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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TUOLUMNE JOBS & SMALL BUSINESS ALLIANCE, Petitioner, v. THE SUPERIOR COURT OF TUOLUMNE COUNTY, Respondent; WAL-MART STORES, INC. et al., Real Parties in Interest.	F063849 (Super. Ct. No. CV56309) **OPINION**

ORIGINAL PROCEEDINGS in mandate. James A. Boscoe, Judge. Petition granted in part.

Herum Crabtree and Brett S. Jolley for Petitioner.

Briggs Law Corporation, Cory J. Briggs and Mekaela M. Gladden for Creed-21 as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts IV, V, and VI.

Trevor A. Grimm, Jonathan M. Coupal and Timothy A. Bittle for Howard Jarvis Taxpayers Foundation as Amicus Curiae on behalf of Respondent and Real Parties in Interest.

K&L Gates and Edward P. Sangster for Real Party in Interest Wal-Mart Stores, Inc.

Roger A. Brown for Real Party in Interest James Grinnell.

Richard Matranga, City Attorney, for Real Party in Interest City of Sonora.

Renne Sloan Holtzman Sakai, Randy Riddle and Ivan Delventhal for League of California Cities as Amicus Curiae on behalf of Real Parties in Interest.

It is settled that when a development project is approved by means of a ballot initiative placed on the ballot by voters and adopted by them in an election, the project is exempt from environmental review under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA). (See CEQA Guidelines, § 15378 (b)[1].) In this case, real parties in interest Wal-Mart Stores, Inc., and the City of Sonora contend that CEQA compliance also can be avoided when a developer's supporters gather signatures of 15 percent of the registered voters on an initiative petition to approve the development, and the lead agency chooses to forgo the election and adopt the initiative directly as an ordinance, pursuant to Elections Code section 9214. We disagree. Environmental review can be avoided when the voters choose to bypass it, not when the lead agency chooses to bypass the voters. We grant the writ relief requested on this issue by petitioner Tuolumne Jobs & Small Business Alliance (TJSBA). We publish the portion of our opinion dealing with this issue because it creates a split of authority, as we respectfully decline to follow *Native American Sacred Site & Environmental Protection*

[1]Guidelines for the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000 et seq.), hereafter Guidelines.

Assn. v. City of San Juan Capistrano (2004) 120 Cal.App.4th 961 (*Native American Sacred Site*). In the unpublished portion of the opinion, we reject TJSBA's arguments on two other points.

FACTUAL AND PROCEDURAL HISTORIES

The essential facts are undisputed. There is a 130,000-square-foot Wal-Mart store in Sonora (the city). Wal-Mart wants to expand it and make it a Wal-Mart Supercenter, which would be larger, would sell groceries, and would be open 24 hours a day, seven days a week.

Wal-Mart submitted an application to the city for the approvals necessary for the expansion. The city prepared an environmental impact report (EIR) on the proposed project and circulated it for public comment. The city planning commission held a public hearing on Wal-Mart's application and voted to recommend approval.

On June 28, 2010, before the city council voted on whether to certify the EIR and approve the project, real party in interest James Grinnell served the city with a notice of intent to circulate an initiative petition. The city referred to this initiative as the "Walmart Initiative." It postponed its vote on the EIR and Wal-Mart's application while it considered the initiative.

Signatures were gathered and submitted to the registrar of voters. Out of 651 signatures submitted, the registrar found 541 valid and concluded that this was more than 15 percent of the city's 2,489 registered voters.

The city council held a public hearing on the initiative on September 20, 2010. The city administrator and a representative of Wal-Mart both explained that the purpose of the initiative was to approve Wal-Mart's construction and operation of the Supercenter, and that it was a procedural alternative to city approval of Wal-Mart's original application, having the same effect.

The city council considered the "Walmart Initiative" at its meeting on October 18, 2010. A Wal-Mart representative again explained that Wal-Mart had put "'the planning

commission's recommendation [to approve the project] into the form of an initiative ….'" The city considered the courses of action open to it under Elections Code section 9214, which provides:

> "If the initiative petition is signed by not less than 15 percent of the voters of the city … or, in a city with 1,000 or less registered voters, by 25 percent of the voters or 100 voters of the city, whichever is the lesser number, and contains a request that the ordinance be submitted immediately to a vote of the people at a special election, the legislative body shall do one of the following:
>
> "(a) Adopt the ordinance, without alteration, at a regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
>
> "(b) Immediately order a special election, … at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city.
>
> "(c) Order 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 an election pursuant to subdivision (b)."

Elections Code section 9212, describing the report the city can order, provides that the report is to be provided by city agencies; it lists specific topics the report can address and sets a maximum of 30 days for presentation of the report to the city council.

After a public hearing at the October 18, 2010, meeting, the city council voted to adopt the initiative as Ordinance No. 796 and to forgo the special election. In this manner, the Wal-Mart expansion was approved by the city even though the EIR was never certified and CEQA review was never completed.

TJSBA filed a petition for a writ of mandate in the superior court, alleging four causes of action: (1) the city's action violated CEQA because, unlike voter approval of an initiative via a special election pursuant to Elections Code section 9214, subdivision (b), city approval of the same initiative under subdivision (a) requires environmental review; (2) the initiative is invalid because it conflicts with the Sonora General Plan; (3) the initiative includes provisions that would improperly limit the city's

legislative power in the future; and (4) the initiative is administrative in character, not legislative, and is therefore not a proper subject for the initiative process.

Wal-Mart filed a demurrer, arguing that the petition failed to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The city and Grinnell joined in the demurrer. Grinnell also filed a separate demurrer asserting that he was not a proper real party in interest. The court sustained Wal-Mart's demurrer with respect to the first, third, and fourth causes of action and overruled it with respect to the second cause of action. It also overruled Grinnell's separate demurrer. The court denied leave to amend.

TJSBA filed a petition for a writ of mandate in this court, requesting that we order the superior court to vacate its order sustaining the demurrer as to the three causes of action. The petition also requested that we stay the proceedings in the superior court. We ordered real parties to file an informal response and then issued an order to show cause why relief should not be granted. We also stayed the trial, pending determination of the petition. Wal-Mart and the city filed returns on March 1, 2012. TJSBA filed a traverse on April 3, 2012.

DISCUSSION

I. Grounds for writ relief

The situation here is similar to the one in *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1314-1315:

> "Even though the lawsuit is still in the pleading stage, review through a petition for extraordinary relief is appropriate. Where a demurrer is sustained without leave to amend with respect to less than all of the causes of action, 'mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action … and when that extraordinary relief may prevent a needless and expensive trial and reversal [citation].' [Citation.] Because the primary issue raised by the parties' pleadings, the trial court's ruling, and Campbell's petition is the novel and important question of whether an insured may sue its insurer for breach of the implied covenant of good faith and fair dealing based solely upon the insurer's unjustified refusal to defend, we stayed further

proceedings in the trial court and issued an alternative writ of mandate to allow us to consider that specific question. [Citation.]"

