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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, ex rel. SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff and Respondent,

v.

CITY OF SAN JOSE et al.,

Defendants and Respondents;

PETER CONSTANT et al.,

Interveners and Appellants.

H043727
(Santa Clara County
Super. Ct. No. 1-13-CV-245503)

In the underlying action in quo warranto against the City of San Jose (City), the San Jose Police Officers' Association (SJPOA) challenged the validity of Measure B, a voter-approved amendment to the City Charter. Supporters of Measure B—Peter Constant, the Silicon Valley Taxpayers Association (SVTA), and Steven Haug (collectively, appellants)—sought unsuccessfully to intervene in its defense. The suit was resolved by way of a stipulated judgment invalidating Measure B. Appellants appealed from the stipulated judgment and the order denying their motion to intervene.

In July 2016, this court stayed enforcement of the stipulated judgment pending the resolution of this appeal. Since that time, City voters approved Measure F, which superseded Measure B.

According to appellants, at issue on appeal is whether a city may stipulate to the judicial invalidation of a voter-enacted charter amendment. They say such a stipulation is illegal absent either a hearing on the merits or voter approval and they request a judicial ruling to that effect. But such a ruling would have no meaningful impact, as voters have approved Measure F, thereby rendering this appeal moot. For the reasons stated below, we conclude the appropriate disposition is to reverse the judgment with directions to the trial court to dismiss the case as moot.

I. BACKGROUND[1]

In March 2012, the San Jose City Council (City Council) voted to place Measure B on the June 2012 ballot. Measure B proposed amending the City Charter to modify retirement contributions and benefits of City employees.

Would-be intervenor Peter Constant is a former San Jose police officer who receives a pension and health benefits from the City. He was a member of the City Council between 2007 and 2014. In his role as a City Councilmember, he helped to design and draft Measure B. The SVTA is a non-profit organization that represents the rights and interests of taxpayers. It raised money in support of and campaigned for Measure B. Its then-president signed the ballot argument in favor of Measure B on behalf of the SVTA. Steven Haug is a City resident and treasurer of the SVTA who voted for Measure B.

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[1] On March 17, 2017, the City and the SJPOA requested this court to take judicial notice of (1) court filings in Measure B-related litigation filed against the City in the superior court (exhibits 1-5, 10-26); (2) four Measure B-related complaints filed against the City with the Public Employees Relations Board (exhibits 6-9); and (3) case dockets for two appeals pending before the Fourth District Court of Appeal (exhibits 27 & 28). We deny the request as to exhibits 27 and 28, which we find to be irrelevant (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"]), and grant the request as to the remaining exhibits pursuant to Evidence Code sections 452, subdivision (d) and 459, subdivision (a).

Voters approved Measure B. Litigation regarding its validity ensued, including the underlying action in quo warranto, which the SJPOA filed against the City in April 2013.[2] The SJPOA alleged the City violated its obligations under the Meyers-Milias-Brown Act (MMBA) to meet and confer with the City's unions before placing Measure B, which impacted the terms and conditions of City employees' employment, on the ballot.

In July 2015, the City, the SJPOA, and a union representing City fire fighters reached an agreement on an Alternative Pension Reform Settlement Framework (Settlement Framework), which the City Council approved in open session on August 25, 2015. The Settlement Framework contemplated the replacement of Measure B through "the process of quo warranto" or a 2016 ballot measure and was contingent on the City reaching a global settlement with all employee groups. At a February 18, 2016 case management conference, the City and the SJPOA informed the trial court that they had reached a settlement and were in the process of preparing the final paperwork and obtaining Attorney General approval.

On March 7, 2016, appellants reserved an April 12, 2016 hearing date for a motion to intervene and advised the Mayor of their intention to intervene. Appellants filed their motion to intervene on March 9, 2016. But in the meantime, on March 8, the City and

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[2] "Quo warranto was a common law writ literally meaning 'by what authority' . . . ." (*Rando v. Harris* (2014) 228 Cal.App.4th 868, 875 (*Rando*).) "The quo warranto remedy is currently codified in [Code of Civil Procedure] section 803, and it is 'the specific action by which one challenges "any person who usurps, intrudes into, or unlawfully holds or exercises any public office." ' " (*Id*. at p. 875.) "[A]n action in the nature of quo warranto [also] will lie to test the regularity of proceedings by which municipal charter provisions have been adopted . . . ." (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 694.) A quo warranto action must be brought by the Attorney General or with his or her permission. Here, the SJPOA sought and obtained leave from the Attorney General to file suit.

the SJPOA filed with the court stipulated facts and proposed findings, a proposed stipulated judgment and order, and a proposed writ quo warranto.

