DENNIS J. HERRERA, State Bar #139669
City Attorney
WAYNE SNODGRASS, State Bar #148137
CHRISTINE VAN AKEN, State Bar #241755
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, California 94102-4682
Telephone: (415) 554-4633
Facsimile: (415) 554-4699
E-Mail: christine.van.aken@sfgov.org

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

CORINNE WOODS, MICHAEL THERIAULT, and TIM COLEN, Petitioners/Plaintiffs, vs. JOHN ARNTZ, et al. Respondents/Defendants.	Case No. CPF-14-513503 [consolidated with Case No. CGC-14-540531] **REPLY IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO'S DEMURRER TO CALIFORNIA STATE LANDS COMMISSION'S FIRST AMENDED COMPLAINT**
REBECCA EVANS, Real Party in Interest.	Action Filed: February 14, 2014 (Woods) July 15, 2014 (Cal. State Lands) **Reservation No.: 100314-04**
CALIFORNIA STATE LANDS COMMISSION, Petitioner and Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, DOES ONE THROUGH FIFTY, Respondents/Defendants.	Hearing Date: February 19, 2015 Time: 9:30 a.m. Place: Dep't 302 Date Action Filed: July 15, 2014 Trial Date: Not set Attached Documents: • Reply Request for Judicial Notice • Proof of Service

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Commission Has Not Shown That The Legislature Clearly And Definitely Intended To Preempt The City's Zoning Power, Or The People's Initiative Power, With The Burton Act. 2

II. The Fact That The Granted Lands Are Of Statewide Importance Does Not Deprive The Board Or The Voters Of Their Regulatory Power. 4

III. Public Resources Code Sections 6009 And 6009.1 Did Not Alter These Longstanding Principles. 8

IV. The Commission Has Not Stated An As-Applied Challenge, And Any Such Challenge Is Not Yet Ripe. 10

TABLE OF AUTHORITIES

State Cases

California ex rel. State Lands Comm'n v. County of Orange
(1982) 134 Cal.App.3d 20 7

City of Burbank v. Burbank-Glendale-Pasadena Airport Authority
(2003) 113 Cal.App.4th 465 6

Committee of Seven Thousand v. Superior Court
(1988) 45 Cal.3d 491 5

DeVita v. County of Napa
(1995) 9 Cal.4th 763 .... 2, 5, 9, 10

Hall v. City of Taft
(1956) 47 Cal.2d 177 7

Hermosa Beach Stop Oil v. City of Hermosa Beach
(2001) 86 Cal.App.4th 534 .... 6, 7, 8

Higgins v. City of Santa Monica
(1964) 62 Cal.2d 24 .... 7, 8, 9

Mallon v. City of Long Beach
(1955) 44 Cal.2d 199 7

Pettye v. City & County of San Francisco
(2004) 118 Cal.App.4th 233 .... 5, 6

San Francisco International Yachting Center v. City & County of San Francisco
(1992) 9 Cal.App.4th 672 .... 2, 3, 8, 9

