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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF LOS ANGELES

13 COMMUNITY POWER COLLECTIVE,
14 EAST LOS ANGELES COMMUNITY
15 CORPORATION, INCLUSIVE ACTION
16 FOR THE CITY, MERLIN ALVARADO,
17 and RUTH MONROY,

18 Petitioners and Plaintiffs,

19 v.

20 CITY OF LOS ANGELES, LOS ANGELES
21 CITY COUNCIL, BUREAU OF STREET
22 SERVICES, and DOES 1-25,

23 Respondents and Defendants.

Case No. 22STCP04289

Hon. James C. Chalfant

**RESPONDENTS' DEMURRER TO
PETITIONERS' PETITION FOR
WRIT OF MANDATE**

*[Filed concurrently with [Proposed]
Order and Request for Judicial Notice]*

Date: March 16, 2023

Time: 9:30 a.m.

Dept.: 85

Action filed: December 7, 2022

1 **TO THE COURT AND TO ALL PARTIES AND THEIR RESPECTIVE**
2 **ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that respondents City of Los Angeles, Los Angeles City
4 Council, and Bureau of Street Services (collectively, the “City”) demur to petitioners
5 Community Power Collective, East Los Angeles Community Corporation, Inclusive
6 Action for the City, Merlin Alvarado, and Ruth Monroy’s (“Petitioners”) Petition for
7 Writ of Mandate and Complaint for Injunctive and Declaratory Relief (“Petition”) filed
8 in this matter on December 7, 2022.

9 The City submits its demurrer on the basis that a writ of mandate under the
10 California Code of Civil Procedure § 1085 is not the appropriate vehicle to adjudicate
11 Petitioners’ claims. The statute at issue, Gov’t Code § 51038, imposes a discretionary,
12 not ministerial, duty. Furthermore, no abuse of discretion exists here, as the City’s
13 actions were not arbitrary, capricious, or entirely lacking in evidentiary support. And
14 any relief provided via mandamus would likely require the Court to compel the City to
15 exercise its discretion in a particular manner, which a court cannot do. Thus, the City
16 seeks an order from the Court sustaining its demurrer without leave, as no amendment
17 would support mandamus relief.

18 Furthermore, the City is also requesting judicial notice as to three documents:
19 (1) Report of the Chief Legislative Analyst, Los Angeles City Council File 13-1493
20 (Nov. 3, 2017), [https://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_CLA_11-03-](https://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_CLA_11-03-2017.pdf)
21 [2017.pdf](https://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_CLA_11-03-2017.pdf); (2) Communication(s) from Public, Los Angeles City Council File 13-1493
22 (Oct. 17, 2018), https://clkrep.lacity.org/onlinedocs/2013/13-1493_pc_10-17-18.pdf; and
23 (3) Final Ordinance 189500, Los Angeles City Council File 13-1493-S5 (Dec. 6, 2018),
24 https://clkrep.lacity.org/onlinedocs/2013/13-1493-S5_ORD_185900_12-06-2018.pdf.

25 This motion is based upon this notice, the accompanying memorandum of points
26 and authorities, the pleadings and papers on file in this action, and oral and documentary
27 evidence that may be presented at the time of any hearing on this motion.

28 ///

1 DATED: February 8, 2023

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SCOTT MARCUS, Chief Assistant City
Attorney

3 GABRIEL S. DERMER, Assistant City Attorney
4 EMERSON H. KIM, Deputy City Attorney

5 By: /s/ Emerson H. Kim

6 EMERSON H. KIM, Deputy City Attorney
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Petitioners seek mandamus from this Court ordering the City to cease enforcement
4 of Los Angeles Municipal Code (“LAMC”) § 42.13. Petitioners primarily focus on the
5 ordinance’s no-vending zones prohibiting sidewalk vending in specific areas in the city.
6 Petitioners allege that the City has violated its ministerial duty under state law,
7 specifically Gov’t Code § 51038, to ensure that no unjustified restrictions limit the
8 territory on which sidewalk vendors may operate. Petitioners, however, may not obtain
9 judicial relief via a writ of mandate, as no ministerial duty is actually present.

