Case No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

CITY OF SAN DIEGO and CYBELE L. THOMPSON, in her capacity as the Director of the City of San Diego's Real Estate Assets Department,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
Respondent,

ELIZABETH MALAND, in her official capacity s San Diego City Clerk, and MICHAEL VU, in his capacity as San Diego County Registrar of Voters, CATHERINE APRIL BOLING,
Real Parties in Interest,

Writ Regarding Order by the San Diego County Superior Court,
Case No. 37-2018-00023295-CU-WM-CTL, Dept. 72, (619) 450-7072
Hon. Timothy Taylor, Judge

EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR OTHER APPRPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER

ELECTION MATTER; CRITICAL DATE: AUGUST 30, 2018

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ATTORNEYS FOR PETITIONERS
CITY OF SAN DIEGO and CYBELE L. THOMPSON

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208(e)(3))

There are no interested entities or persons to list in this certificate.

Dated: July 30, 2018

MARA W. ELLIOTT,
City Attorney

By: _____
Mara W. Elliott
City Attorney

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Deborah B. Caplan
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INTRODUCTION

The City of San Diego[1] asks the Court for emergency relief to remove the proposed "San Diego River Park and Soccer City Initiative" ("INITIATIVE") from the November 6, 2018 ballot. In the guise of a proposed "ordinance," the INITIATIVE directs the City to negotiate and execute a lease of approximately 250 acres of City-owned real estate to private developers on specific terms.

Need for Immediate Relief

It is well-established that the initiative process can only be used for legislative acts and cannot be used to direct administrative action. ***Directing the City to "negotiate" a contract with a third party with required terms is not enacting a legislative act, and placing the direction to negotiate in an "ordinance" does not make that direction a legislative act.*** There is no public action more quintessentially "administrative" than a public entity's negotiation of a lease or sale of its own property to a private concern. Petitioners have found no instances of an initiative being used to force the sale or lease of public property in this manner. Allowing voters to consider such a precedent-setting measure should not be permitted before the courts have determined its validity.

The trial court deferred a determination of the measure's validity until after the election because it concluded that the City had not made a sufficiently "compelling" showing of invalidity. However, as the California Supreme Court reaffirmed just two weeks ago, it can be appropriate to remove a ballot measure when "***substantial questions***" are raised as to its validity and the potential harms of submitting an invalid measure to voters outweigh any harm in delaying consideration until the

[1] Petitioners are the City of San Diego and the Director of its Real Estate Assets Department.

validity of the measure has been determined. (*Planning and Conservation League v. Padilla,* 2018 Cal.LEXIS 5200) This is such a case.

In its Order, the Supreme Court cited *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697 "*AFL*") and *Howard Jarvis Taxpayers Assn v. Padilla* (2016) 62 Cal.4th 486, 494, 496-497. In *AFL*, the Court made a pre-election determination that the measure was invalid and issued a peremptory writ directing elections officials not to place the matter on the ballot. In the *Howard Jarvis* case (as in the *Planning and Conservation* case itself), the Court issued an immediate order removing the measure from the ballot pending further review; ultimately, the *Howard Jarvis* Court concluded that the measure could be submitted to voters at a subsequent election.

Both options would be appropriate here. While the City believes that a pre-election determination that the INITIATIVE is invalid is supported by the record, it also requests in the alternative that the Court issue an order removing the INITIATIVE from the November 6, 2018 ballot pending further appellate review of the validity of the INITIATIVE. Relief is needed on or before **August 30, 2018**, to prevent the INITIATIVE from being included in the printed ballot materials for the November 6, 2018 election and to prevent interference with the election.

Nature of the Case

While the right to adopt legislation by initiative is an important one under our State Constitution, both the Constitution and long-standing jurisprudence limit initiatives to "legislative acts." The proposed INITIATIVE is one of two competing initiatives that would require the City to lease and/or sell a substantial swath of valuable City-owned property in the area of the former Qualcomm Stadium site – one of the

City's largest remaining developable real estate assets – to a narrowly defined group of private developers.[2] Although both initiatives promise voters a new "free" stadium, they would compel the City to lease or sell both the stadium site and additional land in the surrounding area for lucrative private development. They do so by directing the City to "negotiate" a lease or sales agreement on specific terms that are favorable to the proponents but unfavorable to the City.

