A. McGuire Clerk

Deputy

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**NOTICE IS HEREBY GIVEN that Real Party in Interest
City of Sonora intends to rely on the opening brief filed in the
Court of Appeal, and files herewith a copy of the original and 14
additional copies of Appellant's Opening Brief filed with the
Court of Appeal, Fifth Appellate District, on or about March 1,
2012.**

DATED: 3/12/13

Respectfully Submitted,

By: 

Richard Matranga
Attorney for Real Party in Interest
City of Sonora

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**RETURN OF REAL PARTY IN INTEREST CITY OF SONORA
TO PETITION FOR WRIT OF MANDATE, PROHIBITION,
OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF
POINTS AND AUTHORITIES**

*From Order Partially Sustaining Demurrers without Leave to
Amend*

Honorable James A. Boscoe, Superior Court Judge
Superior Court of the State of California, County of Tuolumne
Case No. CV56309
(209) 533-6984

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City of Sonora

INTRODUCTION

This is not an appropriate case for extraordinary relief.

The Superior Court correctly sustained the demurrers. The elections code mandates that when presented with a qualified voter-sponsored initiative—like the Petition—the City must adopt the initiative or place it on the ballot. Petitioner attempts to distract this Court with so-called “evidence” derived from third-party news accounts not in the legal record, focusing on the cast of characters rather than relevant legal issues. The law is clear. The City has no discretion to avoid application of the California Elections Code during the initiative process, regardless of who the project applicant might be. Nor does the City have the luxury of questioning the source of funding of litigation against large retailers in spite of the fact that there is evidence that major financial contributors are comprised of Walmart’s competitors.

RETURN BY VERIFIED ANSWER TO PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER ALTERNATIVE RELIEF

COMES NOW, the City of Sonora (“the City”), Real Party in Interest, for its Return to the Petition for Writ of Mandate, Prohibition or Other Alternative Relief, and answers as follows:

Introduction. The Introduction contains Petitioner’s characterization of this action as well as legal conclusions and does not purport to require a response from the City. To the extent that the Introduction purports to contain factual assertions requiring a response, the City admits that on October 14, 2011 the Trial Court

sustained without leave to amend Walmart's Demurrer to three of Petitioner's four causes of action, leaving only Petitioner's claim that the Initiative is inconsistent with the Sonora General Plan. To the extent that the Introduction purports to quote from a San Francisco Chronicle article entitled "Walmart wins big with California initiatives: Retailer uses elections to grow in state unfettered," the City refers the Court to the article for the language thereof. Except as expressly admitted herein, the City denies each and every allegation in this paragraph.

**BENEFICIAL INTEREST OF PETITIONER;
CAPACITIES OF RESPONDENTS AND REAL PARTIES IN
INTEREST¹**

1. The City admits the allegation in Paragraph 1.
2. The City admits the allegation in Paragraph 2.
3. The City admits the allegation in Paragraph 3.

AUTHENTICITY OF EXHIBITS

4. The City admits the allegation in Paragraph 4.

TIMELINESS OF PETITION

5. The City admits that the Trial Court's ruling partially sustaining the Demurrers of Respondents/Real Parties in Interest was issued on October 14, 2011. The remainder of Paragraph 5 contains legal conclusions to which no response is required.

SUMMARY OF RELEVANT FACTS AND PROCEDURE

The Initiative

6. The City admits that Walmart applied to expand its

¹ Headings included in this answer mirror those in the Petition and are for reference only. The City expressly denies any inference or allegation included in the headings.

existing 130,166 square foot store, and that it proposed to sell groceries and operate 24 hours a day, 7 days a week. The City further admits that it prepared a draft Environmental Impact Report SCH No. 2008052055 ("EIR") on the so-called Walmart Expansion Project and circulated the EIR for public comment. Except as expressly admitted, the City denies each and every allegation in Paragraph 6.

