PETITIONERS' OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-PETITION FOR WRIT OF MANDATE

CITY OF MARINA,

Plaintiff,

vs.

ARMSTRONG RANCH PROPERTY OWNERS; GIBSON SPENO LLC- MARINA; RMC LONESTAR; LANDWATCH MONTEREY COUNTY and DOES 1 through 20, inclusive,

Defendants.

Case No. M 52386

Action Filed: February 1, 2001

Hearing Date: May 18, 2001
Time: 9:00 a.m.
Dept.: 17
Hon. Michael S. Fields

PRELIMINARY STATEMENT

On February 1, 2001, the City of Marina ("City") filed a declaratory relief action ("Complaint") seeking to do what no case precedent in the history of California supports: use taxpayer funds to question the validity of an initiative ordinance duly enacted by the City's voters. The Complaint named as defendants LandWatch Monterey County ("LandWatch"), one of the initiative's many supporters, as well as various developers and landowners opposed to the Measure. The California Constitution precludes the City's action and instead mandates that the City must defend the initiative in question--the Marina Urban Growth Boundary Initiative ("Measure E")--against any judicial challenge. Here, the City's Complaint appears to have precipitated just such a challenge. Indeed, four days after the City filed its

Complaint questioning Measure E's validity, certain developers and individuals opposed to the Measure filed a cross-complaint ("Developers' Cross-Complaint") against the City, asserting that Measure E violates state law. The City responded by filing its own cross-complaint against LandWatch, for the stated purpose of making sure that LandWatch was present in the developers' action.[1]

The instant Cross-Petition for Writ of Mandate ("Petition") seeks to compel Respondents City and City of Marina City Council ("Council") to reverse their present unlawful Actions challenging Measure E. Petitioners herein are LandWatch, defendant in the City's Actions; and Kenneth L. Gray and Marina 2020 Vision ("Marina 2020"), the official proponents of Measure E. As detailed below, the City and Council have a mandatory duty to defend Measure E, which they have violated by suing LandWatch. Accordingly, Petitioners ask the Court to issue a peremptory writ of mandate directing Respondents to: (1) dismiss the City's Actions in their entirety; and (2) to comply with their mandatory duty to defend Measure E against the Developers' Cross-Complaint.

LandWatch has previously filed a special Motion to Strike the City's Complaint, as against LandWatch, under the anti-SLAPP statute. This Motion is currently scheduled to be heard on May 4, 2001, and should suffice to remove LandWatch from that action. The instant Petition is also necessary, however, because the City otherwise will continue to prosecute its original Complaint against the developers and its Cross-Complaint against LandWatch. Incredibly, the City has

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[1] The City's Complaint and its subsequent cross-complaint against LandWatch are collectively referred to herein as "the Actions."

refused to dismiss these Actions even though the developers have filed their own Cross-Complaint seeking a judicial declaration that Measure E is invalid. Rather, the City continues to maintain its Actions for the sole purpose of ensuring that LandWatch will assume the burden of defending Measure E.

The City's actions are inconsistent with the Constitution's guarantee of the initiative power. Under our democratic system of government, the City and its Council--not private citizens and non-profits--must defend the City's own duly enacted initiative.

STATEMENT OF FACTS

I. ADOPTION OF MEASURE E AND THE CITY'S NEW GENERAL PLAN.

On November 7, 2000 the voters of the City of Marina adopted Measure E, amending the City's General Plan to create an urban growth boundary ("UGB") along the City's northern boundary. To promote stability in long-term planning for the City, Measure E prohibits the Council from permitting urban development north of the UGB for a period of twenty years, except in certain circumstances. Measure E, §§ 1-2 (attached as Exhibit 1 to the Declaration of Robert S. Perlmutter in support of Petition for Writ of Mandate ("Petition Decl.")).

