Filed 9/30/08; mod. with change of judg. 10/14/08; pub. order 11/6/08 (see end of opn for mod. & order)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

PENINSULA GUARDIANS, INC., Plaintiff and Appellant, v. PENINSULA HEALTH CARE DISTRICT et al., Defendants and Respondents.	A118303, A118679 (San Mateo County Super. Ct. No. CIV 456563)

Plaintiff Peninsula Guardians, Inc. (plaintiff), an incorporated public interest group, filed suit against defendants Peninsula Health Care District (the District) and Mills-Peninsula Heath Service (MPHS) alleging: (1) the District exceeded its powers under Health and Safety Code section 32126 (section 32126) by negotiating a 50-year ground lease with MPHS so that MPHS could build a new hospital on property owned by the District; and, (2) the District made illegal campaign expenditures under Government Code section 54964 (section 54964) in connection with a special election held in order to secure voter approval for the hospital project.

Plaintiff's appeal follows the trial court's dismissal of the complaint after sustaining defendants' demurrers on plaintiff's section 32126 claims, granting summary judgment on plaintiff's remaining section 54964 claim against the District, and denying Plaintiff's motion for relief from summary judgment under Code of Civil Procedure section 473 (section 473). We affirm the trial court's orders sustaining defendants' demurrers on the section 32126 claims and granting summary judgment on the section

54964 claim. However, we reverse the trial court's section 473 ruling, vacate the judgment and remand for plaintiff to amend its complaint in the manner described herein.

BACKGROUND

A. Pre-Litigation Phase

In 1985, the District and MPHS each owned an acute care hospital serving residents of the District. Seeking to improve both services and efficiencies, the District and MPHS agreed to merge the operations of the two hospitals. As part of that agreement, the District leased its existing hospital facility to MPHS in 1985, with the lease to expire in January 2015 and full fee ownership and control of the existing hospital to revert to the District at that time.

During the term of the lease on the existing hospital, the State of California adopted strict seismic standards for acute care hospitals. Implementation of the seismic standards meant that the existing hospital would require substantial modifications. Based on engineering studies, the District and MPHS concluded that compliance with the seismic standards would be better achieved by the construction of a new hospital facility rather than a retrofit of the existing facility. To this end, the parties entered a Restructured Relationship Pre-Closing Agreement (Pre-Closing Agreement), under which MPHS would develop, construct, and operate a new general, acute-care hospital on roughly 21 acres of land leased from the District as owner of the property.

The Pre-Closing Agreement was incorporated in a series of interrelated written agreements, collectively termed the "Definitive Agreements." The Pre-Closing Agreement itself governed the relationship between the District and MPHS during the interim between the time the parties actually execute the Definitive Agreements and the closing date after voter approval. It covered such matters as the completion and execution of the Definitive Agreements, the parties' obligations regarding the election and securing voter approval for the proposal, and the parties' obligations regarding

financing and the existing lease prior to the specified closing date. Key here among the Definitive Agreements are the Master Agreement and the Ground Lease.[1]

The Master Agreement contains the general terms that govern the relationship between the parties and coordinates all the other agreements where provisions overlap. The Master Agreement also sets forth the parties' rights and obligations regarding the operations of the new hospital and provisions concerning the development and future uses of the new hospital. Under the terms of the Master Agreement, MPHS undertook to design, finance, and build the new hospital, demolish the existing hospital and return the site to the District, all at no cost to the District. It provides that MPHS shall own and operate the hospital during the term of the Ground Lease.

The Ground Lease sets forth the contractual terms governing a 50-year lease of the District's land to MPHS for the purpose of building and operating the new hospital facility. The term of the lease commences when MPHS begins to operate the new hospital (Start Service Date) and may be extended for an additional twenty-five year period upon MPHS's request and the District's written consent. During the term of the Ground Lease, MPHS will pay annual rent to the District in the amount of $1.5 million, adjusted for inflation every three years. The Ground Lease further provides that MPHS shall use the premises only "for the purpose of maintaining and operating a general acute-care hospital and performing such other healthcare-related services in accordance with the Master Agreement." It also specifies that during the term of the lease and any extension thereto, MPHS will hold ownership to the new hospital facility and associated improvements. Also, the Ground Lease provides that upon expiration of the lease term the new hospital automatically becomes the property of the District and the District must

[1] Also included in the Definitive Agreements are the Construction Ground Lease and the Construction Agreement. The Construction Agreement only covers the construction phase, governing such matters as indemnity insurance during construction, default provisions, and provisions for termination. The Construction Ground Lease essentially coordinates the ongoing lease of the existing hospital premises with lease of the ground necessary for the construction of the new facility.

compensate MPHS at book value for certain "Post-Term Assets" as specified in the Ground Lease.

Under the terms of the Pre-Closing Agreement, the District was obligated to hold an election on a ballot measure asking the voters to approve the District's entry into the Master Agreement with MPHS. The Pre-Closing Agreement stated: "Both parties, at their own expense and within the limitations and parameters imposed by any law . . . that governs the parties' respective political activities, . . . shall reasonably support the Ballot Measure and use reasonable efforts to obtain Voter Approval."

