SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 07/12/2011 TIME: 11:18:00 AM DEPT: C24

JUDICIAL OFFICER PRESIDING: Derek W. Hunt
CLERK: Lori Pickrell
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2010-00416256-CU-WM-CJC** CASE INIT.DATE: 10/13/2010
CASE TITLE: **Coalition for Accountable Government Ethics vs. City of Santa Ana**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 71273140

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 5-12-11, now makes the following ruling:

The court issues its Statement of Decision, as attached hereto and incorporated herein by reference.

Court orders Clerk to give notice.

COALITION FOR ACCOUNTABLE GOVERNMENT ETHICS (CAGE), etc, et al. v. CITY OF SANTA ANA, et al.
30-2010
00 416 256

STATEMENT OF DECISION

Facts. This is a petition for writ of mandate under the Elections Code. It seeks a court-ordered public referendum concerning a proposed 37-story office tower to be located on North Broadway in Santa Ana. It would be the second such referendum.

The development itself is to be in private hands, but city approval for actual construction has been a topic of public controversy for the better part of the past decade. A recent city council ordinance would modify a 2004 development agreement between the city and the developer by removing an existing condition precedent which so far has blocked construction. The petitioners essentially request that the city put this change to a public vote.

1. The 2004 Development Agreement.

The original development agreement, dated August 2, 2004, was made between the city and the developer, Michael Harrah[1]. Though quite controversial at the time, it was regularly approved by city ordinance per Gov't C § 65867. Indeed, as described below, it was also later approved by a public referendum in 2005. *Id.* § 65867.5. As for its terms, the development agreement contains two features which have now come into conflict.

(a) Amendment. First, under paragraph 4.4 (page 9) the agreement can be amended from time to time – though only "in the same manner as its adoption by an ordinance as set forth in Government Code section 65868."[2] That, say today's petitioners, means a new public referendum.

(b) Condition Precedent. Second, paragraph 5.8 (p. 13) of the agreement is a condition precedent which bars issuance of any building or rough grading permit until the owner

> "has obtained building commitments for lease of not less than 50% of the net leasable area in the project from tenants who would qualify as 'Investment Grade Tenants' [as defined] . . . ."

Last year the city withdrew that condition (i.e. it amended the agreement) and it is that which has brought about this suit.

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[1] Actually, Mr. Harrah is "managing member" of each of a consortium of three developers: (i) One Broadway Plaza, LLC, (ii) 1200 N. Main, LLC, and (iii) 845 Broadway LLC.

[2] This statute provides that development agreements can be mutually amended if public notice is given per Gov't C § 65867. The referendum procedure of § 65867.5 is also expressly provided for.

2. Measure A (2005).

Petitioners today do not attack the legitimacy of what occurred in the pre-August 2004 background to this development. That includes the initial passage of two city ordinances from this 2004 period: (a) NS-2649 which re-zoned the property for development and (b) NS-2656 which approved the development agreement[3]. It should be said, however, that the current dispute does pertain to these two enactments, as mentioned below.

After the 2004 ordinances had been approved by the Santa Ana city council, the project was challenged by a citizen-backed petition. Legally this obliged the city either to withdraw the agreement or put the ordinance to a popular referendum – where it might also fail. If the public vote fails, the ordinance does not go into effect. Elec C § 9241. In this case the city chose to go forward with the public vote, calling the provision "Measure A."

Measure A (particularly the city attorney's analysis) expressly identified one of the foregoing ordinances by its number, but only mentioned the other indirectly. Specifically, the voter's pamphlet said that the vote was a referendum on Ordinance No. NS-2649, stating that it pertained to "rezoning approximately 4.32 acres . . ." If approved, the pamphlet went on,

> "[a] general plan amendment resolution and an ordinance approving a development agreement previously adopted by the Santa Ana City council [i.e. NS-2656] would become effective." (Underscoring supplied.)

