

1 **Alan L. Geraci, Esq.** (SBN 108324)
2 CARE Law Group PC
3 817 W. San Marcos Blvd
4 San Marcos, CA 92078
5 (619) 231-3131 telephone
6 (760) 650-3484 facsimile
7 alan@carelaw.net

8 Attorneys for Petitioners, Roy B. Garrett and Mary Garrett

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN DIEGO-NORTH COUNTY DIVISION**

11 ROY B. GARRETT, and individual;)
12 MARY GARRETT, an individual,)

13 Petitioners,)

14 vs.)

15 CITY OF ESCONDIDO, a California)
16 Municipality and DOES 1-10,)

17 Respondents,)

18 ESCONDIDO PUBLIC LIBRARY)
19 BOARD OF TRUSTEES,)

20 Real Party in Interest.)
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Case No. 37-2017-00045061-CU-WM-NC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONERS MOTION FOR
TEMPORARY RESTRAINING
ORDER AND FOR PRELIMINARY
INJUNCTION TO STAY
PRIVATIZATION OF THE
ESCONDIDO PUBLIC LIBRARY**

Honorable Earl H. Maas, III, Judge
Department N-28

TRO HEARING DATE: 1/8/2018
TRO HEARING TIME: 8:30 a.m.

PRELIMINARY INJUNCTION:
Date:
Time:

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1 Petitioners, ROY B. GARRETT and MARY GARRETT, move for an order to enjoin
2 Defendant from implementing the private services contract it approved *ultra vires* as Resolution
3 2017-139, through its City Council, on or about October 18, 2017.

4 **I.**

5 **INTRODUCTION**

6 This action challenges the City of Escondido's decision, Resolution 2017-139, through its
7 City Council, on or about October 18, 2017, as void as a matter of law as an *ultra vires* act.

8 Although the ramifications of the Respondent's action are complex, Petitioners' claim rests upon
9 the plain statutory construction of California Education Code § 18910. Petitioners claim that the
10 Municipal Library Act requirement, codified at California Education Code § 18910, that its
11 public library shall be managed by a board of library trustees and such lawful management
12 responsibility may not be usurped by Respondent, through its mayor and city council. A writ of
13 mandate is required to order Respondent to comply with the law. Petitioners will likely prevail
14 on the merits of this matter and the injury of allowing Respondent to implement its unlawful act
15 would be irreparable. Until the final determination of the matter, Petitioners require injunctive
16 relief *pendente lite*.

17 **II.**

18 **LEGISLATIVE BACKGROUND**

19 The Escondido Public Library is a public library system serving the city of Escondido,
20 which is situated in San Diego County, California. The collection of the library contains 166,629
21 volumes, circulates 514,792 items per year and serves a population of 151,613 residents. (VP ¶
22 7)¹

23 The Escondido Public Library Association was established in 1893. On the March 13,
24 1893 meeting of the association, the by-laws and constitution were adopted and a week later, a
25 Public Library Board of Trustees were elected for a term of one year. In April of 1898, the City
26 of Escondido made the Escondido Public Library a city department. (VP ¶ 8)

27 _____
28 ¹ VP is "Verified Petition for Writ of Mandate for Violations of the Municipal Libraries Act."

1 Public library legislation in California dates back to 1878 when legislation was passed to
2 “. . . establish and maintain free public libraries and reading rooms.” (Stats. 1878, ch. 266, §§ 1-
3 8, pp. 329-331.) In 1901, the Municipal Libraries Act was enacted and included provisions
4 authorizing a special tax for the purpose of maintaining municipal libraries. (Stats. 1901, ch.
5 170, § 7, p. 559.) In both landmark provisions, law mandated that governance of the library be
6 by a board of five library trustees whose members held office for three-year terms. (Stats. 1901,
7 ch.170, §§3-6, pp. 558-559.) Trustees were “appointed by the mayor, president of the board of
8 trustees or other executive head of the municipality, with the consent of the legislative body of
9 said municipality.” (Stats. 1901, ch. 170, §3, p. 558.) The 1901 act declared that “(e)very library
10 established under this act shall be forever free to the inhabitants and non-resident taxpayers of the
11 municipality, subject always to such rules, regulations and by-laws as may be made by boards of
12 trustees.” (Stats. 1901, ch.170, §9, p. 559.) (VP ¶ 10)

