

“A fundamental precept of this nation’s democratic electoral process is that the government may not ‘take sides’ in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country’s founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office....” *California Supreme Court, Stanson v. Mott, 1976*

Overview

In 2012, the City of Menlo Park adopted a “Specific Plan” which liberalized the zoning rules for properties located along El Camino Real and the business district of Santa Cruz Avenue. After adoption, the City received two large development proposals which together intend to build over 400,000 SF of office space along the City’s El Camino corridor. This raised concerns in the community that the large concentration of office would create large negative impacts, including significantly increased rush hour and cut through traffic while providing little or no benefit to Menlo Park residents. It was also felt that the proposals were not in keeping with the Specific Plan’s underlying vision of balanced, mixed-use development that included retail, services, hotels, *and* offices. In reaction to these proposals, a group of residents petitioned the City Council to modify the Specific Plan to ensure that development was in keeping with the Specific Plan’s Vision and Goals. When the City Council was unwilling to make these changes, the residents gathered sufficient signatures to force Council to bring the issue to the voters.

The Initiative (Measure M) closes loopholes in the Menlo Park’s 2012 Specific Plan and re-balances development to be more in line with the Specific Plan’s underlying vision and goals (<http://www.menlopark.org/183/El-Camino-Real-Downtown-Vision-Plan>). Measure M makes four primary changes to the Specific Plan:

1. Excludes private balconies, terraces and rooftops from counting toward a project’s open space requirement
2. Limits office development to 100,000 SF per project (only applies to 4 sites in the 130 acre Plan area)
3. Limits the total amount of office space within the Plan boundary to 240,820 SF
4. Limits total non-residential development within the Plan boundary to 474,000 SF

A key issue in the debate over Measure M is how much new office space is appropriate for downtown Menlo Park.

The City of Menlo Park has produced several pieces of information related to Measure M, including a report by an outside consultant (Lisa Wise Consultants), a webpage with “background” information on Measure M, and two articles in the city newsletter “Menlo Focus” that was mailed to all residents. **At issue is whether the information in the website and these documents is purely informational or crosses the line into advocacy using public funds and resources.**

Potential Legal Questions

1. Does the “Ballot Impact Report” by Lisa Wise Consulting meet the fairness, neutrality, and completeness standards set forth in California Codes §§ 9212, 8314, and 54964 and in *Stanson v. Mott*?
2. Was the City of Menlo Park authorized, per California code §9212 and §54964, to publish informational/background materials related to the Initiative/Measure M (on both its “Initiative” website and in the Menlo Focus newsletter)?
3. Does the City of Menlo Park’s information related to the Initiative/Measure M meet the fairness, neutrality, and completeness standards set forth in California Codes §§ 9212, 8314, and 54964 and in *Stanson v. Mott*?
4. Is the City of Menlo Park, by publishing information that advocates against Measure M, in violation of FPPC rules governing campaign finance?
5. Do public comments by City staff and Council Members constitute partisan advocacy against the Initiative?
6. Has the City of Menlo Park fully complied with public records requests related these issues as required by California code §6250?

Question 1

The accuracy, completeness, and impartiality of the Lisa Wise Consulting “Ballot Impact Report” (“LWC Report”) has been questioned on a number of occasions, including¹:

- Public comment at the July 15, 2014 City Council meeting
- Emails to City Council regarding the report
 - <http://tinyurl.com/kp94pbs>
 - <http://ccin2.menlopark.org/7837.html>
 - <http://ccin2.menlopark.org/8079.html>
- Detailed critique of the report submitted by Patti Fry, et.al on July 31, 2014 <http://ccin2.menlopark.org/7928.html>
- Detailed critique of the report’s traffic analysis by Tom Brohard and Assoc. submitted on August 7, 2014.

Despite these critiques, the City has failed to acknowledge any of the reports’ faults or deficiencies, made no revisions to the report, and continues to represent the report as an “independent”, “unbiased”, and “neutral” analysis of the Initiative’s impacts.

The report fails several requirements set forth in *Stanson* and election code:

- It is not a full and impartial disclosure of information: when the impact of the initiative is deemed negative, it’s highlighted; when positive, it’s ignored
- It does not consider all important points: the report ignores two large projects pending before the City; uses an incomplete financial analysis; uses a non-standard method of quantifying traffic impacts
- It is not an “accurate, fair, and impartial” presentation of facts: the report contains numerous errors of substance and methodology.

