IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

S207173

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF TUOLUMNE

Respondent,

WALMART STORES, INC., JAMES GRINNELL, AND THE CITY OF SONORA

Real Parties in Interest.

SUPREME COURT
FILED

APR 16 2013

Frank A. McGuire Clerk

Deputy

CRC 8.25(b)

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

ANSWER BRIEF ON THE MERITS OF PETITIONER TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE

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TABLE OF CONTENTS

ANSWER BRIEF ON THE MERITS OF PETITIONER TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE 1

I. INTRODUCTION AND STATEMENT OF THE CASE 1

II. ISSUES ON REVIEW 5

III. FACTUAL AND PROCEDURAL BACKGROUND 6

A. Original Project. 6

B. Initiative Petition. 6

C. Proceedings in the Trial Court. 7

D. Appellate Court Writ Petition. 8

IV. STANDARD OF REVIEW 9

V. ARGUMENT 10

A. The Appellate Court's Holding that Adopting an Initiative in Lieu of Holding an Election is Not Subject to a Ministerial Exemption from CEQA is Sound and Should be Affirmed 11

B. Holding CEQA Applies Where No Election Occurs Appropriately Harmonizes two Competing Legislative Schemes and Promotes Rather Than Frustrates Reserved Rights of Initiative 15

C. CEQA Compliance Does Not Nullify Elections Code Section 9214 19

VI. CONCLUSION 25

CERTIFICATE OF WORD COUNT 26

TABLE OF AUTHORITIES

Cases

Associated Home Builders, Inc. v. City of Livermore (1976)
18 Cal.3d 582 .... 17, 18

Citizens of Goleta Valley v. Board of Supervisors (1990)
52 Cal.3d 553 10

Committee For Green Foothills v. Santa Clara County Bd. of Supervisors (2010)
48 Cal.4th 32 10

DeVita v. County of Napa (1995)
9 Cal.4th 763 .... 17, 18

Friends of Sierra Madre v. City of Sierra Madre (2001)
25 Cal.4th 165 .... 15, 20, 21, 22, 23

Laurel Heights Improvement Assn. v. Regents of the University of California (1988)
47 Cal.3d 376 2

Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano (2004)
120 Cal.App.4th 961 .... 2, 11, 12, 13

Save Tara v. City of West Hollywood (2008)
45 Cal.4th 116 10

Sierra Club v. Board of Forestry (1994)
7 Cal.4th 1215 1

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra,
40 Cal.4th at p. 435 10

Statutes

Elections Code §9212 7
Elections Code §9214 .... 10, 12, 19, 20, 23, 24

Elections Code §9222 20
Public Resources Code §21000.. 1
Public Resources Code §21080.. 12, 21
Public Resources Code §21080(b)(1) 12

Other Authorities

California Constitution Article II, Section 10(e) 16, 24
California Constitution Article II, Sections 8, 11 21

Regulations

14 California Code of Regulations §15090... 4
14 California Code of Regulations §15369... 13, 14
14 California Code of Regulations §15378.............. 5, 11, 19, 20, 21, 22, 24
14 California Code of Regulations §15378(b)(3) 20

ANSWER BRIEF ON THE MERITS OF PETITIONER TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE

I. INTRODUCTION AND STATEMENT OF THE CASE

This case presents a key question to be resolved by this Court: Where a public agency decides to approve a land use project proposed by initiative measure and to forego an election on the initiative, is the agency's decision exempt from environmental review required by the California Environmental Quality Act (Public Resources Code, §21000 et seq. ("CEQA")) as a ministerial activity?