13 In 1943, comprehensive legislation was enacted creating the California Education Code.
14 (Stats. 1943., ch.71.) The Municipal Libraries Act was incorporated into the California
15 Education Code and substantially unchanged. (*Formally* California Education Code §§22201-
16 22265.) Amendments in 1959, 1971 and 1976, largely reorganized the codified statute to be a
17 more logical sequence of law. (Stats. 1959, ch.2, §1, p. 595; Stats. 1971, ch. 438, § 83, p. 880;
18 Stats 1976, ch. 1010, pp. 2882-2885.) (VP ¶ 11)

19 Education Code §18910 provides that a public library established under the act “shall be
20 managed by a board of library trustees, consisting of five members,. . .” (emphasis added.) This
21 duty is absolute and nondelegable by law. (VP ¶ 12) Although the City of Escondido acts to
22 employ the staff and to budget funds for the Escondido Public Library, it may not usurp the
23 management of its library as a matter of law. The Escondido Public Library receives gifts and
24 endowments from a variety of sources and a board of trustees is in place to manage all the
25 necessary functions of the public library.

26 Use of the word “shall” in a statute imports that its provisions are mandatory and is in
27 accord with the legislative intent. California Education Code § 75.
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III.

FACTUAL BACKGROUND

As early as March of 2017, Respondent began pursuing a “Professional Services Agreement for the Operation of the Escondido Public Library” with a third party private vendor, to wit: Library Systems and Services LLC, a Maryland limited liability company (herein “Agreement”). (VP ¶ 14)

Pursuant to California Education Code § 18910, any decision concerning the management of the Escondido Public Library is within the sound discretion of the Escondido Public Library Board of Trustees.(VP ¶ 15)

Pursuant to California Education Code § 19104.5, “(t)he board of trustees . . . of a library district . . . shall comply with all of the following requirements before entering into a contract to operate the city’s or the district’s library or libraries with a private contractor that will employ library staff to achieve cost savings . . .” Included therein are provisions that the board of trustees publish notice of contemplated action, that the board of trustees clearly demonstrate that the contract will result in actual overall cost savings to the city, that the contract shall not be approved solely on the basis that savings will result from lower contractor pay rates, that the contract not cause an existing city or library district employee to incur a loss of his or her employment or employment seniority or reduction in wages, benefits or hours, that the contract shall be awarded through a publicized, competitive bidding process, that the contract shall include specific provisions pertaining to the qualifications of the staff, that the contract shall provide that it may be terminated at any time by the city or library district without penalty, and specific requirements for contracts whose cost for services exceed \$100,000 annually. (VP ¶ 16)

On or about August 8, 2017, the Escondido Public Library Board of Trustees voted unanimously against the proposal to out source the Escondido Public Library management to a foreign private entity called Library, Systems & Services LLC and presented their position formally in a letter to the City Council of the City of Escondido. (VP ¶ 17)

Despite the Escondido Public Library Board of Trustees’ decision, the City Council of the City of Escondido continued to pursue Agreement. (VP ¶ 18) On or about September 27, 2017,

1 the Escondido Public Library Board of Trustees sent a signed letter to Respondent's Mayor and
2 Councilmembers stating its continued opposition to outsourcing Escondido Public Library
3 management to Library Systems & Services LLC. (VP ¶ 19)

