Case No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

CITY OF SAN DIEGO and CYBELE L. THOMPSON, in her capacity as the Director of the City of San Diego's Real Estate Assets Department,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
Respondent,

ELIZABETH MALAND, in her official capacity s San Diego City Clerk, and MICHAEL VU, in his capacity as San Diego County Registrar of Voters, JACK McGRORY and STEPHEN P. DOYLE,
Real Parties in Interest,

Writ Regarding Order by the San Diego County Superior Court,
Case No. 37-2018-00023290-CU-WM-CTL, Dept. 70, (619) 450-7070
Hon. Randa Trapp, Judge

EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR OTHER APPRPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER

ELECTION MATTER; CRITICAL DATE: AUGUST 30, 2018

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208(e)(3))

There are no interested entities or persons to list in this certificate.

Dated: July 30, 2018

MARA W. ELLIOTT,
City Attorney

By: _____
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INTRODUCTION

The City of San Diego[1] asks the Court for emergency relief to remove the proposed "SDSU West Campus Research Center, Stadium and River Park Initiative" ("INITIATIVE") from the November 6, 2018 ballot. In the guise of a proposed "ordinance," the INITIATIVE directs the City to negotiate and execute a sale of more than 130 acres of City-owned real estate to some combination of San Diego State University ("SDSU") and private parties for University and private development.

Need for Emergency Relief

It is well-established that the initiative process can only be used for legislative acts and cannot be used to direct administrative action. ***Directing the City to "negotiate" a contract with a non-City entity with required terms is not enacting a legislative act, and placing the direction to negotiate in an "ordinance" does not make that direction a legislative act.*** There is no public action more quintessentially "administrative" than a public entity's negotiation of a sale of its own property to a third party. Petitioners have found no instances of an initiative being used to force the sale of public property in this manner. Allowing voters to consider such a precedent-setting measure should not be permitted before the courts have determined its validity.

The trial court deferred a determination of the measure's validity until after the election because it concluded that the City had not made a sufficiently "compelling showing" of invalidity. However, as the California Supreme Court reaffirmed just two weeks ago, it can be appropriate to remove a ballot measure when "***substantial questions***" are

[1] Petitioners are the City of San Diego and the Director of its Real Estate Assets Department.

raised as to its validity and the potential harms of submitting an invalid measure to voters outweigh any harm in delaying consideration until the validity of the measure has been determined. (*Planning and Conservation League v. Padilla,* 2018 Cal.LEXIS 5200.) This is such a case.

In its Order, the Supreme Court cited *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697 "*AFL*") and *Howard Jarvis Taxpayers Assn v. Padilla* (2016) 62 Cal.4th 486, 494, 496-497. In *AFL*, the Court made a pre-election determination that the measure was invalid and issued a peremptory writ directing elections officials not to place the matter on the ballot. In the *Howard Jarvis* case (as in the *Planning and Conservation* case itself), the Court issued an immediate order removing the measure from the ballot pending further appellate review; ultimately, the Court concluded that the measure could be submitted to voters at a subsequent election.

Both options would be appropriate here. While the City believes that a pre-election determination that the INITIATIVE is invalid is supported by the record, it requests in the alternative that the Court issue an order removing the INITIATIVE from the November 6, 2018 ballot pending further appellate review of the validity of the INITIATIVE. Relief is needed on or before **August 30, 2018,** to prevent the INITIATIVE from being included in the printed ballot materials for the November 6, 2018 election and to prevent interference with the election.

Nature of the Case

While the right to adopt legislation by initiative is an important one under our State Constitution, both the Constitution and long-standing jurisprudence limit initiatives to "legislative acts." The proposed INITIATIVE is one of two competing initiatives that would require the City to lease and/or sell a substantial swath of valuable City-owned

property surrounding the former Qualcomm Stadium site – one of the City's largest remaining developable real estate assets – for the purpose of substantial private development.[2] Although both initiatives promise voters a new "free" stadium, they would compel the City to lease or sell both the stadium site and additional land in the surrounding area for lucrative private development. They do so by directing the City to "negotiate" a lease or sales agreement on specific terms that are favorable to the proponents but unfavorable to the City.

The INITIATIVE at issue here proposes the sale of approximately 132 acres of City-owned real property surrounding the stadium site ("PROPERTY") to "SDSU" if an agreement is reached "in compliance with the conditions" in the INITIATIVE, but it defines "SDSU" to include both the University and "any auxiliary organization, entity or affiliate." Although the INITIATIVE purports to authorize and direct sale of the PROPERTY to SDSU, the measure is not binding in any way on SDSU.

The INITIATIVE contemplates, but does not require, that the sale "shall provide for the development of" a joint use stadium; a river park; recreation space and parks; athletic fields; and "facilities," including academic and administrative buildings, retail, office and hotel space, university and private housing, and transportation commercial uses. It

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[2] The other initiative is the "San Diego River Park and Soccer City Initiative" ("Soccer City Initiative"). In that case, the trial court deferred a determination on the validity until after the election for largely the same reasons as the instant case. (*City of San Diego et al. v. Maland et al.*, San Diego Sup. Ct. No. 37-2018-00023295.) Petitioners are separately seeking similar relief from this Court to prohibit the Soccer City Initiative from being presented to voters. The two cases initiated by the City are based on different legal challenges from those presented in *Taylor v. Superior Court*, D074300 (Emergency Petition denied July 18, 2018).

states that the sale "shall be at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest," but it defines the fair market value to be the appraised value as of October 2017 regardless of when it is actually sold, and directs that the value not reflect the proposed development. The INITIATIVE places a lengthy list of specific projects into the Municipal Code (and thus makes them non-negotiable), but also purports to leave development of the PROPERTY to the CSU/SDSU Master Plan process. The INITIATIVE may not be amended for 20 years without voter approval, even if a sale never materializes.

The City's request for pre-election relief in the trial court focused on the administrative nature of the INITIATIVE and the use of initiative to direct the City to negotiate a sale of important City-owned assets. The proponents (and trial court) focused almost exclusively on the purported new "legislative policy" (*i.e.*, the new development) while ignoring the very essence of the INITIATIVE – a requirement that the City "negotiate" the sale of public property to third parties on specified terms.

As detailed in the attached Memorandum of Points and Authorities, the courts have refused to allow initiatives to direct administrative action precisely because it would interfere with basic governmental operations. The INITIATIVE illustrates the need for such a rule; it would not only displace the City's administrative discretion to manage City assets in the public interest, it would also interfere with the City's fiscal and land use responsibilities. In the case of San Diego, whose Charter commits administrative authority to the Mayor, a proposed "ordinance" that would require him to sell City property on specific terms also violates the Charter because it impermissibly exercises authority committed to the Mayor. And

the INITIATIVE directs the actions of SDSU – no small matter since SDSU is a state entity and cannot be regulated by a local ballot measure.

Finally, in response to arguments that the INITIATIVE would displace City administrative authority, the proponents concede that it does ***not actually require that any agreement*** be reached. Put another way, it does not guarantee what it appears to promise. This admission demonstrates why ***an initiative that attempts to direct a negotiated agreement between a public entity and a third party is inherently problematic*** and ultimately either unenforceable or illusory.

Based on these flaws, the City sought a writ of mandate to be relieved of the duty to put this INITIATIVE on the November, 2018 ballot. The trial court denied the writ and postponed a final determination on the validity of the INITIATIVE until after the election. The trial court relied on language in *Save Stanislaus Area Farm Econ. v. Bd. of Supervisors* (*SAFE*) (1993) 13 Cal.App.4th 141, 153 requiring a "compelling showing" of invalidity to remove a measure from the ballot,[3] but ignored other language in that case that makes it clear that the court has the power to remove a measure from the ballot if it is "convinced" that the measure is "invalid for any reason." (*Id.* at 151.) In fact, this Court has previously held that pre-election review is appropriate "where the validity of the proposal is in serious question" and the issues can be resolved as a matter of law. (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389.)

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[3] The "significant doubts" that led the trial court in the *SAFE* case to leave the measure on the ballot had to do with questions about the state of the law and mixed appellate precedent. Here, the law and facts are clear – the only issue is the application of the law to the INITIATIVE.

