3/4/08

SB-1

City Attorney's Office

Interoffice Memorandum

Date: February 26, 2008

To: Jennifer Sparacino, City Manager
Ron Garratt, Assistant City Manager

From: Helene Leichter, City Attorney

Subject: Ballot Measures – Types and Issues

This revised memorandum addresses the types of ballot measures that may be brought in connection with the proposed stadium, and the legal issues associated with such ballot measures.

Many questions and concerns were raised by Council and the public at the January 22, 2008 meeting regarding the "binding" nature of any ballot measure. Any initiative or referendum may be "binding" in the sense that the City is duty-bound to follow the outcome of the election. In addition, even with an advisory measure, the expressed will of the people is certainly a strong political statement, and in that sense is binding politically.

However, it is very difficult to draft a ballot measure that may completely bind future Councils or future votes of the people. For example, if a measure was placed on the ballot that limited the amount of Redevelopment Agency money that could be contributed to the stadium, even if that measure passed resoundingly, a later ballot measure could overturn the previous measure.

The strongest way to have a vote on the stadium be "binding" is to wait until CEQA review of the stadium project is completed, currently projected for Spring 2009. A measure containing a synopsis of all pertinent deal points may then be submitted to the voters for acceptance or denial.

However, prior to CEQA clearance, it is possible to draft a measure (subject to eventual CEQA clearance and Council approval of the ultimate deal) that clearly identifies the objectives sought through the ballot measure, contains a precise course of action, and identifies desired outcomes. Such a measure would direct the Council and staff in their future actions regarding the stadium until a contrary measure was enacted. One way to accomplish this objective is to model the 1990 Measure N text, which provided very clear direction and limitations on the baseball stadium project.

Types of Ballot Measures and Processes

In California, there are three ways to place a local measure on the ballot: initiative, referendum, and advisory measure. Initiatives, which generally contain language instructing a local agency to do or refrain from doing something, may be brought by citizen-generated petition to the local agency, or placed on the ballot directly by the local agency governing board without petition. Referenda generally contain language limiting the effect of previous action of a local agency (e.g., repealing a general plan amendment), and are brought through citizen-generated petition to

the local agency. Advisory measures are generally non-binding policy questions placed on the ballot by the local agency to gain feedback from the voters.

Initiatives and Referenda

The California Constitution provides the power of initiative and referenda to voters in California. An initiative is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."[1] A referendum is "the power of the electors to approve or reject statutes or parts of statutes, except urgency statutes, statutes calling elections and statutes providing for tax levies or appropriations for usual current expenses of the state."[2]

The California Elections Code contains procedural requirements for initiatives and referenda.[3] Santa Clara has adopted these provisions by reference in its charter, and thus is bound by the general election law.[4]

However, the requirements for initiatives that propose changes to a city charter are slightly different from the general requirements for initiative ordinances.[5] These changes primarily relate to the form and process of the initiative itself, most notably that a petition to amend a charter must be signed by fifteen percent (15%) of the registered voters of the City.[6]

Limitations on Initiatives and Referenda

Initiatives and referenda may only be applied to legislative acts.[7] Legislative acts generally involve the formulation of rules to be applied in all future cases; adjudicatory acts generally involve the application of a fixed rule to a specific set of existing facts. Typical legislative acts subject to initiatives and referenda include zoning and rezoning ordinances,[8] general and specific plans,[9] and development agreements adopted pursuant to California Government Code sections 65864 and 65867.5. Typical adjudicatory acts include conditional use permits,[10] variances,[11] planned unit development permits,[12] and subdivision map approvals.[13]