Writ relief in this case will avoid a situation in which the superior court enters judgment for Wal-Mart and the city based on an error of law, an error that will have to be reversed on appeal after much time has elapsed and money has been spent needlessly. Further, the legal issue is important and calls for speedy resolution. Developers' strategy of obtaining project approvals without environmental review *and* without elections threatens both to defeat CEQA's important statutory objectives and to subvert the constitutional goals of the initiative process.

In arguing against writ relief, Wal-Mart and the city point out that the superior court had set the trial for March and had scheduled a mere one-hour hearing. They say this shows that going to trial would have involved minimal expense and any error could easily have been corrected on appeal. Even a one-hour trial has costs for the parties, however, costs that are needless where the trial court has erred in sustaining a demurrer on a meritorious cause of action and a reversal on appeal will necessitate another trial.

There are other consequences besides the wasted one-hour trial. An appeal can take well over a year, and the loss of time is itself an unnecessary cost under these circumstances. In the meantime, Wal-Mart might decide, on the strength of a win in the superior court, to proceed with building the project, possibly leading to a later order requiring the project to be removed at great cost. (See *Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888-889.)

Wal-Mart and the city also point out that we are not dealing with an issue of first impression in this case, since the Court of Appeal addressed the same issue in *Native American Sacred Site, supra,* 120 Cal.App.4th 961. After careful consideration, we have concluded that we disagree with *Native American Sacred Site*, which is the only authority squarely on point**.**

For all these reasons, we conclude that writ relief is appropriate in this case.

II. Standard of review for demurrer

If this were an appeal, we would be reviewing a judgment entered after the demurrer was sustained. Here, of course, there has been no judgment, but we apply the same standard of review to the court's order sustaining the demurrer. This standard is well established:

> "In an appeal from a judgment dismissing an action after a general demurrer is sustained without leave to amend, our Supreme Court has imposed the following standard of review. 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

In this case, the only question on the first cause of action is whether, as a matter of law, CEQA review is unnecessary when a city approves a project by adopting as an ordinance the text of an initiative presented to it under Elections Code section 9214 with certified signatures of 15 percent of the city's registered voters, thereby avoiding the need for an election on the initiative. There is no dispute but that if this is a valid way of approving a project without CEQA review, the demurrer was sustained correctly on this cause of action, and that if it is not, then the demurrer must be overruled. The order sustaining the demurrer on the third and fourth causes of action similarly involves only questions of law. It is undisputed that if the law is as claimed by TJSBA, then the facts TJSBA pleaded are sufficient, and that if the law is as claimed by real parties, then the pleading is insufficient and cannot be cured by amendment.

III. CEQA compliance required before city can approve project without election

A. The problem

The main issue in this case, arising from the first cause of action, is an issue of statutory construction. Specifically, how should we construe the provision of Elections Code section 9214 that allows cities to adopt initiatives without elections in light of CEQA? On the one hand, CEQA generally prohibits governmental agencies from approving projects that have significant impacts on the environment without first completing the environmental review process and either mitigating those impacts or finding mitigation to be infeasible and the impacts to be justified by overriding considerations. (Pub. Resources Code, §§ 21002, 21002.1, 21006, 21081.) On the other hand, our Supreme Court has held that the prerogatives of the electorate when exercising its right of initiative must not be thwarted by procedural constraints arising from other provisions of state law:

> "[S]tatutory procedural requirements imposed on the local legislative body generally neither apply to the electorate nor are taken as evidence that the initiative or referendum is barred. The rule is a corollary to the basic presumption in favor of the electorate's power of initiative and referendum. 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 v. County of Napa* (1995) 9 Cal.4th 763, 786 (*DeVita*).)

The court also stated that local voters' power to approve an initiative at an election is guaranteed by article II, section 11, of the California Constitution "absent the clear indication that the Legislature intended to preempt that power pursuant to a statewide purpose." (*DeVita, supra*, 9 Cal.4th at p. 795.)[2]

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[2]Article II, section 11, of the California Constitution provides: "(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter. [¶] (b) A city or county initiative

This doctrine conforms with the more general remarks the Supreme Court made about the initiative and referendum processes earlier in *Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (*Associated Home Builders*):

> "The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[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.' [Citations.] [Fns. omitted.]"

These holdings indicate that, when there is an actual election, procedures that would restrain the voters' power to enact their will must give way. But what are the consequences for CEQA when the lead agency chooses *not* to have an election but to adopt the initiative through its *own* action?

We apply standards of statutory construction to answer this question. In interpreting a statute, our objective is "to ascertain and effectuate legislative intent." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) To the extent the language in the statute may be unclear, we look to legislative history and the statutory scheme of which the statute is a part. (*People v. Bartlett* (1990) 226 Cal.App.3d 244, 250.) We look to the

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measure may not include or exclude any part of the city or county from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of the city or county or any part thereof. [¶] (c) A city or county initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure."

entire statutory scheme in interpreting particular provisions "so that the whole may be harmonized and retain effectiveness." (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.) "In the end, we '"must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]'" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

B. Friends of Sierra Madre

The related problem of CEQA's applicability when a city *does* conduct an election on an initiative has been settled by our Supreme Court in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 (*Friends of Sierra Madre*). A controversy had arisen in Sierra Madre over 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. The city decided to put the question to a vote of the electorate by placing an initiative on the ballot pursuant to Elections Code section 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. (*Friends of Sierra Madre, supra,* at pp. 174-175.) The city relied on Guidelines section 15378, subdivision (b), as it read at the time. (*Friends of Sierra Madre, supra,* at pp. 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).)

The Supreme 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 p. 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* court'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?[3] In one way, the lesson of *Friends of Sierra Madre* for us here is simple. The

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[3]Logically, there are four possible situations when a project is approved by a city or its voters:

	election	**no election**
voter petition	1. CEQA exemption (*Friends of Sierra Madre)*	3. No CEQA exemption (this case)
no voter petition	2. No CEQA exemption (*Friends of Sierra Madre*)	4. No CEQA exemption (ordinary agency project approval)

Situations 1 and 2 are those considered in *Friends of Sierra Madre*; the Supreme Court's conclusion was that CEQA compliance is required in situation 2 but not in

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.

Applying *Friends of Sierra Madre* in a more detailed way, we employ the method used by the Supreme Court: Starting from the proposition that CEQA applies to projects approved by public agencies unless some authority establishes an exemption or exception, we consider the possible grounds for finding an exemption or exception here.

