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May 13, 2005

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

MT. SOLEDAD MEMORIAL PROPERTY

INTRODUCTION

On March 8, 2005, the San Diego City Council adopted Resolution No. R-300207 [Resolution], which declined the offer of the federal government to accept title to the property at the top of Mt. Soledad commonly known as the Mt. Soledad Memorial, and including the structure commonly known as the Mt. Soledad Cross.¹ On April 7, 2005, the City Clerk accepted referendary petitions containing sufficient signatures to cause the City Council to either rescind the Resolution or call a special election for the electorate to consider the adoption of the Resolution. The City Clerk previously issued a Report (No. 05-01) outlining the procedure to be followed with respect to a referendum, and it is docketed for City Council consideration on May 17, 2005.

The following questions have arisen with respect to this matter:

1. May the Resolution be referred?
2. What is the impact of a City Council rescission of the Resolution?
3. If the Resolution is not rescinded by the City Council what question will the electorate consider at the special election?
4. What is the impact of a vote on the question to be considered by the electorate at the special election?

We answer each of these questions below, and provide the City Council with some other options that may be considered at the time the matter is on the docket.

¹ The Resolution states as follows: "BE IT RESOLVED, by the Council of the City of San Diego that the offer of the federal government to accept title to the Mt. Soledad Property, as set forth in Bill 4818 (P.L. 108-447) is hereby declined." A copy of the Resolution is enclosed as Attachment 1.

BACKGROUND

The general background of this matter is set forth in our prior Report to the Mayor and City Council (No. RC-2004-16), dated June 28, 2004, and Memorandum of Law (No. ML-2005-4), dated February 24, 2005. Copies of those documents are enclosed as Attachments 2 and 3, respectively.

DISCUSSION

1. THE RESOLUTION MAY BE REFERRED.

A. General Principles Concerning Referenda.

The power of referendum is reserved to the people under the California Constitution. Cal. Const. art. II, § 9. The Constitution delegates to the legislature the power to provide procedures for local referenda elections. Cal. Const. art. II, § 11(a). Charter cities such as San Diego [City] may reserve greater referendum powers to their electors than general law cities. Cal. Elec. Code § 9247; *Myers v. City Council of Pismo Beach*, 241 Cal. App. 2d 237 (1966). The City's charter states that "referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this Charter takes effect immediately upon its passage." San Diego Charter § 23.²

It is well established under California law that the power of referendum may be invoked only with respect to matters which are strictly legislative in character. *Devita v. Napa County*, 9 Cal. 4th 763 (1995); *Lincoln Property Co. No. 41, Inc. v. Law*, 45 Cal. App. 3d 230, 234 (1975), citing *Wheelright v. County of Marin*, 2 Cal. 3d 448, 457 (1970); *Johnston v. City of Claremont*, 49 Cal. 2d 826, 834 (1958). Administrative or executive acts are not subject to the referendum process. *Lincoln Property*, 45 Cal. App. 3d at 234. "The plausible rationale for this rule 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." *Id.*

The City of San Diego has adopted provisions that govern the referendum process. San Diego Municipal Code [SDMC] §§ 27.1101 – 27.1140. SDMC section 27.1101 provides that "[a]ny legislative act, except acts making the annual tax levy, making the annual

² By its plain language, this section appears to apply only to ordinances and not resolutions. The section also appears to apply only to acts that don't take effect immediately; resolutions become effective immediately upon their passage. San Diego Charter § 17. However, our office has previously noted that the courts of this state have held that legislative acts, whether they be in the form of ordinances or resolutions, are subject to the power of referendum. City Att'y MOL 93-38 (March 22, 1993), citing *Kleiber v. City and County of San Francisco*, 18 Cal. 2d 718 (1941). Accordingly, this Report does not distinguish the form of the act as being determinative, but rather the substance of the act approved by the Resolution.

appropriations, calling or relating to emergency measures, shall be subject to the referendum process.” The key term in this section is the phrase “legislative act” because not all acts of the City Council are legislative in nature. Legislative acts are generally those that involve the formulation of policies and rules to be applied in the future. League of California Cities, *California Municipal Law Handbook* § 3.6.15(B)(1)(a) (2004). Examples of legislative acts include zoning ordinances, general and specific plans, road abandonments, development agreements, local coastal programs, and ordinances fixing governmental salaries. *Id.* at § 3.6.15(B)(1)(b). By contrast, many of the City Council’s actions are considered “administrative,” in that they do not establish a new policy or plan, but merely carry out existing policies or plans.

