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## COURT OF APPEAL LIMITS 'TEXT' REQUIREMENT FOR LOCAL REFERENDUM PETITIONS

*Lin v. City of Pleasanton.*, \_\_\_ Cal. App. 4th \_\_\_\_, No. A121147 (1st App. Dist. 2009)

by [James Rusk](#)

A referendum petition challenging the approval of a development plan need not include the text of the plan itself, if the plan was neither attached to the ordinance approving the plan nor explicitly incorporated by reference, the First District Court of Appeal has held. Although the content of the development plan clearly was relevant to a decision on the referendum, the court in *Lin v. City of Pleasanton* declined to extend the "text" requirement of Election Code section 9238(b) to require that the petition include the development plan, in addition to the text of the challenged ordinance. Expanding the text requirement would force citizens to guess at the documents that must be included in a valid referendum petition—a burden the court found unwarranted, absent "extreme circumstances" that otherwise would render the petition "affirmatively misleading."

### Background

After preparation of an environmental impact report, the City of Pleasanton ("City") adopted an ordinance approving a development plan that allowed Jennifer and Frederic Lin to construct a 51-unit residential development on a portion of a 562-acre property they owned within the City. The ordinance contained two exhibits that were incorporated by reference into the ordinance itself: the City's Conditions of Approval for the proposed development, and the findings required by the California Environmental Quality Act ("CEQA"). The development *agreement* between the City and the Lins was also attached, as an exhibit to the Conditions of Approval. The ordinance referred to the development *plan*, but the plan itself was neither attached to nor incorporated by reference into the ordinance.

Former city council member Kay Ayala, a member of an association named "Save Pleasanton's Hills," sought to challenge the ordinance approving the development plan. Ayala circulated a referendum petition that included a copy of the ordinance approving the development plan, the CEQA findings and Conditions of Approval, and the development agreement. The petition did not include a copy of the development plan. Ayala obtained the necessary signatures and submitted the petition to the city clerk, who certified it for filing.

The Lins sought, and the trial court granted, a writ of mandate ordering the city clerk to declare the petition invalid on the ground that it violated section 9238 of the California Election Code because it did not contain the development plan approved by the challenged ordinance. Subdivision (b) of section 9238 provides, in part, "Each section of the referendum petition shall contain . . . the text of the ordinance or the portion of the ordinance that is the subject of the referendum." The California courts previously have interpreted the phrase "text of the ordinance" to mean the words of the challenged ordinance itself and any documents physically attached as exhibits or incorporated by reference.

### Analysis

In essence, the Lins argued that the referendum petition must include the text of the development plan because the plan was crucial to an understanding of the challenged ordinance and to an informed decision on the referendum. But the court of appeal rejected this reasoning and declined to extend the "plain language" of section 9238, reversing the trial court's decision. "It may well be the case that an informed voter would prefer to review portions of the Development Plan before determining whether to sign a referendum petition that could ultimately result in that Plan being set aside," the court of appeal wrote. "But section 9238 . . . requires the 'text' of the ordinance being challenged, not the inclusion of additional information a conscientious voter might want to know before signing the petition."

In reaching its conclusion, the court distinguished *Mervyn's v. Reyes*, 69 Cal. App. 4th 93 (1998), which involved a voter initiative to reenact certain portions of the City of Hayward's general plan. In *Mervyn's*, the initiative petition failed to include the text of the portions of the general plan that were to be reenacted. The *Mervyn's* court held that the affected portions of the general plan were part of the "text of the measure" and should have been included in the petition, rendering it invalid.

The *Lin* court did not find the development plan analogous to the general plan sections at issue in *Mervyn's*. In *Mervyn's*, the "measure" proposed by the initiative actually consisted of the portions of the general plan that were to be reenacted. Because the petition did not contain those portions, but referred to them only by their titles, "it did not contain the full text of the measure at issue and voters reading the petition would not have known the substance of the law whose enactment was sought." Conversely, in the *Lin* case, the referendum petition "advised voters of the *precise* language of the ordinance being challenged and its attached exhibits," despite not including the development plan. (Emphasis in original).

The court found it significant that *Mervyn's* involved an initiative, which "is drafted by its proponents and is the very law whose enactment is sought," making it reasonable to require that the petition include the full text of the language to be enacted. By contrast, *Lin* involved a referendum, which "seeks to set aside a law that has been drafted by others" and is therefore constrained by the language that others have chosen. Ayala had no control over the drafting of the ordinance that approved the development plan and, in the court's

view, "it would place an unreasonable burden on her and on other referenda proponents to determine whether additional documents that were neither included nor incorporated by reference ought to be included in the referendum petition."

Finally, the court sought to avoid requiring city and county clerks, who are charged with certifying referendum petitions, to make "quasi-judicial" evaluations of the validity of petitions. This could occur, the court feared, if clerks were asked to assess on a case-by-case basis whether documents not attached to or incorporated into the challenged ordinance ought to be included in the petition. Currently, clerks perform only the "straightforward" ministerial task of comparing the text of the submitted petition with the procedural requirements set forth by law.

## Conclusion

The court's holding leaves open the possibility that a referendum petition might be required to include material that was neither attached to the challenged ordinance nor incorporated by reference, but only in the "extreme circumstances" in which the failure to include additional information would render the petition "affirmatively misleading." That situation was not presented here, because the text of the ordinance and accompanying exhibits adequately described the project covered by the development plan. Some voters "might have wanted additional information contained in the [plan] itself, but there was nothing misleading about the information that was provided." The case therefore leaves for another day the intriguing question of what municipal ordinance would be so misleading, as enacted, that including its complete text in a referendum petition would leave voters confused regarding the measure sought to be overturned.

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