The exemption delineated in Guidelines section 15378, subdivision (b)(3), is inapplicable, for it applies only to "[t]he submittal of proposals to a vote of the people," and nothing was submitted to a vote of the people in this case because no election was held. In *Friends of Sierra Madre*, of course, the Supreme Court went behind that Guideline to make sense of the scope of the exemption for initiatives. In doing so, the court considered the two sources of authority we have mentioned, both of which are discussed in the briefs in this case: the constitutional power of initiative retained by the people under the 1911 constitutional amendment, and the ministerial-projects exemption created by Public Resources Code section 21080, subdivision (b)(1). We consider these in turn.

1. The voters' initiative power

As we have mentioned, the Supreme Court commented on the people's constitutional power of initiative in *DeVita*, stating that procedural constraints imposed by statute on a local legislative body "neither apply to the electorate nor are taken as evidence that the initiative or referendum is barred" when the voters vote to do something

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situation 1. Situation 4 is the ordinary case in which a city council simply approves a project and there is no question of a voter initiative. Situation 3 is the present case.

that would have been subject to those constraints had the legislative body done it instead. (*DeVita, supra,* 9 Cal.4th at p. 786.) Then the court explained that this rule "is a corollary to the basic presumption in favor of the electorate's power of initiative and referendum." (*Ibid.*) Similarly, the court stated that article II, section 11, of the California Constitution guarantees local voters' right to pass an initiative unless the Legislature clearly intended "to preempt that power pursuant to a statewide purpose." (*DeVita, supra,* at p. 795.)

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 Homebuilders, supra*, 18 Cal.3d at p. 591.) In this case, the electorate never had the chance to exercise this right, so the reasoning supporting this type of exemption does not apply.

It might be argued that because 541 of the city's 2,489 voters signed petitions in support of the initiative, CEQA's requirements must be held inapplicable in order to preserve the "precious rights of our democratic process" for those 541 voters. This cannot be correct. Elections Code section 9214 allows as few as 15 percent of a city's voters to place a ballot measure before all the voters, but neither that section nor the constitutional provisions it implements authorizes a small minority of voters in a local jurisdiction, with no election having been held, to overcome the will of the people of the state as expressed by a majority of their representatives in the Legislature. The direct democratic sovereignty our Supreme Court protected from frustration by the Legislature in *Associated Home Builders, DeVita,* and *Friends of Sierra Madre* is exercised when an election is held, not when a minority of voters petitions to hold an election.

The 15-percent minority's power is merely to demand an *opportunity* for the exercise of sovereignty by the voters at an election. To be sure, this is a vitally important power without which the voters' will often would not ultimately be expressed. It does not mean, however, that any constitutional principle allows 15 percent of a city's voters plus a majority of the city council to defeat state law. Far from carrying out the objectives of the 1911 constitutional amendment, that result would undermine those objectives: The amendment aims to allow a majority of voters to step in when they find that their elected representatives have failed them. It was not designed to allow a small minority of voters representing only themselves to obtain, via petition, a policymaking power exceeding that of the majority's elected representatives. To hold otherwise would authorize rule by a few—the antithesis of democracy.

We conclude that when a city council uses Elections Code section 9214, subdivision (a), to approve a project by bypassing the voters and directly adopting an initiative that has been presented to it by petition, the voters' constitutional power of initiative cannot support a CEQA exemption for the project.

2. The ministerial-projects exemption

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." Wal-Mart argues that when a city council faces the choice under Elections Code section 9214 between holding an election and adopting an initiative directly itself, and it takes a vote and decides that the election will not take place and the initiative will become an ordinance upon the council's own authority, the city has merely conformed to a ministerial duty. We disagree. The council makes a choice to authorize the project—a choice based on its policy preferences regarding the desirability of an election and the nature of the project—and this is a discretionary action.

Guidelines section 15369 defines "ministerial":

> "'Ministerial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee."

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 has little in common with the decision to issue an automobile registration, dog license or marriage license, or the decision to issue a building permit after ensuring that zoning and building code requirements are satisfied. It is a policy decision supported on the one side by the 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." He says, "[a] city council may base its decision on its perception of the will of its constituents, economic considerations, policy, budget or any of the myriad of other considerations which go into political decisions." The role of all these considerations shows that the decision was not ministerial.

Wal-Mart argues that the city council's action was ministerial because Elections Code section 9214, subdivision (a), says that if the council adopts the initiative, it must do so "without alteration," and this means there was no scope for the operation of any discretion on the city's part. This argument misses the mark for the reasons we have

already indicated. The question is whether the city acted in accordance with a ministerial duty. No ministerial duty dictated the city's decision to adopt the initiative instead of submitting it to the voters. This decision was discretionary. The definition in Guidelines section 15369 specifies that an action is ministerial if public officials cannot use discretion or judgment in deciding "*whether* or how the project should be carried out" (italics added). Here the city council did decide that the project should be carried out, and in doing so used its discretion and political judgment in concluding that the decision about whether it should be carried out should not be left to the electorate.

C. Native American Sacred Site

Wal-Mart relies on *Native American Sacred Site, supra,* 120 Cal.App.4th 961, for both the proposition that the city council's choice was ministerial and the notion that a CEQA exemption is necessary to protect the constitutional rights of the petition signers. In that case, 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. After the registrar of voters certified that 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. The plaintiffs filed a petition for a writ of mandate in the superior court, arguing that the city was required to complete CEQA review before adopting the initiative. The trial court sustained a demurrer. (*Native American Sacred Site, supra,* at pp. 963-965.)

1. The ministerial-projects exemption

On appeal, the plaintiffs again argued that the city was required to comply with CEQA before adopting the initiative. (*Native American Sacred Site, supra*, 120 Cal.App.4th at p. 965.) The Court of Appeal disagreed. It stated that 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." (*Native American Sacred Site, supra*, at p. 966.)

Although 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. This choice is not insignificant, for it means the difference between giving the voters the opportunity to exercise their franchise and withholding that opportunity; and the array of reasons that can enter into the city council's exercise of discretion is large. We do not agree that the city's action in approving the project via adoption of the initiative is ministerial because the city was required to do either that or something else. After all, how can the making of a policy choice be ministerial, even when the choice must be made?

