SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

ALBYN DOUGLAS MACKINTOSH, et al.,

Petitioners,

vs.

HALF MOON BAY FIRE PROTECTION DISTRICT, et al.,

Respondents.

/

Civil No. 461855

ORDER AND STATEMENT OF DECISION ON PETITION FOR WRIT

Dept: 2, Hon. Marie S. Weiner

On April 5, 2007, an Alternative Writ of Mandate was filed and issued by the Clerk of the Court on the Petition by Petitioners for failure to process referendum petitions submitted to Respondent Half Moon Bay Fire Protection District, and provided for an Order to Show Cause set for hearing on May 4, 2007. On May 4, 2007, hearing was held on the Petition for Writ in Department 2 of this Court, before the Honorable Marie S. Weiner. Alan Davis of Davis & Reno appeared on behalf of Petitioners Albyn Douglas MacKintosh, Kristi Will, Donald Pemberton, Scott Hylton, and Steve Cardosi. Jean Savaree, District General Counsel, appeared on behalf of Respondents Half Moon Bay Fire Protection District, and Jerry Donovan, David Eufusia, Lane Lees, Bert Silva as

members of the Board of Directors. The matter was heard contemporaneously with hearing on Petition for Writ in the related action of Vicerra-Banks v. Point Montara Fire Protection District, Civil No. 461856.

Upon due consideration of the briefs and evidence presented by the parties, and the oral argument of counsel, and having taken the matter under submission,

THE COURT FINDS AS FOLLOWS:

Applicable Law

California Health & Safety Code Section 13800 *et seq.* permits the establishment of fire protection districts, as elected or appointed bodies, to have authority over fire protection services in geographic areas. Respondent Half Moon Bay Fire Protection District is such an entity. The District has statutory authority pursuant to Section 13861, including the power to "enter into and perform all necessary contracts" pursuant to Public Contract Code Section 20810 *et seq.* H&S Code §13861(f).

Public Contracts Code Section 20811 states:

> When a district board determines that it is in the public interest, a district may contract with any other public agency for fire protection services, rescue services, emergency medical services, hazardous material emergency response services, ambulance services, and any other emergency services for the protection of lives and property.

Government Code Section 55632 states: "The legislative body of any local agency may contract with any other local agency for the furnishing of fire or police protection to such other local agency." The term "local agency" is defined by Section 55631 as "a neighboring city, county, fire protection district, joint powers authority that provides fire protection services, police protection district, federal government or any federal department or agency."

Election Code Section 9340 pertaining to the referendum process, provides:

> The voters of any district that is a local public entity as defined by section 900.4 of the Government Code, and to which Section 9300 applies, shall have the right to petition for referendum on legislative acts of the district in the same manner and subject to the same rules as are set forth in section 9141, 9142, 9143, 9144, and 9146. . . .

Section 9300 explicitly pertains to "ordinances" enacted by a "district". Respondent District has the authority to adopt ordinances pursuant to H&S Code Section 13861(h). Respondent District also has the power "to establish and enforce rules and regulations for the administration, operation and maintenance" of fire protection services, pursuant to Section 13861(i) and Section 13862(a).

Although not specifically defined by California statute, an "ordinance" is generally defined as a law enacted by a municipality. Similarly, "resolution" is not specifically defined by Code, but generally means a formal decision made of opinion or future action by an assembled body. (See Webster's Dictionaries.)

In regard to Section 9340, Respondents claim that Petitioners' Referendum was not in conformity with Section 9146 (as required by Section 9340). Section 9146 states: "The provisions of this code relating to the form of petitions, the duties of the county elections official, and the manner of holding elections, when an ordinance is proposed by initiative petition, govern the procedure on ordinances against which a protest is filed."

The "form of petitions" is set forth in Election Code Sections 9020 and 9101. Section 9020 (regarding the form of the signature blocks) is not in issue. Rather, Respondents claim that the Referendum by Petitioners does not satisfy Section 9101, which states in pertinent part: "Each petition section shall comply with sections 9020 and

contain a full and correct copy of the notice of intention and accompanying statement **including the full text of the proposed ordinance.**" (Emphasis added.)

Factual Background

At present and previously, Respondent Half Moon Bay Fire Protection District provided services through the Half Moon Bay Fire Department. It also provides services to Point Montara Fire Protection District pursuant to contract. In approximately 2005, Respondent and Point Montara Fire Protection District entered into discussions to consolidate, which consolidation has not occurred. They have both filed an application with the Local Agency Formation Commission, seeking authority to consolidate these two Districts.

