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Ordinance may be enough to skip CEQA

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SAN FRANCISCO — The state Supreme Court on Wednesday appeared skeptical of arguments that a city's decision to approve a Wal-Mart store through a ballot initiative should go through a review under the state's landmark environmental law.

The case involves a ballot measure in the city of Sonora that sought approval to turn an existing Wal-Mart into a Wal-Mart Supercenter. After enough signatures were gathered to qualify the initiative on the ballot, the city council adopted the measure as an ordinance instead of electing to put it to the voters.

A local group opposed to the expansion sued the city, arguing that it abused the election process to avoid looking at the project's effects under the California Environmental Quality Act or CEQA. *Tuolumne Jobs & Small Business Alliance v. S.C.* (Wal-Mart Stores Inc.), S207173.

The Tuolumne Jobs & Small Business Alliance lost at the trial court, but the 5th District Court of Appeal found in its favor, calling the city's move the "antithesis of democracy." If voters had approved the Wal-Mart in an election it would be clearly exempt from CEQA, but a local agency cannot avoid the law by adopting the measure as an ordinance, wrote now-retired Justice Rebecca A. Wiseman in the unanimous decision.

But the high court must look at the plain meaning of the statutes when deciding this case and the law allows a city to immediately adopt an initiative, said Edward P. Sangster, attorney for Wal-Mart Stores Inc., at oral argument Wednesday.

"Isn't that a good way to avoid CEQA?" Justice Ming W. Chin asked.

"It's the way the election code was written," Sangster replied. "If CEQA applied, the [election] statute would have absolutely no meaning."

Wal-Mart and its supporters, including the League of California Cities, argue that the 1911 constitutional amendment that created California's ballot initiative process protects Sonora's action. Once more than 15 percent of voters have signed onto a proposed ballot initiative cities have two options — they can put the initiative up to a popular vote in an election or they can adopt it as written within 10 days.

Requiring a lengthy CEQA review when a city has only 10 days to adopt a ballot measure is impossible and removes a fundamental voter right to legislate through initiatives, said Sangster, a partner with K&L Gates LLP.

"I think the language of the statute supports your position, but I have a hard time seeing how policy issues are served because the people have not approved anything," said Justice Goodwin H. Liu.

The Supreme Court has supported the initiative process in past cases, calling it "a battering ram" to force government to adopt voter-sponsored legislation quickly or put it up for a popular vote, Sangster replied.

Not only does the city not have time to conduct a CEQA review, but it's also exempt from CEQA because the city has no discretion to alter the ballot measure, said John A. Ramirez, a partner with Rutan & Tucker LLP who argued on behalf of the Sonora resident who sponsored the ballot initiative.

"The exercise of constitutional rights can never be a loophole. These rights are celebrated by the courts," Ramirez said.

But John A. Lawrence, arguing for the Tuolumne Jobs & Small Business Alliance, sharply disagreed.

"The fundamental issue this case presents is, 'Can a local initiative override state law?' And if it can … it's welcome to the Wild West," said Lawrence, a partner with Dongell Lawrence Finney LLP.

Several justices pressed Lawrence on CEQA's power to override election law.

"The reason [the city council] could sidestep CEQA is because it got its authority from the elections code, passed by the Legislature," said Chief Justice Tani G. Cantil-Sakauye.

"CEQA is state legislation, but so is the election code, so I'm having trouble embracing your argument," Justice Carol A. Corrigan said.

The Legislature has had more than one opportunity to address this and hasn't, said Justice Kathryn M. Werdegar. "Should we do something they refused to do?"

"I think you rely on your own precedent," Lawrence replied, referring to the court's decision in *Friends of Sierra Madre*. That case held that when a city council, rather than voters, drafts and qualifies its own ballot measure, it must go through CEQA if it adopts it as an ordinance. *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165 (2001).

Tuolumne Jobs' case has created divisions among attorneys who view themselves as supporters of CEQA and its environmental benefits, said Robert "Perl" Perlmutter, a partner with Shute, Mihaly & Weinberger LLP.

While he sees the move by Sonora in this case as an attempt to "end-run" around CEQA, he has worked with citizen groups that have used the same process for environmental benefit, including an anti-growth measure in the city of Fairfield.

The ability to have local governments adopt a citizen-sponsored initiative allows it to enact a policy quickly rather than wait for an election, Perlmutter said.

If enough people are unhappy with such a move, they can gather signatures to force the city to hold a referendum on the decision, he said.

Richard T. Drury, a partner with Lozeau Drury LLP who represents environmental groups, labor unions and others in CEQA cases, said that if the Supreme Court reverses the 5th District Court of Appeal, it will open up a huge hole in CEQA.

"If you've got a big project with big money behind it, this will be the go-to way to avoid CEQA compliance," Drury said. "It creates this ruse in the name of direct democracy, but you're bypassing direct democracy."