All the cases the court cited in support of the proposition that the project approval was ministerial are distinguishable. 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. The court in each instance ordered the legislative body to place the initiative on the ballot as a remedy for the legislative body's inaction. (*Blotter v. Farrell* (1954) 42 Cal.2d 804, 812; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1021 & fn. 4 (*Citizens for Responsible Behavior*); *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 561; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 696-697.)[4] These holdings are consistent with what we have said: The city had a

[4]Some additional cases the court cited in this portion of its opinion were cited for a point about the timing of the council's action and do not involve any dispute over the nature of a legislative body's duty to act on a petition for an initiative. (*Truman v. Royer* (1961) 189 Cal.App.2d 240, 241-243 [challenges to city clerk's actions in rejecting and later accepting for filing voters' petition for referendum]; *Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 579, 587 [city clerk failed to perform ministerial duty to accept for filing petition presented to him by voters; passage of time did not bar remedy of compelling him to do so]; *Yost v. Thomas* (1984) 36 Cal.3d 561, 564, 569-570 [adoption of specific plan

mandatory duty to act on the petition, but not a mandatory duty to adopt it. In none of the cases, certainly, did the Court of Appeal order a city council to adopt an initiative, and it would be shocking if any court ever did so. The reason why it would be shocking is that a city has discretion not to adopt it—adoption is never mandatory. Once it fails to adopt it, of course, its discretion comes to an end and it must hold an election. Only at that point do the city's options narrow to a single, ministerial course of action, and the performance of that ministerial duty can be enforced by a court.

One of the cases *Native American Sacred Site* relied on appears to undermine the court's analysis. In *Citizens for Responsible Behavior, supra*, 1 Cal.App.4th at page 1021 and footnote 4, the court stated that "once an initiative measure has qualified for the ballot, the responsible entity or official has a mandatory duty to place it on the ballot." At this point it appended a footnote: "An obvious statutory exception permits the legislative body to avoid this necessity by adopting the measure itself …." In other words, the city's power to adopt the measure itself was not a mandatory duty but an *exception* to the mandatory duty to hold an election. Taking advantage of the exception is discretionary, not ministerial.

The court in *Native American Sacred Site* mentioned the plaintiffs' argument that these cases were distinguishable because they involved requests for an order compelling an election to be held, not challenges to a legislative body's decision to adopt an initiative; it concluded that this distinction was "meaningless" because "[i]n both cases, a city's duty is still mandatory and ministerial …." (*Native American Sacred Site, supra*, 120 Cal.App.4th at p. 967.) This conclusion is mistaken for the reasons we have given. Under Elections Code section 9214, a city council has a mandatory duty to hold an election if it does not adopt the initiative as an ordinance; but it never has a mandatory

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and amendments to general plan are legislative acts subject to referendum; Coastal Act did not preclude referendum].)

duty to adopt the initiative. The distinction between the cases the court cited, in which a failure to act on a petition was challenged, and this case, in which the city council made a discretionary choice to adopt the initiative, is crucial.[5]

2. The voters' initiative power

Native American Sacred Site also held that voters' right of initiative would be thwarted if no CEQA exemption were found where the city council chooses to adopt the

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[5]At oral argument, counsel for Wal-Mart cited *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272, for the first time, and quoted the following passage: "To properly draw the line between 'discretionary' and 'ministerial' decisions in this context, we must ask why it makes sense to exempt the ministerial ones from the EIR requirement. The answer is that for truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way. The applicant would be able to legally compel issuance of the permit without change. Thus, to require the preparation of an EIR would constitute a useless—and indeed wasteful—gesture. [¶] Conversely, where the agency possesses enough authority (that is, discretion) to deny *or modify* the proposed project on the basis of environment[al] consequences the EIR might conceivably uncover, the permit process is 'discretionary' within the meaning of CEQA." Wal-Mart's point was that this passage seems to say that being able to reject or modify the project based on an EIR is what makes the decision discretionary, while in the present case, rejecting and modifying the project were not among the city's options after the initiative petition was certified. The court's comments are inapplicable, however, because the context is different. In *Friends of Westwood*, the question was whether the decision to grant or deny a building permit was discretionary or ministerial. It made sense to say that question depended on what the city could do if it was unhappy with some feature of the project; and what it could do, if anything, would be to condition or deny the permit. In a situation like the one here, what a city can do if it does not wish to approve a project presented in a certified initiative petition is order an election instead of adopting the initiative. The fact the universe of options is different does not show that the decision is ministerial. Further, although a court can order the issuance of a ministerial permit as *Friends of Westwood* noted, a court cannot order a city to adopt an initiative as an ordinance; it can only order an election. The adoption of the initiative as an ordinance therefore is not a ministerial action, as we have said.

initiative instead of holding an election. The court wrote, "[W]e are not persuaded by plaintiffs' related claim that their 'appeal has nothing to do with the rights of the voters ….' It has everything to do with those rights. More than 15 percent of the city's voters signed the initiative petition. They, on behalf of themselves and of the entire city population, are entitled to have their decision implemented under [Elections Code] section 9214, which manifests the power of initiative reserved to the people under the Constitution." (*Native American Sacred Site, supra,* 120 Cal.App.4th at p. 968.)

This view merges the right of a fraction of the electorate to demand an election with the right of a majority of voters to enact its will without procedural constraints imposed by the Legislature. As we have said, the latter right means initiatives originating with voters and adopted by a majority at an election are exempt from CEQA. The former right only means the petition signers are entitled to have the city council call an election if it does not adopt the initiative. Contrary to the *Native American Sacred Site* court's view, the petition signers cannot act "on behalf of … the entire city population"; the notion that they can would render elections unnecessary and would silence the remainder of the electorate. The petition signers' right to invoke the council's duties under Elections Code section 9214 does not entitle the petition signers "to have their decision implemented" without CEQA compliance. There is no constitutional principle that could confer such power on a small minority of voters. Only a majority of voters voting in an election has a right to have their decision implemented.

D. If the election option is ministerial, must not the adoption option also be ministerial?

Another argument that might be made by a defender of Wal-Mart's view is as follows: As we have mentioned, *Friends of Sierra Madre* held that "placing a voter-sponsored measure on the ballot is a ministerial act." (*Friends of Sierra Madre, supra*, 25 Cal.4th at p. 189.) If a city council engages in a ministerial act when it decides under Elections Code section 9214, subdivision (b), to place a voter-sponsored measure on the

ballot, then it must also engage in a ministerial action when it decides under Elections Code section 9214, subdivision (a), to adopt the measure as an ordinance. It would not make sense to say one of the council's two options is ministerial but the other is discretionary. Therefore, the council's decision to adopt the initiative cannot be discretionary, the ministerial-projects exemption of Public Resources Code section 21080, subdivision (b)(1), applies to it, and CEQA compliance is not required.

One flaw in this argument has already been indicated by our previous discussion. There is one circumstance in which it *does* make sense to say the council's decision to hold an election is ministerial even if its decision to adopt the initiative is discretionary. If a city council is presented with a petition signed by 15 percent of the voters, and it does nothing, a court can order it to hold an election, because the petition signers have a right to an election. A court could not order the council to adopt the initiative, however, because the petition signers do not have a right to see their policy enacted without an election.