Pursuant to the terms of the Pre-Closing Agreement, a special election was scheduled on a ballot measure (Measure V) to allow voters the opportunity to accept or reject the District's entry into the Master Agreement. The District devoted its six-page Summer 2006 newsletter to Measure V. The newsletter states:

"Dear District Resident, [¶] The [District] Board is proud to announce that after many years of study and planning, we are ready to present our agreement to build a new community hospital to the District voters in a special mail-in ballot election this August. [¶] Last fall, the District Board unanimously approved an agreement with [MPHS], the current operator of Peninsula Medical Center, to build a new $488 million modern medical campus on District land with no new taxes. As part of this new lease, MPHS will pay $1.5 million a year to the District in rent for the use of that land for the 50-year term of the lease, after which time the hospital will be transferred back to the District. The District will reimburse MPHS with the book value of the new hospital, a substantial discount, at the time of this transfer. [¶] Because the current hospital does not meet the newly adopted, state-mandated seismic safety requirements, which must be met by 2013, the District Board is eager to present this agreement to the District voters for approval in order to avoid further cost escalation and to keep construction on budget and on schedule. If the new seismic standards are not met by the deadline and a new medical facility is not built, the Peninsula Medical Center would be forced to shut down, greatly limiting access to quality health care in our community. [¶] We would like to thank all of you who took the time to attend our special Board meetings which were held throughout the District

and to those of you who provided feedback on the draft agreement this past fall. [¶] The negotiations have been extensive and with your input and participation, we have negotiated the best possible agreement for the District. We will get a new hospital, and a framework for providing for the health care needs of the people of the District for generations to come."

The remainder of the Summer 2006 newsletter devotes sections to various aspects of Measure V, including the details of the Master Agreement (p. 2); the construction timeline and the hospital's expected completion in early 2010 (p. 3); the reason the District needs a new hospital, viz., the new seismic requirements for acute care medical facilities (p. 4); how the mail-in ballot works, including when voters should expect to receive their mail-in ballots (p. 6); and the "new hospital for the next century," setting out the features and facilities included in the new hospital campus (p. 5).

During the run up to the election, the District sent three additional postcard-sized mailers to voters concerning Measure V. One is headed "What is Measure V?" It explains that the District and MPHS have reached an agreement for the construction of a new hospital on District land, and that the current hospital will be forced to close down if it does not comply with new seismic standards. Under the subheading, "Measure V Will Ensure" the mailer lists four bullet points on the key terms of the agreement struck between the District and MPHS. The four points listed are that MPHS will build a new hospital meeting seismic standards with no new taxes; the District will lease the site for the hospital to MPHS at rent of $1.5 million per year for the 50-year term; the District "will improve its oversight over hospital operations with its required approval of the removal of any core services"; and the District will have the option to acquire the hospital at the end of the lease at book value.

A second mailer is headed "How the Mail-In Ballot Works." It tells voters there will be no polling places and that once voters receive their ballots in the mail they should fill them in and return them by August 29, 2006, either by mail or to the 24-hour drop-box outside the election office. It also restates the four bullet points listed in the first mailer. A third mailer is headed "Don't Forget to Vote." It too reminds voters that

ballots must be returned by August 29, 2006, and restates the four bullet points. On August 29, 2006, Measure V was approved with 92.82% of the votes cast in favor of the measure.

B. Litigation Phase

The operative pleading for purposes of this appeal is plaintiff's Second Amended Complaint (complaint) filed on October 2, 2006. Plaintiff attached as exhibits to the complaint the Pre-Closing Agreement, the Master Agreement, the Ground Lease, the Construction Agreement, the Construction Ground Lease, as well as the District's summer newsletter and pre-election postcard mailers. The complaint alleged in relevant part that "through the Definitive Agreements, the District seeks to accomplish certain . . . leases that are not authorized by law. The Definitive Agreements involve a lease of a hospital for a term exceeding 30 years." The complaint further alleged: "In an effort to promote passage of Measure V, the District has used public funds to create and mail a series of fliers selectively highlighting beneficial features of the proposed hospital development and encouraging voters to support the Measure."

Based on these and other allegations, plaintiff asserted five causes of action. Only the first, second and fifth causes of action concern us here.[2] In the first cause of action for injunctive relief, plaintiff asserts the 50-year lease granted by the District to MPHS violated section 32126 and sought injunctive relief barring enforcement of the Definitive Agreements. The second cause of action for declaratory relief also asserts a violation of section 32126 and sought a judicial declaration that the District's hospital lease agreement with MPHS is invalid. In a fifth cause of action against the District only, plaintiff sought a declaratory ruling that the District "impermissibly expended public funds to engage in vigorous advocacy, urging voters to pass Measure V, in violation of section 54964 [subdivision] (a)."

---

[2] Plaintiff did not contest defendants' demurrers to its third and fourth causes of action.

Both the District and MPHS demurred to all causes of action asserted in the complaint. They demurred to plaintiff's first and second causes of action on the basis section 32126 does not apply to a ground lease for district land. Additionally, the District demurred to plaintiff's fifth cause of action under section 54964 because the "mailings were accurate, fair and impartial . . . [and therefore] fall within the safe haven of section 54964(c) of the Government Code."

The trial court's "Amended Order on Demurrers to Second Amended Petition and Complaint" was filed on March 26, 2007.[3] In its order, the trial court found: "The terms of the Ground Lease do not violate Section 32126(a). The District does not own the new hospital; the new hospital will be built and owned by [MPHS]. The District is expressly only leasing out the *land*. The District does not own the new hospital, the District is not constructing the new hospital. The agreements are unambiguous that this new hospital is *not* a "hospital acquired or constructed" by [the] District. Thus the time limitations of section 32126(a) do not apply to this transaction." As pertinent here, the trial court sustained the District's and MPHS's demurrers to the first and second causes of action under section 32126 without leave to amend. In its order, the trial court also overruled without comment the District's demurrer to plaintiff's fifth cause of action under Section 54964.[4]

On or about March 16, 2007, the District filed its Notice of Motion and Motion for Summary Judgment on plaintiff's fifth cause of action under section 54964. The District

---

[3] The trial court's initial order on demurrers to the second amended complaint was filed on February 6, 2007. The initial order does not differ from the amended order substantively in terms of the legal analysis and rulings therein. However, in the initial order the trial court sustained MPHS's demurrer to the first and second causes of action but omitted to grant the District's demurrer on the same causes of action.

