

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION TWO

SEAN PATRICK MONETTE-SHAW,

Civil No. A110378

Petitioner-Appellant,

-vs.-

(S.F. CPF 04-504777)

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.

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

**APPELLANT'S OPENING BRIEF**

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## APPELLANT'S OPENING BRIEF

The appellant Sean Patrick Monette-Shaw ("petitioner") files the within opening brief.

### Jurisdiction

Petitioner appeals from a final order and a final judgment of the Superior Court of the State of California, County of San Francisco - Unlimited Jurisdiction, which are respectively entitled, "Order Denying Petitioner's Motion for Writ of Mandate" filed April 4, 2005,<sup>1</sup> and "Judgment" filed April 4, 2005.<sup>2</sup>

The proceeding was under § 1085 et seq. Code of Civil Proceeding.

The Court of Appeal has jurisdiction under § 904.1(a), subds. (1) and (6) Code of Civil Procedure, inasmuch as (1) the order denying writ was a final order which disposed of all issues in the case, and (2) the judgment was a final judgment.

### **ISSUES PRESENTED**

1. Where the provisions of a **bond ordinance** conflict with the provisions of the **ballot proposal** which appears on the voter's ballot and in the Voters Pamphlet, which provision shall apply, and, what are the tests for such judicial determination?

- **NOTE:** This is an important statewide issue of first impression in California.

2. In construing the meaning of Proposition A, a municipal bond measure passed by San Francisco in 1999, what effect shall be given to the

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<sup>1</sup> Appellant's Appendix on Appeal ("Appendix"), 4.

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

official construction which was given to the measure by a special municipal agency created for the express purpose of explaining the true meaning of measures to the voters, – where that City administrative construction and explanation of the measure conflicts with the text of the bond ordinance which placed the measure on the ballot in the first instance?

- **NOTE:** This is also an important statewide issue of first impression in California.

3. Was it error to rule that Proposition A does not require a 1,200-bed skilled nursing facility (SNF) to be constructed to replace the existing Laguna Honda Hospital, (a licensed 1,200-bed SNF), where (1) the ballot arguments of the proponents and opponents of the measure show that the voters intended that Laguna Honda Hospital be replaced with a 1,200-bed skilled nursing facility; and (2) such evidence of voter intent resolves an ambiguity in respect to a subject (namely, the subject of what is to be built) which subject is specified, albeit ambiguously, in the text of the proposition?

(This, compared to a situation where ballot arguments establish the intent of the voters in respect to a subject which subject, however, is not specified or mentioned at all in the text of the proposition, so that no ambiguity as to any subject mentioned in the text is resolved thereby.)

4. Did Proposition A create an express trust in respect to all tobacco settlement revenues, as and when received by the City and County of San Francisco from a 1998 tobacco litigation settlement, to be used exclusively for construction to replace Laguna Honda Hospital, and to service Proposition A bond debt?

## **INTRODUCTION**

Petitioner, a resident and citizen of San Francisco, filed a Verified First Amended Petition for Writ of Mandamus (“Petition”) under § 1085 Code of

Civil Procedure, to require the City and County of San Francisco, its board of supervisors, mayor, health commission, and controller, (collectively, the “City”), to comply with obligations arising out of and imposed upon the City by the Proposition A bond measure passed in November 1999 by San Francisco voters, (the “Proposition A Compact”).

Specifically, petitioner sought mandamus relief:

- **first**, to compel the Board of Supervisors and the Mayor to set aside City ordinance No. 252-04, which ordinance authorizes reduction of the replacement Laguna Honda Hospital project to less than the 1,200 long-term care beds required by the **ballot proposal** in the Proposition A Compact;<sup>3</sup>

- **second**, to compel the respondents to restore \$25 million which was misappropriated in 2003-2004 by the City from the express trust imposed by Proposition A upon all tobacco settlement revenues for the exclusive use (with Proposition A bond proceeds) to construct the replacement Laguna Honda Hospital and to service Proposition A bond debt;

- **third**, to command the respondents not to abandon or reduce the replacement Laguna Honda Hospital project from its promised size and function of 1,200 SNF beds, for lack of funds, unless and until (1) the City first restores the misappropriated \$25 million to the TSR trust, and factors that added amount into its calculation of sufficiency of funding; and (2) the Board of Supervisors first determines by resolution or ordinance, upon factual data, that there are insufficient Proposition A bond proceeds and TSRs by which to construct a replacement Laguna Honda Hospital having 1,200 SNF beds, (as otherwise required by the Proposition A Compact).

### **PROCEDURAL HISTORY**

On February 18, 2005, the petitioner filed a motion for a peremptory writ

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<sup>3</sup> Copy of Ordinance 252-04, enacted October 19, 2004, is at **Appendix 211**.

of mandamus to require the City to do the above acts, on the basis that these were mandatory ministerial acts required by Proposition A. The motion was heard March 15, 2005.

**Final order denying writ of mandamus**

On April 4, 2005, the Superior Court, the Honorable James Warren, presiding, issued a final order which denied the motion for peremptory writ with prejudice, and ordered that judgment be entered in favor of the City.

**Final judgment**

Consistent therewith, a final judgment, entitled “JUDGMENT,” was filed on April 4, 2005, which provided:

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

However, no notice of entry of either the order denying the writ or of the judgment was mailed to the petitioner or his counsel, and filed, until April 5, 2005.<sup>4</sup>

Notice of appeal from both the April 4, 2005 final order denying the writ of mandamus, and the April 4, 2005 judgment was filed by petitioner on May 3, 2005.<sup>5</sup> Hence the notice of appeal was timely filed.

