



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
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ORDER

KATHERINE ALBA-SWANSON et al VS. JOHN ARNTZ et al

001C02955249

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1 Prepared by the Court

FILED
Superior Court of California
County of San Francisco

AUG 30 2010

CLERK OF THE COURT

BY: Audrey [Signature]
Deputy Clerk

8 **SUPERIOR COURT OF CALIFORNIA**

9 **County Of San Francisco**

10 Department No. 220

12 KATHERINE ALBA-SWANSON, et al,

13 Petitioners/Plaintiffs,

14 vs.

15 JOHN ARNTZ, et al,

16 Respondents/Defendants.

17 JEFF ADACHI, et al,

18 Real Parties in Interest

Case No.: CGC-10-502446

ORDER GRANTING IN PART AND
DENYING IN PART PETITION FOR WRIT
OF MANDATE AND REQUEST FOR
INJUNCTIVE RELIEF

19
20 A hearing was held on August 27, 2010 on whether Respondents should be required to
21 remove from the November 2, 2010 ballot and related materials all or any part of a proposed
22 amendment to the Charter of the City and County of San Francisco sponsored by Real Parties in
23 Interest (Proposition B). After full consideration of all the papers submitted by the parties
24 including the additional materials submitted after the hearing and all the arguments made at the
25

1 hearing, I am of the view that the “poison pill” portion of subsection (i) should be severed from
2 the rest of Proposition B and that portion alone be removed from the ballot and related materials,
3 while the balance of Proposition B should be submitted to the voters.

4 Because I committed to issuing this order in a very short time frame to accommodate the
5 time-sensitive concerns of the City in finalizing the language of the ballot materials and
6 potentially to allow for review by a higher court, of necessity I am providing a truncated
7 explanation of the reasons for my decision. Further explanation of my reasons can be found in
8 the transcript of the August 27 hearing.

9 In accordance with the views stated at the hearing, I reject all of the procedural arguments
10 advanced by Ms. Alba-Swanson and her fellow petitioners/plaintiffs (plaintiffs). Construing
11 Elections Code §§9202 and 9207 in a manner against pre-election invalidation of initiatives that
12 have qualified for the ballot, the “notice of intention” is separate and apart from an
13 “accompanied” statement of reasons by a proponent and thus the failure to include the statement
14 of reasons in the petition did not contravene §9207. (Compare former §4005 (explicitly requiring
15 that both the notice of intention and statement of reasons be included in the petition)). Moreover,
16 even if there was technical non-compliance, there was substantial compliance on this point since
17 all information of any substance in the omitted statement of reasons was included in either the
18 “Findings” portion of Proposition B and/or the City Attorney’s summary, both of which were
19 included in the petition.

20 While the omission of Mr. Weber’s name from the petition is a likely technical non-
21 compliance with §9207, the inclusion of Mr. Adachi in the petition met the objectives of §§9202
22 and 9207 and thus passes muster under the substantial compliance test. This is because: 1) §9202
23 requires only one proponent to sign a notice of intention; 2) plaintiffs failed to provide anything
24 other than conjecture that any person who signed the petition would have refrained from doing
25 so had Mr. Weber’s name been included; and 3) there is no basis to believe that any but a small
minority of San Francisco citizens have any knowledge of Mr. Weber, much less any knowledge

1 of his role in the asserted reform of how employee benefits of San Francisco's employees are
2 paid for.

3 Nor is there any violation of the "full text" requirement of §9257. The full text – that is,
4 every word included in the proposed charter amendment – was included in the petition.

5 Construing §9257 in a manner against pre-election invalidation of initiatives that have qualified
6 for the ballot, that section does not require that pre-existing provisions of a charter that are
7 referred to in the proposed amendment to the charter be included in the petition, at least unless
8 one or more of those pre-existing provisions no longer have any force and effect, which is not the
9 case here. Moreover, even if there was technical non-compliance with §9257, language in the
10 City Attorney's summary that the "City could not agree to pay" more than the ten-county survey
11 requires and the reference to the restrictions on an arbitrator's authority in the second to last
12 paragraph of that summary sufficiently apprised San Francisco voters of the effect of the first
13 sentence of subsection (e) and thus there has been substantial compliance with §9257. Indeed,
14 given the prolixity of the Charter provisions that plaintiffs say should have been included in the
15 petition, the inclusion of those provisions in the petition would have provided greater clarity only
16 to those few San Francisco voters who have the capacity to fully understand many pages of
17 dense and highly technical legal language.

