CITY OF
CUPERTINO

CITY HALL
10300 TORRE AVENUE
CUPERTINO, CA 95014-3255
WWW.CUPERTINO.ORG

PRESS RELEASE

FOR IMMEDIATE RELEASE
October 19, 2018

CONTACT: Brian Babcock, PIO
TELEPHONE: (408) 777-3262

California State Court Rules in Favor of the City of Cupertino

CUPERTINO, CA - The State of California Appellate Court has ruled in favor of the City of Cupertino regarding litigation related to the 2016 Measure C ballot language.

On October 9, 2018, the Courts of Appeal, Sixth Appellate District, dismissed an appeal of a trial court's decision that was also in favor of the City. The trial court's decision denied a June 2016 petition by the Committee Supporting Cupertino Citizens' Sensible Growth Initiative to require the City to amend some language in the ballot measure.

The Appellate Court's ruling that the claims against the City are moot follows numerous court decisions during this litigation process that were in favor of the City. On August 10, 2016, the trial court denied a petition after an expedited briefing and hearing finding that the ballot question was factually correct and not misleading, and that the City properly followed the Elections Code. The Committee Supporting Cupertino Citizens' Sensible Growth Initiative then filed an emergency petition, which was summarily denied on August 23, 2016.

The litigation process has cost the City $225,441. The City expects to recover $5,276 in litigation costs.

In the November 2016 election, voters rejected Measure C by a vote of 61% against and 39% in favor.

**Attachment: The State of California Courts of Appeal, Sixth Appellate District, opinion is attached beginning on the next page.*

###

FILED 10/9/18

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COMMITTEE SUPPORTING CUPERTINO CITIZENS' SENSIBLE GROWTH INITIATIVE et al., Plaintiffs and Appellants, v. CITY OF CUPERTINO et al., Defendants and Respondents.	H043940 (Santa Clara County Super. Ct. No. 16CV296322)

Appellants are an unincorporated association (Committee Supporting Cupertino Citizens' Sensible Growth Initiative) and three voters who reside in the City of Cupertino (Steven Scharf, Xiangchen Xu, and Govind Tatachari). In June 2016, Appellants petitioned for a writ of mandate to require Respondents City of Cupertino and its City Council to amend a ballot question on the ground that the wording of the question was false, misleading, and unlawful. The trial court denied the petition, and the election proceeded in November 2016 with the version of the ballot question that Appellants had challenged.

Appellants appeal from the denial of the petition on multiple grounds. First, they argue the City Council's adoption of the ballot question was procedurally improper for various reasons, and they challenge the language of the ballot question on the same

grounds raised below. Second, they claim the trial court erred in finding the petition time-barred under Elections Code section 9295.[1] Respondents contend these claims are barred on collateral estoppel and mootness grounds. As to the merits of the claims, Respondents contend the language of the ballot question was factual and not misleading.

For the reasons below, we will dismiss the appeal as moot.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

In November 2015, Appellants and one other citizen submitted a notice of intent to the City of Cupertino to circulate a petition for a 16-page initiative measure titled Cupertino Citizens' Sensible Growth Initiative, which later became Measure C on the ballot in the November 2016 election. The initiative measure proposed to amend the Cupertino City Plan "to promote sensible and sustainable growth" by "[e]stablish[ing] clear citywide standards for development, including maximum heights, and building planes and required setbacks on major thoroughfares." The initiative was also intended to "[r]estore the Vallco Shopping District as a shopping and entertainment center, and remove the recently added office and residential components that would interfere with that revitalization," among other things. In response to the notice of intent, the City Council directed City staff to prepare a report under section 9212 analyzing the impacts of the proposed initiative.

In February 2016, the Santa Clara County Registrar of Voters certified that the proponents of Measure C had gathered enough signatures to qualify it for the ballot.

In March 2016, the City Council received the previously-ordered report on the initiative's potential impacts. Relevant to Appellant's claims on appeal, the report

---

[1] Subsequent undesignated statutory references are to the Elections Code.

[2] Both parties lodged requests for judicial notice of various documents, including superior court opinions, relevant ballot materials, and other materials. Both parties' requests are hereby granted. (Evid. Code, §§ 452, 459.)

concluded that the initiative would "[i]ncrease the maximum building height from 30 feet to 45 feet" in 12 neighborhoods comprising approximately three-quarters of the City's land area. After receiving the report, the City Council voted to place the initiative on the ballot. The resolution included recommended language forming the ballot question as follows: "Shall an initiative ordinance be adopted amending Cupertino's General Plan to limit redevelopment of the Vallco Shopping District, limit building heights along major mixed-use corridors, establish a 45 feet maximum building height in the Neighborhoods, limit lot coverages for large projects, establish new setbacks and building planes on major thoroughfares, and require voter approval for any changes to these provisions?" A week later, the City Council passed a resolution to amend the ballot question, changing the phrase "*establish a 45 feet maximum* building height" to "*increase to 45 feet the maximum* building height in the Neighborhoods." (Italics added.) The next day, on April 6, 2016, the City made the resolution and ballot question publicly available for a 10-day period of public examination.

