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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO - UNLIMITED JURISDICTION

11 SEAN PATRICK MONETTE-SHAW,

Civil No. 04-504777

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Petitioner,

13 -vs.-

14 SAN FRANCISCO BOARD OF SUPERVISORS,
15 the Board of Supervisors of the City and County of
16 San Francisco; GAVIN NEWSOM, Mayor of the
17 City and County of San Francisco, a city and county
18 of the State of California; SAN FRANCISCO
19 HEALTH COMMISSION, a board of the City and
County of San Francisco; and EDWARD
HARRINGTON, Controller of the City and
County of San Francisco,

PETITIONER'S REPLY
TO OPPOSITION

Date : March 15, 2005
Time : 9:30 a.m.
Dept. : 301
Judge : Hon. James Warren

20 Respondents.

First Filed 11/23/04

1 **PETITIONER'S REPLY TO OPPOSITION**

2 **Recap of relief requested**

3 The within motion of petitioner Monette-Shaw, a citizen and resident of San Francisco,
4 is for a peremptory writ of mandamus under § 1085 Code of Civil Procedure to command the
respondents:

6 - **first**, to restore \$25 million which was misappropriated from tobacco settlement
7 revenues (TSRs) which had been received in express trust under Proposition A, for construction
8 costs and to service Proposition A construction bonds for a new facility (the "new LH") to
replace the existing 1,200-bed Laguna Honda Hospital facility;

9 - **second**, to command the respondents to perform the ministerial duty to refrain from
10 reducing, and to refrain from letting construction contracts which reduce, the size or floors of
11 the new LH below the 1,200 long-term care patient capacity which was promised to the
12 electorate by the City and its officials in their 1999 campaign to obtain passage of Proposition
13 A;

14 - **third**, to command the respondents not to let or approve the letting of any new
15 constructions contracts, **unless and until** the \$25 million misappropriated TSRs (mentioned
16 above) is restored to the TSR trust fund, and used to make up at least \$25 million of the current
17 new LH construction cost budget overrun, so that the planned 1,200 long-term care patient
capacity of the new LH is maintained to the extent which is feasible.

18 **The Opposition is ultimately without merit**

19 **PART ONE**

20 **I. The City raises issues of the greatest public importance in its Opposition,**
21 **which, however important they may be, must be decided against the City,**
so as to avoid a fraud upon the voters.

22 The Opposition claims that the City is not bound by either the **ballot proposal** of the
23 Proposition A measure which is set forth at Page 33 of the Voters Pamphlet, or by the **Digest**
24 of the measure which is set forth by the San Francisco Ballot Simplification Committee on the
25 same Page 33 of the Voters Pamphlet.

26 Rather, says the Opposition, the City is bound by the provisions which are set forth in the
27 **bond ordinance**, which are set forth at Page 55 of the Voters Pamphlet, insofar as the provisions

1 of the *bond ordinance* differ from the provisions of the **ballot proposal** or from the **Digest** of
2 the measure.

3 In this respect the Opposition claims that the *bond ordinance* provides that the only
4 TSRs required to be expended on the Project are those TSRs which are received **after**
5 Proposition A bonds have been issued.

6 Since no Proposition A bonds have been issued, then, ergo, according to the Opposition,
7 **all of the approximately \$100 million of TSRs** which have been received by the City to date,
8 are not required by the *bond ordinance* to be expended on the Project.

9 Accordingly, – if this view of the matter is law, – then not only has there been no
10 express trust created in respect to the \$25 million of TSRs which was taken by the City in fiscal
11 2002-03, but, the City is free to use the remainder \$75 million of TSRs so far received for any
12 purpose it wishes.

13 This case therefore involves public issues of the highest pressing concern, because if the
14 Opposition is correct, then the City can solve its current unprecedented fiscal crisis by simply
15 taking the remaining \$75 million out of the Tobacco Settlement Revenues sub-Account in which
16 they are being held, and expend the \$75 million to make up for all General Fund shortfalls
17 which the City may currently have.

18 Also, if the Opposition is correct, then, that is the end of the new LH, for without all of
19 the \$100 million of TSRs received to date, (including the \$25 million taken by the City in fiscal
20 2002-03), no meaningful amount of construction of the new LH can be done.

