

Case No. H043540

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SIXTH APPELLATE DISTRICT**

**PETER CONSTANT, STEVEN HAUG, and SILICON VALLEY
TAXPAYERS' ASSOCIATION, a California non-profit corporation,**
Proposed Intervenors, Appellants and Petitioners

v.

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA,**
Respondent

**THE PEOPLE OF THE STATE OF CALIFORNIA on the
RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION,**
Plaintiff, Respondent, and Real Party in Interest

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,
Defendants, Respondents, and Real Parties in Interest

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PRELIMINARY OPPOSITION TO PETITION FOR
WRIT OF MANDATE OR, IN THE ALTERNATIVE,
SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF**

From Order of the Superior Court of Santa Clara County
The Honorable Beth McGowen, Presiding
Superior Court Case No. 2013-cv-245503

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SAN JOSE POLICE OFFICERS' ASSOCIATION

TABLE OF CONTENTS

	PAGE
I. THE CITY COUNCIL MUST SELECT BETWEEN TWO ALTERNATIVE BALLOT MEASURES BY MID-JULY, 2016.	5
II. PETITIONERS CANNOT SUCCESSFULLY APPEAL THIS QUO WARRANTO JUDGMENT WITH TARDY AND IRRELEVANT ARGUMENTS ABOUT VOTER RIGHTS.	7
A. PETITIONERS' LAST-MINUTE EFFORTS WERE NOT A PROPER MEANS TO CHALLENGE THE CITY'S SETTLEMENT.	8
B. ON THE FAILURE-TO-BARGAIN CLAIMS AT ISSUE IN THE QUO WARRANTO ACTION, PETITIONERS HAVE NO KNOWLEDGE OR FACTS TO ADD, AND ARE UNLIKELY TO OVERCOME THE PARTIES' STIPULATIONS, ESPECIALLY IN THE FACE OF THE ADVERSE PERB RULING ON IDENTICAL FACTS.	10
III. THE COURT SHOULD TIMELY DENY THIS PETITION.	11
CERTIFICATE OF COMPLIANCE	12

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Banning Teachers Assn. v. Public Employment Relations Board</i> (1988) 44 Cal.3d 799	10
<i>City and County of San Francisco v. State</i> (2005) 128 Cal.App.4th 1030	9
<i>People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach</i> (1984) 36 Cal.3d 591	6, 7
<i>Smith v. Selma Cmty. Hosp.</i> (2010) 188 Cal.App.4th 1	7
STATUTES	
Elections Code	
Section 9255(b)	8
Section 9255(b)(1)	5
Code of Civil Procedure	
Section 387(a)	9
OTHER AUTHORITY	
San Jose City Council	
Resolution 76158	8, 9

I. THE CITY COUNCIL MUST SELECT BETWEEN TWO ALTERNATIVE BALLOT MEASURES BY MID-JULY, 2016.

Real Parties' Settlement Framework requires that the City Council vote to place one of two charter amendments regarding city employee pensions before San Jose voters at the November 2016 general election. (AA 169-175.) If the underlying quo warranto action is fully resolved before August 5, 2016—the last day the City Council can vote to put a charter amendment on the November ballot—Real Parties agree that the City Council would put forward an amendment that (1) requires voter approval for any future pension increases, (2) prohibits any retroactive pension increases, and (3) mandates an actuarially sound pension system. (Hereafter called “the agreed amendment”; AA 167; Cal. Elections Code § 9255(b)(1) [governing body must propose amendment to charter at least 88 days prior to election].)

Alternatively, if this quo warranto action is not fully resolved by that date, Real Parties agree that the Settlement Framework itself would be presented to voters for approval as a more extensive charter amendment (“the alternative measure”). (AA 175.)

If either measure passes, Measure B would be superseded by action of the voters—whether the judgment in the quo warranto is final or not.

Before either charter amendment can legally be put before the voters, the City must meet and confer in good faith with SJPOA and other employee organizations, fulfilling what are known as *Seal Beach*

bargaining obligations.¹ This is the very same obligation the City had before placing Measure B itself on the ballot—the fulfillment of which was the central issue in the underlying, settled quo warranto action. For the “agreed amendment” mentioned above, bargaining obligations are already fulfilled: on March 8, 2016, SJPOA and Local 230 reached agreement on ballot language²; and on May 5, 2016 the City and its other unions reached agreement on ballot language, which SJPOA and Local 230 subsequently adopted. (Supplemental Declaration of Gregg McLean Adam in Opposition to Petition for Writ of Mandate (“Suppl. Adam Decl.”), ¶¶ 2-3 [Exhibits A and B].)

Due to the uncertainties generated by Petitioners’ attack on the Judgment and Writ Quo Warranto, the City and its labor unions have had introductory discussions about negotiating the alternative amendment.³ (Suppl. Adam Decl., ¶ 4.) Because of the potential scope of the alternative amendment, it remains to be seen whether the City could complete its

¹ In *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 602, the Supreme Court ruled that a municipal employer’s statutory obligations under Government Code section 3505 to bargain over changes in wages, hours and working conditions apply equally to changes in city charters that are sponsored by the employing agency, and that failing such bargaining, the Charter measure is set aside.

² This agreement—not panic about Petitioners’ anticipated motion to intervene—was the catalyst for Real Parties’ March 7, 2016 submission of the proposed stipulated facts and order, proposed judgment and proposed writ quo warranto to the Respondent court.

³ For all their bluster about advocating for the voters, Constant and his allies’ untimely challenge to the quo warranto action risks impeding the City’s ability to present a charter amendment to the voters.

bargaining obligations with all of its unions prior to the August 5, 2016 deadline for the City Council to vote.

