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MEMORANDUM OF LAW

DATE: July 16, 2014

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Validity of Legislation Enacted Subsequent to a Post-Referendum Council Repeal or Voter Rejection

INTRODUCTION

The City Council of the City of San Diego (Council) recently took a series of actions related to amending the San Diego Municipal Code (Municipal Code or SDMC) regarding the housing impact fee program. The San Diego Housing Commission (Housing Commission) may soon ask the Council to consider alternative amendments. This Memorandum provides a summary of the history of the fee, a description of recent amendments and their associated referendum, the legal standard that the Council should apply as it considers potential new amendments related to the fee, and an explanation as to how that standard applies to particular facts.

QUESTIONS PRESENTED

1. What legal standard applies to the adoption of new amendments related to the housing impact fee program in light of the fact that previous amendments on that subject were recently repealed following a successful referendum effort?
2. Specifically, would the Council's adoption of new amendments to the Municipal Code as described by the Housing Commission in Report No. SGLU14-02 (July 2, 2014) (Report) satisfy the rules that apply to post-referendum legislative acts?
3. Do the rules that apply to post-referendum legislative acts impact the ability of the Council or a Council Committee to hold a preliminary meeting to discuss the housing impact fee program and related issues?

SHORT ANSWERS

1. The Council should follow the general rule that, although a legislative body is subject to a “stay” that imposes restrictions within the first year after a referendum effort results in the repeal of legislation or the voters’ rejection of legislation, a legislative body may nevertheless adopt new legislation on the same subject matter within that year, provided that (1) the subsequent legislation is essentially different from the initial legislation and avoids, perhaps, the issues that gave rise to popular objection, as may be ascertainable from the record, and (2) the subsequent legislation is not enacted in bad faith and with the intent of evading the effect of the referendum.

2. At this time, the ordinance that may be ultimately proposed for Council action is not sufficiently detailed to analyze whether a court might consider it a valid post-referendum act. This Memorandum provides an analysis of certain provisions outlined in the Report and identifies several issues that the Council may want to consider or refer to staff for analysis. There are also several legal issues that the Council should consider prior to adoption of such an ordinance.

3. The action proposed for consideration at a preliminary hearing or hearings is to accept a report from the Housing Commission and to direct staff to provide information and analysis. As such, is not likely to constitute a legislative action subject to successful challenge under the stay provision. This Memorandum provides some guidance to the Council as to precautions it should take as part of any preliminary hearings on the subject to avoid the appearance of committing to a particular course of action and minimizing the risk of challenge under the stay provision.

BACKGROUND

History of the City’s Housing Impact Fee

The housing impact fee program (alternatively referred to as the linkage fee or workforce housing offset fee program) was initially established in 1990. It levied a fee on developers of certain nonresidential projects for the purpose of providing affordable housing, on the theory that such development creates a need for affordable housing. The fee was based on the type and square footage of such nonresidential development. In adopting the original fee, the Council relied on a nexus study prepared in 1989. The 1990 fee was set at a level that amounted to approximately 1.5% of then-current construction costs.

In 1996, the Council adopted an ordinance that reduced the rates by 50%, and those reduced rates became effective on or about July 1, 1996.¹ Since that time, the fee has been discussed by various Councilmembers, Council Committees, the City Auditor, and stakeholders, but there have been no changes to the fee structure.

¹ The ordinance that reduced the fees was adopted on July 8, 1996 and by its terms went into effect thirty days after its passage, but the ordinance states that the reduced fees were applicable as of July 1, 1996. *See* San Diego Ordinance O-18320 (July 8, 1996).

Council's 2013 Legislation Regarding the City's Housing Impact Fee

A new nexus study was prepared in August 2013 and updated in October 2013. On December 10, 2013, the Council adopted San Diego Ordinance O-20333 (Dec. 24, 2013) (2013 Ordinance) and San Diego Resolution R-308648 (Dec. 24, 2013) (together, the 2013 Legislation) that increased the fees and included numerous other Municipal Code amendments. Specifically, the 2013 Ordinance proposed to:

1. Increase the fees in a phased manner. The first increase was set to take effect on July 1, 2014 and would have returned the fees to the level at which they existed on June 30, 1996 (prior to July 1996's 50% reduction). Second and third increases were set to take effect the following two years. Full implementation of the increase would have occurred on July 1, 2016, at which time the rate would equal approximately 1.5% of 2013 construction costs. The fees would apply to the same five categories as in the 1990 ordinance: office, hotel, retail, research and development, manufacturing, and warehouses;
2. Make changes regarding the existing obligation for the rates to be revised annually in accordance with a construction cost index; specifically, to require that the party responsible for those revisions was the Chief Executive Officer of the Housing Commission, who would be able to revise the rates without Council action, and update the name of the index to be used;
3. Establish that the fee applicable to a project would be set at the time the developer's application for a building permit was deemed complete, unless otherwise required by law;
4. Postpone the due date for payment of the fees such that they would not be due until the date of final inspection or issuance of a certificate of occupancy;
5. Amend a definition to ensure that the fee could be used to benefit households that qualify as "extremely low income" households;
6. Improve the description of how the fees are calculated and who is responsible for certain interpretations that may be required in performing that calculation;
7. Make an amendment to acknowledge the California State Legislature's recent actions related to the abolishment of enterprise zones;
8. Clarify that a developer can seek waivers, adjustments, and reductions to the fee in addition to variances. Amend the procedure for obtaining relief from the fee to make the Commission's decision appealable to Council, specify the information that an applicant could supply to assist the decision-makers in determining whether to grant relief, state the finding that must be made to grant a complete waiver, and otherwise clarify issues related to procedure for variances, waivers, or adjustments of the fee; and
9. Correct internal references to ensure consistency and make other edits for clarification.

