

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - September 04,2008**

EVENT DATE: 09/04/2008 EVENT TIME: 02:00:00 PM DEPT.: C-62

JUDICIAL OFFICER: Ronald L. Styn

CASE NO.: 37-2008-00089123-CU-WM-CTL

CASE TITLE: SAN DIEGO UNIFIED PORT DISTRICT VS. DEBORAH SEILER, IN HER OFFICIAL
CAPACITY AS SAN DIEGO COUNTY REGISTRAR OF VOTERS

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT

/DATE FILED:

The following is a tentative ruling only. The final order of the court will be issued following oral argument.

Petitioner/Plaintiff San Diego Unified Port District's petition for writ of mandate is denied.

The court considers this matter under the principles summarized in *Independent Energy Producers Association v. McPherson* (2006) 38 Cal.4th 1020,

"it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." As we pointed out in our recent decision in *Costa, supra*, 37 Cal.4th, 986, 1005, however, "in *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142 [90 Cal. Rptr. 2d 810, 988 P.2d 1089] (*Senate v. Jones*), we noted that decisions after *Brosnahan I* 'have explained that this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and that the rule does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an amendment. [Citations.]" (21 Cal.4th at p. 1153.)" Under the authorities cited in *Senate v. Jones*, preelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted *by initiative*. (See, e.g., *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687 [206 Cal. Rptr. 89, 686 P.2d 609] [initiative may not be used to apply for the convening of a federal constitutional convention]; *McFadden v. Jordan* (1948) 32 Cal.2d 330 [196 P.2d 787] [initiative may not be used to revise, rather than to amend, California Constitution].) Because the claim raised here is that the California Constitution permits only the Legislature, and not the people through the initiative process, to confer additional authority upon the PUC, the decisions noted in *Senate v. Jones* establish that preelection review of such a claim is not necessarily or presumptively improper.

Nonetheless, although the strong presumption against preelection review does not apply to such a claim, we believe it is appropriate for a court presented with this type of preelection challenge to keep in mind that unlike the type of procedural challenge relating to the petition-circulation process at issue in

our recent decision in *Costa*, *supra*, 37 Cal.4th 986-a type of claim that, as explained in *Costa*, generally can be remedied only prior to an election and that usually will become moot after an election (see *id.* at pp. 1006–1007)-a contention that an initiative measure is invalid because the measure cannot lawfully be enacted through the initiative process is a type of claim that generally will *not* become moot if the initiative is approved by the voters at the election. . . . Because this type of claim is potentially susceptible to resolution either before or after an election, there is good reason for a court to be even more cautious than when it is presented with the type of procedural claim at issue in *Costa* before deciding that it is appropriate to resolve such a claim prior to an election rather than wait until after the election. Of course, as this court noted in *Senate v. Jones*, *supra*, 21 Cal.4th 1142, 1154, potential costs are incurred in postponing the judicial resolution of a challenge to an initiative measure until after the measure has been submitted to and approved by the voters, and such costs appropriately can be considered by a court in determining the propriety of preelection intervention. Nonetheless, because this type of challenge is one that can be raised and resolved after an election, deferring judicial resolution until after the election-when there will be more time for full briefing and deliberation-often will be the wiser course."

Independent Energy Producers, 38 Cal.4th at 1029-1030.

Similar to the facts presented in *Independent Energy Producers*, Petitioner's challenge to The Port of San Diego Marine Freight Preservation and Bayfront Development Initiative are such that they can be raised and resolved post-election. ["A contention that an initiative measure is invalid because the measure cannot lawfully be enacted through the initiative process is a type of claim that generally will *not* become moot if the initiative is approved by the voters at the election." *Independent Energy Producers*, 38 Cal.4th at 1024 citing *Bramberg v. Jones* (1999) 20 Cal.4th 1045. See, *Brosnahan v. Brown* (1982) 32 Cal.3d 236 (*Brosnahan II*) which resolved a single-subject rule case post-election.] The court recognizes pre-election review has been allowed in such instances. See, *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491; *Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142 (and the cases cited therein). However, as the court explained in *Independent Energy Producers*,

