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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, et al.,

Petitioners/Plaintiffs,

v.

ELIZABETH MALAND and MICHAEL VU,

Respondents/Defendants

CATHERINE APRIL BOLING,

Real Party in Interest.

CASE NO.: 37-2018-00023295-CU-WM-CTL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY RELIEF; AND REQUEST FOR INJUNCTIVE RELIEF TO RELIEVE CITY OFFICIALS FROM OBLIGATION TO SUBMIT SOCCER CITY INITIATIVE TO VOTERS ON NOVEMBER 2018 BALLOT

ELECTION MATTER
EXPEDITED ACTION REQUESTED

DATE: July 13, 2018
TIME: 1:30 p.m.
JUDGE: Hon. Timothy Taylor
DEPT.: C-72

Case filed: May 11, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CALIFORNIA CODES

SAN DIEGO CITY CHARTER ARTICLES

SAN DIEGO MUNICIPAL CODES

INTRODUCTION

The City of San Diego brings this action to determine the validity of a local proposed initiative titled "San Diego River Park and Soccer City Initiative" ("INITIATIVE"). The measure would require the Mayor to execute a 99-year lease (Lease) for approximately 233 acres of City-owned real property surrounding the San Diego Chargers' former home stadium, and 20 acres of City-owned real property on Murphy Canyon Road to a "Qualified Lessee" if the Lease meets certain requirements dictated by the INITIATIVE. "Qualified Lessee" is so narrowly defined that only one entity currently meets the definition – Major League Soccer San Diego Pursuit LLC – the entity sponsoring the primary political action committee supporting the INITIATIVE. The INITIATIVE imposes scores of requirements on the Lease, locks in many protections for the Qualified Lessee (including the option to purchase almost 80 acres anywhere on the property), and cannot be amended without voter approval until 2033. The INITIATIVE thus seeks to require the City to lease its largest remaining developable real estate asset, the stadium site, to a narrowly defined lessee on terms unilaterally drafted by the lessee and less favorable than a lease negotiated under the City's normal rules.

Petitioners submit that the INITIATIVE is legally impermissible for multiple reasons. First, the INITIATIVE impermissibly directs a broad range of administrative actions that exceed the scope of the local initiative power. Second, the INITIATIVE conflicts with the City Charter by seeking to control decisions the Charter delegates to the Mayor and the City Council. Third, the INITIATIVE conflicts with state laws governing municipal development agreements and environmental protection. Fourth, it impermissibly impairs the Mayor and City Council's collective responsibility over certain "essential government functions," including the disposition of City-owned real estate and water supply. Finally, the INITIATIVE does not propose an enforceable legislative act, and contains terms that are unreasonably vague and ambiguous.

Petitioners are not asking the Court to resolve a public policy dispute about use of the property at issue; the only question before the Court is whether the voters can lawfully enact the INITIATIVE. Consistent with existing precedent, the City requests preelection review of the INITIATIVE to determine whether it exceeds the permissible scope of the local initiative power and, if so, avoid the unnecessary expense and disruption of presenting an invalid measure to City voters.

WHY PREELECTION REVIEW IS NECESSARY

While the right to act by initiative is protected under our constitutional framework, it is not an unfettered right. When confronted with an attempt to present an invalid initiative measure to voters, courts can – and should – engage in preelection review and order the measure removed from the ballot. (*AFL v. Eu* (1984) 36 Cal.3d 687.)

Preelection review is appropriate "where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign." (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389.) "[I]f the court is convinced, at any time, that a measure is fatally flawed, it should not matter whether that decision is easy or difficult, simple or complicated. Certainly it would be unconscionable for this court, at this time, to rule in favor of petitioner on the basis that the issue is close – only to be faced with a postelection challenge should the measure pass." (*Citizens for Responsible Behavior v. Superior Ct.* (1991) 1 Cal.App.4th 1013, 1022.)

The City alleges the INITIATIVE is invalid for several reasons, including that it seeks to accomplish actions that are beyond the scope of the local initiative power. In *AFL*, the California Supreme Court explained that such claims are appropriate for preelection review. "If it is determined that the electorate does not have the power to adopt the proposal in the first instance...the measure must be excluded from the ballot." (*AFL, supra*, 36 Cal.3d at 695.) One example given by the Court in *AFL* was an initiative that was not legislative in character. (*Id.* at 697.) Courts have subsequently expanded this list to include initiatives that: (1) impermissibly interfere with essential government functions (*City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466, 470); (2) conflict with the provisions of a city charter (*Campen v. Greiner* (1971) 15 Cal.App.3d 836); (3) conflict with state law (*Committee of Seven Thousand v. Superior Ct.* (1988) 45 Cal.3d 491 (hereafter "*COST*"); *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868); or (4) that are unreasonably vague (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892). Each of these legal defects is present in the INITIATIVE and precludes it from being submitted to voters.

The California Supreme Court has also explained that preelection review of invalid initiative measures is important to protect the integrity of the electoral process.

> The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure. (*AFL, supra*, 36 Cal.3d at 697.)