Excluding administrative acts from the initiative and referendum process reflects a desire to “balance the ideal of direct legislation by the people against the practical necessity of freeing municipal government from time-consuming and costly referenda on merely administrative matters.” *Fishman v. City of Palo Alto*, 86 Cal. App. 3d 506, 509 (1978). *See also Housing Authority of the City of Eureka v. Superior Court*, 35 Cal. 2d 550, 590 (1950) (“a vote of the people upon every administrative act of the city council would place municipal government in a straight-jacket and make it impossible for the city’s officers to carry on the public business.”).

Whether an act of the City Council is legislative or administrative depends on the facts and circumstances of each case, and generally whether the act is creating a policy, or instead carrying out the policy. “Acts constituting a declaration of public purpose and making provisions for ways and means of its accomplishment may be generally classified as calling for the exercise of legislative power. Acts of administration, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body.” *Lincoln Property*, 45 Cal. App. 3d at 234, citing *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618, 621 (1962); *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 124 (1921). Stated another way, the “power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.” *Martin v. Smith*, 184 Cal. App. 2d 571, 575 (1960).

B. Resolution No. R-300207 Was A Legislative Act.

The Resolution memorialized the act, by the City Council, of declining an offer by the federal government to accept title to a particular piece of real property. The lawful ability of the City of San Diego to sell, transfer, lease, and dispose of its real property is not the subject of the Resolution. The City has long held such lawful rights. Article XI, section 5 of the California Constitution provides that a charter city may carry out its municipal affairs in the manner prescribed by its charter and ordinances. The City’s Charter expressly authorizes the City to sell and transfer City property. Charter section 1 states in part: “The City of San Diego . . . may own and acquire property within or without its boundaries for either governmental or proprietary, or any municipal purpose . . . and may sell, lease, convey, exchange, manage and dispose of the

same as the interests of said City may require.” Thus, a legislative foundation has long existed under which the City Council may accept or decline offers from other entities with regard to the transfer of title to real property. The City’s legal ability to sell or transfer its lands is not, however, a plan, policy, or program to deal with the Mt. Soledad property. The issue in question, therefore, is whether the City had already established a plan or policy with regard to the Mt. Soledad property when it adopted the Resolution. In other words, the legitimacy of a referendum depends on whether the Resolution is a legislative act or an administrative act.

The decision in *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618 (1962) offers some guidance. In *Reagan*, the city of Sausalito passed a resolution declaring its desire to purchase a parcel of waterfront property for aquatic park, playground, open space, and public ground purposes. A taxpayer filed a referendum petition on the resolution. The city attorney advised that the resolution was an administrative act, not a legislative act, and the city council denied the petition. The trial court disagreed, and ordered the city council to reconsider the resolution or submit it to the voters. The court of appeals upheld the lower court ruling.

The key issue in *Reagan* was whether the city had previously established a policy to acquire the waterfront property. The city argued that it had, and that the subject resolution was therefore merely an administrative act carrying out its already established policy. *Id.* at 622. The trial and appellate courts disagreed, finding that the previous resolutions in question were concerned with land adjacent to the subject property, not the subject property itself, and therefore did not “establish a plan, policy, or program to buy” the property at issue. *Id.* at 622-23. The court concluded:

Thus, the record discloses no action or declaration of policy in existence at the time of the adoption of resolution 1571, which could be held to be a legislative act relating to the policy of purchasing Shelter Cove. The declaration of policy in resolution 1571, upon which the determination to purchase Shelter Cove is based, is a legislative act and therefore the resolution is subject to referendum.

Id. at 624.

