Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

236-6220

DATE: August 21, 2003

TO: John Kern, Chief of Staff - Mayor's Office

FROM: Rick Duvernay, Deputy City Attorney

SUBJECT: Analysis of Emergency Services, Roads & Tourism Initiative

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This memorandum has been prepared in response to your request that our Office perform a preliminary legal review of the proposed Emergency Services, Roads & Tourism Initiative. I understand this is an initiative measure for which a Notice of Intention to Circulate Petition has been published. Given the time frame for the preparation of this memo and the complexities of the issues involved, please understand that this is not an exhaustive and complete analysis of all the potential legal issues. The primary focus of this memorandum is to identify and highlight the most significant legal issues.

1. Severability

The proposed initiative repeals the existing severability clause contained in the current transient occupancy tax [TOT] ordinance found at San Diego Municipal Code [SDMC] section 35.0127. A severability clause, particularly in taxing legislation, is highly recommended by our office to ensure the City's ability to collect taxes in the event of a minor legal challenge to a portion of the ordinance.

Most challenges to our TOT ordinance, and to the administration of TOT ordinances elsewhere in the state, arise out of collection disputes. The TOT is a self-reporting tax, meaning that hotels are obligated to remit the tax on a monthly to the City on an honor system basis. The City periodically audits hotels for compliance to ensure that the proper amount of tax has been remitted. It is not uncommon for disputes to arise regarding whether certain hotel revenues qualify as "rent" subject to TOT. There is an administrative process built into the City's TOT ordinance to resolve such disputes, but when administrative remedies are exhausted, hotels are entitled to take the matter to the courts. There are at least half a dozen appellate court decisions in this state arising from such disputes, and it is not uncommon for an aggrieved party to attack one or more aspects of the TOT statute as being unconstitutional or otherwise vague or ambiguous. Without a severability clause, an entire TOT statutory scheme is vulnerable. Thus, it is important to have a severability clause in place to protect the City's ability to maintain its

taxing authority for such circumstances.

The proposed initiative replaces the existing severability clause with a "poison pill" provision. Essentially, it proposes to enact a new section 35.0140 that states that if any provision of the TOT regulations is invalidated by a court "the City shall cease collection of the taxes . . . until such time as the people have approved a new or revised TOT ordinance."

This concept of a "poison pill" creates an unprecedented and totally unacceptable risk for the City. TOT revenue is budgeted and allocated on a fiscal year basis. Contractual commitments are made to third parties who rely upon the funds. If this provision is triggered by a court order, even one that only invalidates an innocuous provision of the TOT ordinance, the City would be precluded from collecting any TOT. Irrespective of the measures the City takes to protect itself in the granting of TOT revenues to third party recipients, there would be significant exposure to litigation from TOT recipients who cannot receive allocations that were expected. In addition, this poison pill, if triggered would create a budget crisis for those City Departments that rely upon the flow of TOT revenues into the General Fund.

2. "Maintenance of Effort" Provisions in the Initiative

The proposed initiative contains two "maintenance of effort" provisions that are wholly unrelated to the collection and allocation of TOT. One provision is contained in the section of the proposal relating to the allocation of TOT for "Emergency Services, Fire and Rescue" and the other provision is contained in the section of the proposal relating to the allocation of TOT for "Emergency Services, Police." These two provisions read essentially the same and provide as follows:

> Said Transient Occupancy Tax revenue shall be in addition to, and not a substitute for the current level of funding by the City of San Diego for fire-rescue service. The provisions of this section require that existing levels for service be maintained and that a maintenance of effort be employed on current spending for fire-rescue services.

These "Maintenance of Effort" provisions purport to permanently bind the City Council in the budget and appropriation process to a commitment for a certain level of funding for police and fire-rescue services outside the scope of TOT allocations. This standard is expressed in a manner that is ripe for legal controversy because it is vague and ambiguous with regard to establishing baselines for the "current level of funding" or "existing levels of service." More importantly, however, we believe this provision squarely conflicts with the City Charter which contains a comprehensive expression of the will of the electorate with respect to how the budgeting and appropriation process must be implemented, and which carefully sets forth the separation of powers with respect to these matters.

Charter section 68 establishes that a "**complete** budget and accounting system of municipal receipts and expenditures is hereby established." (emphasis added). This section would be abrogated by the "maintenance of effort" mandates that the proposal seeks to incorporate into the Municipal Code [SDMC].

Charter section 69 provides that the City Manager has the responsibility to annually provide budget estimates to the City Council for departments under his control. The Manager's discretion would be diluted and abrogated by a "maintenance of effort" mandate incorporated into the SDMC.