Petitioners submit that the trial court erroneously read *SAFE* as imposing a virtually unattainable standard for pre-election review. Only two weeks ago, the California Supreme Court removed the "Three Californias" Initiative from the November 2018 ballot, deferring a ruling on the ultimate validity of the measure pending further briefing. The Court's Order reaffirmed that "when a ***substantial question*** has been raised regarding the proposition's validity and the 'hardships from permitting an invalid measure to remain on the ballot' outweigh the harm potentially caused by 'delaying a proposition to a future election,' ***it may be appropriate to review a proposed measure before it is placed on the ballot.***" (*Planning and Conservation League. v. Padilla,* 2018 Cal.LEXIS 5200, emphasis added.)

Each of the claims in this case has been the basis of court decisions removing an initiative from the ballot before the election because it could not lawfully be submitted to voters. (See cases at App. 137.) As the Supreme Court explained in *AFL v. Eu,* "[i]f 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 [pre-election relief important to protect the integrity of the electoral process].) "That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason legally invalid." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1022-1024 [relief should be available even if the question is "difficult" or "close" because of harms to the community].)

The claims raised in this case go directly to the legal limits on the use of initiatives. There is no question that the purpose of this

INITIATIVE is to force the City to negotiate a sale of more than 130 acres of the City's most valuable real estate on terms favorable to the INITIATIVE's backers and disadvantageous to the City. It attempts to direct and control contract negotiations between the City and SDSU (which is not subject to local control) and/or unnamed third parties. As a matter of law and common sense, this is an inappropriate use of the initiative process. The absence of a clear case prohibiting this speaks more to the fact that no one has ever tried it than to the closeness of the legal question. As the *SAFE* court stated, if the Court is "convinced" that the INITIATIVE is invalid, it has the power to remove it from the ballot, *i.e.*, it meets the required showing articulated in that opinion. Petitioners submit that such a showing is made in this case.

In the alternative, this case meets the standard articulated by the Supreme Court for *deferral* of the election, *i.e.,* substantial questions have been demonstrated about the validity of the proposed INITIATIVE and the harm of submitting an invalid measure to the voters outweighs the harm of delaying the election.

Harm to City and Voters

Submitting the measure to the voters in November would create all the problems identified by the courts in *AFL v. Eu* and other cases. It will potentially cost several hundred thousand dollars to place it on the November 2018 ballot. (App. 351.) Proponents and opponents of the measure will spend millions more in support of their positions, and the competing initiatives involving this PROPERTY are likely to engender significant community divisions.

Equally important, if the INITIATIVE passes, it will present immediate and substantial questions about the legal obligations of City officials, particularly the Mayor, thereby creating a high likelihood of

costly and disruptive litigation. The City also faces the possibility that both initiatives will pass and there will be mutually exclusive claims to this PROPERTY. The very same legal issues will remain for judicial resolution, but will have to be addressed in the context of competing claims for injunctive relief from differing factions of the community.

A pre-election determination of validity is also necessary to prevent the initiative process from being abused in the manner represented by both this INITIATIVE and the Soccer City Initiative. The very presence of these initiatives has prevented the City from taking any action with respect to this property since early 2017. If the initiative process can be used to force the lease or sale of public property – without pre-election review – private developers could simply identify public property and begin circulating an initiative requiring a particular disposition of that property, thereby interfering with the City's ability to take action regarding the property and giving the developer unwarranted leverage to force a lease or sale of the property on more advantageous terms to them but to the detriment of the public entity and citizens as a whole.

In contrast, there would be no harm to the proponent if consideration of this measure were postponed until after the Court could consider its validity. The INITIATIVE gives SDSU ***up to 20 years*** to decide whether to pursue a purchase of the PROPERTY, while locking in an October 2017 valuation, and the evidence shows that land acquisition by a California State University entity is necessarily a long process; a delay for purposes of judicial review would therefore not interfere with those plans in any meaningful way.

As the Supreme Court just reminded, there can be significant harm to the public if an invalid measure is on the ballot. (See *Howard Jarvis, supra*, 62 Cal.4th at 496-497 [presence of invalid initiative steals attention,

time, and money from other valid measures and allowing voters to act on invalid measure "tends to denigrate the legitimate use of the initiative procedure"].) In the face of "substantial questions" about this INITIATIVE, consideration by voters should at least be deferred until a final determination on its validity. Even if this Court is not prepared to determine the validity of the INITIATIVE on an expedited basis, it should direct that the measure be removed from the November 2018 ballot pending further review by the Court. If the Court ultimately determines that it can validly be submitted to voters, it can direct that it be considered at a future election date. (*Id.*)

Critical Deadlines

Printing of the ballot materials for the November election will commence on approximately **August 30, 2018**. In order to prevent interference with the conduct of the election, the City therefore requests a final order from this Court on or before that date.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

Background

1. Petitioners are the CITY OF SAN DIEGO, a California municipal corporation operating under a city charter, and CYBELE L. THOMPSON, in her official capacity as the City's Director of Real Estate Assets, who is responsible for negotiating land sales and leases on behalf of the Mayor. THOMPSON is also a resident, registered voter and taxpayer in the City of San Diego.

2. Respondent is the SUPERIOR COURT of the City of San Diego, Dept. 70 (Hon. Randa Trapp).

3. Real parties in Interest JACK MCGRORY and STEPHEN P. DOYLE are the proponents of the INITIATIVE ("proponents").

4. Real Parties in Interest ELIZABETH MALAND and MICHAEL VU are the San Diego City Clerk and San Diego County Registrar of Voters, respectively, and are sued in their official capacity only. MALAND and VU are responsible for the conduct of elections within the City of San Diego and will be responsible for taking actions necessary to place the INITIATIVE on the November 2018 general election ballot unless directed to do otherwise by this Court.

Jurisdiction and Basis for Relief

5. The Court has original jurisdiction over this matter pursuant to article VI, section 10 of the State Constitution, California Code of Civil Procedure sections 1085 and 1086, and Rule 8.486 *et seq.* of the California Rules of Court.

6. This case presents a case of great importance to the City of San Diego and its citizens because it involves the legal validity of a proposed measure to be presented to voters at the November 6, 2018 election. Without action by this Court, voters may be asked to support, contribute to, and vote for a measure that cannot lawfully be enacted. In addition, the City may be faced with the adoption of one or more initiatives affecting the disposition of the PROPERTY and inconsistent legal obligations.

7. Petitioners are beneficially interested in the issuance of immediate relief directing City officials to exclude the INITIATIVE from the November 6, 2018 ballot and have no other adequate remedy at law as an appeal will not prevent the INITIATIVE from being submitted to voters

in November 2018 and will not prevent the injury that arises from the absence of pre-election relief.

8. The INITIATIVE focuses on the development of approximately 132 acres of City-owned real property surrounding the San Diego County Credit Union ("SDCCU") Stadium ("PROPERTY"). The SDCCU Stadium was known for many years as Jack Murphy Stadium and, later, Qualcomm Stadium, where the San Diego Chargers played their home games.

9. In January 2017, the San Diego Chargers announced that they were leaving the San Diego area and relocating to Los Angeles.

10. In March 2017, petitions for an initiative entitled the San Diego River Park and Soccer City Initiative ("Soccer City Initiative") began to circulate in the City. That initiative directs the City to enter into a lease for property in the area of the Stadium and surrounding area.

11. Supporters of an alternative plan apparently engaged in discussions that would have guaranteed SDSU some portion of the Soccer City development. When those discussions were unsuccessful, the decision was made to circulate a competing Initiative, the SDSU WEST INITIATIVE at issue in this Petition. (App. 385, 497-498.)

12. The INITIATIVE states that its purpose is to adopt a "new legislative policy" to authorize, direct and provide the means for the sale of the PROPERTY to "SDSU" and/or potential private partners in order to develop a new stadium and substantial non-University development on the PROPERTY. (App. 37.) "SDSU" is defined to include certain private entities. (App. 47.) The measure was not proposed by SDSU and it would not be binding in any way on SDSU.

13. The INITIATIVE would require the City to sell approximately 132 acres in the vicinity of SDCCU Stadium to SDSU if an

agreement is reached that is "in compliance with the conditions imposed by" the INITIATIVE. (App. 44.)

