Wal-Mart Goes to the Ballot Box in Inglewood—

A Case Study in the Attempted Use, Legal Challenge, and Voter Rejection of an Initiative Measure to Approve a Large Scale Development Project

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Introduction

In 2002, Wal-Mart announced its intention to build forty massive "supercenters" [2] throughout California. One of its targets for development was a sixty acre parcel of property adjacent to the Hollywood Park Racetrack in the City of Inglewood, just south of the Forum where the Los Angeles Lakers once played. The land was little used, except for overflow parking, and Inglewood's residents certainly wanted economic development. However, Wal-Mart found that the Inglewood City Council was reluctant to approve its big-box store and surrounding retail development despite the support of the City's Mayor.

The City Council was concerned with the project's potential environmental impacts. An initial study prepared for the project had identified the potential for significant impacts in the areas of aesthetics, hazardous materials, public services, utilities and service systems, hydrology and water quality, noise, air quality, geology and soils, and transportation and traffic. The City Council was

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[2] Supercenters are 50 percent larger than a typical Wal-Mart store. Measuring more than 180,000 square feet, they combine grocery products with department store goods.

also concerned with the social costs of a Wal-Mart store because of its potential for depression of local wages and driving small local businesses out of business, among other reasons.

Frustrated at City Hall, Wal-Mart turned to the ballot box in an attempt to circumvent local subdivision review, the California Environmental Quality Act, and other regulatory provisions that are designed to mitigate the types of potential impacts identified in the initial study. Along with the proposed project developer, Rothbart Development, Wal-Mart crafted and qualified an initiative ("Initiative") to approve a 650,000 square foot commercial retail development spanning an area the size of 17 football fields. The project was called "The Homestretch at Hollywood Park". The retail giant poured more than $1 million of its enormous economic resources into convincing Inglewood voters to approve its Initiative. Despite Wal-Mart's efforts, the Initiative was rejected by a 61% majority of those voting, a defeat for Wal-Mart that resounded around the state and the nation.

Wal-Mart's Initiative effort was not the first attempt by development interests to secure direct voter approval. However, it crystallized a number of issues involving the interplay of the initiative power, the California Environmental Quality Act, Community Redevelopment Law, Planning and Zoning Law, and the Subdivision Map Act that are likely to reemerge elsewhere. Under California's initiative laws, it is entirely possible that Wal-Mart or other developers will try similar initiative efforts to avoid the time and expense of

environmental and administrative review. This article examines the origin and legality of the Wal-Mart Initiative, and the implications Wal-Mart's effort has for land use initiatives in California.

Prelude to the Initiative: Wal-Mart Fails to Get City Council Approval

In 2002, Rothbart and Wal-Mart proposed their 650,000 square foot commercial retail development. After the submission, the City Council adopted an ordinance to prohibit the development of certain "big box" retail buildings. In response, a group called the Inglewood Committee for Open Competition[3] circulated a referendum petition to set aside the big box ordinance. After the referendum petition was presented to the City Council in November 2002, the Council repealed the big box ordinance.

However, instead of pursuing approval through the City's planning process, which would require preparation and City approval of an Environmental Impact Report (EIR), Wal-Mart circulated an initiative. Every developer that seeks approval to develop a project in California must comply with laws such as CEQA, the Subdivision Map Act, and Community Redevelopment Law. Local land use laws require City administrators to ensure that environmental impacts of a project are mitigated and that public resources, such a fire and police services, are sufficient to respond to the development. By proposing the Initiative, Wal-Mart sought to circumvent these important protections. The Iniative also would

have precluded the public from having the opportunity to influence the nature of the development plan through comments in a public hearing process.

To Wal-Mart, it must have seemed an easy sell to gain passage of the Initiative in blue collar Inglewood**.** Analysts expected to see major opposition from the United Food and Commercial Workers union, but the union was tied up in a strike with the supermarkets. However, the non-profit Los Angeles Alliance for a New Economy ("LAANE") stepped up to the plate, and helped organize the Coalition for a Better Inglewood ("CBI"), an unincorporated association of residents, workers, churches, small businesses and ally organizations residing in, working in, or located in Inglewood, who were ready to take on Wal-Mart. Before the election campaign got into full swing, CBI and LAANE ("the Plaintiffs") filed a lawsuit seeking to take the Initiative off the ballot.

