

OPINION NUMBER 2000-1

DATE: February 15, 2000

SUBJECT: Proposed Initiative and Referendum Regarding Ballpark and
Redevelopment Project

REQUESTED BY: City Clerk

PREPARED BY: City Attorney

INTRODUCTION

On November 2, 1999, Michael Dunkl and Philip Zoebisch published a Notice of Intent to circulate an initiative petition in the City of San Diego [City] related to the proposed ballpark and redevelopment project [Project]. A copy of that Notice and petition as it appears on the proponents' internet site¹ is enclosed as Attachment 1. That initiative purports to call for the electors of the City to determine whether any of the conditions subsequent set forth in the Memorandum of Understanding [MOU] regarding the Project not satisfied as of November 2, 1999, have been satisfied. Questions have arisen about whether the action purported to be initiated is a proper one for the exercise of the initiative power reserved to the electors of the City by the City Charter.

On February 2, 2000, Bruce Henderson announced his intention to circulate a referendum petition to refer to the electors of the City the adoption of Ordinance No. O-18747 [Ordinance] by the City Council on January 31, 2000. That Ordinance authorized the execution of certain documents related to the City's proposed financing of its investment in the Project, including a Site Lease and Facility Lease with the City's Public Facilities Financing Authority [PFFA], and a Bond Indenture. A copy of the referendary petition as it appears on the proponent's internet site² is enclosed as Attachment 2. Questions have arisen about whether the adoption of the Ordinance is also the proper subject of a referendum and whether the referendum petitions are in a proper form.

This Opinion addresses all these questions.

QUESTIONS PRESENTED

1. Is a determination that any of the conditions subsequent in the MOU have been satisfied the proper subject of an initiative measure?

2. Is the adoption by the City Council of an ordinance authorizing certain Project finance related documents the proper subject of a referendum?

3. Are the referendary petitions in proper form where they do not include copies of any of the documents authorized by the Ordinance, or copies of Proposition C and the MOU?

SHORT ANSWERS

1. No. Only legislative acts are the proper subject of the initiative power. The legislative act in this matter was the adoption by the electorate of Ordinance No. O-18613 [Proposition C] which authorized and directed the City Manager to enter into the MOU for the Project. A determination about whether any of the conditions subsequent have been satisfied is administrative, not legislative, because such a decision implements the policy direction of Proposition C and the MOU.

2. No. Similar to initiative measures, only legislative acts may be referred to the electorate. As set forth above, the legislative act in this matter was the adoption by the electorate of Proposition C. The adoption of the Ordinance, which is the subject of the referendum, implements Proposition C and the MOU and thus, pursuant to the plain language of Proposition C and the MOU, was an administrative act which is not a proper subject for the referendum power.

3. No. State and local law provides that referendary petitions include copies of all documents that are the subject of the legislative act sought to be referred. Even if the Ordinance was the proper subject of a referendum, the petitions do not appear to be in proper form as they do not include copies of the relevant documents. Accordingly the petitions should not be accepted by your office pursuant to Municipal Code 27.1119.

FACTS

On November 3, 1998, the electorate of the City adopted Proposition C. Proposition C authorized and directed the City Manager to execute the MOU between the City, Agency, Centre City Development Corporation and San Diego Padres. The MOU, executed prior to the election by the Padres, was subsequently executed by all other parties. A copy of Proposition C and MOU are enclosed as Attachments 3 and 4, respectively.

Proposition C, in a recital, states as follows:

WHEREAS, it is the intent of the People of the City of San Diego [People] that this ordinance and the Memorandum of Understanding it authorizes constitute the legislative acts that establish policy for the City on these matters, and provide the ways and means for the implementation of that policy by such administrative and non-legislative acts as may be necessary and appropriate to carry out the purpose and intent of this ordinance;

....

Section I of the MOU, entitled "Purpose and Intent," provides in relevant part as follows:

It is the intent of the Parties that this MOU and its authorizing ordinance which are being voted on by the electorate constitute the only legislative act necessary to establish policy for the City and the Agency on these matters, and provide the ways and means for the implementation of that policy by such administrative and non- legislative acts as may be necessary and appropriate to carry out the purpose and intent provided for [in the MOU].

The MOU contains numerous provisions calling for action on the part of the parties under certain circumstances, and includes provisions setting forth certain "conditions subsequent" that must be satisfied before further performance by the parties under the MOU will be required. *See* MOU section XXXIII.

On October 26, 1999, the City Council, sitting as the Redevelopment Agency of the City of San Diego, certified the environmental impact report for the Project. At that time, the City Attorney read a statement indicating that the actions undertaken that day were not referable to the electorate. A copy of that statement is enclosed as Attachment 5. Whether or not coincidental, the initiative notice was published the following week.

If the purported subject of the proposed initiative is proper, the proponents have 6 months to gather the required number of signatures (approximately 60,000 valid registered voters of the City of San Diego) to place the matter before the electorate.

The express purpose of the proposed initiative is clearly set forth in Section 2, entitled "PURPOSES OF THIS PROPOSITION:"

(a) This proposition is enacted to declare and determine on behalf of the City that as of November 2, 1999, certain contingencies and conditions subsequent affecting obligations of the City set forth in various provisions of the MOU have failed, are unsatisfied, or are defeated by non-performance.

(b) This proposition is enacted in order to terminate as of November 2, 1999, contingent obligations of the City subject to contingencies and conditions subsequent that this proposition declares and determines have failed, are unsatisfied, or are defeated by non-performance.