14. The INITIATIVE contemplates that any sale "shall provide for the development of" a joint use stadium; a river park; recreation space and parks; athletic fields; and facilities including academic and administrative buildings, retail uses, hotel space, university and private housing, transportation, and other commercial uses. (App. 42-43.) The INITIATIVE does not directly require these developments and it does not specify how the foregoing elements shall be "provided for."

15. The INITIATIVE states that the sale will be for "Bona Fide Public Purposes" but it defines that term to include uses not only for public or governmental purposes, but also "public-private partnership support uses and facilities, including but not limited to commercial, neighborhood-serving retail, research, technology, development, entrepreneurial, and residential uses, because all such uses, individually and cumulatively, promote or facilitate SDSU's higher education mission, goals and objectives." (App. 45.) The INITIATIVE also states that SDSU is not precluded from engaging in any public-private partnerships. (App. 44.)

16. If a sale to SDSU or a private entity results, the buyer is permitted to sell, lease, or exchange any portion of the PROPERTY. (App. 44.)

17. The INITIATIVE states that the sale "shall be at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest," but it defines "fair market value" to be the value of the property as of October 2017, regardless of when it is actually sold, and directs that the value shall not reflect the proposed development. (App. 43, 46.)

18. The INITIATIVE does not propose any zoning changes or any specific plan that would control development of the PROPERTY, but it adds terms to the Municipal Code that would govern any proposed sale. In terms of planning, it states that the PROPERTY shall be "comprehensively planned through an SDSU Campus Master Plan revision process." (App. 43.) The INITIATIVE also states that SDSU "shall use the content requirements of a Specific Plan" under state zoning law, although it acknowledges that CSU is exempt from those requirements under state law. (*Id.*)

19. The terms of the INITIATIVE may not be amended for 20 years without approval by voters. (App. 48.) The INITIATIVE provides no remedies or alternatives in the event the PROPERTY is not purchased.

20. The PROPERTY subject to the INITIATIVE is one of the City's primary real estate assets and represents one of the last opportunities for large-scale development in the City. (App. 307-310.) A sale of the PROPERTY to SDSU could potentially cause the City to lose substantial lease revenue and property tax revenue, as well as the ability to use a ground lease as collateral for lease revenue bonds that finance important City infrastructure needs. (*Id.*)

21. Water supply is a critical issue in the City and the City has two long-term plans for additional water sources, including increased groundwater. There are only three potentially significant groundwater sources in the City and one, the San Diego River aquifer, is located under the PROPERTY. Areas within the PROPERTY have been identified by the City as the location for future groundwater storage and planned injection/extraction facilities, as well as a potential storage area for a nearby future water treatment/recycling facility. (App. 356-358.)

22. On March 12, 2018, the City Clerk certified to the City Council that the petition had received sufficient signatures to be submitted to voters pursuant to San Diego Municipal Code sections 27.1034 and 27.1035 [upon certification, Council shall either adopt the INITIATIVE or submit it to City voters]. The Council declined to adopt the INITIATIVE and voted to submit it to voters at a future election. (App. 351.)

23. On April 24, 2018, faced with competing initiatives concerning this PROPERTY and the potential for additional similar measures in the future, the Council voted to seek a judicial determination that neither measure proposed action that was lawful for an initiative and that the City should be relieved of its obligation to put either on the ballot.

Trial Court Proceedings

24. Pursuant to the City Council's direction, the City initiated two actions in the Superior Court on May 11, 2018: *City of San Diego v. Maland*, San Diego Sup. Ct. No. 37-2018-00023290 (SDSU West); *City of San Diego v. Maland*, San Diego Sup. Ct. No. 37-2018-00023295 (Soccer City).) With respect to the SDSU WEST INITIATIVE (App. 20-84), Petitioners alleged

- The INITIATIVE is not legislative in nature as it directs the City to enter into a sale of City-owned property and the negotiation and execution of contracts is administrative in nature;

- The INITIATIVE impermissibly interferes with City control and management of its assets in the public interest and long-term water plans and impermissibly impairs existing contracts;

- The INITIATIVE violates the San Diego City Charter by usurping the administrative authority over contracting delegated to the Mayor in the Charter and violating provisions

requiring both City Council authorization and public approval of sales of more than 80 acres;

- The INITIATIVE is contrary to state law in that it impermissibly attempts to direct the activities of a state entity, SDSU;

- The INITIATIVE fails to guarantee the development it proposes or enact any enforceable legislative act. Taken as a whole, the INITIATIVE's terms are so vague or internally contradictory as to be unenforceable and invalid.

25. Shortly before the City filed its actions, a third case was filed which challenged the INITIATIVE on other grounds. (*Taylor v. Maland*, Sup. Ct. No. 37-2018-19172.) Petitioners requested that the three cases be deemed "related" and assigned to a single judge. These requests were denied and the cases proceeded before three different judges on different schedules. (App. 55-58; 69-76; 89; 95-96.)

26. The case involving the SDSU WEST INITIATIVE was assigned to the Hon. Randa Trapp (Dept. 70). The City's request for a writ of mandate was briefed and oral argument was held July 5, 2018. (See Transcript at App. 668.)

27. The Court issued a final decision on July 11, 2018, in which the court denied the request for writ relief because it found that petitioners had failed to make a "compelling showing" of pre-election invalidity. A final determination on the measure's validity was deferred until after the election. (App. 670-673.)

28. The trial court erred in the standard used for pre-election review and the application of law to this INITIATIVE. As demonstrated by the terms of the INITIATIVE and the supporting documents, the INITIATIVE is legally impermissible for multiple reasons and cannot

lawfully be submitted to voters. In the alternative, a substantial question exists and the INITIATIVE should be removed from the November 2018 ballot until a final determination is made as to its validity.

Need for Emergency Relief

29. The City estimates that it will cost several hundred thousand dollars to place the INITIATIVE on the November 2018 ballot. (App. 351.) The majority of the costs will be for printing, which will commence after all arguments are submitted to the County, beginning ***August 30, 2018***. (App. 352.)

30. The City is also faced with the possibility that both of the competing initiatives for this PROPERTY may pass and it will be confronted with competing claims for immediate action required under both initiatives and claims that both initiatives are legally invalid. These competing claims for City action will be mutually exclusive and subject the City to the threat of litigation, including injunctive relief, from multiple parties.

31. The use of initiative in the manner presented by this INITIATIVE (and the competing Soccer City Initiative) presents an issue of first impression. In the absence of a judicial determination that the initiative process cannot be used in the manner proposed in the INITIATIVE, the City is likely to be faced with additional initiatives proposing the lease or sale of City-owned property. Without the ability to obtain a pre-election determination that these measures are impermissible, City-owned assets could be tied up for extended periods of time awaiting either elections or post-election litigation.

32. An error or omission is about to occur, within the meaning of Elections Code section 13314(a), in the printing of the ballot for the

November 6, 2018 election in the City of San Diego in that the ballot will include the INITIATIVE even though it cannot be lawfully adopted by the voters.

33. The printing of materials for the November 6, 2018 election will commence on or about ***August 30, 2018***. A determination by this Court on or before that date that the INITIATIVE cannot be submitted to voters will not substantially interfere with the conduct of the election.

Timeliness of Petition

34. The Superior Court's ruling denying pre-election writ relief was entered July 11, 2018. This Petition is therefore timely.

Authenticity of Exhibits

35. All exhibits accompanying this Petition are true copies of original documents on file with respondent court, with the exception of Tab 41 (App. 667), which is the court reporter's transcript of the hearing held July 5, 2018 before the Hon. Randa Trapp. The exhibits are incorporated herein by reference as though fully set forth in this Petition. The exhibits are paginated consecutively, and pages referenced herein are to the consecutive pagination.

