

NOV 23 2004

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO - UNLIMITED JURISDICTION

11 SEAN PATRICK MONETTE-SHAW,

12 Petitioner,

No. **CPF 04-504777**

13 -vs.-

VERIFIED PETITION  
FOR WRIT OF MANDAMUS

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

24 Respondents.

25 \_\_\_\_\_ /

26 Jury Trial Waived

## **VERIFIED PETITION FOR WRIT OF MANDAMUS**

TO THE ABOVE-ENTITLED HONORABLE COURT:

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

### **Jurisdiction**<sup>1</sup>

1. The above-entitled Superior Court has jurisdiction of the within proceeding pursuant to § 1085 et seq., Code of Civil Procedure.

### **Parties**

2. The petitioner Sean Patrick Monette-Shaw is and has been a resident and citizen of the City and County of San Francisco, State of California since before 1999. He resides at 975 Sutter Street, Apartment 6, San Francisco, California. He was born in Moline, Illinois.

3. 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.

4. The respondent San Francisco Board of Supervisors ("Board") is the board of supervisors of the City and County of San Francisco, State of California. The Board has the power to enact ordinances and to override mayoral vetoes under §§ 2.105 and 2.106 of the San Francisco Charter.

5. The respondent Gavin Newsom ("Mayor") is the mayor of the City and County of San Francisco. Under § 3.100 San Francisco Charter the Mayor is the chief executive officer of the City and County and has the duty of general administration and oversight of all departments and governmental units in the executive branch of the City. The Mayor has the power to introduce an ordinance for passage by the Board under § 2.105 San Francisco Charter, and the power to approve or veto ordinances passed by the Board in the exercise of mayoral powers under § 3.103 San Francisco Charter. The Mayor has the duty and power to introduce the annual City budget and appropriation ordinance to the Board under § 9.100 et seq. San Francisco Charter. This respondent is sued in his official capacity only.

6. The respondent San Francisco Health Commission ("Health Commission") is a board of the City and County of San Francisco.

7. The respondent Edward Harrington is the Controller of the City and County of San Francisco. He is sued in his official capacity only.

8. The respondent City and County of San Francisco is a City and county of the State of California.

9. As used below in this Petition, the word "City" means and refers to the aforesaid City and County of San Francisco, a City and county of the State of California.

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<sup>1</sup> Captions and headings are not allegations and need not be denied or traversed.

## 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 calling for Proposition A, a bond measure for the construction of a new Laguna Honda Hospital (“new LHH”), to be voted upon at a special election to be held on November 2, 1999.

12. A voters pamphlet (Voters Pamphlet) was distributed to all voters, which sets forth Proposition A at page 33; the bond ordinance at page 55, and 22 pages of ballot arguments at pages 34–54.

13. Proposition A 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 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 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 hereby?”

14. Since **(1)** the ordinary and commonly understood meaning of the word, “available,” is “able to be used or obtained,” (Oxford University Press Dictionary), 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” mean 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 tobacco settlement revenues was to be set aside and used for tobacco education purposes.

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 debt service, and for nothing else:

— **A.** The official Digest of the Ballot Simplification Committee construed Proposition A and told voters in the Voters Pamphlet that all tobacco settlement revenues received would be used for construction and bond debt 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>2</sup>

— **B.** The City Controller, in the Voters Pamphlet, construed and told voters in the Voters Pamphlet that:

“(T)o 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.” (Emphasis supplied.)<sup>3</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 built Laguna Honda Hospital is the best use of that once-in-a-lifetime financial windfall.”<sup>4</sup>

16. Proposition A was passed by the voters at the November 2, 1999 special election. Therein, **(1)** by the provisions of Proposition A, **(2)** by the above common understanding of “available tobacco settlement revenues,” and **(3)** by the above construction placed upon Proposition A and communicated to voters in the Voters Pamphlet by the official Ballot Simplification Committee, the City Controller, and Mayor Brown, a public trust devolved upon and became impressed, by operation of the 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.