Measure E was proposed by Petitioners Kenneth L. Gray, Marina 2020, and others, in response to the Council's unwillingness to address their concerns about urban sprawl in the area during the process of updating the General Plan. The City had been sporadically attempting to update its General Plan since at least the mid-1990's, and Petitioners had been active participants in that process. Petitioners were particularly concerned about the Council's unwillingness even to analyze and consider a general plan alternative that would not result in the immediate development of the open space lands north of the City. Petition Decl. ¶ 22 & Ex. 6; Petition ¶ 20.

The circumstances surrounding the adoption of Measure E are detailed in LandWatch's Motion to Strike, the instant Petition, and the accompanying Petition

Declaration. Petition ¶¶ 10-27; Motion to Strike at 2-5. What follows is a brief summary. Petitioner Gray presented a preliminary "final draft" of Measure E to the City on February 9, 2000, and after receiving written feedback from the City Attorney, formally filed the final version of the measure on March 8th. Petition Decl. Exs. 2-4. The Council officially determined that sufficient signatures had been gathered to qualify Measure E for the November 2000 ballot on July 18th. Id. ¶ 23. For the next several months, the City worked at break-neck speed in an effort to amend the General Plan prior to the November 7, 2000 election. The Marina Planning Commission, which normally meets twice a month, met seven times between August 10, and September 21, when it formally recommended that the Council adopt the new General Plan. Id. Ex. 5 at 2. State law requires that before a city council can amend the general plan, it must receive a recommendation on the proposed plan from its planning commission. Gov't Code § 65354. In this case, however, even before the Commission completed its work, the Council moved into high gear. Indeed, between September 5 and October 31, the Council held no less than 7 meetings to revise the proposed General Plan. Petition Decl. Ex. 5.

Marina 2020, LandWatch, and over 150 Marina citizens urged the Council not to take final action on the proposed General Plan until after the imminent election. Id. ¶ 24 & Exs. 6-7. Instead of waiting seven days to see what the voters would decide, however, the Council hastily voted to adopt the new General Plan on October 31.[2] One

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[2] When the Council members voted that night, they did not even have before them a complete text of that document, because none existed. This fact, as well as the haste with which the City acted, are documented in the Council's own resolution purporting to adopt the General Plan. Petition Decl. Ex. 5 at 2-3 (stating that the General Plan "hereby" adopted includes the draft General Plan, as well as the following: (1) "all modifications" made or documented by the Planning Commission on August 10, 17, 24, 31, and September 7, 12, 14, and 21, "except as this list may have been changed by subsequent modifications"; (2) "all modifications shown as italicized within items nos. 8, 10, and 19 of the document entitled 'STAFF RESPONSES . . .,' except as this list may have been changed"); (3) "all modifications" made or initiated by the City Council at

week later, on November 7, with the support of Marina 2020, LandWatch, and others, the City's voters adopted Measure E. Under state law, the new General Plan did not become effective until, at the very earliest, 30 days after the Council's vote (i.e., Nov. 30, 2000). Complaint ¶ 3. Thus, when the voters adopted Measure E on November 7, 2000, the old General Plan remained in effect. The City received the official election results on November 29. Petition Decl. Ex. 9. The Council did not certify those results until December 5, five days after the new General Plan allegedly took effect. Complaint ¶ 4.

As the Council acknowledges, it amended the General Plan in a manner that it knew would conflict with Measure E. Marina City Council, Measure E Background/Briefing Paper at 2, 5 (March 5, 2001) ("White Paper") (attached to Petition Decl. as Ex. 10). While Measure E would restrict urban development beyond the UGB, the new General Plan purports to allow intensive development in that same area. (By contrast, as the Council also acknowledges, Measure E is consistent with the old General Plan in effect on November 7, 2000. Id. at 2.) What is perhaps most striking about the Council's choice to adopt a General Plan that would allow this development is that the City Attorney had repeatedly and publicly advised the Council that if it did so, and the voters also approved Measure E, "that new General Plan would have to be

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meetings held on September 12 and 26, and October 10, 17, 19, and 31 "except as may have been changed"; and (4) various documents contained in an Appendix, except as that appendix "may have been changed") (emphasis added). Two days later, the Council purported to ratify the General Plan contained in these documents, as well as any changes that "may" have been made, in yet another Council meeting held on November 2nd. Id. Ex. 8.

further revised or amended as soon as possible" to be consistent with Measure E. Petition Decl. Exs. 11 & 12. The City has not yet proposed any such revisions.