Another flaw in the argument is that when the *Friends of Sierra Madre* court stated that placing a voter-sponsored measure on the ballot was ministerial, it was not referring to Elections Code section 9214 with its two options. It was referring to the holding of *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458, 460-461, which involved a charter city's duty under former Government Code section 34461 to place an initiative on the ballot after receiving a petition signed by voters. (*Friends of Sierra Madre, supra*, 25 Cal.4th at p. 189.) Former Government Code section 34461 did not give the city council any options. It simply required it to place the initiative on the ballot. (Stats. 1969, ch. 1264, § 3, p. 2477.)[6] The conclusion that the city council's duty was mandatory and ministerial was obvious, and the applicability of the ministerial-projects exemption of

[6]Former Government Code section 34461 was enacted in 1969 and repealed in 1981. (Historical and Statutory Notes, 35 West's Ann. Gov. Code (2008 ed.) foll. § 34461, p. 154.)

Public Resources Code section 21080, subdivision (b)(1), was equally obvious. The problem of whether the choice to put an initiative on the ballot under Elections Code section 9214 is discretionary or ministerial did not arise.

As what we have already said indicates, we assume the Supreme Court would hold that CEQA review does not apply when a city puts an initiative on the ballot in response to a voter petition submitted to it under any statute, including Elections Code section 9214. The court did state that there is no CEQA exemption under Guidelines section 15378, subdivision (b)(3), for "ballot measures placed before the electorate by a public agency in the exercise of the agency's discretion." (*Friends of Sierra Madre, supra,* 25 Cal.4th at p. 190.) Even if the council's choice of the ballot option under Elections Code section 9214 is discretionary, however, we do not believe the court intended to say that CEQA review is required when the council makes that choice and the electorate passes the initiative. The initiative is still a voter-sponsored one under those circumstances, since it was generated by a voter petition. It is exempt from CEQA because of the constitutional principle—recognized in *Friends of Sierra Madre*—guarding voter-generated initiatives that are placed on the ballot. This means that, in the present case, if the council ultimately decides to hold the election, CEQA review will not be required before the voters can approve the project.

E. The report allowed by Elections Code section 9214, subdivision (c)

The city, in its return, argues that, by including the option of obtaining a report in Elections Code section 9214, subdivision (c), the Legislature intended to exclude all other forms of environmental review, including CEQA review, in all instances. The city says the existence of this option means "the plain language of the statute" precludes CEQA review. Similarly, Wal-Mart points out in its informal response that the Supreme Court has stated that Elections Code section 9214, subdivision (c), "permits public agencies to conduct an abbreviated environmental review of general plan amendments and other land

use initiatives in a manner that does not interfere with the prompt placement of such initiatives on the ballot." (*DeVita, supra,* 9 Cal.4th at p. 795.)

We see nothing in Elections Code section 9214 to indicate that the subdivision (c) report provision is intended to operate to the exclusion of any other form of environmental review, even in cases in which no election is held. Elections Code section 9214 is not limited to initiatives that would be subject to CEQA in the first place, i.e., initiatives that would have a significant impact on the environment. It applies to all initiatives presented to a city council via voter petition. Many of the matters that can be included in the report (as described in Elec. Code, § 9212) are matters that can be analyzed in an EIR, but a city is free to request the report regardless of whether the project is one for which an EIR would be required. The conclusion that the subdivision (c) report option operates to exclude CEQA review is not compelled by anything in the statute.

A better explanation of Elections Code section 9214, subdivision (c), is simply that it allows the council quickly to form a rough idea of what the consequences of the initiative will be, environmental and otherwise, before deciding whether to hold an election or adopt the initiative. The report might show the council that it should not adopt the initiative because of possible environmental or nonenvironmental consequences. It might show that the initiative should not be adopted absent more extensive environmental (or other) review. If conclusions of these kinds lead the council to choose the election option over the direct-adoption option, the report can help inform the electorate. None of this is incompatible with a rule that if the initiative will have a significant impact on the environment, CEQA review is required before the city can approve it without an election.

The Supreme Court's remarks in *DeVita* are compatible with our view. A fuller quotation, providing the context of the remark quoted above, shows that the court's point was that CEQA cannot be used to prevent adoption of an initiative *by voters in an election*:

> "[T]he Legislature did not intend such requirements [as CEQA's requirements] to obstruct the exercise of the right to amend general plans by initiative. Elections Code section 9111 [providing, in cases of initiative petitions presented to counties, for a report analogous to the report contemplated by Elections Code section 9214, subdivision (c), for cities] represents a legislative effort to balance the right of local initiative with the worthy goal of ensuring that elected officials and voters are informed about the possible consequences of an initiative's enactment. It permits public agencies to conduct an abbreviated environmental review of general plan amendments and other land use initiatives in a manner that does not interfere with the prompt *placement of such initiatives on the ballot*. Plaintiffs would have us redraw this legislative compromise by concluding that environmental review is mandatory in the case of general plan amendments, and that therefore such amendments cannot be enacted by initiative. We decline to engage in such legislation by judicial fiat." (*DeVita, supra*, 9 Cal.4th at p. 795, italics added.)

TJSBA's position in this case does not call for preventing the adoption of initiatives by the voters absent CEQA review. It only calls for preventing city councils from adopting initiatives absent both CEQA review and elections.

F. Prevention of CEQA review by Elections Code section 9214's time limits

Consideration of the city council's three options under Elections Code section 9214 brings us to the problem of how the time limits in that statute interact with CEQA's requirements. Under Elections Code section 9214, the city council has 10 days after certification of the signatures on a petition to make up its mind about whether to hold an election or adopt the initiative directly. The period expands to 40 days if the council opts to order a report (30 days for the creation of the report plus 10 more days to deliberate after the report is issued; see Elec. Code, §§ 9212, subd. (b), 9214, subd. (c)). In the present case, the council could have satisfied both CEQA and the time constraints of Elections Code section 9214 because it had already completed an EIR and was prepared to vote on it before the voters' petition was certified. In other situations, undoubtedly more typical, the petition would be presented to the council before any environmental review has begun. In those situations, it would be impossible to comply

with CEQA before the time for making a decision expired, since an EIR cannot be prepared, made available for public comment, and certified within 40 days.

There is no doubt that Elections Code section 9214 requires the city council to make a decision within the 40-day (or 10-day) period. 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), 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 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.

The observation that a city council would be required to hold an election if it could not complete CEQA review within Election Code section 9214's time limits serves to rebut one argument made by Wal-Mart. Wal-Mart contends that TJSBA's position "would permit city councils to thwart voter initiatives." This is not correct. If a city council opposes an initiative, it must hold an election; and if it wants to undertake CEQA review but cannot complete it before the time limit of Elections Code section 9214 expires, it also must hold an election. Elections, of course, do not thwart initiatives.