7. The City admits that in June 2010, the Sonora City Planning Commission held a public hearing to consider the EIR and related land use approvals for the Walmart Expansion Project, and that it issued a recommendation to the City Council to certify the EIR and adopt the related land use approvals. The City further admits that on June 28, 2010, Real Party in Interest James Grinnell served the City with a Notice of Intent to Circulate an initiative petition. Except as expressly admitted, the City denies each and every allegation in Paragraph 7.

8. The City admits the allegation in Paragraph 8.

9. The City admits the allegation in Paragraph 9.

10. The City admits that, after receiving signatures from more than 20% of the City's registered voters, the City Council considered the Initiative at its September 20, 2010 meeting, and refers the Court to the September 20, 2010 city council meeting minutes for the matters considered therein. Except as expressly admitted, the City denies each and every allegation in Paragraph 10.

11. Paragraph 11 allegedly refers to the City's September 20, 2010 city council meeting minutes and the City refers the Court to the meeting minutes for the statements contained therein. Except as

expressly admitted, the City denies each and every allegation in Paragraph 11.

12. The City admits that the Initiative affects only the property currently owned by Walmart, and refers the Court to the Initiative and the EIR for the language thereof. Except as expressly admitted, the City denies each and every allegation in Paragraph 12.

13. The City admits that it held a city council meeting on October 18, 2010 and refers the Court to the meeting minutes for the language thereof. The City further admits that the City Council adopted the Initiative as Ordinance No. 796, and that Exhibit 4 includes a true and correct copy of Ordinance No. 796. Except as expressly admitted, the City denies each and every allegation in Paragraph 13.

Petitioner's Mandamus Action Challenging the Initiative

14. The City admits the allegation in Paragraph 14.

15. The City admits the allegation in Paragraph 15.

16. The City admits the allegation in Paragraph 16.

17. The City admits the allegation in Paragraph 17.

18. The City admits the allegation in Paragraph 18.

19. The City admits the allegation in Paragraph 19.

Trial Court Order Partially Sustaining Demurrer Without Leave To Amend

20. The City admits the allegation in Paragraph 20.

21. The City admits the allegation in Paragraph 21.

22. The City admits the allegation in Paragraph 22.

23. The City admits the allegation in Paragraph 23.

Basis For Relief By Extraordinary Writ Rather Than Post-Judgment Appeal

24. The City denies the allegation in Paragraph 24.
25. The City denies the allegation in Paragraph 25.
26. The City denies the allegation in Paragraph 26.
27. The City denies the allegation in Paragraph 27.
28. The City denies the allegation in Paragraph 28.

Basis For Stay Request

29. The City denies the allegation in Paragraph 29.
30. The City denies the allegation in Paragraph 30.

PRAYER

WHEREFORE, the City prays that this Court:

1. Discharge the alternative writ as having been improvidently granted;
2. Deny Petitioner's request for issuance of a writ of mandate, prohibition, or any other form of relief;
3. Dissolve the order staying proceedings in the Trial Court;
4. Award Real Party in Interest its costs incurred in connection with this proceeding; and
5. Grant such other and further relief as the Court may deem just and proper.

STATEMENT OF THE ISSUES

1. Did the Superior Court abuse its discretion by sustaining Walmart's demurrer to three causes of action without leave to amend where the City, pursuant to California Elections Code Section 9214, adopted a qualified voter-initiative by Ordinance instead of calling a special election?

STATEMENT OF FACTS

In 2007, Walmart applied to the City to expand its existing store by approximately 27,491 square feet to allow the store to sell groceries and operate 24 hours a day, seven days a week (the "Project"). (Pet., Ex. 2, ¶ 8.) The City prepared a draft environmental impact report ("EIR") relating to the Project, circulated the EIR for public comment, and received comments. (*Id.*, p. 10.) On June 23, 2010, the Sonora Planning Commission held a public hearing to consider the EIR. (*Id.* at ¶¶10-11.) The Planning Commission issued a report to the City Council unanimously recommending that the City Council certify the EIR and approve the Project. (*Id.* at ¶11 & Ex. 3 at 36)

On June 28, 2010, the City was served with a Notice of Intent to circulate a voter initiative petition that would add an ordinance creating a "Specific Plan." (*Id.* at ¶14.) If adopted, the Specific Plan would permit the expansion of the existing Walmart store as set forth in the Project. (*Id.*)

The County Registrar of Voters determined that signatures in support of the Initiative constituted more than 15 percent of the total number of the City's registered voters. (Pet., Ex. 3 at 6, ¶9.)