The trial court signed the stipulated judgment and order and the writ quo warranto on March 15, 2016. The stipulated judgment and order concluded that the City Council resolution that placed Measure B on the ballot was null and void due to a procedural defect in bargaining, namely, the City's failure to satisfy its meet-and-confer obligations under the MMBA. The stipulated judgment and order ordered that, because Measure B was not properly placed before the electorate, it was invalid. The writ quo warranto commanded the City and the City Council to strike Measure B from the City Charter.

The trial court held a hearing on appellants' motion to intervene on April 5, 2016 and denied that motion on April 12, 2016. Appellants then filed an application to stay enforcement of the judgment, which the trial court denied for lack of standing.

On May 2, 2016, appellants appealed from the stipulated judgment and order, the writ, and the orders denying their motion to intervene and their application to stay enforcement of judgment. Appellants also filed a petition for writ of mandate or, in the alternative supersedeas, or other appropriate relief. In *Constant et al. v. Superior Court* (H043540), this court issued a writ of supersedeas on July 28, 2016, staying the superior court's stipulated judgment and order and writ in quo warranto pending resolution of this appeal.

Shortly thereafter, on August 9, 2016, the City Council voted to place Measure F on the November 2016 ballot. Measure F called for a Charter amendment modifying pension benefits and replacing the Charter amendments enacted by Measure B. City voters approved Measure F on November 8, 2016.

II. DISCUSSION

The City and the SJPOA say the passage of Measure F mooted this appeal because appellants got what they wanted—a popular vote on the fate of Measure B. Appellants disagree, saying that the question of whether the City Council was permitted to stipulate

to invalidation of Measure B without a judicial hearing on the merits or voter approval is not moot. Alternatively, they ask that we consider the merits of the appeal under the public interest exception to the mootness doctrine.

A. Legal Principles

It is our duty " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before' " us. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132 (*Paul*).) "A case is considered moot when 'the question addressed was at one time a live issue in the case,' but has been deprived of life 'because of events occurring after the judicial process was initiated.' " (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574.) "The pivotal question in determining if a case is moot is . . . whether the court can grant the plaintiff any effectual relief." (*Ibid.*) If events have made such relief impracticable, rendering the case moot, dismissal is generally appropriate. (*Ibid.*) That said, we may, in our discretion, consider the merits of an otherwise moot case that raises an issue of "broad public interest that is likely to recur, and . . . may otherwise . . . evade review." (*People v. Harrison* (2013) 57 Cal.4th 1211, 1218 (*Harrison*).)

B. This Appeal Is Moot Because We Cannot Provide Effective Relief

Appellants' own descriptions of their appeal demonstrate its mootness. Per appellants, "at the core of this appeal" is the "legality of the [City] and SJPOA's scheme to secure judicial invalidation of a charter amendment by stipulated judgment—without any defense of the measure and without judicial review or a vote of the people." But that "scheme" never came to fruition; there was a popular vote. Accordingly, what appellants seek is an advisory opinion that a hypothetical course of action would have been illegal. Such a ruling would have no "practical, tangible impact" on the parties. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [dismissing appeal as moot].)

Appellants describe themselves as "defending [the] power [of the people] against a local government and special interest group that attempted an illegal end-run around a voter-enacted charter amendment . . . by stipulating to entry of judgment to invalidate the charter amendment without any hearing on the merits and without voter approval." Again, this description highlights our inability to grant effective relief. The people had the opportunity to exercise their power at the ballot box. At this stage, any defense appellants are mounting is against a theoretical threat.

Appellants complain of the harm that *would have* come to pass "but for" this Court's issuance of a writ of supersedeas staying enforcement of the stipulated judgment, which apparently motivated the City to place Measure F on the ballot. But we are not concerned with what might have been. What matters is whether an actual controversy exists *today*. Plainly one does not.

Finally, appellants contend that reversal of the stipulated judgment would vindicate their constitutional right to amend the City's Charter. But that right was vindicated by Measure F.

C. We Decline to Exercise Our Discretion to Address the Merits

Appellants urge us to reach the merits under the public interest exception to the mootness doctrine. They argue that "whether a city can invalidate an initiative or charter amendment passed by its voters through a stipulated judgment and without meaningful judicial review is an issue of continuing public interest that is likely to recur in other cases." Further, they contend the stipulated judgment "stands as practical precedent for invalidating a charter amendment or other voter-approved initiative that is unpopular with the government, without judicial review or a vote."