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[1] Cal. Const. art. II, § 8(a).
[2] Cal. Const. art. II, § 9(a).
[3] *See* Cal. Elec. Code §§ 10101 *et seq*.
[4] City Charter of the City of Santa Clara, Section 700; Cal. Const. art. XI, § 5(b); *People v. Hill*, 125 Cal. 16, 20 (1899).
[5] Elec. Code § 9255.
[6] *Id.*
[7] *Devita v. Napa County*, 9 Cal. 4th 763, 38 Cal. Rptr. 2d 699 (1995).
[8] *See Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 169 Cal. Rptr. 904 (1980); *Associated Homebuilders v. City of Livermore*, 18 Cal. 3d 582, 135 Cal. Rptr. 41 (1976).
[9] *See Devita v. Napa County*, 9 Cal. 4th 763, 38 Cal. Rptr. 2d 699 (1995); *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765, 269 Cal. Rptr. 796 (1990); *Nelson v. Carlson*, 17 Cal. App. 4th 732, 21 Cal. Rptr. 2d 485 (1993).
[10] *See Wiltshire v. Superior Court*, 172 Cal. App. 3d 296, 218 Cal. Rptr. 199 (1985).
[11] *See Topanga Association v. County of Los Angeles*, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974).
[12] *See Fishman v. City of Palo Alto*, 86 Cal. App. 3d 506, 150 Cal. Rptr. 326 (1978).
[13] *See Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979).

An initiative or referendum measure may not be filed regarding matters that the legislature has committed to the discretion of the city council, such as final environmental review under CEQA.[14] The power of initiative and referendum also do not extend to "essential government functions,"[15] or matters which have been preempted by the state.[16] Finally, initiatives and referenda must be consistent with the city's general plan.[17]

If an initiative or referendum is believed to be unlawful (as opposed to procedurally defective), the City may take the following steps:

- The City Attorney may refuse to prepare the title and summary if the initiative is unconstitutional. The city attorney would then seek a declaration that the proposed initiative is unconstitutional and seek relief from the duty to prepare a title and summary.[18]
- The City Council may refuse to place the measure on the ballot. The initiative proponents then may file a mandamus action, and the city defends the action. However, this action is problematic as the strong preference of the courts is to defer ruling on an initiative or referendum's validity until after the election.
- The City Council may place the measure on the ballot, and direct the city attorney to file an action to remove the measure from the ballot.
- The City may file a post-election challenge seeking a judicial determination of the validity of the measure.

Process for City Initiatives

1. Notice of Intent to Circulate Petition. The initiative process is begun by the filing of a notice of intent to circulate petition with the city clerk together with text of the initiative.[19]

2. Ballot Title and Summary Request. The city attorney must provide an impartial and non-argumentative ballot title and summary, in fewer than 500 words, within 15 days of the filing of the notice of intent.[20] Any elector of the city may seek a writ of mandate to amend the ballot title

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[14] *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 247 Cal. Rptr. 362 (1988); *Mitchell v. Walker*, 140 Cal. App. 2d 239, 295 P.2d 90 (1956), *overruled on other grounds, Kugler v. Yocum*, 69 Cal. 2d 371, 71 Cal. Rptr. 687 (1968).

[15] *See City of Atascadero v. Daly*, 135 Cal. App. 3d 466, 185 Cal. Rptr. 228 (1982) (impairment of fiscal management abilities); *Simpson v. Hite*, 36 Cal. 2d 125, 222 P.2d 225 (1950) (siting a courthouse); *Newsom v. Board of Supervisors*, 205 Cal. 262, 270 P. 676 (1928) (franchising authority).

[16] *See, e.g., Redevelopment Agency v. City of Berkeley*, 80 Cal. App. 3d 158, 169, 143 Cal. Rptr. 633 (1978) (redevelopment); *Bruce v. City of Alameda*, 166 Cal. App. 3d 18, 212 Cal. Rptr. 304 (1985) (subsidized rental housing); *Wiltshire v. Superior Court*, 172 Cal. App. 3d 296, 218 Cal. Rptr. 199 (1985) (solid waste management); *Voters for Responsible Retirement v. Board of Supervisors*, 8 Cal. 4th 765, 35 Cal. Rptr. 2d 814 (1994).

[17] *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 277 Cal. Rptr. 1 (1990).

[18] *See Jahr v. Casebeer*, 70 Cal. App. 4th 1250, 83 Cal. Rptr. 2d 172 (1999).