[4] At the hearing on demurrers held on November 6, 2006, counsel for the District urged the court to grant the demurrer on the fifth cause of action. Counsel argued that its mailers did not violate Section 54964 because the statute only prohibits an expenditure which "expressly advocates—this is the word in the statute—a yes on V. And the mailer doesn't expressly advocate Yes on V. . . . It has to say 'we want you to vote yes on V' or it is not subject to the remainder of the statute."

argued that it was entitled to summary judgment because its election mailers did not "*expressly advocate* the approval or rejection of a clearly identified ballot measure" and therefore did not violate section 54964. Plaintiff opposed summary judgment on two grounds. First, plaintiff argued that under *Stanson v. Mott*,[5] section 54964, subdivision (a) prohibits not only the expenditure of funds for express advocacy but also for communications which, based on their style, tenor and timing, unambiguously urge a particular result in an election. Second, plaintiff contended that in expending funds for the election mailers the District violated *Stanson* and section 54964, subdivision (c), which provides that the expenditure of funds for informational purposes is not prohibited if 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."

A hearing was held on the District's summary judgment motion before Judge Freeman on May 2, 2007, at the conclusion of which the trial court adopted its tentative ruling and granted summary judgment in favor of the District. In its order filed on

---

[5] *Stanson v. Mott* (1976) 17 Cal.3d 206, 209-210 (*Stanson*). In *Stanson*, the Supreme Court reversed a trial court's decision to sustain defendant's demurrer without leave to amend in a suit by a taxpayer alleging that the director of the Department of Parks and Recreation (Department) had illegally authorized the expenditure of departmental funds to promote the passage of a bond issue to acquire more land for state parks. (*Stanson, supra,* 17 Cal.3d at p. 209.) Due to the "importance of governmental impartiality in electoral matters[,]" the Court concluded that in the absence of "explicit legislative authorization," the Department could not expend "public funds to campaign for the passage of the bond issue." (*Id.* at pp. 219-220.) Although the Department could not "spend funds for campaign purposes," the Court said it could "disseminate information to the public" in an *informational* rather than a *promotional* role as long as it provided "a 'fair presentation' of relevant information relating to a park bond issue on which the agency has labored." (*Id.* at pp. 220-221.) Noting, however, that "the line between unauthorized campaign expenditures and authorized informational activities is not [always] clear[,]" the Supreme Court stated that "the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of *such factors as the style, tenor and timing of the publication*; no hard and fast rule governs every case." (*Id.* at p. 222 [italics added].)

May 25, 2007, the trial court ruled that only expenditures involving "express exhortations to vote for or against a measure" are prohibited under section 54964 and concluded none of the four mailers "contain that prohibited language and thus none is prohibited by section 54964(a)." Also, the trial court rejected plaintiff's reliance on section 54964, subdivision (c); it stated: "The court finds that subsection (c) operates as a permissive section, akin to a safe harbor for public agencies. The court does not read into section 54964(c) that only materials that are deemed to be 'accurate, fair and impartial' are allowed to the exclusion of all other materials. The Legislature could have written that 'Only materials that are fair are allowed.' It did not do so, choosing instead to state that 'This section does not prohibit . . . .' " Regarding plaintiff's reliance on *Stanson, supra,* 17 Cal.3d 206, the trial court stated: "Finally, the court finds that Gov[ernment] Code sec[tion] 54964 does not incorporate the holding in *Stanson v. Mott, supra* and thus does not require the *Stanson* analysis be applied to a determination of what is prohibited and what is permitted by that statute. The court finds that sec[tion] 54964 left a *gray area* of activity that may remain susceptible to the *Stanson* analysis but that the pleadings do not allege that theory of liability against District."

This "gray area" was the subject of some discussion at the summary judgment hearing on May 2, 2007. Counsel for the District opined that "the question of whether there's a gray area left [under *Stanson*] after the Legislature has enacted 54964 is not something that was before the court with respect to this motion" because plaintiff had not alleged a *Stanson* cause of action. Accordingly, counsel for the District asked the trial court to take the "gray area" language out of the tentative ruling. The court declined and adopted the tentative ruling. However, the court stated: "I am not ruling that *Stanson* has continuing viability. I am ruling that it wasn't alleged [] in this cause of action for dec[laratory] relief. And, therefore, I can't rule on the viability or applicability of *Stanson* to these four mailers." Plaintiff's counsel then verbally requested 30 days to amend the complaint on the grounds that the court had recognized "the possibility of a gray-zone claim [under *Stanson*]." The court replied: "The problem you have is you

have to bring a 473(B) motion, because I am granting summary judgment." On May 25, 2007, judgment was entered that plaintiff take nothing by way of its complaint.

On June 12, 2007, plaintiff filed its motion for relief from judgment pursuant to section 473, subdivision (b), and for leave to file a third amended complaint pursuant to section 473, subdivision (a). To this motion plaintiff attached a proposed third amended complaint that included a cause of action for declaratory relief on the grounds that the District's election expenditures violate *Stanson*'s prohibition on the use of public funds for partisan campaigning. On or about July 25, 2007, Judge Miram in the Law and Motion Department issued a tentative ruling stating: "DENIED. There is no basis for relief absent filing a request for reconsideration of Judge Freeman's Summary Judgment order. Such Motion, if brought, should be heard by Judge Freeman." Plaintiff's counsel appeared before Judge Miram at a hearing on July 25, 2007, and argued that "[o]n the merits . . . cause to amend the complaint under 473(b) and 473(a) has been presented. The whole issue is whether [*Stanson*] survives 54964 or not." The trial court rejected plaintiff's argument and adopted its tentative ruling. Plaintiff filed a timely notice of appeal on July 27, 2007.