As this Court has repeatedly stressed, CEQA has three paramount objectives: first, to improve the quality of state and local governments' environmental decision making by enhancing the quality and depth of relevant information upon which environmental policymakers can rely; second to allow interested members of the public to more effectively and knowledgably participate in the decision making process, again, by providing them with clear and accurate information regarding the proposed project; and third, to ensure that those significant environmental impacts identified during the CEQA process are avoided or mitigated to the extent feasible. (*Sierra Club v. Board of Forestry* (1994) 7 Cal.4th 1215, 1233; *Laurel Heights Improvement Assn. v. Regents of the University of*

California (1988) 47 Cal.3d 376, 391-392; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

Adopting the CEQA exemption rule announced by the court in *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961 and reversing the Appellate Court in this matter – as advocated by Real Parties in Interest James Grinnell ("Grinnell"), Walmart Stores, Inc. ("Walmart"), and the City of Sonora ("City") – will encourage and embolden developers to employ the California initiative process in communities with supporting legislative bodies in order to thwart CEQA and ultimately exclude the public and the decisionmakers from having any say over the design of major development projects.

Here, Walmart, itself neither a citizen nor a voter of Sonora, and supporter Grinnell convinced the Sonora City Council to approve specific plan legislation approving a retail development project without an election, without due process, and without completing environmental review, under the guise of democracy in action. Petitioner challenged this action in Tuolumne County Superior Court – but 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.

The ploy used by Walmart and Grinnell in Sonora appears to be part of a larger statewide strategy to force financially downtrodden communities into approving their development projects without CEQA compliance, without discretionary review, and without an election by presenting approving the Initiatives as the lesser of two evils. As the *San Francisco Chronicle* explains:

> In a push to expand across California without interference, Walmart is increasingly taking advantage of the state's initiative system to threaten elected officials with costly special elections and to avoid environmental lawsuits. The Arkansas-based retailer has hired paid signature gatherers to circulate petitions to build new superstores or repeal local restrictions on big-box stores. Once 15 percent of eligible voters sign the petitions, state election law puts cash-strapped cities in a bind: City councils must either approve the Walmart-drafted measure without changes or put it to a special election. As local officials grapple with whether to spend tens of thousands or even millions of taxpayer dollars on such an election, Walmart urges cities to approve the petition outright rather than send it to voters.

Will Evans, "Walmart wins big with California initiatives: Retailer uses elections to grow in state unfettered" *San Francisco Chronicle*, November 24, 2011[1]

And evidencing the fact that they ultimately do not want the electorate to weigh in on their initiatives (like that proposed in Sonora), Walmart offers no assistance to cities in financing an election once it

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[1] Available online at: http://articles.sfgate.com/2011-11-24/bay-area/30439489_1_initiative-process-walmart-tax-revenue

presents the legislative body with the minimum number of required signatures:

> "We are not embarrassed by our decision to move to an initiative and to allow the electorate to overwhelmingly weigh in, but we are not prepared to cover any costs for an election," Walmart spokesman Aaron Rios said at an Apple Valley Town Council meeting in April.

Id.

In fact, Walmart admits the main purpose of this strategy is to exempt its projects from CEQA compliance and enforcement. "The strategy is necessary, [Walmart] says, to avoid spurious lawsuits targeting the company for political reasons. The retailer points out that it goes much of the way through a lengthy planning process, allowing for an environmental impact report and public input, before heading to the ballot box." *Id.* Of course curtailing the environmental review process before an EIR is ever certified, mitigation measures are adopted, or findings of overriding consideration are made is a meaningless act. See, CEQA Guidelines §§15090-15093. And this does not sit well with at least one respected legal scholar:

> "It is disturbing because it appears to be a fairly overt circumvention of the CEQA process," said [Richard] Frank, now director of the California Environmental Law & Policy Center at the UC Davis School of Law.

Id.

Yet the rule advocated by the Real Parties would effectively eviscerate CEQA. Only those developers and project applicants without sufficient capital to gather signatures to qualify their projects for election would be subject to environmental review – whereas the largest, wealthiest, and likely highest impact projects would adopt the Walmart/Grinnell blueprint to avoid CEQA altogether.