II. THE CITY'S REFUSAL TO DEFEND MEASURE E.

Notwithstanding the City Attorney's repeated and unambiguous pre-election advice that the Council would need to revise the new General Plan to make it consistent with Measure E, the Council claims that it has since been informed that Measure E "may" be invalid because of this very inconsistency. White Paper at 2, 4-5. Indeed, an attorney of record for the City in this action, Marie A. Cooper, has represented to Petitioners' counsel, Robert S. Perlmutter, that she believes the General Plan inconsistency created by the Council's Halloween vote renders Measure E invalid. Petition Decl. ¶¶ 25-27 & Exs. 13 & 14. Accordingly, Ms. Cooper represented to Mr. Perlmutter that she cannot in good faith defend Measure E before this Court. Id. ¶ 26. As mentioned above, the City Attorney certainly did not share this view prior to the

election, and it is not supported by any legal authority.[3]

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[3] Indeed, as discussed in LandWatch's Motion to Strike, all of the authority is to the contrary. See Motion at 13-15. The sole case relied upon by Ms. Cooper, Marblehead v. City of San Clemente, 226 Cal.App.3d 1504 (1991) (see Petition Decl. ¶ 26) is not remotely applicable. There, a developer sued the city challenging an adopted initiative which did not contain any legislation or even attempt to amend the General Plan directly. Instead, the measure simply directed the City of San Clemente to rewrite its general plan to implement certain "concepts." The Court of Appeal correctly held that the measure was invalid because an initiative can only be used to adopt legislation, and a mere directive to implement vague "concepts" does not constitute legislation. Id. at 1510.

Here, by contrast, Measure E contains specific general plan policies, goals, and objectives that indisputably constitute legislation. See DeVita v. Napa County, 9 Cal.4th 763, 771 (1995) (upholding similar initiative legislation). Measure E also unquestionably directly amended the General Plan in effect at the time that the voters approved it. Measure E, § 2; see White Paper at 2, 5. Finally, Measure E properly supplemented that legislation by giving the Council implementing authority to make additional changes to the General Plan and other documents, as necessary. The Court of Appeal expressly upheld this approach, and distinguished Marblehead, in Pala

Band of Mission Indians v. Board of Supervisors, 54 Cal.App.4th 565, 574-78 (1997).

In any event, as Ms. Cooper further explained to Petitioner's counsel, because of her view that Measure E is invalid, she proposed that the City should sue LandWatch in the Actions and ask the Court to declare whether Measure E is valid, presumably after LandWatch bore the entire expense of defending the Measure. Id. ¶ 26. Of course, that is exactly what the City has done. Specifically, on February 1, 2001--one day after the statute of limitations allegedly expired to bring a facial challenge to the City's adoption of the new General Plan--the City filed its Complaint against LandWatch, as a supporter of the initiative, and various developers who oppose it. Documents provided to LandWatch by the City show that the City Attorney and the developers' attorneys discussed possible bases to challenge Measure E on January 26th and 29th, prior to the filing of the City's Complaint. Id. Ex. 15. The City did not contact LandWatch prior to filing its Complaint and, aside from twice suing the organization, has never asked LandWatch for its views about Measure E's validity or how it might be integrated into the October 31st General Plan.

Upon learning of the City's Complaint, LandWatch immediately wrote the City requesting that it dismiss the lawsuit. Id. Ex. 16. On February 13, 2001, LandWatch sent the City a second letter stating that, if the City did not dismiss its Complaint, LandWatch would have no choice but to bring a special motion to strike. Id. Ex. 17. LandWatch also alerted the City to the principal Supreme Court authorities establishing that the City has a duty to defend the Measure. While the City Attorney indicated that he would provide a response to this letter (id. Ex. 18 at 2), he never did so.

