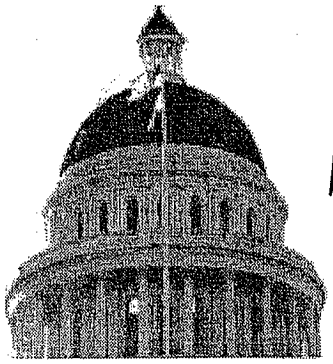

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REFERENDA-PROOF REDEVELOPMENT: HOW SAN FRANCISCO IS EVADING CHALLENGES TO ITS BAYVIEW-HUNTERS POINT PLAN REDEVELOPMENT PLAN

By Ronald A. Zumbrun*

Here is one issue San Franciscans won't get to vote on: a referendum petition to challenge the recent adoption of the controversial new Bayview-Hunters Point Redevelopment Plan. Even though the referendum petition was timely filed, signed by more than 33,000 voters from the area, and processed and certified as successful by the San Francisco Department of Elections, it won't be on the ballot because of an alleged "procedural" defect.

In May of 2006 the San Francisco Board of Supervisors approved Ordinance 113-06, which added nearly 1,400 acres to the previously-existing 137-acre Hunters Point Redevelopment Project Area and authorized the San Francisco Redevelopment Agency to undertake a variety of projects and activities to alleviate "blight" conditions. In so doing, an original proposed redevelopment area of a few square blocks metamorphosed into a huge redevelopment project affecting more than two square miles.

Residents believe that the labeling of their neighborhood as blighted is a mischaracterization. The Bayview-Hunters Point area has the highest percentage of home ownership of any San Francisco neighborhood. Property values in the area have risen consistently for the past five years. The high crime and violence statistics cited by the proponents of redevelopment are not quite accurate, either. Citywide, the epicenter of recent homicides has been in the Western Addition Redevelopment Area—a neighborhood already under the control of the San Francisco Redevelopment Agency and its so-called solutions to blight conditions.

However, more is involved in the dispute than a disagreement over what constitutes blight. Residents also are frustrated by their lack of input in the process leading up to the approval of the redevelopment ordinance. They were given no opportunity to vote or to give their informed consent to the Redevelopment Plan which, in effect, will result in the complete overhaul of their neighborhood. In January 1997, a Project Area Committee (PAC) was formed to provide feedback to the Redevelopment Agency in adopting the new Redevelopment Plan, but the PAC's role is advisory only and has no binding effect on the Redevelopment Agency. Furthermore, no election of the PAC's members has been held since the PAC was

originally formed and many residents do not trust the current committee members. They feel the PAC members do not reflect the overwhelming opposition to redevelopment in the proposed area, and are too pro-development to adequately protect the interests of homeowners and tenants.

Residents also believe that the proposed Redevelopment Plan fosters gentrification and takes much-needed tax money away from necessary services such as fire protection and education. They anticipate higher rents and higher taxes. Twenty-five percent of the new residences to be constructed under the plan will be affordable housing, but even "affordable" housing will be out of reach for many of the area's residents.

Consequently, when the new plan was adopted in May, residents organized quickly to try to get the issue to the local voters. By law, the residents had only 90 days from the date the ordinance was adopted to present the referendum petition to the Clerk of the San Francisco Board of Supervisors.

The referendum's supporters timely filed their petition. The Department of Elections counted 33,056 total signatures on the petition and later certified the signatures as sufficient to satisfy the statutory requirements for referendum petitions.

Once a valid referendum petition has been filed, the San Francisco City Charter requires that the effective date of the challenged ordinance be suspended while the Board of Supervisors reconsiders the ordinance. If the ordinance is not entirely repealed by the Board, the Charter provides that it must be submitted to the voters. Therefore, when the Department of Elections notified the proponents of the petition that the signatures had been verified and deemed sufficient, they thought they had succeeded. Given the requirements of the City Charter, they believed the Board would have to either repeal the redevelopment ordinance or put the issue on the ballot this November 7.

