



OFFICE OF PUBLIC AFFAIRS

Telephone: (408) 777-3262 • FAX: (408) 777-3366 • pio@cupertino.org
City Hall • 10300 Torre Avenue • Cupertino, CA 95014-3255

NEWS RELEASE

January 4, 2017

Santa Clara County Superior Court Denies Challenge to the Cupertino City Clerk's Rejection of Oaks Shopping Center Petition

CUPERTINO, CA – On Thursday, December 22, 2016 the Santa Clara County Superior Court issued an order denying the challenge to the Cupertino City Clerk's rejection of the Oaks Shopping Center development project petition. The Oaks petition called for an initiative amending Cupertino's General Plan and Heart of the City Specific Plan to allow 280,000 square feet of office space, 200 hotel units, 270 residential units, and a height limit of 88 feet for a mixed-use development project at the Cupertino Oaks Shopping Center along Stevens Creek Boulevard.

Elections Code section 9201 states that "[t]he first page of each section shall contain the title of the petition and the text of the measure." The petition sections submitted to the City Clerk did not actually comply, nor substantially comply, with section 9201 because the "first page" of each section did not contain the "text of the measure." Instead each petition section was stapled out of order with the text of the measure not appearing until the fifth physical page of a six page petition. This page was labeled "page 1". The Court noted that "the text of the measure either appears on the first page or it does not."

Significantly, the Court recognized that "... the purpose of the statutory requirement is to give information to the public to assist the voters in deciding to sign or oppose the petition ...". Here, the Court determined that, "Petitioner intentionally buried the text of the measure in the middle of a petition section, the pages of which are not consecutively numbered." As a result, the Court found that "the petition as formatted did not clearly alert voters to the complete text of the measure to allow them to first evaluate what they were being asked to sign." In so ruling, the Court sustained the decision to reject 990 petition sections (4,876 signatures) that were submitted to the City Clerk.

###

(ENDORSED)
FILED
DEC 22 2016

CLERK OF
Superior Court of CA County of Santa Clara
BY Henry Keniston DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

KENNETH SILVERY TERSINI,

Plaintiff,

vs.

GRACE SCHMIDT, et al.,

Defendants.

Case No. 16-CV-299080

ORDER RE: PETITION FOR WRIT OF
MANDATE

ORDER ON SUBMITTED MATTER

The petition for writ of mandate by Kenneth Silvery Tersini came on for hearing before the Honorable Mary E. Arand on October 4, 2016 in Department 9. The matter having been submitted, the Court finds and orders as follows:

I. Background

This is a mandamus action arising out of the rejection of initiative petitions related to the development of a shopping center in Cupertino, California brought by Kenneth Silvery Tersini (“Petitioner”) against the City Clerk of Cupertino, Grace Schmidt (“Respondent”).

KT Urban owns the Oaks Shopping Center in downtown Cupertino. It wanted to revitalize the shopping center by, among other things, adding a new mixed-use development containing retail, office, hotel, and residential space as well as on-site parking. The Cupertino City Council denied KT Urban’s application to build the new development. Consequently,

1 Petitioner began the process of qualifying an initiative measure to amend the city plans for the
2 area and pave the way for the development.

3 On February 9, 2016, Petitioner filed with Respondent the text of the proposed measure
4 and notice of intent to circulate a petition. After receiving the approved title and summary from
5 the City Attorney, Petitioner began circulating the petition. Petitioner circulated some booklet-
6 style petition sections by mail (the “mail-in petition sections”). At issue in the present action are
7 the petition sections circulated in person (the “in-person petition sections”), which are formatted
8 differently.

9 The in-person petition sections consisted of three double-sided 8.5 by 14 inch sheets of
10 paper stapled together as follows: (1) “page 5” containing the title, summary, and signature lines
11 1 through 6; (2) “page 4” intentionally left blank; (3) “page 3” containing an illustration of the
12 proposed development; (4) “page 2” containing some initiative text; (5) “page 1” containing
13 initiative text; and (6) “page 6” containing signature lines 7 through 10 and the circulator
14 declaration. (See Petitioner’s Exh. A.)