Allowing an election to proceed on an invalid initiative measure also wastes taxpayer monies and can create irreparable divisions within a community.

> If an initiative ordinance is invalid, no purpose is served by submitting it to the voters. The costs of an election – and of preparing the ballot materials necessary for each measure – are far from insignificant. [ ] Proponents and opponents of a measure may expend large sums of money during the election campaign. Frequently, the heated rhetoric of an election campaign may open permanent rifts in a community. (*Citizens for Responsible Behavior, supra,* 1 Cal.App.4th at 1023.)

Deferring review of the INITIATIVE until after the election would unquestionably waste taxpayer dollars. The City estimates it will cost as much as a half million dollars to place the INITIATIVE on the November 2018 ballot, plus an additional amount in staff time and resources to comply with all the elections procedures, respond to inquiries from the public, and otherwise prepare for the election. (Maland Decl., ¶¶ 6-7.) The City will begin incurring costs related to this measure for preparation of ballot materials in early August 2018. (*Id.* at ¶ 8.)

Preelection review is additionally important in this case because the INITIATIVE provides for immediate action by the City in the event the INITIATIVE is adopted. If the INITIATIVE passes, it will present immediate and substantial questions about the authority and legal obligations of City officials, particularly the Mayor, thereby creating a high likelihood of costly and disruptive litigation. The City is also prohibited as a practical matter from making any decisions regarding the property at issue as long as the potential exists for submitting the INITIATIVE to voters or it is tied up in postelection litigation. In sum, preelection review is both appropriate and necessary in this case.

FACTUAL BACKGROUND

Petitioner/Plaintiff City of San Diego is a charter city organized under the "home rule" provisions in Article XI of the California Constitution.

Real Party in Interest is the nominal proponent of the INITIATIVE. The INITIATIVE proposes development of approximately 233 acres of City-owned real property consisting of the area surrounding SDCCU Stadium, the former home stadium of the San Diego Chargers, and 20 acres of land and

improvements on Murphy Canyon Road – previously the Chargers' practice facility (collectively, the "PROPERTY"). In 2017, the Chargers announced they were relocating to Los Angeles. Since that time, the City has continued to operate and maintain the PROPERTY. The PROPERTY is one of the City's prime real estate assets and represents one of the last opportunities for large-scale development in the City. (Thompson Decl., ¶ 5.) It is also a potential location for future groundwater storage, an injection/extraction facility, and future wastewater recycling facility. (Adrian Decl., ¶¶ 4, 12; Dorman Decl., ¶ 9.)

The INITIATIVE consists of a General Plan amendment, a new Specific Plan, amendments to several existing Community Plans, a Development Agreement, and a proposed new Division 28 in Chapter 6, Article 1, of the San Diego Municipal Code ("SDMC" or "Municipal Code") that would govern the conditions of the Lease and the procedures for "negotiating" and executing it. Division 28 would require the Mayor to execute a 99-year lease for the PROPERTY to a "Qualified Lessee" if a Lease is presented that meets the conditions proposed in the INITIATIVE. (INITIATIVE, § 61.2803.)[1]

Division 28 places approximately 100 lease terms into the Municipal Code; those terms would therefore be required by law and not subject to negotiation. Among other things, those terms: define a "qualified lessee" as an entity that has been awarded, or is under active consideration for an award of, a professional soccer franchise for the San Diego market; require the price of the 99-year lease be based on the value of the PROPERTY as of March 2017; contemplate development of the PROPERTY for a joint use stadium, River Park, neighborhood parks and athletic fields, office and retail space, multi-family residential units, and hotel rooms; allow the lessee to sublease the PROPERTY; and provide the lessee with an option to purchase up to 79.9 acres of the lessee's choosing. (*Id.* at § 61.2803(d).) There is only one known entity that currently meets the definition of "qualified lessee" – Major League Soccer San Diego Pursuit LLC ("SD Pursuit"). (Thompson Decl., ¶ 4.) Several of SD Pursuit's officers are the largest financial contributors to the campaign committee formed to support passage of the INITIATIVE. (RJN, Exhs. G & H.)

The INITIATIVE provides that if the stadium is not built within 7 years, the City may take steps

[1] A true and correct copy of the relevant portions of the INITIATIVE is attached as Exhibit A to the City's Request for Judicial Notice.

to terminate the Lease, but termination is not automatic and the City's rights to the PROPERTY would be subject to the rights of any sublessees. (INITIATIVE, § 61.2803(h).) That 7-year period is tolled by various events, including litigation, unforeseen conditions, and delays attributable to changes in the law, or the failure to obtain necessary permits. (*Ibid.*) Termination of the Lease would not affect the new Municipal Code provisions added by the INITIATIVE, or the General Plan, Specific Plan or Community Plans provisions amended by the INITIATIVE without a public vote. (INITIATIVE, §14.) The provisions of the INITIATIVE cannot be amended until 2033, except by another public vote. (*Ibid.*)