When the *Reagan* rationale is applied to the Resolution concerning the Mt. Soledad property, the matter becomes one of determining whether the City has previously established a plan, policy, or program regarding the disposal of that particular property. It seems clear that the City had not, prior to the adoption of the Resolution, established a valid policy in dealing with the Mt. Soledad property. While the City has attempted several alternatives with respect to the disposition of the Mt. Soledad property, such as putting before the voters a proposition authorizing the sale of the property to a non-profit corporation, or putting before the voters a proposition authorizing the sale of the property to the highest bidder, none of those actions have been successfully implemented for a variety of reasons, including the invalidity of certain of the

actions. Thus, in our opinion, there was no previously adopted, legally valid plan for the disposition of the property.

In addition, the Resolution raises an issue not discussed in the earlier ordinances. It constitutes the first action taken by the City Council with regard to donating the Mt. Soledad property to a public entity, particularly the United States government. As set forth in the Resolution, the U.S. Congress, on November 20, 2004, adopted a bill that included a provision relating to its acceptance of title to the Mt. Soledad property if offered by the City. The only City resolution or ordinance acknowledging the federal government's action, and the City's response to that action, is the Resolution. Thus, it appears that the Resolution is the first and only action taken by the City Council with regard to the federal government's offer.

The notion that the Resolution is a legislative act is supported by the past history of the City's attempts to address the disposition of the Mt. Soledad property, and by certain provisions of the City Charter. The proposed disposition of the property has been twice put to the voters. In our view this represents an acknowledgment by the City that the disposition of the property is a policy decision of sufficient import to be subject to the collective voice of the electorate. Indeed, the City Charter requires a vote of the electorate with respect to the disposition of certain City property. Charter section 219 requires a vote of the electorate for the sale of Pueblo Lands situated north of the San Diego River, and Charter section 221 requires a vote (with only narrow exceptions) for any real property sale of more than eighty (80) contiguous acres. Finally, Charter section 55 requires a two-thirds (2/3) vote of the electorate if any dedicated park or cemetery land is proposed for any other use. While none of these provisions are directly applicable to these circumstances, in our opinion they support a conclusion that the disposition of certain City lands represents a policy choice, or legislative act, that is ultimately the subject to either the direct authorization of the electorate or the reserved power of referendum.

In sum, we believe that the March 8, 2005, decision by the City Council regarding the disposition of the Mt. Soledad property is, given the history of the site and the public interest in its ultimate fate, a legislative act that is subject to the power of referendum.³ Accordingly, it is our opinion that the Resolution may be referred.

2. A CITY COUNCIL RECISSION OF THE RESOLUTION REQUIRES THE CITY COUNCIL TO TAKE SOME ACTION WITH RESPECT TO THE DISPOSITION OF THE MT. SOLEDAD PROPERTY.

The Resolution did no more than decline the federal government's offer. The impact of a rescission of the Resolution would be that the act of declining the federal government's offer would not be effected. In other words, the City would be deemed *not* to have officially declined

³ We are careful to note that the opinion expressed herein is applicable only to the property that is the subject of the Resolution and the referendum petitions, and to the facts and circumstances relating to the adoption of the Resolution. Not every decision regarding the disposition of City Property would, in our opinion, be a legislative act; the analysis can be very fact specific.

the federal government's offer. We can find no authority upon which to conclude that the rescission of the Resolution in the face of valid referendary petitions by itself causes the *acceptance* of the federal government's offer, or would otherwise result in the automatic transfer of Mt. Soledad title to the federal government. The referendum process can cause the rescission of an existing legislative act by the City Council (or its consideration by the electorate), but it cannot by itself create a new legislative act (which must be undertaken by the City Council, or by the electorate through initiative). Because acceptance of the federal government's offer was never part of the City Council's adoption of the Resolution, such acceptance cannot now be made part of the referendary process. In other words, if the City Council rescinds the Resolution, that act would simply put the City in the position of never having taken action to respond to the federal government's offer.

