IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

SEAN PATRICK MONETTE-SHAW,

Petitioner-Appellant,

-vs.-

SAN FRANCISCO BOARD OF SUPERVISORS; GAVIN NEWSOM, Mayor of City and County of San Francisco; CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO HEALTH COMMISSION; and EDWARD HARRINGTON, Controller,

Respondents-Respondents.

Civil No. A110378

(S.F. CPF 04-504777)

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

The petitioner-appellant Sean Patrick Monette-Shaw (herein "the petitioner") files his reply brief as set forth below.

The $25 million misappropriation of tobacco settlement revenues trust funds.

The City opposition brief, just as did the trial court judgment, ignores the issues of first impression in respect to the City's misappropriation of $25 million of tobacco settlement revenues (TSRs) which is complained of. This is discussed below.

The requirement of Proposition A "to replace Laguna Honda Hospital," and the effect of the Digest of the City's ballot committee, in the Voters Pamphlet.

In respect to the separate issue of the Proposition A measure "to replace Laguna Honda Hospital," – (emphasis on the word, "replace"), – the City brief futilely selects, out of several possible meanings, a meaning which is manifestly **not** the meaning of the words, "to replace," as used in the **ballot proposal** and the **ballot ordinance** which placed the **ballot proposal** on the ballot.

The City brief also inexcusably mis-states the contents of an appellate decision, and disregards case law concerning the relevance of the Digest of ballot measures by the City's ballot committee, in a futile effort to argue that the ballot committee's statement in the Voters Pamphlet of the meaning of Proposition A is neither binding upon the City, nor relevant.

Reversal of the trial court judgment is required.

The City brief, in sum, raises no acceptable defense to the claims and argument of the case in the petitioner's opening brief, so that the trial court judgment must be reversed both as to **first**, its denial of writ of mandamus in respect to the $25 million misappropriation of TSR trust funds for purposes other than to construct a replacement Laguna Honda Hospital ("replacement LHH"), and to service Proposition A bond debt, and **second**, its denial of writ of mandamus (1) to enjoin implementation of City Ordinance 252-04 which authorizes reduction in the scope (i.e., size and function) of the replacement LHH, and (2) to enjoin the respondents

from reducing the size and function of the replacement LHH from the 1,200-bed skilled nursing facility which, at the minimum, is required by Proposition A to be constructed, **unless, – after a factual determination** by a responsible City agency or officer, the Board of Supervisors (a) finds there are insufficient bond proceeds and TSRs by which to construct the replacement LHH to the requisite replacement size and function, (namely, a 1,200 SNF facility, at the minimum), and (b) adopts a resolution or ordinance to abandon that portion of the construction of the replacement LHH project, based on such factual determination.

PART ONE - THE $25 MILLION TSR DEFALCATION

The City brief fails to address the below issues of first impression raised by the appellant's opening brief in respect to the $25 million misappropriation of TSR trust funds for uses not authorized by Proposition A, and, fails to show why the trial court denial of writ to restore the misappropriated $25 million TSR funds should not be reversed, with the respondents to be ordered to restore the misappropriated $25 million TSRs to the TSR trust fund, to be used exclusively, with Proposition A bond proceeds, to construct a replacement LHH and to service Proposition A bond debt.

These issues of first impression, which are not addressed nor answered by the City brief, are:

- When a municipal ordinance such as City Elections Code §§ 500 - 595 and City Elections Code § 600 - 610 creates a ballot committee such as the City's Ballot Simplification Committee, whose function is to state the meaning of a ballot measure in the Voters Pamphlet:

  - (1) Is the municipality be bound by the administrative determination by its ballot committee of the meaning of the measure?

  - (2) Must the ballot committee's statement of the meaning of the measure be considered by a reviewing court in its determination of the municipal obligations created by the measure?

- (3) In any event, is a municipality equitably estopped , – where it gains passage of a bond measure by salutary language in (1) the **ballot proposal** and (2) the ballot committee's statement of the meaning of the measure in the Voters Pamphlet, – from implementing the measure according to a directly contrary provision in the **bond ordinance**, which is set forth only in tiny print, many pages later in the Voters Pamphlet?

