Emails from Save Mt. Diablo's attorney to City of Antioch re LAVD Initiative

From: Robert "Perl" Perlmutter <Perlmutter@smwlaw.com>
Sent: Tuesday, June 9, 2020 5:42 PM
To: Thomas Lloyd Smith (cityattorney@ci.antioch.ca.us) <cityattorney@ci.antioch.ca.us>; Derek P. Cole (dcole@cotalawfirm.com) <dcole@cotalawfirm.com>
Cc: Andrew Miller <amiller@smwlaw.com>
Subject: FW: Placement of the LAVD Initiative on the ballot
Importance: High

Thomas and Derek

Per my voicemail to Derek from a moment ago, I am forwarding my analysis of the stay issue raised by Drew Bassak and Alicia Guerra in their letters of today's date to the City Council.

For the reasons set forth below, we believe the City Council can, and indeed must, place the LAVD on the ballot.

The other issues raised by Mr. Bassak and Ms. Guerra to not warrant much of a response.

Lindelli is wholly inapplicable here. That case involved a referendum, which prohibits a city council from re-adopting its *own* ordinance after it has been rejected *by the voters*.

The "stay" results from the action of the voters. Here, the voters have not yet had the opportunity to weigh in.

And, as the Supreme Court recently reaffirmed in the *Upland,* the City Council has a duty under our Constitution to give the voters the opportunity.

Finally, as your own staff report shows, SB 330 has no bearing on the action before the Council tonight.

Please feel free to call me this evening on my cell phone if you have any questions.

Regards

Perl

Robert "Perl" Perlmutter
Partner
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102-4421
p: 415/552-7272 x248 | he/him/his

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Robert "Perl" Perlmutter <Perlmutter@smwlaw.com>
Sent: Thursday, February 20, 2020 4:47 PM
To: Derek Cole <dcole@colehuber.com>
Cc: Andrew Miller <amiller@smwlaw.com>
Subject: RE: Placement of the LAVD Initiative on the ballot

Derek

As we discussed last week, I am writing on behalf of Save Mount Diablo to explain why we believe that the City Council can—and should—take prompt action to place the LAVD Initiative on the ballot pursuant to Judge Weil's May 31, 2019, Order ,and the writs issued by the Court in the Zeka and Oak Hill matters, respectively, on October 25, 2019 and January 9, 2020.

As an initial matter, we believe that the City's dismissal of its own appeals in these two cases obviates any automatic stay that might have otherwise been in effect pursuant to CCP section 916(a). The Supreme Court has consistently held that where multiple parties have a right to appeal a trial court judgment but only one party appeals, the trial court's judgment is only stayed "*in so far as it affects the appellant*, requires *him* to do something, or permits something to be done as to *him*." *Halsted v. First Savings Bank* (1916) 173 Cal. 605, 609 (emphasis in original). The appeal does not stay the execution of that portion of the judgment that is directed at the nonappealing party. *Id.; see also Kentfield v. Kentfield* (1935) 4 Cal.2d 585, 587 (same); Eisenberg, *Calfiornia Practice Guide, Civil Appeals and Writs* (The Rutter Group 2019) § 7:36 at p. 7-19 ("A stay pending appeal does *not* suspend enforcement of the judgment or order against *a party who did not appeal*") (emphasis in original)

Here, the City's dismissal of its own appeals puts it in the exact same place as a party that did not appeal in the first instance. Accordingly, we believe the City's obligations under the judgment and writ have not been stayed, and the City Council should accordingly comply with the writ. It is my understanding that City Council members have publicly stated their desire that the voters should have an opportunity to vote on the LAVD Initiative this November, and that this desire was a major factor in the City's decision to dismiss its appeals. Promptly placing the LAVD Initiative on the ballot would thus best effectuate the City's own position and would also fulfill the expectations of City voters.

If the City nonetheless believes that SMD's notices of appeal somehow prohibit the Council from doing so, we would ask that the City join SMD in requesting that Judge Weil issue an order directing that the appeal shall not operate as a stay pursuant to CCP section 1110b. As we discussed, this section provides that where an appeal has been taken, the trial court judge (or the court of appeal) "may direct that the appeal shall not operate as a stay of execution if its satisfied upon showing made by the petitioner that he will suffer irreparable damage . . . if the execution is stayed."

Given Judge Weil's prior statements on the record, and in particular his directive to Zeka and Oak Hill that they must provide a proposed judgment and writ notwithstanding the City's then-pending appeal, we believe that Judge Weil will readily find that Save Mount Diablo would be irreparably damaged if the LAVD Initiative is not placed on the ballot for the November 2020 election. As you will recall, the LAVD Initiative qualified for the placement on the ballot at the

November *2018* ballot. If it is not placed on the 2020 ballot, then that could mean that the voters would not have the opportunity to vote on it until 2022, which would constitute a four-year delay of the fundamental constitutional right to vote on a qualified initiative.

We understand that the Zeka and Oak Hill plaintiffs might theoretically have a right to oppose such a directive. But given that Judge Weil granted these plaintiffs the very relief they requested in their lawsuits, we do not think he would find any such opposition to have merit.

Nor do we believe that there is any practical or legal reason why the measure cannot be placed on the ballot while the appeal moves forward.

I understand that you will need to review this information and discuss it with your client.

In the meantime, I will try to give you call tomorrow afternoon to see if you have any questions.

Regards

Perl

Robert "Perl" Perlmutter
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102-4421
v: 415/552-7272 x248
f: 415/552-5816
www.smwlaw.com