Current Issues in Elections Law:
Challenging the Validity of an Initiative Ballot Measure

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Overview

Elections law is dynamic, constantly responding to the political environment while still adhering to constitutional principles and tenets. One particularly provocative aspect of late is the initiative process, and when a city may challenge an initiative ballot measure proposed by, or after approved by, the voters. This paper explores the different points in the initiative process during which a city may mount such a challenge, and discusses some of the most relevant yet unsettled questions, many of which are the subject of pending lawsuits.

Introduction

Recognizing that California stands apart from other states by virtue of its direct statutory initiative process, the courts have long held that:

“[t]he initiative and referendums are not rights ‘granted the people, but ... power[s] 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 wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.’”

Thus, courts will scrutinize closely any effort to derail an initiative.

However, there are times when courts will step into the fray and will adjudicate matters related both to the initiative process and to the substance of the measure itself. The points in the process at which the court may step in are discussed below, with an eye toward a city’s involvement in these challenges.

I. Pre-Qualification Challenges

Challenges to an initiative measure that has not yet qualified for the ballot usually center on technical compliance issues, and whether any deficiencies in the initiative petition rise to such a level that they will adversely impact voters.

1 California is one of 21 states that allow statutory initiative measures, and is one of only 14 states that has a direct initiative statute, whereby qualifying citizen proposals are placed directly on the ballot for voter approval or rejection, without vetting by the state legislature. See <http://www.iandrinstitute.com/>, accessed 7/26/04.

2 Rossi v. Brown (1995) 9 Cal.4th 688, 695 (internal citations omitted); see also San Francisco Forty-Niners v. Nishioka (1999) 75 Cal.App.4th 637, 650 (“We recognize that courts should rarely interfere with the political process, especially the initiative process where competing ideas converge”).
The basic rule is that “election officials have a ministerial duty to reject initiative petitions which suffer from a substantial, as opposed to a technical, statutory defect which directly affects the quality of information provided to the voters.” In deciding whether a technical deficiency is substantial enough to justify rejection of the petition, the California Supreme Court has declared,

“A paramount concern… is whether the purpose of the technical requirement is frustrated by the defective form of the petition. ‘The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the … petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law.’”

California courts have most often found that initiative and referendum petitions were properly rejected where violations of the Elections Code would result in voter confusion or misinformation. These examples include instances where intentional false representations were contained in the initiative petition; where the initiative failed to include the full text of the ordinance at issue; and where the petition failed to include “notice of intention” language designed to impart useful information to voters.

Notably, election officials may not reject a petition based on extrinsic evidence relating to the manner of circulation; at least one California Court of Appeal has declared that such an action exceeds the boundaries of the election official’s role: “…an election official’s role in certifying an initiative petition is confined to the ministerial task of examining the four corners of the petition for compliance with submission requirements. Here, a city clerk refused to certify an initiative petition after deciding based on extrinsic evidence that it was circulated in violation of state law. This factfinding exceeded the scope of the clerk’s lawful ministerial duties….”

Thus, any pre-qualification challenge to an initiative must be based on deficiencies within the petition itself, and those deficiencies must rise to such a level that they frustrate the purpose of election statutes, and have the propensity to affect the integrity of information that voters receive.

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II. Post-Qualification, Pre-Election Challenges

A. Pre-Election Challenge is Disfavored but Allowable

Once an initiative has qualified for the ballot, “the responsible entity or official has a mandatory duty to place it on the ballot.” Further, a “local government is not empowered to refuse to place a duly certified initiative on the ballot;” instead, in order to remove the initiative from the ballot, a court must grant a petition for writ of mandate.

At this stage in an initiative’s life, a pre-election challenge is disfavored but still available: “...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.” However, pre-election review of an initiative measure “is appropriate where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign.” Thus, the question becomes whether a city may bring such a challenge, and when the courts will decide that a city’s participation is warranted.

1. Does a City Have Standing?

Precedent establishes that a city is a proper party to bring a petition for writ of mandate to remove a qualified initiative from the ballot. At least one court of appeal has held that, at the very least, a city properly may bring an action seeking declaratory relief: “[A] question of law may be raised by a nonvoter seeking declaratory relief under [Code of Civil Procedure] section 1060 as to the respective rights and duties of the parties and the construction of a written instrument, where the validity of a ballot measure is concerned.”