Meanwhile, apparently using the City's Complaint as a litigation road map, the developers filed a cross-complaint against the City on February 5, 2001, asserting essentially the same allegations as the City raised. Compare City's Complaint ¶ 11, with Developers' Cross-Complaint ¶ 1. As noted above, the issues raised by the developers were discussed with the City Attorney prior to the filing of either action.

On March 22, 2001, the City filed its answer to the developer's cross-

complaint. Nowhere in that answer did the City attempt to defend Measure E, claim that Measure E was valid, or assert any affirmative defenses. Instead, apparently based on Ms. Cooper's stated belief that Measure E is invalid, and that her duties as an officer of the Court therefore preclude her from defending the measure in Court, the City simply asked for "a declaration or writ regarding the validity of Measure E." Answer at 6.

Also on March 22nd, the City filed a second lawsuit against LandWatch, and only LandWatch, in the form of a "cross-complaint" to the developers' lawsuit. The City's filing of this second lawsuit can only be described as reckless. LandWatch had already informed the City that it was moving to strike the City's Complaint and that the City would be faced with a mandatory award of attorneys' fees if LandWatch prevailed. Petition Decl. Ex. 17. Moreover, even assuming that the City had any valid basis or legal authority for bringing its initial Complaint--and it emphatically does not--its asserted rationale for suing LandWatch a second time is simply nonsensical.

Specifically, in an April 4th letter informing LandWatch that the City had filed, but inadvertently neglected to serve, a second lawsuit against it, the City stated that the new lawsuit "was filed so that all parties will be at the table (or bench) on all causes of action." Id. Ex. 19; see also City's Cross-Complaint ¶ 1 ("The City names LandWatch in this cross-complaint [] to ensure that initiative proponents are not excluded from being able to participate in the cross-action.") (emphasis added). Given that the City had already sued LandWatch on the identical grounds, LandWatch was already "at the table." More importantly, because the City has a duty to defend Measure E, it may not properly shift that duty to a private party.

ARGUMENT

I. STANDARD OF REVIEW

Code of Civil Procedure ("CCP") section 1085 provides that a "writ of mandate may be issued by any court . . . to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins . . ." CCP

§ 1085. "The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized." Santa Clara County Counsel Attorneys Ass'n v. Woodside, 7 Cal.4th 525, 539 (1994). To obtain such writ relief, a petitioner must show two things: "'(1) A clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty . . .'" Id. (citations omitted). The Supreme Court has repeatedly held, however, that this second requirement is met as a matter of course if "the question is one of a public right and the object of mandamus is to procure enforcement of a public duty." Green v. Obledo, 29 Cal.3d 126, 144 (1989); 8 Witkin, Cal. Procedure, Extraordinary Writs § 83 at p. 870 (4th ed. 1997). Where a sufficient showing of duty and public right is made, and no other adequate remedy is available, "the 'discretion' to deny [the writ] practically disappears. The petitioner is then entitled to the writ 'as a matter of right.'" 8 Witkin, Cal. Procedure, Extraordinary Writs § 72 at p. 853-54 (4th ed. 1997) (quoting May v. Board of Directors, 34 Cal.2d 125, 133 (1949)).

II. THE COURT MUST ISSUE A WRIT DIRECTING THE CITY TO DISMISS ITS ACTIONS AND TO DEFEND MEASURE E BECAUSE PETITIONERS HAVE SATISFIED THE CRITERIA FOR MANDAMUS.

It is well-established that once an initiative is adopted by the voters of a jurisdiction, that jurisdiction must defend the measure if its validity is challenged in a judicial action. Here, rather than defend Measure E, the City brought two lawsuits questioning its validity and attempting to force LandWatch, a private nonprofit entity that supported Measure E, to bear the City's burden of defending the Measure. A writ must issue compelling the City to assume its mandatory duty to defend the Measure and to dismiss its Actions challenging Measure E.