**Parties**

\_\_\_\_\_The petitioner Sean Patrick Monette-Shaw is a resident and citizen of the

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<sup>4</sup> Notice of entry of order, filed April 5, 2005. (**Appendix 7.**) Notice of entry of judgment, filed April 5, 2005. (**Appendix 14.**)

<sup>5</sup> Notice of Appeal, Designation of Reporter’s Transcript, and Election to Proceed by Appendix, filed May 3, 2005. (**Appendix 20.**)

City and County of San Francisco.

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

The respondent San Francisco Board of Supervisors (“Board”) is the board of supervisors of the City and County of San Francisco. The board has the power to enact ordinance and to override the Mayor’s veto under §§ 2.105 and 2.106 of the San Francisco Charter.

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 and County. This respondent is sued in his official capacity only.

Respondent San Francisco Health Commission (“Health Commission”) is a board of the City and County of San Francisco.

Respondent Edward Harrington is the Controller of the City and County of San Francisco. This respondent is sued in his official capacity only.

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

**Respondents are collectively referred to as the “City”**

\_\_\_\_\_As prior noted, the respondents are referred to collectively in this brief as the “City.”

**STATEMENT OF FACTS**  
**IN RE MISAPPROPRIATION OF \$25 MILLION IN TRUST FUNDS**

San Francisco voters, in Proposition A, voted to issue \$299 million in construction bonds, and to use all available tobacco settlement revenues (TSRs),

to replace Laguna Honda Hospital.<sup>6</sup>

The First Cause of Action of the Petition requested writ of mandamus under § 1085 Code of Civil Procedure to require the City to restore \$25 million in misappropriated TSRs to a trust (the “TSR trust”) imposed by Proposition A upon all TSRs received by the City, for the exclusive trust use, with \$299 million Proposition A bond proceeds, to construct a replacement of the existing Laguna Honda Hospital, and to service Proposition A bond debt.

The evidence for this claim is set forth below, as follows:

1. 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.<sup>7</sup> Under the settlement the City was to receive substantial TSRs to be paid over a number of years by the tobacco companies; which TSRs (a) were \$25 million in excess of projections, as of fiscal 2003-2004, and (b) are now expected by the City to exceed the initial 1999 projection of \$347 million, **by \$137 million**, or 40%, over the period 1999-2024.<sup>8</sup>

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

3. A voters pamphlet (Voters Pamphlet) was distributed to all voters which sets forth Proposition A, (“ballot proposal”) at page 33;<sup>9</sup> the bond

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<sup>6</sup> **Ballot proposal**, at **Appendix 125**.

<sup>7</sup> Admitted. Respondents’ Memorandum, at **Appendix 59-59A**..

<sup>8</sup> Admitted. Respondents’ Memorandum, at **Appendix 59A**.

<sup>9</sup> **Appendix 125**.

ordinance at page 55,<sup>10</sup> and 22 pages of ballot arguments.<sup>11</sup>

4. Proposition A (the **ballot proposal**) provided as follows:

LAGUNA HONDA HOSPITAL 1999. Shall the City and County incur bonded debt and/or other evidences of indebtedness and/or undertake lease financing, in an aggregate amount not exceeding \$299,000,000 for the acquisition, improvement, construction of a new health care, assisted living and/or other type of continuing care facilities to replace Laguna Honda Hospital, and **reduce the property tax impact by requiring the application of available tobacco settlement revenues** received by the City and County and any state and/or federal grants or funds received by the City and County that are required to be used to fund these facilities, **(a) to finance the acquisition, improvement, construction, and/or reconstruction costs of such facilities, and (b) to pay the principal and interest on, reserve fund deposits, if any, and/or financing costs for the obligations authorized hereby.**” (Emphasis supplied .)<sup>12</sup>

5. The petitioner contended below that since (1) the ordinary and commonly understood meaning of the word, “available,” is “able to be used or obtained,” (Oxford University Press Dictionary), and since (2) no tobacco settlement revenues can be available (i.e., able to be used or obtained) until received by the City, it follows (3) that “available tobacco settlement revenues” meant and was commonly understood by the voters to mean and refer to all tobacco settlement revenues received by the City.<sup>13</sup>

- (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 settlement education

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

<sup>11</sup> **Appendix 126-146.**

<sup>12</sup> **Appendix 125.**

<sup>13</sup> Petition, at **Appendix 33.**

purposes.<sup>14</sup>

6. Further, the voters were told in the Voters Pamphlet, in the Digest of the measure by the City's official Ballot Simplification Committee, that **all** TSRs received by the City were to be used for construction and bond service of the new LHH, and for nothing else; as follows:

“Proposition A also provides that all tobacco settlement monies received by the City, after \$1 million is set aside each year for smoking education and prevention programs, would be used to pay for some construction and to offset the cost to property owners of repaying the bonds.”<sup>15</sup>  
(Emphasis supplied.)

7. Proposition A was passed by the voters at the November 2, 1999 special election by a 73% margin.<sup>16</sup>

8. Petitioner contended below that (1) by the passage of Proposition A, (2) by the above common understanding of “available tobacco settlement revenues,” and (3) by the above construction placed upon Proposition A which was communicated to the voters in the Voters Pamphlet by the terms of the ballot proposal and the construction of the ballot proposal by the Ballot Simplification Committee, an express trust became and was imposed upon all TSRs received by the City, as and when received, to be expended exclusively, (with Proposition A bond proceeds), for construction of the replacement Laguna Honda Hospital, and to service Proposition A bond debt, (except for \$1 million annually which is set aside each year for tobacco education purposes).<sup>17</sup>

8. Petitioner refers to this express trust of TSRs, as the “TSR trust.”

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<sup>14</sup> **Appendix 125.**

<sup>15</sup> **Appendix 125.**

<sup>16</sup> Admitted. Respondents' Memorandum, at **Appendix 59.**

<sup>17</sup> Petition, at **Appendix 34.**

9. Further:

- (1) the Ballot Simplification Committee is a board of the City pursuant to § 600 of the City Elections Code;<sup>18</sup>
- (2) the function and duty of the Committee under § 610, City Elections Code, is to prepare a digest of each proposed City ballot measure for inclusion in the Voters Pamphlet.