Additionally, when the initiative measure, if enacted, will directly impact the city’s rights and duties, the city clearly has standing: “The choice facing the city of finding itself either in violation of its own general plan or conducting an election which, in turn, may constitute such a violation, gives Irvine the requisite standing.”

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14 City of San Diego v. Dunkl (2001) 86 Cal.App.4th 384, 398; see also Save Stanislaus Area Farm Economy v. Board of Supervisors of the County of Stanislaus (1993) 13 Cal.App.4th 141, 149 (“A governmental body, or any person or entity with standing, may file a petition for writ of mandate, seeking a court order removing the initiative measure from the ballot”).
2. Who is the Proper Defendant?

Once it is apparent that the city may bring a suit, the question becomes who should be named as the defendant. One recent case has suggested that the initiative proponents are the proper defendants; however, the procedural posture of the case was rather unusual and thus the question remains open whether the city clerk also may be a proper defendant.

In *City of San Diego v. Dunkl*, the city and the owner of a professional baseball team brought actions for declaratory judgment and injunctive relief against initiative proponents who were promoting a measure that would have made certain negative findings about an earlier voter-approved measure. This earlier measure was designed to enable funding and construction of a new ballpark. However, at the time that the declaratory relief actions were filed, the initiative had not yet qualified for the ballot; instead, proponents were in the process of gathering signatures to qualify it for the ballot. The initiative proponents thus argued that the city clerk would be a more appropriate defendant.

The court of appeal rejected this notion, stating, “There is no bar to naming the proponents as defendants where appropriate.” The court further declared that the city clerk would not have been a proper defendant: “…it would have been premature to name the city clerk as a defendant, because [the municipal code] only requires the city clerk to accept a petition to place an initiative on the ballot if it is in substantial compliance with the requirements for the appropriate number of signatures and format. Here, the proposed initiative never got to that point, and the duties of the city clerk to process it further were never implicated, such that the city clerk would have been a necessary or appropriate party. … The proponents are appropriate defendants under these circumstances.”

Whether a city clerk would be an appropriate defendant once the ballot measure has qualified, and whether the proponents would still be appropriate defendants in such a case, remain open questions. One could argue that the city clerk would be the proper defendant because of the duties that she had to perform, but that likely will depend exactly what those duties were, and on the procedural posture of the case.

B. Reasons Why the Court Will Intervene at this Stage

Assuming that the appropriate parties have brought and been named in the suit, it will then be up to the court to determine if the case presents a situation worthy of pre-election judicial intervention. Although hesitant to do so, courts will step into the initiative process when necessary to adjudicate either claims of impermissible technical irregularities, or the validity of the initiative at hand.

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17 *Id.* at 397.
18 *Id.* at 397-398.
1. Procedural/Technical Irregularities

Perhaps the easiest case in which a court may decide to intervene is when claims of procedural or technical irregularities are alleged. Specifically, this type of lawsuit envisions a determination that the initiative was improperly qualified for the ballot.\(^1\) In one example, the Court of Appeal declared, “we find that the petition in the instant case did not substantially comply with Elections Code section 9201. The approximately 17 pages of general plan sections omitted from the petition were the key element of the initiative.”\(^2\)

Essentially, this type of action is simply a delayed challenge to an initiative’s ballot qualification; however, since the court is reviewing the qualification determination, the court is not constrained by the same “ministerial duty” limitations placed on elections officials. Thus, a court may consider a greater amount of evidence in reaching its decision.

2. Substantive Concerns

Courts may also act when the substance of the initiative measure is at issue. Specifically, courts have struck measures when they were not legislative in character, when the subject matter was not a municipal affair, or when the proposal amounted to a revision of the constitution and not an amendment thereto.\(^3\) However, some of the most recent cases have struck down initiatives on the grounds that they were beyond the power of the voters to enact.

