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NEWS RELEASE

March 10, 2017

Trial Court Rules in Cupertino's Favor, Upholding Rejection of Petition Sections for North DeAnza Gateway Initiative

CUPERTINO, CA – On Friday, March 3, 2017 the trial court ruled in favor of the City of Cupertino ("City") by denying the Petition for Writ of Mandate filed in Reed Sparks, Ruby Elbogen, and William Hausmen ("Petitioners") v. Grace Schmidt, et al., Santa Clara County Superior Court Case No. 16CV301471. Petitioners challenged the City Clerk's rejection of 2,048 petition sections relating to the North DeAnza Gateway Initiative ("Initiative").

The Initiative proposed to amend the zoning and height restrictions in the City's General Plan for construction of a hotel with 156 additional rooms at the property, which currently contains the 126-room Cupertino Inn and the Goodyear Auto Service Center.

The court found that the petition sections did not technically comply with Elections Code sections 9201 and 9203(b) because the City Attorney's ballot title and summary was not included "above the text of the proposed measure" on the first page of each petition section.

The court concluded that this failure was a significant defect. The court stated that the title and summary "must be prominently included in the circulated petition to provide the voters whose signatures are sought with an accurate and objective petition" and "an accurate and objective description of the general matter of the initiative and its main points." "Primarily … (this) … reduces the risk that voters will be misled … by making available to them a neutral explanation of the measure."

In denying the petition, the court concluded that Petitioners did not simply omit the City Attorney's neutral explanation of the Initiative on the first page of each petition section. Instead, Petitioners included their arguments in support of the measure, which were clearly not neutral.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

REED SPARKS, et al., Petitioners, vs. GRACE SCHMIDT, Respondent.	Case No. 16-CV-301471 ORDER RE: PETITION FOR WRIT OF MANDATE

The petition for writ of mandate by Reed Sparks, Ruby Elbogen, and William Hausman came on for hearing before the Honorable Peter H. Kirwan on February 27, 2017, at 10:00 a.m. in Department 19. The matter having been submitted, the Court finds and orders as follows:

I. Background

This mandamus action arises out of the rejection of an initiative petition related to the development of the North De Anza Gateway area of Cupertino, California. Petitioners Reed Sparks, Ruby Elbogen, and William Hausman ("Petitioners") proposed the North De Anza Gateway initiative measure (hereinafter, the "Initiative") to amend the zoning and height restrictions in Cupertino's General Plan for construction of a boutique hotel. (Petition for Writ of Mandate ("PWM"), Exh. A.) The City Clerk of Cupertino, Grace Schmidt ("Respondent"),

rejected the petition they circulated in support of the Initiative because it did not comply with statutory formatting requirements. Petitioners commenced this action to compel Respondent to accept their initiative petition and the signatures affixed thereto.

On April 6, 2016, Petitioners filed with Respondent the: (1) notice of intent to circulate petition; (2) text of the Initiative; (3) proponents' certification; and (4) authorization of legal counsel. (PWM, Exh. D.) On April 21, 2016, Petitioners received the official title and summary of the Initiative prepared by the city attorney. (See PWM, ¶ 11; PWM, Exh. E.) Petitioners published the official title and summary of the Initiative in the Cupertino Courier and sent proof of publication to Respondent. (PWM, Exh. F.) Petitioners thereafter circulated the petition in sections to obtain voter signatures and submitted 4 boxes of petition sections to Respondent on October 4, 2016. (PWM, ¶ 14.)

Upon receipt of the petition sections, Respondent conducted a raw signature count. (See Elec. Code, § 9210, subd. (b) [clerk first determines if minimum number of signatures present before verifying signatures].) Respondent issued a "Receipt for Prima Facie Section and Signature Count [ ]" indicating she received 2,048 petition sections containing 5,266 signatures. (PWM, Exh. B.) She represented, however, that she was receiving but not formally accepting the petition sections pending review of compliance with statutory formatting requirements. (PWM, Exh. B.) The very next day, Respondent rejected all 2,048 petition sections based on noncompliance with statutory directives governing placement and formatting of the official title and summary prepared by the city attorney. (PWM, Exh. C.)