On April 5, 2005 the voters *approved* Measure A, no doubt against the wishes of the citizen challengers. Very well, say the petitioners, but the referendum also necessarily included approval of the foregoing 50% pre-lease condition precedent from paragraph 5.8[4]. Indeed, as a practical matter, the petitioners were content with this, because the project had been effectively halted by the 50% tenancy provision[5].

3. Revocation (2010).

And so five years then passed with no development. But on July 19, 2010, relying on the amendment language from paragraph 4.4 of the development agreement, the city council approved an amendment eliminating the condition precedent of paragraph 5.8. It does not appear that there was any quid pro quo for the amendment, only recognition that a large construction project of this nature would probably generate

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[3] "A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan." Gov't C § 65867.5(b).

[4] But except for the quotation just given from the impartial analysis by the city attorney, the Measure A voter's pamphlet was silent about the condition precedent.

[5] The assumption that the condition precedent about tenancy levels is the only thing standing between the community and construction of a 37-story office building may be a bit simplistic.

an economic benefit to the community. As before, the propriety of the council's intramural deliberations leading to the amendment have not been questioned. But the vote itself has caused the current litigation.

Petitioners, who use the acronym CAGE[6], contend the recent amendment was ultra vires and violates Elections C § 9217. The original ordinance from 2005 – i.e. the one with the condition precedent -- remains in effect, they say, and if there is to be an amendment at all, the city must put it to the voters for another referendum and there need be no intervening referendum petition as there previously had been.

4. Mandate Petition.

Having registered a July 29, 2010 reconsideration request with the city which never responded, petitioners filed the instant petition in court on October 13, 2010. It is stated against the city of Santa Ana, the city council, and Maria Huizar, clerk of the city council. The developer is not a party. It contains two causes of action:

- 1st: Arbitrary and Capricious Acts; Failure to Proceed Under Law
- 2nd: Declaratory Relief

The prayer specifically requests a peremptory writ of mandate "to submit the proposed amendment of the development agreement . . . to the voters" and requests the court to set a date accordingly. It also asks for a court declaration that the city's recent elimination of the pre-condition was ultra vires and in violation of the Elections Code § 9217. All three respondents jointly answered on November 15, 2010[7].

In February 2011 I denied their motion for judgment on the pleadings.

5. Indispensable Party.

In limine, the respondents state that this case may not proceed in the absence of the developer who they say is an indispensable party under CCP §§ 1088 and 1107. The operative statute, however, is CCP § 389, from which I conclude that by adjudicating the dispute between the existing litigants I would not deprive the developer of any vested right or somehow expose any existing party to multiple or inconsistent obligations[8].

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[6] It identifies itself as an unincorporated association of citizens, etc. located in Santa Ana. The co-petitioner, John Barneich is a Santa Ana resident.

[7] Among their affirmative defenses are the alleged bar of the following statutes: (i) Gov't C § 65945.7; (ii) CCP §§ 526(b)(4) and (b)(7); (iii) Civ C § 3423(d) and (g) and Elec C §9242. These statutes were not argued in the respondents' brief and the points appear to have been abandoned.

[8] My analysis of the vested rights dispute was not really helped by petitioners' reference to *Midway Orchards v. County of Butte* (1990) 220 CA 3d 765, where the validity of the general plan amendment was defective because of statute of limitations considerations not present in this case.

Whether or not a purported indispensable party must be part of the litigation is not a jurisdictional principle. It is a principle of equity and convenience which in the first instance is in the discretion of the trial court. *Sierra Club, Inc. v. California Coastal Comm'n* (1979) 95 CA 3d 495, 500. The current case entails a legitimate debate over the powers of a city council and the statutory rights of the citizens to intervene. The developer is no differently situated than he was on the day before the city council voted to eliminate the condition precedent. If there is a consistent principle to be derived from the other three cases cited to me[9], I would say that it pertains to how profoundly the resolution of the current debate will affect the developer in his exiting go-forward plan. No argument along those lines has even been made to me.