On March 2, 2017, Real Party in Interest submitted a Notice of Intent to circulate petitions in support of the INITIATIVE. On May 22, 2017, Respondent/Defendant MALAND certified the petitions contained sufficient signatures to qualify for either adoption by the City Council or presentation to City voters. (Maland Decl., ¶ 5.) On June 19, 2017, Respondent/Defendant MALAND presented her certification to the City Council, and the Council voted to submit the proposed INITIATIVE to the voters on a future ballot.[2] (*Ibid.*) The INITIATIVE must be submitted to the San Diego voters at a special election consolidated with the next City-wide General Election to be held in November 2018 unless a court orders otherwise. (*Ibid.*)

ARGUMENT

A. The INITIATIVE Impermissibly Directs Administrative Acts

The initiative power extends only to legislative acts and not to administrative or executive acts. (Cal. Const., art. II, § 11; *Citizens for Jobs & the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1332; *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399.) The Municipal Code confirms this limitation for City initiatives: "Any proposed *legislative act* . . . may be submitted...by an initiative petition." (SDMC § 27.1001, emphasis added.)

"Legislative acts generally are those which declare a public purpose and make provision for the ways and means of its accomplishment. Administrative acts, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body."

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[2] The City Council was required to either adopt the INITIATIVE without alteration, or submit it to City voters. (SDMC §§ 27.1034, 27.1035.) Provisions of the Municipal Code are attached as Exhibit I to the City's Request for Judicial Notice. Provisions of the Charter are attached as Exhibit J to the Request for Judicial Notice.

(*Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509.) "The plausible rationale for [the legislative/administrative dichotomy] espoused in numerous cases is that to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." (*San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530.)

The INITIATIVE proposes the adoption of an ordinance that directs the Mayor to perform a "ministerial" review of a proposed lease and, if it conforms to the terms of the INITIATIVE, to execute a 99-year Lease and potentially sell 80 acres of currently unidentified City land. The INITIATIVE also proposes various zoning changes to facilitate the INITIATIVE's contemplated development of the PROPERTY. While zoning changes are generally considered legislative in nature, *see Arnel Dev. Co. v. Costa Mesa* (1980) 28 Cal.3d 511, 516, the totality of the INITIATIVE proposes far more than a simple zoning change. It asks voters to usurp the administrative power of the Mayor and other City officials to negotiate the terms of lease agreements and development agreements for City land, and forces the City to accept lease terms and a Development Agreement that were crafted, without City input, by the very private parties who are sponsoring the INITIATIVE and who would benefit most from its adoption.

Pursuant to City Charter section 26, the Council has adopted an "Administrative Code" providing for the powers and duties of the administrative officers of the City. (RJN, Exh. K.) The provisions governing the lease and sale of City-owned real property are located in Chapter 2, Article 2, Division 9 of the *Administrative* Code. (*Ibid.*) The INITIATIVE would replace and supersede those administrative provisions with "unique" standards and procedures that would apply *only* to the Lease terms and development of the PROPERTY. (INITIATIVE, §§ 61.2801(a)-(b); 61.2803.) While the INITIATIVE couches these standards as "legislative provisions for the objective requirements that must be contained in any Lease agreement," *id.* at § 61.2801(d), they actually seek to dictate a host of key administrative decisions in the Lease, decisions the current code leaves to the Mayor.

For example, the INITIATIVE narrowly defines the "Qualified Lessee" for the PROPERTY to be a current applicant for a professional soccer league franchise and requires the term of the lease to be 99 years. (INITIATIVE, §§ 61.2802, 61.2803(b).) It provides that the Lessee's responsibility for constructing the River Park will be limited, that the Lessee will have a virtually unlimited right to

sublease the PROPERTY, and that any sublessee's rights will be guaranteed even if the City retakes possession of the PROPERTY. (*Id.* at §§ 61.2803(c)(7), 61.2803(i); see also Thompson Decl., ¶ 19.) The INITIATIVE prescribes how the fair market value of the leasehold interest will be determined, and requires that that payment of rent for the entire 99 years will be made in a single lump sum payment at the beginning of the Lease. (INITIATIVE, § 61.2803(f).) It also provides that the Lessee will have the option to purchase 79.9 acres *anywhere* on the PROPERTY. (*Id.* at (g).) If the new stadium is not built, the City cannot exercise its right to terminate the Lease for 7 years, and this time can be extended by litigation, failure to obtain permits, and other circumstances. (*Id.* at (h).)

The INITIATIVE exceeds the proper scope of the initiative power by prescribing the required terms of the Lease. The *negotiation* of contractual terms by a governmental entity is an administrative act. "When an action requires the consent of the governmental body and another entity, the action is contractual or administrative. The give-and-take involved [in a negotiation] ...is not legislation, but is a process requiring the consent of both contracting parties. (*Worthington v. City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1142; see also *San Bruno Com. for Economic Justice, supra,* 15 Cal.App.5th 524 [real estate contract not a legislative act].) By contrast, the *approval or disapproval* by a governing body of a previously negotiated agreement is generally considered a legislative act. (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 507 [project approval after negotiated agreement is a legislative act]; *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors* (2000) 84 Cal.App.4th 221, 225 [same].)