DISCUSSION

A. Section 32126 Claims

1. Applicable Standards

The trial court sustained the District's and MPHS's demurrers to plaintiff's section 32126 claims without leave to amend. The appropriate standard of review of that ruling is as follows: "When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. (Citation.) Courts must also consider judicially noticed matters. (Citation.) In addition, we give the complaint a reasonable interpretation, and read it in context. (Citation.) If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must

decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (Citation.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (Citation.) The plaintiff has the burden of proving that an amendment would cure the defect. (Citation.)" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The relevant statutory language governing the issue of whether plaintiff's complaint states facts sufficient to state a cause of action under section 32126 is as follows: "The board of directors may provide for the *operation and maintenance through tenants* of the whole or any part *of any hospital acquired or constructed* by it pursuant to this division, and for that purpose may enter into any lease agreement that it believes will best serve the interest of the district. . . . *No lease for the operation of an entire hospital shall run for a term in excess of 30 years*. No lease for the operation of less than an entire hospital shall run for a term in excess of 10 years." (Health & Saf. Code, § 32126, subd. (a) [italics added].)

Based on competing interpretations of the statutory language, the parties dispute whether the District's Ground Lease with MPHS is subject to the statute's 30-year lease restriction. Accordingly, we first examine the statutory language to determine whether its meaning is plain or the statute is ambiguous. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818 [stating that under "well-established principles" of statutory construction, "[i]f the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls"].) We will then address the parties' competing interpretations to determine whether plaintiff can plead a meritorious claim consistent with our own interpretation of the statute.

Section 32126 allows a Board of Directors to "provide for the operation and maintenance through tenants of the whole or any part of any hospital acquired or constructed by it. . . ." (§ 32126, subd. (a).) "[F]or that purpose[,] [the District] may enter into any lease agreement that it believes will best serve the interest of the district." (*Ibid.*) Further, the length of any such lease agreement is determined by whether the

Board chooses to delegate the operation and maintenance of its hospital to a tenant in whole or in part: If the entire operation and maintenance of its hospital is delegated to a tenant, then the maximum term of the lease the Board may enter into is 30 years, as reflected in the statutory language, "No lease for the operation of an entire hospital shall run for a term in excess of 30 years."

On their face, these provisions clearly and unambiguously authorize a District Board to enter a specific type of lease—one that provides (1) for the operation and maintenance through tenants of a hospital (2) acquired or constructed by the District. The statute also places a clear and unambiguous restriction on the power of the Board to enter such a lease—"No lease for the operation of an entire hospital shall run for a term in excess of 30 years." The plain language of this lease restriction, however, must be construed "*in the context of the entire statute* and the statutory scheme of which it is a part[,] [giving] 'significance . . . to every word, phrase, sentence and part of an act in pursuance of the legislative purpose' [and construing] 'words . . . in context, keeping in mind the nature and obvious purpose of the statute where they appear.' " (*Santa Clara Valley Transp. Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 359-360 [brackets and citations omitted]; *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582 ["We do not examine [] [statutory] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment."].)

Applying these principles of statutory construction here, the Legislature's use of "no lease" in the lease restriction set forth in section 32126, subdivision (a) obviously relates to "the operation of an entire hospital" because the complete wording of the lease restriction reads as follows: "[*No lease*] for [*the operation of an entire hospital shall*] run for a term in excess of 30 years." When the entire lease limitation is itself considered in the context of the language of the subdivision as a whole, it is even clearer that the phrase "for the operation of a hospital" in the lease restriction relates back to earlier language that empowers a Board to provide for the "*operation and maintenance through tenants of the whole or any part of any hospital* acquired or constructed by it pursuant to this

division, and for that purpose [to] enter into *any lease agreement* that it believes will best serve the interest of the district." (Health & Saf. Code, § 32126, subd. (a) [italics added].) In short, a contextual analysis of the language of the statute makes clear that the lease restriction only applies if the predicate requirements of the statute are met — a Board enters a lease (1) for the operation and maintenance through tenants of a hospital (2) acquired or constructed by the District.

In sum, when all the language of the statute is given full effect, construed as a whole and considered in context, it is clear that the Legislature intended to restrict the power of a Board to enter a lease in excess of 30 years where two predicate requirements are met, i.e., when a Board enters a lease providing for (1) the entire operation and maintenance through tenants of a hospital (2) acquired or constructed by the District.

2. Analysis

Plaintiff first contends that section 32126's lease restriction applies to *any* lease entered into by the District. Such a crimped interpretation does not comport with the plain meaning of the "no lease" provision when that provision, as explained above, is considered in the context of the section as a whole. Thus, we reject plaintiff's attempt to manipulate the "no lease" language to extend the reach of the 30-year lease limitation in section 32126 to *any* lease executed by the Board.

Plaintiff contends that even if we conclude the statute mandates the existence of predicate requirements, the operative complaint alleges facts sufficient to establish such requirements and therefore the trial court erred by dismissing its claim under section 32126. In support of its fact based argument, plaintiff asserts the Definitive Agreements as a whole establish that the Ground Lease involves a lease for the operation and maintenance of a hospital. Additionally, plaintiff asserts the Ground Lease involves a hospital "acquired" by the District because it provides the District will "acquire" the hospital at the end of the lease at book value. Upon testing the allegations in the complaint against the actual provisions set forth in the Definite Agreements, however, we conclude the allegations fail to establish that the Ground Lease is one involving the

operation and maintenance by a tenant of a hospital constructed or acquired by the District.