These issues were neither addressed nor answered, correctly or at all, by the City's brief or in the trial court judgment which is appealed from; and, the City's brief inexcusably misstates and ignores the case law which is relevant to these issues.

1. **Petitioner's contentions in re the misappropriated $25 million in TSR trust fund.**

First. The language of the **ballot proposal** appearing on the ballot and in the Voters Pamphlet, prevails over contrary language in the **bond ordinance,** where there is, as in the case at bar, a direct conflict.

Second. A municipality is bound by the administrative determination by its own ballot committee of the meaning of a ballot measure, when the municipal code requires, as in case at bar, the committee to ascertain and state the meaning of the measure in the Voters Pamphlet.

Third. The City became equitably estopped, when it gained passage of Proposition A by the salutary language in the **ballot proposal** and in the ballot committee's Digest, – to the effect that all TSRs will be used to construct the replacement LHH and to service Proposition A bond debt, – from asserting that the contrary language in the **bond ordinance,** – in last of many pages of the Voters Pamphlet, – allows it to use TSRs for purposes unrelated to constructing the replacement LHH or to service Proposition A bond debt.

Accordingly, the trial court judgment that there was no misappropriation of $25 million of TSR trust funds, due to the fact that the **bond ordinance** provided that "available" TSRs are only those received by the City **after** Proposition A bonds

are issued, was clearly erroneous. Therein the judgment must be reversed on this cause of action, with directions to issue a writ of mandamus to the respondents to restore, or course to be restored, the $25 million misappropriated from the TSR trust fund in fiscal 2002-2003, plus interest at the legal rate of interest from the date of the misappropriation.

Discussion

2. Reiteration of the facts re the $25 million misappropriation of TSR trust funds.

The Proposition A **ballot proposal,** – which was on the ballot and which appeared prominently on the first page of the Voters Pamphlet, – stated that to reduce the tax effect, that "available tobacco settlement revenues" ("TSRs") would be used, with Proposition A bond proceeds, to construct a replacement Laguna Honda Hospital ("replacement LHH"), and to service Proposition A bond debt.

There is no ambiguity about the words, "available tobacco settlement revenues," in the common understanding of the word, "available," in the **ballot proposal**, hence, the phrase could only have signified to voters that **all TSRs** would be used, as and when received by the City, with Proposition A bond proceeds, to construct the replacement LHH, and to service Proposition A bond debt.

This is so crystal clear that the City's ballot committee, – which was created by the City municipal code for the express purpose of explaining each ballot proposal to the voters on the first page of each ballot measure in the Voters Pamphlet, – reaffirmed this singular meaning to the voters by stating, in the space immediately below the **ballot proposal**, as follows:

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

A copy of the first page of the Voters Pamphlet is set forth on the next page of this brief, in order to show the prominence which the Digest had in the Voters Pamphlet:

Laguna Honda Project A

PROPOSITION A

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 principal amount not exceeding $299,000,000, for the acquisition, improvement, construction and/or reconstruction of a new health care, 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 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 redemption price of, interest on, reserve fund deposits, if any, and/or financing costs for the obligations authorized thereby?

YES ➡
NO ➡

Digest

by Ballot Simplification Committee

THE WAY IT IS NOW: The City owns and operates Laguna Honda Hospital, founded in 1866. 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 hospital also provides the community with adult day health care and senior nutrition programs.

Many of Laguna Honda Hospital's current facilities were built between 1926 and 1940. The hospital was damaged in the 1989 Loma Prieta earthquake. Many of its building systems, including fire safety and electrical, are in need of repair or replacement. In addition, the hospital has large open wards that do not meet Federal and State regulations for patient privacy.

Because of legal settlements with tobacco companies to recover money spent on public health costs associated with smoking, the City expects to receive $347 million over the next 25 years.

The principal and interest on general obligation bonds are paid out of property tax revenues.

THE PROPOSAL: Proposition A would authorize the City to borrow $299 million by issuing general obligation bonds to acquire, construct or reconstruct a health care, assisted living, and/or other type of continuing care facility or facilities to replace Laguna Honda Hospital. Proposition A would require an increase in the property tax to pay for the bonds.