The Council adopted the 2013 Legislation. The 2013 Legislation's date of final passage was December 24, 2013 and it subsequently became the subject of a referendum petition signature drive organized by the San Diego Regional Chamber of Commerce. On January 22, 2014, the City Clerk accepted the referendary petition, which, pursuant to Municipal Code

section 27.1130, suspended the 2013 Legislation. A signature verification was conducted and the City Clerk certified the petition as sufficient. Upon reconsidering the act as required by law, the Council voted to grant the petition, repeal the 2013 Ordinance, and rescind the resolution. *See* San Diego Ordinance O-20359 (Apr. 3, 2014) (whose date of final passage was April 3, 2014, but which was not effective until May 3, 2014). As part of the repeal and rescission action, the Council directed the Housing Commission to continue dialogue and negotiations with an entity called the “Jobs Coalition” that had opposed the 2013 Legislation and to report to the Smart Growth and Land Use Committee within three months with a compromise proposal that could be considered the following year.² (*See* Minutes for Regular Council Meeting of Tuesday, March 4, 2014, Item S500.)

The Housing Commission reports that such negotiations occurred and that it intends to submit for the Council’s consideration a document that memorializes the terms agreed to by the parties. In anticipation of that item, this Office provides this Memorandum in order to highlight several legal issues the Council should consider when making future decisions regarding the housing impact fee. The central purpose is to define the legal parameters that govern the Council’s ability to enact legislation dealing with a subject that has been recently invalidated by a referendum process.

ANALYSIS

I. THE EFFECT OF THE CALIFORNIA CONSTITUTION AND THE CALIFORNIA ELECTIONS CODE ON A LEGISLATURE’S ABILITY TO ENACT POST-REFERENDUM LEGISLATIVE ACTS AND APPLICATION OF THOSE RULES TO THE HOUSING IMPACT FEE

A. Validity of Post-Referendum Legislative Acts, Generally

As described in the analysis that follows, there is a general rule that, although a legislative body is subject to a “stay” that imposes restrictions within the first year after a referendum effort results in the repeal of legislation or the voters’ rejection of legislation, a legislative body may nevertheless adopt new legislation on the same subject matter within that year, provided that (1) the subsequent legislation is essentially different from the initial legislation and avoids, perhaps, the issues that gave rise to popular objection, as may be ascertainable from the record, and (2) the subsequent legislation is not taken in bad faith and with the intent of evading the effect of the referendum.

How this rule evolved and the particular circumstances of the cases in which it is discussed by the courts illustrate how a court might view the validity of the enactment of new legislation regarding housing impact fees. This Memorandum provides a description of the genesis of the rule and how it has been applied.

² This Office understands that the Jobs Coalition is an informal citizens’ organization that may have been formed for the purpose of responding to the City’s initial housing impact fee proposal and is affiliated with the San Diego Regional Chamber of Commerce.

The California Constitution was amended in 1911 to provide for the power of initiative and referendum. “California courts have long protected the right of the citizenry under the California Constitution to directly initiate change through initiative, referendum and recall.” *MHC Fin. Ltd. P’ship Two v. City of Santee*, 125 Cal. App. 4th 1372, 1381 (2005). The California Supreme Court described the Constitutional amendment as:

. . . one of the outstanding achievements of the progressive movement of the early 1900’s. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it “the duty of the courts to jealously guard the right of the people” . . . the courts have described the initiative and referendum as articulating “one of the most precious rights of our democratic process”. . . .“(I)t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.”

Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591 (1976) (citations and footnotes omitted).

A California Court of Appeal established the rule regarding post-referendum limitations in 1920 in *In the Matter of the Application of George U. Stratham for a Writ of Habeas Corpus*, 45 Cal. App. 436 (1920).³ A council had initially adopted an ordinance that prohibited some passenger solicitation by taxicab drivers in certain areas of the city. Following a referendum, the council repealed that ordinance. *Id.* at 438. Two months later, the council adopted another ordinance. It expanded the geographic area in which the prohibition would apply, removed some exemptions, and added new restrictions. *See Rubalcava v. Martinez*, 158 Cal. App. 4th 563, 575 (2007).⁴ The *Stratham* court set forth the rule that:

[O]rdinarily, when an ordinance which has been suspended by referendum has been repealed by the council, the council cannot enact another ordinance in all essential features like the repealed ordinance. . . . The council may, however, deal further with the subject matter of the suspended ordinance, by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. If this be done, not in bad faith, and not with intent to

³ Other courts’ references to this case are inconsistent; some citations use “Ex Parte” or “In Re” and some use “Statham” instead of “Stratham.” But all such references appear to be to the case cited, which is hereinafter referred to as *Stratham*.