21 Scheme of the rest of this brief

22 In the rest of this brief the petitioner will shore up his claims (1) that the **ballot**
23 **proposal**, at Page 33 of the Voters Pamphlet, unambiguously provides that all TSRs received by
24 the City are required to be used for new LH construction and Proposition A bond service; so that
25 an express trust, for that trust purpose, is thereby imposed upon all TSRs so received; (2) that
26 the conclusion of the **Digest** of the San Francisco Ballot Simplification Committee, (namely,
27 that **all** TSRs received by the City are required to be used to construct the new LH and service
28 its bond debt), is binding upon the City; and (3) that in this unprecedented case of conflict
between the provisions of the *bond ordinance*, on the one hand, and the provisions of the **ballot**

1 proposal and of the Digest of the measure, on the other hand, that the provisions of the ballot
2 proposal and/or the Digest must prevail, because (1) it is the ballot proposal, not the *bond*
3 *ordinance*, which is on the ballot for which the voter voted “yes” or “no;” and because (2)
4 otherwise a fraud upon the voters would be perpetrated.

5 II. All TSRs received by the City are required by the *ballot proposal* of the measure
6 (at Page 33 of the Voters Pamphlet) to be used for construction of the new
7 LH and to service Proposition A bond debt.

8 Also, the City is bound by the ruling of the Digest of the San Francisco
9 Ballot Simplification Committee, which told voters that the measure requires all
10 TSRs received to be used to pay construction costs and to service Proposition A
11 bond debt.

12 Accordingly, by the established law of trusts, all TSRs are received subject
13 to these directions, – (namely, that they be used to construct the new LH and to
14 service Proposition A bond debt), – are received in express trust, to be used for
15 construction of the new LH, and to service Proposition A bond debt.

16 I.e., the receipt of monies subject to A direction that the funds be used for a stated
17 purpose, without more; and without any requirement that the parties understood or agreed that
18 an express trust was thereby entered into. (Ennis-Brown v. Rochdale L. Co., 47 Cal. App.508
19 (1920); McGee v. Bank of America, 60 Cal.App.3d 442; Scott on Trusts, 3d ed. § 2.8.)

20 III. The specific provisions of the ballot proposal and of the Committee’s Digest

21 The *ballot proposal* of the measure provides that:

22 “LAGUNA HONDA HOSPITAL, 1999. Shall the City and County of San Francisco
23 incur bonded debt and/or other evidences of indebtedness and/or undertake lease
24 financing, in an aggregate principal not to exceed \$299,000,000, for the acquisition,
25 improvement, construction and/or reconstruction of a new health care facility, assisted
26 living and/or other type of continuing care facility or facilities to replace Laguna Honda
27 Hospital, and reduce the property tax impact by requiring the application of available
28 tobacco settlement monies received by the City and County, and any state and/or
federal grants or funds received by the City and County that are to be used to fund these
facilities, (a) to finance the acquisition, improvement, construction and/or
reconstruction costs of such facilities, and (b) to pay the principal and redemption
price of, interest on, reserve fund deposits, if any, and/or financing costs for the
obligations authorized hereby? (Emphasis supplied.)

There is no hint or suggestion of ambiguity in this *ballot proposal*. Accordingly the provision in

1 the **ballot proposal** that the tax impact is to be reduced “by requiring the application of
2 available tobacco settlement monies received by the City” to finance construction costs of the
3 new LH, and to service the Proposition A bond authorized by the measure, cannot mean
4 anything other than that **all** TSRs received, not just **some** of them, shall be used to pay costs to
5 construct the new LH and to service the Proposition A bonds.

6 This is so plain that the San Francisco Ballot Simplification Committee, whose function
7 under §§ 500 and 600 of San Francisco Elections Code is to prepare a digest of each local
8 measure which is to be voted on, readily construed Proposition A to so require as set forth
above. Thus, the **Digest**, (at Page 33 of the Voters Pamphlet), stated that:

9 “Proposition A also provides that all tobacco settlement monies received by the City,
10 after \$1 million is set aside each year for smoking education and prevention programs,
11 would be used to pay for some construction and to offset the cost to property owners
of repaying the bonds.” (Emphasis supplied.)

12
13 Accordingly, by the above directions in the **ballot proposal** of the measure, (Page 33 of
14 the Voters Pamphlet), as well as by the above ruling and ballot proposal of the Ballot
15 Simplification Committee that this was the meaning of Proposition A, **all** TSRs, not just **some**
16 of them, are received in express trust for the exclusive use to be expended solely for
construction costs of the new LH, and to service Proposition A bond debt.