Both Districts received proposals by the California Department of Forestry to provide fire protection services to the Districts. Both Districts held a joint meeting of their Boards of Directors on January 30, 2007. The proposed structure of the arrangement would be that the services contract would be between Respondent Hallf Moon Bay Fire Protection District and the CDF. By the proposed arrangement with CDF, Respondent would no longer employ its own fire fighters (through the local fire department), but rather services would be provided by CDF employees instead.

The Resolution is set forth as Exhibit 1 to the Respondents' Answer to Petition for Writ of Mandate, and in the Administrative Record starting at AR1. The Resolution includes seven "Whereas" clauses setting forth pertinent factual findings as well as the "decision" portion stating: "NOW, THEREFORE, BE IT RESOLVED the Board of the Half Moon Bay Fire Protection District approves the terms and conditions of a contract

with the California Department of Forestry for provision of fire services as shown on Exhibit 1 and authorizes the Chair of the Half Moon Bay Fire Protection District to execute the contract." The proposed contract Exhibit 1 as referenced in the Resolution itself is over 30 pages in length. (AR 3 through AR38.)

Petitioners solicited a "Referendum" against the Resolution. The text of the Referendum is set forth in Exhibit 1 to the Respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate.

The Referendum does set forth the text of the "Resolved" clause, but does not set forth the portion of the Resolution as to the factual findings in the "Whereas" clauses nor provide the text of Exhibit 1 (the proposed contract with CDF). The Referendum includes three additional paragraphs setting forth the arguments and position of those opposing the Resolution.

The Referendum contains statements that are contrary to the Whereas provisions of the Resolution, but which text was not provided to signators in the text of the Referendum. The Referendum also contains arguments and assertions about the propriety of consolidation of Respondent and Point Montara Fire Protection District, but does not provide any of the "Whereas" text of the Resolution pertaining to those consolidation efforts, and the "Resolved" provision (which is included in the Referendum) says nothing about the consolidation proceedings. Further, the Referendum seeks to characterize the nature, scope, and effect of the proposed CDF contract, but does not provide the text of that contract (which was Exhibit 1 to the Resolution).

Respondents rejected the Referendum on the basis that it was inaccurate and misleading and did not include the entire text of the Resolution and did not include the text of Exhibit 1 to the Resolution, namely the CDF proposed contract. (AR 148.)

Whether The Resolution Is A Legislative Act Subject To Referendum

The initial issue presented is whether the Respondent's Resolution is a legislative act subject to referendum. This decision is not named as an ordinance. This decision does not create any law. Thus, the issue is whether the decision to "farm out" the fire protection services of Respondent to CDF is a substantive change that is legislative in nature (and thus treated as an ordinance for purposes of the right of referendum). The decision whether or not the Districts should consolidate is not before this Court on this Petition for Writ, and thus any effect of consolidation in the future, even as to the contract with the CDF, is not before this Court.

A decision by Respondent to enter into a contract for services is *explicitly* authorized as a power of the District under existing law, specifically Public Contracts Code Section 20811 and Government Code Section 55632. No new law was created.

In Lincoln Property Co. No. 41, Inc. v. Law (1975) 45 Cal.App.3d 230, the First Appellate District held that a resolution by a city adopting a specific development plan for a subdivision is *not* a legislative act subject to referendum. The First Appellate District applied the standard:

> While it has been generally said that the reserved power of initiative and referendum accorded by article IV, section 1, of the Constitution is to be liberally construed to uphold it whenever reasonable [citations], it is established beyond dispute that the power of referendum may be invoked only with respect to matters which are strictly legislative in character [citations]. Under an unbroken line of authorities, administrative or

> executive acts are not within the reach of the referendum process [citations]. The plausible rationale for this rule espoused in numerous cases is that to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of business affairs of a city or municipality [citations].

Lincoln, at pp. 233-234.

> Accordingly, acts constituting a declaration of public purpose and making provisions for ways and means of its accomplishment may be generally classified as calling for the exercise of legislative power. Acts of administration, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body.

Lincoln, at p. 234. The Court of Appeal held that a resolution to engage in acts which are "done merely to carry out the legislative policies already declared" "must be classified as a purely administrative act which is not subject to the referendum process." Lincoln, at p. 235.

In general, a governing body entering into a contract is not a legislative act. None of the cases presented by the parties hold that entering into a contract for services is a legislative act. On the other hand, case law hold that a new plan or new policy can constitute a legislative act subject to referendum, regardless of the title or characterization of the adopted resolution or ordinance.

Here, Respondent does not contest that its Resolution constitutes a legislative act subject to referendum. (See Opposition at page 4.)