The SOCCER CITY INITIATIVE proposes an "ordinance" with approximately 100 terms that affect every aspect of the agreement from the identity of a potential lessee, the way in which rental amount will be determined and the timing of payment (one-time at the commencement of the lease), the lessee's option to purchase and its unlimited right to sublease, restrictions on the City's right to interfere with any sublease or retake possession, and environmental mitigation, the specific process by which the City must consider lease applications and the Mayor's "ministerial" role in determining (within 10 days) whether a proposed lease contains all the requirements set forth in the INITIATIVE. Despite this level of detail about the lease terms, ***the INITIATIVE does not actually require a stadium or river park to be built – two of the features likely to be***

[2] The other initiative is the "SDSU West Campus Research Center, Stadium and River Park Initiative" ("SDSU Initiative"). The trial court deferred a determination on the validity of that measure until after the election for largely the same reasons as the instant case. (*City of San Diego et al. v. Maland et al.*, San Diego Sup. Ct. No. 37-2018-00023290.) Petitioners are separately seeking similar relief from this Court to prohibit the SDSU West Initiative from being presented to voters. The two cases initiated by the City are based on different legal challenges from those presented in *Taylor v. Superior Court*, D074300 (emergency petition denied July 18, 2018).

the most popular with voters. In fact, according to the proponent, it does not require any agreement at all.

The use of an initiative to attempt to compel a public entity to "negotiate" a lease or sale of public property to private interests on specific terms is unprecedented. Indeed, the proponent has offered no example of an initiative ever being used in this manner; the absence of reported cases confirms the extraordinary nature of the proposal.

The City's request for pre-election relief in the trial court focused on the administrative nature of the INITIATIVE. The proponent (and trial court) focused almost exclusively on the purported new "legislative policy" (*i.e.,* build a new stadium) while ignoring the very essence of the INITIATIVE – requiring the City to "negotiate" a lease and sale of public property for private development on specified terms.

As detailed in the attached Memorandum, the courts have refused to allow initiatives to direct administrative action precisely because directing such action would interfere with basic governmental operations. The INITIATIVE illustrates the need for such a rule; it would not only displace the City's administrative discretion to manage City assets in the public interest, it would interfere with the City's fiscal and land use responsibilities. In the case of San Diego, whose Charter commits administrative authority over contracting to the Mayor, the proposed "ordinance" interferes with that authority and violates the Charter.[3]

Finally, the proponent has conceded that the INITIATIVE does ***not actually require or guarantee the a stadium or river park*** to be built, does

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[3] The INITIATIVE also requires a one-time lease payment at the commencement of the lease and precludes taking future development into account. These terms conflict with State law prohibiting leases of public land for more than 55 years unless the lease provides for periodic review and modification to reflect then-current conditions. (Gov. Code, § 37380.)

not preclude the City from negotiating terms ***that conflict with the INITIATIVE,*** and ***does not even require that any agreement*** be reached. Put another way, it does not guarantee what it purports to promise. This admission demonstrates why ***an initiative that attempts to direct a negotiated agreement between a public entity and a third party is inherently problematic*** and ultimately either unenforceable or illusory.

Based on these flaws, the City sought a writ of mandate to be relieved of the duty to put this INITIATIVE on the November 2018 ballot. The trial court denied the writ and postponed a final determination on the validity of the INITIATIVE until after the election. The trial court relied on language in *Save Stanislaus Area Farm Econ. v. Bd. of Supervisors* (*SAFE*) (1993) 13 Cal.App.4th 141, 153 requiring a "compelling showing" of invalidity,[4] but ignored other language in that case that makes it clear that the court has the power to remove a measure from the ballot if it is "convinced" that the measure is "invalid for any reason." (*Id.* at 151.) In fact, this Court has previously held that pre-election review is appropriate "where the validity of the proposal is in serious question" and the issues can be resolved as a matter of law. (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389.)

Petitioners submit that the trial court erroneously read *SAFE* as imposing a virtually unattainable standard for pre-election review. Only two weeks ago, the California Supreme Court removed the "Three Californias" Initiative from the November, 2018 ballot, deferring a ruling on the ultimate validity of the measure. The Court's Order reaffirmed that

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[4] The "significant doubts" that led the trial court in the *SAFE* case to leave the measure on the ballot had to do with questions about mixed appellate precedent. Here, the law and facts are relatively clear – the only issue is the application of the law to the language of the INITIATIVE.

"when a ***substantial question*** has been raised regarding the proposition's validity and the 'hardships from permitting an invalid measure to remain on the ballot' outweigh the harm potentially caused by 'delaying a proposition to a future election,' ***it may be appropriate to review a proposed measure before it is placed on the ballot.***" (*Planning and Conservation League v. Padilla*, 2018 Cal.LEXIS 5200, emphasis added.)