17 (See, the trust law cases cited on Page 3 of this brief.)

18
19 **IV. The Opposition hews to the erroneous claim that the *bond ordinance* (at Page 55 of**
20 **the Voters Pamphlet), supersedes the contrary provisions in the *ballot proposal* and**
in the Digest of the measure, (at Page 33 of the Voters Pamphlet).

21 Approval by the Court of this Opposition claim would put the judicial seal of approval
22 on what is essentially a bait-and-switch, in which municipalities would be given the judicial go-
23 ahead to first enact a *bond ordinance* which places a bond measure on the ballot; then draft a
24 **ballot proposal** which has salutary language to persuade the voters to pass the measure; but
25 which *bond ordinance* has completely contradictory wording which would nullify the salutary
26 provisions of the ballot proposal. Then, when the bond measure passes, the governing board

1 says that it was the provisions of the *bond ordinance* which the voters passed, not, the
2 provisions of the **ballot proposal** or question put to the voters in the voters pamphlet and the
3 voting booth; so that by this bait-and-switch, back-door politics can continue as usual.

4 In this respect the Opposition has been unable to come up with a single case decision
5 which holds that, where a municipality puts Language X in a *bond ordinance*, but, obtains
6 passage of the measure by using a **ballot proposal** and a **Digest** of the measure which says Y,
7 that the municipality can enforce the measure on the basis that Language X, which the voters did
8 not approve, applies, and that Language Y, which the voters did approve by marking “Yes” to
9 the **ballot proposal** in the ballot booth, does not apply.

9 **Petitioner Monette-Shaw’s claims in this Reply**

10 **Conclusion:** Petitioner Monette-Shaw takes the position, that his claim of express
11 trust, and misappropriation of trust funds is supported by the conceded facts and the law
12 which is set forth in this brief, and, the defense of the respondents is without merit.

13 **PART TWO**

14 V. **Under the Laguna Honda Compact a facility with 1,200 beds is required
15 to be constructed, to the extent there are sufficient TSRs to do so.**

16 **Public officials’s statements in voters pamphlets which do not seek to change
17 the substance or effect of the ballot proposition, but to confirm what is
18 implicit or inferable from the provisions of the ballot proposition, are admissible to
19 aid the Court to construe the terms of the obligation devolved upon the City by the
20 passage of Proposition A.**

21 **First.** A municipality becomes subject to a contract or an obligation “analogous” to a
22 contract when the electorate passes a ballot proposition for issuance of bonds. (Associated
23 Students of North Peralta Community College v. Board of Trustees (1972) 92 Cal.App.3d 672,
24 676-678.) The terms of the municipal obligation are derived from several sources, not least of
25 which is the ballot proposition itself. Other sources from which the municipal obligation is
26 determined are the bond ordinance which submitted the proposition to the voters; and the
27 “assent or ratification” of the electors; and “extrinsic sources.” (Associated Students, supra, 92
28 Cal.App.3d at 676-678.)

Also, due to the enactment of § 500 and 600 San Francisco Elections Code, which
requires a digest by the San Francisco Ballot Simplification Committee to be included in the

1 Voters Pamphlet for each local measure to be voted on, the Committee's ruling or interpretation
2 of the provisions of the measure is also, necessarily, a source which must be considered in
3 determining the extent of the municipal obligation arising from passage of a bond proposition.

4 There is no rule or decision which holds that representations made by municipal officials
5 in the official voters pamphlet mailed to all voters are not admissible as one of the sources from
6 which the terms of the municipal obligation, arising from passage of a bond measure, is
7 determined. In fact, in Associated Students, *supra*, 93 Cal.App.3d at 678-679, a ballot argument
8 by college officials was considered by the Court and rejected, not because it was a ballot
9 argument of college officials but because the particular ballot argument proved nothing.