In the complaint, plaintiff alleges the Pre-Closing Agreement outlined the terms of an agreement between the District and MPHS to settle then-existing litigation, transfer certain properties, build a "state-of-the-art" hospital facility, and enter into a 50-year lease agreement. The terms of this agreement are embodied in the Definitive Agreements, including the Master Agreement and the Ground Lease. Plaintiff further alleges that if the Master Agreement is approved by the voters the "District is to lease the operation of its hospital for the next 50 plus years." Noting the section 32126's lease restriction, plaintiff then alleges that "the Definitive Agreements implementing Measure V call for a lease that shall run for a term of over 50 years. . . ." The actual terms of the Definitive Agreements, however, refute plaintiff's assertion that the Definitive Agreements involve a 50-year lease for the operation and maintenance of a hospital acquired or constructed by the District.

First, the express terms of the Ground Lease demonstrate that it is *not* a lease for the operation or maintenance of a hospital. The Ground Lease provides that it does not come into effect until the Start Service Date under the Master Agreement, i.e., not until MPHS has completed the construction and begins operation of the new hospital facility. The Ground Lease further provides that, upon the Start Service Date, the District will lease the "Premises" to MPHS. The "Premises" are a certain portion of real property owned by the District in the City of Burlingame which includes the site of the existing hospital grounds. A legal description of the Premises in metes and bounds is included in the Ground Lease, as well as a diagram showing the Premises as comprising 20.98 acres. Also, in its definition of the Premises, the Ground Lease specifically *excludes* improvements. In short, the terms of the Ground Lease demonstrate that it provides for the lease of District *land* to MPHS, not for the lease of a District hospital to be operated and maintained by a tenant.

Second, the Definitive Agreements demonstrate that the Ground Lease does not involve a hospital "acquired or constructed" by the District. The Master Agreement

states that MPHS, *not the District*, "will design and build" a new general acute care hospital on roughly 21 acres of land leased from the District. It further provides that MPHS shall build the new hospital "in conformity with Seismic Standards . . . at no cost to the District." Moreover, the Master Agreement specifies that during the term of the Ground Lease, "*MPHS shall own and operate*" the new facility. The Construction Agreement, consistent with the Master Agreement, also states that "MPHS will design and build" the new facility. It further provides that MPHS will demolish the existing hospital at its own expense and indemnify the District from all claims arising from *MPHS's construction of the new facility* and demolition of the existing hospital. Thus, the definitive agreements, when read as a whole or individually, do not support plaintiff's contention that the District leased a hospital acquired or constructed by it. On the contrary, the terms of the agreement establish that MPHS will construct the new facility and will "acquire" or own it for the 50-year duration of the Ground Lease.[6]

---

[6] Plaintiff raises two additional contentions for the first time in its reply brief. First, plaintiff contends the District "constructed" a hospital merely because the District is constituted pursuant to, and exercises its powers under, the Local Healthcare District Law (Health & Saf. Code, §§ 32000 et seq.). Second, plaintiff contends it must be conclusively presumed the Definitive Agreements pertain to a lease for the operation and maintenance of a hospital acquired or constructed by the District because the District submitted the project to the voters. Plaintiff bases this conclusive presumption on the fact that section 32121 *does not* require voter approval for a lease of the District's real property whereas section 32126 *does require* voter approval for the operation of 50% or more of a District hospital.

Plaintiff offers no explanation why these contentions were not presented earlier in its opening brief. Because arguments raised for the first time in the reply brief are considered untimely and may be disregarded by the reviewing court (see, e.g., *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn.10), we deem these contentions forfeited. (See *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn.3 ["Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before"]; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [noting that "[t]he California Supreme Court long ago expressed its hostility to the practice of raising new issues in an appellate reply brief"].)

Even if considered on the merits, the contentions are unavailing. On the first contention, plaintiff erroneously attributes controlling significance to the phrase

Plaintiff also contends that the District acquired and constructed a hospital within the meaning of section 32126 because upon termination of the Ground Lease the ownership of all improvements automatically become the property of the District. According to plaintiff, the District's *future* property interest in the new facility means the Ground Lease is *presently* subject to section 32126's lease restriction. However, we have already explained that the statute's lease restriction is not triggered unless and until certain predicate requirements are met, viz., the lease must involve "the operation and maintenance through tenants of . . . any hospital acquired or constructed" by the District. (Health & Saf. Code, § 32126, subd. (a).) At the point the Ground Lease expires the new hospital facility will be "acquired" by the District, but at that point there is no lease for the operation of a hospital by a tenant, only sole ownership of the hospital by the District. In short, the hospital's reversionary interest in a hospital constructed and acquired by MPHS does not trigger section 32126's 30-year lease restriction.

In sum, under the plain language of the statute, the lease restriction in section 32126 does not apply unless certain predicate requirements are present—viz., the lease involves the operation and maintenance through tenants of a hospital acquired or constructed by a District Health Authority.[7] Our interpretation is consistent with the statute's purpose of providing built-in oversight to the operations of District Health Authorities, an oversight which precludes any lease of publicly-funded medical facilities

---

"pursuant to this division" and ignores preceding language that the District's leasing powers apply specifically to "any hospital acquired or constructed" by the District. (See Health & Saf. Code, § 32126, subd. (a) [lease limitation applies to "*any hospital acquired or constructed* by [the District] pursuant to this division." [italics added].) On the second contention, the fact the District held an election it may not have been required by statute to hold is irrelevant to the issue of whether the Definitive Agreements pertain to the operation and maintenance of a hospital acquired or constructed by the District.