6. Disposition.

(a) The Meaning and Subject Matter of Measure A. The two sides disagree about what Measure A accomplished and who might have been at fault for any deficiencies. In my view, this segment of the debate is not dispositive, but I will try to give the competing positions.

Respondents say that the voters did not vote on the condition precedent from the development agreement. It was not even mentioned in Measure A. That's because the vote was explicitly an up or down referendum on a *rezoning* measure (NS-2649), as can be seen from the very title given to it and which was put before the voters.

The petitioners have had two somewhat contradictory responses. First, they point to the language of the voter's pamphlet which at least mentions the development agreement[10]. But second, they also argue that if there was an omission, it was the responsibility of the city attorney who was the author of Measure A. In fact, not only did he fail to mention the condition precedent, they say, he also didn't mention that the city council had reserved the right to abandon that provision. Furthermore, the city's reliance on ordinance No. NS-2649, say petitioners, requires more than simply underscoring the word "rezoning" in its title. Beneath the title, one must then consult the *language* and *content*. And that includes section five which says,

> "This ordinance shall not be effective unless and until Resolution No. 2004-021 and Ordinance No. NS-2656 becomes [sic] effective. If said ordinance or resolution are for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, or otherwise do not go into effect for any reason, then this ordinance shall be null and void and have no further force and effect." (Underscoring supplied.)

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[9] *Lundgren v. Community Redevelopment Agency* (1997) 56 CA 4th 868 (suit by state attorney general to set aside a redevelopment agency's transfer of public property to an Indian tribe to develop as a casino); *Beresford Neighborhood Ass'n v. San Mateo (1989) 207 CA 3d 1180* (developer's EIR intertwined with challenged zoning variance); *Save Our Bay v. San Diego Unified Port Dist.* (1996) 42 CA 4th 686 (challenge to EIR respecting property not yet acquired by the government entity).

[10] Quoted in section 2, *supra*.

The respondents then take the last word, although I do not feel that I have adequate information to evaluate it. They say that it was not the city attorney but the petitioners who put Measure A together. It was the petitioners who "set the table" by seeking to have the full text of Ordinance NS-2649 attached to the petition and they made no such demand pertinent to NS-2656; any ambiguities are their fault.

If I were to stop here, I believe that I would be compelled to rule in favor of the respondents, though probably not based on the language and environment of a vote taken more than five years ago. Instead, I would simply conclude that a legislative body has the discretion to determine the management of a development agreement which it has reviewed and approved -- particularly an agreement which so explicitly and conspicuously reserved that discretion as did in paragraph 4.4.

But this latitude is subject to both contractual language and statutory restraints, which I now consider in the following sections.

(b) Petitioners' Position. First, the petitioners are well situated in relying on the clear language of the development agreement's amendment clause (¶ 4.4):

> "**4.4 Amendment or Cancellation of Agreement**. This Agreement may be amended from time to time or cancelled only by the mutual consent of the parties, but only in the same manner as its adoption by an ordinance set forth in Government Code Section 65868[11]. The term "Agreement" or "Development Agreement" as used herein shall include any amendment properly approved and executed." (Underscoring supplied.)

The statutory language is similarly lucid:

> "**Elections Code 9217**. If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the city. . . . 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." (Underscoring supplied.)

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[11] "**Government Code 65868. Amendment or Cancellation; Notice of Intent**. A development agreement may be amended, or cancelled in whole or in part, by mutual consent of the parties to the agreement or their successors in interest. Notice of intention to amend or cancel any portion of the agreement shall be given in the manner provided in Section 65867. *An amendment to an agreement shall be subject to the provisions of Section 65867.5*" (Italics supplied.)

"**Government Code 65867.5. Approval by Ordinance; Referendum.** (a) A development agreement is a legislative act that shall be approved by ordinance *and is subject to referendum.*" (Italics supplied.)