⁴ *Rubalcava* took judicial notice of and described the ordinances in question in the *Stratham* case, even though those ordinances were not detailed in that case itself.

evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause.

Stratham, 45 Cal. App. at 439-40.

The *Stratham* court compared the two ordinances and determined that they “differ from each other, not merely in phraseology, but in substance relating to items of importance,” and concluded that the evidence in the record did not support the petitioner’s assertion that the ordinances were in all essential features and provisions similar, nor that the subsequent ordinance had been enacted in bad faith. *Id.* at 440.

Other courts followed the *Stratham* rule. In one example, the council had adopted an ordinance related to business licensing, which became the subject of a referendum petition and was defeated by voters. *Gilbert v. Ashley*, 93 Cal. App. 2d 414, 414-15 (1949). Eight months later, the council enacted a subsequent ordinance. Its recitals provided that the subsequent ordinance would take effect immediately but the provisions related to the tax levy contained therein would not take effect until a date that was approximately thirteen months in the future. *Id.* The court found that the ordinances were similar in that they both sought to raise municipal general fund revenue by imposing and collecting fees or taxes related to business licensing. *Id.* The subsequent ordinance, however, provided that the revenue would be used for the usual and ordinary expenses of the city (and thus, unlike the initial ordinance, the subsequent ordinance met an exception to the Constitutional right of referendum). *Id.* Also, the tax rates were different, they dealt with different tax years, and there were different exemption and enforcement provisions, among other “numerous other particulars” that demonstrated a difference between the ordinances. *Id.* On that basis, the court found that they were not similar in all essential features and provisions. *Id.*

The court also analyzed whether the subsequent ordinance amounted to bad faith on the part of the council and found none. *Id.* at 416. The court stated that it could only look to the terms of the ordinance to determine whether there was bad faith, not to the motives of the council’s members. *Id.* The court found nothing in the language of the ordinance indicating bad faith and found that every presumption was in favor of its validity. *Id.*

Very shortly thereafter, the State Legislature enacted a more specific rule regarding the ability to take legislative action subsequent to a referendum. It placed a provision in the California Elections Code (Elections Code) stating that “[i]f the legislative body repeals the ordinance . . . the ordinance 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. . . .” Cal. Elec. Code § 9241 (emphasis added).⁵

The judiciary addressed the issue again a decade later. A council had initially adopted two resolutions in April and May of 1959 that were related to a lease of certain land for commercial purposes. *Martin v. Smith*, 176 Cal. App. 2d 115, 116 (1959). The acts provided for

⁵ The State Legislature enacted this rule in 1949 as former Elections Code section 1772. Subsequently, that section was repealed and reenacted as former Elections Code section 4052. Each was a predecessor to current Elections Code section 9241.

lease of the land until 2007. *Id.* at 117. A referendum petition was presented to the council regarding these resolutions and the council failed to act on the petition. *Id.* In July, as a writ proceeding was underway regarding whether the council was required to act on the petition, the council adopted a subsequent resolution on the same subject. *Id.* The court applied the *Stratham* rule and the Elections Code. *Id.* at 118-19. The court identified several ways in which the subsequent legislation differed from the initial legislation, namely that it provided that the lease would expire in 2002 and that it included an additional parcel in the deal. *Id.* at 120. The court found that those differences were not sufficient, however, determining that the additional features could not prevent the acts from being essentially the same for the purposes of the analysis of the validity of a post-referendum act. *Id.* The court opined that “[n]o one will contend that the voters signing the referendum petition were doing so because of the extra five-year period” and that “[u]ndoubtedly the voters were concerned with the fundamental principle, namely, the leasing of city property for . . . commercial purposes.” *Id.* It found that, because the principle was identical in both resolutions, it was essentially the same. The court noted that, otherwise, councils could merely amend legislation in a minor way and deprive the voters of the right to have the act repealed or voted upon by the people; no referendum could ever be brought to a conclusion. *Id.*

The First District Court of Appeal also examined this issue in 1962. In that case, the council had adopted two resolutions in July that stated that a policy of the city was to protect its scenic beauty and approved a contract for the purchase of certain waterfront properties called Shelter Cove. *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618, 622 (1962). Referendum petitions were submitted, but the city took the position that those resolutions were not subject to referendum and the opponents filed for a writ of mandate. *Id.* In September and October, the council adopted two resolutions that authorized the acquisition of property adjacent to Shelter Cove, approved retention of an appraiser for that deal, and stated that the action was in accordance with the city’s policy of acquiring waterfront property, referring specifically to Shelter Cove. *Id.* In December, the council repealed the July resolutions, purportedly for a reason unrelated to the referendum. *Id.* It also adopted a resolution that “re-affirm[ed]...the policy...of [the] City...to acquire” Shelter Cove. *Id.* at 621.

