



# San Diego City Attorney Jan I. Goldsmith

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## NEWS RELEASE

**FOR IMMEDIATE RELEASE: April 11, 2016**

Contact: [Gerry Braun](mailto:gbraun@sandiego.gov), Director of Communications: [gbraun@sandiego.gov](mailto:gbraun@sandiego.gov) (619) 533-4782

## **Flaws in Briggs/Frye Initiative Put City at Risk** *Review of “Citizens’ Plan” flags myths and legal problems*

City Attorney Jan Goldsmith today released a comprehensive review of the “Citizens’ Plan,” a ballot initiative proposed by attorney Cory Briggs and former Councilmember Donna Frye. The review was requested by Mayor Kevin Faulconer and was provided to the Mayor and City Council.

The attached 25-page Report with 153 footnotes explains the proposed Initiative and identifies a number of potential legal problems posing a legal risk to the City of San Diego.

In explaining the Initiative, the Report dispels several myths surrounding the Briggs/Frye Initiative. For example, some have stated that the Initiative “clears the environmental hurdles” for a downtown convadium. The Initiative does not clear environmental hurdles for any downtown project. Rather, it establishes a local environmental process, with questionable legality, setting forth requirements that equal or exceed the current environmental requirements in state law. (See Report, page 9, “CEQA Exemption and Environmental Mandates for Overlay Zone Projects”).

Legality issues are discussed in Section I of the Report which states as follows:

“Part 6 of the Briggs/Frye Initiative, “Interdependence; Interpretation,” states that all of the codified provisions,<sup>[1]</sup> discussed below, are “inseparably interconnected and interdependent” such that if “any portion” of the codified sections “is held to be invalid by a court of competent jurisdiction after any and all appeals are complete, then none of the remaining portions of the Ordinance shall have any force or effect.”

This provision voids the entire Initiative if any substantive provision is successfully challenged in court. It operates as a “poison pill” by eliminating the entire Initiative upon one provision being held invalid.

This is a very unusual provision. An initiative would typically state just the opposite to ensure that all of its terms are not jeopardized by one legal issue. By including this “poison pill” in the Briggs/Frye Initiative—a complicated and varied initiative containing some legally questionable terms—the authors have rendered the measure legally unreliable.

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<sup>[1]</sup> The codified provisions are contained in Part 4 of the Initiative and are the proposed changes to the San Diego Municipal Code to achieve the purposes of the Initiative.

This Report identifies six provisions that are arguably invalid, any one of which, if found invalid, would invalidate the entire initiative:

- Allowing hotel operators to retain tax revenue collected from guests (who are the taxpayers) is at odds with state and local laws, including San Diego Charter section 85, requiring deposit of all tax revenue in the City's treasury. See Part IV.C and D
- Allowing hotel operators to exercise discretion in deciding whether to fund certain outside agencies may be at odds with Charter section 11.1, which prohibits delegation of the City Council's legislative discretion to third parties. See Part IV.D
- Creating a new "Downtown Convention and Entertainment Overlay Zone" (Overlay Zone) in the City in which CEQA does not apply to certain types of development and replacing CEQA with a local environmental law goes well beyond current law, including recent California Supreme Court decisions. This could result in a legal challenge and "test" case. See Part III
- Requiring "any project" authorized under the new downtown Overlay Zone to pay \$15 million to the Port District and \$5 million for a Mission Valley reserve fund may be challenged on constitutional grounds. See page 6, fn 16 and page 10 fn. 41
- Directing the San Diego Unified Port District (Port District), a separate government agency, on the use and expenditure of certain funds may infringe on the Port District's jurisdiction under state law. See page 7, fn. 17 and fn. 18.
- Including various provisions in the Initiative to increase taxes, create new downtown zoning (Overlay Zone), prohibit expansion of the convention center on its current site, authorize sale and set conditions for development of the Qualcomm Stadium site in Mission Valley, create a new environmental law to replace CEQA in the Overlay Zone, direct use of Port District funds, create an environmental reserve fund for Mission Valley, and address the land use needs of San Diego State University and other educational institutions creates a strong likelihood that the Initiative violates the constitutional requirement that initiatives be limited to a single subject. See Part VII.

This unusual "poison pill" provision creates financial risks for the City in the event of litigation. For example, because our office questioned the legality of the original convention center tax increase designed by outside tax counsel, we insisted that no tax be collected until final court approval on a validation action we would file. When the tax was found illegal years later, the City was not ordered to pay refunds as no taxes were collected.

This Initiative similarly contains legally questionable provisions, any one of which could invalid the entire Initiative, including the tax increase. Litigation challenging the measure could take many years to conclude during which the measure requires that the new taxes be collected. The Initiative contains no protection or security for the City from having to repay taxes or rescind actions upon a court finding one provision invalid, thereby rendering the entire Initiative void.

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