The Initiative

One of the most striking features of the Initiative was its sheer size: it encompassed 71 pages of text, figures, and diagrams. The detail of the Initiative was extraordinary, including such issues as the types of plants allowable as landscaping, how many parking spaces would be provided, and designs and paint colors that would be appropriate for the approved development. The Initiative identified a permissible gross leaseable area of 650,000 square feet, with 265,000

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[3] According to documents filed with the Fair Political Practices Commission on behalf of Wal-Mart in November of 2002, Wal-Mart contributed $53,451.04 to the Inglewood Committee for Open Competition.

square feet for Wal-Mart and 175,000 square feet for its retail division, Sam's Club, leaving only 220,000 square feet for other commercial ventures. Although no environmental review had been conducted by the City to assess the issues of aesthetics, hazardous materials, public services, utilities and service systems, hydrology and water quality, noise, air quality, geology and soils, and transportation and traffic, the Initiative stated the development plan would fully mitigate any adverse environmental impacts. The Initiative also claimed the project would neither raise nor impose any new or additional taxes on the residents of Inglewood, though there was no documentation to support these claims and there was no mention of the potential social costs such as the heavier reliance by Wal-Mart employees on the public health care system when compared with employees of other retail establishments.

The Initiative amended the City's General Plan and zoning ordinances to create a Commercial zone on the site, which was zoned Commercial/Recreation and would otherwise allow such recreational land uses as a convention center, a performing arts center, and a circus. The Initiative included a Tentative Tract Map and required approval of a "Tract Map or Parcel Map . . . that is in substantial conformance . . . with the Tentative Tact Map" in the Initiative. It declared void any portion of the City's applicable redevelopment plan which would "conflict or impede implementation of the Home Stretch Specific Plan." It also prohibited the City from imposing additional conditions beyond those set forth in the Initiative. Finally, the Initiative provided that "The Home Stretch

Specific Plan shall only be amended by another initiative measures(s) approved by a two-thirds vote of the electorate."

Pursuant to Election Code section 9211, the City Council ordered the preparation of a report to evaluate the fiscal and land use impacts of the Initiative. Even though a majority of the City Council opposed the Initiative, the Council set a special election for April 6, 2004.

The Plaintiffs Mount a Legal Challenge.

1. Pre-election Review. Since 1911, the local initiative power has been guaranteed by article II, section 11, subdivision (a) of the California Constitution. The Supreme Court has described the initiative power as a "legislative battering ram" to "tear through the exasperating tangle of the legislative procedure and strike directly toward the desired end." (*Amador Union High School v. Board of Eq*. (1978) 22 Cal.3d 208, 228.) Courts will liberally construe constitutional and charter provisions in favor of the people's right to exercise their reserved power of initiative, perceiving a duty to "jealously guard" this power so as not to improperly annul its exercise. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776.) The initiative power in charter cities such as Inglewood may be even broader than the constitutional reservation, potentially allowing the exercise of administrative as well as legislative powers by initiative. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 696.) However, voters cannot take non-legislative action by initiative, and voters in a local election cannot enact a measure that conflicts with, or is preempted by

State law. (*Committee of Seven Thousand v. Superior Court* ("*COST*") (1988), 45 Cal.3d 491, 511.)

On December 18, 2003, CBI and LAANE filed a petition for a writ of mandate and a complaint for injunctive and declaratory relief to challenge the validity of the Initiative. It was to avoid a costly election battle that they sought pre-election review, despite the rarity with which courts indulge such challenges. In the end, despite expressing doubts about the legality of some provisions of the Initiative, the trial court during pre-election review chose to defer a decision on the Initiative until after the election, if the Initiative passed. Key legal issues were raised as follows.

2. Legal Issues

Prohibition on Naming Private Corporations. California Constitution Article II, Section 12 states, in relevant part: "No . . . statute proposed . . . by initiative, that . . . names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." Plaintiffs argued that the Initiative violated this prohibition by naming Wal-Mart to perform the function of anchoring a large retail development. Wal-Mart, however, claimed it was not named or identified, arguing the Initiative merely referred to retailers "such as" Wal-Mart and the reference to Wal-Mart and Sam's Club, a retail division of Wal-Mart, in one of the figures in the Initiative was "for illustrative purposes only." Wal-Mart also argued that its naming did not grant it a power or function, saying it would have to vie for space just as would

any other potential tenant.