7. The public trust set forth in the preceding Paragraph shall be referred to variously in this Petition as “the public trust” or as the “Proposition A public trust.”

### **Binding contemporaneous construction of Proposition A by City agencies**

18. Further:

— (1) the Ballot Simplification Committee is a board of the City pursuant to § 600 of the City Elections Code;

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

<sup>2</sup> Page 33 of Voters Pamphlet.

<sup>3</sup> Page 33 of Voters Pamphlet.

<sup>4</sup> Page 37 of Voters Pamphlet, *op. cit.*

Pamphlet, in respect to which digest preparation the City Attorney is required to assist and consult;

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 for \$1 million per 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>5</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 bond debt; in that in December 2000 the Board, with the approval of Mayor Brown, enacted new Ordinance 316-00, (File No.01911, App. 12/28/00),<sup>6</sup> which ordinance required (1) that **all** tobacco settlement revenues (except \$1 million per 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 funds all of whose earned interest goes into the City’s general fund); and which ordinance required (2) that **all** the tobacco settlement revenues in the fund be used solely for acquisition, improvement, construction and/or reconstruction (collectively, “construction”) of a new LHH and to service bond debt.<sup>7</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.

21. The above contemporaneous construction of the terms of Proposition by first the Bond 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 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 Mayor Brown 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 year 2003-04, of \$25,005,644.60 of tobacco settlement revenues 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. 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 Proposition A public trust to be expended solely for new LHH construction costs and to service bond debt.

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<sup>5</sup> Page 33 of Voters Pamphlet, *op. cit.*

<sup>6</sup> Added as subsections (a) through (b)(2) of § 10.100-128 City Adm. Code.

<sup>7</sup> This separate fund, as a “Category Four” fund interest earned by the fund. Code, under the City Adm. retains all

23. More particularly, subsection (b)(3) of § 10.100-218 City Adm. Code, as amended by Ordinance 191-03, provided:

“(b) **Use of Fund.** ... The monies deposited into the Tobacco Settlement Revenue 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 Revenue 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.”

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 which were not related to any costs of construction of the new LHH or to service any Proposition A bond debt. The Misappropriated \$25 Million has never been restored to the public trust fund (i.e., the Tobacco Settlement Revenue Sub-account). This misappropriation and non-repayment is a continuing material breach of the public trust.

26. 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 § 10.100-218 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 mandatory 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.

27. Demand upon the respondents to perform the aforesaid mandatory ministerial duties is and would be entirely futile, hence is excused.

28. Petitioner has no plain, speedy, or adequate relief at law or in equity, and money damages are inadequate, in respect to the nonperformance of mandatory ministerial public duty which is complained of.

WHEREFORE, petitioner prays for judgment and orders as shall be hereinafter specified.

## SECOND CAUSE OF ACTION

### Estoppel

29. Petitioner refers to and incorporates each of the allegations in the preceding Paragraphs as if fully set forth herein.

30. By the representations of the City's Ballot Simplification Committee, the Controller, and Mayor Brown which are alleged in Paragraph 15 of this Petition, and by the provisions of Proposition A which represented that if the voters passed Proposition A that the property tax impact would be reduced by "requiring the application of available tobacco settlement revenues received by the City and County. ... (a) to finance and 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), the respondents Board, Mayor Newsom, the Health Commission, and the City became estopped from denying that they have a duty to apply all tobacco settlement revenues received by the City to pay the costs to construct the new LHH and to service Proposition A bond debt; but **to the contrary**, by such estoppel, the respondents have the continuing mandatory ministerial duty to (1) repeal and to cause the repeal of Ordinance 191-03, and (2) to account for and to cause the Misappropriated \$25 Million to be repaid to the public trust fund (i.e., the Tobacco Settlement Revenue Sub-account), with interest, from City funds.

31. Demand upon the respondents to perform the aforesaid mandatory ministerial duties was and is futile, and is hence excused.

32. Petitioner has no plain, speedy or adequate relief at law or in equity, and money damages are inadequate, in respect to the nonperformance of mandatory ministerial public duty complained of.