A. The City Has No Discretion to Bring a Lawsuit Challenging Measure E Because it Has a Mandatory Present Duty to Defend the Measure.

As the California Supreme Court has explained, "a city or county is

required to defend an [adopted] initiative ordinance."[4] Building Indus. Ass'n v. City of Camarillo, 41 Cal.3d 810, 822 (1986) ("BIA"). This duty is rooted in the fact that the constitutionally reserved initiative power not only is "greater than that of the [legislative body]," but in fact gives the people "the final legislative word, a limitation upon the power of the Legislature." Rossi v. Brown, 9 Cal.4th 688, 704 (1995). Indeed, for the past century, California citizens have exercised their reserved powers of initiative and referendum as a "legislative battering ram" for the purpose of "tear[ing] through the exasperating tangle of the traditional legislative procedure and strik[ing] directly toward the desired end." Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 228 (1978). In Rossi, 9 Cal.4th at 695, the Supreme Court reiterated its long-standing directive that the judiciary must jealously guard and protect this power:

> The initiative and referendum are not rights 'granted to the people, but . . . power[s] reserved by them. Declaring it the duty of the courts to jealously guard this right of the people,' the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.' [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 reserved power, courts will preserve it.

Because of this constitutionally compelled mandate, a number of legal safeguards exist to "ensur[e] that successful initiatives will not be undone by

[4] This Part II.A. largely repeats the arguments set forth in Part IV.B.1 of LandWatch's Motion to Strike, which is presently calendered for May 4, 2001. For the Court's convenience, LandWatch has set forth those arguments in full here.

subsequent hostile boards of supervisors." DeVita, 9 Cal.4th at 788. Most importantly, the Legislature has provided that "[i]f a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the city. . . . No ordinance that is . . . adopted by the voters[] shall be repealed or amended except by a vote of the people . . ." Elections Code[5] § 9217 (emphasis added); see DeVita, 9 Cal.4th at 796-97 (applying analogous provisions of section 9125 to uphold an initiative general plan amendment that, like Measure E, prohibited county officials from changing the relevant provisions of the general plan without a vote of the people).

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[5] Unless otherwise indicated, further statutory references are to the Elections Code.

As noted above, the Supreme Court in BIA expressly recognized the legislative body's duty to defend a duly adopted initiative, which is grounded in these same constitutional principles. At issue in BIA was whether Evidence Code section 669.5--which places the burden of defending a growth control ordinance on its proponents--applied to adopted initiatives. An amicus had argued that section 669.5 should not apply because local elected officials, like the Council here, generally do not favor slow-growth initiatives and would therefore not conscientiously defend them. The Supreme Court rejected that argument, explaining that the "the city or county would have a duty to defend the ordinance."[6] BIA, 41 Cal.3d at 822. Of course, the Court was also realistic enough to recognize that, despite this duty, the city "might not [defend] with vigor if it has underlying opposition to the ordinance." Id. Accordingly, the Court concluded that the initiative proponents should be allowed to intervene, if they so chose, id., an option which Petitioners unfortunately may yet have to exercise here.

In the entire history of the initiative power in this state, however, not a single published case has ever found--or even remotely suggested--that a legislative body has the power to avoid its duty to defend an adopted initiative, or to shift that obligation to a private party. Rather, even hostile city councils and boards of supervisors that initially opposed initiative measures have repeatedly recognized that, once the voters have spoken, their elected officials have the duty to defend and uphold the voters' final legislative word. See, e.g., DeVita, 9 Cal.4th at 771, 788; Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal.3d 534, 551(1990) (Mosk, J,.