PRAYER

WHEREFORE, Petitioners pray this Court for the following relief:

1. Issuance of a peremptory writ of mandate and/or prohibition in the first instance or such other extraordinary relief as is warranted directing respondent court to vacate its order denying pre-election relief with respect to the INITIATIVE and enter a new order granting the requested relief and directing Real Parties in Interest MALAND and VU to refrain from taking any action to present the INITIATIVE to City voters at

the November 6, 2018 general election based on the invalidity of the INITIATIVE;

2. Issuance of an alternative writ or an order to show cause why the INITIATIVE should not be declared invalid with an order directing Real Parties in Interest MALAND and VU to refrain from taking any action to present the INITIATIVE to City voters at the November 6, 2018, election pending further consideration by this Court;

3. For such other and further relief as may be just and proper.

Dated: July 30, 2018

MARA W. ELLIOTT,
City Attorney

By: _____
Mara W. Elliott
City Attorney

Attorneys for Petitioners

OLSON HAGEL & FISHBURN LLP
Deborah B. Caplan
Lance H. Olson
Richard C. Miadich

By: _____
Deborah B. Caplan

Attorneys for Petitioners

VERIFICATION

I, Mara W. Elliott, declare as follows:

I am an attorney duly admitted to practice law in the State of California and before this Court. I am the City Attorney for the City of San Diego and an attorney for petitioners herein.

I have read the foregoing Emergency Petition for Writ of Mandate and/or Other Appropriate Relief, and know its contents. The facts alleged in the Petition are within my own knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of July, 2018 in San Diego, California.

MARA W. ELLIOTT
SAN DIEGO CITY ATTORNEY

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The SDSU WEST INITIATIVE, like the competing Soccer City Initiative, would require the City to negotiate and enter into a contractual agreement for the sale and development of City-owned property in the area of the former Qualcomm Stadium. In the case of the SDSU WEST INITIATIVE, it would require the City to "negotiate" a sale of more than 130 acres surrounding the stadium site ("PROPERTY") to SDSU and/or private parties on terms unilaterally drafted by its supporters and negotiated outside the City's normal rules and policies. Although a new stadium and river park are the selling point, neither is guaranteed; the only thing guaranteed is that this valuable land would be tied up for years, as the INITIATIVE cannot be amended without voter approval for 20 years.

To the City's knowledge, the forced sale of publicly-owned property through a privately financed initiative has never been done, nor should it be allowed. Although the INITIATIVE is invalid for a number of reasons, the fundamental problem is that it attempts to dictate discretionary administrative action – contract negotiations over the disposition of City property. It displaces the City's authority and control over its own administrative processes and interferes with core municipal functions. Allowing such an initiative to be considered by voters represents an unprecedented – and impermissible– use of initiative and would open the door to misuse of the process by private concerns. In addition, the terms of the INITIATIVE purport to direct the activities of a third party – in this case, the California State University system. Whatever legislative authority

may be exercised by initiative, it certainly does not include directing the action by non-City entities.

The proponents[4] have argued that the City retains its administrative discretion and nothing in the INITIATIVE requires an agreement to be executed. (App. 392.) If true, the INITIATIVE is illusory and unenforceable. The proponents cannot have it both ways: either the INITIATIVE displaces the City's administrative authority and forces the sale of the property on disadvantageous terms or it simply presents a "proposal" to be considered. An initiative cannot legally do either.

The INITIATIVE is not sponsored by SDSU; the area targeted by the INITIATIVE exceeds any reasonable SDSU use and is planned for private development by developers who have acknowledged that they initiated this effort because they could not reach a satisfactory deal with the backers of the Soccer City Initiative. (App. 385; 497-498.) 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. (App. 307-310.) A sale of this PROPERTY as proposed would be extremely disadvantageous to the City, as it would normally be leased and would be expected to generate approximately 15% of the City's lease revenues. (*Id.*) It is also a planned location for future groundwater storage, pumping stations and an injection/extraction facility – important elements of the City's long-range water plans. (App. 356-359.)

As the Supreme Court explained in *AFL v. Eu,* "[i]f 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

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[4] Petitioners refer to the proponents for clarity because real parties include elections officials.

Cal.3d at 695 [pre-election relief important to protect the integrity of the electoral process.) In this case, the City submits that the invalidity is apparent from the text of the INITIATIVE. In the alternative, "substantial questions" have been raised as to its invalidity that merit deferring the election until the validity of the measure has been determined. As the Supreme Court reaffirmed last week in removing a statewide ballot initiative from the November, 2018 ballot, "when a ***substantial question*** has been raised regarding the proposition's validity and the 'hardships from permitting an invalid measure to remain on the ballot' outweigh the harm potentially caused by 'delaying a proposition to a future election,' ***it may be appropriate to review a proposed measure before it is placed on the ballot.***" (*Planning and Conservation League. v. Padilla*, 2018 Cal.LEXIS 5200, emphasis added.) The City requests such relief here.

ARGUMENT

I. THE INITIATIVE CANNOT LAWFULLY BE SUBMITTED TO VOTERS BECAUSE IT DIRECTS ACTION THAT IS FUNDAMENTALLY ADMINISTRATIVE: THE NEGOTIATION AND EXECUTION OF A CONTRACTUAL AGREEMENT

The INITIATIVE attempts to direct the City to negotiate and sell public property to third parties on terms dictated by private concerns. This is beyond the power to act by initiative, impermissibly interferes with the City's ability to manage its own affairs and violates the Charter.

A. The INITIATIVE Impermissibly Directs the Negotiation and Execution of a Contractual Agreement – An Administrative Act Outside the Scope of Initiative

The initiative power extends only to legislative acts and not to administrative or executive acts. (Cal. Const., art. II, §§ 8, 11; *Citizens for*

Jobs & the Econ. v. County of Orange (2002) 94 Cal.App.4th 1311, 1332; *Dunkl, supra,* 86 Cal.App.4th at 399.)

"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." (*Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509, emphasis added.) The asserted "public purpose" here is taking City property to accommodate SDSU expansion and significant non-University development. While SDSU may be a "public" entity, that term is defined in the INITIATIVE to include private entities and the INITIATIVE is unquestionably ***designed in large measure to serve private interests rather than a public purpose.***

In the only reported case involving a sale of public property, the Court contrasted cases involving the public acquisition of property for a public purpose (deemed legislative) with the *sale* of City-owned property for a private development, which the Court termed administrative. (*San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530.) Although that case involved a referendum on a City-negotiated and Council-approved sale, the determination that the City's process for selling public property to a private developer is administrative applies even more forcefully to an initiative ***proposed by private entities who stand to benefit.*** It simply cannot be said to be for a public purpose.

Proponents have argued that an initiative can direct administrative action so long as it "prescribes a new policy or plan," *i.e.*, an initiative that does both is permissible. Petitioners believe this misreads the law. The courts have termed it "beyond dispute" that initiative or referendum "may

be invoked ***only*** with respect to matters that are ***strictly*** legislative in character...to allow [them] to be invoked to annul or delay the exercise of executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." (*Dunkl, supra*, 86 Cal.App.4th at 399, emphasis added; *San Bruno, supra,* 15 Cal.App.5th at 530; see also *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1090 [absence of administrative matters in initiative "not only proper, but also legally imperative"].) If the purpose of the rule is to prevent interference with basic governmental operations, the rule would be obliterated if an initiative could direct administrative action – and directly interfere with the business affairs of a city – simply by combining it with a "new legislative policy." (*See Newsom v. Bd. of Supervisors* (1928) 205 Cal. 262 [initiative could not be used to compel award of bridge franchise because action involved both legislative and administrative functions].)

The trial court accepted the INITIATIVE's own characterization that it was adopting a new legislative policy "authorizing, directing and providing the means for the sale of approximately 132 acres of real property...to SDSU." (App. 671, citing the INITIATIVE.) Virtually all initiatives can be said to articulate a new policy but can nonetheless be impermissibly administrative. In *Dunkl*, an initiative arguably asked voters to make a policy decision about the appropriate type of financing for a stadium project, but the Court concluded it improperly directed administrative acts. In *Worthington v. City Council of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1142-43, proponents argued that an MOU represented approval or disapproval of Indian gaming within the City, but the Court concluded that the agreement was administrative (noting that an act could embody a policy preference but still not be legislative). In *Citizens for Jobs & the Econ. v. County of Orange, supra*, 94 Cal.App.4th

at 1319-1320, the stated legislative purpose was to require public approval for certain land use decisions, but the Court found that it impermissibly directed administrative action.