On October 18, 2010, in compliance with the mandates of Election Code Section 9214, the Sonora City Council unanimously adopted the Initiative as an ordinance, adding Chapter 17.33 to the Sonora Zoning Code (the "Ordinance"). (Pet., Ex. 2, p. 13, ¶27 & Ex. 4.)

STANDARD OF REVIEW

The Code of Civil Procedure provides that mandate “may be issued . . . to compel the performance of an act which the law specially enjoins” where “there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” Cal. Code Civ. P. §§ 1085, 1086.

“A demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court’s discretion.” *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal. App. 4th 1087, 1091. Although it is well established that mandamus cannot be issued to control a court’s discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way.” *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851. Thus, “an appellate court employs two separate standards of review on appeal”:

First, the complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] . . . Reversible error exists only if facts were alleged showing entitlement to relief under any possible legal theory. [Citations.] [¶] Second, where the demurrer is sustained without leave to amend, reviewing courts determine whether the trial court abused its discretion in doing so. [Citations.] On review of the trial court’s refusal to grant leave to amend, we will only reverse for abuse of discretion if we determine there is a reasonable possibility the pleading can be cured by amendment. Otherwise, the trial court’s decision will be affirmed for lack of abuse. [Citations.]”

Id. at 1091-92, quoting *Hernandez v. City of Pomona* (1996) 49 Cal. App. 4th 1492, 1497-1498.

ARGUMENT

A. The City Properly Adopted A Qualified Voter-Sponsored Initiative Pursuant To The California Elections Code.

On June 28, 2010, the City was served with a Notice of Intent to circulate an initiative petition signed by more than 15 percent of the total number of the City's registered voters. The initiative clearly complied with the requirements set forth in Elections Code Section 9214.

When an initiative petition is signed by at least 15% of the voters of the city, the city council "shall" either "[a]dopt the ordinance, without alteration" or "[i]mmediately order a special election." Elections Code Section 9214 (emphasis added).² The City's duty to adopt the Ordinance or place it on the ballot is "mandatory and ministerial." *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal. App. 3d 561, 559, citing *Blotter v. Farrell*, (1954) 42 Cal.2d 804; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal. App. 4th 1013, 1021 & n.4. ("once an initiative measure has qualified for the ballot, the responsible entity or official has a mandatory duty to place it on the ballot," subject to "[a]n obvious statutory exception [that] permits the legislative body to avoid this necessity by adopting the measure itself").

² As discussed in greater detail, below, before deciding which to do, a city council can request preparation of a report concerning the impact of the initiative pursuant to Elections Code § 9212. The report must be received within 30 days following certification of the sufficiency of the initiative, and after receiving the report, a city council again must either adopt the ordinance without alteration or order a special election. Elections Code § 9214(c).

By statute, the Sonora City Council could not modify the Ordinance before adopting it. Elections Code § 9124. Thus, once a voter-sponsored initiative has qualified—as the Petition had—the City’s duty under Elections Code Section 9214 to adopt the initiative or place it on the ballot is mandatory.

Voter action by initiative is so fundamental that it is described “not as a right granted the people, but as a power reserved by them.” (*Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, fn. omitted.) The CEQA guidelines specifically exempt initiatives from environmental review, and attempts to subject voter-sponsored initiatives to the CEQA process have failed. Cal. Code Regs., tit. 14, § 15378, subd. (b)(4); *Northwood Homes, Inc., v. Town of Moraga* (1989) 216 Cal. App. 3rd 1197, 1206-07 (“When the electorate undertakes to exercise the reserved legislative power, the city has no discretion and acts as the agent for the electorate. In such event, the enactment of the initiative measure is excluded from CEQA compliance.” (emphasis added).)