[6] This constitutionally based duty to defend enacted initiatives is consistent with the general duty of public officials to defend enacted legislation. See, e.g., Deukmejian v. Brown, 29 Cal.3d 150, 158 (1981) (agreeing with a "federal court [which] found it incongruous for an attorney general, purporting to act for the people, to mount 'an attack by the State upon the validity of an enactment of its own legislature.'"); Cal. Const. Art. III, § 3.5; 64 Op. Atty. Gen. 690 (1981).

dissenting); Mervyn's v. Reyes, 69 Cal.App.4th 93, 98-99 (1999) (council voluntarily adopted qualifying measure that flatly reversed council majority and defended measure in court); Bank of the Orient v. Town of Tiburon, 220 Cal.App.3d 992, 997 (1990); BIA v. Oceanside, 27 Cal.App.4th 744, 748 (1994). Indeed, in the one Supreme Court decision where the council decided not to vigorously defend a challenge brought by a third party, the Court roundly condemned the city attorney for not doing so. Arnel Dev. Co. v. City of Costa Mesa, 28 Cal.3d 511, 514 n.3 (1980). The Court stated, "Apparently believing that his duty is to represent the city council instead of the voters of Costa Mesa, the city attorney did not defend the initiative. When the Court of Appeal held the initiative invalid, he did not petition this court for hearing." Id. So outraged was the Court that, on its own motion, it reviewed the court of appeal decision invalidating the initiative and reversed. Id.

Does this mean that a council is powerless to prevent the expenditure of public funds on a measure that it firmly believes is invalid? Not at all. While the courts have insisted that public officials' duties with respect to proposed measures are almost entirely ministerial,[7] they nonetheless have carved out a narrow exception for precisely this situation. If a council believes that it can make a compelling showing that a measure is clearly invalid, it may seek judicial review before the election to determine whether the matter should be placed before the voters. SAFE, 13 Cal.App.4th at 149; deBottari, 171 Cal.App.3d at 1209 (council may lawfully withhold a qualified measure from the ballot only if it is "'directed to do [so] by a court on a compelling showing that a proper case has been established for interfering with the [initiative] power'"); see

[7] E.g., Save Stanislaus Area Farm Economy v. County of Stanislaus, 13 Cal.App.4th 141, 149 (1993) ("SAFE") (board of supervisors has no power to "unilaterally decide to prevent a duly qualified initiative from being presented to the electorate"); deBottari v. Norco City Council, 171 Cal.App.3d 1204, 1209 (1985) (same re city council); see, e.g., Farley v. Healey, 67 Cal.2d 325, 327 (1967) (same re registrar of voters) Billig v. Voges, 223 Cal.App.3d 962, 968-69 (1990) (same re city clerk).

Schmitz v. Younger, 21 Cal.3d 90, 92-93 (1978) (even where the Attorney General believes a statewide initiative is invalid, he has a ministerial duty to prepare a ballot title and summary, but explaining that "[t]his does not mean that the Attorney General may not challenge the validity of a proposed measure by timely and appropriate legal action") (emphasis added).

The City did not take advantage of this procedure here by filing a timely pre-election challenge to Measure E. Nor could it have done so successfully. As the Council itself acknowledged in its White Paper, the primary basis for Measure E's alleged invalidity (viz., its inconsistency with the new General Plan) did not even exist until at least 23 days after the election. See White Paper at 5-6. Now that the voters have enacted Measure E, the Council may not properly initiate a post-election court challenge questioning the measure's validity. Rather, the validity of Measure E, like any other city enactment, is properly tested in an action against the governmental official or entity responsible for its enforcement--not against a private party that supported enactment of the ordinance. CCP § 1085; see, e.g., Legislature v. Eu, 54 Cal.3d 492 (1991); BIA, 41 Cal.3d at 810. Of course, in the present case, such a post-election challenge to Measure E has already been filed against the City. Rather than pursue its unauthorized and illegal "declaratory relief" action, the City must defend against the developers' cross-complaint.

B. Petitioners Have a Clear, Present and Beneficial Right in The Writ.

The second requirement for issuance of a writ (i.e., that petitioners have a beneficial right in respondents' performance of the asserted duty) is established here as a matter of law because the defense of Measure E is an important public right. As the Supreme Court has repeatedly held, no particular showing of a present, beneficial right need be shown "where the question is one of a public right and the object of mandamus is to procure enforcement of a public duty." Green, 29 Cal.3d at 144; see 8 Witkin, Cal. Procedure, Extraordinary Writs § 83 at p. 870 (4th ed. 1997) (citing additional cases).