[7] Because our ruling rests on the plain language of section 32126, we need not and do not conduct any analysis of the statute's legislative history. On that basis we deny as moot the requests for judicial notice filed by plaintiff on November 9, 2007, by MPHS on January 18, 2008, and deny in part as to Exhibits A and B of the request for judicial notice filed by the District on January 24, 2008.

in perpetuity and limits such leases to 30 years. The statute is not intended as a restraint on the alienation of *all* real property owned by a District Health Authority. Thus, because the complaint states no facts that would support a claim under our interpretation of the statute, we affirm the trial court's ruling sustaining defendants' demurrers to plaintiff's section 32126 causes of action.

B. Section 54964 Claim

1. Standard of Review

The trial court granted summary judgment in favor of the District on plaintiff's claim under section 54964. Summary judgment is proper when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review a ruling granting summary judgment de novo. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ' "specific facts," ' and cannot rely upon the allegations of the pleadings." (*Id.* at p. 805.) We review the court's ruling, not its reasoning, and affirm if correct on any basis. (*Ibid*.)

2. Analysis

Section 54964 provides in relevant part:

"(a) An officer, employee, or consultant of a local agency *may not expend or authorize the* ***expenditure*** *of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure,* or the election or defeat of a candidate, by the voters.

(b) As used in this section the following terms have the following meanings:

(1) 'Ballot measure' means an initiative, referendum, or recall measure certified to appear on a regular or special election ballot of the local agency, or other measure submitted to the voters by the governing body at a regular or special election of the local agency.

. . . . [¶]

(3) '**Expenditure**' means a payment of local agency funds that is used for communications that *expressly advocate the approval or rejection of a clearly identified ballot measure,* or the election or defeat of a clearly identified candidate, by the voters.

. . . .

(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." (Gov. Code § 54964, subds. (a), (b) (1)&(3), (c) (1-2) [italics and emphasis added].)

Plaintiff argues summary judgment should be reversed because the trial court applied an erroneous legal standard in determining whether the District's election communications amounted to the express advocacy prohibited under section 54964. Specifically, plaintiff contends the trial court erred because it interpreted section 54964 to prohibit only words of express advocacy, such as "Vote Yes" and "Vote No."

Indeed, the scope of section 54964's prohibition on express advocacy is the key point of contention between the parties. It is plaintiff's contention that section 54964's prohibition on express advocacy is broader than the one applied by the trial court. Citing to legislative history,[8] plaintiff asserts that the Legislature intended to adopt the standard for express advocacy set forth in *Federal Elections Commission v. Furgatch* (9th Cir. 1987) 807 F.2d 857 (*Furgatch*).[9] Under this standard, speech constitutes express

---

[8] Plaintiff's supplemental request for judicial notice, filed on February 14, 2008, is granted. The District's request for judicial notice, filed on January 24, 2008, is granted in part as to Exhibits C and D of that request.

[9] See (Sen. Com. on Elections and Reapportionment, Analysis of Assem. Bill 2078 (1999-2000 Reg. Sess.) as amended August 7, 2000, p. 2.) This analysis states the bill

advocacy if "when read as a whole, and with limited reference to external events, [it is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." (*Furgatch*, *supra*, 807 F.2d at p. 864.)

Respondent, relying on a regulation promulgated by the Fair Elections Practices Commission (FPPC),[10] urges a bright-line rule that would narrowly construe express advocacy under section 54964 to prohibit only communications amounting to "an explicit plea, in direct and unmistakable terms, that the voters pass or defeat a measure." Plaintiff not only disputes the applicability and relevance of Regulation 18225 to section 54964, but it also contends that the regulation actually defines express advocacy in broader terms than the District would have it.

We have examined the language of Regulation 18225 and note that although it includes in its definition of express advocacy explicit terms such as "vote for," it also states more broadly that a "communication 'expressly advocates' the . . . passage or defeat of a measure if it . . . otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, *unambiguously urges a particular result in an election.*" (Cal. Code Regs., tit. 2, § 18225(b)(2).) We conclude that although there are linguistic differences between the two, Regulation 18225's definition of express advocacy is actually very similar to the standard enunciated in *Furgatch*, *supra.* (807

"prohibits [] an expenditure if it 'expressly . . . advocates' . . . [but] it does not define this term." (*Ibid.*) In this regard, the Analysis notes that whereas in "*Buckley v. Valeo* (1976), the United States Supreme Court interpreted the term 'expressly advocate' to mean a communication that expressly advocates the election or defeat of a clearly identified candidate [by] . . . the use of certain words or phrases in the communication to meet the express advocacy standard, e.g., 'vote for,' 'defeat,' 'throw out,' etc[,] [¶] . . . the Ninth Circuit United States Court of Appeals expanded the definition of 'express advocacy' [i]n *Furgatch* [to] communications [that], read as a whole and with limited reference to external events, must be susceptible of no other reasonable interpretation than as exhortation to vote for or against a specific candidate." (*Ibid.*)

[10] The FPPC is charged with administering the Political Reform Act (PRA) (Gov. Code, § 81000 et seq.), and pursuant to that authority promulgated the regulation defining "Expenditure" for purposes of the PRA relied upon by respondent here. (See Cal. Code Regs., tit. 2, § 18225 ["Regulation 18225"].)

F.2d at p. 864 [to constitute express advocacy, speech "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"].)