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.

A two-thirds majority vote is required for passage of Proposition A.

A "YES" VOTE MEANS: If you vote yes, you want the City to issue general obligation bonds in the amount of $299 million to acquire, construct or reconstruct a health care, assisted living, and/or other type of continuing care facility or facilities to replace Laguna Honda Hospital.

A "NO" VOTE MEANS: If you vote no, you do not want the City to issue bonds for these purposes.

Controller's Statement on "A"

City Contoller Edward Harrington has issued the following statement on the fiscal impact of Proposition A:

Should the proposed bonds be authorized and issued, in my opinion the costs would be:

Bond Redemption	$299,000,000
Bond Interest	230,526,000
Debt Service Requirement	$529,526,000

Based on a single bond sale, the average annual debt requirement for twenty (20) years at the current six (6) percent interest rate would be approximately $26,476,300 which is equivalent to four and eleven hundredths cents ($0.0411) per $100 of assessed valuation in the current tax rate. The increase in annual property taxes for the owner of a home with an assessed value of $300,000 would amount to approximately $120.36 if all bonds were sold at the same time. It should be noted, however, that the City does not plan to issue all authorized bonds at one time; if these bonds are issued over several years, the actual effect on the tax rate would be less than the maximum amount shown above. Also, to the extent revenues that are expected to be available from a settlement with certain tobacco companies are used for debt service, the impact on future years' tax rates would be substantially less.

How Supervisors Voted on "A"

On June 21, 1999 the Board of Supervisors voted 9-2 to place Proposition A on the ballot.

The Supervisors voted as follows:

Yes: Supervisors Ammiano, Becerril, Bierman, Brown, Katz, Leno, Teng, Yaki, Yee

No: Supervisors Kaufman, Newsom

THIS BOND MEASURE REQUIRES 66 2/3% AFFIRMATIVE VOTES TO PASS

ARGUMENTS FOR AND AGAINST THIS MEASURE IMMEDIATELY FOLLOW THIS PAGE. THE FULL TEXT BEGINS ON PAGE 55
SOME OF THE WORDS USED IN THE BALLOT DIGEST ARE EXPLAINED ON PAGE 31

Thus the wording of the **ballot proposal**, within its four corners and as affirmed by the City's ballot committee Digest, provided, – and thereby imposed an express trust for that purpose, – that all TSRs, not just some of them, would be used exclusively for construction of the replacement Laguna Honda Hospital, ("replacement LHH") and to service Proposition A bond debt.

The respondent Board of Supervisors, however, violated their fiduciary duty to the electorate, by misappropriating $25 million from the TSR trust fund in fiscal 2002-2003 for other civic purposes; and the trial court erred in denying writ of mandamus to set aside the misappropriation and order the respondents to restore the misappropriated TSR trust funds to the TSR trust, to be used exclusively, with Proposition A bond proceeds, to construct the replacement LHH **(whatever its size or scope may be**), and to service Proposition A bond debt.

Respondents' position

Respondents defend the City's misappropriation of TSR trust funds by in effect saying to the electorate, ha, ha, the joke is on you taxpayers: Didn't you notice in the tiny print in the **bond ordinance**, – at the back of the Voters Pamphlet section, – that we defined "available tobacco settlement revenues" to mean only TSRs received by the City **after** the Proposition A bonds are issued? Therefore we, the City, can use all the $100 million-plus of TSRs received by the City **before** the City first issued Proposition A bonds in 2005, for any civic purpose we want, **not,** for construction or Proposition A bond debt servicing, or for servicing Proposition A bond debt; and you taxpayers will just have to dig into your pockets to pay the extra tax burden which results from our not applying either the $25 million misappropriated, or any of the TSRs received before the Proposition A bonds were issued in 2005, for the purposes for which we stated in the **bond proposal**, and in the ballot committee's statement, the TSRs would be used for.

If this defense is acceptable in law and equity then the Court of Appeal should affirm the judgment of the trial court, which in effect so held, and **publish,**

and not hide its appellate decision in an unpublished decision, so that henceforth all municipalities can use this bait-and-switch, under the judicial imprimatur of the Court of Appeal.