The amended ballot question for Measure C subsequently appeared on the ballot for the November 2016 election. The English version of the ballot question asked, "Shall an initiative ordinance be adopted amending Cupertino's General Plan to limit redevelopment of the Vallco Shopping District, limit building heights along major mixed-use corridors, increase to 45 feet the maximum building height in the Neighborhoods, limit lot coverages for large projects, establish new setbacks and building planes on major thoroughfares, and require voter approval for any changes to these provisions?"[3]

[3] The Spanish version asked, "¿Debe adoptarse una norma de iniciativa que reforme el Plan General de Cupertino para limitar la remodelación del Vallco Shopping District, limitar la altura de los edificios en los principales corredores de uso mixto, aumentar a 45 pies la altura máxima de edificios en los vecindarios, limitar la cobertura de lotes para proyectos grandes, establecer nuevos límites y planes de construcción en las carreteras principales y requerir la aprobación del votante para cualquier cambio en estas disposiciones?"

In the November 2016 election, the voters rejected Measure C by a vote of 61% against and 39% in favor.

B. Procedural Background

Appellants filed a petition for a writ of mandate in Santa Clara County Superior Court on June 13, 2016. The petition alleged, among other things, that the above amended ballot question "falsely imputes to the Cupertino Citizens' Sensible Growth Initiative . . . the legislative effect of raising maximum building heights in various residential areas (so-called 'Neighborhoods') from 30 feet to 45 feet. In fact, the [Cupertino Citizens' Sensible Growth Initiative] specifically preserves the existing 30-foot maximum height for 'Neighborhoods.' The ballot question on this point is erroneous as a matter of statutory construction and is false and misleading." Appellants sought "a writ of mandate to correct the noncompliant ballot question, and to issue an injunctive order prohibiting respondent [Elections Officer for the City of Cupertino] from placing the current unlawful ballot question on the ballot."

Respondents opposed the petition as time-barred because it was filed after expiration of the 10-day review window set forth in section 9295. On the merits, Respondents argued the ballot question was not false, misleading, or inconsistent with any legal requirement.

After expedited briefing and a hearing on the matter, the trial court denied the petition in a written order on August 10, 2016. The court found, as an initial matter, that the petition was time-barred under subdivision (b)(1) of section 9295 as construed by *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1173 (*McDonough*) ("When a measure is to be placed on the ballot for an upcoming municipal election, it must be subjected to a 10-day public examination period, during which any voter in the jurisdiction may seek a writ of mandate to delete or amend the language of the measure"). Addressing the merits of the petition, the court then found "the proposed ballot question accurately states the nature of the [Cupertino Citizens Sensible Growth Initiative]. The

challenged language is factually correct; and it is not false, misleading, partial, or otherwise fails to comply with the Elections Code. Petitioners have not sustained their burden of proof required for the issuance of a peremptory writ." Appellants timely appealed from the trial court's denial of the petition.

One week after the trial court's order denying the petition, Appellants filed an emergency petition for a writ of mandate in this court in case No. H043840. We summarily denied the emergency petition on August 23, 2016.

II. DISCUSSION

Appellants contend the ballot question was false and misleading, and that the City Council's adoption of the question was procedurally improper. Appellants claim this process "put in jeopardy" the voters' right to legislate through the initiative process as established by the California Constitution. Appellants further argue that the trial court erred in finding the petition time-barred under section 9295 because judicial review of ballot questions is governed not by that section, but by section 13314 (establishing the right of an elector to seek a writ of mandate challenging the accuracy of a ballot, among other things). Appellants claim the trial court's application of section 9295 was unconstitutional under the California Constitution.

Respondents contend this appeal is barred on grounds of mootness and collateral estoppel. As to the merits, respondents argue that the trial court correctly found the ballot question to be factually correct and not misleading, and that the procedures for promulgating the question complied with the Elections Code.

For the reasons below, we conclude this appeal must be dismissed as moot.

A. Mootness

"A case is moot when the reviewing court cannot provide the parties with practical, effectual relief. [Citation.]" (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 417.) "Generally, courts decide only 'actual controversies' which will result in a judgment that offers relief to the parties.

[Citation.] Thus, appellate courts as a rule will not render opinions on moot questions: '[W]hen, pending an appeal from the judgment of a lower court, and without fault of the [respondent], an event occurs which renders it impossible for [the reviewing court] if it should decide the case in favor of [appellant], to grant [appellant] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]' [Citations.] The policy behind this rule is that courts decide justiciable controversies and will normally not render advisory opinions." (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178-1179.)