In *Citizens for Responsible Behavior v. Superior Court of the County of Riverside*, the court affirmed the decision of the trial court to uphold a board of supervisors’ refusal to put an initiative on the ballot that would have codified discrimination against gay individuals. Explaining its decision, the court opined, “But if the court is convinced at any time, that a measure is fatally flawed, it should not matter whether that decision is easy or difficult, simple or complicated. ... It is clear that a measure may be kept off the ballot if it represents an effort to exercise a power which the electorate does not possess.”\(^4\) The *Citizens* court went on to find that the initiative measure was both constitutionally infirm and beyond the power of the electorate to enact.

In another example, the court in *City of San Diego v. Dunkl* found that the initiative was designed to direct policy implementation, and thus encroached on administrative duties properly held by the city government: “...the proposed initiative is an effort to administratively negate the legislative purpose of Prop. C. There is no overt statement that the Prop. C policy will be changed, but the manner in which the proposed initiative would replace City administrative discretion with voter approval places the proposed initiative firmly within the administrative

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1. Note that in this type of situation, a third party (usually one who will be aggrieved if the initiative passes) files suit against the city clerk, thereby putting the city in a defensive posture. See, e.g., *Mervyn’s v. Reyes* (1998) 69 Cal.App.4th 93, 104.


3. See, e.g., *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 6 (Mosk, J., concurring and dissenting) for a list of citations.

category of voter enactments, which are not permitted. As such, the proposed initiative is beyond the power of the voters to enact.”

Thus, courts have shown a willingness to assess the substance of an initiative measure pre-election, and, when necessary, to render a decision striking down the initiative.

III. Post-Election, Pre-Certification Challenges

Once voters have approved an initiative measure, the city does not have any discretion to refuse to certify the results of the election, regardless of whether city officials believe that the initiative may be unconstitutional. Although the case setting forth this rule occurs in the context of a statewide initiative measure, it follows from the California Supreme Court’s strong language that the rule applies locally as well: “[The California Constitution and Elections Code] impose on the Secretary of State the clear ministerial duty to file a declaration or statement of the vote on measures submitted to the people. They do not empower him to refuse to do so with respect to any particular measure on the ground that the measure is invalid.”

Moreover, the Court went on to declare that judicial intervention is not appropriate in this procedural posture:

“[Since certification] is the last step required to put ballot measures into effect, it is an integral part of the legislative process with which this court cannot properly interfere. [Citation.] Regardless of how clearly a statute’s unconstitutionality appeared, it would be an intolerable interference with the coordinate branches of government to invoke the judicial power to prevent the Legislature from recording its vote on a statute….It would likewise be an intolerable interference with the people’s reserved legislative power to prevent the official recordation of their vote.”

Thus, once the vote is complete, the city must certify the results, and may not withhold such certification based upon concerns about the initiative’s constitutionality.

IV. Post-Election, Post-Certification Challenges

Whether and how a city may challenge the substance of an initiative post-election and post-certification are open questions, with multiple cases pending before the California Courts of Appeal. As the law is presently unsettled, there are no clear rules in this area, only possible extrapolations of existing case law.

24 Kevelin v. Jordan (1964) 62 Cal.2d 82, 83.
25 Ibid.
A. What is the Proper Alignment of Parties?

The first question is who may sue whom to adjudicate the contents of a newly enacted initiative. If voters in the city passed the initiative, and city government is merely the representative arm of those voters, can the city government sue to invalidate an electoral decision of its own people? If so, who does the city government properly sue – the initiative proponents, the city elections official, or some other party? These are currently open questions before the California courts.

1. Does the City Have Standing to be the Plaintiff?

The preliminary consideration is whether the city has standing to bring an action seeking to overturn an initiative that was approved by its own voters in a valid election. Arguably, this question presents different considerations than the standing issue discussed above in the post-qualification, pre-election section. During that phase the city may have a more marked interest in whether or not an initiative makes it to the ballot, as the city will be conducting the election; thus, a determination that the initiative is invalid may spare the city an unnecessary expenditure of resources and funds. However, once the measure is passed, this is no longer a concern for the city. At this point, it is arguable that only the electorate may amend or invalidate the initiative through another election.26

However, one recent case suggests that a city still maintains standing to sue after the election results have been certified. In City of Burbank v. Burbank-Glendale-Pasadena Airport Authority, the court determined that the city did have standing, post-election, to challenge the validity of an initiative that had passed.27 The court declared that authority suggesting that an initiative cannot be repealed or amended after enactment, except by a vote of the people, was not on point:

“This action is not one to amend or repeal Measure A. It is instead an action seeking a judicial determination of the measure’s validity in the first instance. Unlike the situations in [appellant’s] cited authorities, Burbank did not pass legislation which had the effect of either amending or repealing Measure A.

