

1 STEPHAN C. VOLKER (CSB #63093)
2 JOSHUA A.H. HARRIS (CSB #226898)
3 MARNIE E. RIDDLE (CSB #233732)
4 LAW OFFICES OF STEPHAN C. VOLKER
5 436 – 14th Street, Suite 1300
6 Oakland, CA 94612
7 TEL: 510/496-0600
8 FAX: 510/496-1366

9 Attorneys for Petitioners
10 CARL FRIBERG, ANNE WAGLEY, JIM SHARP
11 and DEAN METZGER

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF ALAMEDA

14 CARL FRIBERG, ANNE WAGLEY, JIM SHARP)
15 and DEAN METZGER,)

16 Petitioners/Plaintiffs,)

17 v.)

18 TOM BATES, in his official capacities as Mayor and)
19 Councilmember of the City Council of Berkeley,)
20 LINDA MAIO, in her official capacity as)
21 Councilmember of the City Council of Berkeley,)
22 DARRYL MOORE, in his official capacity as)
23 Councilmember of the City Council of Berkeley,)
24 MAXWELL ANDERSON, in his official capacity as)
25 Councilmember of the City Council of Berkeley,)
26 LAURIE CAPITELLI, in his official capacity as)
27 Councilmember of the City Council of Berkeley,)
28 GORDON WOZNIAK, in his official capacity as)
29 Councilmember of the City Council of Berkeley,)
30 CITY OF BERKELEY, a municipal corporation,)
31 CITY COUNCIL OF BERKELEY, PHIL)
32 KAMLARZ in his official capacity as City Manager)
33 of the City of Berkeley, MANUELA)
34 ALBUQUERQUE, in her official capacity as)
35 Attorney of the City of Berkeley, and DOES I-XX,)

36 Respondents/Defendants,)

37 and)

38 UNIVERSITY OF CALIFORNIA BERKELEY;)
39 REGENTS OF THE UNIVERSITY OF)
40 CALIFORNIA, and DOES XXI-XXX,)

41 Real Parties in Interest.)

Civ. No. RG 05230715

**PETITIONERS’
SUPPLEMENTAL BRIEF IN
OPPOSITION TO
RESPONDENTS’ AND REAL
PARTIES’ DEMURRER TO
VERIFIED PETITION FOR WRIT
OF MANDATE AND
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
ATTORNEY'S FEES**

Date: May 10, 2006
Time: 2:00 p.m.
Dept.: 518
Judge: Hon. Jo-Lynne Lee

Reservation No. 550048

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I. INTRODUCTION

Pursuant to this Court’s order, petitioners brief two recent appellate decisions: *108 Holdings v. City of Rohnert Park* (2006) 136 Cal.App.4th 186 (“*108 Holdings*”) and *Trancas v. City of Malibu*, 2006 DJDAR 3860, 2006 WL 802483 (Mar. 30, 2006) (“*Trancas*”). These rulings hold that a local agency may not “surrender its police power,” or otherwise “contract away its legislative and governmental functions.” *108 Holdings* at 194. Because respondents’ and real parties in interest’s (collectively, “respondents”) Settlement Agreement (“SA”) severely restricts the City’s right and duty to plan, assess, mitigate and control growth in its downtown area, it is unlawful. Therefore, respondents’ Demurrer to petitioners’ Amended Petition should be overruled.

II. DISCUSSION

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As detailed in petitioners’ Amended Petition at 3:15–6:18 and 21:4–24:28, the City’s SA (3 Adm. Rec. 509-529) improperly restricts the City’s police power. Among other improper constraints, the SA purports to:

- a. *relocate* the “Downtown Area” specific plan boundaries (Section II);
- b. *relinquish* the City’s authority to independently exercise its police power over downtown area land uses on a site-by-site basis (Section II.A.1);
- c. *subvert* the City’s CEQA Lead Agency duties by giving the University a *veto* over the “release of draft or final DAP or EIR” and “[a]ny mitigation measures included in the EIR” (Sections II.B.1; II.B.6);
- d. require the City’s DAP to *conform* to the University’s 2020 LRDP (Section II.A.5);
- e. *forbid* the City from adopting a DAP or EIR “which does not accommodate U.C. Berkeley development in a manner satisfactory to the Regents” (Section II.B.7);
- f. *divest* the City of its planning and environmental review independence by requiring that the University and the City “make process decisions jointly” with regard to the DAP and its EIR (Section II.B.4);
- g. *abrogate* the City’s duty to provide for adequate public participation, and to complete all necessary environmental studies, by placing a 48-month deadline on the City’s adoption of the DAP and certification of its EIR (Section II.B.2);
- h. *disable* the City from receiving additional monetary compensation from the University for services the City provides to the University “if changes in state law modify the monetary legal obligations of UC,” regardless “of any new obligation” (Section III.D);
- i. *surrender* the City’s legislative autonomy by preventing the City from imposing parking taxes on the University for such time as the University continues to fulfill its monetary obligations to the City under the Settlement Agreement (Section VI.B);
- j. *abjure* the City’s independent legislative and taxing powers by directing the City

1 Council to “promptly pass a resolution . . . to exempt UC Berkeley from the
2 imposition of the sewer fees adopted by the City Council on April 26, 2005”
(Section VI.C); and

- 3 k. *forbid* the City from pursuing “any challenges to any LRDP projects” and to the
4 University’s Southeast Quadrant Academic Commons so long as they conform to
5 the University’s 2020 LRDP and its EIR, regardless whether such projects are
6 lawful and regardless of their impact on the City (Sections VI.D and VI.E).