Petitioners assert the petition sections technically and substantially comply with the applicable statutory requirements. On this basis, they filed a verified petition for writ of mandate to compel Respondent to accept their petition for filing. Respondent filed an opposition and requests for judicial notice in support thereof.

II. Requests for Judicial Notice

Respondent filed initial and supplemental requests for judicial notice in support of her opposition. "Judicial notice is the recognition and acceptance by the court [ ] of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of

the matter." (*Unruh-Haxton v. Regents of the University of California* (2008) 162 Cal.App.4th 343, 364, internal quotation marks and citations omitted.)

A. Initial Request for Judicial Notice

First, Respondent requests judicial notice of initiative petitions for developments with no connection to the present action. Respondent apparently presents these other petitions as examples of petitions she previously accepted. These initiative petitions for unrelated developments are not relevant here. Courts are not bound by the acts of local officials. (See, e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-56 [trial courts bound by rulings of higher courts].) A clerk's acceptance of unrelated petitions, in the absence of an appellate court's decision confirming the clerk properly accepted the petitions, does not demonstrate whether the clerk correctly applied the Elections Code and formatting requirements therein. In other words, the Court cannot simply rely on Respondent's previous interpretations and applications of the law. Accordingly, the unrelated petitions are not proper subjects of judicial notice.

Second, Respondent requests judicial notice of the initiative text and preliminary documents Petitioners filed in April 2016 prior to circulating their petition. A court need not take judicial notice of documents unless they are necessary, relevant, or helpful. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.) Petitioners already filed these documents as exhibits to the petition for writ of mandate. Consequently, it is not necessary or helpful to take judicial notice of these documents.

Third, Respondent requests judicial notice of several requests to withdraw signatures from the petition in support of the Initiative. Respondent does not specifically address whether these requests are proper subjects of judicial notice. Rather, Respondent states generically with respect to the entirety of the initial request for judicial notice that "[a]ll of the above documents are public records." (Initial Request for Judicial Notice "Initial RJN" at p. 1:20.) Respondent thereafter quotes Evidence Code section 452, subdivision (h), which authorizes a court to take judicial notice of: "Facts and propositions that are not reasonably subject to dispute and are

capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (See Initial RJN at p. 1:22-24.)

Evidence Code section 452 does not authorize a court to take judicial notice of documents simply because they are public records. Rather, a court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).) There is "'no authority and none has been cited for the proposition that materials prepared by private parties and merely on file with state agencies may be judicially noticed pursuant to [Evidence Code section 452,] subdivision (c).' [Citations.]" (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 856, fn. 2.) These requests to withdraw signatures prepared by private individuals and merely filed with Respondent therefore are not subject to judicial notice as official acts.

While Respondent quotes Evidence Code section 452, subdivision (h), it is not especially clear what fact or matter she asserts is undisputed. Presumably, these voter requests are being offered to show voter confusion. Even so, a voter can simply withdraw his or her signature; the voter need not be confused or state his or her reason for doing so. (See Elec. Code, §§ 103, 9602 [procedure for withdrawal of signature].) Accordingly, requests to withdraw signatures, without more, do not indisputably demonstrate voters were confused. Only three of these voter requests actually contain additional information reflecting a voter was "misled." (Initial RJN, Exh. 6.) In any event, these three voters did not clearly identify the specific source of confusion or attribute confusion to the formatting of the petition sections Petitioners circulated. (Initial RJN, Exh. 6.) Furthermore, Petitioners dispute whether the voters who submitted these requests even signed the petition sections at issue because Respondent rejected them based on a purported facial defect and never even began verifying signatures or requests to withdraw signatures. Thus, while Respondent may be a reputable source, these requests to withdraw signatures and their significance are in fact disputed.

Otherwise, while Respondent is correct that a court may consider evidence of voter confusion in evaluating a petition for writ of mandate based on a purported formatting defect, she

cites no cases in which a court took judicial notice of requests to withdraw signatures. (See Suppl. RJN at p. 5:17-26 [addressing Petitioners' objection], citing *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, *Hayward Area Planning Assn. v. Superior Court* (1990) 218 Cal.App.3d 53.) For these reasons, the requests to withdraw signatures are not proper subjects of judicial notice.