The Court of Appeal recognized the problem with this policy; it converts the shield of the initiative process into a sword to ultimately disenfranchise the people from either participating in environmental review of the Project or casting support or disapproval for the project at the ballot box. As the Appellate Court below succinctly concluded, "Real Parties' argument on this point reveals, once again, their failure to appreciate the importance of elections in the initiative process. The results of an election represent the will of the people. A petition signed by 15 percent of the voters does not. Without an election, it simply is not possible to say that the people's will requires the important legislative objectives of CEQA to be set aside so a project can be expedited." Slip Op. at 27-28. Petitioner Tuolumne Jobs & Small Business Alliance ("TJSBA") agrees and urges this Court to affirm the Court of Appeal.

II. ISSUES ON REVIEW

CEQA Guidelines §15378 provides that voter-generated initiatives

submitted to a vote of the people at an election are exempt from CEQA. Is a voter-generated initiative for a development plan that is *not submitted* to the public for a vote but instead approved by the legislative body without an election also exempt from CEQA?

III. FACTUAL AND PROCEDURAL BACKGROUND

The basic facts are undisputed.

A. Original Project.

Walmart applied to the City for permits to expand its existing 130,166 sq. ft. Sonora store by approximately 28,366 sq. ft. to allow the store to sell groceries and operate 24 hours a day, 7 days a week as a supercenter ("Walmart Expansion Project" or "Project"). Appellate Writ Pet. ¶6. In response to the application the City prepared a draft Environmental Impact Report ("EIR") on the Walmart Expansion Project and circulated the EIR for public comment. *Id.* The Planning Commission considered the Project application and EIR in June 2010 and recommended approval to the City Council. *Id.* at ¶7. The City Council never considered the Project application. *Id.*

B. Initiative Petition.

Rather, shortly after the Planning Commission issued its recommendation, Grinnell presented the City with a Notice of Intent to Circulate an initiative petition. *Id.* The Initiative, which the City dubbed

the "Walmart Initiative" proposed adopting a "specific plan" known as the "Sonora Commercial Specific Plan" at the Walmart Expansion Project site. *Id.* at ¶8. Unidentified parties gathered signatures in support of the Initiative and submitted them to the County Clerk for verification. *Id.* at ¶9. The County Clerk determined that out of 651 signatures submitted, 541 were found sufficient and this number exceeded 15% of Sonora registered voters. *Id.* at ¶9.

On September 20, 2010 the City Council received a staff report from the City Manager regarding the Initiative. *Id.* at ¶¶ 10-11. The City Council ordered a report pursuant to Elections Code § 9212. *Id.* At its regular October 18, 2010 meeting the City Council considered the Initiative. *Id.* at ¶13. Walmart advocated that the City forego an election and instead adopt the Initiative as an alternative means of approving its Project, stating "by putting the planning commission's recommendation [on the Walmart Expansion Project] into the form of an initiative, we have given hundreds of your constituents the opportunity to express support for this project and streamline the process of approval." *Id.* The City Council decided to grant Walmart's request to forego the election and approve the Initiative as its own. *Id.*

C. Proceedings in the Trial Court.

In January 2011 TJSBA filed an action challenging the Initiative on four grounds. *Id.* at ¶¶ 14-15. The First Cause of Action alleged that the

decision to approve the Project by Initiative is not a ministerial act and therefore not exempt from CEQA and/or to the extent the Elections Code authorizes a City Council to forego submitting a site specific land use decision to a vote of the people, and instead to treat that decision as exempt from CEQA and approve that initiative as its own legislation based on the desire of a minority of registered voters, such authority conflicts with the California Constitution (Art. II, sec. 11), which reserves legislative decision making to the people regardless of cost. *Id.* at ¶16. The Second through Fourth Causes of Action raised non-CEQA challenges to the Initiative. *Id.* at ¶¶ 17-19.

City, Grinnell, and Walmart demurred to all four causes of action and in October 2011 the trial court issued a ruling sustaining the demurrers without leave to amend as to the first, third, and fourth causes of action. *Id.* at ¶¶ 20-22. The trial court overruled the Demurrer to the second cause of action, which challenged the Initiative's consistency with the Sonora General Plan. *Id.* at ¶22.