¹ Copies of all documents can be found via the web links or in the appendix

² “City newsletter criticized for bias against Measure M”, *The Almanac*, August 27th 2014

Question 2:

City staff, without authorization from the City Council, published information about the Initiative on the Menlo Park website and in the City newsletter.

<http://www.menlopark.org/859/Background>

<http://www.menlopark.org/ArchiveCenter/ViewFile/Item/1830>

Because this information was never presented at a public meeting, the public was never given an opportunity to review or comment on the information being distributed by the City. Spending money on information about a ballot measure must be "authorized". By not bringing this information before City Council for approval as a §9212 report, the City may be in violation of the law.

Question 3:

In August of 2014, the City of Menlo Park mailed the "Menlo Focus" newsletter to all residents (<http://www.menlopark.org/ArchiveCenter/ViewFile/Item/1830>). The newsletter contains two articles, both of which extoll the benefits of office development and the Stanford and Greenheart proposals. The City also maintains a website on the initiative with similar information: <http://www.menlopark.org/783/Overview-of-Proposed-Changes>. Numerous residents complained to the City about the newsletter: http://ccin2.menlopark.org/att-8475/Retraction_Demand_to_Menlo_Park.pdf;; <http://tinyurl.com/m5wv6rv> (Almanac News); <http://tinyurl.com/ppegajd> (Daily Post).

Menlo Park's Mayor, Ray Mueller, had this to say about the articles in the Menlo Focus newsletter:²

Mayor Ray Mueller was less than enthusiastic about the inclusion of Measure M in the latest issue. "I don't review its content prior to publication. I am told the aforementioned article is technically legal. That being said, I personally would have preferred that it not refer to Measure M," he commented. "It may unnecessarily create a question for some as to whether city resources are being spent for political purposes, and ammunition for others who would choose to criticize city staff."

Anyone reading this information will know that the City is opposed to Measure M. For example, an article in Menlo Focus states:

"office development generally has a positive fiscal impact on a community...increased property taxes helps a city to maintain and improve important community services, and would provide significant funds to the Menlo Park City School District, even though office developments do not increase enrollment."

One could make the exact same statement about other non-residential development - retail, restaurants, services, and hotels (most of which also generate significant sales and hotel taxes, something that office uses do not). Why did the City choose to focus only on

² "City newsletter criticized for bias against Measure M", *The Almanac*, August 27th 2014

office development? This statement appears to be a defense of the office dominated proposals for 500 and 1300 El Camino, the same projects that spurred Menlo Park residents to create Measure M.

Another example from the City's website:

"Rather than requiring more subjective "one size fits all" limits on office square footage, the Specific Plan's office FAR limit of one-half is calculated to help ensure that an active office development market does not crowd out other uses that may be desired (such as residential, retail, or hotel) over the long term. The Specific Plan FAR limits are clear and non-negotiable, encourage mixed-use development, and help both the community and developers know what to expect. *Imposing a more subjective, non-proportional limit may influence developers to shift their focus to housing, and move away from the more balanced development concepts that are envisioned in the Specific Plan.*" (emphasis added).

Measure M, which has no effect on housing, is about the balance of non-residential uses – retail, hotels, and services and office. Moreover, the Specific Plan, at full build-out, anticipates residential development to approximately double non-residential development in order to maintain a balanced jobs to housing ratio. This is the "balanced development envisioned in the Specific Plan", not developments that will only further exacerbate Menlo Park's jobs to housing imbalance.

The city's website section about the Measure's Fiscal Impacts represents office development as having a favorable financial impact, ignoring the conclusions of the LWC Report that excessive office development can result in a net negative financial impact on the city's General Fund. Their analysis was based on information in the Financial Impact Analysis ("FIA") created for the El Camino Real/Downtown Specific Plan.

This section implies that property taxes from office development are more favorable than more balanced development with less office whereas the same LWC Report states that property taxes from office development are about the same as from other types of development. It also implies that the two large proposed projects will be beneficial financially to the City. Entirely missing from this section is mention that the LWC Report and the City's FIA stressed that the financial viability of the Specific Plan depended on hotel development. The Specific Plan assumed that a hotel would be built on the Stanford site but the current proposal does not include it. The Stanford and Greenheart sites are the largest sites in the downtown area; the lack of a hotel in either project has significant implications to the City. Measure M's restrictions on office development could make it more likely that this sort of development – or revenue-generating retail - would be viewed more favorably by the developers.

