

March 23, 2017

Heather L. Hong  
McPharlin Sprinkles & Thomas LLP  
160 W. Santa Clara St., Suite 400  
San Jose, CA 95113

Gene Tanaka  
Best Best & Krieger LLP  
201 N. Main St., Suite 390  
Walnut Creek, CA 94596

Re: Means v. City of Milpitas  
Santa Clara Superior Court Case No. 16CV301785

Per request of Neutral Evaluator Linda Hendrix McPharlin, this letter provides “a statement regarding the key facts and legal issues” of this case.

Although Defendant’s Answer questions certain statements in the Complaint, there is really only one substantive question at issue in this case: did the Milpitas City Council respond legally to their responsibilities under Section 9215 of the Election Code (ELEC)?

Section 9215: ... the legislative body shall do one of the following:

- (a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
- (b) Submit the ordinance, without alteration, to the voters pursuant to subdivision (b) of Section 1405, unless the ordinance petitioned for is required to be, or for some reason is, submitted to the voters at a special election pursuant to subdivision (a) of Section 1405.
- (c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b).

Plaintiff claims the Council did not act legally, and asks for a favorable judgment.

This point of legality is most important to a neutral evaluation because Defendant’s ANSWER responded to each and every allegation in Plaintiff’s COMPLAINT – **except** the legal matter posed in paragraph 3 on page 5. Defendant’s silence on that point seems to imply acceptance of that paragraph as re-stated here:

Denying access to the ballot of a certified petition by Milpitas City Council is not one of the options specified in the Elections Code, and is therefore a violation of the law. Such denial also violates the civil rights of the Plaintiff by denying to them [sic] the proper functioning of the process designed to enable people “to petition the Government for a redress of grievances.”

The Council’s denial likely arises from their mis-interpretation of Proposition 218, supporting legislation, and/or court rulings such as that made in the *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano*, case number G048969 in the COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE (235 Cal. App. 4th 1493; 186 Cal. Rptr. 3d 362; 2015 Cal. App. LEXIS 330).

However, the second paragraph of the CONCLUSION (page 13) in the Court's Opinion filed April 20, 2015, in the Capistrano case, clarifies the interplay:

“The way Proposition 218 operates, water rates that exceed the cost of service operate as a tax, similar to the way a 'carbon tax' might be imposed on use of energy. But, we should emphasize: Just because such above-cost rates are a tax does not mean they cannot be imposed--they just have to be submitted to the relevant electorate and approved by the people in a vote. There is no reason, for example, why a water district or local government cannot, consistent with Proposition 218, seek the approval of the voters to impose a tax on water over a given level of usage--as we indicated earlier, that might be a good idea.”

The Council seemingly ignored the Court's opinion, decided that the new water rate measure was illegal on its face, and therefore exempted themselves from the requirements of Elections Code §9215. Although Plaintiff would take exception with the unusual tactic of declaring a ballot measure illegal before being voted upon, rather than seeking a court's judgment afterwards, the qualified measure was in fact legal under the Court's Capistrano Opinion. Whether Council was ill advised, jumped to conclusions, or simply wanted an easy way out of a difficult problem is irrelevant. What they did was not an option under existing law. See page 10 of Council Minutes for Aug. 2, 2016 at <http://www.ci.milpitas.ca.gov/pdfs/council/2016/080216/Minutes.pdf>

Therefore, Plaintiff asks the Court and the Neutral Evaluator for a favorable decision to redress injuries sustained by both Plaintiff and our democratic procedures as a result of an action taken by Defendant Milpitas City Council charged with responsibilities under Section 9215 of the Election Code (ELEC).

WHEREFORE Plaintiff prays:

- A. That judgments be entered in favor of the Plaintiff and against the Defendants, and that the Court order an injunction that the certified petition be placed before the voters in a special election to be held in 2017. A special election accomplishes two desirable results: 1) it speeds the remedy of allowing the voters to vote on the matter, and 2) due to the extra cost of a special election, it both imposes a financial penalty upon the City and sends a warning to others tempted to impinge the rights of citizens that accountability will be enforced.
- B. That Plaintiff recover the costs of litigation including a reasonable fee for counsel.
- C. That Plaintiff have such other and further relief as the Court may deem necessary or proper under the circumstances.

#### Clarifications requested of Neutral Evaluator

First, did Defendant fail to respond within the 30 calendar days allotted as specified in the SUMMONS served upon Defendant on November 1, 2016? On December 8, Mr. Means filed with the Court an AMENDED COMPLAINT and Defendants STIPULATION AND [PROPOSED] ORDER. Thirty days later is January 7, 2016. On February 1, Defendant filed with the Court DEFENDANT CITY OF MILPITAS' ANSWER TO AMENDED COMPLAINT.

Second, would it be advisable for Plaintiff to ask the Court for a Summary Judgment in this case on these three grounds?

1. All the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law under section 437c(c) of the Code of Civil Procedure (CCP).
2. Defendant failed to respond within the 30 calendar days allotted.
3. Defendant's ANSWER did not respond to the legal matter posed in paragraph 3 on page 5. Defendant's silence on that point implies acceptance.

---

Robert S. Means

Attachments:

Court's Opinion filed April 20, 2015, in *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano*, case number G048969 in the COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE (235 Cal. App. 4th 1493; 186 Cal. Rptr. 3d 362; 2015 Cal. App. LEXIS 330). (see CONCLUSION, page 13)

Milpitas City Council Minutes for Aug. 2, 2016 (see page 10)