Here, the INITIATIVE does not seek voter approval for an agreement already negotiated by the City officials authorized to engage in such negotiations. Rather, it seeks to dictate nearly 100 Lease terms that would ordinarily be subject to negotiation as a means to improperly control the key administrative decisions for construction of a new stadium and development of the surrounding area.

The approval of the proposed Development Agreement as part of the INITIATIVE is impermissible administrative action for similar reasons. The INITIATIVE asks voters to approve a Development Agreement that has been crafted in advance by one side of the agreement – i.e., private parties affiliated with SD Pursuit, the only entity that meets the INITIATIVE's definition of a "Qualified Lessee" – without City participation. While the ultimate *approval* of a Development Agreement has

been statutorily defined as a legislative act, see Gov. Code, § 65867.5, no statute or case law suggests that the process of *negotiating* such an agreement is legislative. In fact, as noted above, the case law suggests precisely the opposite. (*Worthington*, *supra*, 130 Cal.App.4th at 1142.)

That the INITIATIVE impermissibly directs and supplants administrative action is further illustrated by its provisions that recast the Mayor's review of the Lease, Development Agreement, and the proposed Specific Plan as "ministerial" actions. For example, section 61.2805(d) defines the Mayor's approval "and other determinations set forth in [Division 28]" as "ministerial" and that nothing in Division 28 grants the Mayor or City officials "discretionary authority to address environmental concerns" or to revise the standards and conditions of development "as set forth in the Specific Plan." Similarly, Section 8 of the INITIATIVE states that the Specific Plan is not only approved, but that it is exempt from any conflicting provisions of the Municipal Code, except as provided in the Specific Plan itself, which contains "exclusive provisions governing and regulating the Specific Plan's development review procedures and process, including the plan-checks, sign-offs, actions, decisions, approvals, and other determinations required by the Specific Plan..." The INITIATIVE thus not only directs executive or administrative action, it also precludes the City from exercising any future discretionary administrative authority over this project by including virtually all discretionary decision-making in the INITIATIVE itself and characterizing all future action as ministerial.

Although the INITIATIVE states in numerous places that it is directing legislative action or legislative policy, it is not enough to *declare* that it is a legislative act; it must in fact direct only legislative action. (See *Citizens for Jobs & the Econ.*, *supra*, 94 Cal.App.4th at 1332-34.) The INITIATIVE's provisions go far beyond legislative matters though, and seek to control several administrative decisions, from the terms of the Development Agreement to the terms of the Lease and sale of the PROPERTY. At best, the INITIATIVE improperly combines legislative and administrative features in one measure by not only asking voters to approve certain zoning policies, but also to approve the implementation of those policies through numerous administrative decisions.

B. The INITIATIVE Conflicts With the San Diego City Charter

The City Charter is an instrument of limitation on the exercise of power by the City and its officers. (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598.) It is the governing rule under

which the City must conduct its affairs and has been analogized to a municipal "constitution." While the voters of a charter city may use the initiative process to amend the city charter, see Elec. Code, §§ 9255-9269, the local initiative power may not be used to enact ordinances that contravene the city charter. (*Campen, supra*, 15 Cal.App.3d at 842-43 [invalidating local initiative that conflicted with provisions in the city charter].) Here, the INITIATIVE violates the City Charter by usurping administrative functions that the Charter has exclusively vested in the Office of the Mayor.

The City Charter provides for a "Strong Mayor" form of government, in which the Mayor holds the administrative powers of the City and is responsible for day-to-day operations. (See Charter, art. XV, §§ 260, 265 [transferring all "executive authority, power and responsibilities" previously held by the City Manager to the Mayor].) The Charter includes the execution of contracts among the Mayor's administrative functions. (*Id.* at art. V, § 28.)

The City Attorney has advised that engaging in contract negotiations is an administrative function under the Charter and that attempts by the Council to exercise that function would violate the Charter. (RJN, Exh. L.) In Opinion 86-7, the City Attorney opined that the Charter "makes absolutely no provision for any role for the City Council in the administrative affairs of the City, including, but not limited to, the negotiation of contracts []." (*Id.* at 1.) While the Council's legislative authority allows it to veto a contract it does not believe to be in the public interest, the Council may not change the terms of the contract or become directly involved in the negotiations without impermissibly exercising executive authority in a manner prohibited by the Charter. (*Id.*; see also Exh. M [same].)

The differing roles of the Mayor and Council under the Charter are also reflected in Council Policy 700-10. (RJN, Exh. D.) That Policy does not grant any authority to the Council to make the determination regarding which property can be disposed of, nor does it give the Council authority to initiate or negotiate the sale or lease of real property; those actions are committed to the Mayor. (*Id.*)

An initiative may only propose actions that are within the authority of the legislative body. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775 [local electorate's right of initiative is generally coextensive with the legislative power of the governing body]; *Galvin v. Bd. of Supervisors* (1925) 195 Cal. 686, 691 [proposed initiative must be "in the nature of such legislation as the board of supervisors has power to enact"].) In a charter city, the legislative body may not act in a manner that is inconsistent

with the city's charter, and an initiative is subject to the same constraints. (See *Citizens for Responsible Behavior v. Superior Ct.* (1991) 1 Cal.App.4th 1013, 1034 [discussing charter] and *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95 [same].) A local initiative that conflicts with the city charter is essentially an unlawful attempt to amend the charter without complying with the stricter requirements for charter amendments. (*Patterson, supra*, 202 Cal.App.3d at 104-5.)

