

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

AUG 28 2014

ALAN CARLSON, Clerk of the Court

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BY K. BELTRAN

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ORANGE COUNTY SUPERIOR COURT
CENTRAL JUSTICE CENTER

WILLIAM FURNISS, an individual,

Petitioner,

vs.

PAT HEALY, INTERIM CITY CLERK OF
THE CITY OF RANCHO SANTA
MARGARITA; NEAL KELLEY,
REGISTRAR OF VOTERS OF THE
COUNTY OF ORANGE; THE BOARD OF
SUPERVISORS OF THE COUNTY OF
ORANGE, and DOES 1 through 10,
inclusive,

Respondents.

JESSE PETRILLA, an individual;
DONALD CHADD, an individual;
JAMIE CASSIDY, an individual; and
JOSEPH DAICHENDT, an individual; and
DOES 11 through 20, inclusive,

Real Parties In Interest.

Case No.: 30-2014-00740289-CU-WM-CJC

Hon. Kirk H. Nakamura
Dept. C15

**ORDER GRANTING AND DENYING
PETITON FOR WRIT OF MANDATE**

Petition Filed: August, 18, 2014

Hearing Date: August 27, 2014

Hearing Time: 1:30 p.m.

Department: C15

Judge: Kirk H. Nakamura

1 On August 22, 2014, the Honorable William D. Claster, in Department C18 of this
2 Court, issued an Alternative Writ of Mandate and Order to Show Cause pursuant to Petitioner
3 William Furniss' Application for a Writ of Mandate, commanding Respondent NEAL
4 KELLEY, Registrar of Voters of the County of Orange, and Respondent PAT HEALY, City
5 Clerk of the City of Rancho Santa Margarita, to remove the statements from the Real Parties'
6 "Argument in Favor of Measure Z" that are alleged in the Petition to be false, misleading, or
7 inconsistent with the requirements of Elections Code sections 9295 and/or 13314, or, in the
8 alternative, to show cause on August 27, 2014 at 1:30 p.m. in Department C15 of the Orange
9 County Superior Court why Respondent has not done so.

10 The Order to Show Cause came on for hearing on August 27, 2014 at 1:30 p.m. before
11 the Honorable Kirk H. Nakamura, Judge of the Superior Court. Petitioner William Furniss
12 was represented by Michael S. Winsten, Esq. of Winsten Law Group.

13 Respondent Pat Healy, Interim City Clerk of the City of Rancho Santa Margarita, was
14 represented by Lois Bobak, Esq. of Woodruff, Spradlin & Smart, APC. Respondent, Neal
15 Kelley, Registrar of Voters of the County of Orange was represented by Rebecca S. Leeds,
16 Esq., Deputy County Counsel, of the Office of the Orange County Counsel. Real Parties in
17 Interest Jesse Petrilla, Donald Chadd, Jamie Cassidy and Joseph Daichendt were represented
18 by Jeffrey M. Oderman, Esq. of Rutan & Tucker, LLP.

19 The Court, having read the moving, opposing and reply papers of the parties and heard
20 oral argument, ruled as follows:

21 1. The challenge to the identification of Joseph Daichendt as a "Property Owner" is
22 DENIED. The purpose production and distribution of the voter pamphlet is to give the voters
23 information upon which they can make an informed decision as to which way to vote.
24 Therefore, it does not seem reasonable to accept a narrow, technical definition of the word
25 "owner" in this case. As illustrated by his declaration, Mr. Daichendt still exercises some
26 degree of dominion and control over the property. His control is evidenced, among other
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1 things, by his signature on the rezoning application and his presentations to both the Planning
2 Commission and the City Council. The statement is not necessarily "false or misleading."

3 2. The challenge to the statement: "3 auto dealerships closed at this location. . ." is
4 GRANTED. This statement is misleading on its face pursuant to Elections Code section
5 9295(b)(2) and is stricken. The statement suggests that there is a long history of auto
6 dealerships that failed and this is a reason for supporting the initiative. Petitioner has shown
7 that there was simply a succession of businesses and only one "closure." The Court modifies
8 this statement and orders the 6th paragraph of the Real Parties' Ballot Argument in Favor of
9 Measure Z to be changed so it reads as set forth in paragraph 10 below.