When that resolution was also referended, the city took the position that the act was not subject to referendum because it was not a legislative act, but rather an administrative declaration of previous policy. The city also argued that the December resolution was not subject to referendum because it was void on the basis that it was adopted within one year of the July resolutions. The court determined that the policy statement in the December resolution constituted a legislative act. *Id.* at 624. It also compared the terms and concluded that the December resolution was substantially dissimilar from the July resolutions. *Id.* at 630. This meant that the December resolution was not void and was, in fact, itself subject to referendum. Despite the facts of the case, the court reiterated the *Gilbert* rule that the existence of bad faith could only be determined from the language of the legislative act, and found no existence of bad faith. *Reagan*, 210 Cal. App. 2d at 631.

More recently, the First District Court of Appeal adjudicated a case in which the city’s initial act had been to award a franchise agreement to a particular entity, Marin Sanitary Service, for a period of five years. *Lindelli v. Town of San Anselmo*, 111 Cal. App. 4th 1099, 1111 (2003).

The service had previously been conducted by another entity for approximately eight years. *Id.* at 1103. A referendary petition was certified to challenge the new franchise agreement. *Id.* At the same meeting that the council set the date for the vote on the referended act, it awarded a one-year “interim” contract to the same entity, Marin Sanitary Service, on otherwise the same terms. *Id.* at 1103 and 1111. The court determined that the subsequent legislation was essentially the same as the initial legislation and was therefore void under Elections Code section 9241’s one-year stay provision. *Id.* at 1111. The court stated that “[t]he record demonstrates that it is the change in provider, and not the length of the franchise grant, that inspired the referendum[,]” although the court does not specify what evidence in the record it relied upon. *Id.* It rejected the notion that the city could authorize a contract that would cover the period until the vote took place, noting that such an interpretation would nullify the Elections Code’s stay provision. *Id.*

In *Rubalcava*, the court addressed related questions. In that case, the council had adopted an ordinance related to the minimum wage as applicable to hotel workers near Los Angeles International Airport, but that ordinance was the subject of a referendary petition and the council repealed it. *Rubalcava*, 158 Cal. App. 4th at 567-68. A month later, the council enacted a “hospitality enhancement zone” ordinance, which set identical minimum wage requirements for hotel workers as the initial ordinance, but phased the implementation and delayed full implementation until a future date, allowed for exemptions, and committed not to impose wage requirements on other businesses without additional study. *Id.* at 568.

Although the appellants had contended that the *Stratham* and the Elections Code’s one-year rule applied only to general law cities, the court determined that the California Constitution requires that the *Stratham* rule does apply to charter cities. *Rubalcava*, 158 Cal. App. 4th at 570.⁶ It also clarified that, in order to perform the *Stratham* analysis, the courts may consult the record as a whole to identify what the issues at controversy are. *Rubalcava*, 158 Cal. App. 4th at 575.

Although the referendum petition did not contain specific objections, the court determined from the record that the initial legislation was challenged for two reasons: that the wage requirement would create an economic burden on certain businesses and that similar increases would be imposed outside of the airport area. The court found that features of the subsequent legislation, such as the phased implementation and commitment to performing a study, were “substantive provisions” that addressed those issues in “tangible, concrete and significant ways” such that the legislation was “essentially different.” *Id.* at 577-78. It stated that the inquiry need not extend to whether the subsequent legislation “wholly alleviates the concerns of those who opposed” the initial legislation, but that it need only address them. *Id.* at 578.

⁶ Although the court did not explicitly find that the California Elections Code’s one-year rule applies to charter cities, and California Elections Code section 9247 indicates it may not, *Rubalcava* provides a reasonable basis for that conclusion. Further, due to the fact that the San Diego Charter and Municipal Code are silent as to what restrictions apply to post-referendum acts, it is appropriate to look to state law for guidance on this issue. Doing so supports the conclusion that the one-year rule applies. That interpretation is consistent with advice previously given by this Office. See 1997 City Att’y MOL 168 (97-8; Mar. 5, 1997); 2005 City Att’y Report 374 (2005-10; May 13, 2005); and 2011 City Att’y MOL 161A (2011-9; July 21, 2011). Also, note that although *Rubalcava* contains references to California Elections Code 9421, not 9241, its analysis appears to refer to the one-year rule in 9241 and not the unrelated provision in 9421.