The INITIATIVE is invalid because it proposes an ordinance that conflicts with the Mayor's administrative powers under the Charter by, inter alia, requiring the Mayor to execute a lease agreement and Development Agreement with critical terms that are not subject to negotiation at all. Since the Council could not validly adopt such an ordinance under the Charter, neither can the INITIATIVE.

C. The INITIATIVE Conflicts With State Law

"[I]f the State Legislature has restricted the legislative power of the local governing body, that restriction applies equally to the local electorate's power of initiative." (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 920.) A local initiative may not, for example, control decisions concerning matters of statewide concern that state law exclusively delegates to the city council. (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 474-75; *COST* (1988) 45 Cal.3d 491.) The INITIATIVE conflicts with state laws governing development agreements, the environment, and real property.

1. The INITIATIVE Conflicts with State Laws on Development Agreements

State law authorizes a city to enter into a development agreement "with any person having a legal or equitable interest in the real property." (Gov. Code, § 65865(a).) The INITIATIVE conflicts with this requirement because the "Qualified Lessee" with whom it proposes the City enter a development agreement for the PROPERTY does not possess a "legal or equitable interest" in the PROPERTY. As noted previously, the INITIATIVE narrowly defines a "qualified lessee" to effectively mean SD Pursuit, a private entity which seeks to bring a major league soccer team to San Diego, and whose major funders are the largest financial contributors to the INITIATIVE. (See, e.g., RJN, Exhs. G & H.) Since the lease contemplated by the INITIATIVE will not, however, be executed until some future time (if at all), neither SD Pursuit, nor any other non-City entity, *currently* possesses any "legal or equitable interest" in the PROPERTY.

The INITIATIVE also conflicts with other provisions in state law governing municipal development agreements. For example, state law requires a city planning commission and the city's "legislative body" both to hold public hearings on development agreement applications. (Gov. Code, § 65867.) The city's "legislative body" must also make findings that "the provisions of the agreement are consistent with the general plan and any applicable specific plan." (*Id.* at § 65867.5(b).) After the development agreement is approved, the parties to the agreement may amend or cancel it at any time by "mutual consent." (*Id.* at § 65868.)

The INITIATIVE impermissibly conflicts with these state law requirements by circumventing the public hearing requirements and supplanting the "legislative body's" duty to make the statutorily required "findings" for development agreements. (See, e.g., *City of Atascadero, supra*, 135 Cal.App.3d at 469-70 [exclusive delegation of authority to local legislative body preempts use of the local initiative power].) Not only are these functions exclusively delegated by state law to the City's "legislative body," they also constitute administrative activities beyond the scope of the local initiative power. (*See*, e.g., *Long Beach Community Redevelopment Agency v. Morgan* (1993) 14 Cal.App.4th 1047, 1054 [making of statutorily required findings is an administrative action].) Finally, by prohibiting amendments to the proposed Development Agreement without voter approval, the INITIATIVE conflicts with the statutory rights of the parties to amend or cancel the Development Agreement by mutual consent.

2. The INITIATIVE Conflicts with CEQA

The INITIATIVE asserts that the execution of the Lease itself is a ministerial act, and it further states that nothing in the required provisions of the Lease (which the INITIATIVE would codify in new Division 28 of the Municipal Code) is intended to grant the Mayor or other City official "discretionary authority to address potential environmental concerns" or to make any revisions to the Specific Plan or Lease. (INITIATIVE, § 61.2805(d).) These provisions preclude future environmental review and "exempt" all aspects of the development authorized by the INITIATIVE from the requirements of the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000, et seq.), including that the legislative body of a city make certain factual findings as a condition of approving a development project. (*Id.* at §§ 21081 & 21081.6; see also Cal. Code of Regs., tit. 14, §15091.)

Division 28 states it is "necessary to ensure that all of the environmental considerations and mitigation measures...contained in the Specific Plan are fully and accurately reflected in the Lease...without the necessity for the City to repeat the analysis already contained in the Specific Plan or the possibility that conflicting environmental measures would be contained in any Lease that could conflict with the Specific Plan." (INITIATIVE, § 61.2801(c).) In fact, all "determinations set forth in [Division 28] shall be ministerial decisions [by the Mayor]" and nothing in that division "is intended to grant the Mayor or other City official the 'discretionary authority to address potential environmental concerns' (as such concept has been addressed by California courts) or to revise the standards and conditions of the planned development as set forth in the Specific Plan or the provisions of any Lease which conform to the Specific Plan, such environmental concerns and mitigation measures having been fully addressed within the requirements of the Specific Plan..." (*Id.* at § 61.2805(d).)