The petitioner contends, however, that such a practice of promising in prominent wording on Page One of a sales document, but including exclusionary language in tiny print on Page Twenty-Three of the sales document, would be enjoined out of hand, if a business were to engage in this practice, as an unfair or illegal business practice. Petitioner submits that municipalities must be held to the same standard, and that behavior of this kind by the City, in case at bar, creates and raises an equitable estoppel which prevents the City from taking advantage of its own up-front representation, in the **ballot proposal** and in the Digest of the City's ballot committee, that all available TSRs would be used, with Proposition A bond proceeds, to construct a replacement LHH, and to service Proposition A bond debt, so as to thereby, – as represented, – reduce the property tax burden in respect to the replacement LHH project.

Thus, see:

- (1) Civil Code § 623:

> "Whenever a party, has by his own statement or conduct, intentionally and and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

- (2) Farrell v. County of Placer (1944) 23 Cal.2d 624, 627-628:

> "If we say with Justice Holmes, 'men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens,"

and,

- "[T]here are many instances in which an equitable estoppel in fact will run against the government when right and justice demand it."

Other matters

3. **The City has inexcusably misstated the holding of a case, and fails to address the issues of which is to prevail, and why, where there is a conflict between the Ballot Proposal language, on the one hand, and the Bond Ordinance which placed the Ballot Proposal on the ballot, on the other hand.**

It is particularly outrageous that the City, in its opposition brief, inexcusably elided from its statement of the case law on the subject of what a court may consider in determining the obligations of a bond measure, any reference to extrinsic sources, when in fact, the very case from which it quotes **specifically included** extrinsic sources as being an item which may be considered, when relevant, by the reviewing court.

Thus the City quotes Associated Students of North Peralta Community College v. Board of Trustees (1979) 92 Cal.App.3d 672, 677-678, as **holding that there are only four elements** to a bond "contract," namely: (1) the statute authorizing the creation of the bonded indebtedness which is presumptively within the knowledge of each elector, (2) the resolution by which the bonding entity resolves to submit the issue to the voters, (3) the "ballot proposition" submitted to the voters; [1] and (4) assent or ratification by the electors of the "ballot proposition."

However, the City **entirely deleted from its quotations** from Associated Students the fifth element stated by Associated Students to be considered in determining the bond "contract" resulting from passage of a bond measure, namely, **extrinsic evidence,** where relevant.

Associated Students thus specified the following additional element which may be used to judicially construe the meaning and obligations of a bond measure, as follows:

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[1] I.e., what the petitioner in this litigation calls the "**ballot proposal**."

"Extrinsic documents may be added to the primary elements comprising the relationship." (92 Cal.App.2d at 678.)

Therefore **it is not the rule,** as inexcusably mis-stated by the City, by elision, that extrinsic evidence, where relevant, may not be considered in determining what obligations arise from the passage of a bond measure.

Further, judicial ascertainment of the meaning of bond measures is essentially no different from the judicial ascertainment of the meaning of ballot measures, in general, which, as noted in petitioner's opening brief, has always included judicial consideration of arguments pro and con in the Voters Pamphlet, in those cases where the meaning of the ballot measure is not so unambiguous as to exclude such consideration.

Thus, the established rule, as stated in Legislature v. Eu (1991) 54 Cal.3d 492, 504-505, that where there is an ambiguity in a ballot measure, that:

" . . . to help resolve such ambiguities, 'it is appropriate to consider indicia of the voters' intent **other than the language of the provision itself.** [Citation omitted.] Kennedy Wholesale Inc. v. State Board of Equalization (1991) [53 Cal.3d 245], 250. Such indicia include the analysis and arguments contained in the official ballot pamphlet. (See, ibid.; Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization (1978) [22 Cal.3d 208], 245-256 . . . "

4. The "extrinsic evidence" consisting of the ballot committee's statement of the meaning of the Proposition A measure.

The Digest of the City's ballot committee, – required by City Elections Code, §§ 500 - 595, [2] and City Elections Code, §§ 600 - 620, [3] to be made by the committee

[2] Appellant's Appendix (AA) 279-291.