10 The petitioner submits that in this case that "extrinsic sources" include (1) statements
11 made to the voters in the proponents argument and rebuttal in the Voters Pamphlet which was
12 mailed to all voters, (which proponents' argument and rebuttal is required by § 500 San
13 Francisco Elections Code), (2) other statements by San Francisco's entire officialdom which
14 were made in the Voters Pamphlet, and (3) statements by prominent citizens **which are offered,**
15 **not to show their "understanding" of the proposition, but, to show what had been**
16 **represented to them by the City and its officials.**

17 In conclusion: The provisions of the *ballot proposal* prevail over contrary provisions in
18 the *bond ordinance*, for the reason that the wording of the *ballot proposal* is what the voters
19 approved, not, any contrary wording in the *bond ordinance* which were not presented to or
20 approved by the voters in the ballot and the "yes" votes approving the terms of the *proposition*
21 set forth in the ballot.

22 Further, the measure to which the City is bound is the obligation collected from all the
23 above sources, namely, the proposition submitted to the voters, (the *ballot proposal*), the *bond*
24 *ordinance*, and the officials' representations made to the voters which are set forth below.

25 **Second.** The primary cases cited by the City, (City of Los Angeles v. Dannenbrink
26 (1965) 234 Cal.App.2d 642, 655, and Mills v. S.F. Bay Area Rabid Transit District (1968) 261
27 Cal.App.2d 666, 669), involved "some" campaign statements made by public officials, the
28 content of which is unknown, which were **outside** of and not included in the official voters
pamphlet distributed to all voters. However:

1 - None of the statements were **official** statements required or authorized by specific
2 ordinances to be made, (such as the arguments of the members of the Board of
3 Supervisors as the **proponents** of Proposition A, pursuant to § 500, subs. (8), San
4 Francisco Elections Code).

5 - None of the statements were made in a voters pamphlet, as are all the officials'
6 statements in the case at bar.

7
8 - None of the statements were made en masse, on a massive basis, of the entire
9 officialdom of the municipality, as in case at bar.

10
11 Also, most importantly, the statements condemned in the cases cited, such as Dannenbrink,
12 *supra*, 234 Cal.App.2d at 655, were statements made to change the substance or effect of the
13 proposal to be voted upon. In case at bar, however, the ballot proposal given to the voters
14 was to issue bonds and use TSRs “to replace Laguna Honda Hospital,” which is a 1,200-bed
15 long-term care facility. Therefore, inferentially, the ballot proposal called for nothing less than a
16 new 1,200-bed long-term care facility; for a facility with, say, only 800 long-term care beds
17 would be only a **partial replacement**; i.e., would not “replace Laguna Honda Hospital” as
called for in the ballot proposal.

18 Hence the statements of the City’s entire officialdom in the Voters Pamphlet, in which
19 the compact sued upon was entered into between the City and the electorate, **did not seek to**
20 **change the substance or effect** of the Proposition A ballot proposal to “replace Laguna Honda
21 Hospital,” but, rather, were statements to **effect** the purpose of, and to make plain to the voters
22 that to “replace Laguna Honda Hospital,” as used in the ballot proposition, meant to build a
23 1,200-bed long-term care facility to replace the existing Laguna Honda Hospital’s 1,200-bed
long-term care facility.

24 Such statements of officials in explanation and confirmation of the terms which are
25 implicit or inferable in a ballot proposition, are not condemned by any of the cases cited by the
26 City.

1 VI. **The only case cited by the City on the issue of the binding effect of the**
2 **construction given to the Proposition A measure, by the Digest of the**
3 **Ballot Simplification Committee, is inapplicable on its facts.**

4 The Opposition brief, at page 13, lines 18-24, makes the futile argument that the
5 construction and statement of the Proposition A measure by the Ballot Simplification
6 Committee, in its **Digest**, at Page 33 of the Voters Pamphlet, (**Exhibit C** of the City's Request
7 for Judicial Notice), is inadmissible under City of Los Angeles, supra, 234 Cal.App.2d at 655,
8 which ruled that "no public official or private citizen is authorized to change the substance or
9 effect" of a bond proposal.

10 Here, the City is in error for at least two reasons.

11 **First**, the Ballot Simplification Committee is not just some public official who is making
12 campaign statements to "change the substance and effect" of the *bond proposition*.

13 To the contrary, the San Francisco electorate got sick and tired of ballot measures which
14 appeared to them to mean one thing, only for City government to interpret the measure
15 differently. So §§ 500 and 600 City Elections Code were passed to stop these bait-and-switch
16 tactics of City Hall.