D. Appellate Court Writ Petition.

TJSBA filed a petition for a writ of mandate with the Fifth District Court of Appeal ("Appellate Court") in December 2011 requesting that the Appellate Court order the trial court to vacate its order sustaining the demurrer as to the three causes of action. *Id.* at ¶¶12-13. The petition also requested the Appellate Court stay the proceedings in the trial court. *Id.* at

¶29. The Appellate Court issued an order to show cause why relief should not be granted and stayed the trial, pending determination of the petition. Slip Op. p. 5. Walmart and the City filed returns on March 1, 2012. Grinnell did not file any return. *Id.* On Walmart's request the appellate court heard oral argument in September 2012. Walmart and TJSBA appeared and argued. Neither City nor Grinnell appeared at oral argument.

The Appellate Court concluded that the trial court erred in sustaining demurrer without leave to amend as to TJSBA's CEQA claims and directed the trial court to modify its order allowing TJSBA's first (CEQA) and second (general plan) causes of action to proceed to hearing on the merits. In addressing the issue now before this Court, the Court of Appeal under took a thorough analysis and ultimately decided "Environmental review can only be avoided when the voters choose to bypass it, not when the lead agency chooses to bypass the voters." Slip. Op. at p. 2.

Walmart and Grinnell each petitioned this Court for review in December 2012. On February 13, 2013 this Court granted review.

IV. STANDARD OF REVIEW

The issues presented raise questions of law which are reviewed de novo. "On review from an order sustaining a demurrer, 'we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for

this purpose.'" *Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42. "[W]e answer independently from the agency whose decision is under review. While judicial review of CEQA decisions extends only to whether there was a prejudicial abuse of discretion, 'an agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) Judicial review of these two types of error differs significantly: while we determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, 276 Cal.Rptr. 410, 801 P.2d 1161), we accord greater deference to the agency's substantive factual conclusions." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.)" *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131.

V. ARGUMENT

In reversing the trial court's order sustaining demurrer, the Court of Appeal held that "a lead agency is not permitted to skip CEQA review when it chooses, under Elections Code section 9214, subdivision (a), to approve a project submitted to it via voter petition instead of holding an

election under Elections Code section 9214, subdivision (b)." Slip Op. at 17. Thus, a voter sponsored initiative that is not submitted to the vote of the people is not exempt from CEQA review.[2] *Id.*

Real Parties urge the Court to overturn the Appellate Court and instead to conclude that the City Council's decision to adopt the Initiative is exempt from CEQA. TJSBA agrees.

A. The Appellate Court's Holding that Adopting an Initiative in Lieu of Holding an Election is Not Subject to a Ministerial Exemption from CEQA is Sound and Should be Affirmed.

The subtext of the debate in this matter is whether, in light of the split of authority created by the Appellate Court's opinion and that in *Native American Sacred Site*, should the statewide rule be one exempting initiatives adopted without election from CEQA, or should the rule be more refined to harmonize the competing strong public policy consideration inherent in elections law and environmental law as expressed by the Court of Appeal in the matter below? TJSBA submits that the Appellate Court's approach is well reasoned and better harmonizes the competing legislative schemes than does the *Native American Sacred Site* rule.

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[2] This holding coheres with the plain language of CEQA Guidelines §15378(b), which provides that the term "project" excludes "[t]he *submittal of proposals to a vote of the people* of the state or of a particular community that does not involve a public agency sponsored initiative." (Emphasis added).

In *Native American Sacred Site* , a private high school wanted to develop a parcel for recreational facilities. It collected signatures on a petition in support of an initiative to rezone the property and amend the general plan. *Native American Sacred Site* at 964. After the registrar of voters certified the petition had valid signatures of more than 15 percent of the city's registered voters, the city council acted pursuant to Elections Code section 9214 to adopt the initiative as an ordinance instead of submitting the initiative to the voters in a special election. *Id.* at 964-65. The plaintiffs filed a petition for writ of mandate in the superior court, arguing the city was required to complete CEQA review before adopting the initiative. The trial court sustained the demurrer, and on appeal the Fourth District affirmed. *Id.* at 965.

