December 3, 1991

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PLANNED GROWTH AND TAXPAYER RELIEF INITIATIVE

In a memorandum dated November 7, 1991, the Mayor asked the City Attorney to separate the growth management (Growth Measure) and prevailing wage (Wage Measure) provisions of the Prevent Los Angelization Now! Initiative (PLAN! Initiative) in anticipation of Council's consideration of these measures for the June 1992 ballot. This report discusses legal issues that were raised by opponents to the PLAN! Initiative but were not addressed by the Superior Court on October 16, 1991, when it ordered the PLAN! Initiative not be placed on the ballot.

BACKGROUND

On July 31, 1991, a petition containing the PLAN! Initiative and the signatures of over 10% of the City's registered voters was filed with the City Clerk. In Resolution No. R-278608, Council directed that the PLAN! Initiative be submitted to the voters in the June 1992 election.

Opponents successfully challenged placement of the PLAN! Initiative on the ballot in Strobl v. City of San Diego, No. 641951 (Super. Ct. San Diego County, Oct. 16, 1991). The court held that the PLAN! Initiative, by including a prevailing wage requirement among provisions related to limited growth, violated the single-subject rule of the California Constitution and was judicially nonseverable. Subsequently, in a memo dated October 28, 1991, proponents of the PLAN! Initiative requested that the Mayor and Council, in lieu of pursuing an appeal, sever the provisions and place them on the ballot as two distinct proposals.

ANALYSIS

The proposed Growth Measure and Wage Measure may be subject to preelection or postelection challenge. Generally, courts favor the latter over the former in deference to the democratic process and for reasons of judicial economy. Legislature v. Deukmejian, 34 Cal. 3d 658, 665-66 (1983) (citations omitted). The significant distinction between the two is that challengers bear a higher burden of proof in a preelection attack. Id. In either scenario, the Growth Measure has a reasonable chance of surviving an attack, but the Wage Measure is not likely to withstand a challenge.

As noted, the superior court in Strobl v. City ruled on only one legal issue -- violation of the single-subject rule -- raised by opponents of the original PLAN! Initiative. The Coalition for San Diego/Construction Industry Federation (Coalition), in its Memorandum to the Mayor and City Council dated October 28, 1991 (Coalition Memo), reasserts the unresolved

issues.F

The superior court's holding suggests that there would be no remaining single-subject violations if the PLAN! Initiative's growth and prevailing wage provisions were split into two ballot measures; therefore, that issue is not addressed in this report.

These can be divided into three broad categories. First, the Coalition alleges that the proposed measures are outside the scope of the people's initiative power because they are nonlegislative in nature. Coalition Memo 6 1. Second, the Coalition contends that the Growth Measure is an improper subject for an initiative and is substantively invalid. Id. 66 2, 4-6. Third, the Coalition claims that the Wage Measure is unconstitutional and preempted by federal statutes. Id. 6 3.

A. Legislative Nature of the Proposed Measures

Section 27.2523 of the San Diego Municipal Code (SDMC) provides that Council may, without petition, submit a proposed legislative act to the voters for their approval. An amendment to a general plan is a legislative act. Cal. Gov't Code Section 65301.5.

Analogizing to Marblehead v. City of San Clemente, 226 Cal. App. 3d 1504 (1991), opponents have claimed that the original PLAN! Initiative is not a legislative act. Marblehead, however, is readily distinguishable. In the Marblehead initiative, voters directed the city council to amend the general plan "to reflect 'concepts' expressed in the measure." Id. at 1510. In contrast, the PLAN! Initiative would amend the General Plan directly.

As severed for Council consideration, the Growth and Wage Measures would also directly amend the General PlanF

To be valid, the subject of the severed provisions also must be "clearly expressed" in each measure's title. See San Diego City Charter, ' 16; see also Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 543 (1990) (title and ballot summary are relevant in construing initiative). and are equally distinguishable from Marblehead. Consequently, the City has a strong argument that the proposed measures are legislative acts, and, as such, are within the scope of the initiative power.

B. The Growth Measure

Four issues that remain unresolved by the superior court in Strobl v. City are relevant to the Growth Measure: (1) interference with "essential governmental functions," (2) preemption by the state, (3) failure to comply with the California Environmental Quality Act, and (4) creation of internal inconsistency in the General Plan.

1. Essential Governmental Functions

Opponents contend that the Growth Measure, in particular, is beyond the scope of the initiative power because it would impair "essential governmental functions." See Coalition Memo 6 2. For this reason, they

argue that initiatives may not amend general plans. The California Supreme Court, however, has never decided this fundamental issue. Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 539 (1990).F

In an opinion issued before Lesher, the California Attorney General concluded that a general law county's general plan could be amended by initiative as long as the amendment complied with the substantive requirements of the State Planning and Zoning Law. 66 Ops. Cal. Att'y Gen. 258 (1983). On the other hand, the appellate court in Marblehead read Lesher as hinting that a general plan might not be an appropriate initiative subject. Marblehead, 226 Cal. App. 3d at 1509 n.3.

The Coalition singles out two areas where the Growth Measure allegedly would intrude upon "essential governmental functions." First, the measure would impair the Council's power to amend the Progress Guide and General Plan granted in Government Code Section 65358. Coalition Memo 6 2. Second, it would interfere with "state-delegated redevelopment powers." Id.

a. Power to amend

As to the first issue, the opponents' argument is based on the fact that any legislation adopted by initiative can be amended or repealed only by initiative. See Cal. Elec. Code Section 4013; SDMC Section 27.2528. To this extent, Council's power to directly amend those General Plan provisions adopted by initiative would be eliminated.