WHEREFORE, petitioner prays for judgment and orders as shall be hereinafter specified.

## THIRD CAUSE OF ACTION

### Violation of the Proposition A Compact

33. Plaintiff 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:

— in divers Health Committee Resolutions;

— in divers statements by City officials in many community meetings San Francisco;

— in divers statements by City officials to influential persons in the community who used their organizing and support bases to rally votes for Proposition A;

— 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.

— in divers representations of others in the Voters Pamphlet which were the product of the above representations of the respondents and City officials; which divers representations to the voters were direct and indirect, that if Proposition A was passed that all tobacco settlement revenues, not just some of them, which became available by distribution to the City, would be used, — in addition to \$299 million bond proceeds, — to rebuild a new Laguna Honda Hospital, (the "new LHH"), to provide SNF services to not less than 1,200 elderly or disabled San Franciscans.

37. The fact that Proposition A was passed upon the basis of these divers representations and promises is encapsulated by the testimony of Joseph O'Donoghue, president of the San Francisco Builders Association, which he presented at a June 24, 2004 hearing of the City Services Committee of the Board [of Supervisors], as follows:

**SUPERVISOR TONY HALL:** What was your thought. ... as one of the prime movers [in getting Proposition A passed]?

**O'DONOGHUE:** ... Before we put the bond measure on the ballot I went to people who were volunteers at Laguna Honda. We did our investigation. We went to . . . the Irish community and to other families in the Irish community, who not only were homeowners but were also landlords. We asked them, "Will you support this bond measure?" They said, "Absolutely yes."

**SUPERVISOR HALL:** What was your modus operandi? What was the purpose you were asking?

**O'DONOGHUE:** The purpose was that we were going to take, first of all, take care of the existing patient load in there, which was approximately 1,200. Because it was now reduced down to 1,000 patients. The whole purpose of that bond measure was to keep intact and increase the patient care quality that was now being endangered due to a threatened shutdown by tile federal government, and to preserve that in-house excellent care for not only the present but the future.

**SUPERVISOR HALL:** Mr. O'Donoghue, for what segment of the population?

**O'DONOGHUE:** For the elderly.

**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 the 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 of 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 later in this Petition.

**Ultimate City Duty under the Proposition A Compact**

42. 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 boards 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 the 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.

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

late 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.

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.

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 (File 041246), 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 by 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.

— (A) The Board enacted the new ordinance (File 041246) under a legislative history in which the basis for 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.

— (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 (File 041246), reduces the number of SNF patients which can be cared for at the new LHH, to between only 850 to 950 SNF patients.

47. Also, the legislative history of the enactment of new ordinance (File 041246) 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 because they were not mentioned in the Budget Analyst report upon which the Board acted in enacting the new ordinance (File 041246); 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.

#### **The Budget Analyst report and recommendation upon which the new ordinance was erroneously based**

48. The errors in the Budget Analyst report and recommendation were as follows:

— (1) The Budget Analyst used the wrong standard as the basis for his recommendation that the ordinance (File 041246) be enacted, i.e., the Budget Analyst, — without any perception of the existence of the Proposition A Compact — erroneously assumed that there was no legal requirement that the new LHH contain space for 1,200 SNF patients, but assumed that the number of patients to be served was expendable, and must be reduced if construction could not be accomplished within the \$401.6 million construction budget which had been set by respondents.

— The Board at all times has had the same erroneous view in this respect as did the Budget Analyst, — hence, both the Budget Analyst and the Board used the wrong standard in determining that the new ordinance should be enacted.

— (2) The Budget Analyst report and recommendation erroneously failed to mention, — and hence both the Budget Analyst and the 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 million in the first part of 2006 were applied to the construction costs of the first phase, (namely, South, Link, and East Buildings to be constructed in these years), that a substantially different and improved financial situation was presented, which better financial condition of the construction project was a required factor to be considered in any determination that it had become financially impossible, by any reasonable means, to avoid having to reduce the scope of the construction, with its concomitant reduction in the number of SNF patients to be served by the new LHH.