The Fourth District stated the approval was exempt from CEQA under Public Resources Code section 21080, subdivision (b)(1), because "[a] city's duty to adopt a qualified voter-sponsored initiative, or place it on the ballot, is ministerial and mandatory." *Id.* at 966. Public Resources Code section 21080(b)(1) provides that CEQA does not apply to "ministerial projects proposed to be carried out or approved by public agencies."

As the Fifth District countered below, however, "[a]lthough the duty to adopt the initiative *or* hold a special election certainly is mandatory under Elections Code section 9214 – the statute says the city council "shall"

do one or the other – the *choice between the two* is entirely discretionary." Slip Op. at 17. That "choice," as the Court of Appeal notes, is not insignificant because it means "the difference between giving the voters the opportunity to exercise their franchise and withholding that opportunity…" *Id.* And, because the choice itself is discretionary (whereas the duty to make the choice is ministerial), it is subject to CEQA review in the event a public agency chooses to forego an election.[3] *Id.* at 18.

Real Parties also suggest that a City does not exercise discretion in adopting a land use initiative as its own and therefore such action is not exempt from CEQA. Yet despite Respondents' arguments against, the Appellate Court articulately and appropriately holds a city council's decision to adopt a land use initiative otherwise subject to CEQA is exempt as a "ministerial" application.

CEQA Guideline §15369 provides, "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment is deciding *whether or how the project should be carried out.*" CEQA Guideline §15369

[3] The Court of Appeal further distinguished the cases relied upon by the *Native American Sacred Site* court in reaching a contrary conclusion. Slip Op. at 18. Unlike here, in each of them "the legislative body failed to take any appropriate action in response to a certified initiative petition presented on behalf of the voters; it neither called an election nor adopted the initiative." *Id.* The courts in those cases merely ordered the agencies to place the initiatives on the ballot to remedy their inaction. *Id.*

(emphasis added). Critical here – the Sonora City Council rather than the electorate made the ultimate decision to carry out the Initiative.

"A city council's decision about whether to approve a development project or instead to let the voters make the decision is not 'ministerial' under this definition...It is a policy decision supported on the one side by many considerations relevant to whether the project is good for the community and on the other side by all the reasons why it might be desirable for the voters to be able to make the decision for themselves. It also involves a weighing of the costs of holding an election against its benefits. Even real party in interest Grinnell recognizes, in his informal response, (albeit in another context), that the council's decision whether to adopt the initiative or hold an election is 'political.'"...The role of all these considerations shows that the decision was not ministerial." *Id.* at p. 16. The Opinion continues, "The definition in Guidelines section 15369 specifies that an action is ministerial if public official cannot use discretion or judgment in deciding *whether* or how the project should be carried out.' Here, the city council did decide that the project should be carried out, and in so doing used its discretion and political judgment in concluding that the decision about whether it should be carried out or not should be left to the electorate." *Id.* (emphasis in original).

Thus, the elected officials rather than the electorate made the final decision to carry out the project by approving the Initiative and, as such,

that decision is not exempt from CEQA. And nothing in that reasoning conflicts the purpose and intent of CEQA or the initiative process.

B. Holding CEQA Applies Where No Election Occurs Appropriately Harmonizes two Competing Legislative Schemes and Promotes Rather Than Frustrates Reserved Rights of Initiative.

Real Parties suggest that requiring CEQA compliance where the legislative body enacts the initiative in lieu of an election somehow deprives the people of the reserved power of initiative. To the contrary, the Appellate Court's holding merely provides that where a city council decides to adopt a voter-sponsored initiative as its own rather than allow the electorate to make the decision, the city cannot absolve itself of complying with CEQA. As the opinion explains, this conforms to this Court's opinion in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 (which held the submission to the electors of a voter-generated initiative is exempt from CEQA but the submission of a city-generated initiative is not) and noted "even if an election is held [following a city council placing an initiative on the ballot] and a majority of voters expresses its will to let a project go forward, CEQA review is still required if it was the city council that chose to put the initiative on the ballot." Thus reasoned the Appellate Court, "It is even clearer that CEQA applies when a mere 15 percent of the voters has expressed support of the initiative and the city council chooses to approve the project without an election." Slip Op at 13.