17 § 600 City Election Code provides that an official Ballot Simplification Committee is
18 established, to consist of five voting members and the City Attorney as an ex officio nonvoting
19 member to advise the Committee on the meaning of ballot measures. The Committee's duty and
20 function is to "(p)repare a digest of each measure that will be voted on only in the City and
21 County of San Francisco," i.e., so that the electorate will be officially told by the City, and
22 know, what it is they are voting on.

23 Further, in preparing and issuing its **Digest** of a ballot measure, the Committee manifestly
24 functions in a quasi-judicial administrative capacity to construe the meaning of ballot measures
25 such as Proposition A; which construction or administrative adjudication of the meaning of the
26 Proposition A measure is **first, conclusive** on the City as to the construction, by the Committee,
27 that the measure requires **all** TSRs, – (**not just the first \$100 million** of TSRs received **after** the
28 Proposition A bonds are issued), – are required to be used for construction of the new LH, and
to service Proposition A bond debt.

Second, the **Digest** of the Committee is manifestly not by any means a mere "campaign

1 statement” of an unauthorized public official seeking to “change the substance or effect” of the
2 Proposition A measure; but rather, it is the other way around: the Digest’s duty and purpose is
3 to set forth the true substance and effect of the measure.

4 In summary, the San Francisco Ballot Simplification Committee’s interpretation and
5 statement in its Digest, at Page 33 of the Voters Pamphlet, of the plain meaning of the
6 Proposition A measure, in respect to the required use of all TSRs to construct the new LH and
7 service the Proposition A bond debt, is conclusive upon the City in case at bar.

8 **VII. The statements of City officials in the Voters Pamphlet, both in proponents and**
9 **rebuttal arguments required by the local Elections Code to be included in the**
10 **Voters Pamphlet, and other statements, demonstrate that the proposition presented**
11 **to the voters was a proposition for the building of a 1,200-bed long-term care**
12 **facility to replace the existing 1,200-bed long-term care facility, using all TSRs**
13 **received by the City to do so.**

14 Petitioner offers into evidence the below statements which were made to the voters by
15 the members of the Board of Supervisors, the Mayor, the Health Commission, the Director of
16 Public Health, the City Attorney, – namely, the entire body of City officialdom, – in the Voters
17 Pamphlet, which confirmed that the meaning of the provision in the Proposition A ballot
18 proposal “to replace Lagune Honda Hospital,” was to replace the existing 1,200-bed long-term
19 care facility by a new long-term care facility with the same number of long-term care patients;
20 and, to use all TSRs to do so, as provided in the ballot proposition known as Proposition A.

21 Petitioner also offers into evidence some statements of prominent citizens of San
22 Francisco, not to evidence their “understanding” of the *ballot proposal*, but to evidence the
23 statements of City officials of which the citizens’ statements are a reflection.

24 Thus, the petitioner offers the following evidence consisting of the statements of City
25 agencies or officers in the Voters Pamphlet:

26 **First: The Digest of the San Francisco Ballot Simplification Committee:**

27 **“THE WAY IT IS NOW: . . . Laguna Honda provides more than 1,000 residents**
28 **with long-term care, regardless of ability to pay, including skilled nursing, AIDS**

1 and dementia services, hospice, rehabilitation, and acute care. . . .

2 **THE PROPOSAL:** Proposition A would authorize⁴ the City to borrow \$299 million by
3 issuing general obligation bonds to acquire, constructor reconstruct a health care,
4 assisted living, and/or other type of continuing care facility or facilities to replace
5 **Laguna Honda Hospital. . . .**

6 **Proposition A also provides that all tobacco settlement monies received by the City,**
7 **after \$1 million is set aside each year for smoking education and prevention programs,**
8 **would be used to pay for some construction and to offset the cost to property**
9 **owners of repaying the bonds.”** (Emphasis supplied.)

10 **Second:** The proponents’ argument, by the Board of Supervisors:

11 “Since 1866 San Francisco has cared for our elderly and disabled at Laguna Honda
12 Hospital. Proposition A enables us to continue fulfilling this moral obligation into the
13 next century.

14 Extensive studies by medical experts, architects, financial analysts and patient advocates
15 show conclusively that **rebuilding Laguna Honda** at its current location is the most
16 cost-effective and humane solution.” (Emphasis supplied.)