17 Plaintiffs' argument that Proposition B violates the single subject rule also fails. All
18 portions of the proposition, including those that restrict or eliminate the bargaining and
19 arbitration rights of the City's employees, are reasonably germane to the single subject of
20 employee benefits of the City's employees.

21 Having concluded that none of plaintiffs' procedural arguments warrant invalidation of
22 Proposition B prior to the election, I now turn to plaintiffs' two substantive arguments. The first
23 of those arguments is that the portions of Proposition B requiring City employees to pay higher
24 contributions toward their pensions violate the vested rights of current employees. This argument
25 has possible, maybe even probable, merit, but at this stage of the case, with very limited

1 development of the pertinent facts and equally limited time to make a decision before the ballot
2 materials need to be sent to the printer, I cannot say that Proposition B “clearly” violates the
3 vested rights of current City employees.

4 This is so for two reasons. First, based on the record presented by the parties, which does
5 not include much or any material in the nature of “legislative history” of the relevant sections of
6 the Charter, I cannot tell to the required degree of clarity whether the 10% provision in the
7 Charter (A8.525) can be harmonized with or has been explicitly or impliedly repealed by all,
8 some or none of the later-enacted 7% and 7.5% provisions (e.g. A8.595-11). Second, California
9 law permits increases in pension contribution rates by employees after they have been hired if
10 there is there is some “commensurate” or “comparable” advantage to the employees and such an
11 “advantage” can be in the form of preserving or protecting the financial integrity of the pension
12 system. (*Allen v. City of Long Beach* (1955) 45 Cal. 2d 128, 131-33; *Houghton v. City of Long*
13 *Beach* (1958) 164 Cal. App. 2d 298, 305-6). The title given to Proposition B by Real Parties
14 (“The Sustainable City Employee Benefits Reform Act”) as well as the last paragraph of the
15 Findings (“These amendments are intended to ... ensure ... [the] sustained ability to pay
16 promised benefits”) disclose Real Parties’ views that Proposition B provides just such an
17 advantage to the City’s employees. Even assuming that there is no continued vitality of the 10%
18 provision, the issue of whether or not Proposition B does provide a “commensurate advantage”
19 to City employees in the form of a financially strengthened pension system must be determined
20 based on a fully developed factual record (*id.*), not mere assertions by the parties, which is all I
21 have in the papers filed thus far. Accordingly, in keeping with the strong presumption against
22 deciding the substantive invalidity of an initiative prior to an election, plaintiffs’ vested rights
23 argument does not support the relief that plaintiffs seek.

24 Plaintiffs’ second substantive argument concerns the so-called “poison pill” language in
25 subsection (i). Citing Chief Justice George’s majority opinion in *California Teachers Assn. v.*
State of California (1999) 20 Cal. 4th 327, plaintiffs contend that the poison pill language

1 imposes an impermissible burden on the constitutional rights of City employees to seek redress
2 from the courts. I agree. Real Parties do not even mention *California Teachers* in their brief.

3 Real Parties' two arguments seeking to retain the poison pill language "clearly" lack
4 merit. The first argument is that the issue of the validity of the poison pill is not ripe is
5 contradicted by the abundant and longstanding case law providing for pre-election review of
6 initiatives. While invalidation of an initiative prior to an election based on substantive grounds
7 should only be done when there is "clear invalidity," the many appellate decisions approving or
8 requiring such invalidation demonstrates that the ripeness doctrine poses no obstacle to doing so,
9 at least, where, as here, a decision can be made based solely from the face of the initiative. Real
10 Parties' second argument that the five year freeze on bargained compensation is not mandatory
11 in the event of a court judgment invalidating any portion of Proposition B is contradicted by the
12 unambiguous language of subsection (i). That subsection now states: "should a court of
13 competent jurisdiction render a final judgment determining that any portion of this section
14 cannot be enforced, *then there shall be no increase in the cost of bargained compensation for a*
15 *period of five years....*" (Emphasis added.) Real Parties' unsuccessful effort to recast their
16 mandatory language into something less than mandatory strongly suggests that they realize the ill
17 effects that the language has on City employees who might contemplate bringing a legal
18 challenge to Proposition B.

19 As I stated at the hearing, in the event that Proposition B passes, any reasonable person or
20 organization contemplating a challenge to "any portion" of Proposition B would have to think
21 long and hard before making the challenge due to the consequences imposed by the poison pill
22 if the challenge is successful in whole or in part. By eliminating five years of bargained
23 compensation increases if any portion of Proposition B is invalidated, the poison pill may
24 discourage potentially meritorious challenges to Proposition B merely because the "cost" of a
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1 successful challenge may be seen as substantially exceeding the “benefit” of achieved in
2 invalidating some or all of Proposition B. So viewed, the poison pill imposes an unwarranted and
3 wholly disproportional burden on the right to seek redress from the courts. Fidelity to the
4 important right to petition demands that the poison pill be eliminated now, before its “chill” takes
5 effect. This is especially true given the serious basis for a challenge to Proposition B based on
6 violation of vested rights and the absence of anything in Proposition B or the proponents’
7 statement of reasons or arguments to suggest any reasonable correlation between invalidity of
8 any or all of the proposition and five years of increases in bargained compensation.