In light of the courts' historical analyses of the validity of post-referendum acts, the Council should assume that the *Stratham* rule applies and that the Elections Code one-year rule may also apply.⁷

B. Nature of the Objections to the Initial Housing Impact Fee Amendments

Applying the rule established by *Stratham* and its successors to the facts of a particular case requires two steps. The first step requires determining what issues gave rise to popular objection. For this inquiry, a court would look to the record. A court might be persuaded that letters submitted to the Council in support of or in opposition to the 2013 Legislation might be relevant, as might public testimony provided at the hearings where the Council deliberated the proposal. Most likely, however, a court would afford great weight to the Statement of Reasons that accompanied the referendary petition, on the basis that the individuals that signed the petition presumably read and agreed with its reasoning.⁸

In this case, the Statement of Reasons contained a declaration, prepared by the San Diego Regional Chamber of Commerce, that characterized the 2013 Legislation as a "major tax increase" and "massive tax hike" of "377 to 744 percent" on businesses expanding or opening new locations that would "increase automatically every year without a vote," have a "harmful effect on jobs" by discouraging job creation, hurting the economy, and "negatively impacting employers" including "small business owners who cannot afford to absorb a tax increase," and would "make us less competitive with other cities" in part because "San Diego is the only city in the county that has this tax." See Statement of Reasons, attached as Exhibit A. The Statement of Reasons' objections to the 2013 Legislation were limited to the increased fee and its automatic increase provision.⁹ The Statement of Reasons did not specifically take issue with any other aspect of the ordinance or resolution, such as the payment deadline, relief provisions, date for use in making the fee calculations, or the edits that corrected errors and inconsistencies.

Although there is an argument that the objection was to *any* increase, a court might be persuaded that it was the *degree* of increase that inspired protest. The Statement of Reasons is not clear as to whether a smaller increase would have been more palatable, but the use of the words "major" and "massive" and inclusion of the percentages would support this interpretation. If the City were to use this interpretation and were challenged, it might attempt to introduce information from the record (such as public testimony and letters) that supports that conclusion.¹⁰

⁷ The ordinance that repealed and rescinded the initial housing impact fee program-related acts was effective as of May 3, 2014 and, thus, the one-year stay period will be terminated as of May 3, 2015.

⁸ Even a rudimentary analysis cannot occur without making some assumption about what a court would consider the controversial issues to have been. This Office's analysis is based on an assumption that a court would use the Statement of Reasons as the sole or at least primary means to make that determination; if, upon challenge, a court were to consider other evidence in the record, the analysis might produce a different result.

⁹ Arguably, the Statement of Reasons also takes issue with the charge being a "tax." But it is reasonable to assume that, for the purposes of this analysis, it is the increase itself that led to the objection. Our Office previously provided analysis regarding the characterization of the increase. See City Att'y MS 2013-13 (Oct. 25, 2013).

¹⁰ Also, it is reasonable to assume that a lesser increase may not have raised objections due to the fact that the drafter of the Statement of Reasons and primary circulator of the referendary petition appears poised to consider a lesser increase now.

For those reasons, it is reasonable to conclude that a court might consider the “issues that gave rise to popular objection” to be the “377 to 744 percent” fee increase and the required annual update provision. Under this interpretation, the City could legislate freely on any of the other issues covered by the 2013 Legislation; even, perhaps, adopting those provisions again verbatim.

The second step requires determining how the proposed subsequent legislation affects those elements objected to by the voters and, then, whether it differs from the 2013 Legislation with respect to those elements. The City must have the legislation, or an outline of its substantive terms, in order to perform this comparison. In this case, there is insufficient information to perform a conclusive legal analysis, but the sections that follow examine several key provisions that may ultimately be included in future legislation in order to illustrate how the Council might apply the legal standard in making its decision.

The City must also be prepared to defend itself from any challenge that the subsequent legislation was enacted in bad faith and with the intent to evade the effect of the referendum. The Council’s decision would be less vulnerable to defeat if the record contained evidence of a bona fide attempt to address the opponents’ objections to the 2013 Legislation.

II. APPLICATION OF THE LEGAL STANDARD TO PROPOSALS RELATED TO THE HOUSING IMPACT FEE

A. Specific Potential Subsequent Legislation Not Fully Formed

There is insufficient information available at this time to allow for definitive *Stratham* and Elections Code analysis. A Report to the City Council (Report) prepared by the Housing Commission contains some detail as to what a future proposal might include. In addition, certain terms have been negotiated by the San Diego Housing Commission, which is a public agency authorized under state law, and the Jobs Coalition, which is a citizens’ group. The document reflecting these parties’ agreement is entitled “PROPOSED - Memorandum of Understanding on Workforce Housing,” dated July 2, 2014 (Commission-Coalition Agreement).

The Report indicates that near-term action could include the consideration of an ordinance that would amend the Municipal Code to (1) make Facilities Benefit Assessment (FBA) Fees payable at the time of final building inspection; (2) effective January 15, 2014, temporarily return housing impact fees to the level that existed on June 30, 1996, which represents a 100% increase from current rates; (3) eliminate that increase after three years, resulting in a decrease to the July 1, 1996 50% reduced levels, unless certain milestones are met; and (4) “create and clarify a variety of mechanisms to reduce the burden for developments that pay” the fee, as detailed in the Commission-Coalition Agreement.

