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**MEMORANDUM OF LAW**

**DATE:** November 30, 2012

**TO:** Honorable Mayor and City Council members

**FROM:** City Attorney

**SUBJECT:** Analysis of Senate Bill 829, and Proposition A, the Fair and Open Competition Ordinance

**INTRODUCTION**

On October 2, 2011, Governor Edmund G. Brown, Jr. signed California Senate Bill 922 (SB 922), which added section 2502 to the California Public Contract Code (PCC). PCC section 2502 prohibits State of California (State) funding or financial assistance for city construction projects if a charter provision, initiative or ordinance prohibits the governing body from “considering” a project labor agreement (PLA) for that project. *See* PCC § 2502. SB 922 was passed in reaction to voter approved local initiatives that restricted local governments from using PLAs.<sup>1</sup> The effective date of SB 922 was January 1, 2012, and to date it has not been enforced against the City.

On April 26, 2012, Governor Brown signed California Senate Bill 829 (SB 829), extending the reach of SB 922. SB 829 adds PCC section 2503, which prohibits State funding or financial assistance for *any* city construction project, if a charter provision, initiative or ordinance “prohibits, limits, or constrains in any way” the use of PLAs for *some or all* of the

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<sup>1</sup> A PLA generally is an agreement between a general contractor and a labor organization that requires one or all of the following: (i) all workers must be members of a labor organization; (ii) the general contractor must notify the local labor organizations about employment opportunities; (iii) a minimum amount of training or experience; or priority for employment based on length of service. *See* 29 U.S.C. § 158(f) (1976).

city's projects. *See*, Cal. Sen. Bill 829 (2100-2012 Reg. Sess.) SB 829 becomes effective January 1, 2013.

On June 5, 2012, the citizens of San Diego passed Proposition A, the "Fair and Open Competition in Construction Ordinance" ballot initiative, which prohibits the City from requiring a contractor to enter into a PLA as a condition of bidding, negotiating or being awarded a City construction project. Proposition A does not ban PLAs, nor does it prohibit a contractor who voluntarily enters into a PLA from bidding on and being awarded a City construction contract.

Because at least one State attorney has opined that PCC section 2502 refers to bans on PLAs, and the City does not ban them, and further because PCC section 2503 is the more serious funding restriction, this Memorandum will confine itself to an analysis of the City's rights and obligations under SB 829 and PCC section 2503.

### **QUESTIONS PRESENTED**

1. Can the State under PCC section 2503 deny State funding to all City projects, if the City prohibits requiring a contractor to enter into a PLA on a totally City-funded project?
2. Can the State under PCC section 2503 deny funding to a totally or partially State funded City project because Proposition A prohibits requiring contractors to enter into PLAs?
3. If the State can deny funding to the City under PCC section 2503, does any provision of Proposition A preserve access to State funding?

### **SHORT ANSWERS**

1. No. Construction of a City operated facility funded solely by the City is a "municipal affair" free from regulation by the State's general laws.
2. No, but the answer is not as clear as in the case of a project solely funded by the City. The boundary between a "municipal affair" and a "matter of statewide concern" which allows State law to override a Charter is unclear in the situation where state funding is involved. The boundary should be tested in the courts.
3. Yes. An exception clause in Proposition A is written to protect the City's access to State funding.

### **ANALYSIS**

1. City-financed projects.

In *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista* ["*Vista*"] (2012) 54 Cal. 4th 547, the California Supreme Court recently ruled that the construction of two fire stations totally funded by the City of Vista were municipal affairs and not subject to the State's prevailing wage laws, which generally apply to all other public works

projects. The City of Vista successfully argued that the State law invaded its constitutionally guaranteed autonomy as a charter city.

The *Vista* decision reaffirmed “that the construction of a *city-operated facility* for the benefit of a *city’s inhabitants* is quintessentially a municipal affair, as is the control over *the expenditure of a city’s own funds.*” 54 Cal. 4th at 559 [emphasis in original.] “Likewise, the wage levels of contract workers designing and constructing two city-operated fire houses do not appear to be a matter of ‘general state concern.’ ” *Id.* at 560 (citation omitted).

The union in the case unsuccessfully argued that wage rates were matters of state concern. To this the California Supreme Court responded:

No one would doubt that the state could use its own resources to support wages and vocational training in the state’s construction industry, but can the state achieve these ends by interfering with the fiscal policies of charter cities? Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity. ‘[W]e can think of nothing that is of greater municipal concern than how a city’s tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.’ Therefore, the Union here cannot justify state regulation of the spending practices of charter cities merely by identifying some indirect effect on the regional and state economies. *Id.* at 562 (citation omitted).

It would appear that the fact that the city totally funded the project was crucial to the decision that the State’s prevailing wage law did not apply. If the State were to penalize the City, by denying funding to all City projects, because the City under Proposition A refused to mandate PLAs for a City operated project solely funded by the City, it would be interfering with what the *Vista* decision clearly states is a municipal affair.

