

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELATE DISTRICT

SEAN PATRICK-MONETTE-SHAW,

Civil. no.

Petitioner

-vs-

(S.F. CPF 04-504777)

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE CITY  
AND COUNTY OF SAN FRANCISCO  
– ULIMITED JURISDICTION,

RELATED APPEAL  
PENDING

Respondent,

\_\_\_\_\_  
CITY AND COUNTY OF SAN FRANCISCO,

Real Party in Interest,

\_\_\_\_\_

From an April 4, 2005 final judgment of the San Francisco Superior Court  
Hon. James Warren, Presiding,

**PETITION FOR WRIT OF MANDAMUS**

Lynn S. Carman  
State Bar No. 028860  
28 Newport Landing Dr.  
Novato, CA 94949  
Telephone: (415) 927-4023  
Facsimile: (415) 499-1687

Attorney for Petitioner  
Sean Patrick Monette-Shaw

## PETITION FOR WRIT OF MANDAMUS

TO THE ABOVE ENTITLED HONORABLE COURT:

The verified petition of Sean Patrick Monette-Shaw, a resident and citizen of San Francisco, for a writ of mandamus under § 1085 Code of Civil Procedure, respectfully shows:

### Writ of mandamus sought; and related appeal

1. The petitioner seeks a writ of mandamus to direct the San Francisco Superior Court to vacate an April 4, 2005 order and final judgment denying writ of mandamus which had been sought by petitioner first, to direct the City and County of San Francisco (“City”) and City officials to refrain from abandoning construction of the full 1,200-bed skilled nursing facility (the replacement Laguna Honda Hospital project), in respect to which and upon which a public trust devolved, by the 1999 passage of Proposition A, for such public purpose, using all tobacco settlement revenues (“TSRs”) – (the public trust fund), – and Proposition A bond proceeds to do so, unless and until the respondents, (after considering all the TSRs which are available), concludes that there is insufficient TSR and Proposition A bond funding so to do; second, to enjoin an ordinance which allows respondents to amend bid specifications so as to reduce the number of skilled nursing facility (SNF) beds of the replacement Laguna Honda Hospital project below the number of 1,200 SNF beds promised to voters in Proposition A, and third, to order the repayment of \$25 million misappropriated from a trust fund imposed by Proposition A upon TSRs received, which are required by Proposition A to be used solely to construct the replacement LHH and service Proposition A bond debt. An appeal from that judgment is pending in the above-entitled Court of Appeal. The Court of Appeal docket number is A110378.

The title of the appeal is:

SEAN PATRICK MONETTE-SHAW, Petitioner-Appellant,  
vs. SAN FRANCISCO BOARD OF SUPERVISORS; GAVIN NEWSOM, Mayor; CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO HEALTH COMMISSION; and EDWARD HARRINGTON, Controller, Respondents-Respondents.

### Jurisdiction

2. The above-entitled Court of Appeal has jurisdiction of the within original proceeding under article VI, section 10, California Constitution, and § 1085 et seq., Code of Civil Procedure.

### Trial court proceedings

3. A motion for peremptory writ of mandamus was heard on March 15, 2005 in the San Francisco Superior Court, the Hon. James Warren, presiding; who denied the motion, with prejudice, by written order filed April 4, 2005.<sup>1</sup> Final judgment for the respondents was filed on April 4, 2005. The judgment, entitled “JUDGMENT,” stated:

“On March 15, 2005, the Court denied Petitioner Sean Patrick Monette-Shaw’s motion for writ of mandamus with prejudice. Accordingly, Respondents San Francisco Board of Supervisors, Gavin Newsom, Mayor of the City and County of San Francisco, City and County Of San Francisco, San Francisco Health Commission and Edward Harrington, Controller of the City and County of San Francisco shall have judgment against Petitioner Sean Patrick Monette-Shaw.”<sup>2</sup>

No notice of entry of the above order and judgment was mailed to the petitioner or his counsel except a Notice of Entry of Order Denying Petitioner’s Motion for Writ of Mandate and a Notice of Entry of Judgment each of

---

<sup>1</sup> Notice of motion, **Appendix 51**; memorandum in support of motion, **Appendix 257**; order denying motion for writ of mandamus, **Appendix 4**. See, Reporter’s Transcript (RT) of March 15, 2005 hearing.

<sup>2</sup> **Appendix 2**.

which notices were mailed by counsel for respondents on April 5, 2005 to counsel for the petitioner.<sup>3</sup> Notice of appeal from this Judgment was filed by petitioner on May 3, 2005.<sup>4</sup>

### **Parties**

4. The petitioner Sean Patrick Monette-Shaw is and has been a resident and citizen of the City and County of San Francisco since before 1999. He resides at 975 Sutter Street, San Francisco, California. He was born in Moline, Illinois.<sup>5</sup>

5. Petitioner sues on his own behalf and on behalf of the public to procure the performance of public duty by the respondents, pursuant to *Green v. Obledo*, 29 Cal.3d 126 (1981).

6. The respondent is the Superior Court of the State of California in and for the City and County of San Francisco - Unlimited Jurisdiction.

7. The City and County of San Francisco is the real party in interest.

### **PRELIMINARY STATEMENT**

#### **Proceedings in the trial court**

##### **A. The petition below**

8. The Verified Petition for Writ of Mandamus filed in the trial court alleged in part:

“9. As used in this Petition, the word “City” means and refers to the City and County of San Francisco.

### **“FIRST CAUSE OF ACTION**

#### **“Creation of an express and implied trust**

“10. In 1998 a Master Settlement Agreement was entered into in respect to tobacco litigation prosecuted by the State of California and municipalities, including the City (herein, the “tobacco settlement”). Under the tobacco settlement the City was to receive substantial revenues to be paid over a number of years by the tobacco companies.

“11. In 1999 the Board enacted an ordinance (“bond ordinance”) calling for Proposition A, a bond measure to replace the existing Laguna Honda Hospital, (herein, the “new LHH”), to be voted upon at a special election on November 2, 1999.

“12. A voters pamphlet (Voters Pamphlet) was distributed to all voters, which sets forth Proposition A, (“ballot proposal”) at page 33;<sup>6</sup> the bond ordinance at page 55,<sup>7</sup> and 22 pages of ballot arguments at pages 34-54.<sup>8</sup>

“13. The ballot proposal provided as follows:

“LAGUNA HONDA HOSPITAL 1999. Shall the City and County incur bonded debt and/or other evidences of indebtedness and/or undertake lease financing, in an aggregate amount not exceeding \$299,000,000 for the acquisition, improvement, construction of a new health care, assisted living and/or

---

<sup>3</sup> **Appendix 51, Appendix 7, 13**, (notice of entry of order). **Appendix 14, 19**, (notice of entry of judgment).

<sup>4</sup> **Appendix 20**.

<sup>5</sup> Verified petition for writ, at **Appendix 31**.

<sup>6</sup> **Appendix 125**.

<sup>7</sup> **Appendix 147**.

<sup>8</sup> **Appendix 126-146**.

other type of continuing care facilities to replace Laguna Honda Hospital, and reduce the property tax impact by requiring the application of available tobacco settlement revenues received by the City and County and any state and/or federal grants or funds received by the City and County that are required 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 interest on, reserve fund deposits, if any, and/or financing costs for the obligations authorized hereby.”<sup>9</sup>

“14. Since (1) the ordinary and commonly understood meaning of the word, “available,” is “able to be used or obtained,” (Oxford University Press Dictionary), and since (2) no tobacco settlement revenues can be available (i.e., able to be used or obtained”) until received by the City, it follows (3) that “available tobacco settlement revenues” meant and was commonly understood by the voters to mean and refer to **all** tobacco settlement revenues received by the City.