Indeed CEQA compliance in this circumstance does not hinder the reserved right of initiative at all. Rather, if anything, it *ensures* those reserved rights by exempting only decisions by the electorate from CEQA compliance. As the Appellate Court noted, "Real parties' argument on this point reveals, once again, their failure to appreciate the importance of elections in the initiative process. The results of an election represent the will of the people. A petition signed by 15 percent of the voters does not. Without an election, it simply is not possible to say that the people's will requires the important legislative objectives of CEQA to be set aside so a project can be expedited." Slip Op. at 27-28.

Requiring CEQA compliance deters developers and public officials from enlisting registered voters to propose legislation on controversial land use issues for the purposes of circumventing CEQA all the while upholding the rights of the people to enact legislation via elections. To put a finer point on it, to the extent holding such agency approvals are subject to CEQA will result in more initiatives decided by the electorate than by vote of the agency's legislative body, such result implements rather than hinders Constitutional protections.

Cal. Const., art. 2, § 10(e) instructs "The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, *and measures submitted to the electors*." (emphasis added) Real Parties, in their quest to ultimately prevent the Initiative from ever being submitted to

the electors, ignored this key phrase. Rather, upholding the process advocated and applied by Real Parties here would provide public agencies and well-funded developers a vehicle to bypass CEQA and approve land use policies and development projects without ever evaluating the environmental impacts and without ever allowing the electorate to participate in the decision. This is not the intent of CEQA and this is not the intent of the State Constitution's reservation of initiative rights.

Nor is this approach inconsistent with this Court's previous decisions in *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582 and *DeVita v. County of Napa* (1995) 9 Cal.4th 763. In *Associated Home Builders* this Court reviewed homebuilders' challenges to a local growth control measure enacted by initiative. In rejecting the homebuilders' claim that the initiative was invalid for failing to follow procedural notice and hearing requirements contained in the State Planning and Zoning Law, this Court emphasized the importance of the Constitutionally reserved rights of initiative and referendum explaining, "[I]t has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." *Associated Homebuilders, supra*, 18 Cal.3d at 591.

In *DeVita* the voters of Napa County enacted Measure J, an initiative that amended the land use element of the county's general plan to preserve agricultural land, rendering the redesignation of existing agricultural land and open space conditional on voter approval, with certain exceptions, for 30 years. This Court rejected *DeVita's* claim that a General Plan could not be amended by initiative explaining, "When the Legislature enacts a statute pertaining to local government, it does so against the background of the electorate's right of local initiative, and the procedures it prescribes for the local governing body are presumed to parallel, rather than prohibit, the initiative process, absent clear indications to the contrary." *DeVita, supra,* 9 Cal.4th at 786

Both cases involved challenges to initiatives *enacted by the people via election* – rather than an initiative proposed by a voter and enacted by the city council as was the situation in Sonora. And this was a material distinction according to the Appellate Court, which rejected Real Parties' reliance on *DeVita* and *Associated Home Builders*, explaining:

> This reasoning is based on the constitutional prerogatives *of the electorate.* It logically can have no application where, as here, the public agency decides to take the matter out of the electorate's hands. The fundamental policy of the category of exemptions recognized in *DeVita* is the policy the Supreme Court enunciated in *Associated Home Builders:* to vindicate "the theory that all power of government ultimately resides in the people" by ensuring that the voter initiative—" 'one of the most precious rights of our democratic process' "—is not thwarted by legislation. (*Associated Home Builders, supra,* 18 Cal.3d at p. 591, 135 Cal.Rptr. 41, 557 P.2d 473.) In this case,

> the electorate never had the chance to exercise this right, so the reasoning supporting this type of exemption does not apply.

Slip Op. at 14.