"although preelection resolution of this type of a challenge is not presumptively improper, the challenge here at issue-unlike the type of challenge at issue in *Costa*-generally will not become moot after an election if the measure is adopted, and thus such a claim reasonably is susceptible to judicial resolution either before or after an election. As a consequence, when such a challenge is brought prior to an election, a court should recognize that the need for an expedited preelection resolution of the claim is less compelling than with regard to the type of claim at issue in *Costa*. Accordingly, in such a case a court should take into consideration the availability of postelection relief in deciding whether it is preferable to resolve the issue in the often charged and rushed atmosphere of an expedited preelection review, or instead to leave the challenge for resolution with the benefit of the full, unhurried briefing, oral argument, and deliberation that generally will be available after the election."

Independent Energy Producers, 38 Cal.4th at 1025.

"Particularly when a preelection challenge is brought against an initiative measure that has been signed by the requisite number of voters to qualify it for the ballot, the important state interest in protecting the fundamental right of the people to propose statutory or constitutional changes through the initiative process requires that a court exercise considerable caution before intervening to remove or withhold the measure from an imminent election. Only when a court is confident that the challenge is meritorious and justifies withholding the measure from the ballot, should a court take the dramatic step of ordering the

removal of a measure that ostensibly has obtained a sufficient number of qualified signatures. (See, e.g., *Farley v. Healey* (1967) 67 Cal.2d 325, 327 [62 Cal. Rptr. 26, 431 P.2d 650] [court should order removal of an initiative measure from ballot only "on a compelling showing that a proper case has been established for interfering with the initiative power"]; *Zaremborg v. Superior Court* (2004) 115 Cal.App.4th 111, 116 [8 Cal. Rptr. 3d 723] ["[t]he ballot box is the sword of democracy. A court will intervene in the ... process only when there are clear, compelling reasons to do so".])"

Costa v. Superior Court (2006) 37 Cal.4th 986, 1007.

"[T]he Constitution's initiative and referendum provisions should be liberally construed to maintain maximum power in the people. [Citations.] Any doubts should be resolved in favor of the exercise of these rights. [Citations.]" *Independent Energy Producers*, 38 Cal.4th at 1032 citing *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675.

The court considers the merits of Petitioner's claims under these parameters.

Electorate's Right of Initiative/Port District's Exclusive Authority

The court finds this case analogous to the facts presented in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491. However, *DeVita v. County of Napa* (1995) 9 Cal.4th 763, a subsequent case, allows for the amendment of a general plan by initiative. In addition, §33 of the Port District Act, allows for initiative and referendum – in at least some instances. In light of *DiVita* and §33, and considering the cautionary parameters of *Independent Energy Producers*, the court finds Petitioner fails to conclusively establish the Port District's exclusive authority so as to provide clear and compelling reasons for the removal of the Initiative from the ballot.

Legislative/Administrative Act

"[L]egislative acts 'are those which declare a public purpose and make provisions for the ways and means of its accomplishment' . . . administrative acts . . . 'carry out the legislative policies and purposes already declared by the legislative body'" *AFL v. Eu* (1984) 36 Cal.3d 687, 712, fn.23 quoting *Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509.

[T]he test used to decide whether a particular ballot measure constitutes a legislative or an administrative act . . . is set out and explained in *Valentine v. Town of Ross* (1974) 39 Cal. App. 3d 954, 957-958 [114 Cal. Rptr. 678]: " '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.] . . . [P] Also well settled is the distinction between the exercise of local legislative power, and acts of an administrative nature. [P] . . . " ' "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]; . . . "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, or such as are devolved upon it by the

organic law of its existence." [Citations.]' (Italics added.)" (*Id.* at pp. 399-400, some italics omitted; second italics added.)"

Citizens for Jobs & the Economy v. County of Orange (2002) 94 Cal.App.4th 1311, 1332-1333.