Accordingly, this Office believes that, if the City follows the operative provision of Proposition A on projects totally funded by the City, PCC section 2503 is unenforceable to the extent it triggers the funding sanctions due to Proposition A’s application to locally funded projects..

## 2. State funded projects.

The boundary between State regulation and the “home rule” rights of the City under the San Diego City Charter is less clear in the situation where some State funding is involved in a particular project.

Even though the *Vista* decision did not address projects with non-local funding, City’s argument that the State cannot use PCC section 2503 to deny it funding because of Proposition A still rests on its constitutionally guaranteed “home rule” powers.

The California Constitution specifically authorizes the City, as a charter city, to govern itself, free of state legislative intrusion, as to those matters deemed municipal affairs. Cal. Const.

art. XI, § 5(a). Charter cities “may make and enforce all ordinances and regulations *in respect to municipal affairs*, subject only to restrictions and limitations provided in their... charters...” *Id.*; *Vista*, 54 Cal. 4th 555 (emphasis added).. The State funding sanctions of PCC section 2503 violate the City’s home rule rights over municipal affairs guaranteed by article XI of the California Constitution.

Whether a particular matter is a municipal affair subject to the home rule authority of a charter city is a question of law for the court. *Vista*, 54 Cal. 4th at 558. For this reason, the court may properly resolve issues related to charter cities’ home rule authority without the need for a factual record.

PLAs are pre-hire agreements between a construction contractor and one or more labor unions to establish the terms and conditions of employment on a particular construction project, which can include wages, working conditions and methods of dispute resolution. Whether or not to use a PLA is a city’s choice of a particular mode of contracting.

The California Supreme Court has recognized that “[w]hatever the subject matter of a municipal contract, it is manifest that the mode in which a city chooses to contract is a municipal affair...” *Associated Builders and Contractors, Inc. v. San Francisco Airport Commission* (1999) 21 Cal. 4th 352, 364 (citation and internal quotation marks omitted). The California Supreme Court in *Associated Builders and Contractors* rejected a challenge to the Airport Commission’s adoption of a PLA. If adopting a PLA is a municipal affair, because it is a “mode of contracting,” then refusing to require a PLA, as Proposition A does, is equally a mode of contracting and a municipal affair free from State control.

The California State Legislature, in adopting SB 829, seems to have admitted that the use of PLAs in local contracting is a municipal affair which, in a charter city like San Diego, the State may not directly regulate. The Committee Analysis of SB 829 admits that “because cities’ contracting processes are general considered to be a municipal affair, state law can’t [sic] directly eliminate charter cities’ PLA bans.” Bill Analysis, SB 829, Senate Governance and Finance Committee, 4/18/2, p. 3.

“What the Legislature is prohibited from doing directly, it cannot do indirectly.” *Rainey v. Michel* (1936) 6 Cal. 2d 259, 282-283. Through its funding sanctions, PCC section 2503 attempts to control indirectly the use of PLAs by charter cities, something which the Legislature admitted it cannot do directly.

The California Supreme Court has further held that the Legislature may not use its spending powers to control charter cities’ exercise of their constitutional right to control their municipal affairs. *Sonoma County Org. of Pub. Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 314-318, (since wages paid to a charter county’s own employees are a municipal affair, the legislature could not withhold state funds from a local agency which granted its employees cost-of-living increases greater than those provided to state employees.) “Constitutional power cannot be used by way of condition to attain an unconstitutional result.” *Id.* at 319. (quoting *Western Union Telegraph Co. v. Foster* (1918) 247 U.S. 105).

On the other hand, the State will argue that the use of State funding or financial assistance renders City contracts matters of legitimate State interest. What was said in the *Vista*

decision about the use of local tax dollars, could just as well be said by the State about a City's use of State taxpayer dollars—the State has sufficient interest to demand that the City comply with State law as a pre-condition to receiving State money.

In an early case decided not long after the State's prevailing wage law took effect, a California Court of Appeal ruled that a Caltrans-financed extension of a State highway, even though it was also a City of Los Angeles street, was of sufficient state interest to require compliance with the prevailing wage law. *Southern California Roads Co. v. McGuire* (1934) 2 Cal. 2d 115. The contractor resisting the prevailing wage law argued that it was a city street and its improvement was a municipal affair. The court replied that, among other factors (including that it was a State highway and subject to inspection by the State), the fact that: "the entire cost of said improvement is to be met and defrayed by the state except that furnished by the federal government through the state... indicates beyond any question that the work of improving said street is not merely a local or municipal affair of the city, but that it is an affair in which the state has a direct and vital interest." *Id.* at 121-122. However, the City is unaware of any case which allows the State to override a charter city's home rule powers over municipal affairs merely because State funding is involved.