There is, however, a limitation on actions by the City Council in response to the rescission of the Resolution that, in our opinion, compels the City Council to take some action with respect to the property. Pursuant to California Elections Code section 9241, upon rescission of a legislative act subject to a referendum, the legislative act "shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body."⁴ This limitation serves the purpose of prohibiting legislative bodies from rendering meaningless the referendum process by merely re-adopting the referred legislative act. *Martin v. Smith*, 176 Cal. App. 2d 115, 118-121 (1959). Accordingly, if the Resolution is rescinded the City Council may not adopt, for one year, a resolution or ordinance that declines the federal government's offer. But direct action is not the only means in this instance by which the referendum process could be rendered meaningless. In our view, taking *no* action following a rescission of the Resolution, or taking an action other than accepting the federal government's offer, indirectly declines the federal government's offer and frustrates the referendum process. Thus, in our opinion, the City Council may not choose a course of inaction, or otherwise take affirmative action that results in disposing of the property by means other than acceptance of the federal government's offer. We offer our views on the City Council's options in these circumstances in Part 5, below.

3. IF THE RESOLUTION IS NOT RESCINDED BY THE CITY COUNCIL THE ELECTORATE WILL BE CONSIDERING THE QUESTION OF WHETHER TO APPROVE THE RESOLUTION.

The California Constitution defines "referendum" to mean "the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." Cal. Const. art. II, § 9(a). San Diego City Charter section 23 reserves the power of referendum to the people of the City, but provides that the procedures for exercising this power shall be made

⁴ Although the City of San Diego does not have similar language in its Charter or Municipal Code, our office has previously opined that section 9241 should be used for guidance in City referendum matters. City Att'y MOL 97-8 (Mar. 5, 1997).

through its election code. The relevant portion of the City's election code is found in the San Diego Municipal Code [SDMC] at sections 27.1101, et seq. Nowhere in these sections is there language explicitly stating what the voters are deciding when they vote on a referred matter. Nevertheless, there is ample language in these sections that collectively illustrate that the voters are doing nothing more or less than approving or rejecting the City's legislative acts.

For example, SDMC section 27.1107 contains mandatory language concerning the contents of a referendary petition. Such petitions are required to include language stating that the petition is asking "that the City Council repeal, or submit to the registered voters of the City for their adoption or rejection that legislative act adopted by the City Council." The petition circulated by the proponents of the Mt. Soledad referendum complies with this requirement. This petition states:

We, the undersigned registered voters of The City of San Diego, California, hereby present this petition to the City Council of The City of San Diego, California, and ask that the City Council repeal, or submit to the registered voters of the City *for their approval or rejection, that legislative act* adopted by the City Council on the 8th day of March, 2005 of which the following is a full and correct copy [Emphasis added.]

The clear intent of SDMC section 27.1107, as well as the subject petition, is for the voters to either approve or reject Resolution R-300207. This perspective is supported by the language in SDMC section 27.1130. With regard to a legislative act subject to referendum:

(a) . . . if the petition is found to be sufficient, the legislative act shall be suspended until it is adopted by the voters and becomes effective in accordance with Sections 27.1139 and 27.1140.^{5,6}

. . . .

(c) If the City Clerk issues a certification of the referendary petition's sufficiency, the referended legislative act shall become effective in accordance with Sections 27.1139 and 27.1140.

⁵ Section 27.1139 provides that referred legislative acts may generally be adopted by a majority vote. Section 27.1140 pertains to the date of adoption and provides that the legislative act shall be deemed adopted on the date the City Council declares the results of the election.

⁶ This provision is similar to California Government Code section 9237, which provides that upon presentation of a referendum petition, "the effective date of the ordinance shall be suspended and the legislative body shall reconsider the ordinance."

It therefore seems clear that the only question before the voters is whether or not the Resolution should be adopted. If a majority of those voting approve the measure, the suspended resolution becomes effective as soon as the City Council declares the election results. If a majority does not approve the measure, the resolution remains suspended. The SDMC does not provide any additional language regarding referendum measures that fail to obtain the requisite number of votes. Thus, as is stated by article II, section 9(a) of the California Constitution, the process of referendum is simply a matter of adopting or rejecting the official actions of the legislative body.

4. IF THE ELECTORATE ADOPTS THE RESOLUTION IT MAY TAKE EFFECT; IF THE ELECTORATE DOES NOT ADOPT THE RESOLUTION THE CITY COUNCIL MUST TAKE SOME ACTION WITH RESPECT TO THE DISPOSITION OF THE PROPERTY.