A. The only **exception** to the foregoing is that the voters were told in the Voters Pamphlet that the first \$1 million in annual TSRs was to be set aside and used for tobacco settlement education purposes.<sup>10</sup>

“15. Further, the voters were told in the Voters Pamphlet, by officers and official agents of the City, that tobacco settlement revenues received by the City were to be used for construction and bond service of the new LHH, and for nothing else; as follows:

- **A.** The official Digest of the Ballot Simplification Committee of the City and County of San Francisco told voters, in the Voters Pamphlet, that all tobacco settlement revenues received would be used for construction and bond service:

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

...

- **C.** Then-Mayor Willie Brown told the voters in the Voters Pamphlet that:

Everyone agrees that using San Francisco’s share of money won from these tobacco companies to build Laguna Honda Hospital is the best use of that once-in-a-lifetime financial windfall.”<sup>12</sup>

“16. Proposition A was passed by the voters at the November 2, 1999 special election. Therein, (1) by the passage of Proposition A, (2) by the above common understanding of “available tobacco revenues,” and (3) by the above construction placed upon Proposition A which was communicated to the voters in the Voters Pamphlet by the terms of the ballot proposal and the construction of the ballot proposal by the Ballot Simplification Committee and Mayor Brown, a public trust became and was imposed, by operation of California law of the public trust, upon all tobacco settlement revenues received and to be received by the City, for the benefit of the San Francisco public and taxpayers, which requires all tobacco settlement revenues received by the City, as the trustee of the public trust, to be used solely (A) to pay the costs of construction of the new facility (the “new LHH”) for health care, assisted living, and/or other type of continuing care services (collectively, “long-term health care”) to replace the existing Laguna Honda Hospital; and (B) to service Proposition A bond debt; **save and except** for \$1 million annually which is set aside each year for tobacco education purposes.

“17. The express trust alleged in the next preceding Paragraph shall be referred to in this Petition as the “public trust” or as the “Proposition A public trust.”

**“Binding administrative construction of Proposition A by City Agencies**

“18. Further:

---

<sup>9</sup> Copy of ballot proposal in the Voters Pamphlet, at **Appendix 125**.

<sup>10</sup> **Appendix 125**.

<sup>11</sup> **Appendix 125**.

<sup>12</sup> **Appendix 129**.

- (1) the Ballot Simplificati4on Committee is a board of the City pursuant to § 600 of the City Elections Code;<sup>13</sup>

- (2) the function and duty of the Committee under § 610, City Elections Code, is to prepare a digest of each proposed City ballot measure for inclusion in the Voters Pamphlet; . . .

so that therein, the action of the Committee to administratively rule and publish in the Digest in the Voters Pamphlet, that Proposition A provides that all tobacco settlement revenues (except \$1 million a year) will be used for new LHH construction costs and to service Proposition A bond debt, was an administrative ruling by a City agency which is binding and conclusive against the respondents in respect to all matters relating to the use of tobacco settlement revenues received or to be received by the City.<sup>14</sup>

“19. Further, the Board and the then-Mayor, upon the passage of Proposition A, contemporaneously construed and treated Proposition A as requiring that all tobacco settlement revenues (except for \$1 million per year), be expended solely for new LHH construction costs and to service Proposition A bond debt; in that in December 2000 the Board, with the approval of Mayor Brown, enacted City Ordinance 316-00, (File No. 01911, App. 12/28/00),<sup>15</sup> which ordinance provided first, that all tobacco settlement revenues (except \$1 million a year) be placed into a restricted separate fund, entitled the “Tobacco Settlement Revenues Sub-account,” with interest earned by the fund to be credited to the fund, (as per a trust, as distinguished from non-restricted City funds in which all the interest, from such latter non-restricted funds, goes into the City’s unrestricted general fund; and which ordinance required second, that all tobacco settlement revenues in the fund be used solely for the acquisition, improvement, construction and/or reconstruction (collectively, “construction”) of a new LHH and to service Proposition A bond debt.<sup>16</sup>

“20. The above provisions of Ordinance 316-00 were codified as subsections (a),(b)(1), and(b)(2) of § 10.100-218 City Adm. Code.<sup>17</sup>

“21. The above contemporaneous construction of the terms of Proposition A by first the Ballot Simplification Committee and then by the administrators, (the Board, Mayor Brown, and the City), as set forth above, is binding and conclusive upon the respondents in all matters relating to the issue of the meaning of Proposition A in respect to the restricted use placed on tobacco settlement revenues by Proposition A.

**“Material Breaches of the Public Trust**

“22. However in July 2003 the Board passed and the Mayor approved City Ordinance 191-03 which *inter alia* amended § 10.100-218 of the City Adm. Code by adding subsections (b)(3) and (c) to authorize the transfer, in fiscal 2003-04, of \$25,005,644.60 of tobacco settlement revenues in the Tobacco Settlement Revenues Sub-account to the general fund of the City to pay certain costs of the City’s Department of Public Health which were unrelated to payment of any new LHH construction costs or servicing of any bond debt.<sup>18</sup> Such enactment of Ordinance 191-03 and its provisions was a violation and material breach of the aforesaid public trust, under Proposition A, whereby all tobacco settlement revenues received by the City (except for \$1 million per year), become impressed and subject to the TSR trust to be expended solely for new LHH construction or to service Proposition A bond debt.

“23. More particularly, subsection (b)(3) of § 10.00-128 City Adm. Code, as amended by Ordinance 191-03, provided;

---

<sup>13</sup> Request for judicial notice of §§ 500 through 620 is separately filed herewith.

<sup>14</sup> The Digest of Proposition A of the Committee is at Page 33 of Voters Pamphlet. (**Appendix 125.**)

<sup>15</sup> Added as subsections (a) through (b)(2) of § 10.100-128 City Administrative (“Adm.”) Code. A copy of § 10.100-128 City Adm. Code is set forth at **Appendix 163-165.**

<sup>16</sup> This separate fund is stated by the ordinance to be a “Category Four” fund which, under the City Adm. Code, retains all the interest earned by the fund. (**Appendix 164.**)

<sup>17</sup> See, City Ordinance 191-03, amending City Ordinance 316, which states in Section 2 that Ordinance 316 is codified as § 10.100-128 City Adm. Code.

<sup>18</sup> **Appendix 163-165.**

“(b) **Use of Fund.** . . . The monies deposited into the Tobacco Settlement Revenues Sub-account shall be expended as follows: . . . 3. From amounts received by the City under the Master Settlement Agreement and deposited into the Tobacco Settlement Revenues Sub-account prior to the issuance of the Bonds, for transfer in fiscal year 2003-2004 to the General Fund for payment of certain costs of the Department of Public Health, provided that the amount so transferred shall not exceed \$25,005,644.60.”<sup>19</sup>

“24. Pursuant to the enactment of the new subd. (b)(3) of Ordinance 191-03, \$25 million was misappropriated by the trustee of the public trust, – i.e., the City, – during the 2003-04 fiscal year, (herein, the “Misappropriated \$25 Million”), by transfer of the Misappropriated \$25 Million to the general fund of the City for costs of the City’s Department of Public Health and for other purposes, which were not related to any costs of construction of the new LHH or to service any Proposition A bond debt.<sup>20</sup> The Misappropriated \$25 Million has never been restored to the public trust fund (i.e., the Tobacco Settlement Revenues Sub-account). This misappropriation and non-repayment is a continuing material breach of the public trust.

