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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SAN DIEGO – HALL OF JUSTICE
9

10 CITY OF SAN DIEGO *et al.*,

11 Petitioners/Plaintiffs,

12 vs.

13 ELIZABETH MALAND *et al.*,

14 Respondents/Defendants;

15 CATHERINE APRIL BOLING *et al.*,

16 Real Parties in Interest.
17

CASE NO. 37-2018-00023295-CU-WM-CTL

**INTERVENOR SAN DIEGANS FOR
OPEN GOVERNMENT'S OPPOSITION
BRIEF; DECLARATION OF MONIQUE
WARDENAAR AND CORY BRIGGS**

Action Filed: May 11, 2018
Department: C-72 (Taylor)

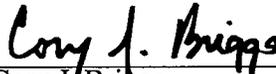
Hearing Date: July 13, 2018
Hearing Time: 1:30 p.m.

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19 Intervenor SAN DIEGANS FOR OPEN GOVERNMENT ("SDOG") respectfully submits the
20 following brief in opposition to Petitioner/Plaintiff City of San Diego.

21 Date: June 26, 2018.

BRIGGS LAW CORPORATION

22 By:


Cory J. Briggs

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24 Attorneys for Intervenor San Diegans for Open
25 Government
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1 **I. Introduction**

2 The Court should not reach the merits of this lawsuit; rather, the lawsuit should be dismissed
3 forthwith. As the most humble branch of government, the Judiciary has wisely followed a practice of
4 going out of its way to avoid pre-election challenges to citizen initiatives. The extremely limited
5 timeframes for review in the trial court – not to mention at the appellate level, as will certainly be the
6 case here – is reason enough to defer.¹ When coupled with the opportunity for proponents or
7 opponents to misuse a rushed ruling in campaign propaganda, the Court has all the more reason to take
8 a “wait and see” approach. The best way for the Court to respect the citizenry's right of initiative and
9 the electorate's collective wisdom is to avoid even dipping a toe into these waters until the voters have
10 spoken.

11 Such considerations arise in every pre-election challenge to a citizen initiative. In this case,
12 because San Diego is a hotbed of political sleaze, there are others that the City will never mention (but
13 SDOG will, below).

14 For these reasons, the Court is urged to dismiss this case without reaching the merits of the
15 City's claims and without reaching any issues raised by the anti-SLAPP motion. SDOG has not taken a
16 position on the SoccerCity Initiative because it believes in letting the voters decide first. The Court
17 should do the same thing. No good will come from deciding any merits-related issue at this stage – that
18 is, if the *public* good is what matters most. Questions of invalidity can wait.

19 **II. Standard of Review**

20 Because the right of initiative is “one of the most precious rights of our democratic process,” the
21 Judiciary has long been extremely reluctant to interfere in the initiative process. *Associated Home*
22 *Builders v. City of Livermore*, 18 Cal.3d 582, 591 (1976). Cognizant of their “obligation to jealously

1 This lawsuit must get through the Superior Court, the Court of Appeal, and possibly even the California Supreme Court no later than August 10, 2018. With so many other important matters on its docket, how can the Judiciary do its best work on something as important as reviewing the validity of a ballot measure in such a short period of time?

1 guard the people's reserved right of initiative, courts approach pre-election challenges to an initiative
2 based on “the established principle that all reasonable doubts must be resolved in favor of the people's
3 exercise of the reserved initiative power.” *Rossi v. Brown*, 9 Cal.4th 688, 711 (1995). Why such
4 reticence? It's because judges are “cognizant of the injury to the public that would result from an
5 erroneous determination to keep an initiative off the ballot.” *Save Stanislaus Area Farm Economy v.*
6 *Board of Supervisors*, 13 Cal.App.4th 141, 150 (1993) (“*Save Stanislaus*”). “[N]o serious consequences
7 will result if consideration of the validity of a measure is delayed until after an election.” *Legislature*
8 *v. Deukmejian*, 34 Cal.3d 658, 666 (1983).

9 Of course, the reasons for prescinding are not entirely altruistic. To some extent, courts avoid
10 pre-election initiative challenges for reasons of judicial economy. If voters approve an initiative, there
11 will be plenty of time to review it; if they don't, then judicial review will be a moot point. *See id.* at
12 666.

13 When is it appropriate for a court to delve into a substantive² pre-election challenge? As the
14 California Supreme Court has “frequently observed, it is usually more appropriate to review
15 constitutional and other challenges to ballot propositions and initiative measures after an election rather
16 than to disrupt to electoral process by preventing the exercise of the people's franchise, in the absence
17 of some *clear showing of invalidity*.” *Brosnahan v. Eu*, 31 Cal.3d 1, 4 (1982) (emphasis added).