However, we need not establish the outer parameters of the express advocacy prohibited under section 54964 in order to determine the issue before us — whether the trial court properly granted summary judgment to the District on plaintiff's section 54964 claim. Even if we assume, as urged by plaintiff, that the *Furgatch* standard controls under section 54965, plaintiff still cannot avoid summary judgment on its section 54965 claim. We have reviewed all the election materials complained of by plaintiff and conclude as a matter of law that they do not amount to express advocacy even under the broader *Furgatch* standard. The longest document — the Summer 2006 Community Update — does not amount to "an exhortation to vote for" Measure V. (*Furgatch, supra*, 807 F.2d at p. 864.) Five of its six pages provide information about why the District is seeking to provide a new hospital, the details of the agreement securing the construction of the new hospital, the construction timeline for the new hospital, and the facilities the new hospital will provide. Only one of the six pages speaks to the election: one half of that page explains how the mail-in ballot works; the other half describes the election, stating, "District residents will be voting on the new hospital plan submitted by MPHS to replace Peninsula Medical Center in Burlingame." In bolder lettering it states: "*If* the District voters approve Measure V in a special August election, construction on the new hospital to replace Peninsula Medical Center will begin in September [italics added]." Thus, the newsletter cannot be read as an "exhortation to vote for" Measure V or as a "clear plea" for action in favor of Measure V. (*Furgatch, supra,* 807 F.2d at p. 864.) Nor when read as a whole can the newsletter be seen as carrying an "unmistakable and unambiguous" message that District residents should vote in favor of Measure V. (*Ibid.*)

Similarly, after reviewing the postcard-sized election fliers, we conclude that they do not purport to convey an unmistakable message to vote *in favor of* Measure V: One explains how the mail-in ballot works, one explains what Measure V is about, and one is a reminder to vote in the election. Like the newsletter, we conclude as a matter of law

that none can be read as an unambiguous exhortation to vote for a particular outcome on Measure V.

In sum, we conclude as a matter of law that the District's election materials do not constitute "communications that expressly advocate the approval" of Measure V. (§ 54964, subd. (b)(3).) Accordingly, we affirm the trial court's grant of summary judgment in favor of the District on plaintiff's section 54964 claim.

C. Section 473 Motion

1. Legal Standards Governing Leave to Amend

Plaintiff contends that the trial court erred by denying its motion to amend its complaint under section 473, subdivision (b) (section 473(b)), in order to state a *Stanson* claim. Plaintiff asserts its application was proper and it was entitled to relief from judgment on the basis it committed "at worst . . . an honest mistake of law." The District notes plaintiff sought leave to amend the complaint under section 473, *subdivision (a)* (section 473(a)), but contends that there was no abuse of discretion by the trial court in denying leave to amend because "*Stanson* has been superseded by Section 54964" and therefore the proposed amendment does not state a "legally viable" claim.

The section 473 order appealed from below was in response to a post-judgment motion by plaintiff pursuant to section 473, subdivision (b), for *discretionary relief from judgment* due to its "mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) Under this standard, the "failure to timely object or to properly advance an argument, is not . . . excusable." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) However, as the District acknowledges, the record shows that plaintiff moved to amend its complaint *before* entry of judgment during oral argument on the District's motion for summary judgment. At one point in the discussion about the viability of a *Stanson* claim, plaintiff's counsel asked the trial court for "30 days to amend the complaint" to include a *Stanson* claim. Although the court remarked that "it's probably grounds for leave to amend," the court added, "The problem you have is you have to bring a 473(b) motion, because I am granting summary judgment." In sum, the

record is clear that plaintiff moved for leave to amend the complaint *before* entry of judgment pursuant to section 473(a). We review the denial of a motion to amend a complaint under this section for an abuse of discretion. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487; see also *Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1124 [noting that "[t]he failure to exercise discretion is an abuse of discretion"].)

In the summary judgment context, where the court is inclined to grant summary judgment "on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court *should give the plaintiff an opportunity to amend the complaint before entry of judgment*." (*Bostrom v. County of San Bernadino* (1995) 35 Cal.App.4th 1654, 1663 (*Bostrom*) [italics added].) Thus, if a party "wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend . . . [and] [s]uch requests are *routinely and liberally* granted." (*Id.* at pp. 1663-1664 [italics added]; see also *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1485 [noting that if complaint alleges sufficient facts "showing entitlement to relief under *any possible* legal theory," it is error for a trial court to dismiss an action on a motion for summary judgment "on the ground the complaint does not adequately raise that legal theory of liability"].)

These cases are in accord with the "policy of great liberality in permitting amendments to the complaint at any stage of the proceedings, up to and including trial, . . . where no prejudice is shown to the adverse party." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761; see also *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965 ["Motions to amend are appropriately granted as late as the first day of trial (citation) or even during trial (citation) if the defendant is alerted to the charges by the factual allegations, no matter how framed (citation) and the defendant will not be prejudiced."].) Here, the District has not asserted surprise or prejudice by an amendment to the complaint to include a *Stanson* claim, and we see none given that the proposed amendment relates to "the same general set of facts" (i.e., the election materials

mailed to voters by the District) and the complaint alleges that "the District is prohibited from expending funds in a partisan campaign promoting passage of Measure V." (See *Atkinson, supra,* 109 Cal.App.4th at p. 761 [abuse of discretion "to deny leave to amend where the opposing party was not misled" even if a new legal theory is introduced, "as long as the proposed amendments relate to the same general set of facts"] [citations omitted].) Accordingly, as neither surprise nor prejudice bars the proposed amendment, we must address the legal viability of the claim.

2. Continuing Viability of Stanson Claim

A trial court's decision to deny a motion to amend will not be accounted an abuse of discretion on appeal "if the proposed amendment fails to state a cause of action," because in that case "it is proper to deny leave to amend. (Citation.)" (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) Here, the District contends the proposed amendment fails to state a claim because *Stanson* has been superseded by section 54964. However, we think remand is appropriate because we cannot say as a matter of law that *Stanson* has been superseded by section 54964.