[3] AA 293-294.

and to be placed immediately below the **ballot proposal** in order to explain the meaning of the measure to the voters, – told the voters that under the Proposition A bond measure that "all tobacco settlement revenues," – not, just some of them, – would be used for some construction of the replacement LHH and for Proposition A bond servicing. [4]

However, the **bond ordinance** which placed the **ballot proposal** on the ballot, provided that "available tobacco settlement revenues" did not mean all available tobacco settlement revenues, but, only meant those TSRs which may be received by the City **after it issues the Proposition A bonds.** [5]

The City contends, – and the trial court held, – that the entirely contradictory language of the **bond ordinance** which placed the **ballot proposal** on the ballot, – and which is set forth in tiny print on the next-to-last page of a long Voters Pamphlet, – prevails over the language of the **ballot proposal**; and that the official Digest of the City's ballot committee is meaningless, not to be relied upon by the voters in deciding whether to approve or disapprove a bond measure, not to considered by a court in determining the meaning of the ballot measure in question.

In this respect both the trial court judgment and the City's brief ignore a series of rulings of the First District Court of Appeal to the effect that the purpose of the formation of the City's ballot committee is to state "the major objectives or 'chief purpose and points' of the measure," (Brennan v. Board of Supervisors (1981) 125 Cal.App.3d 87, 92; that the ballot summary **cannot be misleading,** (Brennan, 125 Cal.App.3d at 93), and **must reasonably inform the voter of the character**

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[4] **Note:** The words, "some construction," are manifestly used in the Digest to reflect that the rest of the construction not paid for by TSRs, was to be paid for by the $299 million proceeds of the Proposition A bonds; so that therein only part of, – i.e., "some" of the construction – of the replacement LH was to be paid for by TSRs, not, all of the construction.

[5] *See*, AA 147.

and real purpose of the proposed measure, (Brennan, 125 Cal.App.3d at 93; and, that courts are empowered to examine the contents of a ballot digest to determine if it fairly represents the measure it summarizes, (Brennan, 125 Cal.App.3d at 93).

Clearly, it is too late in the day for the City to now seek to establish regression from this established law, so as to "dumb down" judicial review of the meaning of Proposition A so as to exclude consideration by the reviewing court of the interpretation of the measure which was given to the voters by the City's ballot committee, which was, pure and simple, that the Proposition A measure **required all TSRs** to be used for construction of the replacement LHH, and to service Proposition A bonds.

Hence, it is clearly erroneous of the City to argue that "even if the Ballot Simplification Digest were materially different from the documents that make up the Proposition A bond contract," -- (i.e., the **ballot proposal** which appeared on the ballot and in the Voters Pamphlet), – **it would be irrelevant**." (City brief, Page 22.) (Boldface emphasis supplied.)

A further argument of the City only compounds the frivolity of the City's futile argument on this score.

Thus, the City brief actually goes on to argue that the City's ballot committee is not authorized to change the substance or effect of the measure "by the characterization he (sic) employs in discussing a bond measure," so that, ergo, the ballot committee may not "alter or enlarge the scope of San Francisco's resulting duties." (City brief, Pages 22-23.) But this is mischaracterizes the administrative function of the ballot committee: which function is as stated in Brennan, supra, (125 Cal.App.3d at 92-93), namely: to fairly state the real character and purpose of the measure, **not,** to change the real character and purpose of the measure, and, not to mislead the voters in respect to the meaning of the measure upon which they are voting.

Hence the ballot committee, -- in interpreting Proposition A to require, among other things, that **all TSRs** would be used for construction of the replacement LHH and to service Proposition A bond debt, – presumptively correctly interpreted the measure; and the voters were entitled to rely upon the committee's interpretation – that all TSRs would be required to be used for such construction and debt servicing, – as being the correct and official meaning of the measure.

Notably also, the City, – if it disagreed with this interpretation by the ballot committee of the meaning of the measure, – had a right to seek mandamus to require the ballot committee to add that "available" TSRs did not include TSRs received before Proposition A bonds were issued; but, the City sat on its hands and let the voters conclude, from the ballot committee's Digest, that if they voted for Proposition A that all TSRs, (including the tens of millions of TSRs received before issuance of the bonds), would be used for the construction of the replacement LHH, and to service bond debt, – thus reducing the property tax impact which would obtain if this were not the case.