18 Just how clear must the invalidity be before a court will be justified in ruling on the issue? It
19 must be “clear *beyond* a doubt.” *Save Stanislaus, supra*, 13 Cal.App.4th at 151 (emphasis added).

20

III. Argument & Analysis

21 Based on the foregoing precedents, emanating mostly from California's highest court, the best
22 thing for this Court to do is dismiss the lawsuit without addressing any merits-related issues.³ The

1 2 A substantive challenge like this lawsuit is to be distinguished from a challenge over whether an initiative has satisfied
2 the procedural prerequisites to appearing on the ballot in the first place, which courts do not avoid. *See, e.g., Costa v.*
3 *Superior Ct.*, 37 Cal.4th 986, 1006 (2006) (noting that sole focus in such a lawsuit is on whether initiative qualified for ballot
4 and not on its validity or invalidity if approved by voters).

3 As noted earlier, that means the City's claims and Ms. Boling's anti-SLAPP motion.

1 reason the City filed this lawsuit now is because the politicians have only recently begun to appreciate
2 the consequences of their years of failed leadership on the issue of how to deal with the City's single
3 largest physical asset when the San Diego Chargers leave Mission Valley.

4 Just over one year ago, after receiving the City Attorney's May 2017 confidential analysis of the
5 SoccerCity Initiative, members of the City Council paid homage to the electorate's right to vote on the
6 matter (after it received the requisite number of voter signatures to qualify) and unanimously placed it
7 on the November 2018 ballot. Around that time, the Mayor was also trying to persuade the City
8 Council to put his proposal for raising the transient occupancy tax ("TOT"), to pay for another
9 expansion of the San Diego Convention Center, on the ballot. Briggs Decl., ¶ 7. The improvidence of
10 such a use of TOT revenues and the timing of the election gave some members of the City Council
11 heartburn, so they rejected the proposal altogether. *Id.*

12 But when it came time to discuss SoccerCity, attitudes were very different. As Councilmember
13 Scott Sherman put it:

14 I would really like to try to set it up today to where we could have a
15 special election just for SoccerCity. There were issues with the TOT
16 thing before us, there were issues with the way it was put together, but
17 *this is the will of the voter*, at this point. *Our job is to implement the*
18 *will of the voter and not impose our will on the voter*. And that's what
19 we have been doing around here for the last couple of weeks. So with
20 that being said, I think I have no choice really to put a motion out there
21 that we move this to November of 2018.

22
23 Wardenaar Decl., ¶ 4 (emphasis added). Councilmember Alvarez, despite not being a member of the
24 same political party as Mr. Sherman and not liking the measure, nevertheless seconded his motion to
25 put the SoccerCity Initiative on the November 2018 ballot because of the importance of the franchise
26 right. *Id.*, ¶ 6. "I am supporting Councilmember Sherman's motion to *put this before the voters.*" *Id.*,
27 ¶ 7 (emphasis added).

1 Councilmember Cate joined the chorus, recognizing the important benefits of a spirited debate
2 over the future of the Qualcomm Stadium site: “I think the public . . . deserves the opportunity to vote
3 on this. And let folks come forth with the best arguments because *you don't know what you're going*
4 *to learn during the course of a public debate* on this process.” *Id.*, ¶ 8 (emphasis added).

5 Nobody should ever advocate against giving the public the right to vote on important issues like
6 the future of Mission Valley and the disposition of major public assets. That's why, not surprisingly,
7 Councilmember Sherman's motion passed unanimously. *Id.*, ¶ 10.

8 So what changed? If the SoccerCity Initiative is illegal today, it was illegal a year ago. Why
9 did the City wait so long? The answer can be summed up in one word: politics. Before SDOG
10 explains that answer, however, the Court needs to understand a couple other dynamics at play.

11 Nature abhors a vacuum. The Mayor's and the City Council's years of joint-and-several
12 incompetence in planning for the Chargers' departure from Qualcomm Stadium had indeed created a
13 vacuum. Being savvy Wall Street financiers, the SoccerCity Initiative's backers saw an opportunity
14 and seized it.⁴ What they didn't anticipate is the fight that would ensue over development that would
15 bring even more traffic to an already-gridlocked Mission Valley.