“26. (sic) By each and all of the facts alleged:

– (1) the aforesaid amendments by Ordinance 191-03 of subsection (b)(3) of § 10.100-218 City Adm. Code, by the Board, constituted a violation and material breach of the Proposition A public trust and as such was ultra vires and void; such that at all times the Board, and now Mayor Newsom, and the trustee City, have the continuing mandatory ministerial duty, – owed to the public and the taxpayers who are the beneficiaries of the public trust, – to repeal and cause the void subsection (b)(3) of § 10.100-128 of City Adm. Code to be repealed.

– (2) The aforesaid transfer and expenditure of the Misappropriated \$25 Million for purposes unrelated to the public trust was a material breach of the public trust by the Board, Mayor Brown, and the trustee City; such that the Board, the current Mayor Newsom, and the trustee City have the continuing ministerial duty, – owed to the public, and to the taxpayers who are the beneficiaries of the public trust, --to repay or cause to be repaid, from the funds of the City, the Misappropriated \$25 Million, together with interest thereon for the period since the date the Misappropriated \$25 Million was misappropriated from the public trust.

“ . . .

### **“THIRD CAUSE OF ACTION**

#### **“Violation of the Proposition A Compact**

“33. Plaintiff (sic) refers to and incorporates each of the allegations in the preceding Paragraphs as if fully set forth herein.

“34. Proposition A was passed by a 73% affirmative vote because the respondents and City officials made massive and divers representations to the voters that the tobacco settlement revenues, together with the bond proceeds, would be used to construct a new LHH which would provide long-term care to at least 1,200 elderly and disabled San Franciscans.

“35. Therein and thereby, by obtaining the passage of Proposition A by these divers representations, a compact and public trust became entered into and impressed upon the City and its officers (herein the “Proposition A Compact”), in which the City and the respondents have a duty to expend the tobacco settlement revenues, in addition to the bond proceeds, to construct a new LHH with space to care for 1,200 SNF patients from the community.

“36. These divers representations, by which the respondents and their predecessors obtained the passage of Proposition A, were made:

“ . . .

---

<sup>19</sup> **Appendix 164.**

<sup>20</sup> This is admitted by respondents. *See*, respondents’ memorandum, **Appendix 59-A**; finding by the Superior Court, at **Appendix 5.**

“- in divers statements in the Voters Pamphlet by the Board, Mayor Brown, Health Commission members, and in many divers arguments stated to be paid for by the City’s Director of Public Health.<sup>21</sup>

“ . . .

**“The Proposition A Compact and the Public Use**

“38. Also, by virtue of the provisions of Proposition A, by the Compact, and by the operation of California law of the public use, a public use is imposed and impressed upon all tobacco settlement revenues, as and when received by the City, to be used for the public use, to wit, to construct a new LHH which serves at least 1,200 SNF patients, and to service Proposition A bond debt.

**“Tobacco settlement revenues received and to be received**

“39. The respondents have received **\$99.1 million** in tobacco settlement revenues, (including the Misappropriated \$25 Million which, as prior alleged, was misappropriated to non-Proposition A uses in fiscal 2003-04).

“40. Also, the respondents are scheduled to receive more tobacco settlement revenues at times and in amounts which are more particularly set forth in this Petition.

**“Ultimate City duty under the Proposition A Compact**

“42. (sic) Because of the Compact, the City is required to construct a new LHH which is capable of serving 1,200 SNF patients, to the extent that tobacco settlement revenues and the \$299 million bond proceeds are available to enable the City to do so. Therein, under the Compact, which is a public trust, the City and its governing board and agencies have the affirmative public trust duty to administer tobacco settlement revenues, as well as the bond proceeds, by means which in the exercise of their discretion are best suited to achieve the purposes of the public trust, – namely, the public purpose of constructing a new LHH with space to serve 1,200 SNF patients.

“43. Also, because the City has the fixed and affirmative duty under the Compact to use the tobacco settlement revenues and bond proceeds to construct a new LHH with space to serve 1,200 SNF patients, the City cannot abandon this public purpose or reduce the number of SNF patients to be served by the new LHH, on the basis it has become reasonably impossible or impracticable to do so, unless the governing board, (the Board), considers all the relevant facts and factors and, based thereon, reasonably concludes that, under the circumstances obtaining, the project cannot be completed or that its size or scope must be reduced.

**“Initial compliance with the Compact and Public Trust**

“44. Initially, the respondents complied with the Compact by determining that a new LHH would be constructed which would serve at least 1,200 SNF patients. The respondents planned for and budgeted \$401.6 million for this construction project, as follows:

Construction	\$311,600,000
Professional Services	75,000,000
Assisted Living Construction	<u>15,000,000</u>
	\$401,600,000 <sup>22</sup>

In their plan the respondents provided for five new buildings, namely: (1) the South, Link, and East Buildings, to serve 300, 60, and 420 SNF patients, respectively, with construction to commence in 2004; and (2) the West Building, to serve 420 SNF patients, plus the assisted living building, with construction of these buildings not to commence until 2007.<sup>23</sup>

---

<sup>21</sup> Voters Pamphlet, at **Appendix** 126 through 141. “Dr. Mitch Katz,” who is stated in the Voters Pamphlet to be one of the largest contributors for 34 of the 41 “Paid Arguments in Favor of Proposition A,” was and is the City’s Director of Public Health, who is the chief executive officer of Laguna Honda Hospital and, – as set forth at **Appendix** 133, – was co-chair of the Laguna Honda Hospital Rebuild Committee, a City committee.

<sup>22</sup> Admitted by respondents in their memorandum, **Appendix** at 60.

<sup>23</sup> Admitted by the Program Manager of the Laguna Honda Hospital Replacement Program. (**Appendix** at 248, 253.)

“45. However, in fiscal 2003-04, the respondents materially breached the Proposition A Compact, as well as violated the public use to which tobacco settlement revenues are impressed by Proposition A, by misappropriating the Misappropriated \$25 Million, as prior alleged in the First Cause of Action.<sup>24</sup>

“46. In October 2004 the Board and the Mayor again materially breached the Compact, in that on October 19, 2004, the Board enacted a new ordinance (Ordinance No. 252-04),<sup>25</sup> which was approved by Mayor Newsom on October 22, 2004, the effect of which ordinance is that several floors in the four SNF buildings, (the South, Link, East, and West Buildings) will be eliminated in the construction, thereby reducing the SNF patients to be served from 250 to 350 patients, in violation of the Proposition A Compact, which requires that a new LHH be built which services 1,200 SNF patients, not, just 850 or 950.<sup>26</sup>

- (A) The Board enacted the new ordinance (Ordinance No 252-04) under a legislative history in which the basis for the ordinance was that bids for the first phase of constructing the South, Link, and East Buildings indicated that the costs to construct the entire project would exceed the budgeted \$401.6 million by anywhere between \$32 million and \$40 million.<sup>27</sup>

- (B) Inasmuch as space for 60 patients is reduced for every \$7 million of construction cost reduction, the reduction of construction costs by \$32 to \$40 million, as authorized by the new ordinance (Ordinance No. 252-04), reduces the number of SNF patients which can be cared for in the new LHH, to between only 850 to 950 patients.<sup>28</sup>

“47. Also, the legislative history of the enactment of the new ordinance (Ordinance No. 252-04) shows that the Board erroneously acted upon the wrong standard in determining what it should do about the escalation in bid prices; and erroneously failed to consider major relevant and material facts about the financial condition of the construction project . . . , so that for failure to consider all the relevant facts and factors, there was no rational basis for the Board’s implicit conclusion, in enacting the new ordinance, that the construction of a new LHH to serve 1,200 SNF patients could not, by any reasonable means, be achieved.<sup>29</sup>

“ . . .