Accordingly, the City’s decision to adopt the Ordinance was compliant with the Elections Code, non-discretionary and, thus, exempt from CEQA.

B. The Special Report Mechanism of Election Code Section 9124 Is the Exclusive Means By Which City Governments Can Study the Environmental Impact of a Voter Initiative.

As described above, California’s Elections Code Section 9214 mandates the procedures that a city council must follow when presented with a qualified voter initiative. To comply with Section 9214, the city council “shall” (1) “[a]dopt the ordinance, without

alteration” (2) “[i]mmediately order a special election” or (3) “[o]rder a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order a [special] election.”

Elections Code 9212 allows the city council to order a report evaluating the project’s fiscal impact, internal consistency with the city’s general and specific plans, effect on land use, impact on housing, vacant land, business districts and/or agricultural lands, impact on infrastructure funding, and impact on the community’s business and employment.

Elections Code Section 9214 provides no other mechanism for evaluating the environmental or other impact of a project set forth in a qualified voter initiative. It neither mandates nor permits a city council to undertake the full CEQA report procedure, or undertake any other formal project evaluation. Petitioner’s efforts to convince the Court that a different process was required is contradicted by the plain language of the statute.

C. The City Extensively Evaluated The Environmental Impact of the Project.

Petitioner’s attempts to portray the City’s process as cursory, or to imply that the City somehow dodged its environmental impact obligations, ignores the City’s extensive environmental review undertaken of the Project.

The City prepared a draft environmental impact report (“EIR”) *on the same project that included in the Initiative*, circulated it for public comment, and received comments. (Pet., Ex. 2, p. 10.) The

purpose of an EIR is to inform the agency and the public, in detail, about the effect the project is likely to have on the environment and the ways available to minimize that impact. Cal. Pub. Resources Code § 21061. The City's Planning Commission held a public hearing to consider the EIR, and issued a report to the City Council recommending that the City Council certify the EIR and approve the Project. (*Id.* at ¶11.)

Even though the City did not take formally certify the EIR, the City thoroughly considered the environmental impacts of the Project before voting to enact the Ordinance. The Initiative included the same proposals contained within the EIR. Indeed, Petitioner concedes that "the 'objectives' and 'mitigation measures' described in the Initiative are strikingly similar to, and in many cases identical to, those contained in the uncertified Walmart Expansion EIR." (*Id.* at ¶ 12 (emphasis added).) Therefore, the City went through an in-depth and rigorous process of public examination and review regarding the potential environmental impact of the project. Nothing more is required.

D. Forcing Cities To Incur The Costs of a Special Election Is Unnecessary and Burdensome.

Notwithstanding the plain language of Elections Code 9214, Petitioner argues that the City is not entitled to adopt a voter approved initiative by ordinance. In other words, Petitioner seeks to force the City—and other purportedly "financially downtrodden communities"—to spend "tens of thousands or even millions of taxpayer dollars" when it is clear the City and its taxpayers embrace the measure. (Pet. at 1-2.)

The Initiative—in a matter of weeks—was approved by more than 20% of the City's registered voters. (Pet. at 7-9.) The City's Planning Commission *unanimously* voted to approve the Project, and the City Council *unanimously* voted to adopt the Ordinance because they and the electorate supported it. (Pet., Ex. 3 at p. 50, Ex. 4.) It is obvious under the facts of this case that the City and its electorate supported the Initiative. Under such circumstances, no public policy would be served by forcing the City to incur the cost to hold an election.

CONCLUSION

The City complied to the letter with the Elections Code requirements prior to adopting the voter-sponsored initiative under attack in these proceedings. There is no compelling showing that a proper case has been established for interfering with the initiative power. It is respectfully submitted that any modification of the duties required to carry out the "initiative procedure" are within the purview of the legislature, not the Courts.