16 Sudberry Properties and H.G. Fenton are the two largest Mission Valley developers in recent
17 years. Their multi-phase developments are mostly complete, but – as is true with many multi-phase
18 developments – the big profits come at the end. The single-biggest environmental constraint on
19 completing their Mission Valley developments is traffic. If SoccerCity comes to the Qualcomm
20 Stadium site, its additional traffic will make it impossible for Sudberry and Fenton to realize the profits
21 they had envisioned.

22 Unfortunately, those two developers are unsympathetic victims in the drama that is Mission
23 Valley's vehicle-intensive devolution. They needed a cause that the public would support, a cause that

1 4 It also helped that Ms. Boling had served as campaign treasurer and raised money for the Mayor and other members of
2 the City Council.

1 would not have the obvious Achilles' heel of a campaign that pitted high financiers against mega-rich
2 developers. Conventional wisdom has both sides losing that battle at the ballot box. That's where San
3 Diego State University ("SDSU") comes in.

4 SDSU has a loyal alumni base in San Diego. The university is popular for its sports teams, and
5 for the most part the community is highly supportive of the university's long-term goal of becoming
6 one of the nation's premier research institutions.⁵ SDSU also contributes a lot economically to the
7 region.

8 So Sudberry and Fenton, along with some of their closest business and political allies, came up
9 with the "SDSU West" idea for a competing citizen initiative. And that's when the the light bulb went
10 off for the politicians. They were finally beginning to see that getting in the middle of SoccerCity and
11 SDSU West at the ballot box, when neither is ideal from a policy standpoint, would (i) reveal the
12 politicians' years of incompetence to the voters by forcing them to choose between two far-from-
13 perfect options, as opposed to the politicians doing their jobs and crafting a compromise that is in the
14 City's collective best interest and then implementing it without the need for a messy election contest;
15 and (ii) force the politicians to take sides and thereby alienate big donors in both initiative camps.

16 In short, the biggest – nay, only – victims of letting the public vote on SoccerCity and SDSU
17 West will be the politicians, who'll have to explain to voters and donors alike why City Hall could not
18 do what every other major city is capable of doing. What changed over the last year are the political
19 calculations that the politicians are now having to make as they eye their next campaign for public
20 office.

21 At this point, what the politicians want more than anything is to get SoccerCity's backers and
22 SDSU West's backers into a room where they can hammer out a compromise for which the politicians

⁵ Mini-dorms near the main campus remain a problem. Providing student housing at the Qualcomm Stadium site would alleviate some of the current conflicts between the university's administration and the residents of adjacent neighborhoods.

1 can take credit. But now that both measures have qualified for the ballot, the politicians need the
2 Court's assistance to get the measures off the ballot. The City's sincerity in seeking judicial review is
3 feigned.

4 The City will almost certainly object to the foregoing as baseless speculation. That would be
5 wrong for two reasons.

6 First, the City did not debate the commencement of this lawsuit in public. More than one year
7 after receiving the City Attorney's public analysis of the SoccerCity Initiative and nearly a year after
8 receiving the City Attorney's secret analysis, the City went into closed session and voted to authorize
9 this lawsuit and the companion lawsuit against SDSU West. Neither the Mayor nor any member of the
10 City Council who voted to sue has made a public statement about why the two lawsuits were filed at
11 the eleventh hour. If there were genuine legal concerns – at least with regard to SoccerCity, since the
12 City Attorney's analyses were done before the City Council put the matter on the ballot – the City
13 surely would have promptly filed suit a year ago, before putting it on the ballot, to avoid the sin of
14 *laches*. If the people who authorized the lawsuit are unwilling to state their reasons publicly, the City is
15 in no position to explain its delay.

16 Second, the foregoing is not speculation at all. It is based on SDOG's counsel's first-hand
17 knowledge of the behind-the-scenes scheming that the politicians and backers of the SDSU West
18 Initiative have been trying to accomplish. *See Briggs Decl.*, ¶¶ 2-6.

19 So why must the Court avoid the merits like the plague. If the Court touches any aspect of the
20 merits, the biggest loser will be the Court itself. If the Court rules in favor of the City, the same
21 politicians who whole-heartedly embraced the public's right to vote a year ago will blame the voters'
22 disenfranchisement on the Court; when asked why they authorized the lawsuit, they will claim that they
23 were given advice by the City Attorney in a secret meeting and are precluded from disclosing what was
24 said. SoccerCity will likewise blame the Court for disenfranchising the voters.