“48. . . . (T)he Board erroneously failed to consider . . . that if the Misappropriated \$25 Million were restored to the construction project, and if tobacco settlement revenues receivable in the amounts of \$18.2 million in the first part of 2005 and \$14.4<sup>30</sup> in the first part of 2006 were applied to the construction costs of the first

---

<sup>24</sup> The taking of the \$25 million for the General Fund in fiscal 2003-04 was admitted by respondents in their memorandum, (**Appendix 59-A**); and the Superior Court found that the \$25 million was transferred to the General Fund. (Order denying motion for writ, at **Appendix 5**.)

<sup>25</sup> **Editing Note:** The text of the verified petition cited this ordinance was actually “File 041246.” However, File 041246 is City Ordinance 252-04. (See, **Exhibit J** of respondents’ Request for Judicial Notice, at **Appendix 211**.) Therefore the petitioner has substituted Ordinance 252-04 as the cite for this ordinance, rather than “File 041246” by which it was cited in the verified petition for writ.

<sup>26</sup> Text of Ordinance 252-04 is set forth at **Appendix 211**.

<sup>27</sup> See, report of the Program Manager, at **Appendix 253-256**.

<sup>28</sup> See, figures set forth by the Program Manager, at **Appendix 245-247, 253-256**; and his recommendation, (**Appendix 253-256**), that construction not go forward under the \$410.6 million limited budget, except to build only the South Residence (300 beds) and the Links Building, (60 beds), which is only a total of 360 beds.

<sup>29</sup> The \$401.6 million budget fixed by the respondents for this project, includes \$299 million from Proposition A bond proceeds, and only \$100 million from tobacco settlement revenues; even though **\$183 million in tobacco settlement revenues** is expected by the City’s Budget Analyst and the Mayor to be received by the City before and during the construction of the new LHH. (Official June 23, 2003 Budget Analyst report to the Board of Supervisors, at **Appendix 160-161**.)

Therefore, in adopting Ordinance 252-04 the Board failed to consider that there is more than enough, **if all the tobacco settlement revenues** are used, to cover the costs increase.

<sup>30</sup> **Note:** \$14.4 million.



phase, (namely, South, Link, and East Buildings to be constructed in these years), that a substantially different and improved financial situation was presented,<sup>31</sup> . . .

- (B) Therein, . . . the Board’s action to enact the new ordinance (Ordinance No. 252-04) so as thereby inevitably reduce the scope of the construction so as to reduce the number of SNF patients at the new LHH, by 20% to 30%, were each a gross abuse of discretion, because major relevant facts as to financial assets or condition of the construction project, which could have resulted in a different conclusion by the Board had they been considered, were not considered in the course of the Board’s decision to enact the new ordinance.

“49. Also, the Board in enacting the new ordinance (Ordinance No. 252-04) failed to administer the Proposition A Compact by means which in their discretion are best suited to achieve the purposes of the Compact; in that the Board based its exercise of discretion to enact the new ordinance without considering the relevant factors of (1) the Board’s Proposition A public trust duty to restore the Misappropriated \$25 Million to the construction fund, (i.e., the Tobacco Settlement Revenue Sub-account), (2) the tobacco settlement revenues . . . which become available during the construction<sup>32</sup> . . . Therein, because of this gross abuse of administrative discretion in the carrying out of the Proposition A Compact, the Board’s action of enacting the new ordinance (Ordinance No. 252-04) was arbitrary and capricious, and contrary to law, hence void. Accordingly the Board has the mandatory ministerial duty to vacate and set aside the new ordinance, and all the respondents have the mandatory ministerial duty not to implement the new ordinance, . . .

“50. Further, under the facts alleged in this Cause of Action, the respondents and each of them have the mandatory ministerial duty not to enact any ordinance or resolutions or engage in any action to reduce the scope or size of the new LHH construction program, or of any bid specifications for the program, on the basis that there is a shortfall between the amounts available to pay higher construction bid prices and funds available therefore, **save and until** the City restores the Misappropriated \$25 Million to the Proposition A trust public trust fund (i.e., the Tobacco Settlement Revenue Sub-account), with interest at the legal rate for the period of the misappropriation, and, with such \$25 million restored, reconsiders any decision to reduce the scope or size of the new LHH construction project.”

— END OF QUOTED PORTION OF TRIAL COURT PETITION —

\* \* \*

**The trial court motion for peremptory writ of mandamus**

13. Based on the verified petition, upon the 24-page Voters Pamphlet for Proposition A, and upon evidence of the sufficiency of the tobacco settlement revenues (TSRs) and the Proposition A bond proceeds to enable the requisite construction, the petitioner filed a motion for peremptory writ of mandamus, (1) to require the respondents to restore \$25 million which the Board had misappropriated from the trust which was imposed by Proposition A upon all TSRs to be used for construction of the replacement LHH, (2) to vacate and set aside Ordinance No. 252-04 which authorized the respondents to approve construction bid changes to reduce the number of the 1,200 SNF beds to be constructed under the Proposition A Compact, and, most importantly, (3) to prohibit the respondents not to reduce the provision for constructing a new LHH planned for serving 1,200 SNF patients, including the present provision for constructing a new:

- South Residence planned for 300 patients,
- Links Building planned for 60 patients,
- East Residence planned for 420 patients,
- West Residence planned for 420 patients,

and, to refrain from taking any action, for lack of TSRs, which reduces the number of SNF patients in total or in respect to the above numbers of SNF patients for the respective four new buildings. **unless and until:**

---

<sup>31</sup> See, footnote 29.

<sup>32</sup> See, footnote 29.

- (1) the Misappropriated \$25 Million is restored the public trust fund (i.e., the Tobacco Settlement Revenue Sub-account), with interest;

- (2) an appropriate City board or officer, with power and authority to make such a decision, finds, **after considering the funding available from the TSRs**, together with the \$299 million Proposition A bond proceeds, that there is insufficient funding available or to become available to construct a new LHH which is planned to serve 1,200 SNF patients at the minimum.<sup>33</sup>

### **Respondents contentions**

14. The respondents, however, contended that the wording of the **ballot proposal**, which appeared on the ballot and on the first page of the Voters Pamphlet, did not apply, because (1) the wording of the **bond ordinance**, – which appeared inconspicuously on the next to last page of the voluminous Voters Pamphlet, – stated that the TSRs available for construction were only those TSRs received “over the term of any lease financing, bonded debt and/or other evidence of indebtedness” authorized by Proposition A; and, (2) no bonds had yet been issued; hence, the City could use all of the TSRs received before bond issuance for any purpose it wanted.<sup>34</sup>

15. The respondents also contended that the ballot arguments in the Voters Pamphlet, including those of the City’s boards and officials, could not, as a matter of law, be considered by the Superior Court in its construing of the meaning of the bond measure.<sup>35</sup>

### **First rulings contrary to law, hence, in gross abuse of discretion**

16. Two issues of law were thereby presented to the trial court, namely:

- Does the wording of a **bond ordinance** prevail over the wording of the **ballot proposal**, where these wordings are in conflict?

and,

- May ballot arguments be considered by a court in determining the terms of the compact entered into between a municipality and its citizens, upon the passage of a local ballot measure?