Under these guidelines, the inclusion of implementation provisions (i.e. "the ways and means") within an initiative does not *a fortiori* render the initiative an administrative act. The provisions challenged by Petitioner such as entering into an exclusive negotiating agreement to develop a master development agreement, formulating a specific redevelopment plan and executing cooperative agreements and subsidiary development agreements are similar to those approved in *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384 [entering into a "memorandum of understanding"] and *Pala Band of Mission Indians v. Board of Supervisors of San Diego County* (1995) 54 Cal.App.4th 565 [amending an existing zoning ordinance] as properly included in an initiative. Also, "the award of a contract, and all acts leading up to the award are legislative in character" *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1112-1113 quoting *Joint Council of Interns & Residents v. Board of Supervisors of Los Angeles County* (1989) 210 Cal.App.3d 1202, 1211. And, "[a] development agreement is a legislative act that shall be approved by ordinance and is subject to referendum." Government Code §65867.5. See also, *Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, 910 [holding that modification of mater development plan, precise development plan, and development agreement are legislative in nature]. In light of these authorities, the court finds Petitioner fails to establish the Initiative as administrative so as to provide clear and compelling reasons for the removal of the Initiative from the ballot.

Single Subject Rule

"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." California Constitution, Article II, §8. "[W]hen a court determines that the challengers to an initiative measure have demonstrated that there is a strong likelihood that the initiative violates the single-subject rule, it is appropriate to resolve the single-subject challenge prior to the election." *Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1154.

"In articulating the proper standard to guide analysis in this context, the governing decisions establish that " ' "[a]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are 'reasonably germane'* to each other," and to the general purpose or object of the initiative.' " (*Legislature v. Eu, supra*, 54 Cal. 3d 492, 512, original italics.) As we recently have explained, "the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship. [Citation.] It is enough that the various provisions are reasonably related to a common theme or purpose." (*Id.* at p. 513.) Accordingly, we have upheld initiative measures " 'which fairly disclose *a reasonable and common sense relationship among their various components in furtherance of a common purpose.*' [Citation.]" (*Id.* at p. 512, italics added.)"

Senate, 21 Cal.4th 1142, 1157. Stated more recently, the test requires simply that "the separate provisions of a measure be reasonably germane to a common theme, purpose, or subject." *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764 & fn. 729.

Each of the provisions challenged by Petitioner relate to redevelopment of the Tenth Avenue Marine Terminal. While the Initiative contains "twin goals" of preserving marine freight and developing the TAMT

with non-industrial uses, both "goals" are related to the redevelopment of the TAMT. Thus, *Senate* and the cases cited therein, all of which involved initiatives with completely unrelated provisions, are distinguishable. Therefore, Petitioner fails to demonstrate that there is a strong likelihood that the initiative violates the single-subject rule.

Conclusion

In finding the absence of "clear and compelling" reasons for removing the Initiative from the ballot, the court is not pre-judging the merits of Petitioner's challenges to the Initiative. However, at this stage, the court is not confident any of Petitioner's challenges justifies withholding the Initiative from the ballot. In reaching this conclusion, the court is constrained by *Independent Energy Producers*. The Supreme Court heard *Independent Energy Producers* even though the issue was moot in light of the defeat of Proposition 80, and issued the opinion specifically to provide "guidance for the future." Therefore, the court must exercise the caution required under *Independent Energy Producers*. The court finds the "wiser course" is to allow the Initiative to appear on the ballot in the November 4, 2008, election and address Petitioner's challenges post-election with the benefit of full, unhurried briefing, oral argument and deliberation. *Independent Energy Producers*, 38 Cal.4th at 1025.

Petitioner's request for judicial notice is granted as to exhibits 1, 2, 5 and 6 and denied as to exhibits 3 and 4. Real Party in Interest, San Diego Community Solutions, LLC's objections to exhibit 3 and 4 of Petitioner's request for judicial notice are sustained. Real Party in Interest, San Diego Community Solutions, LLC's request for judicial notice is granted.

The application to file amicus curiae brief filed by the State of California/State Lands Commission , Pacific Merchant Shipping Association and San Diego Port Tenants Association are granted. Real Party in Interest, San Diego Community Solutions, LLC's objection to the applications of Pacific Merchant Shipping Association and San Diego Port Tenants Association is overruled.