— (B) Therein, both the Budget Analyst's report and recommendation, Board's action to enact the new ordinance (File 041246) so as thereby inevitably reduce the scope of the construction so as 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 (File 041246) 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 missing Misappropriated \$25 Million to the construction fund, (i.e., the Tobacco Settlement Revenue Sub-account), (2) the tobacco settlement revenues of \$18.2 million and, 14.4 million which become available during the construction of the South, Link, and East Buildings, or (3) the tobacco settlement revenues of \$18.7 million, \$19 million, and \$20.6 million which become available during the construction of the West Building and the assisted living building. 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 (File 0041246) 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, and, to refrain from implementing Section 8 of the ordinance by issuing any certification to the Department of Public Works that any award to a contractor "will achieve the greatest cost savings for the Laguna Honda Hospital Replacement Program."

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 ordinances 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 public trust fund, (i.e., the Tobacco Settlement Revenue Sub-Account), with interest at the legal rate for the period the misappropriation, and, with such \$25 million restored,

reconsiders any decision to reduce the scope or size of the new LHH construction program or of any bid specifications for any construction on the new LHH construction project.

51. Demand upon the respondents to perform the aforesaid mandatory ministerial duties was and is futile, hence is excused.

52.. Petitioner has no plain, adequate, or speedy relief at law or equity, and money damages are inadequate.

WHEREFORE, the petitioner prays for judgment and orders as follows:

1. That petitioner have judgment in his favor against the respondents and each of them, and that respondents take nothing.

2. That under an alternative writ of mandamus issue, and then a peremptory writ of mandamus issue, or that a permanent injunction issue, which commands each of the respondents to forthwith, without delay:

**First**, to repeal the aforesaid new ordinance (File 041246); and refrain from implementing the ordinance, including but not limited to refraining from certifying, and not certify, that any award to any construction bidder in the new LHH construction project will achieve the greatest cost savings for the Laguna Honda Hospital Replacement Program'

**Second**, to forthwith pay or cause to be repaid to the aforesaid public trust fund, (the Tobacco Settlement Revenue Sub-account), without delay, the Misappropriated \$25 Million, with suitable interest from the date of its misappropriation to the date of its repayment; and to render an account to the Court and the petitioner showing they have done so;

**Third**, to not reduce the present provision and plans for constructing a new LHH planned for serving 1,200 patients, including the present provision and plans for:

- constructing a new South Residence planned for 300 patients;
- constructing a new Link Building planned for 60 patients;
- constructing a new East Residence planned for 420 patients;
- a new West Residence planned for 420 patients;

and, to refrain from taking any action, for lack of tobacco settlement revenues, to issue any requests for bids for construction, or issue any bid specifications, or accept any construction bids, which do not provide for a new LHH with space to serve 1,200 SNF patients, or which reduces the number of SNF patients presently planned in the construction plans for the various buildings of the new LHH, (namely, the new South Residence, Link Building, East Residence, and West Residence which are planned to serve a minimum of 300, 60, 420, and 420 patients, respectively); **unless and until**:

- (1) the Misappropriated \$25 Million is restored to the Trust Fund, with interest;

and,

— (2) an appropriate City board or officer, with power and authority to make such a decision, finds, after considering the funding available from the tobacco settlement revenues, 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, (and, allocated as presently above planned between the new South Residence, Link Building, East Residence, and West Residence).

**Fourth**, to repeal and to cause subsection (3)(b) of § 10.100-218 City Adm. Code to be repealed, forthwith.

3. That petitioner be awarded reasonable attorney fees under § 1021.5 Code of Civil Procedure.

4. That petitioner have costs of suit and such other and further relief as may be just.

Dated: November 23, 2004

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

### **VERIFICATION**

SEAN PATRICK MONETTE-SHAW deposes and says:

I am the petitioner in the within Verified Petition for Writ of Mandamus. The same is true of my own knowledge, except as to the matters which are therein stated on my information or belief, and as to those matters that I believe it to be true.

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 November 19, 2004.

\_\_\_\_\_  
Signature  
SEAN PATRICK MONETTE-SHAW