10 Gov’t Code § 51038 imposes a discretionary, not ministerial, duty. The statute
11 inherently requires an exercise of discretion to determine whether a lawful restriction can
12 be placed and to what extent: “A local authority shall not restrict sidewalk vendors to
13 operate only in a designated neighborhood or area, *except when that restriction is*
14 *directly related to objective health, safety, or welfare concerns.*” Gov’t Code §
15 51038(b)(4)(A) (emphasis added). The statute does not issue a ministerial directive
16 requiring a local authority to limit sidewalk vending in a particular area when one of the
17 enumerated risks exist. It simply prohibits limitation when no exception applies.

18 Further, Petitioners’ contention that the City abused its discretion (and should
19 therefore be entitled to relief under California Code of Civil Procedure § 1085) is based
20 on conclusory statements. The City’s invocation of the health, safety, or welfare
21 exception to create no-vending zones is supported by evidence and documentation, as
22 shown in the same Council file to which Petitioners cite. Similarly, Petitioners provide
23 no direct support evidencing perceived community animus or economic competition
24 favoring brick-and-mortar businesses as the reasons for no-vending zones. Ultimately,
25 the City’s record in formulating, drafting, and passing LAMC § 42.13 since 2013
26 inherently contradicts Petitioners’ argument that the City’s actions in creating no-
27 vending zones were arbitrary, capricious, or entirely lacking in evidentiary support.

28 Finally, Petitioners essentially seek the Court to compel the City to exercise

1 discretion in a particular manner by way of traditional mandamus. As noted above, the
2 City has the discretion to determine whether to implement a no-vending zone due to
3 health, safety, or welfare concerns at a particular location and to what extent. The Court
4 would arguably need to step into the role of the local authority to determine which no-
5 vending zone should or should not exist and to what extent (if one should exist). Thus,
6 mandamus is not the appropriate manner to adjudicate these issues.

7 As such, the City respectfully requests that the Court dismiss the Petition.

8 **II. BACKGROUND**

9 In September 2018, the California Legislature enacted SB 946, codified as Gov't
10 Code §§ 51036, *et seq.* The stated purpose in enacting the statute was to establish state-
11 wide standards for sidewalk vending and bar local authorities from regulating sidewalk
12 vendors except in accordance with its provisions. Gov't Code § 51037(a) (“A local
13 authority shall not regulate sidewalk vendors except in accordance with Sections 51038
14 and 51039.”) The allegations in the Petition focus on Gov't Code § 51038, specifically
15 the provisions governing any requirement for vendors “to operate only in a designated
16 neighborhood or area . . .” and allowing local authorities to “adopt additional
17 requirements regulating the time, place, and manner of sidewalk vending . . .” *Id.* §§
18 51038(b)(4)(A), (c). Such restrictions are expressly permitted by statute “when that
19 restriction is directly related to objective health, safety, or welfare concerns.” *Id.*
20 However, the statute makes clear that “perceived community animus or economic
21 competition does not constitute an objective health, safety or welfare concern.” *Id.* §
22 51038(e). Ultimately, local authorities are not prohibited from “adopt[ing] a new
23 program to regulate sidewalk vendors if the local authority has established an existing
24 program that substantially complies with the requirements” set forth in Gov't Code §§
25 51036, *et seq.* *Id.* § 51037(c).

26 After being in development since 2013, on December 6, 2018, the City passed
27 LAMC § 42.13 to regulate sidewalk vending in a manner that substantially complied
28 with state law. Petitioners primarily take issue with LAMC § 42.13(C)(2)(b), which

1 states that “[v]ending is prohibited within 500 feet of: 1) the Hollywood Walk of Fame,
2 Universal Studios and the El Pueblo de Los Angeles Historical Monument . . . 2) Dodger
3 Stadium, the Hollywood Bowl, the Staples Center and the LA Coliseum on event days;
4 and 3) any other venue as determined by the Board of Public Works or Board of
5 Recreation and Parks Commissioners and published in the Rules and Regulations.”