17 **Third:** The rebuttal argument by the Board of Supervisors:

18 “Painstaking analysis by healthcare, finance and social service experts shows that
19 **rebuilding Laguna Honda Hospital** is the least expensive way to provide quality
20 healthcare to the greatest number of San Francisco’s elderly and disabled.

21 “Yes, **rebuilding Laguna Honda** is expensive, but other alternatives **erving the**
22 **same number of people** would be far more costly. . . .

23 **Dispensing Laguna Honda’s population to smaller public facilities** would require
24 wasteful duplication of costly medical equipment. . . . (Emphasis supplied.)

25 **Fourth:** Mayor Willie Brown:

26 “Everyone agrees that using San Francisco’s share of money won from these tobacco
27 companies to build Laguna Honda Hospital is the best use of this once-in-a-lifetime
28

1 financial windfall.”¹

2
3 **Fifth:** Lee Ann Monfedeini, President, San Francisco Health Commission
Roma Guy, Vice-President, Health Commission

4 Members of the Health Commission:

- 5 - Edward A. Chow, M.D.
6 - Ronald Gene Hill, Chair, Budget Committee
7 - David J. Sanchez, M.D.
8 - John Umekubo, M.D.:

9 **“Rebuilding Laguna Honda Hospital** is the least expensive and least disruptive way to assure **continued care for current residents**, and to assure the availability of medical/skilled nursing care for San Francisco who will need these services in the future.

10 **Talk of a “smaller Laguna Honda”** by Proposition A opponents is irresponsible . . .
11 (Emphasis supplied..)

12 **Sixth:** Congresswoman Nancy Pelosi:

13 “I support Proposition A to save Laguna Honda Hospital because it is the best option to
14 ensure the 1,200 patients at the hospital get the best, quality long-term care possible.”²

15 **Seventh:**

- 16 - **Walter Johnson, Secretary-Treasurer, San Francisco labor Council**
17 - **Sal Roselli, President, Healthcare Workers, Local 250**
18 - **Stanley Smith, Secretary-Treasurer, S.F. Building Trades Council**
19 - **Kent Mitchell, United Educators of San Francisco:**

20 “The new state-of-the-art structure will continue to provide the highest-quality, 24-hour
21 care for 1,200 residents, while meeting the growing demands of the twenty-first
22 century.”³

23
24 _____
25 Page 37 of Voters Pamphlet.

26 ² Page 39 of Voters Pamphlet.

27 Page 41 of Voters Pamphlet..

1 **Eighth: Mitchell Katz, Director of Public Health; and Louise Renne, San**
2 **Francisco City Attorney:**

3 “We chaired this commission, which was appointed by the health commission, with the
4 goal of identifying the very best plan for **rebuilding** Laguna Honda Hospital.”⁴
(Emphasis supplied.)

5 **Ninth: FDR Democratic Club for Seniors and People with Disabilities:**

6 “(W)e oppose a new 1,200-bed Laguna Honda.”⁵

7
8 **Eleventh: Independent Living Resource Center San Francisco:**

9 “We oppose the rebuilding of Laguna Honda Hospital at its current level of
10 1200 beds.”⁶

11 **Twelfth: Supervisor Barbara Kaufman, (in paid argument against Proposition A):**

12 “This bond measure ensures construction of 1,200 skilled nursing beds.”⁷

13
14 **Thirteenth: Committee to Stop the Giveaway, (in paid argument against Prop. A):**

15 “NO CIVILIZED CITY SHUNTS ITS DISABLED INTO 1,200-bed
16 warehouses.”

17
18 **VIII. Petitioner claims that a peremptory writ of mandamus is needed at once**
19 **to prevent letting, and approval of letting, of construction contracts**
20 **under plans which reduce the size or floors of the new LH so as to,**
21 **needlessly, without justification, substantially reduce the number of**
22 **long-term care beds is supported by the respondents’ Opposition papers.**

23 First, the respondent Health Commission meets the afternoon of March 15, 2005, the
24 date of the hearing of the within motion for peremptory writ.

25 ⁴ Page 41 of Voters Pamphle.

26 ⁵ Page 51 of Voters Pamphlet.

27 ⁶ Page 52 of Voters Pamphlet..

28 ⁷ Page 52 of Voters Pamphlet.

1 Second, the petitioner alleged that the respondents had adopted a \$401.6 million
2 construction budget for the new LH construction. This is admitted in the Opposition papers.