Finally, Respondent requests judicial notice of a blank petition section circulated in support of the Initiative. Petitioners initially took issue with the format of the petition section filed with the Court, arguing it was not a true and correct copy. Petitioners have since withdrawn their objection. In any event, the blank petition section filed as Exhibit 1 to Respondent's initial request for judicial notice is identical to that filed as Exhibit A to the petition for writ of mandate. A court may decline to take judicial notice of documents that are not necessary, relevant, or helpful. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, *supra*, 18 Cal.4th at p. 748, fn. 6.) There is no actual dispute between the parties as to the format and contents of the petition sections circulated. Thus, it is neither necessary nor helpful to take judicial notice of the blank petition section because it is a duplicate.

For these reasons, Respondent's initial request for judicial notice is DENIED.

B. Supplemental Request for Judicial Notice

Respondent asks the Court to take judicial notice of an order denying a petition for writ of mandate to compel her to accept an initiative petition for a different retail development in Cupertino. This unrelated order is not relevant to a material issue before the Court because the other action involved distinct facts, legal issues, and arguments. Furthermore, "a written trial court ruling has no precedential value." (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831.) As the Honorable Mary E. Arand explained in this unrelated order when denying a request for judicial notice of unrelated petitions, courts are only bound by higher courts. (See *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at pp. 455-56.) Thus, this unrelated order is neither binding nor persuasive. For these reasons, the unrelated order is not a proper subject of judicial notice. Respondent's supplemental request for judicial notice is therefore DENIED.

III. Discussion

A party may file a petition for writ of mandate compelling a local official to perform a ministerial duty, which is "an act that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists." (*Alliance for a Better Downtown Millbrae v. Wade* ("*Millbrae*") (2003) 108 Cal.App.4th 123, 128-29; see also Code Civ. Proc., § 1085 [authorizing petition for writ of mandate].) A court may issue a writ if there is: "(1) a clear, present, ministerial duty on the part of the respondent and (2) a correlative clear, present, and beneficial right in the petitioner to the performance of that duty." (*Millbrae*, *supra*, 108 Cal.App.4th at p. 129.)

When a proponent submits signed petition sections for signature counting, a city clerk has a ministerial duty to evaluate whether they comply with the formatting requirements set forth in the Elections Code and accept or reject them in accordance therewith. (*Millbrae*, *supra*, 108 Cal.App.4th at p. 132.) In determining whether petition sections are code-compliant, a clerk may not engage in a discretionary evaluation of evidence or consider extrinsic evidence. (*Id.* at p. 134.) The clerk may only conduct a "straightforward comparison of the submitted petition with clear statutory directives." (*Ibid.*)

Here, Respondent reviewed the face of the petition sections, determined they did not comply with the formatting requirements set forth in Elections Code sections 9201 and 9203, and rejected them on this basis. Specifically, Respondent rejected the petition sections because Petitioners did not (1) include the city attorney's title and summary on the first page of each petition section or (2) correctly reproduce and format the city attorney's title and summary on the signature page of each petition section.

Pursuant to Elections Code section 9201, a proponent may circulate an initiative petition in sections so long as the sections comply with the statutory directives. One of these directives states "the first page of each section shall contain the title of the petition and the text of the measure." (Elec. Code, § 9201.) "The person proposing the measure shall, prior to its circulation, place upon each section of the petition, above the text of the proposed measure and across the top of each page of the petition on which signatures are to appear, in roman boldface

type not smaller than 12 point, the ballot title prepared by the city attorney." (Elec. Code, § 9203, subd. (b).) Section 9203 of the Elections Code actually contains a sample heading and instructs that, after the heading, the proponent must: "set forth the title and summary prepared by the city attorney. This title and summary must also be printed across the top of each page of the petition whereon signatures are to appear."

As to the first defect identified by Respondent, there is no dispute Petitioners omitted the city attorney's title and summary from the first page of each petition section. Despite their general position that the petition sections both technically and substantially comply, Petitioners do not actually dispute Respondent's assertion that the petition sections are technically noncompliant in this regard. Consequently, the petition sections, which do not contain the title and summary on the first page, do not technically comply with Elections Code sections 9201 and 9203.