Neither the agreement nor the statute demands that under these prevailing circumstances the petitioners must follow the more elaborate and probably more expensive "circulated amendment petition" that was obligatory in 2005 and which the city says is again required. Under the circumstances presented in this case, Elections Code 9217 is self-executing. The city should have taken the initiative to put the matter out for "a vote of the people."

(c) Respondents' Position.

(i) Referendum vs. Initiative. The city's first response is to challenge the applicability of the Elec C § 9217 altogether. To dwell on the language which I have underscored above, the city says, is to ignore the central subject matter of § 9217: it is an *initiative* statute; the word "referendum" does not even appear. This is true, but it ignores the correlative construction of "either . . . or." The statute says that a city cannot repeal or amend an ordinance that was enacted either (i) by initiative or (ii) by a vote of the people.

Measure A was an ordinance enacted by a vote of the people.

(ii) A New Ordinance. Second, respondents argue that the July 2010 ordinance (i.e. the amendment withdrawing the condition precedent) is essentially a *different ordinance* than Measure A in 2005. Therefore, if petitioners wanted to object to the 2010 withdrawal amendment, they should have "circulated a referendum petition against the ordinance adopting the amendment, and thereby subjected it to a vote of the people." Opposition 17:20-18:1. They fortify this position by citing to *Rubalcava v. Martinez* (2007) 158 CA 4th 563.

This argument carries some weight, particularly if it is seen as assuming that some deference is owing to the regularly-conducted business of an elected body. As I have said, the broad power of referendum in California does not extend to the micromanagement of the administrative details of a legislative council.

But the analysis is ultimately unsatisfying.

Rubalcava was certainly a case of a second ordinance. But quite unlike the instant fact pattern, *Rubalcava* was a case in which the city (Los Angeles) had earlier withdrawn the first ordinance without even risking a referendum – a virtually opposite outcome from Santa Ana's success with Measure A. Moreover, the *Rubalcava* discussion necessarily included reference to *In re Stratham* (1920) 45 CA 436 which articulated the rule that once defeated, a city cannot enact a new ordinance "in all essential features like the repealed ordinance." Any new legislation must be in good faith and "essentially different from the ordinance protested against." In *Rubalcava*, the appellate court found the second ordinance (zoning) *was* "essentially different" from the earlier one (concerning wages).

But that is not the situation here. First, of course, the city is not making a second try at passage of an ordinance it previously lost. Second, the "new" 2010 ordinance which it analogizes to the *Rubalcava* case is *not* new. The new vote would still be on the same development agreement as in 2005 with the exception of a missing clause which had previously stated the percentage of tenants necessary to break ground[12]. Hence neither the *Stratham* rule nor the *Rubalcava* holding fit conveniently with the current facts. Regardless of the passage of time since voter approval of Measure A, the city's 2010 withdrawal of the condition precedent by amendment did not make the legislative action by which it did so an ordinance on a new or essentially different topic.

7. Order.

The court declares that the July 19, 2010 amendment eliminating paragraph 5.8 from the development agreement was beyond the authority of the respondents under both the development agreement and Elections Code § 9217, and orders respondents to submit said proposed amendment of the development agreement to the voters forthwith pursuant to Government Code § 65868.

July 12, 2011

Derek W. Hunt
Judge of the Superior Court

[12] Of course both sides seem to agree that the effect of the omission is potentially profound, though for different reasons.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center DRIVE
Santa Ana, CA 92702

SHORT TITLE: Coalition for Accountable Government Ethics vs. City of Santa Ana

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **30-2010-00416256-CU-WM-CJC**

I certify that I am not a party to this cause. I certify that a true copy of the Minute Order was mailed following standard court practices in a sealed envelope with postage fully prepaid as indicated below.
The mailing and this certification occurred at Santa Ana, California on 07/12/2011

Clerk of the Court, by: Lori Pickrell , Deputy

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CLERK'S CERTIFICATE OF SERVICE BY MAIL