9 Although there is no authority on point, the plaintiffs and Real Parties agree that portions
10 of an initiative that meet the normal tests for being severed can be severed prior to an election. I
11 share this view, and find that the second sentence of subsection (i) and the words “wages or other
12 economic” and “wage or” appearing in the third sentence of subsection (i) easily meet all three
13 tests needed for that language to be severed. The quoted words in the third sentence only make
14 sense by reference to the second sentence and thus, if the second sentence is severed, the quoted
15 words in the third sentence must be as well.

16 The second sentence and quoted words of the third sentence of subsection (i) are
17 grammatically, functionally and volitionally severable. Severing that language would not
18 constitute a deception on the voters. The poison pill language is not central to the stated purposes
19 of Proposition B to “ensure that the City’s retirement and health service systems are properly
20 funded and that the City’s annual costs are balanced with reasonable City employee
21 contributions to their retirement and health plans.” The lack of centrality of the poison pill
22 language to Proposition B is perhaps best seen by the absence of anything in the ten paragraphs
23 of findings that refers to, much less supports, a freeze on five years of bargained compensation.

1 The City requested that, if I do sever the poison pill language, I “make conforming
2 changes to the ballot materials related to” Proposition B. Attachment A to this Order, which
3 strikes out two complete sentences and parts of three other sentences, sets forth the “conforming
4 changes” that I am requiring be made to the ballot materials.

5 Plaintiffs and the City request that I require that additional language be included in the
6 ballot materials to give notice of my ruling so that voters are informed why the version of
7 Proposition B appearing on the ballot differs from the one that was contained in the petition and
8 to explain any discrepancies between the “severed” version of Proposition B and the ballot
9 arguments. This request is both reasonable and supported by the case law discussing possible
10 “deception” on the voters of severing language from an initiative prior to an election.

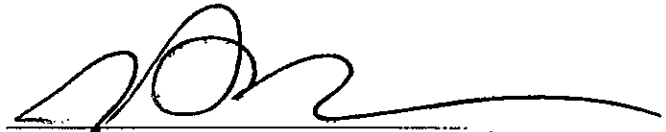
11 Accordingly, I will require that the ballot materials include the following language, which is a
12 modification of the language proposed by the plaintiffs: “Pursuant to an order of the San
13 Francisco Superior Court, portions of one subsection of Proposition B have been stricken from
14 the original text of Proposition B as proposed by Proposition B’s proponents. The stricken
15 language would have prohibited any increase in the cost of bargained compensation for five
16 years for those employees covered by the court’s judgment if a court issued a final judgment
17 determining that any portion of Proposition B could not be enforced. Ballot arguments about
18 Proposition B were submitted prior to the court order striking this language.”

19 For the reasons discussed above, the City and its Director of Elections are hereby ordered
20 to: 1) sever the second sentence of subsection (i) and the words “wages or other economic” and
21 “wage or” appearing in the third sentence of subsection (i) from the remainder of Proposition B
22 and not include the severed language in the version of Proposition B appearing in any ballot
23 materials; 2) make the changes to the ballot materials for Proposition B that are set forth in
24 Attachment A hereto; and 3) include the following additional language in the ballot materials for
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1 Proposition B: "Pursuant to an order of the San Francisco Superior Court, portions of one
2 subsection of Proposition B have been stricken from the original text of Proposition B as
3 proposed by Proposition B's proponents. The stricken language would have prohibited any
4 increase in the cost of bargained compensation for five years for those employees covered by a
5 court's judgment if a court issued a final judgment determining that any portion of Proposition B
6 could not be enforced. Ballot arguments about Proposition B were submitted prior to the court
7 order striking this language."

8 IT IS SO ORDERED.

9 Dated: August 30, 2010



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11 Harold E. Kahn
12 Judge of the Superior Court
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City Retirement and Health Plans

Proposition B

Shall the City increase employee contributions to the Retirement System for retirement benefits; decrease employer contributions to the Health Service System for health benefits for employees, retirees and their dependents; change rules for arbitration proceedings about City collective bargaining agreements; ~~and prohibit any increase in employee compensation for affected City employees for five years if a court invalidates any part of this measure?~~

Digest by the Ballot Simplification Committee

The Way It Is Now: The City provides retirement benefits to employees and retirees through its Retirement System and health benefits through its Health Service System. Both the City and covered employees contribute to funding those systems.