10 3. The challenge to the statement: "[T]he Site is in its 7th year of Vacancy." is
11 GRANTED. The court modifies the language to reflect a vacancy term of "approximately 5
12 and 1/2 years." This statement is misleading pursuant to Elections Code section 9295(b)(2)
13 and is stricken. Notwithstanding the Real Parties' contentions that the property has been only
14 7% occupied and therefore, according to insurance definitions, is "vacant", the pictures
15 provided by the Petitioner indicate a reasonable voter would consider the space "occupied" or
16 at least partially or even substantially "occupied." The land may be "legally" vacant, but to
17 categorize it as such is misleading. The Court modifies this statement and orders the 6th
18 paragraph of the Real Parties' Ballot Argument in Favor of Measure Z to be changed so it
19 reads as set forth in paragraph 10 below.

20 4. The challenge to the statement: "Auto industry experts, including one hired by
21 the City, all agree that no automobile manufacturer is interested in reoccupying the site and
22 this situation is not going to change." is GRANTED as to the words "including one hired by
23 the City" and "all". This language is misleading pursuant to Elections Code section
24 9295(b)(2) and is stricken. The Real Parties can still get their point across by deleting the
25 language. The term "all" implies the Real Parties have surveyed the entire universe of auto
26 experts. That clearly is not the case. The Court modifies this statement and orders the 6th
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1 paragraph of the Real Parties' Ballot Argument in Favor of Measure Z to be changed so it
2 reads as set forth in paragraph 10 below.

3 5. The challenge to the statement: "The City then unlawfully refused to place this
4 measure on the ballot and had to be ordered to do so by the Orange County Superior Court." Is
5 GRANTED as to the term "unlawful". The term "unlawful" should be changed to
6 "improperly." The Petitioner claims the term "unlawful" is misleading in that the Court, in the
7 underlying action, found the publication of the notice of intent in the Orange County Register
8 rather than, the Coto de Caza News, a newspaper of general circulation, was in substantial
9 compliance with the statute and the signatures should have been counted. However, there is
10 nothing in the subject order that indicates the petitioners in the underlying action were in
11 "substantial compliance" with the statute for publication. The Court merely found that the
12 City failed to perform mandatory and ministerial duties and ordered it to do so. Because the
13 Court found the City failed to perform its mandatory statutory duty, it failed to follow the law
14 and this was "improper." The term "unlawful" is misleading in that it implies criminal
15 conduct.

16 6. The challenge to the statement: "[T]hree of the five Council members ... wanted
17 to deny you the right to vote." is GRANTED. The Real Parties rely on the two closed sessions
18 of the City Council to support the propriety of the statement. However, the Real Parties have
19 no evidence as to what discussions were held during those closed discussions and the
20 statement "three of the five Council members ... wanted to deny you a right to vote" is
21 misleading. Even if it is true 3 of the 5 members voted to support the rejection of the measure,
22 that fact does not support the Real Parties' nefarious conclusion the decision was made
23 specifically to "deny you a right to vote." It may have been simply because those members
24 felt, in good faith, the terms of the Election Code had not been followed and they did not want
25 to violate the law.

26 7. The challenge to the statement: "The vote of Council to block the productive use
27 of this property. . ." is DENIED in part and GRANTED in part. This statement is not blatantly
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1 false. It is true the City Council may have had other motivation for denying the rezoning of
2 the property (such as wanting to keep in compliance with the City's General Plan) but the
3 effect of the decision is, in the Real Parties' opinion blocking the productive use of the land.
4 The Real Parties' opinions are backed up by evidence showing it was practically impossible to
5 find another auto dealer to lease the subject premises. Unlike item 6, above, the statement
6 does not state the Council Members *wanted* to block the productive use of the land, just that
7 they effectively did. However, the Court orders the word "the" appearing in this statement
8 ~~between the words "block" and "productive" to be stricken. For the sake of clarity, the 4th~~
9 sentence of the 7th paragraph of the Real Parties' Ballot Argument in Favor of Measure Z is
10 ordered to be changed so it shall read: "The vote on Council to block productive use of this
11 property was not unanimous: three of the five Council members are wasting your tax dollars."

12 8. The challenge to the statement: "[T]hree of the five Council members are
13 wasting your tax dollars. . ." is DENIED. This statement is merely an opinion. It does not
14 imply any corruption or official misconduct. The Real Parties simply opine the actions taken
15 by the City Council are a waste of resources tax dollars. Nothing more.