3 Third, the petitioner alleged that on October 19, 2004, the Board of Supervisors enacted
4 an ordinance, (File No. 041246), the effect of which ordinance is that several floors in the new
5 LH will be eliminated in the construction bids to be issued, due to the fact that bids for the first
6 construction phase indicated that costs to construct the entire project would would exceed the
7 \$401.6 million budget by anywhere from \$32 million to \$40 million.

8 Here, the Opposition papers admit the cost overrun, but state that due to a round of
9 rebidding, the rebid packages now in hand comprise a cost budget overrun of **only \$28 million**.
10 Also, a round of value engineering has reduced the cost budget overrun by \$2 million, so that the
11 **present new LH cost budget overrun is now only \$26 million**, – which need only the consent
12 of the Health Commission at its March 15, 2005 meeting, and the sign-off approval by the
13 Controller which is required by the Ordinance No. 252-04 (Board of Supervisors File No.
14 041246), (a copy of which ordinance is set forth as **Exhibit J** in the City’s Request for Judicial
Notice on file herein).

15 Thus, the Court must act to issue the necessary peremptory writ of mandamus at the
16 within hearing on the morning of March 15, 2004, if it is to restrain the reduction in the size and
17 floors of the new LH by approximately 250 beds, – **in violation of the Laguna Honda
Compact** to construct a 1,200-bed long-term care facility.

18
19 **INDEPENDENT PHARMACIES . The “empty pocket” defense of the respondents is
without merit, in view of the**

20 **the fact that the City has \$25 million of TSR trust funds in its back pocket to use to**
21 **make up \$25 million of the current \$26 million cost budget shortfall, and thereby**
22 **prevent the reduction in the size or floors of the new LH, below the 1,200-bed**
23 **capacity which the City is required, by the City-voter compact which became**
24 **entered into by the passage of Proposition A.**

25 The respondents, in their Opposition, are playing a musical chair money game with the
26 Court.

27 1. The City misappropriated \$25 million from the TSR trust fund created or required by
28 Proposition A, as set forth in the first half of this Reply brief.

1 2. The Opposition papers say that up until now, the City has not needed to use the TSR
2 funds (held in trust under the aforesaid TSR trust created or required by Proposition A), for
3 construction costs of the new LH, (the Project).

4 3. The Opposition papers say that, by reducing the size or floors of the Project so as to
5 eliminate a \$26 million cost budget overrun, that **they can now approve and let construction**
6 **contracts** which are to be paid for (1) by use of the \$74 million of TSRs which are in the TSR
7 (trust) fund, and (2) by use of \$230 million in Proposition A bond proceeds, which bonds are to
8 be commenced to be issued next month, (i.e., on or about April 6, 2005).

9 4. However, it must be obvious that there is a present dire need for immediate restitution
10 to be made by the City, to the TSR trust fund required by Proposition A to be maintained. If this
11 were done, then, **there would be no financial necessity to reduce the size or floors** of the
12 Project, but, instead, this “extra” \$25 million of restored TSR trust funds, could be used to make
13 up \$25 million of the \$26 million cost budget overrun, so that the planned 1,200-bed facility
14 could be built.

15 **Relief requested at the March 15,2005 hearing.**

16 **A.** The petitioner is asking first that the Court simply issue a peremptory writ of
17 mandamus to command the respondents to restore, or cause to be restored, the \$25 million of
18 TSR trust funds which were misappropriated in fiscal 2002-03 from the TSR trust fund required
19 to be maintained by Proposition A, -- all as set forth in the first part of this brief.

20 **B.** The petitioner is asking second that the Court find that by virtue of the terms of the
21 **ballot proposal**, and as construed by the **Digest** of the Ballot Simplification Committee, that:

22 1. The City entered into a compact (the “Laguna Honda Compact”) to use the
23 TSRs and the Proposition A bond proceeds to build the new LH, of a size or capacity for 1,200
24 long-term care patients, provided that there are sufficient TSR trust funds received and
25 Proposition A bond proceeds to do so;

26 2. That due to the facts set forth in these proceedings, especially from the papers
27 filed by the respondents in Opposition, that, if the \$25 million were restored to the TSR trust
28 fund and used for Project construction as intended by the terms of the TSR trust created by the
29 passage of the Proposition A **ballot proposal**, that there is no present necessity to reduce the
30 size or floors of the Project as per its original plan;