“Nor is Burbank bound to enforce Measure A simply because it chose not to make a preelection challenge to its validity. [Appellant] cites no authority to support this particular contention. Court challenges both preelection and post adoption have been held to be appropriate. Although preelection challenges are not uncommon, it is equally appropriate to permit the measure to be placed on the ballot and then to seek review of its validity post election.”28

However, as Burbank is a recent case, it has not yet been either extended or limited to its facts. Thus, it is possible that a court could rule that in Burbank, the city’s rights in its capacity

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28 Id. at 482.
as a municipal corporation were adversely impacted by implementation of the measure, which required the city to take affirmative action to comply with the measure. Therefore, the City’s standing was not based on its status as a public entity, but rather because it was an aggrieved party. If this is accurate, is the proper plaintiff instead a person who has been aggrieved by the measure after its implementation, and who is thus seeking to invalidate it?

The scope of *Burbank* is unknown, and the question of whether a city has post-election standing to challenge an adopted initiative remains unanswered. However, this issue is presently before the California Court of Appeal in the pending case of *City of Pasadena v. Foundation for Taxpayer and Consumer Rights* (“FTCR”), a case dealing with the constitutionality of a voter-approved initiative entitled the “Taxpayer Protection Amendment.” The case is currently set for oral argument on September 29, 2004.

2. **If the City Has Standing, Who Should it Sue?**

If the city does have standing to sue, the next question is who to sue. Is the initiative proponent still the proper defendant, or has its role ended upon enactment of the initiative? Moreover, is it no longer premature to name the city clerk as the defendant?

a. **City Clerk as Defendant**

One possible defendant is the city clerk who certified the results of the election and thus validated adoption of the initiative measure. However, it is unclear whether the city clerk bears sufficient enforcement obligations to render himself or herself an appropriate defendant. If the clerk has no enforcement responsibilities and his or her contact with the measure ends upon certification of the results, does he or she have any incentive to defend the initiative? Or will the perception of collusion occur when a plaintiff city that wishes to invalidate the measure sues its own elections official, who has no interest in upholding passage of the initiative and thus will not vigorously defend it? The answers to these questions and the general issue of whether a city clerk can be an appropriate defendant may well turn out to be a factual inquiry that depends on the nature of the initiative and the duties and obligations of the clerk thereunder.

This issue is the subject of a pending appeal in the case of *City of Santa Monica v. Stewart*, in which the City sued its own City Clerk to invalidate a voter-approved anti-corruption initiative (the same initiative that is the subject of the FTCR case discussed above). Oral argument has been consolidated with the City of Pasadena cases and will be heard on September 29, 2004.

b. **Initiative Proponent as Defendant**

Another option is that the initiative proponent remains a proper defendant, as was the case pre-election. As the California Supreme Court has allowed initiative proponents to

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30 *City of Santa Monica v. Stewart*, Case No. B159223 (2nd App.Dist.).
intervene in order to defend an adopted measure, does it also follow that a plaintiff city may name the proponent outright, rather than waiting for it to intervene? Or does this put the proponent in a position of having to defend an action that the city's voters passed – a role that is typically played by the city government itself? Whether the initiative proponent is a proper defendant may well turn on whether the city is a proper plaintiff, as there appears to be an intertwined relationship between the two.

B. Is the Controversy Justiciable? Is it Ripe?

Assuming that the parties in the lawsuit are properly aligned, the next relevant inquiry is whether the court will even hear a lawsuit on the measure’s validity, or whether it will be dismissed due to lack of ripeness, since the measure may not yet have been enforced against any particular person.