There was much evidence that Wal-Mart was to benefit from the Initiative, especially as the election progressed. First, the Initiative was sponsored by "The Committee to Welcome Wal-Mart to Inglewood," as disclosed to people who signed the Initiative petition when it was circulated. Second, an August 18, 2003 letter to the City Attorney from an attorney acting on behalf of the Committee to Welcome Wal-Mart *and* Wal-Mart attached a proposed ballot title and summary stating, in part: "This initiative measure proposes a specific plan . . . including a new Wal-Mart." Third, an Initiative summary prepared by the City Attorney, and circulated to the voters stated "The retailers include Wal-Mart. . ." Fourth, the Initiative designated Wal-Mart and Sam's Club building areas to occupy 440,000 square feet of the 650,000 square foot retail complex. Fifth, both the campaign to qualify the Initiative for the ballot and the campaign to pass the Initiative were largely paid for by Wal-Mart. Most importantly, the campaign literature and ballot arguments, which can be used to interpret the Initiative (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 551), made it clear that the Initiative was entirely about securing a Wal-Mart at the site.

In *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App. 4th 565, in a post-election review a court held an initiative naming a specific private waste disposal company as the applicant for a project and providing that it would submit a detailed site plan violated Article II section 12. During the pre-election review of the Wal-Mart Initiative, and without having the

campaign literature to evaluate, the trial court did not find the evidence of the Wal-Mart Initiative's violation of Article II section 12 as clear or as compelling as the facts in *Pala Band*.

Preemption by State Law. Plaintiffs believed the Initiative impermissibly attempted to approve a development plan that would supercede an existing redevelopment plan, grant approval of a tentative tract map, and vacate public easements without complying with state law. They viewed the Initiative as void because these actions were preempted by the state. "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) "In matters of statewide concern, the state may if it chooses preempt the entire field to the exclusion of all local control." (*COST*, *supra*, 45 Cal.3d at 511.)

Community Redevelopment Law. Hollywood Park is within a redevelopment project area designated pursuant to the Community Redevelopment Law. ("CRL," Health and Saf. Code § 33000 et seq.) The redevelopment plan for the area sets forth the allowable land uses, the general configuration of streets, and other matters required by CRL. (Health and Saf. Code § 33333.) The CRL declares the redevelopment of blighted areas "to be a governmental function of *state concern*, in the interest of health, safety and welfare of the people of the state and of the communities in which the areas exist." (*Redevelopment Agency of the City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 169.)

The Plaintiffs argued the Initiative was entirely preempted because the Legislature had occupied the field of community redevelopment, exclusively delegating redevelopment planning authority to the City Council and redevelopment agency. (Health & Saf. Code § 33007.) "A legislative intent to preempt the field of community redevelopment is apparent. . . . In view of the Legislature's intent to preempt the field [of redevelopment], we conclude that Health and Safety Code section 33204 [of the Redevelopment Law] does not authorize a charter city to regulate the administrative actions of the city's redevelopment agency by initiative proceedings." (*Redevelopment Agency of Berkeley*, *supra*, 80 Cal.App.3rd at. p. 169.)

Proponents of the Initiative argued the Initiative did not change the redevelopment plan because there was no conflict between the Initiative and the adopted redevelopment plan. Even if it did, Initiative proponents relied upon *Yost v. Thomas* (1984) 36 Cal.3d 561, to argue that approval of the Homestretch Specific Plans was a legislative, not administrative action, and thus was clearly allowable through a referendum or, by analogy, through an initiative.

The constitutional right of referendum was adopted during the same 1911 revisions which adopted the right of initiative. (Cal. Const., art. II, § 9.) However, Plaintiffs believed the ability to referend a specific plan did not imply an ability to approve it by initiative when it affected a redevelopment area.[4] CRL

[4] A general plan may be amended by initiative. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 796.) Therefore, Plaintiffs did not contend the general plan

expressly authorizes the use of referenda at certain points in the redevelopment planning process, but there is no authorization to offer such amendments through the initiative process. (*Redevelopment Agency, supra*, 80 Cal.App.3rd at. p. 169.) Thus, Plaintiffs concluded the express authorization granted by the CRL to exercise the referendum power does not imply the right to use the initiative process because the two reserved powers have different purposes. (*Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1259.)

During pre-election review, the trial court found the issues related to CRL to be complex and unclear, and therefore declined to rule on this aspect of the Initiative's validity before an election could be held.

Subdivision Map Act

Plaintiffs argued the Initiative was preempted by the Subdivision Map Act, which is "'the primary regulatory control' governing the subdivision of real property in California." (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996.) Among its purposes are "to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayer." (*Id*. at 998.)