In sum, the initiative purports to take from the City Council the determination of whether the conditions subsequent set forth in the MOU have been satisfied, at least insofar as they had not been satisfied by act of the City Council as of November 2, 1999.

On January 31 and February 1, 2000, the City Council undertook a number of other actions regarding the Project, including the adoption of the Ordinance on January 31, 2000. The Ordinance provides for the execution of certain agreements related to the financing of the City's \$225 million investment in the construction of the ballpark. The financing, based upon the issuance by PFFA of lease revenue bonds, is patterned exactly after the financing for the expansion of the Convention Center, a method of financing validated in 1998 by the California Supreme Court in the case *Rider v. City of San Diego*, 18 Cal. 4th 1035 (1998). On February 2, the referendum effort was announced. If the matter is properly referable, the proponent has 30 days from and after the adoption of the Ordinance to gather the required number of signatures (approximately 30,000 valid registered voters of the City of San Diego) to place the matter before the electorate.

The purpose of the proposed referendum, as set forth in the introductory paragraph of the petition, is equally clear; the proponents seek to have the City Council repeal the Ordinance or submit the matter to the electorate of the City.

The proponent of the proposed referendum has established an internet site through which signatures are solicited. We also understand that petitions are circulated through traditional means. We have examined the petition contained on the internet site (enclosed as Attachment 2). It does not contain copies of the documents and agreements the Ordinance authorizes; the Site Lease, Facility Lease, and Indenture. Nor does it contain copies of Proposition C or the MOU.

ANALYSIS

I

THE PROPOSED INITIATIVE MEASURE IS NOT A PROPER ONE FOR THE EXERCISE OF THE INITIATIVE POWER

Following the announcement of the initiative effort, the City Attorney retained two independent law firms to analyze the issue of whether the matter was the proper subject of the initiative power; the Los Angeles office of the firm Sheppard, Mullin, Richter & Hampton,

and the San Diego office of Luce, Forward, Hamilton & Scripps. Both firms have concluded that the subject matter of the purported initiative is not a proper one for the exercise of the initiative power reserved to the electorate by the state constitution and City Charter. Copies of the opinions of those firms are enclosed as Attachments 6 and 7, respectively.

In sum, the opinions conclude that the action sought to be initiated is an administrative act, not a legislative one. Since only legislative acts are the proper subjects of initiatives, the proposed initiative is not valid. *See generally Yost v. Thomas*, 36 Cal. 3d 561, 569-570 (1984), citing *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 516 fn. 6 (1980).

II

THE ADOPTION OF THE ORDINANCE IS NOT A PROPER SUBJECT OF THE REFERENDUM POWER

The referendum power, similar to the initiative power, may be exercised only with regard to legislative acts, not administrative ones. *See generally Yost v. Thomas*, 36 Cal. 3d at 569-570, citing *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d at 516 fn. 6. Here, the act of adopting the Ordinance was in furtherance of Proposition C and the MOU, and implements both of them. No other conclusion is reasonable or logical. For the same reasons, therefore, as set forth in the attached opinions, we conclude that the adoption of the Ordinance was an administrative act, not a legislative one, and it is not a proper subject of the referendum power.

III

THE PROPOSED REFERENDUM PETITION IS DEFECTIVE

Even if the financing ordinance challenged by Mr. Henderson was the proper subject of a referendum, the petition is defective. As set forth above, the referendum petition set forth on the internet site does not contain copies of the documents or agreements the Ordinance authorizes. It also does not contain copies of Proposition C or the MOU.³ This Office has previously analyzed whether such documents must be attached to referendary petitions in the context of a proposed initiative on the expansion of Qualcomm Stadium, and has litigated the issue in the context of a proposed referendum on the expansion of the convention center. In the former instance, this Office concluded that such documents must be attached to petitions. Enclosed as Attachment 8 are copies of the relevant pages of City Attorney Opinion No. 97-1 setting forth our analysis.

In the case of the convention center expansion, the San Diego Superior Court held that referendary petitions must include as attachments all the documents that are the subject of the act sought to be referred, in that case the very same type of documents as here concerning the financing of the project. A copy of the judgement and transcript in that case, setting forth the court's ruling, is enclosed as Attachment 9. Subsequent to these matters, the provisions of the San Diego Municipal Code concerning referenda were amended to clarify that the full text of acts sought to be referred, which includes documents referenced in those acts, be included in petitions. *See* San Diego Municipal Code 27.1106(c)(1) and 27.1107.

For the same reasons as set forth in our previous opinion and in the Superior Court's judgement, and in light of the amendments to the Municipal Code, we conclude that, if the Ordinance is the proper subject of a referendum, any petitions must include copies of the documents that are the subject of the Ordinance. Absent such attachments, the petitions do not comply with state or local law regarding the sufficiency of petitions and should not be accepted by your office pursuant to Municipal Code 27.1119.

CONCLUSION

The electorate of the City clearly set forth its intent that Proposition C and the MOU represent the only legislative acts concerning the Project; all other acts implementing Proposition C and the MOU are administrative. Here, the subject of the proposed initiative, a determination concerning the conditions subsequent, and the subject of the proposed referendum, the adoption of the Ordinance concerning the method of financing the City's investment in the Project, furthers and implements Proposition C and the MOU. They are, therefore, administrative in nature, not legislative. Accordingly such actions are not the proper subject of the initiative or referendum power, respectively. In addition, the purported referendum petitions do not comply with state or local law because they do not include as attachments copies of the documents or

agreements that are the subject of or related to the ordinance sought to be referred. Such petitions are thus defective.

submitted,

Respectfully

/ S /

CASEY GWINN
City Attorney

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Attachments 1-9
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