However the proponents may try to define the "new policy," the actual terms of the INITIATIVE – placed in the Municipal Code – require the City to negotiate a sale of City property to non-City third parties on specific terms for specific purposes. The INITIATIVE thus both requires the City to engage in discretionary administrative action (negotiate a sale of City-owned PROPERTY) and it dictates the administrative provisions that the City must include in the sale. In short, the INITIATIVE directs the City and third parties to negotiate a contract.

The trial court erroneously reasoned that a proposed initiative must implement a *prior* legislative plan in order to be administrative; it therefore concluded that since there is no current legislative plan for this property, the INITIATIVE is "new policy" and cannot be administrative. (App. 673.) In fact, a prior legislative policy is ***not*** legally required for an initiative to be found impermissibly administrative. In *The Park at Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, the Court invalidated an initiative that required all projects to have a specific plan approved by voters, finding that it impermissibly withdrew administrative authority from city officials. No prior legislative act was involved.[5]

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[5] Even many cases that involve prior legislative acts also provide *additional* reasons for the administrative determination. In *Dunkl, supra*, 86 CalApp.4th at 393, the trial court noted that "findings" in the initiative were "such as those that are typically made by a governing entity in an administrative decision" and were impermissible. In *San Bruno Comm. for Econ. Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 531-532, the Court first concluded that the sale of city-owned land to a private party did not involve a municipal purpose or services to residents *before* going on to analyze the prior legislative action. In *Citizens for Jobs & the Econ., supra*,

Many of the cases focused on prior legislative action involved referenda rather than initiatives and make sense in that context: It is sound public policy to require a new public policy to be challenged when first enacted rather than downstream when the public entity is already in the implementation phase. However, in the initiative context, where ***any*** initiative can claim to reflect a "new policy," the requirement for an existing policy makes less sense and its application must necessarily be more limited. The fundamental question in the case of an initiative should be whether it impermissibly intrudes on the administrative functions of the public entity. Here, that test is more than met.

The proponents have repeatedly argued that the INITIATIVE is not administrative because it merely provides the "goals" to be pursued and the City retains authority to negotiate the sale terms and fair market value of the PROPERTY. This description is at odds with the text of the INITIATIVE, which requires the City to sell the PROPERTY under conditions that will be codified in the Municipal Code and therefore non-negotiable. Among the twenty-six conditions required by the INITIATIVE are: the sale price must be based on the property value in October 2017; the sale agreement "shall provide for the development of" a new "joint-use" sports stadium, recreation space and parks, athletic fields, and "facilities" including academic and administrative buildings, as well as retail, office and hotel space; SDSU shall be permitted to engage in public-private partnerships as part of the development; and SDSU or other private entities shall be allowed to lease, sell, or exchange the PROPERTY following

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94 Cal.App.4th at 1332, the Court found that *specific elements* of the proposed initiative were administrative in nature and impermissible for an initiative.

purchase from the City. (App. 41-47.) The INITIATIVE does not provide any remedies or alternatives if the PROPERTY is not purchased by SDSU, but the City is prohibited from amending any of its terms for 20 years without voter approval. It is therefore conceivable the PROPERTY may sit vacant and unused at taxpayer expense for 20 years.

This is *not* "negotiation" as that term is commonly understood but, in any event, a direction to "negotiate" is a direction to undertake administrative action and is impermissible for an initiative. The fact that the INITIATIVE directs a sale ***at all*** and includes highly prescriptive requirements constrains the ability of the City – particularly the Mayor – to negotiate the terms of a sale (or decline to sell) in the best interest of the City. In directing the City to exercise its discretion in a specific way, the INITIATIVE displaces the City's administrative authority and impermissibly directs administrative action.

If the purpose of prohibiting administrative acts in initiatives is to prevent interference with the public entity's business affairs, it is difficult to imagine anything that would interfere with the business affairs of a public entity more directly than requiring them to sell their property on terms that they have not negotiated and which are not necessarily in the public interest. *Negotiation* of contract terms 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, supra*, 130 Cal.App.4th at 1142.) The INITIATIVE impermissibly attempts to direct just such action.

The trial court acknowledged that no case supports the use of an initiative to direct the sale of public property to third parties, but it drew the wrong conclusion from this fact. Rather than recognizing that the use of

initiative in this manner would be extraordinary and precedent-setting and should be fully reviewed *before* allowing it to be submitted to voters, the trial court concluded that the absence of reported cases dictated that it must be allowed to be submitted to voters. This was error.

Moreover, even if a prior legislative plan were required (as the trial court mistakenly concluded), the City has at least two existing policies affecting this PROPERTY that would be frustrated by the INITIATIVE.

First, 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 (App. 183-188), as well as Council Policy 700-10. (App. 312-327.) These provisions provide the *process* for land sales and leases to be approved by the Council, but do not dictate specific terms or conditions (consistent with the Mayor's Charter authority over contract negotiation and administrative matters). The INITIATIVE does not amend these general policies and there is no claim that the existing policies could not be used for the proposed development. Instead, the INITIATIVE dictates a host of new administrative requirements and procedures ***applicable to this PROPERTY only***. These provisions use specific administrative provisions to frustrate or overturn the existing legislative policies.

Second, the City has long-terms plans to use the aquifer under the PROPERTY for groundwater extraction and storage. (App. 255-257; 356-359.) The INITIATIVE does not amend these policies, rather, it requires specific administrative actions that simply ignore the existing City policies. By imposing administrative requirements for this PROPERTY that frustrate existing City policies, the INITIATIVE suffers from the same fatal defect as the local initiatives struck down in *Dunkl* and *Citizens for Jobs & the Econ.*

The proponents have repeatedly asserted that the INITIATIVE does not displace the City's administrative authority because the City Council ultimately approves the price, terms and timing of the sale to ensure that it is fair and equitable. This description is disingenuous. In fact, the INITIATIVE clearly requires a sale of the PROPERTY rather than a lease, specifies the buyer, requires the price to be based on a 2017 valuation regardless of when the sale occurs, and specifies that the sale shall "provide for" fairly specific and extensive development. The negotiation of each of these terms would normally be part of the "give-and-take" process that characterizes administrative action. (*Worthington, supra,* 130 Cal.App.4th at 1143.) The INITIATIVE impermissibly directs these actions.

B. The INITIATIVE Impermissibly Impairs Essential Government Functions

As noted above, initiative and referenda may not be used to direct administrative action because using them "to annul or delay the exercise of executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." (*Dunkl, supra,* 86 Cal.App.4th at 399.) 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; *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826.) An enactment that interferes with the City's ability to carry out its day-to-day business or makes it impossible to carry out the public 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; *Housing Authority v. Superior Ct.* (1950) 35 Cal.2d 550, 559.)

1. Management of City Assets in the Public Interest Is an Essential Government Function

Here, the INITIATIVE interferes with one of a public entity's most essential and practical functions, *i.e.*, its responsibilities for managing public assets. The PROPERTY is one of the City's largest real property assets and the proposed sale will adversely impact the City financially. (App. 307-310.) Revenues generated from leases of City-owned land are a vital component of the City's budget. (*Id.* at ¶¶ 7, 11.)

The INITIATIVE overrides the normal City policies governing leases and sales of its own property and requires the City to accept terms in a non-competitive process that benefit private parties. (*Id.* at ¶¶ 7-10.) In the normal course, the CITY would not sell the PROPERTY at all, but would maximize the PROPERTY's value by leasing it and creating a revenue stream for the City that could be used for public purposes, including the issuance of lease revenue bonds that support City infrastructure projects. (*Id.*) If leased, the PROPERTY would generate more than $7 million per year in lease revenues and constitute approximately fifteen percent of the total lease revenues received by the City. (*Id.* at ¶¶ 7, 11.) Lease revenues are the fifth largest source of City revenues. (*Id.*) The substantial loss of lease revenue will harm the City financially and interfere with its ability to finance other infrastructure needs. (*Id.*)[6] Compounding the financial harm to the City, the INITIATIVE requires the City offer to sell the PROPERTY to SDSU at a price that is based on a 2017 valuation (even though the sale may occur any

[6] In fact, the sale of the PROPERTY would leave the City in a negative cash position because the City's proceeds from the sale, after being split with PUD, would be less than the outstanding bond indebtedness on the stadium. (*Id.* at ¶ 8.)

time in the next 20 years) and does not factor in the effect on the value of the PROPERTY resulting from the development contemplated by the INITIATIVE. (*Id.* at ¶ 9.)