As noted above, the exception to the mootness doctrine that appellants invoke applies where a moot case raises an issue of "broad public interest that is likely to recur, and . . . may otherwise . . . evade review." (*Harrison*, *supra*, 57 Cal.4th at p. 1218.) We do not doubt that the extent to which government entities are obligated to defend

voter-approved Charter amendments and the proper procedure for altering or invalidating such amendments are matters of broad public importance that might justify invoking a discretionary exception to mootness in the proper circumstances. But this case is not an appropriate vehicle for resolving those issues.

None of the parties devotes much real estate in their briefs to these questions. Less than four pages of appellants' opening brief is devoted to what they identify as the core issue on appeal—the City's authority to enter into the stipulated judgment. For their position that the City lacked such authority, appellants rely on California Constitution article XI, section 3(a), which provides that a city charter may be amended by majority vote of its electors, and cases holding that voter initiatives may be amended or repealed only by the voters (e.g., *Higgins v. Santa Monica* (1964) 62 Cal.2d 24, 30). The City skirts the issue, saying only that appellants have not identified a case holding that cities are barred from settling ballot-measure-related litigation. The SJPOA focuses on the merits of its quo warranto action, rather than the extent of City's authority to settle litigation challenging a voter-approved charter amendment instead of defending against it.[3]

Given the state of the briefing in this case, certain nuances remain unexplored. For example, appellants equate the stipulated judgment to a legislative amendment or repeal of a voter initiative. But the stipulated judgment invalidated Measure B based on procedural flaws in the way it was placed on the ballot, which arguably distinguishes it from a repeal of a validly enacted measure. (See *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389 ["There is no constitutional right to place an invalid initiative on the ballot"].) Moreover, the parties do not address the distinction between citizen-

[3] This appeal raises, and the parties' briefs address, numerous issues that we do not need to reach, including standing and the timeliness and merits of appellants' motion to intervene. By noting the briefs' limited discussion of the propriety of the stipulated judgment we do not intend to criticize the parties, but rather to explain our decision not to reach the merits of that issue in this case.

sponsored voter initiatives and ballot measures sponsored by the governing body of a charter city (like Measure B). (See *Hernandez v. County of Los Angeles* (2008) 167 In Cal.App.4th 12, 21 [distinguishing between citizen-sponsored voter initiatives and ballot measures sponsored by the governing body of a charter city].) These may be distinctions without a difference. But we hesitate to make that judgment in the absence of more comprehensive briefing.

D. The Appropriate Disposition

In their reply brief, appellants urge us to reverse the judgment and remand to the trial court with directions to dismiss the action as moot. We requested supplemental briefing regarding the appropriate disposition in the event we concluded the case had been rendered moot. In their supplemental briefs, the City and the SJPOA urge us to dismiss the appeal as moot. They acknowledge that we also may reverse and remand for dismissal as moot, and argue that in that case we must note that we are not ruling on the merits and should state that neither side is a prevailing party to avoid further litigation below. Appellants argue we should reverse and remand for dismissal as moot by the superior court to avoid impliedly affirming the judgment.

"Ordinarily, . . . when a case becomes moot pending an appellate decision 'the court will not proceed to a formal judgment, but will dismiss the appeal.' " (*Paul*, *supra*, 62 Cal.2d at p. 134.) However, "[i]nvoluntary dismissal of an appeal operates as an *affirmance* of the judgment, leaving it intact." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 5:48, p. 5-25; *In re Jasmon O.* (1994) 8 Cal.4th 398, 413; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005.) Where, as here, "we do not reach the merits of the appeal . . . , [our Supreme Court has said] it is appropriate to avoid thus 'impliedly' affirming [the] judgment . . . ." (*Paul*, *supra*, at p. 134.) Moreover, "[s]ince the basis for that judgment[—Measure B—]has now disappeared we should 'dispose of the case, not merely of the appellate proceeding which brought it here.' " (*Ibid.*) "That result can be achieved by reversing

the judgment solely for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to the court to dismiss the proceeding. [Citations.] Such a reversal, of course, does not imply approval of a contrary judgment, but is merely a procedural step necessary to a proper disposition of this case." (*Id*. at pp. 134-135; *County of Fresno v*. *Shelton* (1998) 66 Cal.App.4th 996, 1005; *Coalition for a Sustainable Future in Yucaipa v*. *City of Yucaipa* (2011) 198 Cal.App.4th 939, 945.) Reversal of the judgment with directions to the trial court to dismiss as moot also addresses appellants' concern that "the prospect of the stipulated judgment, order, and writ in quo warranto going into effect hang over this case . . . ."

III. DISPOSITION

The judgment is reversed in order to restore the matter to the jurisdiction of the superior court and the case is remanded to the superior court. On remand, the superior court is directed to dismiss the underlying action as moot. There being no prevailing party, the parties shall bear their own costs on appeal.

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ELIA, ACTING P.J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.