First, *Stanson* in our view is a case of constitutional magnitude — a factor which cuts against legislative supersedure. (See, e.g., *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 902-903 (conc. opn. of Lucas, C.J.) ["The California Constitution is the supreme law of our state—a seminal document of independent force that establishes governmental powers and safeguards individual rights and liberties. (Citations.) As the Supreme Court of California, we are the final arbiters of the meaning of state constitutional provisions."].) In *Stanson*, the Supreme Court spoke about the "importance of governmental impartiality in electoral matters," and warned that a "serious constitutional question [] would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning." (*Stanson*, *supra*, 17 Cal.3d at p. 219.) And citing opinions of the Attorney General, the court opined that "the line between unauthorized campaign expenditures and authorized informational activities . . . depends upon a careful consideration of such factors as the style, tenor and timing of the

publication; no hard and fast rule governs every case." (*Stanson, supra,* 17 Cal.3d at p. 222.) On the basis of these considerations, the court reversed the trial court's judgment and remanded so that Stanson could go forward with his claim that defendant engaged in improper campaign expenditures by disseminating agency publications " 'which were merely not informative but . . . promotional[.]' " (*Id.* at pp. 222-223.)

Second, in the legislative process leading to the enactment of section 54964 the Legislature acknowledged *Stanson* as "[e]xisting law [that] prohibits state and local jurisdictions from expending public dollars in support or opposition of a candidate or ballot measure." (Sen. Com. on Elections and Reapportionment, Analysis of Assem. Bill 2078 (1999-2000 Reg. Sess.) as amended August 7, 2000, p. 1.) Despite this acknowledgment of *Stanson* as governing law on a subject within the purview of section 54964, the Legislature did not attempt to overrule or "supersede" *Stanson*, either implicitly or explicitly, when it enacted that provision. Indeed, unlike *Stanson*, which discourses broadly on the "importance of governmental impartiality in electoral matters" and the First Amendment limitations on partisan campaigning by the government (*Stanson, supra,* 17 Cal.3d at p. 219), section 54964 is narrowly tailored to prohibit only expenditures of local agency funds on "communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters." (§ 54964, subd. (b)(3).) Thus, although section 54964 provides a "bright-line rule" prohibiting expenditures of local agency funds on communications that expressly advocate a position in an election, it does not address the scope of other government conduct or speech which may also violate the constitutional limitations on partisan campaigning by the government in election matters.

In sum, plaintiff seeks to amend the complaint to state a claim on the basis that *Stanson* imposes broader restrictions on government speech than does section 54964. Nothing in the legislative history or on the face of section 54964 appears to preclude such a claim. Therefore, we cannot say as a matter of law that plaintiff's proposed amendment would be futile. Accordingly, remand is warranted to allow plaintiff to amend the

complaint to allege a claim under *Stanson*. We express no opinion on either the legal contours, or ultimate legal viability, of a constitutional claim under *Stanson*.[11]

DISPOSITION

The trial court's order sustaining the District's and MPHS's demurrers to plaintiff's first and second causes of action under section 32126 is affirmed. The trial court's order granting summary judgment to the District on plaintiff's fifth cause of action under section 54964 is affirmed.

The trial court's order denying plaintiff's post-judgment section 473 motion is reversed and the trial court's judgment of May 25, 2007, is vacated. The case is remanded so that plaintiff may file an amended complaint alleging a claim against the District under *Stanson*.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.

[11] This issue is currently before the Supreme Court. (See *Vargas v. City of Salinas* (2005) 37 Cal. Rptr.3d 506, 513, review granted and opinion superseded by *Vargas v. City of Salinas* (S140911 Apr. 26, 2006) 135 P.3d 1, 2005 CA Lexis 1984.)

Filed 10/14/08 Peninsula Guardians v. Peninsula Health Care Dist. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

PENINSULA GUARDIANS, INC.,

Plaintiff and Appellant,

v.

PENINSULA HEALTH CARE DISTRICT et al.,

Defendants and Respondents.

A118303, A118679

(San Mateo County
Super. Ct. No. CIV 456563)

ORDER MODIFYING OPINION [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on September 30, 2008 be modified as follows. The Disposition is modified to add the following sentence at the end.

"The parties are to bear their own costs on appeal."

This modification changes the judgment.

_____

McGuiness, P.J.

Justices Jenkins and Pollak concur.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

PENINSULA GUARDIANS, INC., Plaintiff and Appellant, v. PENINSULA HEALTH CARE DISTRICT et al., Defendants and Respondents.	A118303, A118679 (San Mateo County Super. Ct. No. CIV 456563)

THE COURT:

The Request for Publication filed October 16, 2008, asking that the opinion filed herein on September 30, 2008 be published, is granted as to partial publication only.

Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of Background Part B, "Litigation Phase" and Discussion, Part B and Part C.

_____

McGuiness, P.J.

Justices Jenkins and Pollak concur.

Trial Court:	Superior Court, County of San Mateo
Trial Judge:	Hon. Marie S. Weiner Hon. Beth Labson Freeman Hon. George A. Miram
Counsel for Appellant Peninsula Guardians, Inc.:	David W. Skinner, Joseph M. Quinn, MEYERS, NAVE, RIBACK, SILVER & WILSON Mitchell J. Green CURTIS, GREEN & FURMAN
Counsel for Respondent Peninsula Health Care District:	Douglas C. Straus, Mark A. Olson, ARCHER NORRIS
Counsel for Respondent Mills-Peninsula Health Services:	Harriet A. Steiner, Kara K. Ueda McDONOUGH HOLLAND & ALLEN