A sale to SDSU would also adversely affect other City revenue. As a public agency, SDSU would not be responsible for property taxes; since the City typically receives 17-18% of all county property tax revenues, it would lose these revenues. (*Id.* at ¶ 12.) Even if some land is used for non-public purposes, the tax rate for such use is lower than the property tax rate, so there will still be a loss of potentially millions of dollars annually. (*Id.*) The mere fact that the INITIATIVE may be presented to voters has already resulted in lost opportunity costs for the City by delaying the normal process of seeking a lease for the existing stadium site. (*Id.* at ¶ 10.) These lost opportunity costs could conceivably continue for 20 years if SDSU does not purchase the PROPERTY, or does not do so soon. Since the purchase price is fixed at the October 2017 valuation, SDSU has no incentive to do so quickly. (*Id.* at ¶¶ 9-10.)[7]

The City's policy is to "optimize the sale price or lease rent" from City-owned property. (*Id.* at ¶ 3; App. 312.) ***The reason to optimize value is to ensure that public assets are used in a way that benefits the public to the extent possible. This is an essential responsibility of local government.*** An initiative that directs the sale of public property on terms that are instead intended primarily to benefit private parties impermissibly interferes with this responsibility and would unreasonably impair the fiscal

[7] The INITIATIVE also interferes with the City's land use responsibilities by compelling a sale to CSU because property held by state entities is largely free from local control. (See, e.g., *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130.)

authority of the Mayor and the City Council to manage City-owned property and engage in prudent fiscal planning. (See *Citizens for Planning Responsibly v. City of San Luis Obispo* (2009) 176 Cal.App.4th 357, 376 [fiscal matters considered essential government functions]; see also *Totten v. Bd. of Supervisors*, *supra*, 139 Cal.App.4th 826.)

The harm here is not hypothetical or speculative: a forced sale of the PROPERTY is financially disadvantageous compared to a lease; the INITIATIVE requires the use of a 2017 valuation regardless of when the PROPERTY is ultimately sold; and the City will be unable to make other uses of the PROPERTY during the next 20 years if that sale fails to materialize. Nor does it require speculation to conclude that the INITIATIVE offers more favorable terms to its supporters than the City's regular processes would provide; indeed, if the existing process would result in roughly the same agreement, there would be no need for private parties to spend millions of dollars on the INITIATIVE.

The implications of this process are what make the INITIATIVE (as well as the Soccer City Initiative) so concerning: if private developers are permitted to use the initiative process in this manner, virtually any developer could identify public property for potential private development and circulate an initiative petition (or threaten to do so) in order to leverage a better deal from the City. This kind of "reverse eminent domain" process could ultimately cause the City to lose control over its property and its ability to make decisions in the best interests of its citizens.

2. The City's Long-Term Water Planning Is An Essential Government Function

The City's ability to go forward with its long-term water plans is also an essential government function that would be "annulled or delayed" by the INITIATIVE. 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 and water conservation (*see, e.g.*, Water Code, § 10720 *et seq.*), the City has developed two programs related to providing long-term water supplies for the City of San Diego.

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. (App. 356-359.) Water stored in the aquifer could then be pumped through extraction wells to a treatment facility located on the site for municipal use. (*Id.* at ¶¶ 10-11.) The aquifer cannot be moved and is located directly under that site; The INITIATIVE's contemplated development of the PROPERTY would interfere with the City's plan to use the aquifier, as well as the location of the wells and the related infrastructure. (*Id.* at ¶¶ 10-11; 14.)

Second, the City has developed the multi-phase Pure Water San Diego project, which is designed to eventually 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 adjacent to the stadium site, and the aquifer may be used for future storage of treated recycled water. (App. 331.)

Together, these plans are part of the City's long-range water supply plan. (App. 356-359, ¶ 4.) Relocating the planned facilities would not only be very difficult because of engineering requirements; it would result in significant loss of time and expense for the City. (*Id.* at ¶ 14.) Both plans represent substantial City planning and commitments that involve this PROPERTY.

Proposed Section 22.0908(u) provides that the City must receive "compensation" for land owned by the PUD, but it does not guarantee

continued City access to the aquifer. (App. 45.) At best, it acknowledges the INITIATIVE's interference with the City's water supply plans by requiring the City to accept monetary compensation in lieu of continued access to the aquifer – central to those plans. Section 22.0908(v) requires the City and SDSU to "cooperate to modify or vacate easements" on the stadium site, but the City already owns the portions of the PROPERTY that will be used in the water plans and there are no easements. (*Id.*) Finally, Section 22.0908(t) states that the INITIATIVE shall not "alter an obligation under an existing lease." This provision protects tenants under existing leases with the City for use of the PROPERTY, but does not protect the City's water plans since, as just mentioned, the City already owns the land in question. (*Id.*)

In *Citizens for Jobs & the Economy*, the Court invalidated an initiative that interfered with the City's ability to locate airports, jails and landfills because it found that it impermissibly impaired those essential government functions. (*Citizens for Jobs & the Econ., supra*, 94 Cal.App.4th at 1327-1328.) The proposed disruption of the City's long-term water storage and supply plans constitutes an interference with the City's water supply responsibilities – mandated by its Charter – that are at least as important as the responsibilities for land use that the Court found to be impermissibly impaired in that case.

3. The INITIATIVE Impairs Existing Contractual Obligations

The federal and state constitutions prohibit laws that impermissibly impair existing contractual obligations. (U.S. Const. art. I, § 10; Cal. Const., art. I. § 9). These prohibitions encompass impairment of the contracts that the government itself has authorized or entered into. (See, e.g., *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1 [impairment

of statutory covenant]; *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 306).

Here, the INITIATIVE impairs a covenant imposed upon the City, but which also protects bondholders. To make capital improvements to its water system, the City entered into a contract with the San Diego Facilities and Equipment Leasing Corporation ("SDFELC") for the purpose of issuing water bonds. (App. 263-276.) As protection for bondholders, the City agreed to a covenant prohibiting the sale or lease of property that is used for water purposes for less than fair market value. Fair market value is defined to mean "the most probable price that the portion being disposed of should bring in a competitive and open market under all conditions requisite to a fair sale." (App. 301.) The INITIATIVE, in contrast, would set the sale price of the PROPERTY based on the March 2017 valuation and "without advertising for bids" – i.e., the sale price would *not* be based a "competitive and open market." (App. 42.) The covenant also imposes on the City certain procedural requirements in order to dispose of the property. Because the INITIATIVE requires the property to be sold for less than "fair market value" and in a manner different than that imposed by the covenant, it impermissibly impairs the obligation imposed by this covenant.

Proponents have also suggested that the requirement for a "fair market sale" is addressed if the sale price is "fair and equitable." But the requirements for the sale in the INITIATIVE and the requirement set forth in the bonds are different, with the former being undeniably narrower than the latter. Having made the choice to narrowly define the terms of the sale

price (and a non-competitive process), the proponents cannot argue that the INITIATIVE's terms are meaningless.[8]

C. The INITIATIVE Conflicts with the San Diego City Charter

San Diego is a charter city. The INITIATIVE conflicts with the City Charter in at least two respects. First, it conflicts with provisions in the Charter that delegate administrative powers to the Mayor. Second, it conflicts the City Charter's requirements governing the sale of City-owned lands of 80 acres or more.

1. The INITIATIVE Proposes an Ordinance that Conflicts with the Administrative Authority of the Mayor

In 2010, the San Diego City Charter ("Charter") was amended to make the "strong mayor" form of city government permanent in the City. Article XV, Section 260, provides that "all executive authority, power and responsibilities conferred upon the City Manager . . . shall be transferred to the Mayor, assumed, and carried out by the Mayor." (App. 172.) The Charter also includes the execution of contracts among the Mayor's transferred administrative functions. (App. 167; Charter, art. V, § 28.)