Similar to the analysis and conclusion expressed in Part 2, above, the impact of a referendum's failure to gain the approval of a majority of voters would be that the act of declining the federal government's offer would not be effected, and the Resolution would be suspended indefinitely, never having any legal effect. As with a rescission of the Resolution by the City Council, we can find no authority upon which to conclude that the failure of the referendum would by itself cause the acceptance of the federal government's offer, or would otherwise result in the automatic transfer of Mt. Soledad title to the federal government. Electors voting on the referendum of the Resolution would be voting narrowly on whether or not to decline the federal government's offer; they would not be voting on whether or not to accept the federal government's offer. Thus, if a majority of the voters do not approve the Resolution, it would simply put the City in the position of never having taken action to respond to the federal government's offer.

In the face of a rejection of the Resolution by the voters, however, the City Council faces the identical limitation on future action as if the City Council had rescinded the Resolution. California Elections Code section 9241 also provides that if a legislative act is submitted to the voters and a majority of the voters do not vote in favor of it, the legislative act "shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters." Accordingly, if the Resolution is submitted to the voters and fails to obtain a majority vote, it would appear that the City Council would be in the same position had it rescinded the Resolution; it could not adopt, for one year, a resolution or ordinance that declined the federal government's offer, nor could it indirectly decline the federal government's offer by taking no action or taking an action that otherwise disposes of the property. The City Council's options under these circumstances are set forth below.

5. OPTIONS.

When the City Council considers this matter on May 17, 2005, the City Council may choose to rescind the Resolution, or decline to rescind the Resolution and place the question of its adoption before the voters. In the event of the latter, the City Council must first adopt a

resolution declaring its intent to do so (Attachment 4), and then adopt ordinances calling the special election and placing the question before the voters (Attachments 5 and 6), and a resolution asking the Registrar of Voters to conduct the election (Attachment 7). The Council may also adopt a resolution calling for the preparation of the title, summary, impartial analysis, and fiscal analysis, and assigning authorship of the ballot argument (Attachment 8).

In the event the City Council rescinds the Resolution, as described above the City Council may not choose to merely take no further action, and may not choose to dispose of the property in a manner other than one that results in a transfer of title to the federal government. In other words, a further legislative act must be undertaken in response to the referendum that does not frustrate the referendum process. In our opinion, the City Council is left with two choices; either adopt a resolution accepting the federal government's offer or place before the voters the affirmative question of whether to transfer the property to the federal government. SDMC §§ 27.1001, 27.1036.⁷ We are mindful of our previous advice that the act of transferring the property to the federal government is unconstitutional because it would be for the purpose of maintaining the cross (*see* Attachment 3), however we believe that the referendum process must be followed, and therefore the City Council must take one of the two actions described above. In any event, the current litigation (or future litigation) will decide the ultimate legality of any action.

We have prepared the appropriate document for a rescission of the Resolution (Attachment 9). Many of the resolutions and ordinances described above also may be used in the event the City Council decides to put an affirmative question before the voters, and we have taken the liberty of preparing an ordinance with the appropriate question to be placed on the ballot (Attachment 10). We have also prepared a resolution accepting the federal government's offer (Attachment 11). These matters may be considered and acted upon at the May 17, 2005 meeting.⁸

CONCLUSION

The Resolution constituted a legislative act subject to the reserved power of referendum. In the event the City Council rescinds the Resolution, the City Council must choose either to place an affirmative question before the voters regarding a transfer of the property to the federal

⁷ In the event that the City Council places the affirmative question of the transfer before the electorate, the voters are free to decline that disposition of the property. Elections Code section 9241 only restricts actions by the City Council, and does not apply to ballot propositions. Thus the electorate is free to make a decision following a successful referendum that the City Council may otherwise be precluded from making.

⁸ We note that if the Resolution is placed before the voters, and the voters decline to adopt it, the City Council will be faced with the same decision as if it had rescinded the Resolution. In other words, the City Council would have to decide whether to make a decision itself to transfer the property, or place that affirmative question before the electorate.

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government or cause the transfer itself. Alternatively, the City Council may decline to rescind the Resolution, and put the question of the adoption of the Resolution to the voters. In either event, we have prepared the necessary instruments to permit these actions to be considered on May 17, 2005.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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RC-2005-10
Attachments (11)