15 On August 22, 2016, Petitioner submitted two boxes of the petition sections to
16 Respondent. Respondent began the raw count to determine the number of signatures. (See Elec.
17 Code, § 9210, subd. (b) [must first determine if minimum number of signatures present].)
18 During the counting process, Respondent contacted Petitioner’s counsel about the irregular
19 formatting of the sections circulated in person, specifically the placement of “page 1” containing
20 the initiative text. Thereafter, Respondent accepted the 83 mail-in petition sections containing
21 127 signatures but rejected the 990 in-person sections containing 4,876 signatures because the
22 text of the measure did not actually appear on the first page of these sections. (Schmidt Decl., ¶¶
23 9-10.)

24 On August 25, 2016, Petitioner filed a verified petition for writ of mandate to compel
25 Respondent to accept the in-person petition sections. Petitioner submitted evidence and a request
26 for judicial notice in support of his petition. On September 21, 2016, Respondent filed its
27 opposition, supporting evidence, and a request for judicial notice. On October 4, 2016, the Court
28 heard arguments from both parties and received evidence. Petitioner brought to the hearing the

1 original boxes of signed petition sections that had been returned to Petitioner after rejection of
2 the in-person petition sections. The Court examined samples of the original petitions, and
3 returned the original documents to Petitioner. The Court received in evidence, without objection,
4 Exhibit A, an unsigned sample of the in-person petition section; Exhibit C, an unsigned sample
5 of the mail-in petition section; and Exhibits B and D, samples of unrelated petition sections
6 submitted to the City of Cupertino for a different development project. The Court then took the
7 matter under submission.

8 **II. Requests for Judicial Notice**

9 Both parties filed requests for judicial notice in this matter. “Judicial notice is the
10 recognition and acceptance by the court [] of the existence of a matter of law or fact that is
11 relevant to an issue in the action without requiring formal proof of the matter.” (*Unruh-Haxton*
12 *v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364, internal quotation marks
13 and citations omitted.)

14 **A. Petitioner’s Request for Judicial Notice**

15 Petitioner requests judicial notice of the legislative history of Elections Code section
16 9201. A court may take judicial notice of legislative history materials pursuant to Evidence
17 Code section 452, subdivision (c) because they constitute official acts of the Legislature. (See
18 *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th
19 26, 39.) The legislative history of Elections Code section 9201 is relevant because it is the
20 statute at issue in this case. Petitioner’s legislative history materials are therefore proper subjects
21 of judicial notice. Petitioner’s request for judicial notice is therefore GRANTED.

22 **B. Respondent’s Request for Judicial Notice**

23 First, Respondent asks the Court to take judicial notice of two petitions from other
24 unrelated initiative measures. (See RJN, Exhs. 4-5.) Respondent offers these petitions as
25 examples of what other clerks previously accepted for filing. The Court is not bound by what
26 local officials accept or reject. (See, e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57
27 Cal.2d 450, 455-56 [superior court must follow decisions of higher courts].) Whether a clerk
28 accepts or rejects an unrelated petition does not reflect whether such an act was in accordance

1 with the statutory directives. The unrelated petitions therefore are not relevant and are not proper
2 subjects of judicial notice.

3 Second, Respondent requests judicial notice of copies of the mail-in and in-person
4 petition sections pursuant to Evidence Code section 452, subdivision (h), which authorizes a
5 court to take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute
6 and are capable of immediate and accurate determination by resort to sources of reasonably
7 indisputable accuracy.” (See RJN, Exhs. 1-2.) These copies are single-sided and reproduced in
8 a different fashion than the original petition sections that the Court admitted into evidence
9 without objection. Consequently, it is not obvious how these documents are accurate, relevant,
10 necessary, or helpful under the circumstances. (See *Jordache Enterprises, Inc. v. Brobeck,*
11 *Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [request for judicial notice denied where
12 documents not necessary, relevant, or helpful].) The copies of the petition sections therefore are
13 not proper subjects of judicial notice.

14 Finally, Respondent requests judicial notice of its official notice accepting the mail-in
15 petitions sections, rejecting the in-person petition sections, and identifying the raw signature
16 count. (See RJN, Exh. 3.) This notice, signed by Respondent, is the proper subject of judicial
17 notice because it is an official act and is clearly relevant to a material issue before the Court.
18 (See Evid. Code, § 452, subd. (c).)

19 Based on the foregoing, Respondent’s request for judicial notice is GRANTED as to the
20 official notice and DENIED as to the unrelated petitions and copies of the petition sections in
21 this case.