Petitioner asserts that therefore, in this context of the official function of the ballot committee, that the City is bound by the interpretation given to the measure by the ballot committee, in the first instance; and that in any event, the City is equitably estopped from obtaining passage of Proposition A by using (1) the language of the **ballot proposal** and (2) the ballot committee's unchallenged interpretation of the measure, to obtain passage of Proposition A, but, implement the measure contrary thereto, on the basis of a contrary obscure provision in the **bond ordinance** itself, (which only appears in tiny print many pages later in the Voters Pamphlet, at the end of the Voters Pamphlet).

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5. **It should be noted that reversal of the trial court in respect to its denial of writ to restore the misappropriated $25 million to the TSR trust fund, does not depend or relate in any way to the issue of whether the replacement LHH is required, or not required, to be of a given size, scope, or function.**

The petitioner hastens to add the above note, because it seems to petitioner, from reading the City brief, that the City seems to be inferring that if petitioner does not prevail on his claim that the replacement LHH must be, at the minimum, the size and scope and function of the 1,200-bed skilled nursing facility (SNF) it is replacing, that there is no trust imposed upon the TSRs by the **ballot proposal**, purely on that account.

But, this is not the case. The express trust referred to by the petitioner, (which is created by the language of the **ballot proposal**), is an express trust of all TSRs, as and when received by the City, for use (with Proposition A bond proceeds), to construct a replacement LHH, and to service Proposition A bond debt, – **no matter what size or scope or function** the replacement LHH facility may be judicially required or allowed to be.

PART TWO - "Construction . . . to replace Laguna Honda Hospital," as used in Proposition A, means replacement with the same type, scope, and function as the existing 1,200-bed skilled nursing facility (SNF), not, something different or much lesser in type, scope, and function.

According to Page 16 of the City brief, "to replace" means that if the voters voted to approve issuance of bonds for the City to replace a given car, the City could replace the car with a bicycle. I.e., the City asserts, at Page 16:

> "[T]he concept of "replacement" does not necessarily imply sameness, or even any particular degree of similarity; a person may replace her car with a bicycle."

This is an absurd and nonsensical view of what the words, "to replace Laguna Honda Hospital," as used in the **ballot proposal**, could possibly have been intended to mean, in Proposition A.

Petitioner reiterates that it is manifest that the words, "to replace Laguna Honda Hospital," clearly referred to a commonly understood meaning of the word, "replace," which signifies that one is replacing an old item with a new item of the same thing; i.e., as in "He replaced his razor blade." In this usage, "replaced" obviously refers to a new razor blade of the same sort, size, and function as the old razor blade being replace, not, a dull knife or a whistle which is a lesser or different item that which is being replaced.

In effect, the City brief selects, from the possible usages of the word, "replace," the meaning which is ruled out by the context of the reasons why Proposition A was placed on the ballot in the first instance.

The petitioner here notes that the word, "replace," is defined in the American Heritage Dictionary, 3d Ed., as"

"1. To put back into a former position or place.

2. To take or fill the place of.

3. To be or provide a substitute for.

4. To pay back or return; refund."

The American Heritage Dictionary states, among other things, that:

> "To *replace* **is to be or furnish an equivalent** or a substitute in the place of another, especially, another than has been lost, depleted, worn out, or discharged." (Boldface emphasis supplied.)

Plaintiff submits that it is this latter usage which was clearly intended by the use of the words, "to replace Laguna Honda Hospital," in both the **ballot proposal**, (AA 125), as well as, indeed, Section 1 of the **bond ordinance**, (AA 147).

Ambiguity

However, if it is not clear that the words, "to replace Laguna Honda

Hospital," mean that the existing 1,200-bed skilled nursing facility is to be replaced with a new facility having 1,200 beds and whose function is a skilled nursing facility, nevertheless, at worst, only an ambiguity is created as to the meaning of "to replace Laguna Honda Hospital," which requires a reviewing court to consider all the pro-and-con arguments in the Proposition A Voters Pamphlet so as to ascertain therefrom **the voters' intent**; but both the trial court and the City brief erroneously failed to consider the pro-and-con argument sin the Voters Pamphlet in this case.