The Charter limits the exercise of power by the City and its officers. (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598.) It provides the governing rules under which the City must conduct its affairs (Cal. Const., art. XI, § 3.) Just as the State Legislature cannot adopt statutes that are contrary to the State Constitution, local governing bodies

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[8] The proponents have relied on Section 22.0908(t), which prevents the alteration of any *lease* obligations. (App. 45.) The SDFELC contract did not arise under any lease and is therefore is outside the scope of that provision.

cannot enact ordinances that conflict with their charter, and an initiative similarly cannot be used to enact an ordinance that conflicts with the charter. (*Campen v. Greiner* (1971) 15 Cal.App.3d 836, 842-43 [invalidating local initiative that conflicted with provisions in the city charter]; *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"]; *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95 [same].)[9]

The San Diego 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. In Opinion 86-7, the City Attorney advised 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 []." (App. 196.) 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

[9] While the voters of a charter city may use an initiative to amend the city charter (*see* Elec. Code, §§ 9255-9269), charter amendments require additional procedures not applicable to regular initiatives. An initiative that conflicts with the city charter has been characterized as an unlawful attempt to amend the charter without complying with the stricter requirements for charter amendments. (*Patterson, supra*, 202 Cal.App.3d at 104-105.)

executive authority in a manner prohibited by the Charter. (*Id*; *see also* App. 206.)[10]

There can therefore be little dispute that the Charter gives the Mayor, not the Council, the authority to negotiate contracts. Under the Charter, therefore, the Council could not validly adopt an ordinance that directed the mayor to execute a sale on specified terms and an initiative that attempted to do so would be invalid. By mandating a sale of the PROPERTY and circumscribing the terms, the INITIATIVE impermissibly takes administrative authority away from the Mayor to negotiate such contracts.[11]

The proponents have argued that adoption of the INITIATIVE is no different than the Council adopting other general real estate policies such as Policy 700-10. This confuses legislative authority to *set* policy with administrative or executive authority to *implement* policy. Of course the Council can set general policies for disposition of City-owned property and can attempt to influence the terms of an agreement by refusing to approve it and making the basis of its disapproval clear. Both actions are quite

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[10] The differing roles of the Mayor and Council under the Charter are also reflected in Council Policy 700-10. (App. 312.) 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.*)

[11] Proponents have asserted that since contracts of more than 80 acres are subject to Council (and public) approval under section 221 of the Charter, the Mayor has no responsibility for negotiating the sale in these cases. This is incorrect. Under the "strong Mayor" form of government, the Mayor has administrative responsibility for the negotiation of *all* contracts; this is not changed because the Council has an added role in some sales.

different from simply dictating the terms of a sale or lease for a property in advance. (Compare App. 312-327 [Policy 700-10, providing methodology for disposition of City-owned property] with App. 41-47 [required terms of agreement].)

2. The INITIATIVE Conflicts with Charter Requirements Governing the Sale of City Land

City Charter Section 221 states that City-owned real estate consisting of 80 or more acres "shall not be sold or exchanged unless such sale or exchange shall have ***first been authorized by ordinance of the Council*** and ***thereafter ratified by the electors*** of the City." (App. 171; Charter, art. XIV, § 221 (emphasis added).)

Courts interpret city charter provisions using ordinary principles of statutory construction. City charter provisions are therefore construed using their plain meaning. (See, e.g., *Currieri v. Roseville* (1970) 4 Cal.App.3d 997, 1001.) The language in City Charter Section 221 is clear that any sale of more than 80 acres of City-owned lands must go through ***two steps***. First, it must be "authorized by ordinance *of the Council.*" And, second, the actual "sale" authorized by the Council must be ratified by the voters.

If drafters of Section 221 wished to simply reserve to City voters the power to adopt an ordinance authorizing the sale of such lands by initiative, the language in Section 221 would simply have referred to public approval and would not have separated Council authorization from public approval. This Court must give meaning to each word used in Section 221. Interpreting Section 221 to allow the use of an initiative to bypass Council authorization would violate this cannon of statutory construction by rendering the requirement for authorization by the Council superfluous.

Section 221 gives the Council the authority to set the terms of the transaction *and* requires voter approval or disapproval of a specific sales agreement only *after* the City Council has enacted an ordinance authorizing that sale. The INITIATIVE also violates Section 221 because it does not present voters with a final agreement. Instead, it bypasses Council authorization of a specific transaction and asks voters to authorize a sale in the abstract rather than allowing them to review and approve a *final* agreement. In thus violates both aspects of Section 221.[12]

Section 221 requires voter ratification *unless* the sale is to a *governmental entity* for a "bona fide *governmental* purpose." The "bona fide governmental purpose" exemption in Section 221 only exempts transactions "between governmental agencies when a *genuine governmental purpose* is involved." (App. 245.) Although the INITIATIVE requires a sale to "SDSU," it defines "SDSU" to include non-governmental entities ("any SDSU auxiliary organization, entity, or affiliate"), thereby allowing for a sale to non-governmental entities as well as governmental. In addition, it authorizes a sale and use of the PROPERTY for both public and *private* purposes. It apparently attempts to comply with the Charter by defining "Bona Fide Public Purposes" to include commercial, retail, and hotel use. (App. 45.) Whether one agrees that these are "bona fide *public* purposes" or not, they are not "bona fide *governmental* purposes" within the meaning of the Charter. To the extent

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[12] The proponents have asserted that "procedural" requirements do not apply to initiatives, citing *Cal. Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 935 and *DeVita v. County of Napa* (1995) 9 Cal.4th 763. These cases concerned the applicability of specific state requirements to local initiatives; a charter can, impose requirements beyond state law – as section 221 clearly does. (See Cal. Const., art. XI, § 5.)

the INITIATIVE provisions attempt to declare compliance with Section 221, it is another example of impermissibly exercising an administrative function and is 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 [determination that statutory prerequisite exists is an administrative function].)[13]

II. THE INITIATIVE ATTEMPTS TO DIRECT THE ACTIONS OF SDSU WHICH IS IMPERMISSIBLE UNDER STATE LAW

The entire INITIATIVE is built around the premise that the City will sell the Stadium Site to SDSU. The necessary corollary of this is that SDSU will purchase the PROPERTY. The INITIATIVE also requires on the one hand that the sale of the Stadium Site shall "provide for" a long list of specific projects, including many non-University uses such as commercial and retail development, and, on the other hand, that development of the "the Existing Stadium Site shall be comprehensively planned through an SDSU Campus Master Plan revision process." (App. 43.) It also states that SDSU "shall use the content requirement of a Specific Plan" under state zoning law, although it acknowledges that SDSU is exempt from this law. (*Id.*)

The INITIATIVE thus impermissibly seeks to control decisions concerning the purchase of real estate by SDSU, a campus within the CSU system. The notion that SDSU can simply negotiate a deal with the City to

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[13] Nor does the sale of the PROPERTY fall within the exemption for sales of property "*previously* authorized" by the voters. That exemption refers to sales of property which the voters authorized before Section 221 was added to the Charter. Since the City's voters did not "*previously*" authorize a sale of the PROPERTY before enactment of Section 221, that exemption does not apply here.

buy this PROPERTY in accordance with the terms of the INITIATIVE defies reality. The Legislature has vested exclusive authority over the CSU in Board of Trustees ("Trustees"), including the "full power and responsibility" to make decisions concerning the acquisition and development of land for the CSU. (Ed. Code § 66606.) No one disputes that this is a matter of statewide concern.

The purchase and development of real property by CSU is highly regulated by state law, and requires the Trustees to consider both the financial costs and impacts on the educational programs provided by the CSU. (Ed. Code, § 67500 *et seq.* [requiring, *inter alia*, 5-year capital outlay plans to be developed and submitted to Legislature].) CSU may only receive state reimbursement if a project is authorized in the State Budget Act or other statute before the expenditures are incurred, the funds for reimbursement are appropriated by the Legislature, and the CSU has followed "all other applicable procedures" for the expenditure of such funds. (Ed. Code, § 67500.)