The Subdivision Map Act entrusts the "legislative body of a city or county" with the duty of ensuring that a proposed site of development is "physically

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amendment portions of Wal-Mart's initiative were legally defective. However, the general plan amendment portions of the initiative comprised a mere three pages of

suitable" for the type of project and its density, will not "cause substantial environmental damage," and will not "cause serious public health problems . . ." (Govt. Code § 66474.) "Regulation and control of the design and improvement of subdivisions are vested *in the legislative bodies of local agencies.*" (Govt. Code §66411, emphasis added.) To the Plaintiffs, this showed that the Legislature intended to delegate control of the subdivision process exclusively to the City Council, not to the electorate. (*COST, supra,* 45 Cal.3d at 511.)

Approval of a tract and/or parcel map is an administrative act. (*Lincoln Property Co. No. 41 v. Law* (1975) 45 Cal.App.3d 230, 235.) Therefore, Plaintiffs argued the tract map could not be approved by initiative. Wal-Mart argued that "the initiative does not approve a tract map," though the Initiative included a tract map that subdivided the area into 26 parcels and referred to the Tentative Tract Map in no less than twelve places. It made nine findings "For the purposes of the Subdivision Map Act." Plaintiffs thus argued the Initiative approved the Tentative Tract Map by eliminating any City Council discretion to disapprove tract maps: the Initiative "is a comprehensive, stand alone planning document that preempts and replaces all of the standards, criteria, procedures for review . . . and other requirements required by Chapter 12 of the Municipal Code [the City's Subdivision Regulations], except as otherwise expressly set forth herein." However, Wal-Mart argued the Initiative merely required future maps to be evaluated against the Tentative Tract Map set forth in the Initiative for

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the entire 71 page initiative.

substantial consistency with it.

Again, during pre-election review, the trial court identified the arguments made by each side but declined to rule on the merits of the Subdivision Map Act challenge.

Abandonment of Public Street and Utility Easements

The Public Streets, Highways, and Service Easements Vacation Law (Sts. & Hy. Code § 8300, et seq.) delegates public easement vacation[5] duties to local legislative bodies: "The legislative body of a local agency may initiate a [vacation] proceeding. . . ." (Sts. & Hy. Code § 8320.) Plaintiffs argued that when the Legislature specified that " 'Legislative body' means . . . in the case of a city, *the city council* or other body which, by law, is the legislative body of the government of the city" (Sts. & Hy. Code § 8304, emphasis added), it intended an exclusive delegation of that authority to the City Council of Inglewood, thus precluding action by initiative. *Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808 recently confirmed that the vacation of public street easement was a matter of statewide concern, specifically delegated to local legislative bodies.

A parcel map recorded on September 2, 1999, by Hollywood Park, Inc., owners of the Homestretch property in 1999, showed no less than 39 easements

[5] "'Vacation' means the . . . abandonment . . . of the public right to use a street . . . or public service easement." (Sts. & Hy.Code § 8306.)

for various purposes. One of the holders of interests in the parcel was the "City of Inglewood, Easement holder for Public Street Purposes . . . ." under an easement obtained through a condemnation proceeding in 1932. Because the Initiative proposed construction over the entire Home Stretch property, Plaintiffs contended it attempted to vacate public easements in a way that interfered with the City's duties to implement Easements Vacation Law. However, Wal-Mart argued that no public easements were vacated, and even if there were, that it was a legislative act within the purview of the City's electorate to undertake. (*Heist v. County of Colusa* (1984) 163 Cal.App.3d 841, 845-848.) These questions, like others , were not answered by the court during pre-election review.

The Conflict with the Constitutional Right to Take Initiative Action by a Simple Majority

The Initiative provided that "The Home Stretch Specific Plan shall only be amended by another initiative measures(s) approved by a two-thirds vote of the electorate." The California Constitution states, in relevant part: "An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise." The only exception to this rule is for initiatives dealing with tax matters pursuant to Constitution article XIII, section 3, requiring a two-thirds vote for local tax measures.

Plaintiffs argued this attempt to require a "two-thirds vote of the electorate" to make any changes in the future was patently unconstitutional because the California Constitution calls for a simple majority vote to approve

initiatives and referenda. (Cal. Const. Art. II, § 10(a).) Limitations upon the voters' power to pass an initiative repeatedly have been held to be unconstitutional. (*Newport Beach Fire & Police Protective League v. City Council* (1961) 189 Cal.App.2d 17, 21-23 [city charter provision requiring super-majority voter approval for adoption of initiative measure is unconstitutional].)

Proponents argued that the Initiative merely prevented changes to the specific plan and that it was not a general limitation of the power of the people of Inglewood to adopt future initiatives, which would be unconstitutional.

