

CITY OF OAKLAND



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September 6, 2006

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BY HAND DELIVERY

LaTonda Simmons
City Clerk
City of Oakland

Re: Challenge to Referendum Petition for Ordinance No. 12760 C.M.S. (the Oak to Ninth Referendum)

Dear City Clerk Simmons:

On August 17, 2006, the Oak to Ninth Referendum Committee ("Committee") submitted to the Oakland City Clerk 541 referendum Petition sections. The Petition seeks to refer, or place on the ballot for approval, the Oakland City Council Ordinance No. 12760. ("Ordinance Approving A Development Agreement Between The City Of Oakland, The Redevelopment Agency Of The City Of Oakland, And Oakland Harbor Partners, LLC And Authorizing The City Administrator To Execute The Development Agreement On Behalf Of The City" or the "Ordinance.")

On August 29, 2006, Oakland Harbor Partners, LLP, the proponent of the development project at Oak to Ninth, submitted a letter to the City Attorney making five separate challenges to the referendum Petition. (The letter is attached as Attachment 1.) We have examined a sample Petition submitted to the City Clerk by the Committee. This City Attorney letter addresses the arguments raised by Oakland Harbor Partners' letter and advises the City Clerk of her duties under state election law.

The Elections Code Imposes Strict Requirements on the Form of the Petition

The California Elections Code requires that the referendum petition contain "the text of the ordinance . . . that is the subject of the referendum." (Elections Code section 9238(b).)

Each section of the referendum petition shall contain (1) the identifying number or title, and (2) the text of the ordinance or the portion of the ordinance that is the subject of the referendum.

The petition sections shall be designed in the same form as specified in Section 9020. (Section 9238(b).)

The courts have consistently construed the "full text" requirement of section 9230(b) to demand all documents which are part of an ordinance, including exhibits, be included in the referendum petition. A document's length or complexity is not a reason not to exclude it. California courts have overwhelmingly applied this requirement strictly and harshly.

The courts have upheld a City Clerk's rejection a referendum petition because just three words were missing from an ordinance's title. (Hebard v. Bybee, 65 Cal. App. 4th 1331 (1998) (referendum petition omitted words "of four acres," Campbell City Clerk rejected those petitions with the error).)

In Billig v. Voges, the court held that the San Luis Obispo City Clerk had a duty to reject a petition because the petition included only a summary of the ordinance and did not include the two exhibits referenced by the ordinance. (223 Cal. App. 3d 962 (1990).) As the court explained, the purpose of the requirements is "to reduce confusion as to the contents of referendum petitions in the minds of electors." "Where a petition does not comply with the reasonable objectives of statutes designed to protect electors from confusing or misleading information, its deficiencies threaten the integrity of the election process, warranting a refusal to file the petition." (Id. at 965.)

In Pedersen v. Jones, the Temecula City Clerk refused to certify two referendum petitions because two exhibits and a portion of a third were not attached to the petitions. (2002 WL 1472657 (Fourth District, 2002) (not officially published).) The Court of Appeal upheld the City Clerk action under Elections Code section 9238 (b).

The courts have consistently construed the full text requirement to mean that all documents that are part of an ordinance, and that may be necessary for prospective petition signers to understand the effect of the ordinance's repeal, be included in a referendum petition against the ordinance. A document's length or complexity is not a reason to exclude it from a referendum petition. Nor is a reference to a document on single-page attachment a reason to exclude its text. (Id.)

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In Nelson v. Carlson, 17 Cal.App.4th 732, 739-740 (Fourth District, 1993), the Dana Point City Clerk refused to certify a referendum petition that failed to include one exhibit which was incorporated into the challenged resolution. The Court of Appeal upheld the city clerk and rejected the argument that the exhibit, the general plan and coastal program land use plan, was too voluminous. (See also Creighton v. Reviczky 171 Cal.App.3d 1225, 1228, 1231 (1985) (Hermosa Beach City Clerk rejects referendum because of failure to include text of ordinance; ordinance referred to by title and number only).)