Stonehouse Homes v. City of Sierra Madre
(2008) 167 Cal.App.4th 531 10

Voters for Responsible Retirement v. Bd. of Supervisors
(1994) 8 Cal.4th 765 2

Zack's, Inc. v. City of Sausalito
(2008) 165 Cal.App.4th 1163 7

State Statutes, Codes & Regulations

Cal. Publ Res. Code § 6009 .... 1, 5, 8

Cal. Pub. Res. Code § 6009(d) 8, 9

Cal. Pub. Res. Code § 6009.1 .... 5, 8, 10

Cal. Pub. Res. Code § 6009.1(c)(9) 10

S.B. 1295, July 15, 1963 8

Stats. 1962, ch 67, § 2 9

Stats. 1962, ch 67, § 5 9

Stats. 1962, ch 67, § 16 9

Stats. 1962, ch 67, § 19 9

Stats. 1963, ch. 1776, § 1 7

Stats. 1968, ch. 1333 (The Burton Act) .... *passim*

Stats. 2010, ch. 330, § 4 8

Stats. 2011, ch. 477, § 6(g) 4

Stats. 2012, ch. 206, § 6 8

Stats. 2012, ch. 757, § 2(j) 4

Stats. 2013, ch. 381 4

San Francisco Statutes, Codes & Ordinances

S.F. Charter § 2.105 2

S.F. Charter § 4.105 2

S.F. Charter § 14.100 2

S.F. Police Code, art. 1 3

S.F. Police Code, art. 2 3

Other References

"subjugation." Merriam-Webster.com. 2015.
www.merriam-webster.com/thesaurus/subjugation (25 Jan. 2015) 8

INTRODUCTION

For 45 years, the Port Commission of San Francisco ("Port") has successfully fulfilled its Burton Act duty to manage trust lands granted to the City and County of San Francisco ("City"), even though those lands have been subject to height restrictions, zoning regulations, and other land-use requirements adopted by the Board of Supervisors ("Board")—and on occasion, by the voters—under the City's Charter.

Proposition B does not, on its face, alter this landscape. It does not disturb existing height limits—which were adopted by the Board and to which the Port has always been subject—and merely requires that any future increase in those limits be approved by the voters. It is unsurprising, then, that the State Lands Commission ("Commission") has not alleged that Proposition B will, in all of its applications, frustrate the Port's ability to carry out its trust duties under the Burton Act. Instead, to make its case for facial invalidity, the Commission is forced to take an extreme and unsupportable legal position, namely, that all local initiatives—and indeed all local land use regulations—are invalid as to the Port. This position flies in the face not only of decades of practice in San Francisco, subsequent State legislative acts recognizing that practice, and long-established case law, but also the plain language of both the Burton Act and Public Resources Code § 6009, neither of which were intended to wipe out all local zoning regulations and initiatives over granted lands in San Francisco.

Perhaps Proposition B, in some future application to a particular project, could so frustrate the Port's ability to promote the public trust that it must give way to the Port's duties under the Burton Act. That case is not before the Court today. Instead, in this facial challenge, the Court need only determine that Proposition B can be applied in a way that harmonizes the Port's express authority under the Burton Act with the voters' and the Board's powers to legislate building heights under the San Francisco Charter. Because the Commission has alleged no facts showing otherwise, the demurrer should be sustained.

ARGUMENT

I. The Commission Has Not Shown That The Legislature Clearly And Definitely Intended To Preempt The City's Zoning Power, Or The People's Initiative Power, With The Burton Act.

As San Francisco set out in its opening brief, courts find that state law overrides the people's precious right of initiative only where there is a "clear showing of the Legislature's intent" to do so. (*Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 777.) Only a "definite" indication of the Legislature's intent will do. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 777 ["*DeVita*"].) But where the State's regulatory interests are not "*fundamentally incompatible* with the exercise of the right of initiative or referendum," then courts must not find that state law preempts that right. (*Id.* at pp. 780-81 [emph. added].)

The Burton Act evinces no clear and definite showing of the Legislature's intent to displace either the City's general police power, or that of the San Francisco electorate, over building heights. The Commission's brief opposing the City's demurrer ("Br.") repeatedly emphasizes the Burton Act's language that the "City and County of San Francisco, through a [Port Commission], shall have *complete authority*" over the harbor and its operation. (Br. p. 9 [emph. added]). But the Commission never grapples with the fact that this broad grant of authority extends only to those acts "which are not prohibited by . . . the Charter of the City and County of San Francisco." (Stats. 1968, ch. 1333 § 3.) That Charter, in turn, places legislative power over building heights not in the Port but in the Planning Commission, the Board, and the voters. (S.F. Charter §§ 2.105, 4.105, 14.100.) Because the Burton Act assigns power to the Port subject to the Charter, the Act evinces no clear intent to displace the voters' or the Board's zoning power.