22 **III. Discussion**

23 A party may petition a court for a writ of mandate compelling a local official to perform a
24 ministerial duty, which is “an act that a public officer is obligated to perform in a prescribed
25 manner required by law when a given state of facts exists.” (*Alliance for a Better Downtown*
26 *Millbrae v. Wade* (“*Millbrae*”) (2003) 108 Cal.App.4th 123, 128-29; see also Code Civ. Proc.,
27 § 1085 [authorizing petition for writ of mandate].) To obtain a writ, “the petition must show
28 (1) a clear, present, ministerial duty on the part of the respondent and (2) a correlative clear,

1 present, and beneficial right in the petitioner to the performance of that duty.” (*Millbrae, supra*,
2 108 Cal.App.4th at p. 129.)

3 When an initiative petition is filed for signature counting, a city clerk has a ministerial
4 duty to either accept or reject the petition based on whether it complies with the statutory
5 requirements, including formatting. (*Millbrae, supra*, 108 Cal.App.4th at p. 132.) In deciding
6 whether an initiative petition is code-compliant, a clerk may not engage in a discretionary
7 evaluation of evidence or consider extrinsic evidence, such as how a petition was circulated. (*Id.*
8 at p. 134.) The clerk may only conduct a “straightforward comparison of the submitted petition
9 with clear statutory directives,” such as the directives to attach the full text of the measure and a
10 signed declaration to the petition sections. (*Ibid.*) In addition to these directives, “[t]he first
11 page of each section [of a petition] shall contain the title of the petition and the text of the
12 measure.” (Elec. Code, § 9201.)

13 Here, as Respondent points out, Petitioner printed the text of the measure on a page found
14 in the middle of the petition sections. (See Petitioner’s Exh. A.) The text therefore was not
15 printed on the first page. Contrary to Petitioner’s argument, it is unnecessary to rely on extrinsic
16 evidence such as how the petition sections were circulated or how they were placed in the box
17 for submission to reach this conclusion. The page bearing the text of the measure is not visible
18 and is not the first page, irrespective of what direction the petition is oriented, whether pages 5 or
19 6 — the outermost pages — face upwards.

20 Petitioner presents several arguments in support of its position that the Court should,
21 nonetheless, hold its “page 1” is the first page. For the reasons set forth below, these arguments
22 fail.

23 First, Petitioner argues the text is on the first page because it is on a page marked as
24 number 1. Petitioner’s pagination is of little significance because it does not reflect the actual
25 order of the pages. Here, the page marked number 1 appears in the middle of the petition section
26 and on its reverse is a page marked number 6. Consequently, the designated page number is
27 clearly not reflective of the actual order of the petition and “page 1” cannot properly be
28 considered the first page. Moreover, following Petitioner’s logic would vitiate this formatting

1 requirement as parties could simply put the text wherever they wanted so long as they marked
2 the page as “page 1.” Petitioner’s argument that the Court should simply accept the page
3 numbers as determinative of compliance with Elections Code section 9201 therefore is not
4 persuasive.

5 Next, Petitioner argues the text is on the first page because it is on the first sheet of paper.
6 Petitioner relies on *Millbrae* in which the court held it was sufficient to place the title and
7 summary of a measure on the front of each sheet of paper bearing signature lines. (See *Millbrae*,
8 *supra*, 108 Cal.App.4th at p. 130.) In reaching this conclusion, the court determined “page” in
9 the specific context of Elections Code section 9203, meant a sheet of paper as a whole and not
10 each side of a sheet of paper. (*Ibid.*)

11 *Millbrae* can be distinguished for several reasons. First, the court did not consider the
12 meaning of the word “page” as used in section 9201. Second, the language and context of
13 Elections Code section 9201 is distinct because it refers to “the first page of each section”
14 whereas section 9203 refers to “each page of the petition.” Third, the court held placement on
15 one side of the sheet of paper was sufficient because the title and summary conspicuously
16 appeared on the front of each sheet of paper. (*Millbrae, supra*, 108 Cal.App.4th at pp. 130-31.)
17 The court held this placement comported with the purpose of the formatting requirement, namely
18 reducing voter confusion. (*Ibid.*) Here, unlike *Millbrae*, the text appears on the back of what
19 Petitioner argues is the first sheet of paper. This placement does not alert voters to the presence
20 of the text of the measure. Petitioner’s argument that section 9201 requires placement of the text
21 on the first sheet of paper therefore is not persuasive.