Petitioner contended below that therein, the action of the Committee to rule in the Digest in the Voters Pamphlet, that Proposition A provides that all TSRs (except \$1 million a year) will be used for construction of the Laguna Honda Hospital replacement, and to service Proposition A bond debt, was (1) an administrative ruling by a City agency which was created to officially construe and explain to voters, on behalf of the City, the meaning of local ballot measures, and, as such, (2) was binding and conclusive against the City on the issue of whether Proposition A requires all TSRs to be expended for construction of the Laguna Honda Hospital replacement, and to service Proposition A bond debt.<sup>19</sup>

10. Further, the Board of Supervisors, upon the passage of Proposition A, contemporaneously construed and treated Proposition A as imposing a trust upon all TSRs, (except for \$1 million per year), by placing all TSRs, as and when received, in a restricted “Tobacco Settlement Revenues Sub-account,” under a provision that the TSRs be expended solely for replacement Laguna Honda Hospital construction, and to service Proposition A bond debt. (*See,*

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<sup>18</sup> Copy of §§ 600 - 610 of City Elections Code is set forth in the **Appendix** at 293.

<sup>19</sup> The Committee’s Digest of Proposition A is at Page 33 of Voters Pamphlet. (**Appendix 125.**)

Ordinance 316-00 (File No. 01911), enacted December 28, 2000).<sup>20</sup>

11. Further, subsection (a) of § 10.100-218 City Adm. Code provides in effect that interest earned by this fund is to be credited to the fund, (as per a trust, as distinguished from non-restricted City funds in which all the interest, from such latter non-restricted funds, goes into the City's unrestricted general fund.).<sup>21</sup>

\_\_\_\_\_12. The petitioner contended in the Superior Court that the above contemporaneous construction of TSRs, as being trust funds, for use solely for construction and to service bond debt in the Laguna Honda Hospital replacement project, was relevant on the issue of the trust character of TSRs, under the terms of Proposition A.<sup>22</sup>

**Misappropriation of \$25 million from the TSR trust**

13. However in fiscal 2003-2004 the Board of Supervisors transferred \$25,005,645 from the TSR trust, (namely, the Tobacco Settlement Revenues Sub-account), to the General Fund of the City, for uses not related to the replacement of Laguna Honda Hospital.<sup>23</sup>

14. By the facts set forth above, the taking of the \$25 million of TSRs from the TSR trust fund, (namely, the Tobacco Settlement Revenues Sub-account), was a misappropriation of trust funds from the TSR trust, (herein, the "Misappropriated \$25 Million"); for which the petitioner, under Green v.

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<sup>20</sup> Ordinance 316-00 is codified as subsections (a) through (b)(2) of § 10.100-218 City Adm. Code. (A copy of these subsections is set forth at **Appendix** 163-164.)

<sup>21</sup> Subsection (a) of § 10.100-218 City Adm. Code provides that the fund "is established as a category four fund." (**Appendix** 164.) A Category Four fund's earnings are retained by the fund and do not revert to the City's General Fund.

<sup>22</sup> Petition, at **Appendix** 35.

<sup>23</sup> Admitted. Respondents' memorandum, at **Appendix** 59A-60.

Obledo, supra, 129 Cal.3d 126, was entitled to a writ of mandamus to compel the City to restore the Misappropriated \$25 Million to the TSR trust, (namely, the Tobacco Settlement Revenues Sub-account); so that it was error for the Superior Court to deny writ of mandamus on this issue.

**STATEMENT OF FACTS**  
**IN RE WRIT TO REQUIRE ORDINANCE 252-04 TO BE SET ASIDE  
AND TO RESTRAIN REDUCTION OF THE LAGUNA HONDA  
HOSPITAL REPLACEMENT PROJECT**

\_\_\_\_\_Petitioner also, in the Third Cause of Action, (**Appendix 40-48**), sought writ of mandamus:

- (1) to order the City to set aside City Ordinance 252-04 (enacted October 19, 2004), which authorizes reduction of the replacement Laguna Honda Hospital to less than a 1,200-bed SNF facility;<sup>24</sup> in violation of the aforesaid Proposition A Compact; and,

- (2) to restrain the City from reducing or changing the promised size and function of the replacement Laguna Honda Hospital unless:

- the Misappropriated \$25 Million is first restored to the TSR trust, and, factored into the determination by the Board as to whether there is sufficient funding from the TSRs and the Proposition A bond proceeds, to construct a 1,200-bed SNF facility, as required by Proposition A;

and,

- (2) a reliable study is done which shows, if it does, that there is insufficient funding available from the Proposition A bond proceeds and the TSRs to construct a replacement Laguna Honda Hospital sufficient to serve 1,200 SNF patients, as required by

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<sup>24</sup> Ordinance 252-04 is at **Appendix 211**.

Proposition A.

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**RULINGS OF THE TRIAL COURT**

However, the trial court ruled against all of petitioner's contentions by its order of April 4, 2005 which denied the motion for writ of mandamus, and ordered that judgment be entered for the respondents, on the basis that:

- **first**, Proposition A did not require any facility to be built to serve long-term care patients, (including SNF patients), and did not require any replacement Laguna Honda Hospital to be built of any specific size; and,

- **second**, that the contrary language of the **bond ordinance** prevails over the language of the **bond proposal**, and over the ruling of the City's Ballot Simplification Committee on the issue of whether all TSRs are required to be used to construct and serve the bond debt of the Laguna Honda Hospital replacement project; so that therein, no trust was imposed by Proposition A on any of the \$99 million of TSRs received by the City before issuance of Proposition A bonds in Spring 2005, including, the \$25 million which was taken from the TSR fund, (namely, the Tobacco Settlement Revenues Sub-account), in fiscal 2003-2004.