California courts have expressed a preference for resolving litigation over election- and ballot-related claims prior to the election, since the outcome of the election typically renders the contested issues moot. (See *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1006-1007 (*Costa*) [citing cases].) "[A]fter the election the procedural claim may well be considered moot." (*Id.* at p. 1007 [remanding with directions to dismiss appeal as moot].) However, if a pending case poses an issue of continuing public interest that is likely to recur, we may exercise our discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot. "Such questions [of general public concern] do not become moot by reason of the fact that the ensuing judgment may no longer be binding upon a party to the action." (*Ballard v. Anderson* (1971) 4 Cal.3d 873, 876.) This exception to the mootness doctrine applies in the post-election context as well. (*Costa, supra,* 37 Cal.4th at p. 994.) We may also exercise our discretion to opine on a post-election appeal if it presents a question " ' "capable of repetition, yet evading review." ' " (*Horneff v. City and County of San Francisco* (2003) 110 Cal.App.4th 814, 818 (*Horneff*), quoting *Ferrara v. Belanger* (1976) 18 Cal.3d 253, 259.)

B. Appellants' Claims Are Moot and No Exception Applies

Having lost the contest for Measure C in the 2016 election, Appellants concede we are powerless to provide any effective remedy: "Appellants accept that the election has

passed, and that Measure C failed, thus putting Appellants' substantive claims in the trial court beyond the Court's power to grant an effective remedy." They contend we should nonetheless rule on their claims because they raise "several statutory issues of great relevance to the initiative process for the benefit of initiative proponents and opponents, election officials, legal practitioners and courts." We are not persuaded.

Appellants' primary argument is that we should rule on the question of whether judicial review of ballot questions is governed by section 13314 or section 9295. Appellants contend that even if the trial court properly determined that section 9295 applied, then the application of this section was unconstitutional. Appellants argue that we should opine on these matters because "there appears to be no clear guidance" on them.

As to the first point, this court has held that the applicable 10-day time requirement and the standard for judicial review are based on section 9295. "When a measure is to be placed on the ballot for an upcoming municipal election, it must be subjected to a 10-day public examination period, during which any voter in the jurisdiction may seek a writ of mandate to delete or amend the language of the measure. (§ 9295, subd. (b)(1).) The writ of mandate, however, may 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.' (§ 9295, subd. (b)(2); see also § 9092 [same writ review procedure and standard for statewide election materials], [§] 9190 [same writ review procedure and standard for county election materials].)" (*McDonough*, *supra*, 204 Cal.App.4th at p. 1173.)

Appellants attempt to distinguish *McDonough* on the ground that it applies section 9295 only to the language of the ballot measure itself, not to the language of a ballot *question*. Appellants' reading of *McDonough* is incorrect. In fact, the court

explicitly referred to both ballot questions and materials. (*McDonough, supra*, 204 Cal.App.4th at pp. 1173-1176.) Appellants further attempt to distinguish *McDonough* on the ground that the election at issue was conducted pursuant to a local charter, not the Elections Code. Again, the language of *McDonough* makes clear that it concerned the construction and application of section 9295 because the city charter required the election to be held in " 'in accordance with the provisions of the Elections Code.' " (*Id.* at p. 1176, fn. 8.)

Appellants contend the application of section 9295 to find their challenge to the ballot question time-barred would render that section unconstitutional as applied. Appellants cite no authorities supporting this claim. The cases cited by Appellants concern entirely unrelated claims. (See *Rossi v. Brown* (1995) 9 Cal.4th 688 [holding that initiative provisions do not except measures imposing a tax from the initiative power]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208 [upholding the enactment of Cal. Const., art. XIIIA,]; *Young v. Gnoss* (1972) 7 Cal.3d 18 [striking down durational residency requirement].) Again, we perceive no need for further guidance or clarification, and we decline to exercise our discretion to render an advisory opinion on this claim.

Finally, this issue is not a question "capable of repetition, yet evading review." (*Horneff, supra*, 110 Cal.App.4th at p. 818.) First, judicial review of ballot questions is available in both trial courts *and* the courts of appeal through a petition for a writ of mandamus, which is precisely what occurred in this case. We previously denied Appellants' writ petition after careful consideration of the matter. We see no need to revisit the issue on appeal, and Appellants provide no support or justification for doing so. As to appellate review of the trial court's denial of the petition for writ of mandamus, Appellants could have obtained a ruling on appeal prior to the November 2016 election, had they prosecuted their appeal in a timelier fashion. Instead, Appellants did not file an

opening brief until August 2017, more than a year after the trial court denied the petition. Appellants' claims were susceptible to review by courts of appeal.

For the reasons above, we decline to exercise our discretion to rule on Appellants' claims. We will dismiss this appeal as moot.

III. DISPOSITION

The appeal is dismissed as moot.

_____
Greenwood, P.J.

WE CONCUR:

_____
Elia, J.

_____
Mihara, J.

Comm. Supporting Cupertino Citizens' Sensible Growth Initiative v. City of Cupertino
No. H043940