This Court is bound by precedent to reconcile the Charter's delegation of powers with the Burton Act wherever possible. That is the holding of *San Francisco International Yachting Center v. City & County of San Francisco* (1992) 9 Cal.App.4th 672 ["*Yachting Center*"]. In *Yachting Center*, the Court of Appeal confronted a seeming conflict between the Port's *express* authority to enter leases for Port lands under the Burton Act, and a Charter provision requiring Board approval of certain leases. (*Id.* at pp. 676-77.) Rather than throwing out the Charter provision as the Commission would

have this Court do, the Court of Appeal harmonized the provisions by finding that the Board's Charter-granted power to approve leases did not conflict with the Port's exclusive authority to enter into leases under the Burton Act. (*Id.* at pp. 681-82.) Like Proposition B, the measure requiring Board approval of the *Yachting Center* lease was enacted by voter initiative. (Reply RJN, Ex. 49.)

There is no basis to distinguish *Yachting Center* here—indeed, the City's argument here is even stronger, because the Burton Act does not expressly grant zoning powers to the Port, unlike leasing powers. The Commission offers no explanation for *Yachting Center* other than to argue that the Port *chose* in that case to subject its proposed lease to the Board's authority—in other words, the Charter provision at issue was not mandatory but voluntary. (Br. p. 11.) That assertion finds no support in the decision, and indeed is directly contrary to the Court of Appeal's statement that "the provision for approval by the board of supervisors is a requirement of the Charter *which the parties could not waive.*" (*Yachting Center, supra*, 9 Cal.App.4th at p. 683 [emph. added].)

Faced with 45 years of history in which the City and the electorate have routinely exercised zoning powers over granted lands (City's RJN, Exs. 9-40), the Commission takes a step away from reality. It contends that not only are San Francisco's voters prohibited from legislating waterfront building heights, but even the Board has no say. (Br. pp. 9, 13.) Presumably, in the Commission's view, the many ordinances the Board has passed purporting to regulate those heights are facially invalid, and there are actually no legally binding height limits on the waterfront at all.[1] The Commission argues that the Port has merely acquiesced in past limitations set by the Board and the voters. (Br. pp. 13-14.) That argument is implausible on its face, and would be easily rebutted as a factual matter.[2] But as a legal matter, it is rebutted by *Yachting Center*, which holds that Board approval over certain Port leases under the City's Charter is not voluntary but mandatory.

Moreover, the Commission's mistaken argument that the Port can simply ignore local land use

[1] In fact, the Commission's argument extends much farther. If the Port had all police power over granted lands and the Board had none, then San Francisco's police codes, such as those regulating public nuisances and disorderly conduct, similarly would not apply on the granted lands. (See, e.g., S.F. Police Code, arts. 1 & 2.)

[2] For instance, the President of the Port Commission authored the leading ballot argument *against* 1990's Proposition H, which mandated the creation of a Waterfront Land Use Plan and forbade the Port from allowing hotels and certain other non-maritime uses on granted lands. (City's RJN, Ex. 24, at 116.) Yet the Port has complied with Proposition H.

regulations only further undermines its facial challenge to Proposition B. If the Port did have the power to implement or ignore local regulations such as Proposition B on a case-by-case basis as it saw fit, then there would be no ripe conflict today. Only with a specific project where the Port chose not to implement Proposition B could there be a potential conflict between that measure and the Port's trust duties, and the Commission alleges no such conflict.