The petitioner submits that the Superior Court answered each of these pivotal questions erroneously, and therein acted in excess of and without jurisdiction, and in gross abuse of discretion, in denying petitioner’s motion for peremptory writ of mandamus, (1) by ruling, in its order, that the wording of the **bond ordinance** prevailed over the contrary wording in the **ballot proposal** which appeared in the ballot and in the Voters Pamphlet for Proposition A; and (2) by a ruling, in its order, which accepted in effect the primary argument of respondents, to wit, that ballot arguments may not be considered by a court in construing the meaning of a ballot proposition.<sup>36</sup>

---

<sup>33</sup> Notice of motion, at **Appendix 51**; motion, at **Appendix 257**; prayer of the Verified Petition for Writ of Mandamus at **Appendix 47-48**.

<sup>34</sup> Respondents memorandum, at **Appendix 53-70**.

<sup>35</sup> *Ibid*, at **Appendix 65-66**.

<sup>36</sup> Specifically, the April 4, 2005 order (at **Appendix 4**) which denied the denied the writ petition stated:

“IT IS HEREBY ORDERED AS FOLLOWS:

1. Petitioner’s motion for writ of mandamuses DENIED with prejudice on the grounds that:

a. The Proposition A “bond contract” defined “*available tobacco settlement revenues*” as tobacco settlement proceeds that the City receives “over the term of any lease financing, bonded debt and/or other evidence of indebtedness authorized [by Proposition A]. At the time the City transferred the \$25,005,645 in tobacco settlement proceeds to the General Fund, the City had not yet issued any general obligation bonds authorized under the Proposition A “bond contract.” Therefore, transfer of the \$25,005,645 in tobacco settlement proceeds to the General Fund did not violate the Proposition A “bond contract.”

b. The Proposition A “bond contract” described the Laguna Honda Hospital construction project as the “construction and/or reconstruction of” a “new health care facility, assisted living and/or other type of continuing care facility or facilities.” Nothing in the

**Second ruling contrary to law, hence, in gross abuse of discretion**

17. In the proceedings the City filed a June 23, 2003 report of the City's Budget Analyst,<sup>37</sup> which reported that the TSRs **were substantially greater than anticipated;**<sup>38</sup> that at least \$100 million of TSRs had been received as of June 30, 2004; with another \$17 million of TSRs to be received before June 30th of 2005, 2006, and 2007, respectively (\$51 million minimum for these three years); plus another \$38 million in the next two years ended June 30, 2009; with annual TSR payments thereafter in excess of \$19 million each year, to a total expected of \$820 million of TSRs through 2037.<sup>39</sup>

18. However, on March 15, 2005, – after the parties rested and the case taken under submission by the Court – the Program Manager of the Laguna Honda Hospital Replacement program filed a report with the respondent Health Commission and recommended that the resolution appended to the report be adopted by the Health Commission.<sup>40</sup>

19. The report essentially found that (1) there had been an \$84 million increase in the bids for the first phase of the project, (the South Building (300 beds), Links Building (60 beds), and the East Building (420) beds which first phase was expected to commence in the spring of 2005, so that (2) the estimated cost for the entire project had increased beyond the \$410.6 million **budgeted for the entire project**, to **\$410.4 million** for just this first phase, (the South, Links, and West Building); and requested, in the proposed resolution, (3) that the Health Commission only build the South and Links Building (total of **380 SNF beds only**) within the cost of \$401.6 million initially budgeted for the entire project; **and abandon, in effect, constructing the East and West Buildings**, (820 beds), until “additional funding” was found. (Pages 9-12, and 17-20 of the report.)<sup>41</sup>

20. The petitioner then lodged a request to the Superior Court to vacate the submission of the case, and receive the Program Manager's report into evidence, and rule that there was more than sufficient TSRs by which to build all three of the South, Links, and East Residences, with 780 beds, (not, just the South and Links Residences, with only 360 beds), and that the report, – which failed to consider using any more than \$100 million of TSRs maximum, – was further evidence of the need for a writ of mandamus to command the respondents to refrain from not considering use of all of the TSRs, (not just a \$100 million portion of the TSR trust fund), before making any decision to abandon any portion of the 1,200-bed construction project.<sup>42</sup>

---

Proposition A “bond contract” limits the type of facility the City must construct to a “long term care facility.” Moreover, nothing in the Proposition A “bond contract” requires the City to construct a facility of a specific size.”

<sup>37</sup> **Appendix** at 158-161. This is **Exhibit E** of respondents' Request for Judicial Notice.

<sup>38</sup> The Budget Analyst reported:

“According to Mr. Monique Moyer of the Mayor's Office of Public Finance, Tobacco Settlement Revenues have **greatly exceeded initial projections.**” (**Appendix** 159), to the degree that, under the report of TSR receipts and expected receipts, – shown at **Appendix** 161, – the City is expected by the Mayor and the Budget Analyst to have received at least **\$183 million** in TSRs in the period before and during the construction of the new LHH, i.e., 1999 through June 30, 2009.

<sup>39</sup> Budget Analyst report and chart; **Appendix** at 161.

<sup>40</sup> The report of Michael Lane, Program Manager, was entitled:

“Laguna Honda Hospital Replacement Program Update  
Department of Public Health  
Health Commission  
March 15, 1005.”

A copy of the report is shown at **Appendix** 236. This report was attached to petitioner's Request to Set Aside Submission and to take Judicial Notice of a New Report by Mark (sic) Lane, Program Manager, (which was lodged with the Superior Court and filed on March 28, 2005). (**Appendix** 233.)

<sup>41</sup> **Appendix** 245-247, and 253-256.

<sup>42</sup> Petitioner's Request to Set Aside Submission and to Take Judicial Notice of New Report by Mark (sic) Lane, Program Manager, filed March 28, 2005. (**Appendix** 236 - 235; with the Program Manager's report attached, (**Appendix** 236 - 256).

21. This above request of the petitioner was filed by the Court itself on March 28, 2005, and was hence presumptively considered by the Superior Court in its April 4, 2005 rulings.<sup>43</sup> Therein, the Superior Court, in refusing to issue any writ of mandamus to command the Board and the Health Commission to consider using all the TSRs, not just a \$100 million portion of the TSRs, was contrary to law, in that under the terms of the **ballot proposal**, all of the TSRs were required to be used for construction and bond servicing, not, just a \$100 million as claimed by the respondents in the proceedings below.<sup>44</sup> portion of such TSRs; but, the uncontradicted evidence submitted by the City itself showed that the respondents had a policy of refusing to use or consider using all of the more than \$183 million of TSRs which the evidence, without contradiction, showed was expected to be received before and during construction, – which was more than sufficient, together with the \$299 million Proposition A bond proceeds, to build the four projected buildings suitable for 1,200 SNF beds, – as promised to the voters in the Proposition A Compact.