4 Notwithstanding the Escondido Public Library Board of Trustees' rejection of Agreement
5 and repeated opposition to such a plan, the Escondido City Council held a public hearing and
6 ignored the legal duties of the Escondido Public Library Board of Trustees. (VP ¶ 20)

7 On October 18, 2017, the City of Escondido City Council voted 4-1 to contract with
8 Maryland-based Library Systems & Services LLC to operate the library. Councilmembers Ed
9 Gallo, Michael Morasco, John Masson, and Mayor Sam Abed voted in favor of the 10-year
10 contract, with Councilmember Olga Diaz in opposition. As part of its rationale therefor, the City
11 Council expressly stated that it wished to avoid contractual pension obligations to library
12 employees. (VP ¶ 21)

13 III.

14 LEGAL DISCUSSION

15 California Code of Civil Procedure § 527 governs when a preliminary injunction may be
16 ordered. That section provides in relevant part,

17 (a) A preliminary injunction may be granted at any time before judgment upon
18 a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the
19 other, show satisfactorily that sufficient grounds exist therefor. No preliminary injunction shall
20 be granted without notice to the opposing party.

21 California Code of Civil Procedure § 526 sets forth those cases in which an injunction
22 may or may not be granted. As provided by that section:

- 23 (a) An injunction may be granted in the following cases:
- 24 (1) When it appears by the complaint that the plaintiff is entitled to the
25 relief demanded, and that the relief, or any part thereof, consists in
26 restraining the commission or continuance of the act complained
27 of, either for a limited period or perpetually.
 - 28 (2) When it appears by the complaint of affidavits that the commission
or continuance of some act during the litigation would produce
waste, or great or irreparable injury, to a party to the action.
 - (3) When it appears, during the litigation, that a party to the action is
doing or threatens or is about to do, or is procuring or suffering to
be done, some act in violation of the rights of another party to the
action respecting the subject of the action, and intending to render

- 1 the judgment ineffectual.
2 (4) When pecuniary compensation would not afford adequate relief.

3 It is the general rule in this state that while the right to injunctive relief under proper
4 circumstances is well- established, the issuance of an injunction is largely within the discretion of
5 the court and depends on the consideration of the equities between the parties. *Phillips v. Isham*
6 (1952) 111 Cal.App.2d 537. In exercising its discretion, the court should recognize that the
7 general purpose of a preliminary injunction is for preservation of the *status quo* until a final
8 determination on the merits can be made. *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512,
9 528. In determining whether or not a preliminary injunction should issue, the court should
10 consider two inter related questions. First, is there a reasonable probability plaintiffs will prevail
11 on the merits. Secondly, are the plaintiffs likely to suffer greater injury from a denial of the
12 injunction than the defendant is likely to suffer from the granting of the injunction. *Robbins v.*
13 *Superior Court* (1985) 38 Cal.3d 199, 206. Ultimately, the court should determine which party is
14 more likely to be injured by the exercise of the court's discretion and that discretion must be
15 exercised in favor of that party. *Continental Baking Company v. Katz, supra.* 68 Cal.2d at 528.

16 **A. Petitioners Are Likely to Prevail in this Action.**

17 Petitioners' claim is a simple case of statutory construction.

18 California Education Code § 18910 states:

19 The public library shall be managed by a board of library trustees,
20 consisting of five members, to be appointed by the mayor,
21 president of the board of trustees, or other executive head of the
22 municipality, with the consent of the legislative body of the
23 municipality.

24 California Education Code § 75 states:

25 “Shall” is mandatory and “may” is permissive.