Under standard sunshine and notice requirements, the City Council would be required to provide notice to the public of which ballot measures it plans on considering at its August 5, 2016 meeting by approximately July 20, 2016. Accordingly, if the Petition is not resolved by approximately July 20, 2016, the City Council will face uncertainty as to whether the agreed amendment or the alternative amendment should go before the voters. If the *Seal Beach* bargaining process has not been completed with all of the City's unions, the City Council may find itself unable to put any amendment before the voters. That would leave Measure B in unimplemented limbo, and the Settlement Framework not be in effect—with the net effect that the City will enjoy *any* pension savings.

II. PETITIONERS CANNOT SUCCESSFULLY APPEAL THIS QUO WARRANTO JUDGMENT WITH TARDY AND IRRELEVANT ARGUMENTS ABOUT VOTER RIGHTS.

Despite the veil of grandeur that Petitioners draw over their claims—which is misleading in all events, as SJPOA explained in its Preliminary Response—they have not “convincingly show[n] that substantial questions will be raised on appeal.” (*Smith v. Selma Cmty. Hosp.* (2010) 188 Cal.App.4th 1, 18.) This is because, unlike the voter-proposition cases they cite, the underlying quo warranto case is not about the merits of Measure B, or the rights of voters to enact that measure or any other. It is

solely about **the process that preceded Measure B's submission** to the voters, i.e., whether the City complied with its bargaining obligations before approving Resolution 76158 to place Measure B on the June 2012 primary election ballot.⁴ Petitioners not only have nothing to add to the only question here, but waited an inexcusably long time even to try to involve themselves.

A. Petitioners' Last-Minute Efforts Were Not A Proper Means To Challenge The City's Settlement.

The Petition is full of attacks on the City Council's legislative action in approving the Settlement Framework. But if Petitioners believed that the City Council acted illegally (which it did not), they should have petitioned the Respondent court for a writ of mandate or prohibition back in July or August 2015, and had that action related to Real Parties' quo warranto case. (See cases cited in SJPOA's Preliminary Response.)

But Petitioners failed to do that, which left them improperly trying to expand the very limited and specific issue approved by the Attorney General for litigation in the quo warranto action. Their proposed complaint in intervention proffered an array of potential claims:

⁴ Since then, the California Legislature has prohibited cities and counties from submitting charter amendments to voters in primary elections. (Elections Code § 9255(b).) Charter amendments must now be submitted only during a general election. (*Id.*)

- Whether the settlement of this case impermissibly affects non-parties and resolves related actions (AA 49 [Proposed Complaint in Intervention], ¶ 11);
- Whether the settlement “judicially substitutes other provisions for Measure B without any legislative process” (AA 49-50, ¶ 12);
- Whether the City has “a duty to defend Measure B on behalf of its citizens” (AA 55, ¶¶ 32, 33);
- Whether “the City has abdicated its duty to defend Measure B” (AA 55, ¶¶ 32, 33);
- Whether any such duty prohibits the City from settling this action (AA 55, ¶¶ 32, 33); and
- Whether the stipulated judgment violates the rights of the voters and the Applicants (AA 56, ¶ 35).

These claims may have been presentable in a petition for a writ of mandate or prohibition, but they could not be added to the quo warranto action, which was dedicated to the sole question of adequate bargaining of Resolution 76158. (Code of Civ. Proc. § 387(a) [permissive intervenor cannot expand the claims in the underlying action]; *City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1036 [same].)

Petitioners’ claims on the merits are unlikely to succeed because they failed to bring them in the correct action and cannot lawfully include them in the underlying quo warranto action.

B. On The Failure-To-Bargain Claims At Issue In The Quo Warranto Action, Petitioners Have No Knowledge Or Facts To Add, And Are Unlikely To Overcome The Parties' Stipulations, Especially In The Face Of The Adverse PERB Ruling On Identical Facts.

Even if Petitioners could overcome the procedural obstacles to asserting their claims, they are unlikely to prevail for substantive reasons. First, the trial court has accepted the Real Parties' stipulated facts, which acknowledge that the City did not fulfill its meet and confer obligations. (AA at p. 1726.) To prevail, Petitioners would have to show that the City in fact fulfilled its bargaining obligations—despite not having participated in those sessions, and having no independent knowledge of them.

Second, the same claims that SJPOA asserted in the quo warranto action below had been adjudicated, with live witness testimony, before the Public Employment Relations Board. As SJPOA's preliminary response explained (at pp. 12-13), the Administrative Law Judge determined that the City had violated its meet and confer obligations and ordered that Resolution 76158 be rescinded. (AA 381, 384.) The PERB ruling is on appeal, but the City was entitled to see the writing on the wall and negotiate a settlement, **rather than risk losing all potential pension savings.** (AA 525, ¶ 16 [Settlement Framework achieves \$3 billion in savings]; *Banning Teachers Assn. v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 804-805 [PERB's interpretation of unfair labor practice

statutes entitled to great deference and will be upheld unless clearly erroneous.]

III. THE COURT SHOULD TIMELY DENY THIS PETITION.

For these procedural, substantive and practical reasons, Petitioners cannot present substantial questions on the merits of their pending appeal. The Court should deny this Petition well before the deadlines explained above so as to permit Real Party CITY OF SAN JOSE to place—through legal and proper means—a pension-savings measure before the voters in this general election.

Dated: May 16, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **SUPPLEMENTAL BRIEF IN SUPPORT OF PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR, IN THE ALTERNATIVE, SUPERSEDEAS, OR OTHER APPROPRIATE RELIEF** contains **1,527 words**, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

Dated: May 16, 2016



Laurie J. Hepler

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On May 16, 2016, I served the foregoing documents described as:
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(X) BY ELECTRONIC SERVICE: By transmitting via TrueFiling to the above parties at the email addresses listed above.

Executed on May 16, 2016, at Los Angeles, California.

(X) (State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


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