Real parties also argue that requiring CEQA review before the council can adopt an initiative under Elections Code section 9214, subdivision (a), would be a meaningless gesture because the rule that the initiative cannot be altered means the city would be powerless to impose mitigation measures not already included in the initiative. It is true

that the city could not alter the initiative by adding mitigation measures, but that does not mean the city could do nothing meaningful in response to the findings in an EIR. It could withhold its endorsement of the project by choosing to hold an election instead of adopting the initiative, and it could inform the electorate of its objections. Real parties' argument assumes, once again, that there is no important difference between holding an election and adopting an initiative without an election. As we have emphasized, that difference is crucial. A decision to hold an election instead of adopting an initiative can express a city council's nonsupport of an initiative, and at the same time, it makes the difference between giving the electorate the power to make the decision and denying it that power.

G. Elections are necessary to express the voters' desire to proceed without CEQA review

Wal-Mart's final argument is that it would be wrong to "force city councils to incur unnecessary and unwanted expenses to hold elections." In the city's return, the city attorney adds that "[i]t is obvious … that the City and its electorate supported the Initiative" so "no public policy would be served by forcing the City to incur the cost to hold an election."

It would be anomalous in the extreme to hold that CEQA is inapplicable to a city's decision to approve a project based on the city's lawyer's speculation that the local electorate would have voted to approve if the city had not denied them the opportunity to vote. The fact that 541 voters placed valid signatures on the petition does not make it "obvious" that a majority would have voted for the initiative if an election had been held. After all, 1,948 voters did not validly sign the petition. Even if all 651 signatures submitted had been valid, that would still leave 1,838 voters who did not express support for the initiative. Its passage at an election was by no means assured.

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.

As for it being obvious that the *city council* supported the initiative, that is no doubt true, but it does not help real parties' position. A public agency supports the challenged project approval in every CEQA case, but that hardly means CEQA does not apply.

H. Conclusion

In summary, we hold 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). We will issue a writ directing the superior court to overrule the demurrer on the first cause of action.

IV. Third cause of action

The initiative, which calls itself the "Sonora Commercial Specific Plan" (but actually involves only Wal-Mart's parcel), includes the following provisions on amendments. In essence, they provide that the initiative can be amended only by popular vote, except that amendments also can be made by the city council if the property owner requests them:

"**E SPECIFIC PLAN AMENDMENTS**

"1 Purpose

"Amendments to the Sonora Commercial Specific Plan shall be required for revisions that are beyond the scope of substantial conformance determinations. Specific Plan amendments are governed by *Government Code* Section 65453 and the Sonora Municipal Code Section 17 68.

"2 Process

"a) The Specific Plan may be amended or repealed only by a majority of the voters voting in an election thereon.

> "b) Notwithstanding subsection (a), upon application of the fee title holder of the Sonora Commercial Specific Plan area, the City Council may amend the Specific Plan to further the purposes of this Specific Plan, but in no case can such amendment reduce or eliminate the parties' obligation to fund, construct, or cause to be funded or constructed, the public benefits or mitigation measures required."

According to TJSBA's petition filed in the superior court, city staff presented the council with a memorandum stating that, under these provisions, the zoning and general plan designations established by the initiative could not be changed except by the voters or by the council acting on the owner's request. TJSBA argues that these provisions of the initiative unlawfully limit the legislative power of the city council. The third cause of action in the petition it filed in the superior court was based on this contention. TJSBA asserts that the court erred when it sustained the demurrer on this cause of action. We disagree.

The Supreme Court provided the controlling analysis in *DeVita, supra*, 9 Cal.4th 763. *DeVita* involved an amendment to a county general plan, enacted by the voters as Measure J, under which the redesignation of agricultural land and open space would require voter approval for a period of 30 years. (*DeVita, supra,* at p. 770.) The Supreme Court rejected the plaintiffs' contention that this requirement was an improper limitation on the power of the board of supervisors. (*Id.* at p. 796.) The court first observed that Elections Code section 9125 presupposed that county voter initiatives could not be undone by boards of supervisors, providing that "initiative measures cannot be repealed 'except by a vote of the people, unless provision is otherwise made in the original [initiative] ordinance.' Thus, if the 30-year voter-approval provisions had not been included in Measure J, redesignation of the land included in that measure could have been accomplished only by voter approval in any case." (*DeVita, supra,* at p. 796.)

The court next distinguished two cases in which initiatives imposing voter-approval requirements on future legislative action were held invalid, *Citizens for Responsible Behavior, supra,* 1 Cal.App.4th 1013 and *City and County of San Francisco*

v. Patterson (1988) 202 Cal.App.3d 95. In *Citizens for Responsible Behavior*, the Court of Appeal invalidated an initiative approved by the voters of the City of Riverside that purported to require voter approval for any action by the city council to prohibit discrimination on the basis of sexual orientation or AIDS infection. (*DeVita, supra*, 9 Cal.4th at p. 798.) In *Patterson*, the San Francisco electorate enacted an ordinance limiting the city's ability to lease or sell real property without the voters' approval. (*DeVita, supra,* at p. 798.) The Supreme Court held that these cases were inapplicable because of the great breadth of the legislative restrictions they imposed. It explained that Measure J did not have a similar defect:

> "The present case is distinguishable from *Citizens for Responsible Behavior* and *Patterson* in an important respect. It may indeed be the case that initiative ordinances *broadly limiting* the power of future legislative bodies to carry out their duties pursuant to either a governing charter or their own inherent police power, are, as it were, 'constitutional' rather than legislative measures. Such measures may therefore be either improper amendments to a city or county charter, or else may improperly create a charter-like provision in a city or county that does not possess one. But if the electorate enacts *a legislative measure the governing body could have itself enacted*, then such measure may, pursuant to Elections Code section 9125, circumscribe the power of future governing bodies. Thus Measure J, which amends a portion of the land-use element of the County's general plan—a legislative act—may properly restrict the power of subsequent boards of supervisors incident to that enactment, and may provide formal, limited voter approval requirements as a means of implementing that restriction." (*DeVita, supra*, 9 Cal.4th at pp. 798-799, italics added.)

The initiative in this case is analogous to Measure J in *DeVita*. In the first place, Elections Code section 9217, which is equivalent to Elections Code section 9125 at issue in *DeVita*, states: "No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance." Just as in *DeVita*, the statutory scheme implementing the constitutional initiative power presupposes that the legislative

body cannot undo the voters' decision, so a provision in the initiative expressly stating the same rule would, in the usual case, be unremarkable.