Specifically, the order provided, (**Appendix 5**):

IT IS HEREBY ORDERED AS FOLLOWS:

1. Petitioner's motion for writ of mandamus is DENIED with prejudice on the grounds that:

a. The Proposition A "bond contract" defined "*available settlement revenues*" as tobacco settlement proceeds that the City receives "over the term of any lease financing, bonded debt and/or other evidence of indebtedness authorized [by Proposition A]." At the time the City transferred the \$25,005,645 in tobacco settlement proceeds to the General Fund, the City had not issued any general obligation bonds authorized under the Proposition A "bond contract." Therefore, transfer of \$25,005,654 in tobacco settlement proceeds to the General Fund did not violate the Proposition A "bond contract."

b. The Proposition A “bond contract” described the Laguna Honda Hospital construction project as the “construction and/or reconstruction” of a “new health facility, assisted living and/or other type of continuing care facility or facilities.” Nothing in the Proposition A “bond contract” limits the type of facility the City must construct to a “long term care facility.” Moreover, nothing in the Proposition A “bond contract” requires the City to construct a facility of a specific size.

2. Judgment consistent with this order is to be entered in favor of Respondents . . .

The Judgment, that respondents have judgment against the petitioner, was filed on the same day of April 4, 2005, as the order denying the writ.

### **ERRORS**

#### **STANDARD FOR APPELLATE REVIEW**

In this appeal the appellant must show that there is no substantial evidence to support the findings and judgment of the trial court, or that the findings or judgment are contrary to the evidence and applicable law.

#### **FIRST ERROR**

The trial court erred as a matter of law in not applying the provisions of the **ballot proposal** of Proposition A, – which appeared on the ballot in the election and, prominently, on the first page of the Voters Pamphlet section on Proposition A,<sup>25</sup> – where as here the **ballot proposal** was contrary to the **bond ordinance** which placed the measure on the ballot.<sup>26</sup>

This is an issue of first impression in California.

**NOTE:** Had the trial court applied the language of the **ballot proposal**,<sup>27</sup>

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<sup>25</sup> **Appendix 125.**

<sup>26</sup> *See*, the **bond ordinance**, at **Appendix 147.**

<sup>27</sup> **Appendix 125.**

instead of the contrary language of the **bond ordinance**,<sup>28</sup> it could only have concluded that **all** of the TSRs received by the City were “available tobacco settlement revenues” within the meaning of the **ballot proposal**; that an express trust was imposed upon all TSRs received, to be used exclusively for construction of the replacement Laguna Honda Hospital, and to service Proposition A bond debt; such that the admitted taking and use of the \$25 million of TSRs in fiscal 2003-2004 was a misappropriation of trust funds which the respondents are required, by the law of trusts, to restore to the TSR trust for the uses of that trust, (namely, for construction of the replacement Laguna Honda Hospital and to service Proposition A bond debt).

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

## **SECOND ERROR**

The denial of the writ on the trial court finding that Proposition A does not require construction of a SNF facility,<sup>29</sup> or a facility of a specific size,<sup>30</sup> was error, because this crucial ruling is contrary to the intent of the voters in passing Proposition A, namely, that the existing Laguna Honda Hospital, licensed for 1,200 SNF beds, be replaced with a facility which is also, at the least, a 1,200-bed skilled nursing facility, (irrespective of what other services facilities may also be authorized to be constructed, by Proposition A).

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<sup>28</sup> **Appendix 147.**

<sup>29</sup> April 4, 2005 order. (**Appendix 5.**)

<sup>30</sup> April 4, 2005 order. (**Appendix 5.**)

### THIRD ERROR

The requirement of both the **ballot proposal** and the **bond ordinance**, that the Proposition A bond proceeds and TSRs are to be used to “replace Laguna Honda Hospital,” creates, at worst, merely an ambiguity as what is meant by the phrase, “replace Laguna Honda Hospital;” so that under canons of statutory construction (discussed later in this brief) Voters Pamphlet arguments of both the proponents and the opponents of the measure were required to be considered. Had this been done the only rational conclusion that could have been made by the trier of fact and law was that the voters intended, in passing Proposition A, that the existing old Laguna Honda Hospital, – which is licensed for 1,200 skilled nursing facility beds, – be replaced by a new facility which, at the least, is also a 1,200-bed skilled nursing facility; **so that it was plain error** to deny the writ of mandamus:

- **one**, to restrain the City from implementing Ordinance 252-04 to reduce the size of the replacement Laguna Honda Hospital to less than the 1,200 SNF beds required by Proposition A, and,

- **two**, to restrain the Board of Supervisors from reducing the replacement Laguna Honda Hospital to less than the 1,200 SNF beds which the voters intended, by passing Proposition A, be built, – unless a factual study is used which shows that the TSRs, plus the bond proceeds, are insufficient to enable this to be done.

Accordingly, by these errors, both the Judgment and the order denying peremptory writ of mandamus, filed April 4, 2005, should be reversed by the Court of Appeal, with the case remanded with instructions to enter an order granting the writ of mandamus requested, **or**, for further proceedings consistent with the opinion of the Court of Appeal.