Whether The Referendum Is Invalid As Contrary To Statute

Elections Code Section 9340 applies to Petitioners' Referendum. Accordingly, Section 9146 explicitly applies to Petitioners' Referendum. Section 9146 requires the

Referendum to meet the standards of forms of petitions under Section 9101. Section 9101 mandates that it include the "full text" of the proposed Resolution.

There is no case law on Section 9101. Accordingly this presents an issue of first impression under Section 9101. Does "full text" mean, as Petitioners contend, that they need only include the "Resolved" clause of the Resolution? Or does "full text" mean, as Respondents contend, that it must include the entire Resolution including the "Whereas" clauses as well as the Exhibit explicitly referenced in the body of the "Resolved" clause itself?

Jurisprudential guidance can be found in case law pertaining to initiative measures where it was alleged that they did not meet the procedural statutory requirements including defective or insufficient language of the proposed law or statute involved. Indeed, the Supreme Court has very recently issued an opinion stating the standard which this Court finds would be applicable here.

In Costa v. Superior Court (2006) 37 Cal.4th 986, the Supreme Court held that, where there were language differences between the version of the initial submitted to the Attorney General versus the version printed on the initiative petition circulated for voter signatures, the initiative petition was valid (despite its admitted failure to following the letter of the law) because "the version circulated for signature did not mislead the public or otherwise frustrate or undermine the purposes underlying any of the applicable constitutional or statutory provisions or threaten the integrity of the electoral process". Costa, at p. 1028.

Section 9014 provides that an initiative petition must "contain a full and correct copy of the title and text of the proposed measure". Costa, at p. 1011. The Supreme

Court found that is was undisputed that the petitioners intended to circulate a measure using the same language submitted to the Attorney General and that any discrepancies in language were inadvertently. Costa, at p. 1012.

Citing to its own prior decisions, the Supreme Court applied the following "standard that governs the determination whether such defects should invalidate a *referendum* or initiative measure" (emphasis added), as follows:

> This court has stressed that technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in "substantial compliance" with statutory and constitutional requirements. [Citation.] *A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition.* "The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the . . . petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law." [Citations.]

Costa, at p. 1017, emphasis original.

Of interest is the decision of Billig v. Voges (1990) 223 Cal.App.3d 962, cited by the parties, involving an appeal of denial of writ of mandate to compel a city to process a referendum petition. The Court of Appeal applied Section 4052 (subsequently repealed in 1994) requiring that an referendum against an ordinance must contain the "text of the ordinance or the portion of the ordinance which is the subject of the referendum." Billig, at p. 965. The Court of Appeal relied upon existing case law pertaining to section 4052, holding that its purpose is "to reduce confusion as to the contents of referendum petitions and to promote the full enlightenment of prospective signers of the substantive provisions of a challenged ordinance." Id., at p. 966. Failure "to apprise prospective signers of the substantive portions of the challenged ordinance" fails "to provide the electors with the

information they need to intelligently exercise their rights under the referendum law". Id., at p. 966.

The Court of Appeal in Billig held that the word "text" means the entire text – even where, as in Billig, the text is 22 pages long. Id., at p. 967. Selecting the "main points" was not in comformity with the purpose and intent of the statute. "It does not constitute the text of the ordinance because it does not contain the measure's actual words." Id., at p. 967. The Court of Appeal held that there cannot be "substantial compliance" if the technical defects frustrate the purpose of the technical requirement. id., at p. 968.

Upon application of these standards to the facts in this case, this Court finds that the Referendum is not in compliance with Section 9101 as it does not contain the entire text of the Resolution. Indeed, the failure to set forth the Whereas clauses, which constitute a part of the "entire text" of the Resolution, makes the Referendum misleading and frustrates the purpose of the statute. In the Referendum, the petitioners make statements which involve matters stated in the "Whereas" clauses (but not the "Resolved" clause) in order to encourage voters to sign their Referendum petition. This is a lack of material information.

For example, the Referendum states:

> The undersigned signatories to this petition also believe that if consolidation with other fire departments becomes necessary in the coastside communities, that the consolidation should occur with municipal fire departments which perform the same type of high quality fire suppression, emergency medical and paramedic services that are available from municipalities in our County.

Thus, this portion of the Referendum only pertains to consolidation, yet the "Resolved" clause -- which is the only portion of the Resolution set forth in the Referendum -- says nothing about consolidation.