1 measures (at that point still not seen in final form) that could potentially put private interests over the
2 public interest. I participated in several such conversations. During those conversations, the staffers
3 made clear that their bosses and other politicians were very concerned that they had missed the
4 opportunity for the City to control the future of the Qualcomm Stadium site, and that there would be
5 negative financial and environmental consequences for the City and equally negative political
6 consequences for the politicians the next time they ran for office. The problem is that minority factions
7 on the City Council, along with the Mayor, all had their own ideas for what to do and were unwilling to
8 compromise. By this time, in fact, the press had been reporting that the Mayor and his then-Chief of
9 Staff had been having secret meetings with SoccerCity's backers at the same time the Mayor was
10 purportedly negotiating with the San Diego Chargers to keep them at Qualcomm Stadium. I heard the
11 foregoing from City staffers, read some of it in press, and in some instances saw it with my own eyes
12 (e.g., by reviewing public records obtained from the City).

13 5. At one point, after it appeared that the SoccerCity Initiative would end up on the ballot,
14 an attorney representing Sudberry Properties contacted me and asked whether SDOG and I would be
15 willing – in exchange for money – to file a lawsuit over the SoccerCity Initiative to block it from
16 getting on the ballot. During my conversation with the attorney, I was given a lot of information about
17 why the SoccerCity Initiative had to be stopped. The reasons included the financial harm that Sudberry
18 and H.G. Fenton would suffer as a result of the SoccerCity traffic impacts that were unanticipated when
19 their developments were approved years earlier. When I asked why Sudberry was unwilling to file suit
20 in his own name, the attorney told me that Tom Sudberry, one of the client's principals, did not want
21 his name associated with a lawsuit directed at the City because Sudberry had too much business
22 pending before the City and couldn't risk making the decision-makers angry. SDOG and I obviously
23 had no interest in shilling (not at any price).

1 6. Roughly a month or so before the City Council voted to authorize this lawsuit, I spoke to
2 representatives of the City who wanted to know my clients' views about (i) the potential for pre-
3 election lawsuits against the SoccerCity Initiative and the SDSU West Initiative to succeed; and (ii), if
4 the lawsuits were sufficiently threatening, the prospects of getting the backers of the two initiatives into
5 a room to hammer out a compromise that the Mayor and a minority of the City Council could bring
6 forward (with the backers simply withdrawing their financial support for their respective "yes"
7 campaigns). The "urgency," I was told, is the "really deep political mess" in which the Mayor and the
8 City Council now find themselves because they are "alienating their political friends who are on
9 opposite sides of the SoccerCity-SDSU West divide."

10 7. In mid-2017, around the time the City was deciding whether to put the SoccerCity
11 Initiative on the ballot in late 2017 or November 2018, the Mayor was proposing an increase in the
12 City's transient occupancy tax ("TOT") to pay for an expansion of the San Diego Convention Center.
13 He claimed that he wanted the fastest possible special election because a tiny fraction of the revenues
14 could also be made available to address the City's homelessness problems. Many members of the
15 public spoke against the Mayor's proposal because it was playing on the public's sympathies for the
16 homeless in order to generate a pot of money that would mostly go toward the Convention Center;
17 and/or because it would require a special election rather than a general election at which voter turnout
18 tends to be higher. The City Council eventually voted against the Mayor's request for a special election
19 and his request to put his TOT measure on the ballot. I watched the meetings via the City's real-time
20 video broadcast.

21 9. The facts asserted in SDOG's opposition brief are based on my experience and
22 observation recounted above and are true and correct.

23

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

3 Date: June 26, 2018.

4 Cory J. Briggs
Cory J. Briggs

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PROOF OF SERVICE

1. My name is Janna Ferraro. I am over the age of eighteen. I am employed in the State of California, County of San Diego.

2. My business _____ residence address is Briggs Law Corporation, 4891 Pacific Highway, Suite 104, San Diego, CA 92110.

3. On June 29, 2018, I served _____ an original copy a true and correct copy of the following documents: Intervenor San Diegans for Open Government's Opposition Brief; Declaration of Monique Wardenaar and Cory Briggs

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

by personal service. I personally delivered the documents to the person(s) at the address(es) indicated on the list.

by U.S. mail. I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

_____ deposited the envelope/package with the U.S. Postal Service

_____ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of _____ San Diego, California.

by overnight delivery. I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

by facsimile transmission. Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

by e-mail delivery. Based on the parties' agreement or a court order or rule, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws _____ of the United States of the State of California that the foregoing is true and correct.

Date: June 29, 2018

Signature: 

SERVICE LIST

City of San Diego et al. v. Elizabeth Maland et al.,
San Diego Superior Court Case No. 37-2018-00023295-CU-WM-CTL

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