## ARGUMENT

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### PRELIMINARY STATEMENT

This case has two different independent subjects:

- (1) whether the intent of the voters in passing Proposition A was that the replacement Laguna Honda Hospital have, at the least, (irrespective of what other services it might provide), the function and size of a 1,200-bed SNF facility; and,

- (2) whether the City is equitably estopped from pocketing \$99 million in TSRs received before the first Proposition A bonds were issued in Spring 2005, because it unfairly and impermissibly obtained passage of Proposition A by a **ballot proposal**, and by an official City Ballot Simplification Committee's representation, that **all TSRs**, – not just some of them, – would be used to construct a replacement Laguna Honda Hospital and to service Proposition A bond debt.

The appeal, – given these two subjects, – can be granted in respect to both subjects; denied as to both subjects; or granted in respect to the one subject and denied as to the other subject, depending on how the Court of Appeal rules on each of these separate subjects. Petitioner submits that the appeal should be granted as to both subjects.

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**ARGUMENT RE FIRST CLAIM OF ERROR: \_\_\_\_\_**  
**MISAPPROPRIATION**

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**This is a clear cut case of equitable estoppel which prevents the City from misappropriating \$25 million in TSRs which the City promised and represented, in the ballot proposal and in the Digest of the City Ballot Simplification Committee, would be used solely for construction of the replacement Laguna Honda Hospital, and to service Proposition A bond debt.**

**It was therefore plain error to deny the writ to require the City to restore the Misappropriated \$25 Million to the TSR trust, for use exclusively to construct the replacement Laguna Honda Hospital and service Proposition A bond debt.**

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If a business engaged in the same bait-and-switch tactic which the Superior Court approved in the judgment below, the business would be prosecuted for engaging in an unfair or illegal business practice.

This is because courts do not tolerate a business putting their foot in the doorway of a prospective customer and telling them one thing, but giving the prospect a brochure which states the salesman's pitch prominently on the first page, but which, – on its last-of-many pages, – sneaks in a definition which wipes out the promise made on the first page of the sales brochure, so that the business obtains the money of the prospect by such bait-and-switch tactic.

Here, in the case at bar, the Board of Supervisors drafted a **ballot proposal** with salutary language which told the voters in effect that **all** TSRs would be used to construct the replacement Laguna Honda Hospital and to service Proposition A bond debt,<sup>31</sup> for the manifest purpose and result of persuading the voters to pass Proposition A; but, at the same time, the Board of Supervisors used **completely contrary** language in the **bond ordinance** which, if implemented, **nullifies** these representations made in the **ballot proposal** to the voters, (i.e., that no TSRs are “available” unless received by the City

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<sup>31</sup> **Appendix 125.**

after the Proposition A bonds were issued)<sup>32</sup>

The sales-promoting language in the ballot which was handed the voter, and which was on the first page in the Voters Pamphlet section on Proposition A,<sup>33</sup> and which was construed by the official city agency which tells voters what ballot measures mean,<sup>34</sup> signified to every reasonable voter that a facility would be built “to replace Laguna Honda Hospital,” using Proposition A bond proceeds and **all of the TSRs** received by the City, (i.e., “available tobacco settlement revenues”), – not, just some of the TSRs or only the TSRs that are received after the bonds are issued.

Accordingly, the contradiction between the **bond ordinance (Appendix 147)**, and the **ballot proposal (Appendix 125)** which the Board of Supervisors drafted, must be judicially resolved against the drafter of the contradictory document, namely, the City and its Board of Supervisors, just as courts do when construing contracts between a business and the prospects whom it solicits to sign the contract.

As ruled in Farrell v. County of Placer (1944) 23 Cal.2d 624, 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.”

Farrell , 23 Cal.2d at 7627-628, also pointed out that:

“It has been said generally that a government agency may not be estopped by the conduct of its officers or employees, [citation], but there are many instances in which an equitable estoppel in fact will run against

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<sup>32</sup> **Appendix 147.**

<sup>33</sup> **Appendix 125.**

<sup>34</sup> **Appendix 125.**

the government **where justice and right require it.**” (Emphasis supplied.)

The case at bar is plainly one of those cases, where justice and right require that equitable estoppel be applied against the City, to prevent it from taking a \$99-plus million unfair advantage over the voters, by (1) promising up front to offset taxpayers’ costs by using all of the TSRs to construct the replacement Laguna Honda Hospital and service Proposition A bond debt, and (2) representing to voters, by its official Ballot Simplification Committee, that this is the meaning of Proposition A, but (3) sticking in a contrary clause at the back of the Voters Pamphlet, 22 pages later, so as to enable the City, – **if allowed to do so by the courts**, – to use tens of millions of the TSRs for other purposes of the City, (including misappropriating \$25 million in fiscal 2003-2004 for uses not related to the Proposition A project).

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

#### **Summary of the First Claim of Error**

In sum, the Court of Appeal should decide this First Claim of Error in favor of the salutary language which the Board used in the **ballot proposal** to obtain the passage of the measure; not, the contrary Philadelphia Lawyer language hidden away in an obscure section of a single-spaced 6-point ordinance set forth on the 22d page of a very long Voters Pamphlet section on Proposition A.

For the City to engage in this bait-and-switch tactic, shame on the City.

But for the Court of Appeal to judicially approve this bait-and-switch tactic in the case at bar, would open the door for public entities throughout the state to do the same thing, and allow municipalities to work what is in effect a fraudulent and unfair bait-and-switch tactic to obtain passage of bond measures by drafting salutary *ballot proposals* which are substantially and unfairly different from the *bond ordinance* by which the local governing body, cleverly, inserts into the *bond ordinance* to nullify the meaning of the *bond proposal*.