**Appeal is an inadequate remedy**

22. The remedy of appeal from the April 4, 2005 ruling and judgment of the Superior Court is an inadequate remedy, because in the interim before the trial court judgment is reversed on appeal, construction costs for the replacement LHH will continue to drastically escalate so as to threaten the entire project from being completed in the scope and size of 1,200 SNF beds, as promised to the public of the City by the Proposition A Compact.

WHEREFORE, the petitioner prays that the Court of Appeal issue its original writ of mandamus under § 1085 Code of Civil Procedure, to order the respondent Superior Court of the State of California, in and for the State of California, - Unlimited Jurisdiction:

- A. to vacate and set aside (1) its April 4, 2005 order denying petitioner’s motion for peremptory writ of mandamus, and (2) its April 4, 2005 final judgment entitled “Judgment;”
- B. to rehear and reconsider the motion of the petitioner in the Superior Court for a peremptory writ of mandamus, in light of the ruling of the Court of Appeal in this original mandamus proceeding;
- C. to order that petitioner have reasonable attorneys’ fees under § 1021.5 Code of Civil Procedure, costs, and such other and further relief as may be just.

Dated: June 8, 2005

\_\_\_\_\_  
Attorney for Petitioner

**VERIFICATION**

I am the attorney for Sean Patrick Monette-Shaw, the petitioner in the within Petition for Writ of Mandamus, and make this verification fo the reasons that he is absent from the county in which I have my office. I have read the within Petition for Writ of Mandamus and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Novato, California on June 8, 2005.

\_\_\_\_\_  
LYNN S. CARMAN

<sup>43</sup> **Appendix** 233.

<sup>44</sup> Respondents’ memorandum, **Appendix** at 66- 68.

## MEMORANDUM IN SUPPORT OF WRIT OF MANDAMUS

### Writ of Mandamus Sought Against the Superior Court

A writ of mandamus is sought in the Court of Appeal against the San Francisco Superior Court – Unlimited Jurisdiction, to vacate and set aside its final judgment filed April 4, 2005, as well as its order denying mandamus relief which was filed April 4, 2005.

### PRELIMINARY STATEMENT

This case revolves around the meaning of the ballot proposal in Proposition A, and the interpretation given Proposition A by the official Ballot Simplification Committee of the City.

The Proposition A ballot proposal was as follows:

LAGUNA HONDA HOSPITAL, 1999. Shall the City and County of San Francisco incur bonded debt and/or other evidences of indebtedness and/or undertake lease financing, in an aggregate principal not to exceed \$299,000,000, for the acquisition, improvement, construction and/or reconstruction of a new health care facility, assisted living and/or other type of continuing care facility or facilities to replace Laguna Honda Hospital, and reduce the property tax impact **by requiring the application of available 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.)<sup>1</sup>

The Digest of the Proposition A ballot measure by the City’s official Ballot Simplification Committee provided in part as follows:

“Proposition A also provides that **all tobacco settlement monies received by the City**, after \$1 million is set aside each year for smoking education and prevention programs, would be used to pay for some construction and to offset the cost to property owners of repaying the bonds.” (Emphasis supplied.)<sup>2</sup>

Petitioner claims that the ballot proposal and the Ballot Simplification Committee digest of the ballot proposal, as well as the Voters Pamphlet arguments of City officials and of other persons whose arguments were paid for by the City’s Director of Public Health, were to the effect that the City would use all tobacco settlement revenues (“TSRs”), together with \$299 million in Proposition A bond proceeds, to “replace Laguna Honda Hospital,” i.e., **replace it as it presently exists**, namely, as a 1,200-bed skilled nursing facility; and that thereby (1) an express trust was created under the California law of trusts, whereby all TSRs received (not, **just some** of the TSRs), are received in trust to be expended solely for construction of the new facility and for bond debt service; and thereby (2) the City and the respondents became obliged (the “Proposition A Compact”) to construct a replacement Laguna Honda Hospital; i.e., (“new LHH”) with space for 1,200 SNF beds, and use all TSRs received by the City for that exclusive purpose, – at least, to the extent that the TSRs and \$299 million in Proposition A bond proceeds permit.

The City claims that no express trust was impressed upon any TSRs for any purposes and that, in any event, the City is free to spend the first \$100 million of TSRs for any purposes inasmuch as the **bond ordinance**, – a copy of which is set forth at the end of the Voters Pamphlet section on Proposition A, – states that:

“Section 2: For the purposes of this ordinance and the proposition to be voted upon set forth in Section 7 hereof, the following terms shall have the meanings set forth below:

**“Available tobacco settlement revenues” is defined as the total payments the City and County receives under the 1998 Master Settlement Agreement (the “Agreement”) over the term of any lease financing, bonded debt and/or other evidence of indebtedness authorized hereby that the City and County may use for the Project under applicable law, less \$1,000,000 of the amount**

---

<sup>1</sup> The text of this ballot proposal is set forth in the Appendix at 125. (This is Page 33 of the Voters Pamphlet for Proposition A.)

<sup>2</sup> Appendix 125.

the City and County receives each year under the Agreement during the term of any obligations authorized hereby, which amount the City and County will use for tobacco education, prevention, and control purposes.” (Emphasis supplied.)<sup>3</sup>

Therefore the City argued, – and the Superior Court ruled in its April 4<sup>th</sup> order denying the writ petition, — that the transfer of the \$25,005,645 in TSRs in fiscal 2003-04 was no misappropriation because the TSRs were received by the City **before** any Proposition A bonds were issued.<sup>4</sup> I.e., the City argued and the Superior Court held that only TSRs received after Proposition A bonds are issued are “available tobacco settlement revenues,”<sup>5</sup> even though such unusual definition and exception was **not set forth in the ballot proposal** or in the **official Digest** of the Proposition A ballot measure by the City’s official Ballot Simplification Committee in the Voters Pamphlet.

Therefore the issues presented are set forth below as follows:

#### **FIRST PRIMARY ISSUE**

Did the ballot proposal of Proposition A, which was adopted by 73% of the voters in a special election in November 1999, create an express trust in respect to **all** TSRs as and when received by the City and County of San Francisco (“City”), to be used exclusively for construction of a replacement Laguna Honda Hospital facility, and to service construction bond debt?

#### **SECOND PRIMARY ISSUE**

Did the express language of the **ballot proposal**, and the Digest of Proposition A by the official Ballot Simplification Committee of the City, to wit, that the purpose of Proposition A was “**to replace Laguna Honda Hospital**,” which is a 1,200-bed skilled nursing facility, inferentially signify that the ballot measure called for nothing less than a new 1,200-bed skilled nursing facility; **or is** a facility with, say, only 800 SNF or other types of beds only a **partial replacement** of Laguna Honda Hospital which is not within the term, “to replace Laguna Honda Hospital,” as intended by Proposition A?

#### **THIRD PRIMARY ISSUE**

Can Voters Pamphlet arguments be used to construe or affirm the meaning of a ballot proposal? ]

#### **FOURTH PRIMARY ISSUE**

This case presents to the Court of Appeal an unprecedented situation in which the language of a **ballot ordinance**<sup>6</sup> conflicts with the language of the **ballot proposal** and with the official construction by an official ballot simplification committee, in a voter’s pamphlet, so as to squarely raise the issue for the first time in any California appellate court, of, **which applies** where there is such a conflict: (A) the language presented by the **ballot proposal** (which is the language the voter sees on the ballot in the ballot booth, and on the first page of the Voters Pamphlet), or (B) the diametrically opposed language of the **ballot ordinance**?