[19] Elec. Code § 9202.

[20] Elec. Code § 9203.

or summary if either is false, misleading or inconsistent with the requirements of the Elections Code.[21]

3. Publication or Posting. A notice of intention and the title and summary of the proposed measure must be published or posted.[22]

4. Circulation of Petition. After publication or posting, the proponents may circulate the petitions among the registered voters of the city.[23] The petition must be signed and circulated in accordance with the Elections Code.

5. Referral of Petition by City Council. The city council may refer the petition to any city agency or agencies for their reports on fiscal impacts, general and specific plan consistency, various land use issues and "any other matters."[24]

6. Submission with Signatures. A proposed initiative may be submitted to the legislative body of the city by a petition filed with the clerk after being signed by not less than the required number of votes. The petition may be in separate sections, providing each section complies with all the requirements. The first page of each section must contain the title of the petition and the text of the measure.[25]

7. Council Options. If the petition qualifies, the city council must either adopt it without change or submit the proposal to the voters.[26]

8. Special Election. If the petition contains the signatures of at least 15 percent of the registered voters and expressly requests a special election, the council must call a special election. The special election must be held not fewer than 88, nor more than 103, days after the date of the order of elections. However, when it is legally possible: (1) the special election may be held on the same date as an election occurring wholly or partially within the same territory if the petition qualifies within 180 days prior to that election, the special election may be held on the same date as the statewide general election if the petition qualifies during the period between the primary and general election in the same year. The City Council is not required to, but may, call a special election even if the measure does not otherwise qualify for a special election.[27]

9. Regular Election. If the petition contains the signatures of at least 10 percent of the registered voters or at least 15 percent of the registered voters for a charter amendment, the

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[21] Elec. Code § 9204; *San Francisco Forty-Niners v. Nishioka (Comstock)*, 75 Cal. App. 4th 637, 89 Cal. Rptr. 2d 388 (1999).
[22] Elec. Code § 9205.
[23] Elec. Code § 9207.
[24] Elec. Code § 9212.
[25] Elec. Code § 9201; *Mervyn's v. Reyes*, 69 Cal. App. 4th 93, 81 Cal. Rptr. 2d 148 (1998).
[26] Elec. Code §§ 9214, 9215.
[27] Elec. Code §§ 1404, 1405, 9214, 9215, 10301.

council must place the measure on the ballot at the next regular election held not fewer than 88 days after the date of the order of election.[28]

10. Effective Date of Adoption or Repeal. A majority vote is required to adopt the measure. If adopted by vote of the city council without submission to the voters, or adopted by the voters, the measure can only be repealed or amended by the voters (unless the language of the measure provides otherwise).[29]

11. Ballot Arguments. The proponents may file an argument in favor of the measure and the city council may file an argument against the measure. Arguments may not exceed 300 words.[30]

12. Council Initiative. The city council may, on its own, submit a measure for voter approval without a petition.[31] This initiative may include changes to the City Charter.[32]

13. Impartial Analysis. When directed by the city council, the city attorney must prepare an impartial analysis on a city measure. The analysis must not exceed 500 words. The analysis should explain the effect of the measure on existing law and the operation of the measure.[33]

14. Conflicting Initiatives. When two or more conflicting measures pass, the one receiving the highest number of affirmative votes controls. Measures "conflict" if they present themselves as conflicting, or if each creates a comprehensive regulatory scheme relating to the same subject.[34]

Process for City Referenda

1. Petition Signature and Time Requirements. The petition must be submitted within 30 days of adoption of the ordinance and signed by not less than 10 percent of the registered voters (if the city has 1,000 or fewer registered voters, the signatures of 25 percent or 100 voters are required).[35] The referendum petition must be in a form prescribed by statute and each section of the petition must have a declaration of the circulator attached. The declaration must include a statement the circulator is a voter or is qualified to be a voter in California.[36]