**ARGUMENT RE SECOND CLAIM OF ERROR:  
VOTER'S INTENT**

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**The key to the judicial function to construe the meaning of a ballot measure is to ascertain voters' intent.**

**To ascertain the voters' intent, the ballot arguments of the opponents as well as the proponents of Proposition A, in the Voters Pamphlet, must be considered.**

**If this be done, as it must, it follows that voters clearly intended that the existing Laguna Honda Hospital, licensed for 1,200 skilled nursing facility beds, be replaced with a facility which, – whatever other services might be included, – is a 1,200-bed skilled nursing facility.**

**Accordingly, the trial court order and judgment, that Proposition A does require any particular type or size of facility, is plain error, and must be reversed.**

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The cases which construe the meaning of ballot measures are replete with the rule that it is not the intent of the drafter of the measure that is relevant, but what is relevant and key, is the intent of the voters in passing the measure.

For this, the circumstances surrounding the placing of the measure on the ballot are relevant and must be considered, as well as, most importantly, the ballot arguments in the Voters Pamphlet of **both the proponents and the opponents**.

In this respect the circumstances surrounding the placing of Proposition

A on the ballot are that the existing Laguna Honda Hospital, a licensed 1,200-bed skilled nursing facility;<sup>35</sup> is old and decrepit, being built between 1926 and 1940; it was damaged in the 1989 Loma Prieta earthquake; its building systems are in need of repair; it has old-fashioned large open wards which violate federal and state regulations for patient privacy.<sup>36</sup>

Simply put, it is past time for the old 1,200-bed Laguna Honda Hospital skilled nursing facility to be replaced with a new 1,200-bed skilled nursing facility.

Given this widely-known history of Laguna Honda Hospital, and given the specific information by the Ballot Simplification Committee in the Voters Pamphlet of this history, no San Francisco voter could possibly have not understood that the reason that Proposition A was on the ballot was because a bond measure was required in order to build a new 1,200-bed skilled nursing facility to replace the 1,200-bed Laguna Honda Hospital skilled nursing facility.

Petitioner submits that it is impossible, given the commonly understood meaning of the words, “to replace,” as used in both the **ballot proposal** and in the **bond ordinance**, and in the context of why the measure was placed on the ballot, to suggest that there was any other intent in the voters’ passage of Proposition A, other than to replace the old 1,200-bed Laguna Honda Hospital skilled nursing facility, with a new 1,200-bed Laguna Honda Hospital skilled nursing facility. What other meaning could there be to the words, “to replace Laguna Honda Hospital,” than this?

It is true of course that the generic descriptions of kinds of facilities, – i.e., “health care,” “assisted living,” and “continuing care” facilities which are

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<sup>35</sup> **Appendix 111.**

<sup>36</sup> Statement of the City’s official Ballot Simplification Committee in the Voters Pamphlet. (**Appendix 125.**)

to “replace Laguna Honda Hospital,” which are set forth in both the **ballot proposal** and the **bond ordinance**, do raise an ambiguity, where no ambiguity would exist had the drafters simply described the project as a project “to replace Laguna Honda Hospital.”

However, Legislature v. Eu (1991) 54 Cal.3d 492, 504-505 instructs that were there 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.]’ 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], 245-246 . . .

“ . . .

“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 the proponents failed to contradict the opponents’ . . . argument. . . .” (Boldface emphasis supplied by petitioner.)

The significant thing about the Eu discussion and holding, is that Eu points out, either directly or inferentially, that where proponents and opponents cross their arguments, but, agree on specific points, that this articulation or clarification of voters’ intent, obtained as it were in a crucible of cross arguments, serves to winnow out and establish the points that all the opposing voters agree upon, so as to indicate to the construing court what the intent of the voters, – proponents and opponents alike, – was in respect to those material points where all the

proponents and opponents agree.

In applying this principle of analysis we have in the case at bar the unique situation where all the many proponents and opponents of Proposition A agree, again and again, without enunciating any opposing view, on the subject that what is being voted upon, and what the issue is, for the Proposition A measure, is whether or not to construct a 1,200-bed skilled nursing facility.

This serves to remove all ambiguities in the case, and to drive home the only conclusion which the Court of Appeal must assuredly make in this case at bar, namely, that the voters in casting their vote for or against Proposition A, intended to either vote for a 1,200-bed skilled nursing facility, or to vote against a 1,200-bed skilled nursing facility to replace the existing Laguna Honda Hospital 1,200-bed skilled nursing facility. The yeas won. Hence it is incontestable that the voters' intent in passing Proposition A, was to pass a measure for the City to build, at the least, a new 1,200-bed skilled nursing facility to replace the old Laguna Honda Hospital 1,200-bed skilled nursing facility.

**Summary and request in respect to the Second Claim of Error**

\_\_\_\_\_From the foregoing it is clear that the voters' intent in passing Proposition A was to build a new 1,200-bed skilled nursing facility to replace the existing but obsolete 1,200-bed skilled nursing facility at Laguna Honda Hospital.

Accordingly it was plain error for the trial court to conclude that the voters did not intend to approve any "long term care facility," (sic), and that there was no evidence to show that the voters intended for the City to "construct a facility of a specific size,."<sup>37</sup> and, deny the petition for writ in respect to the Third Cause of Action upon that erroneous conclusion.

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<sup>37</sup> April 4, 2005 order denying writ. **Appendix 11.**

Hence, the April 4, 2005 judgment which denied the petition for writ of mandamus, namely:

- (1) to command the Board of Supervisors to set aside Ordinance 252-04, (which authorizes a reduction of the project to less than a 1,200-bed skilled nursing facility),
  - (2) to order the respondents not to implement Ordinance 252-04,
  - (3) to order the City not to reduce the project to less than a 1,200-bed skilled nursing facility unless the City respondents:
    - (a) first restore the Misappropriated \$25 Million to the project, and, factor in this restored funding in determining if there is sufficient TSRs and Proposition A bond proceeds to complete the replacement Laguna Honda Hospital with 1,200 skilled nursing facility beds; and,
    - (b) first determine, from a factual study of costs and the amount of TSRs and Proposition A bond proceeds, whether there is sufficient funding to complete a 1,200-bed skilled nursing facility as required by Proposition A,
- must be reversed, due to the fact that it is not supported by the evidence and is contrary to the evidence and the applicable law.