Several other examples can be found where the City crosses the line and, under the guise of providing information, sells propaganda instead. A markup of one of the City's Initiative websites details many of these (<http://scribble.com/s/kG-6g>).

The City appears to be relying on a faulty interpretation of the Supreme Court's ruling in Vargas (see Citation section below). Vargas reaffirms that public agencies cannot take sides on ballot measures and that the information produced must "constitute an accurate, fair, and impartial presentation of relevant facts." In finding that the City of Salinas' reports, presentations, newsletters, and documents about a ballot measure were "purely informational", Vargas in no way lowered or changed the standard that the Court established in *Stanson v Mott*. Indeed, had Menlo Park limited itself to purely informational material about Measure M, as the Court found that the City of Salinas did, this issue would be moot.

Question 4:

If the City of Menlo Park used public funds to advocate against Measure M, it may be in violation of California campaign finance laws. In 1996, Sacramento County paid a \$10,000 fine to the FPPC for improper information it included in a utility insert. Menlo Park could be liable for a similar penalty.

Question 5:

City staff have made a number of public comments that cast aspersions on the Initiative. These include statements and quotes:

The 150-plus-page report by Lisa Wise Consulting, Inc. concludes that although the initiative wouldn't prevent construction, it could discourage growth in the El Camino Real/Downtown Specific Plan area, according to City Manager Alex McIntyre.

"One of the concerns is that it'll shut down the future of the city and it may have the impact of driving away businesses or steer businesses in another direction because the message will be, 'It's too hard to do business in Menlo Park,'" he said.

San Jose Mercury News, July 12, 2014

http://www.mercurynews.com/peninsula/ci_26135406/ballot-proposal-would-complicate-development-downtown-menlo-park

and

He [Menlo Park Business Development Manager Jim Cogan] said the question is how to mitigate the large loss of sales tax revenue in the mid-term. "We're really hoping downtown development can help bridge that gap. The (downtown/El Camino Real) specific plan is really a big part of our approach to that, by diversifying our tax base so we're not relying so heavily on one source."

Mr. Cogan said that with the proposed initiative to change the specific plan looking like it will be on the November election ballot, the outcome of the vote could reduce the potential investment in downtown.

"It is something we're concerned about," he said.

If the initiative, put forward by grassroots coalition Save Menlo, wins a majority of the vote, the city would have to look for other ways to diversify its tax base.

The Almanac, July 1, 2014

<http://www.almanacnews.com/news/2014/07/01/menlo-park-top-sales-tax-producer-leaving-city>

In the first article, City Manager Alex McIntyre shares his concern that the Initiative will “shut down the future of the City ... and drive away businesses...” He makes this bold statement even though the Lisa Wise report never concludes that the Initiative will “shut down the future of the City.” Mr. McIntyre’s remarks, which are obviously not neutral, were made before the City Council had reviewed or approved the Lisa Wise Ballot Impact report and before the public had an opportunity to review and comment on the report and its conclusions. In making these remarks, he ignores potential positive impacts of the Initiative (some of which can be found in the Lisa Wise report) and jumps to conclusions not supported by the report’s analysis. In particular, more office development than assumed in the Specific Plan has a negative impact on the City’s tax base. Measure M, by capping office development to the amount assumed in the Specific Plan, would help protect against that loss.

In the second article, Mr. Cogan states that the Initiative could “reduce potential investment in downtown”. The article also states, presumably another opinion of Mr. Cogan, that the Initiative’s passage would cause the City “to look for other ways to diversify it’s tax base.” Like Mr. McIntyre, Mr. Cogan’s remarks betray a bias against the Initiative. Mr. Cogan has repeatedly mentioned how “hot” Menlo Park’s retail market is, yet ignores this fact when lamenting the potential change from office to retail uses that would be incentivized should the Initiative pass.

In both articles, City staff make statements that could prejudice voters against the Initiative. Are they allowed to do so under California law?

Question 6:

On the 29th of August, I submitted a public records request to the City of Menlo Park (<http://tinyurl.com/nqw5z3f>) seeking documents related to information about Measure M published by the City in the Menlo Focus newsletter and on the City’s website; the Lisa Wise contract and report; and information relevant to questions 1-5 above. I received a reply on 23rd of September, well after the proscribed ten day response window (<http://tinyurl.com/kbtb8et>). There were NO substantive documents returned that were not already in the public domain. My reply on 25th of September details the failings of the City’s response. (<http://tinyurl.com/my51jyl>), including the City’s failure to produce relevant documents, include text messages in the search, and justify the omission of document drafts, The list of documents returned is here: <http://tinyurl.com/oy5ntqe>. To date, the City has not complied with my original Public Records Request or subsequent follow up requests (<http://tinyurl.com/mctj77q>).

