La Habra Heights Oil Watch v. Shauna Clark
BS152800
December 31, 2014

Petition for a Writ of Mandate (Moving Parties: Petitioners La Habra Heights Oil Watch, Center for Biological Diversity, William Phelps, Ofelia Bermudez, Michael Hughes, William Welcher)

Petitioners' request for judicial notice is granted. Exhibts 2-4 are subject to judicial notice as official acts of the City of La Habra Heights. Evidence Code § 452(c). Exhibits 1 and 5-8 only indicate that they were received by the City of La Habra Heights from third parties, so they do not constitute official acts. However, for the purposes of this litigation, the Court takes judicial notice of them and their contents as facts not reasonably subject to dispute and subject to "immediate and accurate determination by resort to sources of reasonably indisputable accuracy," through the Respondent Clerk's records. Evidence Code § 452(h). Real Parties' request for judicial notice is also granted. Evidence Code § 452(c); *Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45.

The evidentiary objection of the Intervenor and non-City Council Real Parties to the Declaration of Irene Gutierrez is overruled.

The demurrers of Intervenor and the Real Parties are removed from the calendar.

The petition is granted in part. A writ will issue to Respondent Clerk, mandating her to amend the ballot title of Measure A consistent with the Court's ruling, pursuant to Elections Code § 9204. The remainder of the petition is denied.

The demurrers. Intervenor and Real Parties other than the City Council filed demurrers to the petition on December 29, 2014, indicating a hearing date of December 31, 2014. They did not seek permission, on an *ex parte* basis or otherwise, to have their demurrers heard on shortened notice. Nor did they reserve December 31, 2014 – or any date – for the hearing on their demurrers. A party must serve its moving papers 16 court days before the hearing date. CCP § 1005(b). The Court does not consider the demurrers filed two days before the hearing date.

The petition. The Court reviews measures on municipal ballots pursuant to Election Code § 9295(b), which provides:

> (1) During the 10-calendar-day public examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the elections official, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted. The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period.
>
> (2) A peremptory writ of mandate or an injunction shall be issued *only upon clear and convincing* proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ

> or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. (emphasis added)

This section applies to ballot arguments. Elections Code §§ 9295(a); 9282. To determine that ballot materials must be amended or disallowed under Election Code § 9295, the Court must find that: (1) the ballot material in question is defective in the manner specified by the petition; and (2) issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. Elections Code § 9295(b)(2). Only clear and convincing evidence that the ballot does not conform to the statutory requirements warrants the issuance of a writ. *Id.*

A mandamus challenge to a prepared title or question for an initiative presented to the electors is reviewed on substantially the same basis. Elections Code § 9204 provides that

> Any elector of the city may seek a writ of mandate requiring the ballot title or summary prepared by the city attorney to be amended. The court shall expedite hearing on the writ. A peremptory writ of mandate shall be issued *only upon clear and convincing* proof that the ballot title or summary is false, misleading, or inconsistent with the requirements of Section 9203. (emphasis added)

Section 9203 provides, in relevant part, that the city attorney "shall give a true and impartial statement of the purpose of the proposed measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure." Prohibited partiality is "language signal[ing] to voters the [government's] view of how they should vote, or cast[ing] a favorable light on one side of the [issue] while disparaging the opposing view." *McDonough v. Superior Court of Santa Clara County (City of San Jose)* (2012) 204 Cal.App.4th 1169, 1174; see also *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 781 ("The ballot title and summary must reasonably inform the voter of the character and real purpose of the proposed measure.").

Petitions such as this should not be used to impede a political opponent from expressing its views. "The right to seek deletion of false and misleading ballot arguments should not be used as a weapon against differing – as opposed to misleading – opinions." *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1769. "[I]t is not the province of the courts to blue-pencil statements merely on the basis that they do not believe them to be persuasive or cogent," *Huntington Beach City Council v. Superior Court of Orange County (Blackford)* (2002) 94 Cal.App.4th 1417, 1423. See also *Yes on 25, Citizens For An On–Time Budget v. Superior Court of Sacramento County (Brown)* (2010) 189 Cal.App.4th 1445, 1452 (affording drafters "considerable latitude.").