6 **III. LEGAL STANDARD**

7 Petitioners seek a writ of mandate under California Code of Civil Procedure §
8 1085. Pet. ¶¶ 56-69. A writ of mandate under § 1085 is the method of compelling the
9 performance of a legal, ministerial duty. *Pomona Police Officers Ass’n v. City of*
10 *Pomona*, 58 Cal. App. 4th 578, 583-84 (1997). Generally, mandamus will lie when (1)
11 there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty
12 to perform, and (3) the petitioner has a clear and beneficial right to performance.” *Id.* at
13 584 (internal citations omitted). Whether a statute imposes a ministerial duty for which
14 mandamus is available, or a mere obligation to perform a discretionary function, is a
15 question of statutory interpretation. *AIDS Healthcare Found. v. L.A. Cnty. Dept. of Pub.*
16 *Health*, 197 Cal.App.4th 693, 701 (2011).

17 Where a duty is not ministerial and the agency has discretion, mandamus relief is
18 unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus
19 will not lie to compel the exercise of a public agency’s discretion in a particular manner.
20 *American Fed’n of State, Cnty. and Mun. Emps. v. Metro. Water Dist. of S. Cal.*, 126
21 Cal. App. 4th 247, 261 (2005). It is available to compel an agency to exercise discretion
22 where it has not done so (*L.A. Cnty. Emps. Ass’n v. Cnty. of L.A.*, 33 Cal. App. 3d 1, 8
23 (1973)), and to correct an abuse of discretion actually exercised. *Manjares v. Newton*,
24 64 Cal. 2d 365, 370-71 (1966). In making this determination, the court may not
25 substitute its judgment for that of the agency, whose decision must be upheld if
26 reasonable minds may disagree as to its wisdom. *Id.* at 371. An agency decision is an
27 abuse of discretion only if it is “arbitrary, capricious, entirely lacking in evidentiary
28 support, unlawful, or procedurally unfair.” *Kahn v. L.A. City Emps.’ Ret. Sys.*, 187 Cal.

1 App. 4th 98, 106 (2010). A writ will lie where the agency’s discretion can be exercised
2 only in one way. *Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 579 (1974).

3 **A. By Definition, Gov’t Code § 51038 Imposes a Discretionary, not**
4 **Ministerial, Duty.**

5 An act is “ministerial” if a public officer is required to perform it in a prescribed
6 manner in obedience to legal authority and without regard to the officer’s own judgment
7 or opinion concerning the propriety of the act. *Lockyer v. City and Cnty. of S.F.*, 33 Cal.
8 4th 1055, 1082 (2004). Discretion, on the other hand, is the power conferred on public
9 officials to act according to the dictates of their own judgment. *Id.*

10 Here, Petitioners mistakenly assert that Gov’t Code § 51038 imposes a ministerial
11 (mandatory) duty barring the City from implementing no-vending zones. *See* Pet. ¶¶ 56-
12 69. But § 51038 does not explicitly prohibit the creation of no-vending zones—it limits
13 a local authority’s ability to confine vendors to specific zones:

14 A local authority shall not restrict sidewalk vendors to operate only in a
15 designated neighborhood or area, except when that restriction is directly
16 related to objective health, safety, or welfare concerns.

17 Gov’t Code § 51038(b)(4)(A). Even setting that distinction aside, the plain language of
18 the statute requires discretion. Specifically, the exception language of “objective health,
19 safety, or welfare concerns” presupposes that the local authority exercises its discretion
20 in determining whether the risk justifies limiting the location of sidewalk vending.

21 Practically, this language inherently requires discretion on more than one level.
22 The local authority must identify areas where it believes sidewalk vending should be
23 limited. The authority must also assess whether a health, safety, *or* welfare risk to the
24 public justifies limitation—and to what extent—based on objective facts. And even so,
25 the authority can still choose *not* to implement such a limitation. Put differently, the
26 statute does not issue a binary, ministerial directive requiring a local authority to limit
27 sidewalk vending in a particular area when one of the enumerated risks exist. It simply
28 prohibits limitation when no exception applies.