The petitioner submits that in such a conflict the language set forth in the **ballot proposal** in the ballot itself,<sup>7</sup> and in the Voters Pamphlet,<sup>8</sup> and in the official digest of the **ballot measure** which is set forth by the City’s official Ballot Simplification Committee at Page 33 of the Voters Pamphlet to inform voters of what they are voting on,<sup>9</sup> must prevail over any contrary language which is used in the **ballot ordinance** itself, – which

---

<sup>3</sup> Appendix 147.

<sup>4</sup> Respondents’ arguments are at **Appendix 61-70**. The Superior Court ruling, denying writ of mandate, is at **Appendix 4**.

**Note:** No Proposition A bonds were issued until this spring of 2005.

<sup>5</sup> Respondents’ memorandum is at **Appendix 61-70**. The Superior Court ruling, in the order denying motion for writ of mandate, is at **Appendix 4**.

<sup>6</sup> **Exhibit J** of Respondents’ Request for Judicial Notice.

<sup>7</sup> Appendix 125.

<sup>8</sup> Appendix 125.

<sup>9</sup> Appendix 125.

latter conflicting language is not even set forth until the next to last page of the 24-page of the Voters Pamphlet in the case at bar.<sup>10</sup>

The Superior Court's order and judgment of denial of the petition for writ in case at bar was therefore **clearly erroneous in respect to the applicable law**, hence, was a gross abuse of discretion for which a writ of mandamus may be issued under § 1085 Code of Civil Procedure. Accordingly, a writ of mandamus should be issued by the Court of Appeal to command the San Francisco Superior Court to vacate and set aside its April 4, 2005 order and judgment denying writ of mandamus in Superior Court action No. CPF 04-504777, as prayed in the within Petition for Writ of Mandamus.<sup>11</sup>

## **I. Discussion**

The Respondents claim that the City is not bound by either the **ballot proposal** of the Proposition A measure which is set forth at Page 33 of the Voters Pamphlet, (**Appendix 125**), or by the **Digest** of the measure which is set forth by the San Francisco Ballot Simplification Committee on the same Page 33 of the Voters Pamphlet, (**Appendix 125**).<sup>12</sup>

Rather, says the Respondents, the City is bound by the provisions which are set forth in the **bond ordinance**, which are set forth at Page 55 of the Voters Pamphlet,<sup>13</sup> insofar as the provisions of the **bond ordinance** differ from the provisions of the **ballot proposal** or from the **Digest** of the measure.

In this respect the Respondents claim that the **bond ordinance** provides that the only TSRs required to be expended on the Project are those TSRs which are received **after** Proposition A bonds have been issued.<sup>14</sup>

Since no Proposition A bonds have been issued, then, ergo, according to the Respondents, **all of the approximately \$100 million of TSRs** which have been received by the City to date, are not required by the **bond ordinance** to be expended on the Project.<sup>15</sup>

Accordingly, – if this view of the matter is law, – then not only has there been no express trust created in respect to the \$25 million of TSRs which was taken by the City in fiscal 2002-03, but, the City is free to use the remainder \$74 million of TSRs so far received for any purpose it wishes.

This case therefore involves public issues of the highest pressing concern, because if the Respondents are correct, then the City can solve its current unprecedented fiscal crisis by simply using all of the \$99 million of TSRs received by the City, before any issuance of Proposition A bonds, for any use it wishes for City government.

Also, if the Respondents are is correct, then, that is the end of the new LHH, for without all of the \$99 million of TSRs received to date, (including the \$25 million taken by the City in fiscal 2002-03), plus the large amount of TSRs which are to be received by the City between now and in next few years, no meaningful amount of construction of the new LHH can be done.

## **II. All TSRs received by the City are required by the ballot proposal of the measure (at page 33 of the Voters Pamphlet) to be used for construction of the new LHH and to service Proposition A bond debt.**<sup>16</sup>

**Also, the City is bound by the ruling of the Digest of the San Francisco Ballot Simplification Committee, which told voters that the measure requires all TSRs received to be**

---

<sup>10</sup> **Appendix 147.**

<sup>11</sup> The prayer of the Verified Petition for Writ of Mandamus is set forth at **Appendix 47-48.**

<sup>12</sup> **Appendix 61-70.**

<sup>13</sup> **Appendix 147.**

<sup>14</sup> **Appendix 61-70.** The Superior Court so held, signing the order denying the writ, as drafted by the City Attorney. **Appendix 4.**

<sup>15</sup> **Appendix 61-70;** as so held by the Superior Court, at **Appendix 4.**

<sup>16</sup> The **ballot proposal** in the Voters Pamphlet is at **Appendix 125.**

used to pay construction costs and to service Proposition A bond debt.<sup>17</sup>

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

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

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

The **ballot proposal**, – as seen by the voters in the voters booth, and as set forth on Page 33 of the Voters Pamphlet,<sup>18</sup> – expressly provides that the tax impact is to be reduced “by requiring the application of available tobacco settlement monies received by the City” to finance construction costs of the new LHH, and to service Proposition A bonds, cannot mean anything other than that **all** TSRs received, not just **some** of them, shall be used to pay costs to construct the new LHH and to service the Proposition A bonds.

This is so plain that the San Francisco Ballot Simplification Committee, whose function under §§ 500 and 600 of San Francisco Elections Code is to prepare a digest of each local 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:

“Proposition A also provides that all tobacco settlement monies received by the City, after \$1 million is set aside each year for smoking education and prevention programs, would be used to pay for some construction and to offset the cost to property owners of repaying the bonds.” (Emphasis supplied.)<sup>19</sup>

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

### IV. The Respondents hew to the erroneous claim that the *bond ordinance* (at Page 55 of 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).

Approval by the Court of Appeal of this Respondents’ claim would put the judicial seal of approval on what is essentially a bait-and-switch, in which municipalities would be given the judicial go-ahead to first enact a *bond ordinance* which places a bond measure on the ballot; then draft a **ballot proposal** which has salutary language to persuade the voters to pass the measure; but which *bond ordinance* has completely contradictory wording which would nullify the salutary provisions of the ballot proposal. Then, when the bond measure passes, the governing board says that it was the provisions of the *bond ordinance* which the voters passed, not, the provisions of the **ballot proposal** or question put to the voters in the voters pamphlet and the voting booth; so that by this bait-and-switch, back-door politics can continue as usual.

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

<sup>17</sup> The Digest of the City’s Ballot Simplification Committee is set forth at **Appendix 125**.

<sup>18</sup> **Appendix 125**.

<sup>19</sup> **Appendix 125**.



### Petitioner Monette-Shaw's claims

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

## PART TWO

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

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

**First.** A municipality becomes subject to a contract or an obligation "analogous" to a contract when the electorate passes a ballot proposition for issuance of bonds. (Associated Students of North Peralta Community College v. Board of Trustees (1972) 92 Cal.App.3d 672, 676-678.) The terms of the municipal obligation are derived from several sources, not least of which is the ballot proposition itself. Other sources from which the municipal obligation is determined are the bond ordinance which submitted the proposition to the voters; and the "assent or ratification" of the electors; and "extrinsic sources." (Associated Students, supra, 92 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 Voters Pamphlet for each local measure to be voted on, the Committee's ruling or interpretation of the provisions of the measure is also, necessarily, a source which must be considered in determining the extent of the municipal obligation arising from passage of a bond proposition.