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[28] Elec. Code §§ 1405, 9215.
[29] Elec. Code § 9217; *Mobilepark West Homeowners Association v. Escondido Mobilepark West*, 35 Cal. App.4th 32, 41 Cal. Rptr. 2d 393 (1995) (city council adopted ordinance purporting to clarify and implement existing rent control initiative measure declared invalid).
[30] Elec. Code § 9282.
[31] Elec. Code § 9222.
[32] It is my understanding that prior charter changes have been proposed as separate ballot measures, following recommendation of a charter review committee. However, there is no legal impediment to other methods.
[33] Elec. Code § 9280.
[34] *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*, 51 Cal. 3d 744, 274 Cal. Rptr. 2d 787 (1990).
[35] Elec. Code § 9237.
[36] Elec. Code §§ 102, 104, 9238.

2. Number or Title to Be Included. Each section of a referendum petition must contain the identifying number or title of the ordinance that is subject to the referendum.[37]

3. Text to Be Included. The text of any ordinance or resolution for which a referendum is sought, must be attached to the petition.[38]

4. Filing. Petitions must be filed during normal office hours as posted.[39] Petitions are filed with the city clerk, who must determine the number of signatures and certify the results.[40]

5. Effect of Valid Petition. If a valid petition containing the requisite number of signatures is timely submitted, the city council must either repeal the entire ordinance or submit the ordinance to a vote.[41] The submission of such a petition suspends the effective date of the ordinance.[42]

6. Time of Election. If not repealed, the city council must submit the ordinance to the voters at: the next regular municipal election if it occurs within not fewer than 88 days; or, if there is no regular election within that time, at a special election called not fewer than 88 days after the order of the city council.[43]

7. Election Procedures. These are the same as those dealing with initiatives.[44]

8. Effect of Adverse Vote. To become effective, the ordinance must be approved by a majority vote. If not approved by a majority vote or if the city council repeals the ordinance, the same or similar ordinance cannot be again enacted for one year from the date of the election or repeal.[45]

City Ballot Measures

In addition to the powers of initiative and referenda, the City Council may place such delegable measures as it determines appropriate on the ballot.[46] When such matters are submitted to the electorate, they are deemed adopted or rejected based upon the majority vote.

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[37] Elec. Code § 9238.
[38] Elec. Code § 9238.
[39] Elec. Code § 9242.
[40] Elec. Code §§ 9239, 9240.
[41] Elec. Code § 9241.
[42] Elec. Code § 9237.
[43] Elec. Code § 9241.
[44] Elec. Code §§ 9217-9225, 9243.
[45] Elec. Code § 9241.
[46] Elec. Code § 306 "'City measure'" includes any proposed city charter, any proposed amendment to a city charter, any proposition for the issuance of bonds by the city, any advisory question, or any other question or proposition submitted to the voters of a city." Although no cases exist pursuant to this provision, presumably the same limitations on the topics of initiatives and referenda exist, *see Limitations on Initiative and Referenda, supra.*

The city council may also submit "advisory measures" to the electorate.[47] Such measures are advisory only and do not bind the council in the legal sense. The topics for advisory measures include almost any relevant topic, so long as the measure is clearly labeled as "advisory."

The procedure for such advisory measures is simply that the Council adopts the appropriate resolutions calling for the election, and places the advisory measure on the ballot. The city clerk must publish a synopsis of the measure in the manner provided for publication in the form provided for in the Elections Code.[48]

Ballot Measure Legal Issues

CEQA

One overarching consideration with any City ballot measure is whether compliance with the California Environmental Quality Act ("CEQA")[49] is required before placement of a measure on the ballot by the City Council. In general, the CEQA guidelines provide that "[t]he submittal of proposals to a vote of the people of the state or of a particular community that does not involve a public agency sponsored initiative" is not considered a "project" under CEQA.[50]

However, a measure generated and placed on a ballot by a city council that shifts partial or total approval for a project to the voters will be considered a discretionary project under CEQA, and therefore complete environmental review under CEQA is required prior to placement of such measure on the ballot. For example, in *Friends of Sierra Madre v. City of Sierra Madre,* [51] a city council proposed a ballot initiative that, if approved, would automatically remove structures from historic preservation status. The California Supreme Court held that CEQA review was required prior to such placement, because the council had already determined to de-list the properties and place the matter on the ballot for approval, and neither of those were ministerial decisions.