The agreement, in turn, lists a variety of items that could be considered “mechanisms that reduce the burden” for such developments, so it is unclear which may form part of a future

legislative proposal. It also includes a list of “immediate municipal code changes.” In a few minor respects, the terms contained in the agreement differ from those described in the Report.¹¹

Perhaps more important, however, the agreement also includes additional proposed amendments not referenced specifically in the Report, by which the Council would:

1. Make the fee payable at the time of final building inspection or receipt of certificates of occupancy;
2. Expand the number of projects that would be eligible to take advantage of lower fees, by establishing that the fee applicable to a project would be set at the time the application for ministerial or discretionary permits is deemed complete;
3. Take certain actions related to exemptions:
 - a. Exempting two of the six categories from paying the fee (manufacturing and warehouses);
 - b. Exempting non-profit hospitals from paying the fee;
 - c. Not raising the fees for the research and development category
[Note: Although the agreement is not clear how the actions to “exempt” are different from the action to “not raise the fee,” the basis for (a)-(c) is stated as being tied to economic development.];
 - d. Strengthening the exemption process for high-wage employers;
4. Direct the Housing Commission not to provide any additional recommendations to the Council regarding the fee until 2018, including specific direction that would prohibit the Housing Commission from making a recommendation to remove the sunset provision before that time;
5. Agree to consider proposals to reduce the fee if affordable housing revenue is generated through some of the efforts described in the milestones related to the sunset provision;
6. Amend waiver, reduction, and variance provisions [Note: Although the Commission-Coalition Agreement references all three, the current code only contains language that pertains to variances.];
7. Prohibit using any more than 20% of the fee proceeds on transitional housing; and
8. Eliminate the requirement for the Commission to prepare an annual recommendation to the Council regarding the duty to revise the fee in proportion to the construction cost index.

¹¹ For example, the section that discusses deferral of FBA fees includes detail not identified in the Report’s proposed actions. Sections in the agreement regarding the date to use in calculating the fee differ from one another. Also, it is unclear from the Report and the Commission-Coalition Agreement how the sunset provision might operate. (The former indicates that the increase would be temporary (three years) unless milestones are met. This could be construed to mean that the increase would automatically remain in effect if they are met and the reduction would automatically occur if they are not met. The agreement appears to state something slightly different. It implies that the reduction would be automatic in either case and that Council would be *prohibited* from considering whether to remove the sunset provision and allowing the increase to remain in effect unless the milestones are met.) Should the Council decide to pursue future amendments to the Municipal Code, these are examples of issues that could likely be clarified and resolved as part of this Office’s ordinance drafting process, which would be accomplished in coordination with staff.

By the terms of the Commission-Coalition Agreement itself and according to Housing Commission staff, not all provisions of the agreement are proposed to be implemented right away, nor do all of the provisions appear to require a legislative act. That is another reason it is not entirely clear what portions of the agreement may eventually form part of an ordinance and which of those might be addressed within the one-year period.

Similarly, due to the fact it is not clear whether the subsequent legislation will in fact include certain “mechanisms” or the provisions mentioned in the “immediate municipal code changes” section of the Commission-Coalition Agreement, the substantive terms of a future ordinance are too speculative to provide the information necessary to draw a conclusion about whether its enactment would satisfy the *Stratham* test.

Also, whether subsequent legislation, including legislation that incorporates the terms of the Commission-Coalition Agreement, would raise legal issues other than those related to enactment during the one-year stay is a topic not discussed in this analysis. For example, a legislature cannot generally restrict the power of subsequent legislatures, such as by enacting irrevocable legislation or prohibiting subsequent legislatures from repealing legislation. *See* San Diego Charter § 11.1 (regarding nondelegable legislative power) and City Attorney Opinion 1987 Op. City Att’y 47 (87-6; Dec. 30, 1987) (citing *In re Collie*, 38 Cal. 2d 396 (1952) and *United Milk Producers of Cal. v. Cecil*, 47 Cal. App. 2d 758 (1941)). Inclusion of a provision that would restrict the ability of future legislative bodies to make decisions on the fee would require further analysis.¹²

When this Office receives a sufficiently concrete proposal regarding what a new ordinance might include, we will review that proposal, identify potential legal issues, if any, and provide advice as necessary. Our Office is prepared to work with staff to that end.

B. Potential Subsequent Legislation Described in the Housing Commission’s Report to Council

Other legal issues notwithstanding and assuming that a subsequent ordinance were proposed that incorporated just the terms explicitly referenced in the Report (meaning, that it included the FBA deferral, a 100% increase in fees, and elimination of that increase after three years), but that did not incorporate additional terms that appear in the Commission-Coalition Agreement, the following analysis applies.