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

The petitioner submits that in this case that "extrinsic sources" include (1) statements made to the voters in the proponents argument and rebuttal in the Voters Pamphlet which was mailed to all voters, (which proponents' argument and rebuttal is required by § 500 San Francisco Elections Code), (2) other statements by San Francisco's entire officialdom which were made in the Voters Pamphlet, and (3) other Voters Pamphlet arguments.

In conclusion: The provisions of the **ballot proposal** prevail over contrary provisions in the **bond ordinance**, for the reason that the wording of the **ballot proposal** is what the voters approved, not, any contrary wording in the **bond ordinance** which were not presented to or approved by the voters by their "yes" votes cast for the **ballot proposal** as it appeared on their ballot.

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

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

- None of the statements were made in a voters pamphlet, as are all the officials' statements in the case at bar.
- None of the statements were made en masse, on a massive basis, of the entire officialdom of the municipality, as in case at bar.

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

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

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

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

The Respondents’ trial brief, at page 13, lines 18-24,<sup>20</sup> makes the futile argument that the construction and statement of the Proposition A measure by the Ballot Simplification Committee, in its **Digest**, at Page 33 of the Voters Pamphlet,<sup>21</sup> is inadmissible under City of Los Angeles, *supra*, 234 Cal.App.2d at 655, which ruled that “no public official or private citizen is authorized to change the substance or effect” of a bond proposal.

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

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

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

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

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

<sup>20</sup> Appendix 68.

<sup>21</sup> Appendix 125.

**Second**, the **Digest** of the Committee is manifestly not by any means a mere “campaign statement” of an unauthorized public official seeking to “change the substance or effect” of the Proposition A measure; but rather, it is **the other way around**: the **Digest’s** duty and purpose is to **identify** and state to the voters the true substance and effect of the measure.

**In summary**, the San Francisco Ballot Simplification Committee’s interpretation and statement in its **Digest**, at Page 33 of the Voters Pamphlet, of the plain meaning of the Proposition A measure, in respect to the required use of **all** TSRs to construct the new LHH and service the Proposition A bond debt, is conclusive upon the City in case at bar.<sup>22</sup>

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

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

Petitioner also offers into evidence other ballot arguments, to show that the common understanding that the words, “replace Laguna Honda Hospital” as used in the **ballot proposal**, was to replace Laguna Honda Hospital as it presently existed, of a size capable of serving 1,200 SNF patients.

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

**First:** The **Digest** of the **San Francisco Ballot Simplification Committee**:<sup>23</sup>

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

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

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

**Second:** The proponents’ argument, by the **Board of Supervisors**:<sup>24</sup>

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

. . .

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

---

<sup>22</sup> Appendix 125.

<sup>23</sup> Appendix 125.

<sup>24</sup> Appendix 126.

**Third:** The rebuttal argument by the Board of Supervisors:<sup>25</sup>

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

“Yes, **rebuilding Laguna Honda** is expensive, but other alternatives **servicing the same number of people** would be far more costly. . . . **Dispensing Laguna Honda’s population to smaller public facilities** would require wasteful duplication of costly medical equipment. . . .” (Emphasis supplied.)

**Fourth: Mayor Willie Brown:**<sup>26</sup>

“Everyone agrees that using San Francisco’s share of money won from these tobacco companies to build Laguna Honda Hospital is the best use of this once-in-a-lifetime financial windfall.”<sup>27</sup>

**Fifth:** Lee Ann Monfedini, President, San Francisco Health Commission, Roma Guy, Vice-President, Health Commission, and the following members of the Health Commission:

- Edward A. Chow, M.D.
- Ronald Gene Hill, Chair, Budget Committee
- David J. Sanchez, M.D.
- John Umekubo, M.D..<sup>28</sup>

“**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.

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

**Sixth: Congresswoman Nancy Pelosi:**<sup>29</sup>

“I support Proposition A to save Laguna Honda Hospital because it is the best option to ensure the 1,200 patients at the hospital get the best, quality long-term care possible.”<sup>30</sup>

**Seventh:**

- **Walter Johnson, Secretary-Treasurer, San Francisco labor Council**
- **Sal Roselli, President, Healthcare Workers, Local 250**
- **Stanley Smith, Secretary-Treasurer, S.F. Building Trades Council**
- **Kent Mitchell, United Educators of San Francisco:**<sup>31</sup>

“The new state-of-the-art structure will continue to provide the highest-quality, 24-hour care for 1,200 residents, while meeting the growing demands of the twenty-first century.”<sup>32</sup>

---

<sup>25</sup> Appendix 127.

<sup>26</sup> Appendix 129.

<sup>27</sup> Appendix 129.

<sup>28</sup> Appendix 135.

<sup>29</sup> Appendix 131.

<sup>30</sup> Appendix 131.

<sup>31</sup> Appendix 133.

<sup>32</sup> Appendix 133.

**Eighth: Mitchell Katz, Director of Public Health; and Louise Renne, San Francisco City Attorney:**<sup>33</sup>

“We chaired this commission, which was appointed by the health commission, with the goal of identifying the very best plan for **rebuilding** Laguna Honda Hospital.”<sup>34</sup> (Emphasis supplied.)

**Ninth: FDR Democratic Club for Seniors and People with Disabilities:**<sup>35</sup>

“(W)e oppose a new 1,200-bed Laguna Honda.”<sup>36</sup>

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

“We oppose the rebuilding of Laguna Honda Hospital at its current level of 1200 beds.”<sup>37</sup>.

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

“This bond measure ensures construction of 1,200 skilled nursing beds.”<sup>38</sup>

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

“NO CIVILIZED CITY SHUNTS ITS DISABLED INTO 1,200-bed warehouses.”<sup>39</sup>

**CONCLUSION AS TO THE THIRD CAUSE OF ACTION OF THE COMPLAINT BELOW.**

The petitioner submits that from the above analysis of cases that the trial court erroneously accepted as the applicable law, the contention of the Respondents that in construing a ballot measure, that ballot arguments may not be considered. Therein, by such erroneous application of the law applicable to the construction of the meaning of the Proposition A measure, the trial court acted in gross abuse of discretion, for which the requested writ of mandamus should be issued by the Court of Appeal, as prayed.

**SUMMARY**

For the reasons given, the Court of Appeal should issue its writ of mandamus under § 1085 of Code of Civil Procedure to order the respondent San Francisco Superior Court to vacate and set aside its April 4, 2005 order denying writ of mandamus, and its April 4, 2005 judgment, in Superior Court action No. CPF 04-504777.

Petitioner further requests that he be awarded reasonable attorneys’ fees under § 1021.5 Code of Civil Procedure; costs; and such other and further relief as may be just.

Respectfully submitted,

\_\_\_\_\_  
Attorney for Petitioner

---

<sup>33</sup> **Appendix 133.**

<sup>34</sup> **Appendix 133.**

<sup>35</sup> **Appendix 144.**

<sup>36</sup> **Appendix 143.**

<sup>37</sup> **Appendix 144.**

<sup>38</sup> **Appendix 144.**

<sup>39</sup> **Appendix 145.**