Each of the claims in this case has been the basis of court decisions removing an initiative from the ballot *before* the election because it could not lawfully be submitted to voters. (See App. 151.) As the Supreme Court explained in *AFL v. Eu*, "[i]f it is determined that the electorate does not have the power to adopt the proposal in the first instance...the measure must be excluded from the ballot." (*AFL, supra*, 36 Cal.3d at 695 [pre-election relief important to protect the integrity of the electoral process].) "That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money and creation of emotional community divisions concerning a measure which is for any reason legally invalid." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1022-1024 [relief should be available even if the question is "difficult" or "close" because of harms to the community].)

The claims raised in this case go directly to the legal limits on the use of initiatives. There is no question that the purpose of this INITIATIVE is to force the City to negotiate a lease of approximately 250 acres of the City's most valuable real estate to a private party on terms favorable to the INITIATIVE's financial supporters and disadvantageous to the City. It attempts to control contract negotiations between the City and an unnamed third party. As a matter of law and common sense, this is an inappropriate use of the initiative process. The absence of a clear case

prohibiting this speaks more to the fact that no one has ever tried it than to the closeness of the legal question. As the *SAFE* court stated, if the Court is convinced that the INITIATIVE is invalid, it has the power to remove it from the ballot, *i.e.*, it meets the required showing articulated in that opinion. Petitioners submit that such a showing is made in this case.

In the alternative, this case meets the standard articulated by the Supreme Court for *deferral* of the election, *i.e.*, substantial questions have been demonstrated about the validity of the proposed INITIATIVE and the harm of submitting an invalid measure to the voters outweighs the harm of delaying the election.

Harm to City and Voters

Submitting the measure to the voters in November would create all the problems identified by the courts in *AFL v. Eu* and other cases. It will potentially cost at least several hundred thousand dollars (and as much as ***$3.4 million*** if printed in full) to place it on the November 2018 ballot. (App. 496.) Proponents and opponents of the measure will spend millions more in support of their positions, and the competing initiatives involving this PROPERTY are likely to engender significant community divisions.

Equally important, if adopted, the INITIATIVE would direct the City to take certain critical actions ***immediately*** after its adoption. (*See, e.g.*, App. 211 [§61.2804(j), requiring action within 10 days].) If the INITIATIVE passes, it will present immediate and substantial questions about the legal obligations of City officials, thereby creating a high likelihood of costly and disruptive litigation. The City also faces the possibility that both competing measures will pass. The very same legal issues will remain for judicial resolution, but will have to be addressed in the context of competing claims for injunctive relief from differing factions of the community.

A pre-election determination of validity is also necessary to prevent the initiative process from being abused in the manner represented by both this INITIATIVE and the SDSU Initiative. The very presence of these initiatives has prevented the City from taking any action with respect to this property since early 2017. If the initiative process can be used to force the lease or sale of public property – without pre-election review – private developers could simply identify public property and begin circulating an initiative requiring a particular disposition of that property, thereby interfering with the City's ability to take action regarding the property and giving the developer unwarranted leverage to force a lease or sale of the property on more advantageous terms to them but to the detriment of the public entity and citizens as a whole.

In contrast, there would be no harm to the proponent if consideration of this measure were postponed until after the Court resolved its validity. The initiative was initially rushed out early in 2017 after the Chargers gave notice to try to obtain one of two 2017 Major League Soccer expansion teams. San Diego was not awarded a franchise and is not on the short list for 2020; the next franchises will not be available until 2022. (https://en.wikipedia.org/wiki/Expansion_of_Major_League_Soccer#2022_expansion candidates)

As the Supreme Court just reminded, there can be significant harm to the public if an invalid measure is on the ballot. (See *Howard Jarvis*, *supra*, 62 Cal.4th at 496-497 [presence of invalid initiative steals attention, time, and money from other valid measures and allowing voters to act on invalid measure "tends to denigrate the legitimate use of the initiative procedure"].) Even if this Court is not prepared to determine the validity of the INITIATIVE on an expedited basis, the presence of "substantial questions" about this INITIATIVE require that it be removed from the

November 2018 ballot pending further review by the Court. If the Court ultimately determines that it can validly be submitted to voters, it can direct that it be considered at a future election date. (*Id.*)

The trial court virtually invited the City to seek appellate review, and noted that such review would be *de novo*. (App. 1543.) Petitioners ask that this Court accept the invitation in light of the obvious invalidity of the measure and the adverse consequences that would result from allowing the INITIATIVE to be considered.