1 Petitioners’ argument that the statute imposes a ministerial duty falls further apart
2 when considering the subsection dealing with time, place, and manner restrictions,
3 specifically applying to Petitioners’ reference to Dodger Stadium, the Hollywood Bowl,
4 the Staples Center (now known as Crypto.com Arena), and the LA Coliseum on event
5 days. Pet. ¶ 44; see Gov’t Code § 51038(c) (“A local authority may, by ordinance or
6 resolution, adopt additional requirements regulating the time, place, and manner of
7 sidewalk vending if the requirements are directly related to objective health, safety, or
8 welfare concerns, including but not limited to, any of the following . . . (2) Requirements
9 to maintain sanitary conditions . . . (3) Requirements necessary to ensure compliance
10 with the federal Americans with Disabilities Act of 1990 . . . (7) Requiring compliance
11 with other generally applicable laws . . .”). The concerns listed in § 51038(c) are broad
12 and inherently require discretion, thus further establishing that the statute does not
13 impose a ministerial duty.

14 Moreover, based on the allegations, Petitioners’ primary focus is not that the City
15 has implemented a no-vending zone in contravention of § 51038 without providing *any*
16 justification; instead, Petitioners seem to aver that the City’s stated justification of
17 overcrowding is unsupported and pretextual. See Pet. ¶¶ 34-43. In other words, it
18 appears that Petitioners’ primary argument for seeking traditional mandamus is based on
19 an alleged abuse of discretion by the City. If this is their argument, it is also without
20 merit.

21 **B. No Abuse of Discretion Exists.**

22 “Mandamus may also issue to correct an agency’s discretionary decision if that
23 decision was made in an arbitrary or capricious manner.” *Bull Field, LLC v. Merced*
24 *Irrigation Dist.*, 85 Cal. App. 5th 442, 456 (2022). The review of an agency’s legislative
25 determination is “limited to an inquiry of whether the act was arbitrary, capricious, or
26 entirely lacking in evidentiary support.” *Fair Educ. Santa Barbara v. Santa Barbara*
27 *Unified Sch. Dist.*, 72 Cal. App. 5th 884, 896 (2021). “However, judicial review of such
28 discretionary decisions is highly deferential.” *Bull Field*, 85 Cal. App. 5th at 456.

1 Here, Petitioners take issue with LAMC § 42.13:

2 Vending is prohibited within 500 feet of: 1) the Hollywood Walk of Fame,
3 Universal Studios and the El Pueblo de Los Angeles Historical Monument
4 (as described in Chapter 25 of Division 22 of the Los Angeles
5 Administrative Code); 2) Dodger Stadium, the Hollywood Bowl, the
6 Staples Center and the LA Coliseum on event days; and 3) any other venue
as determined by the Board of Public Works or Board of Recreation and
Parks Commissioners and published in the Rules and Regulations.

7 LAMC § 42.13(C)(2)(b). Though all seven locations are referenced by Petitioners, they
8 focus on the Hollywood Walk of Fame, as both individual Petitioners' allegations are
9 specific to sidewalk vending in that area only. Pet. ¶ 20. Petitioners contend that the
10 City's justification in implementing the Hollywood Walk of Fame no-vending zone is
11 merely a conclusory assertion unsupported by data, documentation, or other evidence.
12 Pet. ¶¶ 46-47. Petitioners further contend that the true purpose of the no-vending zone is
13 "to eliminate sidewalk vendor competition with local merchants operating from a brick-
14 and-mortar location or else to appease the perceived community animus" which are the
15 two bases that do not constitute objective health, safety, or welfare concerns under §
16 51038. Pet. ¶ 49; Gov't Code § 51038(e) ("For purposes of this section, perceived
17 community animus or economic competition does not constitute an objective health,
18 safety, or welfare concern."). However, these are unsupported, conclusory allegations.