The City appears to be negligent in its obligation to make public records available upon request as required by California code §6250. The public has a right to know how decisions by taxpayer funded staff are made. To date, the City of Menlo Park is withholding this information.

Citations

California Codes §9212 and §54964 allows public agencies to produce information pertaining to ballot measures for the purpose of helping voters make informed decisions. §54964c clearly states the rules that public agencies must follow when producing these materials:

(c) This section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

- (1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.
- (2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure (emphasis added).

The relevant legal ruling on the permissibility of public agencies providing information regarding ballot measures is the California Supreme Court decision in Stanson v. Mott, 551 P.2d 1 (Cal. 1976). The California Attorney General's office has a good summary Stanson and the use of public funds related to ballot measures: <http://oag.ca.gov/ethics/accessibile/misuse>.

It summarizes the Stanson ruling as it relates to ballot measures:

1. The Stanson Court also noted that if a state agency or department has authority to disseminate information relating to its activities, it may spend funds to provide the public with a fair presentation of relevant information.
2. The Court found that it would be contrary to the public interest to bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial and does not amount to improper campaign activity (emphasis added).
3. To be fair, a presentation must consider all important points and provide equal treatment to both sides of the issue (emphasis added).

In a subsequent ruling (Vargas v. City of Salinas, 2009), the California Supreme Court sided with the City of Salinas and found that the materials published by the City were purely informational and thus permitted. In doing so, the court re-affirmed the standards for impartiality, fairness, and completeness set forth in Stanson (1976) and Mines (1927). Specifically, the Court confirmed Stanson's tests that find unlawful the use of public funds to influence a ballot measure, un-weakened and unchanged, even when a Court is analyzing a city that had proceeded under §9212. The Court decides what is proper, not the city, and the use of §9212 in no way lessens the city's general legal obligation not to use public funds to influence a ballot measure. In siding with the City of Salinas, the Court in Vargas looked carefully and in detail at the City's actions and, at the end, found that such actions were "informational" and not "campaign materials". Reading carefully what the city did, the Court was correct. The city was providing information and did not slip over to advocacy or campaign. Had they done so, they would have been in violation of the standards established in Stanson.

Appendix

Approximate Timeline

2007-2009 – Visioning Phase of Downtown Specific Plan

2010 – Environmental Impact Report

June 2012 – Downtown Specific Plan (DTSP) approved by the Council

November 2013 – minor modifications to DTSP enacted by Council

February 2014 – SaveMenlo notifies City of its intent to gather signatures to amend the DTSP

March 2014 – City council requests a report on the Initiative’s impacts under CA Code §9212. Council authorizes up to \$150,000 for the report.

May 2014 – City contracts with Lisa Wise Consulting (LWC) to produce §9212 report on the Initiative

June 2014 – San Mateo County certifies that the number of signatures is sufficient to place Initiative on November ballot

July 10, 2014 – LWC report is made public:

<http://www.menlopark.org/DocumentCenter/View/4645>

July 15, 2014 – City Council accepts LWC report; votes to place Initiative on the November ballot

July 15 to present – Numerous errors and deficiencies in the LWC report are made known to the City; City takes no action to address these errors or deficiencies

July 2014 – City creates a web page with information about the Initiative:

<http://www.menlopark.org/859/Background>

August 6, 2014: Lack of neutrality of City’s Initiative information is questioned during Council public comment.

August 15, 2014 – Arguments for and against the Initiative are submitted; County designates Initiative as “Measure M”; “Against” argument cites LWC report as a reason to vote against the Initiative

August 2014 – “Menlo Focus” newsletter is published; contains two articles relevant to Measure M: “Measure to modify approved Downtown Plan on November Ballot” and “Sales Tax is a Revenue Source Forever Fitful and Forever Changing”. Newsletter to mailed to every household in Menlo Park.

August 2014 – residents object to City taking sides on Measure M:

<http://www.almanacnews.com/news/2014/08/26/menlo-park-city-newsletter-criticized-for-bias-against-measure-m>; <http://tinyurl.com/ppegajd> (Daily Post article)