Thus, we have the State's control of its own funding, and its right to precondition the grant of that funding, juxtaposed with the use of State funding to prevent the City from exercising its home rule power to control its own mode of contracting, a power the Legislature recognized when it adopted SB 829.

This Office believes that the City has the better argument. In any event, the boundary between State and local control in this instance needs to be tested in the courts.

3. Proposition A's exception clause protects the City's access to funding.

SB 829 prohibits the State from awarding State funds to a charter city for a construction project if the charter city's law "constrains in any way the governing board's authority or discretion to adopt, require, or utilize a project labor agreement ... for some or all of the construction projects to be awarded by the city . . . ." Cal. Sen. Bill 829 (2011-2012 Reg. Sess.) The operative provision of Proposition A prohibits the City from requiring a contractor to enter into a PLA as a condition of bidding, negotiating or being awarded a City construction contract. Absent more, SB 829 would, therefore, bar the City from receiving any state construction funds, because Proposition A "constrains" the City Council's authority and discretion to adopt, require or use PLAs for City construction projects.

However, Proposition A contains an "exception clause" which precedes its operative provision, and is in italics below. San Diego Municipal Code section 22.4402 states in full:

*Except as required by state or federal law as a contracting or procurement obligation, or as a condition of the receipt of state or federal funds, the City shall not require a Contractor on a Construction Project to execute or otherwise become a party to a Project Labor Agreement as a condition of bidding, negotiating, awarding or the performing of a contract. Id. (italics added).*

The first step in interpreting this clause is to look at the plain meaning of this statute. *People v. Birkett*, (1999) 21 Cal. 4th 226, 233

Early opponents to Proposition A construed the exception clause narrowly to mean that “where a PLA is required by the state . . . as a contracting or procurement obligation, or as a condition of the receipt of state . . . funds,” the City may ignore the operative provision of Proposition A and require a PLA.

a. A narrow interpretation would render the exception clause meaningless.

Portions of statutes should be construed in the context of the entire statute, and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuit of the legislative purpose. *See, City of Long Beach v. California Citizens for Neighborhood Empowerment*, (2003) 111 Cal. App. 4th 302, 305. The exception clause must be read to have some meaning within the purpose and intent of Proposition A.

The problem with a narrow interpretation of the exception clause is that it would never apply. The State will never require the City to utilize a PLA, because the State cannot legally do so. Utilization of a PLA is a “mode of contracting,” and “it is manifest that the mode in which a city chooses to contract is a municipal affair.” *See Associated Builders and Contractors*, 21 Cal. 4<sup>th</sup> at 364, discussed above. Thus, as a charter city, the City of San Diego may choose its own mode of contracting free from regulation by State law.

As discussed above, the Legislature in adopting SB 829 admitted that “because cities’ contracting processes are generally considered to be a municipal affair, state law can’t [sic] directly eliminate charter cities’ PLA bans.” Bill Analysis, SB 829, Senate Governance and Finance Committee, 4/18/2, p. 3.

A narrow reading of the exception clause renders it meaningless, because the event which triggers the exception in this narrow reading can never legally occur.

b. A narrow interpretation of the exception clause would be inconsistent with the voters’ intent.

What is more, the voters clearly intended that the exception clause protect the City from funding losses. A broader interpretation of the exception clause is required to further that intent.

In the case of citizen initiatives, the goal is ascertain voters’ intent and purpose. *See People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294 (1996); *Noroian v. Department of Administration Public Employees’ Retirement System*, (1970) 11 Cal. App. 3d 651 ; *California Institute of Technology v. Johnson*, 55 Cal. App. 2d 856 (1942). The courts will ascertain the voters’ intent by, among other things, reading the Official Ballot Arguments both in favor and in opposition to the Proposition. *People v. Briceno*, (2004) 34 Cal. 4th 451.

The purpose and intent of the exception clause can be found in Proposition A’s Official Ballot Argument in support, which states: “Proposition A was written to protect the City’s access to state construction funds.” The exception clause is the only provision in Proposition A that can

accomplish that protection. That supports a broader interpretation of the exception clause, so it will fulfill the intent of Proposition A to protect the City's access to State funding.

Maintaining authority and discretion to adopt, require or utilize PLAs in City construction projects is, in the words of Proposition A's exception clause, a requirement of the state as a condition of the receipt of state funding.

Thus, under a broader interpretation of the exception clause, the City may meet this condition of the receipt of state funding, imposed by SB 829, by maintaining its discretion to adopt, require or utilize PLAs in City construction contracts, notwithstanding the operative language of Proposition A, which prohibits the City from requiring contractors to enter into PLAs.

This broad interpretation is consistent with the stated purpose of Proposition A to prohibit mandatory PLAs only where there is no resulting loss of State or federal funds.

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By */s/ Donald R. Worley* \_\_\_\_\_

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