In the second place, there is nothing in this particular initiative that would cause it to fall outside the general rule allowing this type of restriction on the legislative body's future action. The initiative merely prohibits changes in the land-use entitlements applicable to a specific parcel. It does not broadly limit the city council's powers. Further, as we will explain in more detail in the next section of this opinion, the initiative enacts a legislative measure the city council could have enacted on its own. In essence, the initiative sets aside the preexisting zoning, general plan designation, and other development regulations for the parcel and replaces them with other regulations designed specifically to accommodate Wal-Mart's project. We see no reason why the city council would have lacked the power to do the same thing (provided it complied with CEQA, of course).

Attempting to distinguish *DeVita*, TJSBA relies on *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311 (*Citizens for Jobs*). This case, however, is consistent with *DeVita* and does not support TJSBA's position.

Citizens for Jobs and the Economy sued the county after the voters passed Measure F, which provided that "'[n]o act by the County of Orange to approve any new or expanded jail, hazardous waste landfill, or civilian airport project shall be valid and effective unless also subsequently ratified by a two-thirds vote of the voters voting at a County General Election.'" (*Citizens for Jobs, supra*, 94 Cal.App.4th at pp. 1316, 1319.) Measure F also placed "numerous constraints and roadblocks on the planning and reporting process" by creating complex procedural requirements for any action on the affected categories of projects. "For example, section 5 of Measure F requires the Board, before it takes any act to approve any designated project, to 'hold, with widespread public notice, at least one public hearing in each Orange County City that would be affected by the project.'" (*Citizens for Jobs, supra,* at p. 1329.) Further, it appeared that many voter

approvals might be required for each project, "since the definition of 'any act by the County to approve' is extremely broadly defined …." (*Ibid.*)

The Court of Appeal applied the reasoning of *DeVita* and held that this was an improper limitation on the future legislative power of the board of supervisors. It stated: "The terms of Measure F seek to broadly limit through procedural restrictions the power of future legislative bodies to carry out their duties, as prescribed to them by their own inherent police power. As such, the measure should not be considered to have a proper legislative subject matter." (*Citizens for Jobs, supra*, 94 Cal.App.4th at p. 1331.) The court also stated that Measure F did not make "substantive policy" but instead imposed "procedural hurdles upon the planning process." (*Citizens for Jobs, supra,* at p. 1329.) In sum, *Citizens for Jobs* applied *DeVita* and held that the initiative at issue there fell on the invalid side of the line because of its broad subject matter and because it used procedural obstacles to impede the legislative body's action on that subject matter.

The present case is not similar to *Citizens for Jobs*. The subject matter the initiative covers is not broad; it concerns only the land-use entitlements for a single parcel. It does not create complex procedural hurdles for the city council, but merely implements the ban on legislative revision provided by Elections Code section 9217, with an exception for amendments requested by the property owner.

A separate argument TJSBA makes for its claim that the initiative improperly interferes with the council's legislative authority is based on the law concerning development agreements, Government Code section 65864 and following. Citing *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 182 (*Trancas*), TJSBA says the execution of a development agreement is "the exclusive means of creating legislatively enacted vested rights in California." TJSBA contends that, by limiting the city council's power to amend it, the initiative creates vested rights in favor of Wal-Mart, the owner of the property. The initiative is not and does not purport

to be a development agreement, so it invalidly creates vested rights, according to this argument.

TJSBA has failed to support the key elements of this theory. First, TJSBA does not provide a satisfactory explanation of how the initiative creates any vested rights. It offers no definition of a vested right and no analysis showing that the entitlements provided by the initiative amount to vested rights.

Authorities TJSBA has cited tend to undermine the view that the initiative, if valid, confers vested rights on Wal-Mart. In *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785 (*Avco*), for instance, a vested right is described as a right to build, which, once obtained by a landowner via issuance of a permit, cannot be revoked by government through a change in the law: "Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied." (*Id.* at p. 791.) Here, however, the initiative says the electorate can amend or revoke the provisions of the initiative, potentially eliminating Wal-Mart's right to build the project. If the initiative truly created vested rights, it would prevent those rights from being taken away from the landowner at all.

Second, TJSBA cites no authority establishing that a development agreement is the exclusive means of creating legislatively enacted vested rights. *Trancas* did not reach this conclusion. It held invalid a contract between a city and a property developer under which the city promised, for the parcel at issue, not to enact zoning or other ordinances inconsistent with the developer's project. The contract was invalid because it did not conform to the requirements of the development agreement statute. (*Trancas, supra*, 138 Cal.App.4th at pp. 175, 181-182.) The court's opinion says nothing about vested rights.

TJSBA cites authorities for the existence (or arguable existence) of three types of vested rights, but none of these authorities state that the three types are an exhaustive list. (See *Avco, supra*, 17 Cal.3d at pp. 791-792 [common law vested right to finish

construction arises when landowner performs substantial work and incurs substantial liabilities in good faith reliance on permit issued]; Gov. Code, §§ 66498.1-66498.9 [agency approval of vesting tentative subdivision map confers vested right to proceed with development under existing regulations]; Gov. Code, §§ 65864-65869.5 [development agreement provides property owner with assurance that applicable development regulations will not change after project has been undertaken; term "vested rights" not used].)

Third, if we set aside the question of vested rights and interpret TJSBA's argument to mean simply that the exclusive legislative means of freezing development regulations is a development agreement, then again TJSBA has provided no authority for its view. *Trancas* does not say there are no methods other than a development agreement by which a city can validly limit its future zoning authority. In particular, the opinion does not say a voter-sponsored initiative cannot validly impose limits on that authority, the question of voter-sponsored initiatives not having been presented in the case.

Further, *DeVita, supra,* 9 Cal.4th 763, itself supports the proposition TJSBA would have us reject, i.e., that a voter-sponsored initiative is a valid means of freezing regulations. Although *DeVita* involved an initiative denying a legislative body the power to *allow* development—rather than, as here, denying it the power to *block* development—that case nonetheless supports the view that a voter-sponsored initiative can validly limit a legislative body's future zoning authority. We see no reason to make a distinction based on whether the freezing of the regulations serves to promote or inhibit development.

In sum, TJSBA has not shown that the initiative is invalid either because it creates vested rights improperly or because it freezes development regulations improperly. For all these reasons, we hold that the trial court did not err when it sustained the demurrer on TJSBA's third cause of action without leave to amend.

V. Fourth cause of action

In its fourth cause of action, as we have mentioned, TJSBA asserted that the approval of Wal-Mart's project was not a proper subject for an initiative because it was an administrative act, not a legislative act. TJSBA argues that the superior court erred in sustaining the demurrer on this cause of action. Again, we disagree.