Technical deficiencies in referendum petitions will not invalidate petitions if they are in "substantial compliance" with statutory and constitutional requirements (Hebard, 65 Cal.App.4th at 356). However, as the cases shown above make clear, the failure to present the actual text of the ordinance challenged, or to attach the exhibits to the ordinance, is fatal to a referendum petition. Such failures to present the public with all the information necessary for an educated decision defeat substantial compliance because they subject the electors to confusing or misleading information and threaten the integrity of the election process. (Chase v. Brooks, 187 Cal.App.3d 657, 663.)

Oak to Ninth Petition Attached the Wrong Ordinance

A cursory review of the Oak to Ninth petition reveals that the wrong draft of the ordinance was attached. Petition supporters attached an outdated version of the Ordinance.

There is no statement on the Ordinance on the Councilmembers votes; this portion is incomplete. (Petition attachment, p 1.) The Table of Contents states "NOT ACCURATE-TO BE UPDATED." The Definitions are "TO BE UPDATED." (Id. at p. 4.) Apparently, the Referendum Committee attached a draft, but not the final adopted, version of the Ordinance. In total, Oakland Harbor's letter identifies 75 differences between the Ordinance the City Council adopted and the ordinance attached to the Petition. Among the differences as discussed above, the Petition's Ordinance fails to include exhibits to the Adopted Ordinance. Missing are Exhibits A, B, D-1, D-2, D-3, I, and K.

As dictated by cases cited above, the failure to attach the true and final version of the Ordinance No. 12760 and the omission of the incorporated exhibits requires rejection of the Petition.

The Petition Omitted Maps That Would Have Disclosed to Voters the Public Access in the Project

While the failure to include the correct and accurate version of the Ordinance is by itself fatal, the error is underscored by the nature of some of the information not included with the Petition.

One of the hotly debated issues on this ordinance was/is the amount of the public access to the open space in the project.

The adopted Ordinance included two maps, Exhibits D-1 and D-2. Exhibit D-1 is a map that shows open space designated "Parcel N." Exhibit D-2 is a map that shows the total amount of public access to all of the project's open space. The maps provide an easy and essential visual aid for the voter to decide for him/herself whether the project included enough public access. The ordinance attached to the Petition did not include these maps. (The missing maps are attached as Attachment 2.)

Without these maps a prospective signer who was interested in the actual amount of public access in the Plan area would have had great difficulty in making a fully informed decision on whether to sign the petition.

The Duty of the City Clerk

The courts have instructed that elections officials, such as the City Clerk, have a ministerial duty to reject petitions that do not attach the text of the challenged ordinance. (Billig v. Voges, supra.) "In this case, respondent city clerk had the ministerial duty to reject appellants' petition, which was procedurally invalid on its face." (Id. at 969.) A "ministerial" act means an act over which the official has no discretion; she must carry it out. (See also Pedersen v. Jones, supra ("A city clerk has the authority and duty to reject a referendum petition that does not contain the full text of the ordinance that is the subject of the referendum petition.").)

Even the Attorney General has issued an opinion stating that a city clerk is required to reject initiative petition that is not in a form compliant with state law. (83 Ops.Cal.Atty. Gen 139 (2000) (Initiative petition had notice of intent that did not include names of proponents).)

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Conclusion

Some, if not all, of the referendum Petition sections attach the wrong version of the challenged ordinance. This error precluded prospective signers from having full disclosure of what the challenged ordinance would do. Because this error appears on the face of the Petition, the City Clerk has a ministerial duty to reject defective Petitions. Accordingly,

(1) The City Clerk should notify the County Registrar of Voters that any Petition that does not attach the adopted version of Ordinance No. 12760 or is missing the exhibits to Ordinance 12760 is invalid;

(2) The City Clerk cannot certify to the City Council any count that includes signatures from a Petition that does not attach the adopted version of Ordinance No. 12760 or is missing the exhibits to Ordinance No. 12760.

As a final note: the City Attorney's office makes no comment on the four other challenges raised by Oak Harbor Partners because those arguments rely on extrinsic evidence or on debatable interpretations of the law.

The City Clerk's rejection of the referendum Petition is based entirely upon the public's right to know fully, fairly and with precision what City Council action is being challenged. This Petition does not meet that standard of transparency and under the mandate of California law cannot be allowed to proceed.

Very truly yours,

John A. Russo
City Attorney


By: Mark T. Morodomi
Supervising Deputy City Attorney

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