Unbeknownst to the petition proponents, the City had a trump card up its sleeve. California Elections Code Section 9238(b) requires that a referendum petition contain the "text of the ordinance or the portion of the ordinance that is the subject of the referendum." Even though interpretive case law requires only "substantial compliance" with this statutory requirement, it was this code provision which proved fatal to the Bayview-Hunters Point referendum petition.

On September 19, 2006, the San Francisco City Attorney, Dennis Herrera, issued an opinion advising the Clerk of the Board of Supervisors to reject the referendum petition. In the opinion, Mr. Herrera engaged in a lengthy analysis of the governing law and the precise meaning of the text inclusion requirement. Even though Mr. Herrera recognized that the referendum process is "one of the most precious rights of our democratic process" and that where "doubts can be reasonably resolved in favor of the use of [the referendum power], courts will preserve it" (Opinion, quoting *Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591), he still determined that the "core purpose" of Section 9238(b)—that the petition signers be fully informed as to the effect of the petition—was not satisfied in the Bayview referendum case.

Although the petition had included a complete copy of the text of the proposed ordinance, it had failed to include the full text of no less than ten separate documents which had been incorporated by reference into the ordinance during the drafting phase. Even though the incorporated documents were clearly identified and readily obtainable from the Clerk's Office, Mr. Herrera found that the failure to set forth the complete text of those documents in the petition required that the petition be rejected.

In so doing, Mr. Herrera effectively stonewalled an entire community's effort to

have a say in what the Redevelopment Agency does to their neighborhood.

His opinion cited four California cases which rejected petitions based on the omission of text. Of the four cases, however, all could be distinguished from the Bayview case: three of the four reflect a failure to include an actual *exhibit* to the ordinance as opposed to a mere failure to include public documents incorporated by reference, and the remaining case is an *initiative* petition case which, by its very nature (because it is proposing a change in existing law versus preserving the status quo), merits a greater burden of thorough documentation at the petition stage.

Mr. Herrera did cite a case wherein the court found that the petitioners *had* complied with the text inclusion requirement. In *We Care—Santa Paula v. Herrera* (2006) 139 Cal.App.4th 387, the plaintiff, an unincorporated association, sought to amend the general plan by way of an initiative petition but failed to include the text of the general plan which would be affected by the amendment.

The *We Care* court rejected the city's argument that this constituted a fatal flaw. It distinguished cases where the text of actual exhibits was omitted or where the ordinance was identified only by number and held that the plain text of the proposed ordinance was sufficient to satisfy the statute. Even though the text may not have been enough to fully apprise the voters of all the effects of the proposed amendment, the court pointed out that the Elections Code "does not require an initiative petition to contain all the information an informed voter would want. It requires only the text of the measure proposed to be enacted."

Although the court upheld the sufficiency of the initiative petition, the *We Care* decision provided little clarification of the text inclusion requirement where referendum petitions are concerned. However, when the attached documents are so voluminous so as to make compliance with the statute impossible, it is unlikely that a court would require a referendum petition to comply with such a burdensome rule.

In effect, Mr. Herrera's interpretation of the election statute creates a no-fail checkmate for any municipality seeking to insulate its legislation from referenda. The municipality merely has to incorporate so many documents into its proposed legislation as to make the inclusion of the full text impossible. Legislative clarification of the Elections Code is sorely needed to safeguard the voters' rights to exercise their referendum power.

As it stands now, the residents of the Bayview-Hunters Point area have no recourse, aside from litigation, to mitigate or manage the Redevelopment Agency's activities in their neighborhood. Because of the alleged procedural deficiency of the referendum petition, the ordinance adopting the new Redevelopment Plan has now gone into effect. Unless this community can find the resources to carry forward a complicated lawsuit, the Bayview-Hunters Point residents will be faced with an uphill 30-year future battle against the Redevelopment Agency as a result of this blow to their community's rights to self-determination. Unless this opinion is challenged, all citizens' fundamental right of referenda in California will be in jeopardy. Without these resources, the Bayview-Hunters Point residents are now left with only one option: move aside and make way for redevelopment.

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