Accordingly, Real Parties' arguments regarding alleged harm to initiative rights lacks merit.

C. CEQA Compliance Does Not Nullify Elections Code Section 9214

Real Parties also suggest that the holding in the Appellate Court nullifies Elections Code §9214 and therefore should not be followed. But this argument is without merit for three reasons.

First, not all initiatives are subject to CEQA. Rather, CEQA applies only to "projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment or amendment of zoning ordinances…" The Initiative, of course, does just that by amending the Sonora Municipal Code to act as the zoning for the area. To be a project, a zoning ordinance amendment must pose the potential to cause a "physical change to the environment." CEQA Guideline 15378(a). Of course, public agencies regularly adopt legislation that does not meet this threshold and therefore is not subject to CEQA. Accordingly, any such legislation proposed by initiative could, in fact, be enacted pursuant to the procedures set forth in Elections Code §9214(a) without triggering CEQA.

Second, this Court has provided an express exemption for citizen initiatives that are placed on the ballot pursuant to §9214(b) and similar initiative statutes. In *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, a controversy arose regarding whether certain properties should be removed from the Register of Historic Landmarks. The city council was advised that an EIR would need to be prepared assessing the impact of the delisting. Property owners were reluctant to pay the cost of an EIR. In an effort to avoid CEQA the city decided to put the question to a vote of the electorate by placing an initiative on the ballot pursuant to Elections Code §9222. This section authorizes a city council to place its own initiative on a ballot, that is, an initiative it created on its own, without receiving a petition from voters. The city took the position that if the decision were made by the voters, rather than the city council, the properties could be delisted without CEQA compliance. *Id.* at 174-175. The city relied on Guidelines section 15378, subdivision (b), as it read at the time. *Id.* at 187-188.) It appeared on its face to exempt all ballot initiatives from CEQA review by stating that the term "project" within the meaning of CEQA does not include "[t]he submittal of proposals to a vote of the people of the state or of a particular community." (Former Guidelines § 15378, subd. (b)(3).)

This Court began its analysis by summarizing the requirements of CEQA and observing that these requirements are triggered by all projects

that are not exempted. (*Friends of Sierra Madre, supra,* 25 Cal.4th at 184.) It stated that the city's action in placing the initiative on the ballot without prior environmental review "was improper unless Guidelines section 15378, subdivision (b)(3) exempted the ballot measure from CEQA compliance." (*Id.* at p. 187.) Assuming that the California Natural Resources Agency, which promulgates the Guidelines, intends them to be valid, the court searched for some law that "mandates or permits exclusion of ballot measures initiated by a public agency from CEQA ...." (*Friends of Sierra Madre, supra,* at p. 190.)

It found two sources of authority that justify application of Guidelines section 15378, subdivision (b)(3), to *voter*-sponsored initiatives: First, Public Resources Code section 21080, subdivision (b)(1), provides that CEQA does not apply to "'[m]inisterial projects proposed to be carried out or approved by public agencies.'" The court stated that "placing a voter-sponsored measure on the ballot is a ministerial act." (*Friends of Sierra Madre, supra,* 25 Cal.4th at p. 189.) Second, "imposing CEQA requirements on such [voter-generated] initiatives might well be an impermissible burden on the electors' constitutional power to legislate by initiative. (Cal. Const., art. II, §§ 8, 11.)" (*Ibid.*) These authorities do not justify applying Guidelines section 15378, subdivision (b)(3), to *city-council-generated* initiatives, however.

For these reasons, the court concluded that there is "a clear distinction between voter-sponsored and city-council-generated initiatives." (*Friends of Sierra Madre, supra*, 25 Cal.4th at pp. 189, 190-191.) While ballot measures initiated by voter petition are exempt from CEQA, those generated and placed on the ballot by a public agency are not. (*Friends of Sierra Madre, supra,* at p. 191.) The Guidelines cannot be understood to authorize a CEQA exemption for "ballot measures placed before the electorate by a public agency in the exercise of the agency's discretion." (*Friends of Sierra Madre, supra,* at p. 190.)