The Commission's refusal to recognize the Board's general police-power authority to regulate granted lands is not shared by the State Legislature. Repeatedly, in statutes that concern specific granted lands in San Francisco, the Legislature has acknowledged that the Board must approve local land uses. (See, *e.g.*, Stats. 2013, ch. 381 [City's RJN, Ex. 42], p. 91 [discussing mixed-use development project at Pier 30-32 and stating that "the city's board of supervisors and the Port have given the project all necessary local approvals"].) The City cited some of these statutes in its opening brief. (City's Br. 6.) The Commission's brief offers no substantive response to this statutory language—instead the Commission and its *amici* actually cite additional examples of statutes where the Legislature has acknowledged that the Board retains the power to approve land uses or has other regulatory powers over granted lands. (See Stats. 2011, ch. 477, § 6(g) [acknowledging that Port must "submit[] a financial and land use plan to the board of supervisors of the city for approval" concerning Pier 70 development] [Chamber of Commerce's RJN, Ex. H; Commission's RJN, Ex. L]; *id.* § 2(j) [Pier 70 financial and land use plan must be approved by Board and must "conform[] to the city's general plan"]; Stats. 2012, ch. 757, § 2(j) [acknowledging that "[p]rivate commercial development on port property is subject to the city's jobs-housing linkage program fees"] [Commission's RJN, Ex. K].) For this Court to hold that no one but the Port has regulatory power over the granted lands would essentially write out this statutory language.

II. The Fact That The Granted Lands Are Of Statewide Importance Does Not Deprive The Board Or The Voters Of Their Regulatory Power.

The Commission places great weight on the principle that the operation of the waterfront and the management of granted lands are matters of statewide concern. It points, for example, to the regional ferry services run out of the Ferry Building to illustrate that harbor and waterfront operations are a matter of statewide and regional concern. (Br. 12.) That is a red herring. Proposition B does not

on its face imperil any harbor operations or otherwise conflict with statewide interests. The Complaint does not assert interference with ferry service; instead it alleges that Proposition B could impact future residential or commercial development projects on granted lands, for which developers may seek height increases beyond what current zoning allows. (Complaint ¶ 20.) Such projects generate revenue for the Port for trust purposes, and of course revenue is important to the trust. But the notion that a voter approval requirement for height-limit increases—on lands already subject to voter- and Board-imposed use restrictions—is intrinsically incompatible with the Port's revenue-raising ability is incorrect. Indeed, it is rebutted by the voters' decision in November 2014, by an overwhelming majority of 72.85%, to approve height limit increases for Pier 70 for a large redevelopment project on granted lands. (Reply RJN, Exs. 50, 51.) This example alone demonstrates that the mere presence of a voter approval requirement concerning granted lands does not on its face frustrate state purposes.

Instead, the presence of a statewide interest is the beginning, not end, of the inquiry. As the Supreme Court stated in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511, in language quoted by the Commission (Br. p. 8), "[i]n matters of local concern, the state may *if it chooses* preempt the entire field to the exclusion of all local control." [Emph. added.] If the State chooses to allow some local autonomy, "it has the authority to impose procedural restrictions on the power granted, including the authority to bar the exercise of the initiative and referendum." (*Id.*) There is no question here whether the State possesses the *power* to prevent the Board or the voters from deciding the height of buildings on granted lands. Instead, the question is whether the State has in fact *exercised that power* with the Burton Act (or with Public Resources Code sections 6009 or 6009.1, discussed in Section III, *infra*). Because the Burton Act acknowledges the Charter's assignment of powers, it does not clearly and definitely evince an intent to oust the voters of their power, as it must for this Court to find that power preempted. (See *supra* at pp. 2-3.)

Case law illustrates how the exclusive-delegation inquiry is not controlled by the mere presence of a statewide interest but is instead decided on a case-by-case basis. (*DeVita, supra,* 9 Cal.4th at pp. 777, 780-81.) The determinative question is often whether courts can harmonize the statewide interest with whatever local assertion of control is at issue. In *Pettye v. City & County of San Francisco* (2004) 118 Cal.App.4th 233, 247, for example, the Court of Appeal held that although

general assistance programs were a matter of statewide concern delegated expressly to the Board, there was room for San Francisco's voters to decide whether to pay general assistance grants in part with in-kind services. The voters' local interest in controlling the numbers of single homeless adults congregating in San Francisco and receiving cash grants was compatible with the State's interest in aid for the indigent, and thus the voters' authority was not preempted. (*Id.* at p. 246.)