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**Petitioner here sets forth the evidence in the Voters Pamphlet of the**

**ballot arguments of both the proponents and the opponents of Proposition A, by way of fully marshaling the evidence of voters' intent which is delimited and disclosed by the opposing sets of arguments: all of which agree that the project being voted upon is a project to replace the existing 1,200-bed skilled nursing facility at Laguna Honda Hospital, with a new 1,200-bed skilled nursing facility.**

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\_\_\_\_\_ These Voters Pamphlet arguments are set forth below, as follows:

**First:** The official **Digest** of the San Francisco Ballot Simplification Committee, pursuant to §§ 500 and 600 City Adm. Code:

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

**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 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>38</sup>

**Second:** The proponents' argument, by the Board of Supervisors:

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

. . .

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

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<sup>38</sup> **Appendix 125.**

(Emphasis supplied.)<sup>39</sup>

**Third:** The rebuttal argument by the Board of Supervisors:

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

“Yes, **rebuilding Laguna Honda** is expensive, but other alternatives **serving the same number of people** would be far more costly. . . . **Dispensing Laguna Honda’s population to smaller public facilities** would require wasteful duplication of costly medical equipment. . . . “  
(Emphasis supplied.)<sup>40</sup>

**Fourth:** Mayor Willie Brown:

“Everyone agrees that using San Francisco’s share of money won from these tobacco companies to build Laguna Honda Hospital is the best use of this once-in-a-lifetime financial windfall.”<sup>41</sup>

**Fifth:** Lee Ann Monfedeini, President, San Francisco Health Commission; Roma Guy, Vice-President, Health Commission; and,  
Members of the Health Commission:

- Edward A. Chow, M.D.
- Ronald Gene Hill, Chair, Budget Committee
- David J. Sanchez, M.D.
- John Umekubo, M.D.:

“**Rebuilding Laguna Honda Hospital** is the least expensive and least disruptive way to assure **continued care for current residents**, and to assure the availability of medical/skilled nursing care for San Francisco who will need these services in the future.

**Talk of a “smaller Laguna Honda”** by Proposition A opponents is

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<sup>39</sup> **Appendix 126.**

<sup>40</sup> **Appendix 127.**

<sup>41</sup> Page 37 of Voters Pamphlet. (**Appendix 129.**)

irresponsible . . .” (Emphasis supplied.)<sup>42</sup>

**Sixth:** Congresswoman Nancy Pelosi:

“I support Proposition A to save Laguna Honda Hospital because it is the best option to ensure the 1,200 patients at the hospital get the best quality SNF possible.”<sup>43</sup>

**Seventh:**

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

“The new state-of-the-art structure will continue to provide the highest-quality, 24-hour care for 1,200 residents, while meeting the growing demands of the twenty-first century.”<sup>44</sup>

**Eighth: Mitchell Katz, Director of Public Health; and Louise Renne, San Francisco City Attorney:**

“We chaired this commission, which was appointed by the health commission, with the goal of identifying the very best plan for **rebuilding** Laguna Honda Hospital.”<sup>45</sup> (Emphasis supplied.)

**Ninth: FDR Democratic Club for Seniors and People with Disabilities:**

“ (W)e oppose a new 1,200-bed Laguna Honda.”<sup>46</sup>

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<sup>42</sup> **Appendix 135.**

<sup>43</sup> Page 39 of Voters Pamphlet. (**Appendix 131.**)

<sup>44</sup> Page 41 of Voters Pamphlet. (**Appendix 133.**)

<sup>45</sup> Page 41 of Voters Pamphlet. (**Appendix 133.**)

<sup>46</sup> Page 51 of Voters Pamphlet. (**Appendix 143.**)

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

“We oppose the rebuilding of Laguna Honda Hospital at its current level of 1200 beds.”<sup>47</sup>.

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

“This bond measure ensures construction of 1,200 skilled nursing beds.”<sup>48</sup>

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

“NO CIVILIZED CITY SHUNTS ITS DISABLED INTO 1,200-bed warehouses.”<sup>49</sup>

**Summary of Third Error for denial of writ to require Ordinance 252-04 to be set aside**

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Accordingly, the judgment and order of the trial court, to deny the writ of mandamus sought to enjoin Ordinance 252-04,<sup>50</sup> – which ordinance authorizes the City to reduce the size and scope of the replacement Laguna Honda Hospital, – on the basis that Proposition A does not require the replacement of the existing 1,200-bed SNF Laguna Honda Hospital facility with another 1,200-bed SNF facility, was erroneous, because this finding or conclusion was not supported by, and was contrary to, the evidence and the applicable law of statutory construction.

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<sup>47</sup> Page 52 of Voters Pamphlet. (**Appendix 144.**)

<sup>48</sup> Page 52 of Voters Pamphlet. (**Appendix 144.**)

<sup>49</sup> (**Appendix 145.**)

<sup>50</sup> **Appendix 211.**

**FURTHER ELABORATION OF THE TRIAL COURT  
ERROR IN DENYING THE WRIT TO SET ASIDE  
ORDINANCE 252-04, IN THE THIRD CAUSE OF ACTION**

**Background of this Third Cause of Action**

\_\_\_\_\_ Proposition A, as shown prior in this brief, created a compact between the City and the San Francisco electorate, (the “Proposition A Compact”), which requires the City to construct a replacement 1,200-bed SNF Laguna Honda Hospital facility, using Proposition A bond proceeds and all TSRs received and to be received to do so.