7 The SA is not simply an agreement to cooperate with the University; rather it *specifically*
8 *dictates* City actions and directs that the City’s “obligations under this Agreement shall be
9 specifically enforceable” where not coerced by other means. Section VII.F.

10 Under *108 Holdings* and *Trancas*, a city cannot settle litigation by signing a contract that
11 “amounts to a local entity’s ‘surrender,’ ‘abnegation,’ ‘divestment,’ ‘abridging,’ or ‘bargaining
12 away’ of its control of a police power or municipal function.” *108 Holdings* at 195.¹ Because
13 the SA here surrenders the City’s exercise of its police power in multiple, significant ways, the
14 agreement is unlawful under *108 Holdings* and *Trancas*, as shown below.

15 *Trancas*

16 In *Trancas*, the Court determined that the City of Malibu unlawfully surrendered its
17 police power by entering into a settlement agreement with a developer. *Trancas*, 2006 DJDAR
18 at 3862-63. The agreement exempted the developer from future zoning and density
19 requirements by granting a closed-door equivalent to a variance and development agreement for
20 the properties at issue. *Id.* The Court held that Malibu’s contractual exemptions improperly
21 attempted to make important municipal decisions that can only be legally accomplished through
22 a public legislative or administrative process:

23 This promise to abjure legislative zoning action was unlawful. . . . Such
24 departures from standard zoning . . . by law require administrative proceedings,
25 including public hearings . . . , followed by findings for which the instant density
26 exemption might not qualify. Both the substantive qualifications and the
27 procedural means for a variance discharge public interests. Circumvention of
28 them by contract is impermissible.

Id. at 3862-63, citations omitted. According to the Court, municipal litigation settlements
which attempt to decide important policy issues without public participation are “invalid and
unenforceable as contrary to public policy.” *Id.*, citing *Avco Community Developers, Inc. v.*
South Coast Regional Com. (1976) 17 Cal.3d 785, 800.

Likewise here, the City improperly adopted major policy decisions through the SA
without conducting the required legislative or administrative public hearings or issuing findings
supporting its decision. For example, the City relocated the “Downtown Area” planning

¹ *Id.*, citing *County Mobilehome Positive Action Com., Inc. v. County of San Diego* (1998)
62 Cal.App.4th 727, 738 and *Santa Margarita Area Residents Together v. San Luis Obispo*
County Bd. of Supervisors (2000) 84 Cal.App.4th 221, 233.

1 boundaries, and relinquished its authority to determine land uses therein on a site-by-site (rather
2 than “building envelope”) basis. Section II.A.1. This action could affect hundreds of individual
3 property owners and could decrease residential housing in and around downtown Berkeley. The
4 City’s closed-session decision to redefine and relocate the City’s “Downtown,” and to regulate
5 land use therein on an area-by-area rather than site-by-site basis, sidesteps the public process
6 needed to assess the impacts of these changes prior to a final decision.² The City’s
7 “circumvention of [these public processes] by contract is impermissible.”³ *Trancas* at 3863.

8 Similarly, the City surrendered its police power autonomy by granting the University a
9 veto over approval of the DAP and its EIR in contravention of the City’s exclusive lead agency
10 duty under CEQA to prepare and approve these key planning, environmental assessment and
11 mitigation documents independent from the University’s control. Sections II.A.5, II.B.1, II.B.4,
12 and II.B.6. Likewise, without any public process the SA immunized all future “LRDP projects”
13 and other University development from any future City litigation, exempted the University from
14 any future increases in parking taxes, and even required the City Council to *adopt a resolution* –
15 clearly a legislative act – repealing sewer fees previously imposed upon the University.
16 Sections VI.D and VI.E; Section VI.B. The SA thus goes far beyond the University’s
17 exemption from local land use controls by granting the University immunity from *any suit* by
18 the City over future projects – including CEQA litigation– and from *any future tax hikes*. *Id.*
19 The SA thereby grants the University a vast exemption from the City’s police power even
20 broader than the illegal zoning exemption in *Trancas*.

21 *Trancas* also addresses the ripeness of contractual constraints on municipal power to
22 judicial review. Respondents contend that the SA’s defects are not ripe for review because its
23 future implementation by the City is unpredictable. Dem. Memo. at 5:11-14, 10:9-24. But
24 *Trancas* rejected this defense, holding that the city there “has already made impermissible
25 promises and commitments,” the “adjudication of which is timely and appropriate.” *Trancas* at
26 3863.

27 As *Trancas* makes clear, “statutory procedures and protections of public involvement

28 ² Respondents’ contention that no decision has yet been made on the eventual boundaries
of the specific plan area fails to acknowledge the SA’s requirement that all “obligations under
[the SA] shall be specifically enforceable,” and thus the “Downtown Area” boundaries have been
impermissibly fixed by contract. Section VII.F.