26 **1. Determining the Legislative Intent of California Education Code § 18910.**

27 Under California law, a court's primary role in statutory interpretation is determining the
28 legislature's intent. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1396-1397 [156
Cal.Rptr.3d 771] [citations omitted].) California courts have established a three-step process of
statutory interpretation that must be applied in the proper sequence. (*Id.*)

1 First, the court looks to the plain meaning of the statute's text. (*Id.*) This is because the
2 words of the statute are the most reliable indicator of legislative intent. (*Id.*) Only when the
3 meaning of the statute's words are not clear will a court proceed to the next step. (*Id.*)

4 Second, if the statute's words are not clear (which is not the case here), then the courts
5 may turn to legislative history and the wider historical circumstances of its enactment. (*Id.*)

6 Third, if any ambiguity remains after consulting the legislative history, courts will apply
7 reason, practicality, and common sense to the statutory language, considering the consequences
8 that flow from a particular interpretation. (*Id.*) This last step involves consideration of the evils to
9 be remedied, the history of the times and legislation on the same subject, public policy, and
10 contemporaneous construction. (*Id.*) This final step must remain consistent with effectuating the
11 purpose of the law. (*Id.*)

12 **2. The Plain Meaning of the California Education Code § 18910 is Non-**
13 **controvertible.**

14 The plain meaning of “shall be managed” cannot be controverted with a straight face.
15 The public policy of established by the legislature is to protect public libraries from the whims of
16 politically elected officials is clear on its face. That is the essence of having a board of trustees.²
17 Monies are received not only from the municipality who operates a public library, but from gifts,
18 endowments and other sources. Protecting the public trust of the institution of the public library
19 is at the core of this requirement.

20 It is expected that Respondent will proffer that Government Code § 39732(a) provides it
21 with authority to “operate” a public library and therefor usurp the management role of its board
22 of trustees.³ This argument is as fundamentally flawed on many levels, has been rejected before,
23 and should be rejected here. This Court can find the discussion of statutory construction for
24 California Education Code § 18910 *vis-a-vis* Government Code § 39732(a) in *Friends of the*

25
26 ² Under California Education Code § 18911 “the trustees shall hold office for three years.”

27 ³ Government Code § 39732(a) provides that the legislative body of a city may: “(a) Acquire, own,
28 construct, maintain, and operate bus lines, street railways, steam railway spur tracks, telephone and telegraph lines,
gas and other works for light, power, and heat, public libraries, museums, gymnasiums, parks and baths.”

Garrett v. City of Escondido

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Points and Authorities in support of
TRO and Preliminary Injunction

1 *Library of Monterey Park v. City of Monterey Park* (1989) 211 Cal.App.3d 358 [259 Cal.Rptr.
2 358].

3 In *Monterey Park*, the city council unlawfully attempted to discharge its board of library
4 trustees by ordinance without cause or hearing, and to abolish altogether the offices of trustees
5 and thereafter provide for operation and management of the municipal library by the city council
6 with the aid of an advisory commission. The instruction by the appellate court is compelling if
7 not conclusive: "The Municipal Libraries Act is a detailed regulatory provision, and thus
8 controls over the more general provisions of Gov. Code, § 39732, to the extent they are
9 inconsistent." The appellate court found:

10 "Having examined the same two statutory schemes under
11 consideration here, the Attorney General concluded that "the
12 detailed provisions of the Education Code prevails [*sic*] over the
13 general provisions of the Government Code to the extent that they
14 may be inconsistent." (61 Ops.Cal.Atty.Gen. at p. 517.)
15 Elaborating upon his conclusions, the Attorney General stated:
16 "Further, because of the marked contrast between the unelaborated
17 designation of city libraries in Government Code section 39732
18 and the extended and detailed provisions for such libraries in the
19 Education Code, Government Code section 39732 cannot be
20 viewed as an independent alternative source of library-establishing
21 authority for cities but must be viewed merely as a collateral
22 confirmation of the grant of authority more fully delineated in the
23 Education Code. [¶] If it were viewed otherwise, local authorities
24 could completely bypass the Education Code's explicit directives
25 for the establishment and operation of public libraries simply by
26 declaring in some manner that the library was being established
27 under the minimal provisions of the Government Code rather than
28 under the Education Code. It cannot be presumed that the
Education Code's elaborately devised legislative plan for the
establishment and operation of city public libraries was to have so
little authoritative significance. Statutes are not to be interpreted in
a manner which affords an opportunity for evasion of its
provisions." (Ibid.) We concur with the Attorney General's
analysis." [211 Cal.App.3d 358 at 371]

23 Thus, the clear and plain meaning of California Education Code § 18910 prevails and a
24 public library established under the act "shall be managed by a board of library trustees,
25 consisting of five members."