Respondent also rejected the petition sections because Petitioners did not correctly reproduce the city attorney's title and summary on the signature page of each petition section. Respondent concluded Petitioners did not fully comply with the requirement that the title and summary be reprinted on the signature page because they did not clearly denominate the title and summary, inaccurately reproduced the summary provided by the city attorney, and failed to print the title and summary in boldface type.

First, Respondent argues Petitioners should have printed the words "Title:" and "Summary:" before the actual title and summary. Respondent cites no authority establishing these denominations must appear before the title and summary. The sample heading in section 9203 of the Elections Code does not include these denominations. Respondent also does not demonstrate these terms are part and parcel of the title and summary. The notice from the city attorney to Petitioners informing them of the official title and summary states, for example, "**TITLE:** Initiative (1) amending Cupertino's General Plan requirements for the North De Anza Gateway . . . ." (PWM, Exh. E.) Given the actual contents of the title follows the colon, it is not obvious how the denomination is a part of the title itself. (See, e.g., *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 242-44 [discussing

requirements for initiative titles].) Furthermore, Respondent's reliance on *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331 is not persuasive because that case involved omission of the actual contents of the title, specifically the phrase "of four acres," and not simply a denomination used in the city attorney's correspondence informing the proponent of what the title and summary were. This argument therefore lacks merit.

Second, while not substantively addressed in her opposition, Respondent also rejected the petition sections because Petitioners included the word "and" in the city attorney's summary. Paragraph 2 of the summary contains a long list of the amendments to "the City's Zoning Code" that would be effectuated by the Initiative. (PWM, Exh. A.) Before the very last item in this list, Petitioners included the word "and," which does not appear in the city attorney's summary. (PWM, Exh. A.) Specifically, paragraph 2 of the summary as printed, which consists of subdivisions a) and b), states: "iii) includes a parking requirement of one space per unit and employee and a bicycle parking requirements of 5% more than auto parking; *and* b) change the zoning for the Property to G (Gateway)[.]" (PWM, Exh. A, italics added.) Respondent does not explain and it is not obvious how this extra "and" changes the meaning of the summary in any way. Even so, the word "and" is, indeed, an addition to the city attorney's summary. A proponent must accurately reproduce the city attorney's title and summary in each petition section. (See *Hebard v. Bybee*, *supra*, 65 Cal.App.4th at pp. 1338-39.) Petitioners did not print the exact summary as prepared by the city attorney. Petitioners do not argue to the contrary. The petition sections therefore do not strictly comply with the statutory directives in this regard.

Finally, Respondent also rejected the petition sections because Petitioners did not print the city attorney's title in boldface type. As with the extra "and," Respondent does not substantively address this issue in her opposition. Petitioners do not dispute that the city attorney's title must be printed in boldface type or that the petition sections do not technically comply with this requirement. (See Elec. Code, § 9203, subd. (b).) Consequently, the petition sections do not technically comply with the statutory directives for this reason as well.

To summarize, the petition sections do not technically comply with the statutory directives in Elections Code sections 9201 and 9203 because Petitioners omitted the city attorney's title and summary from the first page of each section, included an additional "and" in the summary printed on the signature page, and failed to print the title and summary on the signature page in boldface type. Nevertheless, Petitioners emphasize the petition sections should still be accepted because they substantially comply with the content and formatting requirements.

In California, "the governing cases [ ] have recognized that an unreasonably literal or inflexible application of constitutional or statutory requirements that fails to take into account the purpose underlying the particular requirement at issue would be inconsistent with the fundamental nature of the people's constitutionally enshrined initiative power . . . ." (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1013.) Thus, a measure may still be submitted to the voters when there are "relatively minor defects that [ ] could not have affected the integrity of the electoral process as a *realistic and practical* matter . . . ." (*Ibid.*, original italics.) That is, "technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in 'substantial compliance' with statutory and constitutional requirements." (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 652, quoting *California Teachers Assn. v. Collins* ("*CTA*") (1934) 1 Cal.2d 202, 204.)