Dated: 2/29/12

Respectfully submitted,

By: 

Richard Matranga

Attorney for Real Party in Interest
City of Sonora

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.204, 8.409)

The text of this petition consists of 3,464 words as counted by the MS Word program used to generate the petition.

Respectfully submitted,

Dated: 2/29/12

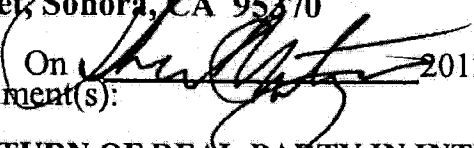
By: 

Richard Matranga

Attorney for Real Party in Interest
City of Sonora

PROOF OF SERVICE

I am employed in the county of Tuolumne, State of California. I am over the age of 18 and not a party to the within action; my business address is Office of the City Attorney, 94 N. Washington Street, Sonora, CA 95370

On  2012, I served the foregoing document(s):

**RETURN OF REAL PARTY IN INTEREST CITY OF SONORA TO
PETITION FOR WRIT OF MANDATE, PROHIBITION, OR
OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS
AND AUTHORITIES**

together with an unsigned copy of this declaration, on all interested parties in this action addressed and sent as follows:

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Small Business Alliance

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BY MAIL (By Following Office Business Practice): By placing a true copy thereof enclosed in a sealed envelope(s). I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I placed such envelope(s) for collection and mailing on that date following ordinary business practice.

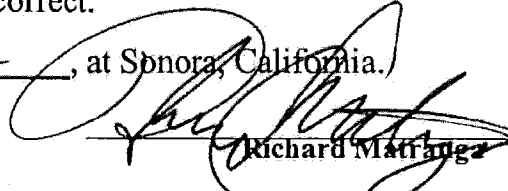
BY ELECTRONIC MAIL: I am personally and readily familiar with the business practice of the firm for the preparation and processing of documents in portable document

format (PDF) for e-mailing. I prepared said document(s) in PDF and then caused such documents to be served by electronic mail to the above addressees.

- [] **BY FEDERAL EXPRESS:** I deposited such envelope in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents in an envelope designated by the said express service carrier, addressed as above, with delivery fees paid or provided for, to be transmitted by Federal Express.

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

Executed on 2/29/12, at Sonoma, California.


Richard Matranga

PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is **K&L Gates, Four Embarcadero Center, Suite 1200, San Francisco, CA 94111.**

On **March 14, 2013**, I served the foregoing document(s):

**CITY OF SONORA'S NOTICE OF INTENT TO RELY ON COURT
OF APPEAL BRIEF**

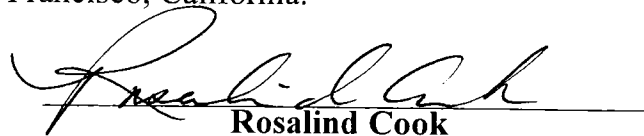
together with an unsigned copy of this declaration, on all interested parties in this action addressed and sent as follows:

SEE ATTACHED LIST

- BY MAIL (By Following Office Business Practice):** By placing a true copy thereof enclosed in a sealed envelope(s). I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I placed such envelope(s) for collection and mailing on that date following ordinary business practice.
- BY ELECTRONIC MAIL:** I am personally and readily familiar with the business practice of the firm for the preparation and processing of documents in portable document format (PDF) for e-mailing. I prepared said document(s) in PDF and then caused such documents to be served by electronic mail to the above addressees.
- BY FEDERAL EXPRESS:** I deposited such envelope in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents in an envelope designated by the said express service carrier, addressed as above, with delivery fees paid or provided for, to be transmitted by Federal Express.

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

Executed on March 14, 2013, at San Francisco, California.


Rosalind Cook

SERVICE LIST

Counsel for Petitioner Tuolumne Jobs
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