The INITIATIVE thus purports to address all environmental issues as a matter of legal definition rather than factual inquiry and concludes that any permits required are ministerial in nature rather than an exercise of discretion. "Fact-finding" is normally an exercise of administrative discretion. (*Center for Biological Diversity v. Department of Fish & Wildlife (2015)* 62 Cal.4th 204, 228 [review of administrative agency's factual findings]; see also *Morgan, supra*, 14 Cal.App.4th at 1054.) The INITIATIVE replaces that fact-finding, or requires only one permissible result: the lease and development of the PROPERTY as provided for in the INITIATIVE. As noted above, an initiative can only take action that would be permitted to the legislative body. Since initiatives are not subject to CEQA review, by dictating that future environmental decisions are "ministerial" the INITIATIVE would avoid all CEQA compliance for development of a major project, something the City could not do by ordinance.

3. The INITIATIVE Conflicts with State Laws Governing Leases of City Land

The Lease proposed by the INITIATIVE would be for 99 years. However, Government Code section 37380 provides that a city may only lease property beyond 55 years if certain conditions are met. While several provisions do not apply to charter cities, section 37380(b)(1) requires the lease to be subject to "periodic review by the city and shall take into consideration the then current market conditions."

The INITIATIVE violates subdivision (a) of section 37380 because it neither provides for "periodic review" of the lease nor allows for modification of the Lease to reflect "*current* market conditions." (See, e.g., INITIATIVE, § 61.2803(f)(2) ["fair market value" of Lease based on March 2017 valuation].) Although section 37396 allows leases up to 99 years for stadiums and sports arenas, the INITIATIVE proposes leasing an area well in excess of that necessary for a stadium. The INITIATIVE requires a lease of 233 acres (and a separate 20 acres on Murphy Canyon Road) and proposes extensive non-stadium development, including retail, a hotel, and new homes. The INITIATIVE's provisions therefore conflict with the state laws governing leases of City-owned land.

D. The INITIATIVE Impermissibly Impairs Essential City Government Functions

An initiative cannot be used where "the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential." (*Simpson v. Hite* (1950) 36 Cal.2d 125, 134; *Geiger v. Bd. of Supervisors* (1957) 48 Cal.2d 832 [invalidating tax measure]; *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826 [minimum annual budget for public safety].) An enactment that interferes with the City's ability to carry out its day-to-day business is not a proper use of the initiative power. (*Lincoln Property Co. No. 41, Inc. v. Law* (1975) 45 Cal.App.3d 230, 233-234.) Similarly, an enactment cannot straitjacket the City to make it impossible to carry out the public business. (*Housing Authority v. Superior Ct.* (1950) 35 Cal.2d 550, 559.) Here, the INITIATIVE impairs the City's ability to discharge essential government functions concerning the leasing of City real estate assets and water supply.

1. Interference with the City's Duties Concerning City-Owned Real Estate Assets

The INITIATIVE would impermissibly impair the authority of the Mayor and the City Council to make basic financial and land use decisions for City-owned real estate. The City has a duty to "optimize . . . the lease rent" from City-owned property. (Thompson Decl., ¶3.) The INITIATIVE interferes with this duty by authorizing a lease of the PROPERTY that does not "optimize" its value, but rather is intended primarily to benefit the private parties supporting the INITIATIVE.

As noted previously, the PROPERTY is one of the City's largest real property assets. (Thompson Decl., ¶ 5.) Revenue generated from leases of City-owned land are a vital component of the City's budget. (*Id.* at ¶ 11.) On the open market, the City would expect the PROPERTY to generate at least

$11 million in annual lease revenues, about $1 million more per year than generated from the City's current largest tenant, Sea World. (*Id.* at ¶ 12.) The annual lease revenues from the PROPERTY would represent approximately one-fifth of the City's total annual real estate rental revenues, and total more than $1 billion in City revenues over the life of the Lease. (*Ibid.*) Yet the INITIATIVE proposes to tie up this asset for 99 years (or at least until 2033 when amendments would first be allowed without a public vote) with virtually no public participation or oversight.

The INITIATIVE overrides the normal City policies that allow the City to "optimize" the lease rent for the PROPERTY and instead requires the City to accept lease terms that benefit a single entity and the private parties supporting the INITIATIVE. (See Thompson Decl., ¶¶ 7-10.) Normally, the City's administrative officers would put out a "Request for Proposals" and solicit competitive offers for leases of City-owned property. The INITIATIVE would override this practice by imposing a definition of "Qualified Lessee" that would effectively only ever apply to one entity - SD Pursuit. (*Id.* at ¶ 4.)

The INITIATIVE requires the SDCCU Stadium property and the training facility property to be valued together even though the latter is more valuable. (INITIATIVE, § 61.2803(f)(2); Thompson Decl., ¶ 17.) By valuing them together, the City loses the increased value of the training facility property. (Thompson Decl., ¶ 17.) In addition, the INITIATIVE allows the Lessee to purchase approximately a quarter of the PROPERTY (79.9 acres) – presumably the most valuable – at a below market value, disadvantaging the City even further. (INITIATIVE, § 61.2803(g)(1); Thompson Decl., ¶ 17.) The INITIATIVE also changes the usual definition of "fair market value" for purposes of the Lease by introducing several "negative" value factors. The City would not normally use these factors, which only tend to depress the value of the PROPERTY and thereby reduce the value of the lease. (Thompson Decl., ¶ 13.) The INITIATIVE even contemplates a negative fair market value, in which case it assigns a value of $10,000 for a 99-year lease of the City's largest and most valuable undeveloped real estate asset. (*Ibid.*; INITIATIVE, § 61.2803(f)(3).)