Consolidation is discussed in the following Whereas clauses of the Resolution, but those are *not* provided in the Referendum – yet are obviously material, or else Petitioners would not have discussed it in the Referendum:

> WHEREAS, the Half Moon Bay Fire Protection District and the Point Montara Fire Protection District have filed an application with Local Agency Formation Commission (LAFCO) to consolidate the Districts; and
>
> WHEREAS, the Half Moon Bay Fire Protection District and the Point Montara Fire Protection District have, while consolidation proceedings are pending, received and reviewed proposals from the California Department of Forestry for delivery of fire services within their jurisdiction[.]

Further, the statements made in the Referendum are at odds with findings by the Respondent in the Whereas clauses of the Resolution – and thus are material information which should have been provided to the potential signers. For example, the Referendum states: "There are hidden costs to the residents of the community with a contracting out of services to 'CDF'." Yet, portions of the Resolution pertain to this issue, but were not included in the Referendum; specifically the following:

> WHEREAS, the Half Moon Bay Fire Protection District Board and the Point Montara Fire Protection District Board have determined that the California Department of Forestry proposal is the most cost effective and prudent way within which to provide fire services to the citizens and properties within their respective jurisdictions; and
>
> WHEREAS, the delivery of fire services through the California Department of Forestry will provide needed financial and organizational stability, leadership and training."

Respondent also asserts that the Referendum does not contain the text of Exhibit 1 (the proposed contract with CDF) which was incorporated by reference into the Resolution. The point is a good one; but the Court need not reach it since, the failure to set forth the entire text of the Resolution by failure to set forth in Whereas clauses is a material technical defect which does violence to the purpose of the statute, and thus the Resolution is invalid regardless.

Whether Injunctive Relief Should Be Granted As To Violation Of Brown Act

In regard to the alleged violation of Government Code Section 54956.9, no case law is presented on the issue of Respondents alleged violation of failure to list the specific subdivision of section 54956.9 on the agenda.

No injury or harm is demonstrated for injunctive relief. To make the Respondent go through the exercise again would be pointless. The law does not require such. C.C. §3532 ("The law neither does nor requires idle acts."); C.C. §3533 ("The law disregards trifles.")

The prayer seeking to require Respondents to "hold all meetings . . . in open session unless an agenda is posted specifying the exception to Government Code Section 54956.9 which applies to said closed session" seeks prospective action only. Although this is permitted under Section 54960, there must be showing that "such violations are continuing or threatened in the future." Old Town Dev. Corp. v. Urban Renewal Agency (1967) 249 Cal.App.2d 313, 329 fn. 9; see also Shapiro v.San Diego City Council (2002) 96 Cal.App.4th 904, 915-917. Thus, the Court is within its discretion to deny relief, as there was a lack of substantive evidence demonstrating a real threat of future violations.

Id. Whether or not there was a single actual violation on March 2, 2007 is not relevant to the prayer for prospective injunctive relief; as there was no evidence that Respondents were intentionally subversive in not listing in the agenda the specific subdivision of Section 54956.9 which applied. See Shapiro, at pp. 915-917.

THE COURT ORDERS AS FOLLOWS:

Respondents have demonstrated good cause. The stay under the Temporary Stay Order issued March 29, 2007 is lifted and dissolved. The Alternative Writ is discharged, and Peremptory Writ denied. Accordingly the Petition is DENIED.

It is uncontested that the subject Resolution is a legislative act subject to Referendum. The form of the Referendum itself is invalid as it is not in compliance with law.

In regard to the alleged violation of Government Code Section 54956.9, no injury or harm is demonstrated for injunctive relief; and there is a lack of showing that it is reasonably anticipated that any such violation would occur in the future.

Petitioners' request for fees is DENIED. Respondents' request for fees is DENIED.

DATED: August 6, 2007

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORIA, COUNTY OF SAN MATEO

FILED
SAN MATEO COUNTY
AUG 8 2007
Clerk of the Superior Court
By DEPUTY CLERK

AFFIDAVIT OF MAILING

CASE NO.: CIV 461855
NAME: ALBYN DOUGLAS MACKINTOSH, et al vs HALF MOON BAY FIRE PROTECTION DISTRICT, et al.
DOCUMENT: ORDER AN STATEMENT OF DECISION ON PETITION FOR WRIT; HEARING 5/4/07 IN DEPARTMENT NO. 2.

I declare under penalty of perjury that I am over the age of 18 years and not a party to the above cause and on the following date I deposited in the United States Post Office mailbox at Redwood City, California a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

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Executed on: 8/8/07
at Redwood City, California
JOHN C. FITTON, CLERK OF THE SUPERIOR COURT

By: **TERRI PETRIAT**
Deputy Clerk