Even *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465 ["*Burbank*"], on which the Commission relies for its exclusive delegation argument (Br. p. 12), aids the City's case, not the Commission's. In that case, the court considered an initiative requiring voter approval of any city council action to finance or construct an airport terminal. (*Burbank, supra*, 113 Cal.App.4th at p. 484.) The court held that the initiative violated the Legislature's exclusive delegation to the city council of the power to decide whether to expand the existing airport, a facility of regional importance. (*Id.* at pp. 478, 480.) But the statute at issue in *Burbank* specified that the city council must make airport-expansion decisions. Here, by contrast, the Burton Act makes no mention of zoning power and instead provides that the Port's grant of authority subject to San Francisco's Charter. Moreover, even in *Burbank*, the court acknowledged that the regional airport was subject to local zoning, traditionally a matter of local concern. (*Id.* at 479.) Thus, *Burbank* illustrates that local zoning powers can be imposed on facilities of statewide importance, so long as they do not unduly impair state interests. And the local interest in zoning applies with great force in a case like this one, where the surrounding cityscape is dense and the granted lands sit in close proximity to non-trust property on the waterfront. (Reply RJN, Ex. 52 [map].)

Cases concerning public trust lands also make clear that local power can coexist alongside state interests. In *Hermosa Beach Stop Oil v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534 ("*Hermosa Beach*"), the Court of Appeal considered a local initiative prohibiting oil drilling on trust lands for which the Commission had approved drilling as in the "the best interests of the state." (*Id.* at pp. 543, 570-71.) The appellate court held this was a valid exercise of local power, and the voters appropriately prohibited drilling in "exercising their right to adopt general land use policies for their community." (*Id.* at p. 570.) In other words, the voters were entitled to reach a different conclusion than the Commission about the best use of trust lands, notwithstanding the statewide importance of trust lands.

The Commission tries to distinguish *Hermosa Beach* on the basis that it did not specifically consider preemption. (Br. p. 7.) But the case holds that local determinations about land use are appropriate exercises of the police power even where the Commission prefers a different use. (*Hermosa Beach, supra*, 86 Cal.App.4th at pp. 541-42, 570.)[3] A voter initiative prohibiting drilling was also at issue in *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24 ("*Higgins*"). But *Higgins* rejected any claim that Santa Monica's duty to raise revenue for trust purposes, as a trustee of granted lands, prohibited the voters from legislating to prohibit drilling. (*Id.* at pp. 28-29.)[4]

Finally, the idea that local zoning is compatible with the statewide interest in public trust lands has been ratified by the Legislature itself. The Legislature has repeatedly acknowledged the Waterfront Land Use Plan prescribed in Proposition H, and the need for Board approval of Port development plans, in statutes enacted after the Burton Act that also note the statewide importance of granted lands. (*Supra* at p. 4). And even before the Burton Act, the Legislature enacted a law permitting San Francisco to adopt zoning ordinances for trust lands that were not required for trust uses. (Stats. 1963, ch. 1776, § 1 [City's RJN, Ex. 17].) This measure allowed the state agency administering the land to use such property "to yield maximum profits *consistent with the pattern of land uses in the vicinity of the land so zoned*." (*Id.* [emph. added].) The bill's purpose was to ensure that "future redevelopment of the Port Authority's Embarcadero properties will conform to the City of San Francisco's general zoning plans for this area." (Enrolled Bill Memorandum, S.B. 1295, July 15,

---

[3] The Commission also tries to distinguish *Hermosa Beach* as involving non-trust lands. This is not accurate: the oil lease at issue covered "submerged mineral rights acreage owned by the City, known as the 'tidelands,'" for which "State Lands Commission (SLC) approval to allow drilling for oil" was required. (*Hermosa Beach, supra*, 86 Cal.App.4th at p. 541-542.)

The Commission also cites cases holding that revenue from public trust lands cannot be used for municipal or local purposes. (See *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199; *California ex rel. State Lands Comm'n v. County of Orange* (1982) 134 Cal.App.3d 20.) And its *amicus* the Pacific Merchant Shipping Association argues that municipalities cannot enforce local land use regulations on state property, citing *Hall v. City of Taft* (1956) 47 Cal.2d 177, 184. These are yet more red herrings. Nothing about Proposition B diverts trust revenue for other purposes, and the granted lands are no longer state property, since they were transferred in trust to the City.