Huntington Beach City Council provides helpful insight into the meaning of the terms "false" or "misleading:"

> In determining whether statements are false or misleading, courts look to whether the challenged statement is subject to verifiability, as distinct from "typical hyperbole and opinionated comments common to political debate." … An

> "outright falsehood" or a statement that is "objectively untrue" may be stricken. … We need only add that context may show that a statement that, in one sense, can be said to be literally true can still be materially misleading; hence, the Legislature did not indulge in redundancy when it used both words. On the other hand, the standard, as defined by the Legislature, is necessarily a high one: Courts may intervene only if clear and convincing evidence shows the statement to be false or misleading. 94 Cal.App.4th at 1432 (citations omitted)

Legislative Effect of Measure A. The passage of Measure A would amend the La Habra Heights general plan, adding a new Land Use Element Policy ("28.A") (RJN Exh. 1, p.4). The stated purpose of the policy would be the "prohibition on land use for new oil and gas development, including High-Intensity Petroleum Operations, new oil and gas wells, and reactivation of Idle Wells (*id.*)." A key issue is the specification of "high-intensity" operations as a targeted disfavored use. Proposed Policy 28.A defines "high intensity petroleum operations" as a combination of two species of extraction (*id.*, p.5):

> "Well Stimulation Treatment" means any treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation. Well stimulation treatments include, but are not limited to, hydraulic fracturing treatments and acid well stimulation treatments. Well stimulation treatments do not include steam flooding, water flooding, or cyclic steaming and do not include routine well cleanout work, routine well maintenance, routine removal of formation damage due to drilling, bottom hole pressure surveys, or routine activities that do not affect the integrity of the well or the formation, provided that such activities do not constitute operation of an Enhanced Recovery Well.

and;

> "Enhanced Recovery Wells" means wells that are injected with water, steam, polymers, carbon dioxide, or other fluids or gasses into petroleum-bearing formations to recover oil and natural gas. Examples include waterflood injection, steamflood injection, and cyclic steam injection.[1]

The proposed legislation also amends other sections of the general plan to prohibit high-intensity operations and the resumption of production from idle wells (*id.*, pp.7-9). Measure A would also amend the La Habra Heights Municipal Code to alter the permissible uses of the OS-RP Zone (Open Space-Resource Production), prohibiting the issuance of a permit or the unpermitted use of land in that zone in a manner which is inconsistent with proposed Policy 28.A (*id.*, pp.10-11). La Habra Heights Municipal Code ("LHHMC") § 7.3.50. Similar amendments are proposed to the Municipal Code's section concerning the City's SPO ("Specific Plan Overlay") and IO ("Institutional Overlay") zones (*id.*, p.11). LHHMC § 7.3.70. Measure A also includes certain exemptions for vested rights uses of land and land uses where prohibition would constitute an

[1] The exception in "Well Stimulation Treatment" for "steam flooding, water flooding, or cyclic steaming" appears to be merely a definitional exception and not a substantive exemption from the proposed prohibition, as those activities are expressly included in the definition of "Enhanced Recovery Wells," also included as prohibited "High Intensity Petroleum Operations (RJN, Exh. 1)."

unconstitutional taking (*id.*, pp.6-7, 12-13). The proposed amendments also include provisions for public hearings and adjudication of claims for exemptions on this basis. (*id.*).

The petition notes that Measure A was subject to previous litigation in Los Angeles County Superior Court between Respondent and Real Parties ("Responding Parties") and James Pigott, who has intervened in the instant action (*James Pigott v. Shauna Clark*, LASC Case No. BS152700). The *Pigott* Litigation concluded with a dismissal, after Responding Parties agreed to amend the ballot language. The petition challenges the resulting proposed language. Specifically, Petitioners challenge the ballot question formulated by Responding Parties, asserting that it is both impermissibly partial and false and misleading. Elections Code § 9204. Petitioners also assert that the argument against the ballot was submitted in violation of Elections Code § 9282(a), as it was submitted by a collection of individuals and not by the City. Finally, Petitioners challenge multiple statements in the argument against Measure A, contending that they are false and misleading. Elections Code § 9295(b)(2).

Ballot Question. A presently drafted, Measure A poses to the electors the following question:

> "Shall an ordinance be adopted that prohibits land use for any treatment of oil or gas wells that is designed to enhance production or recovery, any new oil and gas wells, and reactivation of idle wells?" (RJN, Exh. 4)

As explained above, this ballot question is the result of La Habra Heights' attempt to avoid litigation with the Intervenor (*id.*). Petitioners complain that the ballot question is defective because it misleadingly claims a prohibition covering "any treatment … that is designed to enhance production." Petitioners also claim that the ballot measure is impermissibly partial because of its use of the word "enhance," which Petitioners claim is positive. Petitioners also assert that the language of the ballot question deviates significantly and impermissibly from the language that was circulated to the voters.