The Unified School District, Community College District and Superior Court participate in the City's Retirement System and Health Service System, but not all of their employees participate.

The uniformed members of the Sheriff's Department and certain other employees participate in the California Public Employees Retirement System and not in the City's Retirement System.

The Charter sets the contribution rate employees must pay to the Retirement System. For most City employees, that rate is 7.5% of compensation. The City and other participating employers pay the balance needed to fund the system. Under collective bargaining agreements, the City sometimes has agreed to pay the Charter-required employee contribution to the Retirement System.

The City averages the amount paid by California's 10 most populated counties to set the minimum amount that the four employers contribute to the Health Service System. Participating employees and retirees also contribute to the system. Under some collective bargaining agreements, participating employers have agreed to pay additional costs for employee and dependent medical, vision and dental coverage.

The Proposal: Proposition B is a Charter amendment that would increase employee contributions to the Retirement System, decrease employers' contributions to the Health Service System and change rules for arbitration proceedings about City collective bargaining agreements. ~~If a court invalidates any part of Proposition B, any increase in employee compensation for affected City employees would be prohibited for five years.~~

Proposition B would increase required employee contributions to the Retirement System, and reduce the employers' share of funding that system, as follows:

- Uniformed members of the police and fire departments (but not of the Sheriff's department) would contribute up to 10% of their compensation to fund retirement benefits. This increase would not exceed the amount needed to pay the added costs of increased police and fire retirement benefits resulting from the 2002 Charter amendment. (Prop H, see "Words You Need to Know")

ATTACHMENT A

- Other employees in the Retirement System would contribute 9.0% of their compensation to fund retirement benefits.
- In future collective bargaining agreements, the City, but not the other three employers, would be prohibited from paying any portion of the employee contribution.

Proposition B would decrease the employers' contribution to the Health Service System, and increase the employees' payments, and possibly retirees' payments, to that system, as follows:

- For medical coverage, employers could pay only the 10-county average amount.
- The City, but not the other three employers, would be prohibited from paying any additional costs for employee coverage.
- For employee dependent health care coverage, the City, but not the other three employers, would reduce its contribution to no more than 50% of the cost of the least expensive plan the Health Services System offers for each level of coverage.
- For dental plans, the City, but not the other three employers, would contribute no more than 75% of the cost of employee coverage and 50% of the cost of dependent coverage.

In any arbitration to resolve disputes in the City's collective bargaining, Proposition B would require the arbitrator to make findings about the current and projected costs to the City of retirement and health benefits and take those costs into account in deciding compensation. This would not apply to the other three employers.

~~If a court invalidates any part of Proposition B, any increase in employee compensation for affected City employees would be prohibited for five years.~~ Proposition B also states that if an arbitrator awards an increase in wages or benefits for covered employees during the five-year period, the increase shall first be subject to voter approval.

Proposition B would take effect on January 1, 2011. Some provisions would take effect only when current collective bargaining agreements expire.

A "YES" Vote Means: If you vote "yes," you want to:

- increase employee contributions to the Retirement System for retirement benefits,
- decrease employer contributions to the Health Service System for health benefits for employees, retirees and their dependents,
- change rules for arbitration proceedings about City collective bargaining agreements, and
- ~~prohibit any increase in employee compensation for affected City employees for five years if a court invalidates any part of this measure.~~

A "NO" Vote Means: If you vote "no," you do not want to make these changes to the Charter.

Controller's Statement on "B"

City Controller Ben Rosenfield has issued the following statement on the fiscal impact of Proposition B:

Should the proposed charter amendment be approved by the voters, in my opinion, the City will have significantly reduced costs for providing employee retirement benefits and health

care benefits, with those costs being shifted from the City government to City employees. Annual savings to the City would total approximately \$121 million by fiscal year 2013-2014, assuming current workforce levels and healthcare utilization. This includes approximately \$73 million in savings to the City's General Fund, and \$48 million in savings to other enterprise funds such as the Airport and Public Utilities Commission funds.