[4] In addition, *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, holds that state laws concerning street closure were not displaced by a local trustee's state-law authority to lease granted lands for any trust purpose. (*Id.* at p. 1186.) *Zack's* involved a state land-use statute, but its reasoning applies equally to local ordinances when it notes that "the effect of exempting tidelands and submerged lands from such laws would offend public expectations and have destabilizing consequences." (*Id.* at pp. 1187-1188.)

1963 [Reply RJN, Ex. 53].) In other words, there is no facial inconsistency between the pursuit of trust purposes and respect for local land-use patterns, as the Legislature itself has recognized.

III. Public Resources Code Sections 6009 And 6009.1 Did Not Alter These Longstanding Principles.

The Commission and its *amici* argue that Public Resources Code sections 6009 and 6009.1 also prohibit Proposition B. The former statute requires local grantees to manage granted lands "without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises." (Pub. Res. Code § 6009(d).) The latter lists the trustee duties of local grantees and reaffirms that granted lands remain subject to state supervision. (*Id.* § 6009.1.) But neither changes the result of this case. The statutes enacting sections 6009 and 6009.1 both state that they do "not constitute a change in, but [are] declaratory of, existing law." (See Stats. 2012, ch. 206, § 6 [Reply RJN, Ex. 54]; Stats. 2010, ch. 330, § 4 [City's RJN, Ex. 45].) Because existing law permitted San Francisco's Board and its electorate to exercise Charter-granted powers over building heights, the enactment of these statutes could not and did not change the Board's and the electorate's power.

Nor is the plain text of Section 6009(d) in conflict with Proposition B. This section only prohibits local initiatives that "subjugate[]" state interests. Merriam-Webster defines "subjugation" as "the act or process of bringing someone or something under one's control," and uses as an example "the *subjugation* of much of Europe by Napoléon." (See www.merriam-webster.com/thesaurus/subjugation.) The voters' decision whether to approve a height-limit increase for a particular project is hardly a takeover of the granted lands.

By contrast, the Commission appears to define "subjugation" to include any local initiative that affects the granted lands, since it argues that "none of the powers delegated by the Legislature to the Port *can be subject* to the 'inclination' of the electorate." (Br. p. 5 [emph. added].) That definition of "subjugation" is so broad as to be meaningless. Under that definition, anything that the Board or voters do that touch the use of granted lands is subjugation. But the Port's authority is *not* exclusive; under the Burton Act, it is subject to the powers delegated to other bodies by the Charter under the Burton Act. Nor does the local regulation of the uses of granted lands, without more, amount to subjugation of statewide interests, as demonstrated by *Yachting Center*, *Hermosa Beach*, and *Higgins*.