The structure of the Lease is also contrary to fiscal principles that would normally govern the use and disposition of City property. (Thompson Decl., ¶ 14.) A lease for similar property would normally include a "base" amount and a percentage of income, so the City would benefit from the long-term improvement of the property. (*Ibid.*) The INITIATIVE deprives the City of any increase in value by

providing for a one-time payment at the commencement of the Lease that is not subject to renegotiation regardless of developments to the PROPERTY. (INITIATIVE, § 61.2803(f)(5).) The loss of long-term lease revenues from the PROPERTY also reduces the City's ability to sell lease revenue bonds, which it routinely uses to finance the City's infrastructure needs. (Thompson Decl., ¶ 15.) The Lessee is also free to sublease and the City would be precluded from ending any subleases, even in the event it re-takes possession of the PROPERTY. (*Id.* at ¶ 19; INITIATIVE, § 61.2803(h)-(i).)

The INITIATIVE proposes several other Lease terms that contravene the existing City policies and financially disadvantage the City. As of June 30, 2017, the City currently owed approximately $37 million in outstanding principal on bonds secured by the stadium. (Thompson Decl., ¶ 20.) The INITIATIVE calls for the Qualified Lessee to demolish the stadium, INITIATIVE, § 61.2803(e)(7), but prohibits the City from shifting any portion of the existing bond indebtedness to the Qualified Lessee. (*Id.* at (e)(3)(B).) The responsibility for the existing stadium bond costs would usually be addressed during lease negotiations. (Thompson Decl., ¶ 20.) Likewise, the lease terms in the INITIATIVE would require the City to remain liable for environmental contamination discovered on the PROPERTY and the indemnification provisions do not protect the City from potential liability to the same extent as the indemnification language the City normally requires in leases for City-owned property. (*Ibid*; INITIATIVE, § 61.2803(j)-(k).) Finally, while existing City policy requires private developers to pay for City staff time spent processing a proposed development application, the INITIATIVE does not require any such reimbursement. (Thompson Decl., ¶ 20.) Just the possibility that the PROPERTY could be subject to the terms of the INITIATIVE has already interfered with the City's ability to optimize the use of the PROPERTY. (*Id.* at ¶ 21.)

Underscoring the problematic nature of the lease terms, the INITIATIVE provides that if the lease is not executed by *December 31, 2017*, certain required lease provisions would be either suspended or modified – not at some later date. (Thompson Decl., ¶ 22.) SD Pursuit originally asked the City Council to place the INITIATIVE on the November 2017 ballot, apparently as a means to improve their chances of securing a Major League Soccer ("MLS") franchise by 2020. Instead the City Council expressed an intention to place the INITIATIVE on the November 2018 ballot. (*Ibid.*) This apparently explains why several terms of the INITIATIVE provide "contingency" dates of December 31, 2017. For

example, the INITIATIVE provides that if the Lease is not approved by December 31, 2017, the Qualified Lessee will not be required to construct a River Park and any required deposit for such construction will be reduced from $40,000,000 to $20,000,000. (INITIATIVE, §§ 61.2803(c)(7), 61.2804(i).) After that date, the City also loses the power to impose time lines on construction of the River Park, as well as the other parks and fields contemplated by the INITIATIVE. (*Ibid.*) Under its existing policies, the City would never negotiate a Lease or Development Agreement that contained contingencies *that have already occurred* and that operate only to disadvantage the City. (Thompson Decl., ¶ 22.)

Taken together, the requirements in the INITIATIVE do not merely impose "procedural hurdles" on the City's ability to determine how (if at all) to dispose of its largest real estate asset, *Citizens for Jobs & the Econ,* 94 Cal.App.4th at 1329, they operate to entirely upend the City's existing policies for City-owned leases in favor of terms dictated by the private parties for private benefit.

2. Interference with the City's Duties Concerning Water Supply and Storage

Water supply is a critical issue in the City and water service is required by the City Charter. (Charter, art. V, § 26.1.) Consistent with state laws that prioritize and encourage the use of groundwater, see Water Code, § 10720 et seq., the City has developed two different programs related to providing long term water solutions to the City of San Diego. One plan relies entirely upon the Mission Valley aquifer, which lies directly beneath the stadium site. (Adrian Decl., ¶ 5.) The other plan may use the aquifer for future storage of treated recycled water. (Dorman Decl., ¶ 9; RJN, Exhs. N & P.) Together, these plans are part of the City's long-range water supply plan. (Adrian Decl., ¶ 4.)