The inclusion of the extra "and" in the summary and failure to print the city attorney's title in boldface type are clearly minor defects that could not have affected the integrity of the electoral process under the circumstances. (See, e.g., *Costa v. Superior Court*, *supra*, 37 Cal.4th at p. 1025 [even substantive differences are insignificant if they do not impact accuracy]; see also *CTA*, *supra*, 1 Cal.2d at p. 204 [petition with incorrect font type and slight wording differences substantially complied with statutory directives].) These minor discrepancies did not change the meaning or accuracy of the title and summary in any way. Thus, these defects are not a basis for concluding the petition sections do not substantially comply with the statutory directives.[1]

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[1]Respondent concedes the petition sections substantially comply with the statutory directives if considering the extra "and" alone. (Resp. Mem. of Pts. & Auth. at p. 14, fn. 4.)

their petition for filing, irrespective of the formatting defects, because once she began counting the signatures she had to accept the petition. This argument lacks merit for several reasons.

First, Petitioners do not actually cite any authority demonstrating Respondent's review procedure was improper. While Petitioners cite Elections Code section 9210, it simply states the elections official must determine the number of registered voters and whether the minimum number of signatures are affixed to the petition. This statute does not, on its face, restrict when an elections official may review the petition for compliance with the statutory directives. Petitioners do not explain how this statute somehow requires Respondent to instantly evaluate the format of the petitions or relinquish her obligation to do so. Significantly, Respondent's "ministerial duty exists even when the procedural statute contains no express authorization to the local elections official to enforce its provisions." (*Millbrae*, *supra*, 108 Cal.App.4th at p. 123.) Thus, while reviewing a petition for compliance with the statutory directives is not explicitly listed in Elections Code section 9210 as one of the steps that must be taken during the signature count process, an elections official still has an obligation to conduct this review. (*Ibid.*)

Second, Petitioners do not articulate how any initial defect in the review procedure gives rise to a ministerial duty to accept the petition sections given they do not technically or substantially comply with the statutory directives in the first instance. Elections Code section 9201 conditions the submission of a proposed ordinance to a legislative body through the initiative petition process on compliance with the statutory procedures. (Elec. Code, § 9201 ["[I]n the manner hereinafter prescribed."]) Petitioners do not demonstrate Respondent must accept their petition for filing based solely on commencing the signature count when she is otherwise required to reject a petition that "violate[s] one or more statutory procedural requirements." (*Millbrae*, *supra*, 108 Cal.App.4th at p. 123.) Thus, even if Petitioners had demonstrated the order of review was improper, they fail to establish their petition could, nevertheless, be accepted for filing given it does not comply with the statutory directives.

Finally, any assertion that Respondent somehow did in fact accept the petition for filing such that she could not subsequently reject it lacks merit because the "Receipt for Prima Facie

Section and Signature Count [ ]" explicitly states she was not accepting the petition as she had not completed her review. (PWM, Exh. B.)

In sum, Petitioners do not demonstrate Respondent's review of the petition sections was procedurally improper or that the raw signature count vested in them a right to have a noncompliant petition accepted for filing. Petitioners' argument that Respondent must accept their petition irrespective of their noncompliance with the statutory directives therefore lacks merit and is not a basis for granting the petition for writ of mandate. Based on the foregoing, Petitioners fail to demonstrate Respondent had a ministerial duty to accept the petition sections, which do not comply with the statutory directives in Elections Code sections 9201 and 9203. The petition for writ of mandate is therefore DENIED.

Date: 3/1/17

Peter H. Kirwan
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA	**FILED** Date: March 1, 2017 REBECCA FLEMING Chief Executive Officer / Clerk Superior Court of CA County of Santa Clara By: I. STEWART, DEPUTY CLERK
Plaintiff: REED SPARKS, et al	
Defendant: GRACE SCHMIDT	
PROOF OF SERVICE BY MAIL OF: ORDER RE: PETITION FOR WRIT OF MANDATE	**Case Number: 16-CV301471**

CLERK'S CERTIFICATE OF SERVICE: I certify that I am not a party to this case and that a true copy of this document was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below and the document was mailed at SAN JOSE, CALIFORNIA on : MARCH 1, 2017

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