It is debatable, however, whether opponents can demonstrate that this limitation on Council's power meets the legal standard for invalidating an initiative measure. That standard requires a showing that the limitation would inevitably result in greatly impairing or entirely destroying Council's ability to carry out state-mandated responsibilities with respect to the General Plan, such as providing for the City's share of regional housing needs. See Brosnahan v. Brown, 32 Cal. 3d 236, 258 (1982). Furthermore, this showing must be based on more than mere speculation. Id. Assuming that an element of the Growth Measure eventually might have to be amended in order to comply with some state planning requirement, Council could propose the necessary amendment to the electorate without petition. See SDMC Section 27.2523. Further, any provision directly contrary to a properly imposed state mandate would be invalid, whether local electors acted or not.

b. State-delegated redevelopment powers

The Coalition's second argument on the issue of interference with essential governmental functions -- that the Growth Measure would interfere with the City's state-mandated redevelopment powers -- is even more speculative. Currently, there seems to be no inconsistency between the Growth Measure and the state's redevelopment policy of promoting "sound growth." See Cal. Health & Safety Code Section 33331. Therefore, it does not appear that the Growth Measure impermissibly impairs

essential governmental functions.

2. State Preemption

The Coalition claims that the Growth Measure also is substantively invalid because it attempts to regulate matters of statewide concern, such as traffic, housing, and water supply, rather than purely municipal affairs. State law, however, requires the City to have a general plan which includes elements addressing these topics. Cal. Gov't Code Section 65302. Thus, the assertion that the Growth Measure is preempted on this basis alone seems to lack merit.

3. The California Environmental Quality Act

The Growth Measure also raises an issue with regard to the applicability of the California Environmental Quality Act (CEQA), Pub. Resources Code Section 21000 et seq. Generally, CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." Id. Section 21080. This definition includes amendments to general plans. Cal. Code Reg., tit. 14, Section 15378(a).

A CEQA "project," however, does not include "submittal of proposals to a vote of the people." Id. Section 15378(b)(4). This exemption has been recognized as applying to voter-proposed initiatives, Stein v. City of Santa Monica, 110 Cal. App. 3d 458 (1980), but it is unresolved whether the exemption also applies to government-proposed initiatives.

Resolution of this question depends on the extent to which Council's action in placing the Growth Measure on the ballot qualifies as an act of "approval." Assuming that Council severs the PLAN! Initiative and places the severed portions on the ballot with only those changes absolutely necessary to correct the single-subject defect, principles of statutory construction suggest that Council's action would not constitute "approval." Conversely, the more Council deliberates on the merits or amends the text of the original PLAN! Initiative provisions, the greater the chance that a court will find that the Growth Measure should have been subjected to an environmental review pursuant to the provisions of CEQA.

4. Internal Inconsistency

Finally, the Coalition claims that the Growth Measure is invalid because its adoption would make the General Plan internally inconsistent. See Coalition Memo 6 6. While a court may invalidate provisions of an inconsistent general plan, Concerned Citizens of Calaveras County v. Board of Supervisors, 166 Cal. App. 3d 90, 97, 103 (1985), it does not follow that an amendment to a general plan must be rejected because it would create an inconsistency in the plan. If that were true, a general plan could never be amended to reflect a change in policy. Thus, if an otherwise valid amendment creates an internal inconsistency, the appropriate remedy is to preserve the amendment and invalidate the inconsistent provisions in the General Plan and not vice-versa.

C. The Wage Measure

The three coalition arguments specifically directed at the Wage

Measures find their genesis in Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca, 769 F. Supp. 1537 (N.D.Cal. 1991) decided on June 21, 1991, and published in West's Federal Supplement on October 21, 1991. In a case of first impression, the court, in granting a motion for summary judgment, held that the imposition of a prevailing wage rate on private industry by a city impermissibly interfered with the collective bargaining process, exceeded the scope of minimum wage determination, and, therefore, was preempted by the National Labor Relations Act. Id. at 1545. Additionally, the court held that the incorporation of the definition of per diem wages from California Labor Code Sections 1770, 1773, and 1773.1 resulted in preemption by the Employee Retirement Income Security Act of 1979. Associated Builders & Contractors, 769 F. Supp. at 1547-48.

The court also held that the prevailing wage measure interfered with existing contracts in violation of the California and United States Constitutions. Id. at 1551. To the extent that the Wage Measure of the PLAN! Initiative attempts to avoid the interference with contract issue by exempting existing contracts, it is defendable as to that issue. However, the Wage Measure's preemption difficulties appear to be a serious impediment to its implementation.F

Although it did not base its ruling on this issue, the superior court, at the hearing on the writ regarding the original PLAN! Initiative on October 3, 1991, indicated orally that it felt that the prevailing wage provisions were preempted by federal law and, therefore, invalid.

D. Attorneys' Fees

In closing, it should be noted that a successful party may be awarded attorneys' fees in cases resulting in a significant public benefit. Cal. Code Civ. Proc. Section 1021.5. A challenge to either measure might qualify as such an action. Accordingly, the City could be liable, in whole or in part, for the challengers' attorneys' fees if it is unsuccessful in defending either measure.

CONCLUSION

As this analysis indicates, Council has authority to split the PLAN! Initiative and place the severed portions on the ballot. The Growth Measure is reasonably defensible, but the Wage Measure is most likely preempted.

Respectfully submitted,
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