1 The Commission, and its *amici* the San Francisco Chamber of Commerce *et al.*, also assert that
2 if a voter initiative interferes in any way with the Port's ability to generate money to fund its capital
3 needs, then that is subjugation. That assertion is rebutted by *Yachting Center*, which held that the
4 Board's exercise of its Charter authority in refusing to approve a Port-approved lease for
5 "develop[ment of] a maritime, yachting, retail and exhibition center" did not interfere with the Port's
6 exclusive authority. (*Supra*, 9 Cal.App.4th at pp. 675-76.) It is also rebutted by *Higgins, supra*, 62
7 Cal.2d 24, which acknowledged that voters could by local initiative prohibit a city, as trustee for
8 granted lands, from drilling for oil on those lands, notwithstanding the fact that oil-drilling would have
9 generated money for the trust. (*Id.* at pp. 27-29.) Moreover, as the City set out in its opening brief and
10 the Commission and its *amici* do not rebut, the Supreme Court has instructed that courts must presume
11 the voters will exercise their initiative rights in a manner that respects state interests. (*DeVita*, *supra*, 9
12 Cal.4th at pp. 792-93.[5]) Only if the voters reject a particular height-limit increase, and that decision
13 significantly interferes with the Port's ability to raise revenues for trust purposes, could a conflict be
14 ripe. The voters' overwhelming approval of the Pier 70 project this past November demonstrates that
15 the Supreme Court's trust in the voters is sound.
16 Nor does the legislative history of section 6009(d) support the Commission's arguments. The
17 statute appears motivated by an initiative measure in San Diego, ultimately rejected by San Diego's
18 voters, which would have amended the San Diego Unified Port District's ("SDUPD") master plan. But
19 SDUPD, as the local grantee for granted lands that span five different cities, faces unique land-use
20 challenges, and accordingly its granting statute—unlike the Burton Act—expressly delegates to
21 SDUPD land use and zoning powers. (Stats. 1962, ch 67, §§ 2, 5, 16, 19 at pp. 362-63 [City's RJN,
22 Ex. 44].) And the San Diego initiative measure would have required SDUPD to implement plans—
23 such as redevelopment of a marine terminal, and the addition of new nonmaritime amenities like a
24 stadium and hotels—that SDUPD had already rejected as inconsistent with trust uses. (SPUPD's RJN,
25 Ex. 1 at 2-3; Ex. 2 at 1-4.) The proposed measure's direct conflict with the SDUPD's own master plan
26
27 [5] The Commission tries to distinguish *DeVita*, arguing that *DeVita* involved general plans, a
matter of local concern. But *DeVita* acknowledged that while some initiative outcomes could impede
28 state interests, such a conflict is unripe until it actually occurs. (*Supra*, 9 Cal.4th at pp. 792-793.)

1 and with the granting statute's express delegation of SDUPD's exclusive power to enact such a plan
2 reflects precisely the kind of "subjugation" that was of concern to the Legislature, and stands in
3 marked contrast with Proposition B.

4 Finally, section 6009.1 does not preclude Proposition B. That statute simply spells out the
5 duties of local grantees and provides that they remain subject to state supervision. But it does not
6 purport to oust local law. Thus, for example, a trustee must "make the trust property productive *under*
7 *the circumstances* and in furtherance of the purposes of the trust." (§ 6009.1(c)(9) [emph. added].) The
8 circumstances trustees must cope with include local zoning; nothing in section 6009.1 gives trustees
9 warrant to ignore local ordinances.

10 **IV. The Commission Has Not Stated An As-Applied Challenge, And Any Such Challenge Is Not Yet Ripe.**
11

12 In the final paragraph of its demurrer opposition, the Commission recasts its Complaint,
13 contending that it actually states an as-applied challenge because it alleges that Proposition B
14 interferes with the Port's ability to fund capital projects today. But the Complaint does not allege that
15 Proposition B will cause any shortfall; it contends that there is "interfer[ence]" only because the voters
16 "could" reject important Port projects. (Complaint ¶ 20.) But that is not a proper basis to oust the
17 people's initiative powers; courts should not "assume . . . that the electorate will fail to do the legally
18 proper thing." (*DeVita*, *supra*, 9 Cal.4th at p. 793.) And while the Commission's *amici* the Chamber of
19 Commerce *et al*. contend that the mere prospect of seeking voter approval has caused at least one
20 potential development project to fall through, this speculative assertion is nowhere in the Complaint
21 itself. Nor does the Commission allege that any project the Port is considering today is threatened by a
22 voter-approval requirement. Indeed, the only project the voters have considered since Proposition B
23 was enacted met with their overwhelming approval. Thus, the Commission's allegations of harm are
24 unripe. Courts should not "speculate on the resolution of hypothetical situations." (*Stonehouse Homes*
25 *v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.) Instead, the Court should sustain the City's
26 demurrer and dismiss this case.

27 Dated: January 28, 2015

DENNIS J. HERRERA
City Attorney
28 By: /s/Christine Van Aken