There can be no question that the City's duty to defend Measure E, and the duty of local officials to defend adopted initiative measures generally, is a matter of sufficient public right to warrant mandamus relief. Indeed, the Supreme Court has "[d]eclar[ed] it the duty of the courts to jealously guard this right of the people,' . . . [and] described the initiative [] as articulating 'one of the most precious rights of our democratic process.'" Rossi, 9 Cal.4th at 695 (citations omitted); see also BIA, 41 Cal.3d at 822; Arnel, 28 Cal.3d at 514 n.3 (chastising city attorney for failing to petition Supreme Court for review of appellate ruling invalidating an adopted initiative).

Moreover, even assuming, arguendo, that Petitioners need to show a beneficial interest separate from the public at large, they can readily do so by virtue of their status as the official proponents and prime supporters of Measure E. Indeed, it is this very interest that the City claims is the basis for its illegal lawsuits against LandWatch. See Complaint ¶ 1 ("The City names initiative proponents . . . so that parties who are keenly interested in . . . the validity of the [Measure] have an opportunity to address the Court"); id. ¶¶ 6-7 (describing the stake of LandWatch and Marina 2020 in Measure E); Cross-Complaint ¶¶ 1, 6, 7. The nature and scope of Petitioners' beneficial interests in this proceeding, and in the City's defense of Measure E, are further documented in the verified Petition submitted herewith. Petition ¶¶ 3-7; see also BIA, 41 Cal.3d at 822 (initiative proponents' special interest in adopted initiative generally requires that they be allowed to intervene in its defense).

Accordingly, because Petitioners have satisfied both requirements for the issuance of a writ, and because there is no other adequate remedy at law, they are entitled to the writ "as a matter of right."[8] May, 34 Cal.2d at 133.

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[8] Petitioners have no other adequate remedy at law here. LandWatch's repeated written requests that the City dismiss its Complaint and comply with its mandatory duty to defend Measure E not only have gone unheeded, but were in fact met with a second lawsuit against LandWatch. Accordingly, in the absence of a writ, the City will continue to evade its mandatory duty to defend Measure E and to spend taxpayer funds in contravention of that duty. No other remedy--neither an action at law, nor an

C. Courts Have Issued Writs to Compel Local Agencies to Pursue Judicial Relief in Similar Circumstances.

As the Supreme Court has recently reaffirmed, "Mandamus is [broadly] available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as 'ministerial' or 'legislative.'" Woodside, 7 Cal.4th at 541. Accordingly, the courts have long held that mandamus is an appropriate remedy to compel local officials to undertake ministerial duties comparable to defending a duly adopted initiative, and there can be no doubt that such relief is proper here.

In Board of Supervisors v. Simpson, 36 Cal.2d 671 (1951), for instance, the Supreme Court issued a writ of mandamus under CCP section 1085 to compel the Los Angeles County district attorney to institute judicial proceedings to abate a public nuisance. The district attorney had refused to initiate a civil action to abate the nuisance on the grounds that it was the county counsel's duty to prosecute the action. Id. at 672. The Court rejected that argument, and expressly held that because "it is the duty of the district attorney . . . to prosecute [such] actions[,] . . . mandamus is the proper remedy . . ." Id. at 675; see also Nasir v. Sacramento County Dist. Attorney, 11 Cal.App.4th 976, 990-93 (1992) (reversing trial court and issuing writ to compel the district attorney to commence judicial forfeiture proceeding); Cf Woodside, 7 Cal.4th at 541-43 (granting writ of mandamus to compel the Santa Clara County Board of Supervisors to bargain in good faith with the collective bargaining unit for the attorneys

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appeal, nor further protests to the City--will suffice to direct the City to defend the Measure. See May, 34 Cal.2d at 133; Monterey Mechanical Co. v. Sacramento Reg. County Sanit. Dist., 44 Cal.App.4th 1391, 1413-14 (1996).

in the county counsel's office); see generally Witkin, Cal. Procedure, Extraordinary Writs § 87 at 874-76 & 2000 Supp. at 119-20) (4th Ed. 1997) (explaining that "the ministerial acts of local administrative boards and officers that can be compelled by mandamus are virtually unlimited in number" and listing cases).