One argument in favor of a court exercising its jurisdiction is that an issue of widespread interest which has produced lingering uncertainty as to its ramifications (often the characterization of the subject matter of initiative measures) favors prompt judicial resolution, so as to clarify the scope of the measure: “[T]he [justiciability] requirement[s] should not prevent courts from resolving concrete disputes if the consequences of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question.” Moreover, does the declaratory relief provision of Code of Civil Procedure section 1060 automatically make the issue justiciable, so long as there is a fundamental disagreement between the parties?

However, if the nature of the initiative does not fit within the public interest classification, is it therefore automatically not ripe? Must the city wait until an aggrieved party steps forward to enjoin it? Or until a proponent sues to compel its enforcement?

These questions, which are the subject of at least one appeal pending before the courts, are unanswered as of yet.

V. Anti-SLAPP – Is a Challenge to the Initiative Measure Subject to a Special Motion to Strike?

While not specifically part of the above framework, another relevant (and currently undetermined) issue is whether a challenge to an initiative measure may be subject to the anti-SLAPP provisions delineated in Code of Civil Procedure sections 425.16 and 425.17. The anti-SLAPP statute is designed to protect the valid exercise of constitutional rights, and to prohibit lawsuits designed to chill those activities. In the context of initiatives, the pertinent question is whether by virtue of being political speech, an initiative is protected by anti-SLAPP

33 City of Pasadena v. Foundation for Taxpayer and Consumer Rights, Case No. B160037 (2nd App.Dist., Div. 8).
34 SLAPP stands for Strategic Lawsuits Against Public Participation.
laws, or whether a challenge to the contents of the initiative is not seen as an attempt to impermissibly suppress the method of speech, but instead to strike the unconstitutional portions of the initiative itself. Further, does the recent enactment of Code of Civil Procedure section 425.17, which is designed to exempt actions brought in the public interest from the reach of anti-SLAPP motions to strike, encompass challenges levied to invalidate possibly unconstitutional initiative measures? These questions arise in the above-referenced City of Pasadena cases that are currently pending before the Court of Appeal, and in which oral arguments are scheduled to be heard on September 29, 2004.35

Although California courts have not yet spoken definitively on these questions, one case does suggest that anti-SLAPP motions to strike may be brought against those seeking to invalidate an initiative measure. In City of San Diego v. Dunkl, proponents of an initiative filed an anti-SLAPP motion against the city and a landowner, who were both seeking to invalidate the initiative. The trial court granted summary judgment motions by the city and landowner, and found that, as a result, the anti-SLAPP motion was moot. The court of appeal affirmed this decision, but noted that “although under section 425.16, subdivision (b)(1), the court would have been authorized to strike a cause of action that fits within the SLAPP parameters, ‘unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim,’ there was no longer any doubt that the plaintiffs City and [landowner] were entitled to prevail on their declaratory relief causes of action.”36

Thus, the court left the door open for use of anti-SLAPP motion, but did not hint at how an initiative might fare within the anti-SLAPP parameters.

Additionally, the Dunkl case occurred prior to the state legislature’s enactment of Code of Civil Procedure section 425.17, which was designed to rein in abusive anti-SLAPP motions by exempting lawsuits filed in the public interest. It is possible that under section 425.17 the court would have denounced the applicability of an anti-SLAPP motion when the challenge to the initiative was brought in the public interest.

The relationship between anti-SLAPP motions and challenges to initiatives is currently undefined, and likely will depend on future judicial interpretations of the interplay between both of them

Conclusion

The landscape of elections law shifts with each new election cycle and its resulting cases; the initiative process has only added to this dynamic area of law. Questions related to cities’ roles with respect to initiatives are at the forefront of several cases pending before the California courts of appeal. The decisions stemming from these cases may clarify whether, when, and how cities may challenge initiative measures, as well as the responsibilities of cities either defending placement of initiatives on the ballot or seeking to invalidate initiatives that they believe are

35 City of Pasadena v. Foundation for Taxpayer and Consumer Rights, Case Nos. B160037 and B162530 (2nd App.Dist., Div. 8).
unconstitutional. Without a doubt, these decisions will prompt new and unforeseen issues. Thus, the area of elections law regarding ballot measures will continue to present challenging issues and questions.