In *DeVita,* the Supreme Court described a "general dichotomy between a governing body's legislative acts, which are subject to initiative and referendum, and its administrative or executive acts, which are not." (*DeVita, supra*, 9 Cal.4th at p. 776.) Quoting an earlier decision, the Court of Appeal explained the distinction in *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399-400:

> "'The acts, ordinances and resolutions of a municipal governing body may, of course, be legislative in nature or they may be of an administrative or executive character. [Citation.] … [¶] Also well settled is the distinction between the exercise of local legislative power, and acts of an administrative nature. [¶] Following earlier authority, we said in [citation]: """*The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.*""" [Citation]; we also said [citation]: "*Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power.* Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body ….' [Citations.]" (Italics added.)'"

TJSBA first argues that the initiative essentially duplicates the approvals the city would have given on its own after certifying the EIR if the initiative petition had never been presented. Then TJSBA argues that those approvals would have been administrative, not legislative. Similarly, TJSBA argues that, although the initiative refers to itself as a specific plan, and it is settled that the adoption of a specific plan is a legislative act, in substance the initiative is not a specific plan because it only effectuated

the project approvals the city council was already contemplating, and these would have been administrative.

TJSBA never explains, however, why the approvals the city council was already contemplating would have been administrative. Nearly all the discussion in both its petition and its traverse is dedicated to demonstrating that the initiative has the same effect as those approvals would have had. Demonstrating this establishes nothing unless the approvals the council would have given would have been administrative.

We see no reason why they would have been. TJSBA never says what preexisting policy the approvals would have applied.[7] Having reviewed the text of the initiative, we see no indication that it is designed merely to authorize construction under existing regulations. Instead, it contains detailed regulations of its own. It states that it will "focus on the unique needs of a specific area" and "allow for greater flexibility than is possible with conventional zoning." Further, it will "constitute the zoning for" the parcel, and the "[l]and use standards and regulations contained within" it "shall govern future development" of the parcel. All this indicates that the purpose of the initiative is to *replace* existing policy and regulations, so far as they apply to Wal-Mart's land, with new policy and regulations more amenable to Wal-Mart's plans. Further, TJSBA's own argument in its traverse supports the conclusion that the initiative is (and the approvals would have been) a break from existing policy. Quoting the petition TJSBA filed in the superior court, the traverse says: "'Eroding the distinction between legislative and administrative acts to allow a property owner to obtain approval of a specific

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[7]It would make no sense to say, as some of TJSBA's remarks could be taken to suggest, that the approvals the council considered giving were the preexisting policy, and the initiative applied that policy. For one thing, TJSBA says the initiative and the approvals that were under consideration were essentially the same, so it is hard to see how one could be administrative while the other was legislative. For another, the council never gave the approvals before the initiative petition was presented, so it never established the policy they reflect.

development project *while eliminating compliance with local planning and zoning laws* and eliminating public input … is not within the scope of the initiative process and the Initiative is an unlawful use of that initiative process.'" (Italics added.) If the effect of the initiative is to eliminate the need to comply with existing planning and zoning regulations and to replace them with others, then the initiative does not merely apply existing policy; it alters existing policy by creating new regulations to be applied to the subject parcel.

Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal.3d 511 (*Arnel*) is instructive. There the Supreme Court, in reaffirming the rule that passage and amendment of zoning ordinances are legislative acts, cited with approval various cases stating that the granting of variances and conditional use permits and the approval of subdivision maps are administrative in nature. (*Id.* at pp. 516-519.) What these administrative actions have in common is that they "generally [involve] the application of standards established in the zoning ordinance to individual parcels [citation] and often require findings to comply with statutory requirements or to resolve factual disputes [citation]." (*Id.* at p. 518-519, fn. 8.) TJSBA has not shown that the initiative, or the council approvals it took the place of, were comparable to the granting of a variance or a conditional use permit. The initiative's provisions change the applicable regulations. They do not, for instance, merely apply preexisting standards to approve a proposed use, as in the case of a conditional use permit.

Contrary to TJSBA's suggestion, there is no rule that a decision applicable to a single parcel cannot be a legislative decision. In *Arnel*, for instance, the Supreme Court stated: "California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts." (*Arnel, supra*, 28 Cal.3d at p. 514.)

If the substantial terms of the initiative could have been effectuated by the council through application of existing policy, there would be reason to conclude that the initiative was a ploy to implement the city's existing development policies in a way that

avoided CEQA compliance (assuming application of existing policy would have triggered CEQA in the first place), and that would be an improper use of the initiative process. TJSBA has not shown that this is what happened. It has failed to show that the initiative's subject matter was administrative, not legislative, and therefore we have no grounds for disturbing the superior court's decision to sustain the demurrer on TJSBA's fourth cause of action.

VI. Motion to strike and request for judicial notice

TJSBA's petition in this court begins with an introduction in which it quotes an article from the San Francisco Chronicle. The article reports on other instances around the state in which Wal-Mart sought approval of building projects via voter initiative. On March 1, 2012, Wal-Mart filed a motion to strike the portions of the introduction that quote and refer to the article. In the alternative, Wal-Mart lodges evidentiary objections to these portions of the introduction. TJSBA filed a brief in opposition.

We have read the introduction and conclude that the quotations of and references to the newspaper article make no difference to our reasoning or our conclusions, which would have been exactly the same had those quotations and references not been included. The motion therefore will be denied as moot, and it is unnecessary to rule on the evidentiary objections.

At the end of its traverse, TJSBA requests that we take judicial notice of several documents filed in a San Bernardino County Superior Court case involving another Wal-Mart project, *Rodriguez v. Town of Apple Valley* (Super. Ct. San Bernardino County, 2011, No. CIVVS 1103746). TJSBA says these documents are "relevant to impeaching Real Parties' claims in the present action that the Initiative is not an attempt to gain approval of its quasi-judicial project though the legislative process." The documents are judicially noticeable under Evidence Code section 452, subdivision (d). TJSBA also asks us to take judicial notice of portions of the EIR prepared for Wal-Mart's project in this case. The content of the EIR is subject to judicial notice under Evidence Code

section 452, subdivision (g). Real parties filed no opposition. The requests will be granted.

DISPOSITION

Let a writ of mandate issue directing the superior court to modify its order sustaining in part the demurrer of Wal-Mart and the city. As modified, the order will sustain the demurrer without leave to amend as to the third and fourth causes of action, and overrule the demurrer as to the first and second causes of action. Costs are awarded to TJSBA.

Wal-Mart's motion to strike is denied. TJSBA's requests for judicial notice included in its traverse are granted.

This court's order staying the proceedings in the superior court is vacated.

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Wiseman, J.

WE CONCUR:

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Hill, P.J.

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Kane, J.