In regards to the stadium, the Council may place an initiative measure on the ballot that is presented by the voters, without first complying with CEQA. The Council action placing the matter on the ballot is a ministerial act that is not subject to CEQA. In addition, the Council can place a voter-initiated referendum on the ballot without first complying with CEQA, again because placing the measure on the ballot is a ministerial act. However, a referendum seeks voter review of an action the Council has previously taken. Consequently, although putting the referendum on the ballot is not itself subject to referendum, the Council would have complied with CEQA prior to making the decision that is the subject of the referendum.

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[47] Elec. Code § 9603.
[48] Elec. Code § 12111.
[49] Cal. Gov't. Code § 21000 and following.
[50] 14 Cal. Code Regs. § 15378(b)3; *see Stein v. City of Santa Monica*, 110 Cal. App. 3d 458, 168 Cal. Rptr. 39 (1980) (codified by CEQA Guidelines). However, if a city believes that a voter-sponsored initiative is ill advised because it will have an adverse impact on the environment, it may refer the matter for an abbreviated environmental review pursuant to Cal. Elec. Code §§ 9111 and 9212.
[51] *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 105 Cal. Rptr. 2d 214 (2001).

The Council could also place an advisory measure on the ballot. An action that is advisory in nature and does not commit the Council to a particular course of action is not a "project" subject to CEQA.[52] The advisory measure may be couched in terms of the parameters for negotiations concerning the financial and planning aspects of a stadium. An advisory measure may express the will of the people in regards to the parameters of a stadium transaction and project, but should not contain a City commitment to enter into an agreement should a document complying with those parameters be achieved through negotiations. If, however, the Council drafts or proposes a measure for the ballot that is intended to be legally binding on the Council, such a measure would require CEQA review. For example, if the Council wanted to propose a measure to rezone property so that it was zoned exclusively for stadium use, that measure would be subject to CEQA.

I have attached for your information a copy of the ballot measure that was placed on the November 1990 ballot by the City Council regarding a proposal for a baseball stadium. Please note that the ballot language establishes general principles upon which a stadium agreement may be reached – it does not commit the City to approval of such a project. Such language should not invoke CEQA review prior to placement on the ballot, but full CEQA review will be required to be completed prior to the City actually entering into any such detailed agreement with the 49ers, granting land use entitlements, or committing City or RDA funds directly to the stadium project.

Please let me know if you have any questions.

Helene Leichter

Helene Leichter
City Attorney

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[52] *City of Vernon v. Board of Harbor Commissioners*, 63 Cal. App. 4th 677 (1998).

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JAN 15 2008
CITY OF SANTA CLARA
CITY ATTORNEY'S OFFICE

November 6, 1990 (General Election)

Measure N Ballpark Land Use Advisory
(Passed) Yes - 12,647 No - 12,137
"Should the City of Santa Clara (City) work with a Joint Powers Authority (JPA) to locate a baseball park for use by the Giants baseball organization on approximately 98 acres of City owned land south of State Highway 237 between Great America Parkway and the Guadalupe River, subject to the following conditions?

1. City would own the land and receive escalating lease payments commencing with $4,320,000 per year (which amount City may agree to defer to pro rate);
2. The one time costs for site improvements of approximately $2.7 million will be paid by City's Redevelopment Agency;
3. JPA, consisting of local governments including the city of Santa Clara, would finance construction of the ballpark, parking facilities and related on-site and off-site improvements with a utility tax of not more than 1%. JPA would own the ballpark structure;
4. JPA would contract with private management to construct and operate the ballpark and parking facilities;
5. City, JPA, the Giants, and private management would enter into agreements of no less than thirty (30) years guaranteeing rent payments to City and the payments necessary to construct, maintain and operate the ballpark facilities;
6. JPA would pay for above normal services such as traffic control and security on game days."