¹² Several other issues identified by this Office that may require analysis include: whether there are legal issues related to permanent deferral of FBA fees, including whether such a deferral would affect fiscal assumptions in the current calculations; whether that deferral is meant to apply to all projects or only certain projects; how to address similar questions related to the permanent deferral of the housing impact fee; whether the legal authority exists to enact rules that apply differently to different types of projects as described; who will have the authority to determine whether the milestones have been met related to the sunset provision, pursuant to what metrics; how to implement the sunset provision; whether the law allows a sunset provision that hinges upon a future decision as to whether certain criteria have been met; whether those criteria are sufficiently specific or feasible; authority of this legislative body to restrict the activity of this and future Housing Commissions with respect to making recommendations to Council; and whether a subsequent act that contained certain terms from the Commission-Coalition agreement would be consistent with existing City ordinances, policies, and the General Plan.

The City would need to examine both legislative acts to determine how they differ on the issue of the rate of fee increase and automatic increase provisions. First, the 2013 Legislation would have raised the fees to a rate aligned with 2013 construction costs by July 1, 2016, and would have called for automatic annual adjustments to reflect any increases in construction costs. The Report's proposed subsequent legislation would raise fees to a maximum of the rate that existed on June 30, 1996, and would terminate that increase after a period of three years. Assuming that the City were successful in convincing a court that the objection was to the degree of the fee increase, the City would have a strong basis to argue that this increase is substantially less burdensome and is designed to address the objections to the increase resulting from the initial legislation.

The second objection identified in the Statement of Reasons is the automatic adjustment provision. The existing code states that the fees "shall be revised . . . each year" in accordance with a particular index and that the Housing Commission, in consultation with the Mayor, shall prepare the recommendations for such annual revisions. SDMC § 98.0619.¹³ The 2013 Legislation would have required the Housing Commission to make those annual increases based on a construction index (renamed to reflect the current publisher of the index), without a Council action. The Report does not specifically state that any changes would be made to the existing code's annual increase provision, indicating that the Report's proposed subsequent legislation would not change the existing code. The fact that the Report's proposed subsequent legislation would leave the existing code intact seems to address the petition signatories' concerns regarding the automatic annual adjustments and the City would have a strong basis to argue that the legislation is sufficiently different in this respect.

The 2013 Legislation did not affect the deadlines for the payment of FBA fees and therefore that issue was not at controversy during the referendum process. Thus, this is likely that court would find that neither the *Stratham* rule nor the Elections Code would bar the Council from adopting such a provision.

These differences alone may be sufficient to survive legal challenge. The Commission-Coalition Agreement, however, contains additional features, as described previously in this Memorandum. Including such additional differences may not be necessary to satisfy the *Stratham* rule, but the Council could consider whether there are independent policy reasons to support their inclusion.

It is for the Council to determine what terms to include in such subsequent legislation. It may include one or more of the terms contained in the Commission-Coalition Agreement or the Council may exercise its legislative discretion to include different terms. If the Council adopts subsequent legislation, it should describe reasons for doing so: this will provide a basis in the

¹³ The current ordinance, therefore, is internally inconsistent in that it imposes a mandatory duty to revise the rates based on an objective standard but allows the Housing Commission and the Mayor some discretion as to what increase to recommend and leaves the ultimate decision subject to a Council action. The Housing Commission's and City's failure to bring forward such annual recommendations to the Council was highlighted in a City Auditor's Performance Audit dated July 29, 2009, wherein the City Auditor recommended that the recalculations occur or the Municipal Code be changed. The edits proposed by the initial ordinance were designed to address this issue. Regardless of the Council's policy decision on the revision issue, there will likely be a means to correct the inconsistency without violating the stay provision.

record for an argument that the subsequent legislation is being undertaken for the purpose of resolving a difference of opinion between stakeholders interested in this issue and that it is being done to address the concerns of those who supported the referendary petition.

Depending on what detail is ultimately included in any subsequent legislation, the Council will be able to consider whether it meets the legal standard set forth in this Memorandum, and our Office is available to assist with that interpretation.

III. ACTIONS PROPOSED FOR PRELIMINARY COUNCIL CONSIDERATION ARE NOT LIKELY VULNERABLE TO SUCCESSFUL CHALLENGE

The Housing Commission is scheduled to present the Commission-Coalition Agreement to the Council at a preliminary meeting or meetings, including a Special Smart Growth & Land Use Committee meeting on July 17, 2014. This Office understands that a purpose of such a meeting is to inform the Council of the status of the negotiations with the Jobs Coalition, consistent with the Council's direction from March 4, 2014. Further, the purpose is to solicit input from the Council as to the terms contained in the Commission-Coalition Agreement and to give the Council the opportunity to request information from staff that may lead to subsequent legislation on the housing impact fee or actions on related matters. These actions are reflected in a draft resolution that will be presented for the Council's consideration.

The item proposed for preliminary discussion allows the Council to provide general input to City and Housing Commission staff regarding what type of features it may want to consider enacting in future legislation. For example, the Council might request analysis and preparation of new legislation that includes the terms of the 2013 Legislation that were not subject to objection and provide direction or request analysis as to how to address the objectionable provisions.