26 Moreover, Government Code § 39732 is reconcilable with Education Code § 18910. The
27 power of the legislative body, i.e. city council to "acquire, own, construct, and operate . . . public
28 libraries . . ." is not logically inconsistent with that public library being managed by a board of

1 trustees. Public libraries are part of the fabric of the community. A library is the delivery room
2 for the birth of ideas, a place where history comes to life. Public libraries are central to our free
3 society. It is a critical element in the free exchange of information at the heart of our democracy.
4 Government Code § 39732 authorizes the establishment of the land and structure of the public
5 library and the establishment of a budget for the library. Education Code § 18910 places the
6 gatekeepers of that public trust to assure that the management of the institution of the public
7 library is never compromised by political whims.

8 **3. California Education Code § 19104.5 establishes the mood of the**
9 **legislature on privatization.**

10 California Education Code § 19104.5 which states: “(t)he board of trustees . . . of a
11 library district . . . shall comply with all of the following requirements before entering into a
12 contract to operate the city’s or the district’s library or libraries with a private contractor that will
13 employ library staff to achieve cost savings . . .” Included therein are provisions that the board
14 of trustees publish notice of contemplated action, that the board of trustees clearly demonstrate
15 that the contract will result in actual overall cost savings to the city, that the contract shall not be
16 approved solely on the basis that savings will result from lower contractor pay rates, that the
17 contract not cause an existing city or library district employee to incur a loss of his or her
18 employment or employment seniority or reduction in wages, benefits or hours, that the contract
19 shall be awarded through a publicized, competitive bidding process, that the contract shall
20 include specific provisions pertaining to the qualifications of the staff, that the contract shall
21 provide that it may be terminated at any time by the city or library district without penalty, and
22 specific requirements for contracts whose cost for services exceed \$100,000 annually.” This
23 section clearly articulates the California statutory proscriptions and prescriptions regarding
24 outsourcing library operations and management, most of which were not followed by the
25 Respondent. (Declaration of Roy Garrett at ¶ 5, p. 2, ln13- p. 3 ln 1.)

26 Respondent will proclaim that California Education Code § 19104.5 is inapplicable to
27 these facts because it applies to standards for a city’s withdrawal from a county free library
28 system. Although true, the requirements establish the “mood” of the legislature about the

1 scrutiny of a board of trustees to award private contracts to assure a standard of consistency and
2 uniformity in due process and high standards of review. Here, not only did Respondent ignore the
3 Library Board of Trustees who unanimously rejected privatization, but ignored any semblance of
4 due process and high standards of review.

5 Thus, Petitioners are likely to prevail under the standards of California Code of Civil
6 Procedure § 526 and 527.

7 **B. Petitioners will be irreparably harmed unless injunctive relief is granted to**
8 **maintain the status quo until final judgment.**

9 This matter is brought by a citizen and taxpayer of the city against the legislative body of
10 that city. California Code of Civil Procedure § 526a grants standing to a citizen resident taxpayer
11 to seek a judgment restraining and preventing illegal expenditures, waste or injury to the property
12 of a California county, town or city. The purpose of § 526a is to “enable a large body of the
13 citizenry to challenge governmental action which would otherwise go unchallenged in the courts
14 because of the standing requirement.” Section 526a has been liberally interpreted to grant
15 standing whether the amount of allegedly illegal expenditures is large or small, whether the
16 illegal procedures result in increased or decreased expenditure of tax funds, whether the
17 unlawfully spent funds derive from tax revenues or from the operation of a public utility, and
18 whether the plaintiff taxpayer could show a special damage. In addition, where compensatory
19 damages are inadequate in such a case should apply and justifies a finding of irreparable injury if
20 the requested relief is not granted. See *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 830