After *Friends of Sierra Madre* was decided, Guidelines section 15378, subdivision (b), was amended to conform with the court's holding. It now states that the term "project" excludes "[t]he submittal of proposals to a vote of the people of the state or of a particular community *that does not involve a public agency sponsored initiative*." (Italics added.)

Friends of Sierra Madre and the revised Guidelines section 15378, subdivision (b), establish the manner in which the law deals with project approvals that are obtained through elections that *actually take place*: If the initiative the voters voted on originated with a voter petition, then the project is exempt from CEQA. If the voters voted on an initiative that originated with a public agency's discretionary action and there was no voter petition, then the project is not exempt from CEQA.

Given the *Friends of Sierra Madre* opinion's construction of CEQA in light of the Elections Code where an election *does* take place, how should we construe CEQA in the situation here, where the city decides under Elections Code section 9214 *not* to hold an election on a voter-sponsored initiative but instead adopts the initiative on its own authority? In one way, the lesson of *Friends of Sierra Madre* for us here is simple. The Supreme Court held that, even if an election is held and a majority of voters expresses its will to let a project go forward, CEQA review is still required if it was the city council that chose to put the initiative on the ballot. "It is even clearer that CEQA applies when a mere 15 percent of the voters has expressed support for the initiative and the city council chooses to approve the project without an election." Slip Op. at 13.

Thus the Appellate Court's holding does not frustrate the initiative process. And that court expressly and thoughtfully addresses this very point as follows:

> The fact that CEQA compliance is required if there is to be no election, and that CEQA compliance may often be impossible before the deadline, do not change the statute's mandate to make a decision. In effect, this means that a city council will be compelled to hold an election in all cases in which environmental review has not begun when the voters' petition is presented. We acknowledge that our holding means the direct-adoption option of Elections Code section 9214, subdivision (b),[4] will usually not be available for an initiative that would have a significant environmental impact, and an election will usually be required. The results in a case like

[4] The direct-adoption option is actually found in Subdivision (a).

> this, in which statutes point in different directions and must be reconciled with one another, are bound to be imperfect. Our solution is the better one, however, because it avoids the anomalous consequence of allowing a small fraction of a local electorate, combined with a majority of a city council, to nullify state law under conditions in which the local electorate as a whole has not been given a voice.

Slip Op. at 26. Thus, holding CEQA applies to the Council's decision to adopt the Initiative does not invalidate Elections Code §9214 as the election option is expressly exempt from CEQA per Guideline §15378(b)(3).

Rather, at most, timing restraints may limit an agency's ability to adopt the initiative as its own under §9214(a) and force the agency to hold an election to allow the citizens to decide the issue pursuant to §9214(b). This is not an offensive result, for the Constitution does not guarantee enactment of initiatives by a majority vote of the legislative body. Rather the precise language of the Constitution guarantees the people the right to bypass its elected officials and to submit proposed legislation "to the electors." Cal. Const., art. 2, § 10(e). Neither the holding in *Tuolumne Jobs* nor the relief sought by Appellant in this case in any way harms that principle. Indeed, if anything, the legislative-body adoption process contained in Election Code §9214 appears to exceed the scope of the Constitution which limits approval of initiatives "by the electors" not by the legislative body should it not want to refer the issue to the electors.

VI. CONCLUSION

TJSBA believes the Appellate Court adeptly harmonized the two competing and important legislative schemes to protect the power of initiative and to avoid creating a gaping loophole in the CEQA compliance process. Accordingly the Supreme Court should affirm the holding of the Court of Appeal.

Respectfully submitted,

DATED: April 15, 2013

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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1))

The text in this brief (including footnotes) consists of 5,731 words as counted by the Microsoft Office Word 2007 word processing program used to generate this brief. The font is 13 point Times New Roman.

Dated: April 15, 2013

Brett S. Jolley

PROOF OF SERVICE

I, Laura Cummings, certify and declare as follows

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Dated: April 15, 2013

LAURA CUMMINGS