19 The Council files, which Petitioners cite at length in their Petition, demonstrate
20 that the City identified objective health, safety, or welfare concerns in implementing the
21 no-vending zones. The November 3, 2017 report by the Chief Legislative Analyst
22 identified possible criteria, such as "inadequate parking that creates unsafe conditions"
23 and "[p]edestrian safety (high commercial activity and visitor pedestrian traffic)."
24 Report of the Chief Legislative Analyst, Attachment 2 at 2, Los Angeles City Council
25 File 13-1493 (Nov. 3, 2017), [https://clkrep.lacity.org/onlinedocs/2013/13-](https://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_CLA_11-03-2017.pdf)
26 [1493_rpt_CLA_11-03-2017.pdf](https://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_CLA_11-03-2017.pdf). And the Hollywood Walk of Fame was highlighted for
27 these concerns: "Hollywood Boulevard, for example, may require restrictions given the
28 level of safety concerns raised as a result of high commercial activity and the number of

1 visitors.” *Id.* The record is further supported by an October 17, 2018 special joint
2 meeting between the Public Works and Gang Reduction Committee, Economic
3 Development Committee, and Arts, Entertainment, Parks and River Committee, where
4 communications from the public included photographs of sidewalk vending and
5 pedestrians along Hollywood Boulevard. Communication(s) from Public, Los Angeles
6 City Council File 13-1493 (Oct. 17, 2018), [https://clkrep.lacity.org/onlinedocs/2013/13-
7 1493_pc_10-17-18.pdf](https://clkrep.lacity.org/onlinedocs/2013/13-1493_pc_10-17-18.pdf). And the City made clear that the restrictions were directly
8 related to an objective health, safety, or welfare concern when passing the final
9 ordinance:

10 **WHEREAS**, vending within 500 feet of popular tourist attractions
11 and concert and sport venues on event days impacts pedestrian, tourist and
12 vendor safety due to overcrowding on sidewalks, which results in
13 pedestrians walking in the street and along the sidewalk to keep moving
14 forward. These venues also experience a high amount of traffic, affecting
the safety of pedestrians and motorists, due to a high concentration of
visitors at one time;

15 Final Ordinance 189500, Los Angeles City Council File 13-1493-S5 (Dec. 6, 2018),
16 https://clkrep.lacity.org/onlinedocs/2013/13-1493-S5_ORD_185900_12-06-2018.pdf.

17 Thus, the City’s decision to establish specific no-vending zones was not an abuse of
18 discretion, meaning it was not arbitrary, capricious, or entirely lacking in evidentiary
19 support. To the contrary, the implementation was a lengthy, comprehensive process
20 involving multiple reports, hearings, and public comments, which is apparent when
21 reviewing the Council files as well as the allegations in the Petition. *See* Pet. ¶¶ 34-43.

22 Furthermore, Petitioners’ contention that the City implemented these no-vending
23 zones due to community animus is unsupported. Petitioners proffer no evidence, let
24 alone specific allegations, for the conclusory statement that perceived community
25 animus played any role in the creation of these zones.

26 Nor does Petitioners’ contention make sense that the City established these zones
27 out of economic competition bias in favor of brick-and-mortar businesses. As discussed
28 in the Petition, approximately four years prior to SB 946 becoming law, the City

1 grappled with balancing the interests of local businesses and sidewalk vending. Pet. ¶¶
2 35-43. As Petitioners point out, the Council files reflect early consideration and desire to
3 create permit requirements that would include the consent of adjacent property owners or
4 businesses. *Id.* ¶ 38. However, once SB 946 was enacted, the City abandoned any such
5 requirement and embarked on “a new Sidewalk Vending Ordinance consistent with SB
6 946,” which ultimately became LAMC § 42.13 as it reads today. *Id.* ¶ 41. In other
7 words, the City specifically removed the provision that Petitioners contend is at play
8 here.