The first plan is the City's Mission Valley Groundwater Project ("MVGP"), which envisions capturing, treating and storing surface water in the aquifer through infiltration and/or injection. (Adrian Decl., ¶ 10.) Water stored in the aquifer could then be pumped through extraction wells to a treatment facility located on the 233 acre site for municipal use. (*Ibid.*; RJN, Exh. O.) Second, the City has developed the multi-phase Pure Water San Diego project, which will provide one third of the City's water using water purification technology. Phase II of this project involves construction and operation of a water purification facility, currently planned to be located on the stadium site. (Dorman Decl., ¶ 10.)

The INITIATIVE's contemplated development of the stadium area of the PROPERTY would interfere with the City's plan to use the aquifer under the site for groundwater supply and planned injection/extraction and treatment facilities. The aquifer cannot be moved and is located directly under that site. (Adrian Decl., ¶ 14.) The wells must be located on-site to adequately inject or extract water from the aquifer. (*Ibid.*) Infrastructure will need to be constructed to move the water off the stadium site to the municipal water system. (*Id.* at ¶¶ 13-14; Dorman Decl., ¶¶ 9-10.) Relocating the planned water purification facility or the MVGP treatment facilities would not only be very difficult; it would result in significant loss of time and expense for the City. (Adrian Decl., ¶ 14; Dorman Decl., ¶ 11.)

E. The INITIATIVE Fails to Enact an Enforceable Legislative Act and is Unreasonably Vague

To qualify as a proper legislative act, a proposed ordinance cannot merely direct the legislative body to take some future action; it must propose concrete action. (See *Hopping v. Council of Richmond* (1915) 170 Cal. 605; *Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506.) A proposed ordinance does not constitute a "legislative act" merely because it may be said to embody "what might be called a policy decision." (*Worthington, supra*, 130 Cal.App.4th at 1142.) "[A] legislative act necessarily involves more than a mere statement of policy. It carries the implication of an ability to compel compliance . . . [and] must be obeyed and followed by citizens, subject to sanctions or legal consequences." (*Id.* at 1142-43.) "[A] city might make a statement describing policy but without the power to enforce or require compliance it is not an exercise of legislative power." (*Id*; see also *AFL v. Eu, supra,* 36 Cal.3d at 714 ["an initiative which seeks to . . . render an administrative decision . . . or declare by resolution the views of the resolving body – is not within the initiative power [ ]"]; *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769 [initiative that merely states policies and directs the city council to enact unspecified laws is not valid].)

The INITIATIVE violates these rules because, at best, it merely expresses a policy preference the PROPERTY be leased to a major league soccer franchise if certain conditions are met. It does not require or guarantee the Lease will ever occur, or that the PROPERTY will ever be developed as contemplated in the INITIATIVE. Rather, as the INITIATIVE itself acknowledges, it merely provides a

"*path* for development of the existing stadium site," but only if the Lessee ultimately agrees to enter into the Lease. (INITIATIVE, § 61.2801(a), emphasis added.)

The INITIATIVE is also invalid for the related reason that many of its terms are unreasonably vague and ambiguous. (See *Citizens for Job & the Econ.*, *supra*, 94 Cal.App.4th at 1334-35.) For example, while the INITIATIVE purports to make the Mayor's acceptance of a lease for the PROPERTY "ministerial" (i.e., non-discretionary) if the required terms are present, see INITIATIVE, § 61.2805(d), it allows the Mayor to unilaterally decide whether the required terms impermissibly intrude upon the administrative authority of the Mayor's office. (INITIATIVE, § 61.2805(c).) If the Mayor decides a provision in the INITIATIVE impermissibly intrudes upon the office's administrative duties, the INITIATIVE authorizes the Mayor, "without limitation," to make "the determination as to the appropriate content of the Lease and the determination as to whether or not to execute the Lease." (*Ibid.*) The INITIATIVE therefore makes it impossible for the City Council – or the voters, for that matter – to know in advance which (if any) of the INITIATIVE's "required" terms will be included in the Lease; put another way, the "required" terms are, in fact, illusory.

Similarly, section 61.2804(j) provides that the Mayor shall "confirm that the application for a Lease is complete" and identify any deficiencies within 10 days, but it makes no provision in the event the Mayor and applicant disagree about those terms. Section 61.2805(a) likewise provides that the Mayor may make "such modifications that he deems necessary and do not alter or vary the standards in [Division 28] and the Specific Plan," but it does not address the possibility that the parties will disagree on whether modifications are "necessary" or whether they will "alter or vary" the terms of the INITIATIVE. City officials could not comply with the directives in the INITIATIVE without lawsuits from various sides. (See, e.g., *Citizens for Jobs & the Econ.*, *supra*, 94 Cal.App.4th at 1335-36.) These terms, as well as other terms including, the City's ability to retake possession of the PROPERTY are so vague as to render them unintelligible to voters. This failure renders the INITIATIVE invalid.

CONCLUSION

For the above-stated reasons, the City respectfully requests this Court adjudicate the INITIATIVE on a preelection basis, issue an order determining that the INITIATIVE is not valid, and relieve the City of its obligation to present the invalid measure to City voters.

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