³ Additionally, the City committed itself to establishing “development envelopes and
design guidelines by area or subarea, not site-by-site.” Section II.A.1. As an enforceable
obligation, the City will have to prepare the DAP through the use of area-wide envelopes rather
than on a site-by-site basis, a significant policy decision that should have been the subject of
public review and comment.

1 cannot be ignored, and established regulatory regimes such as zoning may not be deviated from
2 solely on bilateral agreement.” *Id.* at 3865.

3 108 Holdings

4 In *108 Holdings*, the Court upheld a settlement agreement between a community group
and the City of Rohnert Park in which the City committed to:

- 5 1. “interpret and apply its General Plan in a manner specified in” the settlement
6 agreement; and
- 7 2. “apply to LAFCO for an amendment of its sphere of influence.”

8 *108 Holdings* at 191. Thereafter, the planning commission and city council held public hearings
9 to consider altering the sphere of influence before the council adopted the amendment. *Id.*

10 The *108 Holdings* Court determined that the first component of the agreement did not
11 “limit the City’s ability to alter or amend its General Plan should future events so require.” *Id.*
12 at 196. Instead, the agreement simply ensures that the current General Plan will be interpreted
13 in a certain manner, and thus does not impermissibly limit municipal powers. *Id.* at 191.

14 Here, by contrast, the SA went far beyond ensuring that current provisions of the
15 General Plan will be interpreted in a certain manner. For example, the SA gave the University
16 *veto* power over the “draft [and] final DAP or EIR,” and “[a]ny mitigation measures included in
17 the EIR.”⁴ Sections II.B.1; II.B.6. Similarly, the SA requires the University and the City to
18 “make process decisions jointly” with regard to the DAP and its EIR, thereby surrendering the
19 City’s independence over the procedure and substance of writing the DAP. Section II.B.4.
20 Thus, where Rohnert Park “preserve[d] its authority to legislate in the future,” Berkeley has
21 *forfeited* legislative control over both the adoption process for, and substance of, the future
22 DAP.

23 Additionally, *108 Holdings* determined that the settlement did not improperly commit
24 the City to seeking an amendment of its sphere of influence, and the City thereafter met all
25 requirements for adopting that amendment. *Id.* at 198-199. The Court held that a city can
26 appropriately promise to *seek* a change in planning policy in a settlement agreement; it cannot,
27

28 ⁴ Importantly, *108 Holdings* specifically distinguished Rohnert Park’s agreement with the
contract disputed in *Alameda County Land Use Assn v. City of Hayward* (1995) 38 Cal.App.4th
1716, 1719-1720. In *Alameda*, the illegal contract provision amounted to “an effective *veto*
over” general plan amendments. *108 Holdings* at 196, emphasis added. In contrast, the
agreement in *108 Holdings* did not grant anyone “veto power over future General Plan
amendments,” and thus was legal. *108 Holdings* at 197. The instant case falls squarely *within*
the *Alameda* line of authority, which outlaws the creation of veto power over critical City
decisionmaking processes, and *outside* of *108 Holdings*, wherein no future veto power was
granted to anyone.

1 however, *change* policy without providing the public an opportunity to review and comment.
2 *Id.* at 198-199. There, the city properly promised to seek a change in boundaries and then
3 followed the correct boundary change procedures.

4 Here, Berkeley irrevocably changed significant City policies, by altering the Downtown
5 Plan boundary, discarding the area’s previous site-by-site land use regulation, surrendering
6 procedural and substantive control over the DAP and its EIR, repealing the City’s previous
7 sewer fee, foregoing any future parking fees, and forswearing any future litigation challenging
8 future University projects, *all without going through the proper public processes*. Berkeley
9 sharply constrained its future exercise of its police and taxing powers – and even promised to
10 legislatively repeal a previous tax – *without once holding a public meeting*.⁵ By adopting such
11 far-reaching restrictions on its police powers behind closed doors, Berkeley failed to do what
12 Rohnert Park successfully accomplished in its settlement agreement – settle the litigation
13 without illegally bargaining away its police power and vital municipal functions.

14 Unlike Berkeley, Rohnert Park took all the illegal provisions out of the final settlement
15 agreement. *108 Holdings* at 195, n. 4. Because Berkeley failed to do so, its SA is invalid.

16 **III. CONCLUSION**

17 For the foregoing reasons, respondents’ Demurrer should be overruled.

18 Dated: April 16, 2006

19 Respectfully submitted,

20 _____
21 STEPHAN C. VOLKER
22 Attorney for Petitioners Carl Friberg, Anne
23 Wagley, Jim Sharp and Dean Metzger

24 _____
25
26 ⁵ Berkeley’s failure to conduct proper public review eliminated any opportunity for its
27 citizens to voice the concerns raised in this case. Berkeley could have benefitted from a public
28 discourse prior to signing the SA to identify and correct unlawful surrenders of its police power
such as giving the University veto power over the DAP and its EIR.