21 Additionally, irreparable damage was acknowledged by Respondent and is reflected in its
22 own minutes:

23 “If the court accepts the arguments of the opponents, and the
24 contract is found to be null and void, the City will be left with
25 various options. It may do nothing and operate the library as is; it
26 may reduce the funding of the library to reflect the lost budget
27 savings anticipated under the contract; and it may seek out other
28 providers of library services. . . To allow time to examine filed
lawsuits against the City, and perhaps even the Library Board, the
contract provides for a period of up to 90 days to implement the
terms of the agreement.” (NOL Exhibit 1, Minutes dated October
18, 2017, at page 5.)

Thus, Respondent prepared for this judicial review and only underestimated the amount

1 of time it would take for said judicial review. On or about January 15, 2018, Respondent is
2 planning full implementation of the offensive privatization contract that is the subject of
3 Resolution 2017-139, which Petitioners allege was made *ultra vires* of its authority and is thus
4 void as a matter of law.

5 Moreover, submitted declarations support the irreparable nature of the harm should the
6 court not act to enjoin Respondents *pendente lite*, as follows:

- 7 1. “On August 8, 2017, the Escondido Library Board of Trustees voted unanimously
8 against the proposal to outsource the Escondido Public Library (EPL)
9 management to Library Systems & Services (LS&S). . .” (Letter dated September
10 27, 2017 signed by the Library Board of Trustees to the Mayor and City Council,
11 attached as Exhibit 1, Declaration of Roy Garrett, ¶ 7.)
- 12 2. Library employees will be removed from employment and their participation in
13 PERS and health care benefits will be terminated. (Declaration of John Donel, ¶
14 6.)
- 15 3. “Employees should not be rushed into an unknown and financially and
16 professionally risky situation because the City did not consider all the implications
17 of their actions.” (Declaration of John Donel, ¶ 8.)
- 18 4. Implementation of the offensive contract was done not only in defiance to the
19 Escondido Library Board of Trustees, but the 10-year, multi-million dollar
20 contract was awarded without consideration of any other proposals and no
21 competitive bids were considered. (Declaration of Debra Resler, ¶ 7.)
- 22 5. Citizens respectfully worked with the Library Board of Trustees, who are charged
23 with the management of the Public Library, and asked for more time to explore
24 other money-savings options, such as joining the San Diego County library
25 system, or other options. (Declaration of Brenda Townsend, ¶ 7.)

26 Thus, the clear picture that’s formed by this evidence is that the active citizens of the
27 community and the Library Board of Trustees have tried to work within the parameters of the

1 City Council but were ignored. Now there is a “rush to justice” created by Respondent’s own
2 actions to make the judicial review a moot issue. This cannot be tolerated in a civilized society
3 and must be moderated by the court.

4
5 **IV.**
6 **CONCLUSION**

7 Petitioners have consistently acted in good faith toward a resolution of their concern that
8 Respondents are violating the law. They have been ignored, pushed away and bullied into
9 intended submission. The law is clear – Petitioners have a reasonable likelihood of success on
10 the merits and will prevail. The facts are clear – Without *pendents lite* injunctive orders,
11 Respondent will continue on its path of firing employees, and pushing privatization of its public
12 library in defiance of the law and until any judicial review to of the matter is moot. Based upon
13 the foregoing, Petitioners request that the Court issue a temporary restraining order and
14 preliminary injunction until the final determination of the matter can be made.

15 Dated: 1/4/18

CARE LAW GROUP PC

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17 
18 By: Alan L. Geraci, Attorney for Petitioners
19 Roy B. Garrett and Mary Garret