Petitioner here reiterates that, as stated in Legislature v. Eu (1991) 54 Cal.3d 492, 504-505, that where there is an ambiguity in a ballot measure, that:

> " . . . to help solve such ambiguities, 'it is appropriate to consider indicia of the voters' intent **other than the language of the provision itself.** . . . ' [Citation omitted.] Such indicia include the analysis and arguments contained in the official ballot pamphlet. . . .
>
> " . . .
>
> "We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure. [Citation.] **Nonetheless, we find it significant** that [one side] failed to contradict the [other side's] . . . argument . . . " (Boldface emphasis supplied by the petitioner.)

In case at bar, all the pro and con arguments reflect a consensus or unanimity, – of the type remarked upon by Legislature v. Eu, *supra*, 54 Cal.3d at 505, – that the voters intended to vote, up or down, a proposal to replace the existing 1,200-bed SNF at Laguna Honda Hospital, with a new 1,200-bed SNF facility; so that City Ordinance 252-04, which authorizes the City Controller to approve a down-scoping of the 1,200-bed SNF facility whose construction is being bid upon, to an SNF which is lesser in scope, (i.e., with significantly fewer beds), than the existing 1,200-

bed SNF facility which Proposition A was passed to replace, violates the requirement of Proposition A that a new skilled nursing facility having at least 1,200 beds is to be built; hence, the trial court erred in failing to issue a writ of mandamus to enjoin the implementation of Ordinance No. 252-04. [6]

6. **Lastly, the City's attempt to construe City Ordinance 252-04, as not any ordinance to reduce the scope of the replacement LHH, is without merit, inasmuch as the City brief downplays the provisions of Ordinance 252-04, which authorize contractors to reduce the scope of the project upon approval by the respondent City Controller, and, without formal approval of the City Health Commission or Board of Supervisors.**

As set forth in the City Budget Analyst report to the Board of Supervisors, (Page 49 of **Exhibit 2** of Respondent's Request for Judicial Notice filed in the Court of Appeal), a "trade package" is as follows:

> "A trade package is a specific **scope of work**. For example, the concrete trade package is the structural concrete for **all the buildings**, the steel trade package is the structural frame, metal stairs, and metal deck, the electrical package is **all the wiring and conduit** for the buildings." ((Emphasis supplied.)

Hence, a reduction in the "scope of work" is a reduction in the size of the project..

Further, as clearly shown by the Budget Analyst's report, the purpose of Ordinance 252-04 is to **reduce the scope of the project,** – i.e., to reduce the planned 1,200-bed SNF to a SNF of much smaller size, (i.e., a reduction to a facility with less than 1,200 SNF beds), – by authorizing the City Department of Public Works, **with the approval of the City Controller**, to reduce the **scope of trade packages**, without any formal approval by the City Health Commission or Board of

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[6] A copy of Ordinance No. 252-04 is set forth on Page 251 of Appellant's Appendix.

Supervisors to do so. [7]

7. **Also, it should be noted that the "Laguna Honda Hospital Update" (AA 236-256), is further evidence that the respondents have a policy to reduce the size of the replacement LHH to substantially less than 1,200 SNF beds, due to their insistence to remain "within" a $401.6 million construction budget by inexcusably limiting themselves to use no more than $100 million of TSRs for the construction part of the project**

. Hence, this policy is also in violation of the requirement of the **ballot proposal** that all available TSRs be used for construction and to service Proposition

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[7] Thus, the Budget Analyst Report states, (at Page 49 of **Exhibit 2** of the Respondent's Request for Judicial Notice filed in the Court of Appeal), that Ordnance 252-04:

> " . . . would authorize the Department of Public Works to negotiate the price of each **trade package** with any of the bidders for that trade package, and to **reduce the scope of said trade package**, if necessary, to an effort to achieve cost savings to meet the construction budget of the Program." (Boldface emphasis supplied.)