9 Petitioners also emphasize the scope and geographic extent of the Hollywood
10 Walk of Fame no-vending zone, alleging that the 500 foot buffer area is “expansive” and
11 is “transparently calculated to eliminate sidewalk vendor competition with local
12 merchants” Pet. ¶ 49. Yet Petitioners’ attached exhibit shows that the zone pushes
13 vendors merely one block away from Hollywood Boulevard. *See* Pet. Ex. A at 3. To
14 contend that this zone was solely designed to shield businesses falls flat when looking at
15 the map. For example, Sunset Boulevard, which is only two blocks south of Hollywood
16 Boulevard and also lined with local merchants, is mostly unaffected. *See id.* Petitioners
17 may contend that Hollywood Boulevard is inherently more attractive profit-wise due to
18 increased foot traffic, but that argument also cuts against them, as it supports the City’s
19 point that the no-vending zones were driven by public safety concerns, such as
20 overcrowding due to pedestrian traffic specifically along the Hollywood Walk of Fame.

21 Moreover, Petitioners’ argument that the mere existence of the Al Fresco dining
22 program is evidence of such economic competition bias is unavailing. As they admit,
23 “some City guidelines suggest that ‘permitted food vendors’ might seek to join the Al
24 Fresco program.” *Id.* ¶ 54 n.6. Though they go on to contend that the program “is
25 explicitly limited to business and property owners,” the City’s public website states that
26 sidewalk food vendors can apply. L.A. Al Fresco,

27 <https://coronavirus.lacity.org/laalfresco> (last visited Feb. 7, 2023) (“**Who can apply?**
28 The program will be available to all restaurants, bars, and permitted sidewalk food

1 vendors and food trucks in the City of Los Angeles.”). If Petitioners’ argument is that
2 practically this has not occurred, then their issue is with the application of the Al Fresco
3 program. Such does not support their argument that the City created no-vending zones
4 for the purpose of shielding economic competition to the exclusive benefit of local
5 business owners when it passed LAMC § 42.13. Temporally and substantively, the two
6 are discrete, as the Al Fresco program was passed in 2020 in response to the COVID-19
7 pandemic while LAMC § 42.13 was passed in 2018 to decriminalize and facilitate safe
8 sidewalk vending throughout the City. And Petitioners proffer no evidence or allegation
9 that the Al Fresco program was designed to circumvent Gov’t Code § 51038. *See* Pet. ¶¶
10 53-55.

11 **C. Petitioners Essentially Seek the Court to Compel the City to Exercise**
12 **Discretion in a Particular Manner.**

13 Traditional mandamus is a proper remedy to compel an agency to exercise its
14 discretion if the agency is legally required to do so; however, the court cannot compel
15 the agency to exercise its discretion in a particular manner. *Hollman v. Warren*, 32 Cal.
16 2d 351, 354-356 (1948); *Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 445
17 (1989) (“[I]t is well settled that although a court may issue a writ of mandate requiring
18 legislative or executive action to conform to the law, it may not substitute its discretion
19 for that of legislative or executive bodies in matters committed to the discretion of those
20 branches.”)

21 Here, Petitioners do not properly seek mandamus relief. Though they seek an
22 order “directing Respondents to withdraw, and cease enforcement of, all such
23 provisions . . .” such an order would likely require the Court to instruct the City to
24 exercise its discretion in a particular manner. Again, the local authority has the
25 discretion to determine whether to implement a no-vending zone due to health, safety, or
26 welfare concerns at a particular location and to what extent. The Court would arguably
27 need to step into the role of the local agency to determine which no-vending zones
28 should or should not exist and whether the 500 foot buffer area should be adjusted if it

1 determines that an objective health, safety, or welfare concern exists. The Court would
2 be instructing the City to exercise its discretion in a particular manner. Thus, mandamus
3 is not the appropriate method to address the claims made by Petitioners. Therefore, the
4 City's demurrer should be sustained, and the Petition should be dismissed.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the City respectfully requests that the Court sustain its
7 demurrer without leave, as no amendment would support mandamus relief.

8
9 DATED: February 8, 2023

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