The description of Measure A as prohibiting land use for "*any* treatment of oil or gas wells that is designed to enhance production or recovery" (RJN, Exh. 4 (emphasis added)) is misleading. The proposed legislative effects of the measure reveal that the prohibition focuses on "high intensity" extraction techniques, which it defines as: (1) techniques that "increase the permeability of the formation," including hydraulic fracturing (or "fracking"), as well as the introduction of acid in the wellbore; and (2) techniques that involve the injection of material into an oil pocket to enhance oil recovery (RJN, Exh. 1). Notwithstanding the statute's carve-out for the apparently routine maintenance and testing operations discussed in the definition of "Well Stimulation Treatment" or the carve-out for vested-right high-intensity drilling operations, the proposed legislative effect of Measure A is to prohibit specific extraction techniques (*id.*). Converting the prohibition against these two categories into "any technique" is a misleading exercise in drafting prohibited by the Elections Code. Elections Code § 9204. The breadth of the proposed language is demonstrably "false" when compared to Measure A's potential legislative effect. It is similarly misleading in that it suggests that it applies to all current and future extraction enhancing processes, rather than those defined by the measure. *Huntington Beach City Council, supra*, 94 Cal.App.4th at 1432.

The Court rejects Responding Parties' contention that the language is derived from Measure A's definition of "Well Stimulation Treatment" (Clerk Opp., p.7:2-10). This argument ignores much of the definition of "Well Stimulation Treatment" and the definition of "High Intensity Petroleum Operations" as including both "Well Stimulation Treatment" and the operation of "Enhanced Recovery Wells." The Court also rejects Responding Parties' excuse that the Elections Code limits the words permitted in the ballot title. Even recognizing this limitation, the ballot question proposed by the Clerk glosses over the categories of extraction that are targeted by the measure and therefore is not "a true and impartial statement of the purpose of the proposed measure." Elections Code § 9203(a).

For the foregoing reasons, the Court grants the petition in part and issues a writ commanding Respondent to prepare a different ballot question. In making this determination, the Court notes that the use of the word "enhance" in this context does not constitute impermissible partiality, as it is consistent with the language in Measure A and accurately describes the oil production and recovery that results from using the prohibited techniques. In addition, *Costa v. Superior Court of Sacramento County (Lockyer)* (2006) 37 Cal.4th 986, cited by Petitioners, does not readily apply to the instant situation. The *Costa* opinion concerns the failure of proponents of a statewide re-districting initiative to present the petition that they circulated for signatures to the Attorney General; they instead provided a similar petition which nevertheless contained certain discrepancies. Here, there is no contention that Petitioners failed to present the version of Measure A that they circulated to the City Attorney, and therefore *Costa* has no real application, other than its recognition of the importance of transparency in the initiative process in California. *Id.*, at pp.1020-1021.

Statute of Limitations. Respondent Clerk contends that Petitioners' petition for review of the ballot argument is time-barred by operation of Elections Code § 9295(b)(1), which provides that "[t]he writ of mandate or injunction request *shall* be filed *no later than* the end of the 10-calendar-day public examination period (emphasis added)." The statute defines the period as "a period of 10 calendar days immediately following the filing deadline for submission of those materials." *Id.* The petition alleges that the ballot materials were filed on December 1, 2014 (Petn., ¶ 56; Clark Decl., ¶ 4). This commenced the 10-day examination period. Elections Code § 9295(a). This period concluded on December 11, 2014, the tenth calendar day after the deadline for submissions. Elections Code § 9295(b)(1). The petition was filed on December 12, 2014. As a result, the petition is time-barred. Therefore, the petition is denied to the extent it seeks a writ of mandate pursuant to Elections Code § 9295(b), directed at the ballot argument. *Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 71. The contention of the non-City Council Real Parties and the Intervenor that the statute of limitations bars the entire cause of action has no merit. They provide no persuasive analysis supporting the application of § 9295(b)(1)'s statute of limitations to a petition for a writ of mandate brought pursuant to § 9204. Their reliance on *McDonough v. Superior Court of Santa Clara County (City of San Jose)* (2012) 204 Cal.App.4th 1169, 1174 is misplaced. *McDonough* does not mention section 9204 and therefore is not mandatory or persuasive authority on the issue. The statute of limitations bars only the petition's challenges to the ballot arguments, brought through Elections Code § 9295.