16 9. The challenge to the statement "The existing zoning that narrowly restricts the
17 property to vehicle-related uses has failed." is DENIED. What constitutes "failure" or
18 "success" is very subjective. In the Real Parties opinion the zoning has failed. The Real
19 Parties point to substantial evidence to support their claim. The Petitioner and his declarants,
20 on the other hand, also have a valid opinion the zoning hasn't failed. The Petitioner and his
21 declarants argue zoning is designed to promote the orderly, long-term, comprehensive
22 planning goals of a community and the current zoning has supported those goals. Either way,
23 this statement is one of opinion and not subject to strike as false and/or misleading.

24 10. The Court orders the 6th paragraph of the Real Parties' Ballot Argument in Favor
25 of Measure Z to be changed so it reads in its entirety as follows:

26 "The existing zoning that narrowly restricts the property to vehicle-related
27 uses has failed. Even though the property is located at the busiest

1 intersection in RSM (Santa Margarita Pkwy/Empresa), the Nissan
2 dealership closed in 2008, the site was then vacant for approximately 5-
3 1/2 years, and no new auto dealership has opened there despite the owners'
4 extensive efforts to attract one. Many auto industry experts agree that no
5 automobile manufacturer is interested in reoccupying the site and this
6 situation is not going to change."

7 11. Based on the foregoing, the Court orders the Real Parties' Ballot Argument
8 in Favor of Measure Z to be amended and restated in its entirety so that it reads as follows:

9
10 Argument in Favor of Measure Z

11 Vote "Yes" on Measure Z to eliminate an eyesore and restore the former Nissan
12 automobile dealership property to productive uses.

13 "Yes" means new businesses, jobs, and increased tax revenues to support police, fire,
14 and other vital public services.

15 A "Yes" vote will AFFIRM THE VISION for the property set forth in the City's
16 existing General Plan and RESTORE the original Commercial General zoning to the
17 property.

18 A "Yes" vote brings NEW AMENITIES to RSM. Potential tenants in discussion to
19 occupy the site include Five Guys Burgers, Coffee Bean & Tea Leaf, LA Fitness, Stater
20 Brothers, Chipotle, Whole Foods, and Mother's Market.

21 New businesses bring new jobs and well over \$100,000/year in new local tax revenues.

22 The existing zoning that narrowly restricts the property to vehicle-related uses has
23 failed. Even though the property is located at the busiest intersection in RSM (Santa
24 Margarita Parkway/Empresa), the Nissan dealership closed in 2008, the site was then
25 vacant for approximately 5-1/2 years, and no new auto dealership has opened there
26 despite the owner's extensive efforts to attract one. Many auto industry experts agree
27 that no automobile manufacturer is interested in re-occupying the site and this situation
28 is not going to change.

WE NEED YOUR VOTE! Nearly 4,200 City voters signed the petition to rezone the
property. The City then improperly refused to place this measure on the ballot and had
to be ordered to do so by the Orange County Superior Court. The vote on Council to
block productive use of this property was not unanimous: three of the five Council
members are wasting your tax dollars.

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VOTE "YES" ON MEASURE Z!

More information: www.FreeRSM.com

Joseph Daichendt, Property Owner

Jamie Cassidy, RSM Voter

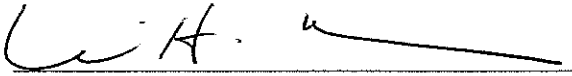
Jesse Petrilla, RSM-City Council Member

Donald Chadd, RSM City Council Candidate

12. Respondent, Neal Kelley, Registrar of Voters of the County of Orange, is commanded to immediately take all steps necessary to effectuate the terms of this Order so that the amended and restated Real Parties' Ballot Argument in Favor of Measure Z set forth in paragraph 11 appears in the Sample Ballots and Voter Information Pamphlet for the November 4, 2014, general election. Respondent Pat Healy, Interim City Clerk of the City of Rancho Santa Margarita, is relieved of any obligation to take any steps necessary to effectuate the terms of this Order.

IT IS SO ORDERED.

Dated: August 28, 2014



Judge of the Superior Court
KIRK H. NAKAMURA