Critical Deadlines

Printing of the ballot materials for the November election will commence on approximately **August 30, 2018**. In order to prevent interference with the conduct of the election, the City therefore requests a final order from this Court by that date.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

Background

1. Petitioners are the CITY OF SAN DIEGO, a California municipal corporation operating under a city charter, and CYBELE L. THOMPSON, in her official capacity as the City's Director of Real Estate Assets, who is responsible for negotiating land sales and leases on behalf of the Mayor and is a registered voter and taxpayer in the City of San Diego.

2. Respondent is the SUPERIOR COURT of the City of San Diego, Dept. 72 (Hon. Timothy Taylor).

3. Real Party in Interest CATHERINE APRIL BOLING is the proponent of the INITIATIVE ("proponent"). Real Party in Interest SAN

DIEGANS FOR OPEN GOVERNMENT was permitted leave to intervene in opposition to the City's request for pre-election relief.

4. Real Parties in Interest ELIZABETH MALAND and MICHAEL VU are the San Diego City Clerk and San Diego County Registrar of Voters, respectively, and are sued in their official capacity only. MALAND and VU are responsible for the conduct of elections within the City of San Diego and will be responsible for taking the actions necessary to place the INITIATIVE on the November 2018 general election ballot unless directed to do otherwise by this Court.

Jurisdiction and Basis for Relief

5. The Court has original jurisdiction over this matter pursuant to article VI, section 10 of the State Constitution, California Code of Civil Procedure sections 1085 and 1086, and Rule 8.486 *et seq.* of the California Rules of Court.

6. This case presents a case of great importance to the City of San Diego and its citizens – as well as other municipalities – because it involves the legal validity of an initiative that would direct the lease and sale of public property to private interests. Without action by this Court, voters may be asked to support, contribute to, and vote for a measure in the November 2018 election that cannot lawfully be enacted. In addition, the City itself is harmed by delay in resolution of the matter as the pendency of the measure interferes with the City's ability to take action with respect to its own property.

7. Petitioners are beneficially interested in the issuance of immediate relief directing City officials to exclude the INITIATIVE from the November 6, 2018 ballot and have no other adequate remedy at law as an appeal will not prevent the INITIATIVE from being submitted to voters

in November 2018 and will not prevent the injury that arises from the absence of pre-election relief.

8. The INITIATIVE focuses on the development of approximately 233 acres of City-owned real property surrounding the former Qualcomm Stadium and current San Diego County Credit Union Stadium (formerly Qualcomm Stadium) as well as 20 acres of City-owned real property and improvements on Murphy Canyon Road (collectively, the "PROPERTY"). The Stadium was formerly the home stadium of the San Diego Chargers; the Murphy Canyon Road land was previously their practice facility.

9. In January 2017, the Chargers announced that they were leaving the San Diego area.

10. On March 2, 2017, real party BOLING submitted a notice of intent to circulate petitions in support of a proposed initiative titled "San Diego River Park and Soccer City Initiative" ("SOCCER CITY" or "INITIATIVE").

11. The INITIATIVE would require the Mayor to execute a 99-year lease for the PROPERTY to a "Qualified Lessee" if a lease is presented containing certain elements set forth in the INITIATIVE. (App. 195.)

12. A "Qualified Lessee" is limited to an entity that has been awarded a professional soccer franchise for the San Diego market, is under active consideration to be awarded a franchise, or owns or controls an entity meeting these requirements. (App. 194.) The only entity that currently meets that definition is Major League Soccer San Diego Pursuit LLC ("SD PURSUIT"), whose partners are the major financial backers of the INITIATIVE. (App. 933, 942-943.)

13. If a "Qualified Lessee" does not submit a proposed lease meeting the requirements of the INITIATIVE after a year, the Mayor may offer the lease to an entity with a collegiate football program or other professional sports franchise. (App. 210.)

14. The INITIATIVE would place approximately 100 provisions into the San Diego Municipal Code that would govern both the terms of the lease and the process by which the City considered any proposed lease. (App. 191-212.)

15. The INITIATIVE would require the value of the lease to be determined as of March 2017, regardless of when the lease is executed and without consideration of any of the land use changes caused by the INITIATIVE. (App. 203-204.) It provides several negative factors to be considered in determining the value of the leasehold interest; if the value is negative, the rent shall be $10,000. (*Id.*) The INITIATIVE provides for payment in full in a lump-sum payment due 30 days after the lease is executed. (App. 204.)

16. The INITIATIVE contemplates, ***but does not specifically require,*** development of a joint use stadium; a 34-acre River Park; neighborhood parks and athletic fields; office and retail space; multi-family residential units; and hotel space. (App. 195-200.)

17. The INITIATIVE provides the lessee with an option to purchase up to 79.9 acres on the Stadium site and an unlimited right to sublease. (App. 204-207.)