Logically, this charge to the City is akin if not the same as the duties which are imposed upon a public entity by a public trust or public use undertaken or imposed upon the public entity. (*See*, such cases as People v. California Fish Co., 166 Cal. 576, and California State Lands Commission v. Long Beach (2005) 125 Cal.App.4th 767, 770.) In such a public trust the public entity must exercise its best judgment to facilitate the implementation of the public trust, (California Fish Co., *supra*), and may not abandon any part of the public trust or charge unless, at the least, it determines upon evidence that the public trust or charge cannot be carried out.

Accordingly, the Board of Supervisors cannot abandon any part of the charge upon it to use Proposition A bond proceeds and all TSRs to replace Laguna Honda Hospital with a 1,200-bed SNF facility, unless it first determines upon evidence satisfactory to it, that there are insufficient bond proceeds and TSRs available to do so.

However, as shown by Ordinance 252-04 upon its face, (**Appendix 211**); by the March 15, 2005 report of Michael Lane, Project Manager of the Laguna Honda Hospital Replacement Program, entitled: “Laguna Honda Hospital Replacement Program Update,” (**Appendix 236-256**); by the City’s Budget

Analyst report to the Board of Supervisors dated June 26, 2003, (**Appendix 158-161**); by the \$25 Million Misappropriation of TSRs from the TSR trust; and by the claims of the City in case at bar, the City does not regard Proposition A as imposing any Compact or public trust upon the City to either (1) replace Laguna Honda Hospital with a replacement 1,200-bed SNF facility, or (2) use all Proposition A bond proceeds and all TSRs received or to be received to do so.

In this wise the Board of Supervisors enacted Ordinance 252-04 to reduce the size of the replacement Laguna Honda Hospital facility below the 1,200 long-term beds required by Proposition A, without any consideration of whether there are sufficient TSRs and bond proceeds by which to presently build a 1,200-bed SNF facility, (and without consideration, as shown by the June 26, 2003 report of the City Budget Analyst (**Appendix 160-161**) that there are sufficient TSRs expected by which to do so).

Accordingly, the enactment of Ordinance 252-04,<sup>51</sup> by the Board of Supervisors, was an action which was arbitrary and capricious and contrary to law, because the Board manifestly failed to consider the relevant factors requisite to enacting any ordinance to reduce the promised size of the replacement Laguna Honda Hospital facility, all, in violation of the Proposition A Compact. Hence, the trial court **committed error** in failing to issue a writ of mandamus, as requested in the Third Cause of Action, to order the Board of Supervisors to set aside Ordinance 252-04, and not implement any reduction in the promised size of the replacement Laguna Honda:

- without first requiring that the Misappropriated \$25 Million be restored to the project's TSR trust fund, and,
- without first making an administrative determination, upon some

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<sup>51</sup> **Appendix 211.**

responsible financial study, that there are insufficient TSRs by which, with Proposition A bond proceeds, to build out the project to the 1,200-bed SNF size and function required by the Compact and the public trust created by the Compact.

### **SUMMARY AND PRAYER**

\_\_\_\_ Petitioner, for the reasons given in this Appellant's Opening Brief, prays that the above-entitled Court of Appeal, Division Two:

1. Reverse the April 4, 2005 final order denying writ of mandamus,<sup>52</sup> and the April 4, 2005 judgment,<sup>53</sup> in whole and in every part;

2. Remand the case with instructions to the Superior Court to issue a peremptory writ of mandamus which orders each and all of the respondents, namely, the City and County of San Francisco, its Mayor, Health Commission, and Controller:

- (a) to restore and cause to be restored to the tobacco settlement revenues (TSR) trust fund, (namely, the Tobacco Settlement Revenues Sub-account), the sum of \$25,005,645 which was misappropriated from the TSR trust fund in 2003-2004, with interest;

- (b) to vacate and set aside, and refrain from implementing, City Ordinance 191-03, (i.e., subd. (3) of § 10.100-218 City Adm. Code), in whole and in every part;<sup>54</sup>

- (c) to vacate and set aside, and refrain from implementing, City Ordinance 252-04 in whole and in every part;<sup>55</sup>

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<sup>52</sup> **Appendix 4.**

<sup>53</sup> **Appendix 2.**

<sup>54</sup> Copy of Ordinance 191-03 is at **Appendix 163.**

<sup>55</sup> Copy of Ordinance 252-04 is at **Appendix 211.**

- (d) to refrain from reducing the provision and plans for constructing a replacement Laguna Honda Hospital having, at the least, space and functions to serve 1,200 SNF patients, without:

- (i) first restoring the misappropriated \$25,005,645 to the TSR trust fund, (namely, the Tobacco Settlement Revenues Sub-account), and expending or scheduling its expenditure to be used to construct or service the bonds for the replacement Laguna Honda Hospital facility;

- (ii) first determining, from a responsible factual study or other reliable data, that the funding from:

- tobacco settlement revenues, plus,
- \$299 million Proposition A bond proceeds, plus,
- state and federal subsidies for creating new skilled nursing facility beds,

which is available or to become available, is insufficient to construct a replacement Laguna Honda Hospital facility which serves at least 1,200 SNF patients, (as otherwise required by the Proposition A Compact); and, reduces the project to fit the amount of such funding;

3. Award reasonable attorneys' fees to petitioner under § 1021.5 Code of Civil Procedure and under the common fund doctrine for awarding attorneys' fees;

4. Award costs of appeal and such other and further relief as the Court of Appeal deems proper.

Dated: July 25, 2005

Respectfully submitted,

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Attorney for Petitioner