Charter section 71 establishes the authority, responsibility, and prerogative of the City Council to make annual appropriations based on the City Manager's budget estimate. This Charter section specifically provides that "the Council may reduce or eliminate any new item, may increase any amount or add any item for personal services, contractual services, materials, supplies, and equipment for any Department." The City Council's discretion would be diluted, and the power and authority to perform this function would be abrogated, by a "maintenance of effort" mandate incorporated into the SDMC.

Because the "maintenance of effort" provisions squarely conflict with the Charter and cannot be reconciled with the language of Charter section 71 above, our Office believes that the initiative contains a legal flaw that could result in forcing a court to confront the conflict and potentially invalidate language in the SDMC.

3. Failure to Recognize the Utilization of Discretionary TOT

The proposed initiative contains a significant legal flaw by failing to address the utilization of 6.25 cents of the 13 cents of TOT collected. The initiative completely repeals all existing SDMC sections relating to the collection and utilization of TOT, and replaces those sections with a new legislative scheme that is represented in the initiative as being a **"comprehensive plan for the imposition of transient occupancy taxes . . . and for the disposition of revenues derived from said taxes.**" See proposed section 35.0140 (emphasis added).

The proposed initiative contains specific details regarding the use of specified allocations of TOT for Fire-Rescue Services, Police Services, Community Infrastructure, and Tourism and Promotion. However, a careful review of the language of the initiative reveals that it is completely silent with regard to the use and disposition of the 6.5 cents of the TOT not allocated for the above-specified purposes. This glaring omission calls into question what the 6.5 cents is intended to be used for and if, in fact, whether the City would have any legal authority to budget, appropriate, or expend these tax proceeds because, as noted above, the initiative repeals all existing SDMC sections relating to utilization of TOT.

If the drafters of the proposed initiative intended for the 6.5 cents to be appropriated by the City

Council for general governmental purposes, the language in the initiative should have clearly identified and codified that intent. Absent such a provision, and because the proposed initiative claims to be a comprehensive plan for the disposition of all revenue derived from TOT, one or more of the groups with specific allocations may claim an entitlement to the 6.5 cents.

4. Locked-In Allocations of the Tourism Promotion Fund

Section 16.0700 of the proposed initiative contains language regarding the use of the Tourism Promotion Fund that may conflict with the intent of the drafters, but which appears to mandate who the recipients are who can qualify to receive TOT from the Tourism Promotion Fund. The language at issue reads as follows:

> **"The Tourism Promotion Fund shall be used to defray expenses of any kind or for any activity or the functional equivalent thereof which received grant funds from the City, other than from the Tourism Marketing Promotion Fund, within the previous thirty six (36) months."**

This language, taken at face value, suggests that the Tourism Promotion Fund may only be used to fund programs and projects to recipients who received grant funds[1] from the City within a 36 month period prior passage of the initiative or to prospective recipients who offer programs and projects which are functionally equivalent to those funded by the City through the award of grants in the 36 month period prior to passage of the initiative. It is not clear whether this is what the drafters intended, but it is, in fact, what the language says and how it would be interpreted. If it is not what was intended, then the initiative contains conflicting provisions (e.g. Section 35.0139(B)) which would need to be reconciled by a court or by the voters at a future election.

5. Incorrect Numbering

Section 4 of the proposed initiative purports to create the Tourism Review Board. In doing so, the initiative's sponsors seek to amend Chapter 2, Article 6 of the SDMC by adding new Division 16, and in that new division add several new sections starting with section 16.0100. This is problematic on several grounds. Most importantly, a Division 16 already exists in Chapter 2, Article 6 of the SDMC and provides for the establishment of the City of San Diego Youth Commission. It does not appear that the drafters of the proposed initiative intended to repeal this commission. Instead, it appears that the drafters probably intended to create a new Division 17. If so, proper numbering of SDMC sections requires that a new Division 17 in Chapter 2, Article 6 start with section 26.1701.

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[1] It is also not clear whether the drafters intended for the term "grant funds" to mean TOT funds. It should be noted that the City annually receives and awards state and federal grant funds to organizations for a wide variety of purposes.

The first number in any SDMC section refers to the chapter of the code, while the second number reflects the article. The drafters apparently failed to understand this structure because numbering the first new section at 16.0100 would place the section in Chapter 1, Article 6, which doesn't yet exist. Some type of amendment or clarification would be required to incorporate these provisions into the correct location in the SDMC.

If you have any follow up questions about issue raised in this memo, do not hesitate to contact me.

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By

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