Even though it entertained doubts about the validity of some provisions of the Initiative, the trial court preferred not to rule until after an election, when it was possible that provisions such as the supermajority requirement might be declared void but severable from the rest of the Initiative.

The Difficulty In Obtaining Pre-election Relief

Courts traditionally have shown a great reluctance to set aside initiatives before a vote may be taken on them, preferring instead to evaluate their validity if and when the voters adopt them. For example, in *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1022, the Court held "post-election review-- assuming that the measure in question passes--is certainly preferable. ..." (See also *Brosnahan v. Eu* (1982) 31 Cal.3d 1.) However, more recent cases depart from this approach. Where an initiative purports to take action beyond the power of the people to act by initiative, the measure should be set aside

before an election. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 695; *Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1153.)

Despite expressing doubts about the legality of some of the Initiative's provisions, especially the land use provisions, the court in the Wal-Mart case chose not to grant pre-election relief, stating "The resolution of the issues and particularly those related to land use provisions of the initiative requires detailed, thorough and comprehensive review of the initiative and interpretation of its provisions. . . . [T]here is no compelling showing of clear invalidity of the initiative and the determination of its validity should, therefore, be deferred to if and when the Initiative passes." Notwithstanding the pre-election ruling, CBI and LAANE were confident that, if it passed, at the very least, major portions of the Initiative would have been set aside.

Policy Considerations

The Initiative Sought to Avoid CEQA Compliance and to Override Planning Laws

Preparation of an EIR pursuant to the California Environmental Quality Act (CEQA), is normally required for projects in California that may cause significant adverse impacts on the environment. (Pub. Resources Code § 21002.1, 21100.) However, despite the fact no EIR was prepared for the Homestretch Specific Plan, CEQA was not one of the bases for the Plaintiffs' challenge to Wal-Mart's Initiative because CEQA is not applicable to initiative measures.

Indeed, due to a specific exemption in CEQA for voter-sponsored ballot initiatives, the entire 60 acre retail commercial development might have been approved by initiative without CEQA review. The exemption states "Project does not include: . . . The submittal of proposals to a vote of the people of the state or of a particular community." (Title 14 Cal. Code of Regulations (hereafter "CEQA Guidelines") § 15378, subdivision (b)(3).) This exemption exists because in placing an initiative measure on the ballot, a public agency acts "only as the agent of the electorate," so the proposal is a nondiscretionary activity, not a project of a public agency. (*Stein v. City of Santa Monica* (1980) 110 Cal. App. 3d 458, 460-461.) One court decision indicates that even if the City Council of Inglewood approved the Initiative rather than submitting it to a ballot, no CEQA review would have been required. (*Native American Sacred Site and Environmental Protection Ass'n v. City of San Juan Capistrano* (2004) --- Cal.App.4th ----, 16 Cal.Rptr 3rd. 146.)[6]. Furthermore, by purporting to remove the exercise of any discretion from City officials reviewing tract maps and similar subsequent approvals, the Initiative sought to save Wal-Mart from the time and expense of CEQA compliance for approvals implementing the Initiative because CEQA does not apply to ministerial actions involving no discretion. This attempt to circumvent regular City review and approval processes was a major argument for defeating the Initiative.

[6] At the time this article was written, the decision was certified for publication, but not yet final.

Conclusion

Despite Wal-Mart's expenditures of over $1 million, opposition by churches, community organizations, elected officials, and neighborhoods ultimately led to the Initiative's defeat. Nevertheless, Wal-Mart and other project proponents may perceive the initiative process as a way to obtain project approval without extended and expensive CEQA and Subdivision Map Act review. In fact, developers repeatedly have attempted to use the initiative process to try to gain approval for specific projects and may do so in the future. However, any initiative must perform a legislative act rather than an administrative one, and avoid conflicts with state laws. Initiatives must not benefit specifically named individuals or corporations. Nor may they impose super-majority requirements on future voter actions. Further, proceeding by initiative carries the risk that an electorate might change its mind at a future point when more information is available about a project.[7] Even a development agreement may be modified when modification is required in the interest of health or safety. (Govt. Code § 65865.3(b).) Thus, attempting to gain project approval by initiative entails significant legal challenges and political risks.

[7] For example, in *Pala Band v. of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565 reported an unsuccessful challenge to a 1994 initiative to site a landfill in an area of northern San Diego County known as Gregory Canyon. However, after environmental reports were completed, on June 24, 2004 an initiative was validated for the November ballot that would rescind the prior-approved initiative.