Most recently, in Bradley v. Lacy, 53 Cal.App.4th 883 (1997), the Court of Appeal ordered the trial court to issue a writ of mandate compelling the district attorney to serve, file, and prosecute an accusation returned by the grand jury against a member of the Board of Supervisors accused of official misconduct. State law required that, once the grand jury had returned an accusation, the district attorney "shall" serve the accusation and file it with the superior court. Id. at 866-67; see Gov't Code § 3063. The county's district attorney ("Lacy") nonetheless had refused to file and serve the accusation and a county resident had petitioned for a writ of mandate compelling Lacy to do so. The trial court correctly found that Lacy had no discretion to refuse to file the accusation. Id. at 887. Because it lacked explicit statutory "'authority to require the district attorney to proceed with the prosecution[,]' however, the trial court concluded that "compelling him to commence the prosecution would be an 'idle act'" and refused to issue the writ. Id.

The Court of Appeal reversed, explaining that allowing the district attorney to exercise discretion as to whether to initiate prosecution would "in effect, [] nullify the grand jury's decision to prosecute." Id. at 893. The Court of Appeal also rejected the trial court's concern that, as a practical matter, it could not oversee the district attorney's prosecution of the case. The Court of Appeal explained that "[a]s an officer of the court, the district attorney must perform his duties in a professional manner. [] We will not presume a district attorney would default in discharging the responsibilities of his office by failing diligently to prosecute an accusation returned by the grand jury." Id. at 895.

The same reasoning applies here. To allow the City to proceed with its

declaratory relief Actions and to avoid defending Measure E would be, "in effect, to nullify" the voters' decision to adopt the Measure. Moreover, just as the district attorney in Bradley was duty-bound as an officer of the court to prosecute the action diligently, so too here, the City's attorneys are duty-bound to defend Measure E diligently. Id.; see also Arnel, 28 Cal.3d at 514 n.3 (criticizing the city attorney for failing to defend an adopted initiative land use measure up through the appellate process). Of course, it may be that the City Attorney and the outside counsel who filed the instant actions against LandWatch are, for that reason, disqualified from defending Measure E.[9] If that proves to be the case--and the Court need not decide this issue here--the City may need to obtain other independent counsel.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a peremptory writ of mandate ordering Respondents to: (1) dismiss their Actions; and (2) comply with their mandatory duty to defend Measure E.

Dated: ____________________ SHUTE, MIHALY & WEINBERGER LLP

By:__________________________________
ROBERT S. PERLMUTTER
Attorneys for Cross-Petitioner and Defendant LANDWATCH MONTEREY COUNTY, and Cross-Petitioners KENNETH L. GRAY, and MARINA 2020 VISION

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[9] See, e.g., Deukmejian v. Brown, 29 Cal.3d 150, 159 (1981); Civil Service Comm'n v. Superior Court, 163 Cal.App.3d 70, 75-78 (1984); Cal. Rule of Prof. Conduct 3-600.

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DECLARATION OF SERVICE

larina v. Armstrong Ranch Property Owners, et al.,
y County Superior Court; Case No. M52386

I , the undersigned, certify and declare that I am over the age of 18 years, employed at 396 Hayes Street in the City and County of San Francisco, State of California, and not a party to the above-entitled case. On May 1, 2001, I caused the following document to be served:

ETITIONERS' OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ROSS-PETITION FOR WRIT OF MANDATE

ry of a copy of said documents to an authorized Federal Express service carrier at San Francisco, California for overnight delivery in a sealed envelope addressed to the following:

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I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 2001, at San Francisco, California.

____

IT\RSP018.WPD

Fran Sullivan