The Budget Analyst Report further stated that:

> "As stated . . . , the proposed ordinance will allow DPW to negotiate with bidders **on trade packages** to achieve the following benefits: . . . d) Allow for an efficient and cost competitive **adjustment of the scope** to match the budget." (Page 51 of **Exhibit 2** of Respondent's Request for Judicial Notice.) (Boldface emphasis supplied.)

The Budget Analyst therefore recommended to the Board of Supervisors that they include in Ordinance 252-04 a provision which would authorize the Department of Public Works, **upon a sign-off approval by the respondent City Controller,** to reduce the scope of the project by approving any bid for a project trade package which "will achieve the greatest cost savings for the Laguna Honda Hospital Replacement Program." (Page 55 of **Exhibit 2** of the Respondent's Request for Judicial Notice filed in the Court of Appeal.)

Ordinance 252-04 was so amended and, as amended, was enacted by the Board of Supervisors. (Appellant's Appendix, 211-212.)

I.e., Ordinance 252-04 provides and authorizes the Controller to unilaterally approve the reduction of the size of the 1,200-bed skilled nursing facility which was planned to be built, using Proposition A bond proceeds and TSRs to do so.

A bond debt. Further, the petitioner here requests the Court of Appeal to take judicial notice that the proposed Health Commission resolution which is attached to the **Update,** (at AA 256) was duly adopted by the Health Commission at a meeting in the spring of 2005, – which further evidences the respondents' policy which is complained of, (namely, to refuse to apply all TSRs to the rebuild Laguna Honda Hospital, but instead, to ultra vires prevent the rebuild of a 1,200-bed SNF by refusing to apply all TSRs received or to be received, for this construction purpose, as required by the **ballot proposal** of Proposition A.

Note further, that Ordinance 252-04, which is complained of, further facilitates this ultra vires decision and policy of the respondents, namely, to violate Proposition A by not using all TSRs available by which to build out the project to the 1,200-bed skilled nursing facility which is required by the **ballot proposal** of Proposition A.

SUMMARY AND RELIEF PRAYED

For the above reasons, and for the reasons stated by the petitioner in his opening brief, the petitioner prays as follows:

1. That the trial court judgment be reversed in whole and in every part, with the trial court instructed to issue a writ of mandamus as specified in the prayer of the Verified Petition for Writ of Mandamus, (which is set forth at Pages 47 through 49 of the Appellant's Appendix);

2. That the petitioner have attorneys' fees pursuant to § 1021.5 Code of Civil Procedure;

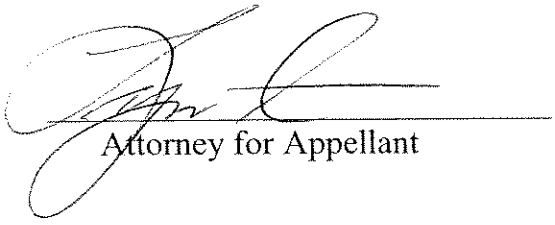
3. That the petitioner have his costs on appeal, and such other and further relief as may be just.

Dated: October 3, 2005

Attorney for Petitioner-Appellant
Sean Patrick Monette-Shaw

Certificate of Number of Words

The undersigned, as attorney for the appellant Shean Patrick Monette-Shaw, certifies that the within Appellant's Reply Brief, which was prepared on a computer, does not exceed 5,494 words.



Attorney for Appellant

PROOF OF SERVICE BY U.S. MAIL

The undersigned deposes and says:

I am a citizen of the United States, over the age of 18, not a party to the within action, whose address is 28 Newport Landing, Novato, California 94949.

On the date below I placed a copy of:

Appellant's Reply Brief

in envelopes addressed as set forth below and sealed and deposited them, first class postage fully prepaid, in the United States Mail in San Francisco, California:

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Supreme Court (4 copies)

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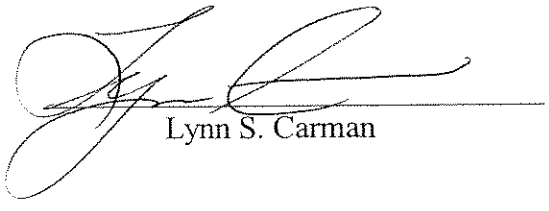
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in San Francisco, California, on October 3, 2005.



Lynn S. Carman