It appears that any legislative act resulting from the preliminary meeting or meetings may be limited to reporting and information-gathering. The 2013 Legislation enacted specific amendments to the Municipal Code. Comparing the two acts to determine how each handles the issues that gave rise to popular objection, it is reasonable to conclude that the acts are essentially, if not wholly, different. Passage of the draft resolution by the Council or a Council Committee is not likely to result in enactment of a legislative act that would render the City subject to successful challenge under the California Constitution or the Elections Code. If it were challenged, a court might be persuaded that the Council's actions constitute a good faith attempt to resolve the issues at issue in the referendum.

The Council should take precautions not to commit to specific legislative provisions, however. Refraining from such specific action at this time may protect the City from challenges based on premature commitment to projects under the California Environmental Quality Act or other statutes. Further, the Council should not commit to a particular course of action or bind itself to the terms of the third party agreement until there is sufficient information to perform a legal analysis, as well as perhaps fiscal and practical analyses designed to provide useful information relevant to the Council's decision.

CONCLUSION

Although the Council is subject to a “stay” that imposes restrictions on the Council’s ability to enact legislation related to the housing impact fee until May 3, 2015, the Council may nevertheless adopt new legislation on that subject matter before that time, provided that (1) the subsequent legislation is essentially different from the initial legislation and avoids, perhaps, the issues that gave rise to popular objection, as may be ascertainable from the record, and (2) the subsequent legislation is not enacted in bad faith and with the intent of evading the effect of the referendum.

With respect to the housing impact fee, subsequent legislation that is “essentially different” from the 2013 Legislation’s rate of fee increases and eliminates or substantially modifies the cost index revision requirement would likely be sufficiently dissimilar such that its enactment during the one-year stay period would not render the act invalid, provided that it is not enacted in bad faith and to evade the referendum effort. Should the Council enact subsequent legislation related to the housing impact fee, its analysis should include a careful consideration of how the subsequent legislation differs from the 2013 Legislation in these respects.

There are insufficient details regarding what may be included in future legislation. Several terms included in the Report and the Commission-Coalition Agreement raise legal questions as well as fiscal and practical issues; this Office recommends that the Council allow for analysis of such issues prior to making a decision about any future legislation. This Office is prepared to work with City and Housing Commission staff as they develop details of a future legislative proposal, and to perform legal analysis and provide advice as necessary.

The Council may conduct a preliminary meeting or meetings to receive information, provide general input, and request analysis. Avoiding commitment to enactment of specific Municipal Code amendments or related actions would eliminate or mitigate the risk of a successful legal challenge, including one based on the validity of post-referendum legislation.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Keely M. Halsey
Keely M. Halsey
Deputy City Attorney

KMH:als
cc: Andrea Tevlin, Independent Budget Analyst
ML-2014-7
Doc. No. 817900

REFERENDARY PETITION

REFERENDUM AGAINST A LEGISLATIVE ACT ADOPTED BY
THE CITY COUNCIL OF THE CITY OF SAN DIEGO,
TO THE HONORABLE CITY COUNCIL OF THE CITY OF SAN DIEGO:

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 adoption or rejection that legislative act adopted by the City Council, on the 10th day of December, 2013, as Resolution No. R-2014-362 and Ordinance No. O-2014-69, a full and correct copy of which is above.

STATEMENT OF REASONS

Protect Jobs and the Local Economy in San Diego

The San Diego City Council just passed a major tax increase that will have a harmful effect on jobs in our city. The tax increase on commercial and industrial construction, which will be used to pay for subsidized housing, will discourage job creation and hurt our economy. To protect our jobs and the working families who live here, the JOBS Coalition is sponsoring a referendum to overturn the City Council's flawed decision. The JOBS Coalition is a group of San Diego-based employers, both large and small, that provide thousands of middle class jobs and billions of dollars to the economy.

The City Council describes the increase as a "housing impact fee" or "linkage fee," but local businesses refer to it as the "jobs tax." It will increase taxes approximately 377 to 744 percent for businesses expanding or opening new locations in San Diego. Additionally, this tax would increase automatically every year without a vote, further hurting businesses at a time when our economy is struggling. The JOBS Coalition believes this massive tax hike will only delay economic recovery by negatively impacting employers, many of which are small business owners who cannot afford to absorb a tax increase.

Raising taxes on businesses that support local families will not adequately address San Diego's subsidized housing needs, but it will make us less competitive with other cities when it comes to attracting and keeping employers. San Diego is the only city in the county that has this tax. Other cities are already using the City Council's shortsighted decision to their advantage by luring our companies away and seeking to steal our jobs.

San Diego needs more affordable housing, but this jobs killing tax will only hurt working families!

SAN DIEGO REGIONAL CHAMBER OF COMMERCE

By [Signature] Date: 12.24.13
Jerry Sanders, President and CEO
402 W. Broadway Suite 1000 San Diego, CA 92101

By [Signature] Date: 12.24.13
Craig Benedetto, Chairman for Public Policy
402 W. Broadway, Suite 1000, San Diego, CA 92101