Employee and City Government Medical, Dependent and Dental Care Payments:

The proposed charter amendment increases medical care contributions from all City employees and limits the amount the City would pay. Currently, the monthly amount paid by the City for each employee's medical benefits is determined through a Charter-required survey of the amount paid for this same purpose by the ten most populous counties in California. For FY2010-2011, that amount is \$473 per employee per month. In addition, under most labor agreements, the City pays the full cost of 'single' medical benefits for those employees who have no dependents on their medical plan. For fiscal year 2010-11, the total City cost of both of these medical benefits is approximately \$178 million citywide. The proposed charter amendment would prohibit the City from paying the additional 'single' medical benefit costs as part of any labor agreement, and shift those costs from the City government to City employees.

The proposed charter amendment increases dependent medical care contributions from all City employees and limits the amount the City would pay. Currently, the monthly amount paid by the City for dependent medical care costs is negotiated in labor agreements. Under most labor agreements, for each employee who has dependents the City pays an amount equal to 75% of the lowest plan cost for a family. For FY2010-11, that amount is between \$481 and \$660 per employee per month, with a total City cost of approximately \$125 million citywide. For dental care, under most labor agreements, the City pays 100% of the cost of family coverage. For FY2010-2011, that amount is \$132 per employee per month with a total City cost of approximately \$44 million citywide. Under the proposed charter amendment the City could pay no more than 50% of the cost of dependent health and dental care and 75% of the cost of employee dental care. The balance of health and dental costs are shifted from the City government to City employees.

The Health Service System's actuary estimates annual savings to the City under the health, dependent and dental care provisions of the amendment would be approximately \$83 million annually based on the fiscal year 2010-2011 premium rates. This amount includes approximately \$13 million in savings for 'single' medical care, \$53 million in savings for dependent care, and \$17 million in savings for dental care. Note that these amounts are not reductions to insurance plan rates or to the cost of care, rather a shift of the cost from the City government to City employees.

Employee and City Government Retirement Payments:

The proposed charter amendment increases required contribution rates to fund retirement benefits from all City employees and decreases the amount the City would pay. Currently, most employees pay 7.5% of salary to fund their retirement benefits. Employee contributions would increase from 7.5% to up to 10% of salary for uniformed Police and Fire employees and from 7.5% to 9% of salary for all other employees. The charter amendment also prohibits the City from paying for any portion of this required employee contribution as a part of a labor agreement.

Because of these increased employee contributions, the proposed charter amendment would decrease the amount the City government must contribute to fund retirement benefits. Each

year required retirement contribution rates are set based on actuarial analysis. In fiscal year 2010-2011, the City's required contribution will be 13.6% of payroll or approximately \$325 million. By fiscal year 2013-2014, the City's contribution rate is projected to increase to an estimated 22.8% of payroll or approximately \$576 million. Actuarial analysis of the proposed Charter amendment is that net annual savings to the City would be approximately 1.5% of payroll, or approximately \$38 million by fiscal year 2013-2014. The City's savings attributable to the shift in cost to employees are somewhat reduced by a higher total cost of retirement benefits resulting from increased employee withdrawal rights and total benefits amounts that will be outcomes of the measure.

Additional Costs or Savings:

There may be significant additional costs or savings to the City as a result of the proposed charter amendment. For example, increases in employee medical care costs will likely result in individuals opting for lower cost plans or decreasing the number of dependents enrolled, resulting in additional savings to the City. Increases in employee payments for retirement and medical costs under the proposed charter amendment could be offset by wage increases and related fringe benefit costs negotiated in future labor agreements or awarded in labor arbitrations, resulting in additional costs to the City. There may also be impacts of the proposed charter amendment under the national health care reform provisions.

Superior Court of California
County of San Francisco

KATHERINE ALBA-SWANSON, et
al.,

Plaintiff(s)

vs.

JOHN ARNTZ, et al.,

Defendant(s)

Case Number: CGC-10-502446

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Audrey Huie, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 30, 2010 I served the attached **Order granting in part and denying in part petition for writ of mandate and request for injunctive relief** by placing a copy thereof in a sealed envelope, addressed as follows:

ROBIN JOHANSEN, ESQ.
THOMAS A. WILLIS, ESQ.
REMCHO, JOHANSEN & PURCELL, LLP
201 DOLORES AVE.
SAN LEANDRO, CA 94577

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CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY
CITY HALL, ROOM 234
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SAN FRANCISCO, CA 94102-4682

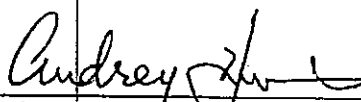
ANTHONY P. CONDOTTI, ESQ.
S. ADAIR PATERNO
LAW OFFICES OF ATCHISON, BARISONE,
CONDOTTI & KOVACEVICH
333 CHURCH STREET
SANTA CRUZ, CA95060

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: August 30, 2010

CLERK OF THE COURT

By:


Audrey Huie, Deputy Clerk