22 Additionally, even if the Court adopted Petitioner’s proposed definition of page as a
23 whole sheet of paper, the text does not appear on the first sheet of paper. The sheet of paper
24 Petitioner argues is first is numbered page 6 on one side and contains signature lines 7 through
25 10 as well as the circulator’s declaration. (See Pet. Exh. A.) In contrast, the outermost page on
26 the reverse of the petition section, although designated page 5, contains signature lines 1 through
27 6. Given the signature lines must be consecutively numbered starting with line 1, page 5 is
28 clearly the first sheet of paper in the petition section, not page 6. (See Elec. Code, § 100, subd.

1 (c) [number and format requirements for signature lines].) The text of the measure is not on page
2 5 or its reverse. Consequently, the petition does not comply with the statutory directive even
3 adopting Petitioner’s proposed definition.

4 Finally, the Court rejects Petitioner’s argument that the statute simply requires inclusion
5 of the text of the measure somewhere in each section. In support of this argument, Petitioner
6 asserts it is effectively impossible to include the text of the measure on the first page because
7 title and summary information, which may contain up to 500 words, must also be included in 12-
8 point font. Petitioner argues there simply is no room.

9 Petitioner may be correct that the formatting requirements are impractical. Even so, it is
10 not the role of the Court to make a policy decision as to what is practical for professional petition
11 circulators as balanced against the rights of voters to have straightforward access to information;
12 that is the role of the Legislature. (See, e.g., *Knight v. Superior Court* (2005) 128 Cal.App.4th
13 14, 30.) Courts are tasked with applying the law so as to “give meaning to every word of a
14 statute if possible [] and avoid a construction making any word surplusage.” (*Arnett v. Dal*
15 *Cielo* (1996) 14 Cal.4th 4, 22; see also *Knight v. Superior Court, supra*, 128 Cal.App.4th at p. 24
16 [“A court cannot insert or omit words to cause the meaning of a statute to conform to a presumed
17 intent that is not expressed.”]) The Court therefore declines to adopt Petitioner’s suggested
18 interpretation of the statute omitting the first-page requirement because doing so would render
19 this express language surplusage.

20 To this point, the Court also rejects Petitioner’s related argument that the express
21 language of the statute should somehow be disregarded as an afterthought because one of the
22 Legislature’s purposes in adopting section 9201 was making it clear petitions could be circulated
23 in sections rather than as a whole. Petitioner does not explain, and it is not obvious from the
24 legislative history presented, how allowing petitions to be circulated in sections is at odds with
25 the first-page requirement and the overall purpose of the formatting requirements, namely
26 reducing voter confusion. This argument therefore lacks merit.

1 For these reasons, the Court concludes the in-person petition sections did not technically
2 comply with Elections Code section 9201 because the text of the measure was not on the first
3 page of each section.

4 Petitioner alternatively argues the Court should compel Respondent to accept the in-
5 person petition sections because they substantially complied with Elections Code section 9201.

6 California courts sometimes invoke the doctrine of substantial compliance when there are
7 minor defects in the initiative process that do not impact the integrity of the electoral process.
8 (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1013.) ““The requirements of both the
9 Constitution and the statute are intended to and do give information to the electors who are asked
10 to sign the initiative petitions.”” (*Id.* at p. 1013, quoting *California Teachers Assn. v. Collins*
11 (“*CTA*”) (1934) 1 Cal.2d 202, 204.) ““If that be accomplished in any given case, little more can
12 be asked than that a substantial compliance with the law and the Constitution be had, and that
13 such compliance does no violence to a reasonable construction of the technical requirements of
14 the law.”” (*Costa v. Superior Court, supra*, 37 Cal.4th at p. 1014, quoting *CTA, supra*, 1 Cal.2d
15 at p. 204 [holding use of 12-point font rather than 18-point font substantially compliant].) In
16 other words, technical defects will only be excused if there is “actual compliance [] in respect to
17 the substance essential to the objective of the statute.” (*Ibarra v. City of Carson* (1989) 214
18 Cal.App.3d 90, 99.) “Where the purpose of the statutory requirement is to give information to
19 the public to assist the voters in deciding whether to sign or oppose the petition, the substantial
20 compliance argument is often rejected and strict compliance held essential.” (*Ibid.*)

21 Here, Petitioner intentionally buried the text of the measure in the middle of a petition
22 section, the pages of which were not consecutively numbered. The Court is not presented with a
23 petition that, while technically non-compliant, otherwise contained a clear or conspicuous
24 presentation of information sufficient to satisfy the purpose of the formatting requirement. The
25 petition as formatted did not clearly alert voters to the complete text of the measure to allow
26 them to first evaluate what they were being asked to sign.

