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SAN FRANCISCO JUDGE REDEFINES THE WORD "TEXT" TO PREVENT REFERENDUM ON REDEVELOPMENT

By Ronald A. Zumbrun*

In November 2006 I wrote about the Bayview-Hunters Point Redevelopment Plan and the as-yet unsuccessful effort by the local citizens to put the Plan on the ballot through the referendum process. The Plan has been a heated topic of debate in San Francisco.

Recently, the citizens' cause suffered a second blow, this time from the judicial arm of San Francisco's local government. In a June 12, 2007 ruling, Superior Court Judge Patrick J. Mahoney held that the word "text" in the Elections Code referendum statute was meant to include documents—over 500 pages total—incorporated by reference into the ordinance which approved the Plan, but which were not quoted or otherwise set forth therein.

In order for you to understand the absurdity of this, a brief review of the facts is in order. In May of 2006, the San Francisco Board of Supervisors approved Ordinance No. 113-06, which added nearly 1,400 acres to the previously-existing 137-acre Hunters Point Redevelopment Project Area. Concurrently, the Board authorized the San Francisco Redevelopment Agency to undertake a variety of projects and activities to alleviate "blight" in the neighborhood.

Local residents harbored myriad objections to the Plan, not the least of which was that application of the "blighted" label to their community was tenuous at best. The Bayview-Hunters Point area has the highest percentage of home ownership of any San Francisco neighborhood and property values have risen consistently over the past five years—conditions which tend to run contrary to a finding of "blight." Additionally, residents expected the Plan to foster gentrification, raise rents and force many of the neighborhood's families out of the city. Because the Bayview-Hunters Point area also has the highest percentage of households with children in the city, forced relocation will entail significantly above-average transition costs for those having to vacate the area.

Perhaps the biggest objection to the Plan was that the local residents had virtually no say in the matter. District 10, where most, if not all, of the affected neighborhoods are located, has only 1 representative out of the 11 on the San Francisco Board of Supervisors. It seemed unfair to residents, as it should, that those who would be most impacted by the Plan should not have a voice in determining what happened to their homes.

Thus, the residents organized quickly, drafted and circulated a referendum petition, and received certification from the Clerk of the Board that enough signatures had been gathered to place the matter on the ballot. Then, inexplicably, the City Attorney instructed the Clerk *not* to accept the petition, citing a failure by the petitioners to quote the full “text” of the challenged ordinance and asserting that this was a violation of the Elections Code.

In December, two *pro bono* attorneys, Michael Grob (The Grob Law Firm of Sacramento, California) and Ross Day (Oregonians in Action of Tigard, Oregon), filed a petition for writ of mandate and declaratory and injunctive relief on behalf of the Defend Bayview Hunters Point Committee. They sought, among other relief, a writ of mandate ordering the Clerk to place the challenged ordinance on the ballot. However, in the recent ruling, the judge agreed with the City Attorney—the failure of the petitioners to attach over 500 pages of documentation “incorporated by reference” into the ordinance was deemed a failure to include the “text” of the ordinance being challenged.

The sole issue before the court was, in its own words, “whether a document ‘incorporated by reference’ in an ordinance is an essential part of the ‘text’ of the ordinance within the meaning of [Elections Code] section 9238.” (June 12, 2007 Statement of Decision Re Writ of Mandate at p. 2:6-7.)

To that end, in their opening brief the petitioners cited *Metropolitan Water District of Southern California v. Marquardt* (1963) 59 Cal.2d 159, a California Supreme Court case directly on point. In that case, the respondent argued that the Bond Act was unlawfully adopted because it incorporated by reference the state General Obligation Bond Law but failed to set forth the “complete text” of the incorporated law in the ballot pamphlet, as required by the state

Constitution and the Government Code. The court held that the General Obligation Bond Law “was not part of the text of the Bond Act, but was *merely incorporated by reference*.” (*Id.* at p. 177, emphasis added.) The “meaning of ‘text’ is the exact written or printed words of a work.” (*Id.* at pp. 177-178, citing Webster’s Third New International Dictionary (1961) p. 2365; 11 Oxford English Dictionary (1933) p. 238.)

Thus, the opinion of the California Supreme Court is that documents incorporated by reference into a statute or ordinance do *not* constitute part of the “text” for purposes of adequately informing voters as to the nature of the statute or ordinance. Judge Mahoney, however, glossed over the instructive language in *Marquardt*, pointing out that the law incorporated by reference in that case was an existing law, not a proposed one. Because some of the documents incorporated by reference into the challenged ordinance in this case were *proposed* law versus existing law (*e.g.*, the Redevelopment Plan itself), the judge found that *Marquardt* was distinguishable.

Ultimately, Judge Mahoney reasoned that the absence of the incorporated documents prevented the petition’s signers from being fully informed as to the nature and effect of the petition. He determined that the interest of fully informed voters outweighed the competing interest of safeguarding the referendum power.

This result, however, raises serious constitutional and public policy concerns because it holds ordinary citizens to a higher standard than government officials. The documents incorporated by reference into Ordinance No. 113-06 were not attached to the ordinance at any time during the Board of Supervisors’ consideration of the ordinance. During the public hearings on the ordinance, the Board made the incorporated documents available in the exact same way and in the same place the petitioners did in their referendum petition:

by referring concerned voters to the City file.

To expect the citizens to do what the Board would not improperly infringe on the referendum power, which is “one of the most precious rights of our democratic process.” (*Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) As the petitioner stated in its opening brief on the writ of mandate:

Forcing Defendant Bayview Hunter’s Point to append to their petition 500 pages worth of documents that the City did not attach to the Ordinance in the first place would stretch the meaning of the word “text,” conflict with long-established precedent from the state Supreme Court, raise difficult First Amendment questions, and impose extreme practical burdens on the referendum power. Such a rule would be inequitable and would turn the concept of popular sovereignty on its head.

Practically speaking, the appendage of voluminous documents might in some cases result in a petition too unwieldy for one person to carry. This not only burdens the signature gatherers, who may now require a wheelbarrow simply to transport the petition, but also burdens the petition signers. Many voters would rather not sign at all than take on the daunting task of skimming through hundreds of attached documents before subscribing to the petition. It is unthinkable that the legislature ever intended to place such a burden upon the basic right to vote.

The judge’s ruling in effect sanctions a no-fail “checkmate” for any municipality seeking to insulate its legislation from referenda. The municipality merely has to

incorporate so many documents into its proposed legislation as to make the inclusion of the full “text” impossible. If litigation is unavailing, legislative clarification of the Elections Code is sorely needed to safeguard the voters’ rights to exercise their referendum power.

The petitioner intends to appeal Judge Mahoney’s ruling. If an appeal is unsuccessful, however, the residents of the Bayview-Hunters Point area will have no recourse to mitigate or manage the Redevelopment Agency’s activities in their neighborhood. The Bayview-Hunters Point residents will instead be faced with years of uphill battle against the Redevelopment Agency. The fundamental right of all citizens to referenda in California will be in jeopardy. Let us hope, for the welfare of all Californians, that the appellate court sees the “inclusion of text” requirement for what it is: a red-herring argument employed and exploited by local agencies to prevent their decisions from being challenged and a serious threat to the right of the people to control renegade agencies whose agendas and policies do not reflect or protect the priorities and interests of the governed. Let us also hope that the California Legislature promptly responds to and rectifies this attack on the fundamental right of referenda.

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