The State University Administrative Manual ("SUAM"), provided by the proponents, makes clear that *before* a campus may agree to a real estate development, the campus must create a development plan and submit the same to the Board for approval. (App. 436-450; 437.) Section 9019.01 refers to three narrow statutory exceptions for the acquisition of real property without prior approval – acquisitions by gift, devise or donation; with proceeds from the sale or exchange of real property previously received by gift or devise; and revenues from parking and housing programs. (App. 444.) None of these exceptions is involved here. According to SDSU's Chancellor, the acquisition will come from "CSU debt issues and repaid with revenues generated from private development partners." (App. 505.) The authority to do this is claimed to be Education

Code sections 89770 through 89774, but those provisions state that the CSU "shall not proceed with any capital expenditures defined in paragraph (1) of subdivision (b) of Section 89770 or capital outlay projects defined in Section 89771, before receiving approval from the Department of Finance . . ." (Ed. Code, § 89772(d)(4).) Thus, there appears to be no circumstance under which SDSU would have independent authority to enter into the agreement contemplated by the INITIATIVE without prior approval and funding, nor could the City of San Diego compel such a transaction.

In addition, all real estate acquisitions "must carry out the *primary functions* of the CSU." (App. 442.) Those functions are intended to "advance and extend knowledge, learning, and culture" through providing higher education to students throughout the CSU system. (App. 565.) The primary functions do not include the development of retail, office space and a hotel or public-private partnerships on non-University projects. The INITIATIVE nonetheless requires that the sales agreement "shall provide for" a range of non-University uses – despite the obvious fact that any eventual development must go through the long-term planning process and must carry out the "primary functions" of the University.

Finally, the INITIATIVE itself acknowledges that it requires the Trustees and SDSU to the planning process provided in Government Code section 65451(a), even though state law exempts CSU from those requirements. (App. 43.) The proponents argue that since SDSU can "voluntarily agree" to abide by locally-dictated conditions, no conflict with state law exists. But this ignores the fundamental issue: ***a local initiative cannot direct state action and cannot conflict with state laws governing matters of statewide concern.*** (See, *e.g.*, *Patterson, supra.*) The INITIATIVE directs that a contract be entered into "in compliance with the

conditions herein established." (App. 41.) The fact that SDSU could voluntarily agree to such conditions or decide to pursue certain developments on its own does not mean that a local ordinance can *impose* such requirements. Here, the INITIATIVE imposes requirements upon SDSU that are contrary to state law and therefore impermissible.

III. IF THE INITIATIVE DOES NOT ACTUALLY REQUIRE A LEASE OR ANY SPECIFIC TERMS, IT DOES NOT ENACT AN ENFORCEABLE ACT AND IS IMPERMISSIBLY VAGUE OR ILLUSORY

An initiative must propose concrete action; it cannot merely direct the legislative body to address a perceived problem. 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.)

In this case, the INITIATIVE sets forth numerous "goals" for a football stadium, a river park, and specified development of the surrounding area. However, it is undisputed that nothing in the INITIATIVE ***requires or guarantees*** those or any other development. Indeed, in response to arguments about the incursion on the Mayor's administrative authority, the proponents have argued that the INITIATIVE ***does not actually require any particular terms and does not even require that a purchase and sale ever be executed***, as they repeatedly suggest that a sale will only occur if an agreement can be negotiated that meets its terms and is "fair and equitable" to the City. (*See, e.g.*, App. 392 [nothing in INITIATIVE requires the City to negotiate an agreement].)

If so, the INITIATIVE does not (and cannot legally) guarantee the very legislative policy it purports to enact – ***a problem that is inherent in the use of an initiative to attempt to direct the negotiation of an agreement rather than the enactment of concrete action.*** Although the INITIATIVE contains numerous "goals" or desirable outcomes, it does not contain any enforceable action or in any way guarantee that the "goals" will be achieved. Simply put, either the INITIATIVE requires a sale of public property on the terms set forth (and impermissibly dictates administrative action and violates the Charter or state restrictions) or it merely constitutes a possible proposal, to be accepted, rejected or modified as the City deems fit. If it is the latter, it is clear that voters are not enacting any enforceable legislative action and it runs afoul of cases that require initiatives to direct enforceable legislative action. (*See, e.g., AFL v. Eu, supra*; *Widders v. Furchtechnicht* (2008) 167 Cal.App.4th 769.)

The underlying ambiguity about the nature of the City's (and SDSU's) obligations and the lack of specific enforceable directives under the INITIATIVE make it impermissibly vague. It states a "desire" for a sale of the PROPERTY but only if "such sale is at such price and upon such terms as the City Council shall deem to be fair and equitable." (App. 41.) Similarly, it "desires" the PROPERTY "to be comprehensively planned through an SDSU Campus Master Plan revision process" and to comply with state law regarding the contents of Specific Plans, although it does not and cannot require these actions. (App. 43.) In short, nothing in the INITIATIVE requires or guarantees that such a sale will ever occur or that SDSU will in fact develop the PROPERTY as provided in the INITIATIVE, nor could it legally do so. The INITIATIVE is therefore not a valid legislative act because it does not "compel compliance . . . subject to

sanctions or legal consequences compel." (*Worthington*, *supra*, 130 Cal.App.4th at 1142-43.)

The ambiguities about this INITIATIVE are inherent in any measure that purports to direct the negotiation of an agreement with parties that it cannot control. It is ultimately unclear whether the Mayor and Council can determine that *no sale* is in the best interests of the City or if they can compel a price higher than the 2017 value if they determine that a higher price is "fair and equitable." It is unclear whether the parties can agree on a contract that fails to "provide for" the 14 development projects to be placed in the Municipal Code, particularly since the INITIATIVE also specifically requires the development to "comprehensively planned" through the CSU Campus Plan Revision Process.

And, of course, the ultimate implementation of the INITIATIVE is contingent upon agreement with a third party, SDSU, who is not directly subject to the terms of the INITIATIVE and as to whom the terms of the INITIATIVE are unenforceable. Even if SDSU is supportive, approval by the Board of Trustees is necessary before any agreement could be implemented. In the absence of an agreement with the CSU Board, the City may be required to hold the PROPERTY for 20 years based only on the *possibility* that a sale might someday be executed.

Cases are clear that an initiative cannot simply direct the legislative body to take action. Here, the INITIATIVE does not direct the legislative body to exercise its discretion, it instead directs the City's administrative officers to exercise their discretion – but the desired action to be taken is indirect and unenforceable just the same.

The language of the INITIATIVE and the proponents' own acknowledgment that it cannot compel any action by SDSU and there may not ultimately be an agreement demonstrate that the INITIATIVE fails to

enact an enforceable legislative act. The numerous unanswered questions make it virtually impossible for voters to evaluate the proposed project since whether the INITIATIVE contains enforceable requirements (and what they are) goes to the heart of what voters are being asked to vote on.

Moreover, without knowing whether the INITIATIVE's critical terms are binding or whether the City has unlimited discretion to reject them, City officials cannot possibly understand their legal obligations and 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.) As that case illustrates, an initiative can have a great deal of detail and yet be impermissibly vague. There, the initiative provided a great deal of detail on multiple issues. The Court nonetheless reviewed the nature of the requirements and the overall structure of the initiative and concluded that it was "so vague as to be an unworkable interference with the [legislative body's] duties." (*Id.* (citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188).) The INITIATIVE is analogous.

CONCLUSION

Based on the foregoing, City petitioners respectfully request that the Court issue a peremptory writ in the first instance determining that the INITIATIVE is not a valid use of the initiative power or, alternatively, remove the INITIATIVE from the November 6, 2018, ballot pending

further review by this Court and issue an order directing real parties to show cause why the INITIATIVE should not be determined to be invalid.

Dated: July 30, 2018

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CERTIFICATION PURSUANT TO RULE 8.204
OF THE CALIFORNIA RULES OF COURT

Pursuant to Rules 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a type-face of 13 points or more and contains 13875 words, exclusive of the cover page, tables, verification and this certification, as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: July 30, 2018

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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

City of San Diego v. Maland, et al.

Superior Court Case No. 37-2018-00023290-CU-WM-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On the below date, I served true copies of the following document(s) described as:

EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER

EXHIBITS TO EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF (2 VOLUMES)

on the interested parties in this action as follows:

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[XX] **(BY ELECTRONIC SERVICE)** By transmitting via TrueFiling to the above parties at the email addresses listed above.

[ ] **(BY PERSONAL SERVICE)** I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

[XX] **(BY OVERNIGHT DELIVERY)** I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

[ ] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 30th day of July 2018, at San Diego, California.

Marci Bailey

Marci Bailey