27 Additionally, given the nature of this particular formatting requirement, it is not obvious
28 how the Court could hold the petition sections substantially complied without rewriting the

1 statute. The text of a measure either appears on the first page or it does not. Consequently, a
2 finding of substantial compliance would effectively require the Court to disregard the statutory
3 directive in its entirety. The petition sections therefore did not substantially comply with
4 Elections Code section 9201.

5 In conclusion, Petitioner fails to demonstrate Respondent had a ministerial duty to accept
6 the petition sections circulated in person because they did not comply with the statutory directive
7 in Elections Code section 9201. The petition for writ of mandate is therefore DENIED.

8
9
10 Date: 12/21/2016

Mary E. Arand

Mary E. Arand
Judge of the Superior Court



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION**

December 22, 2016

**Robert Steven Perlmutter
396 Hayes St
San Francisco CA 94102**

RE: **Kenneth Tersini vs Grace Schmidt**
Case Number: **16CV299080**

PROOF OF SERVICE

ORDER RE: PETITION FOR WRIT OF MANDATE was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on December 22, 2016. CLERK OF THE COURT, by Henry Keniston, Deputy.

cc: Thomas Wayne Hiltachk 455 Capitol Mall #600 Sacramento CA 95814

CITY ATTORNEY'S BALLOT TITLE AND SUMMARY FOR PROPOSED
INITIATIVE SUBMITTED ON FEBRUARY 9, 2016

TITLE: Initiative amending Cupertino's General Plan and Heart of the City Specific Plan to: (1) allow 280,000 square feet of office space, 200 hotel units, and 270 residential units, and a height limit of 88 feet for a mixed-use development project at the Cupertino Oaks Shopping Center ("Property"); (2) exempt the Property from some development standards; and (3) require the City to promptly process and approve an application for a project that includes specified community benefits and is consistent with the terms of the proposed initiative.

SUMMARY: As required by State law, the City of Cupertino's General Plan establishes permissible land uses, maximum development densities, and intensities for all properties within the City. The City recently completed a multi-year planning effort for its new General Plan, Community Vision 2015 – 2040, guiding development through 2040. The City has also adopted several specific plans, which provide additional development guidance for certain areas of the City. The eight-acre Property, bounded by State Route 85, Stevens Creek Boulevard, and Mary Avenue, is within the Heart of the City Specific Plan.

The proposed initiative amends the City's General Plan and the Heart of the City Specific Plan including to:

- (1) add an additional 280,000 square feet of office space and an additional 200 hotel rooms to the development permitted within the Heart of the City area exclusively for the Property;
- (2) change the "Maximum Residential Density" for the Property from "25 units per acre" to a provision allowing 270 residential units;
- (3) exempt the Property from the 1:1 slope line setback requirement;
- (4) increase the maximum allowable building height from 45 feet to 88 feet and change the land use designation and zoning to allow office uses;
- (5) remove the Neighborhood Center designation;
- (6) allow for "parcelization" (i.e., the division of the property into smaller parcels that may then be re-sold) of the Property;
- (7) remove the requirement that the Property contain a "substantial retail component";

- (8) remove restrictions on the percentages of certain uses allowed along Stevens Creek Boulevard and the rear of buildings; and
- (9) reduce the percentage of the required common outdoor space that must be landscaped.

The initiative states that its intent is to revitalize the Oaks Shopping Center with a mixed use project that would generate an estimated \$2.5 million in new annual tax revenues and an additional \$8 million worth of specified community benefits, such as funds for construction of schools, public facilities, and transportation, and affordable housing in excess of City requirements.

It directs the City to promptly review a development application that is generally consistent with the initiative's attached "Site Plan" and promptly approve a development permit and development agreement that would require the landowner to provide community benefits and amenities in substantial conformance with those specified.

The initiative, which has no expiration date, states that the General Plan and Heart of the City Specific Plan provisions it amends could be amended by the voters or, "upon application of the landowner", by the City Council.