18. The INITIATIVE provides that if a stadium is not built within 7 years, the City may terminate the lease, but that period is tolled by various events, including litigation and unforeseen conditions, and the City's rights to re-take possession would be subject to the rights of any subleases in effect. (App. 206.)

19. The INITIATIVE requires the Mayor to consider any applications for a lease submitted within 7 days of the INITIATIVE'S effective date "***without waiting for other applications***" and to determine whether the application meets the terms of the INITIATIVE within 10 days. (App. 211, emphasis added.) If so, "the Mayor ***shall*** request that the City Attorney prepare a final Lease...with such modifications that the Mayor deems necessary and that ***do not alter or vary the standards of [the ordinance proposed in the INITIATIVE] and the Specific Plan.***" (App. 212, emphasis added.) The Mayor's approval is termed "ministerial." (*Id.*)

20. The INITIATIVE also defines as ministerial all future approvals by the Mayor and City staff, including development approvals, and it includes a Development Agreement which provides that the City shall not require the developer to obtain any further discretionary approvals or permits beyond those contemplated in that Agreement.

21. City officials consider the PROPERTY one of the City's primary real estate assets, representing one of the last opportunities for large-scale development in the City. A lease and sale of the PROPERTY as contemplated by the INITIATIVE includes numerous terms that are disadvantageous to the City, could potentially cause the City to lose substantial lease revenue, and would require the sale of approximately one-quarter of the PROPERTY at below-market value. (App. 501-508.)

22. Water supply is a critical issue in the City. The PROPERTY is partially located over the San Diego River aquifer and is the subject of two long-term City water plans. First, area within the PROPERTY has been identified as the location for future groundwater storage and an injection/extraction facility to increase groundwater supply to meet municipal water needs. Second, the area has been identified by the City's Public Utilities Department as the site for a future wastewater re-cycling

facility that will create a new water supply source for City residents. (App. 466-470; 483-486.)

23. The terms of the INITIATIVE cannot be amended until 2033 without further voter approval, even if the contemplated project fails to materialize. (App. 215.) As a practical matter, this will substantially interfere with the City's ability to use the PROPERTY productively or otherwise dispose of it for the foreseeable future. In the absence of a lease, the inability to amend the INITIATIVE and the lack of clarity about the City's rights would almost certainly lead to unproductive use of the PROPERTY and a significant financial loss.

24. In May 2017, after the INITIATIVE petition had received sufficient signatures, its financial supporters entered into discussions with city representatives about possible additional commitments. In these discussions, INITIATIVE supporters agreed to some terms that varied from the INITIATIVE but refused to negotiate over others. (App. 1451-1453.)

25. On June 19, 2017, real party MALAND certified to the San Diego City Council ("Council") that the INITIATIVE had obtained sufficient signatures to be submitted to voters pursuant to San Diego Municipal Code sections 27.1034 and 27.1035 [upon certification, Council shall either adopt the INITIATIVE or submit it to City voters].) The Council declined to adopt the measure and voted to submit the proposed INITIATIVE to the voters on a future ballot. (App. 1148-1152.)

26. In October 2017, another group of citizens began circulating a competing initiative, the so-called "SDSU West Initiative," which would require the City to sell much of the same PROPERTY to SDSU and/or private concerns in order to provide for a range of University and non-University development. The SDSU West Initiative was certified to the Council on March 12, 2018.

27. On April 24, 2018, faced with competing initiatives concerning this PROPERTY and the potential for additional similar measures in the future, the Council voted to seek a judicial determination that neither measure proposed action that was lawful for an initiative and that the City should be relieved of its obligation to put either on the ballot.

Trial Court Proceedings

28. Pursuant to the City Council's direction, the City initiated two actions in the Superior Court on May 11, 2018: *City of San Diego v. Maland*, San Diego Sup. Ct. No. 37-2018-00023290 (SDSU West); *City of San Diego v. Maland*, San Diego Sup. Ct. No. 37-2018-00023295 (Soccer City).) With respect to the Soccer City INITIATIVE (App. 32-74), Petitioners alleged

- The INITIATIVE is not legislative in nature as it directs the City to enter into a lease and sale of City-owned property and the negotiation and execution of contracts is administrative in nature;

- The INITIATIVE impermissibly interferes with City control and management of its assets in the public interest and long-term water plans;

- The INITIATIVE violates the San Diego City Charter by usurping the administrative authority over contracting delegated to the Mayor in the Charter;

- The INITIATIVE violates State law (briefing focused on Government Code section 37380, which prohibits leases of public property of more than 55 years without provisions for periodic review that reflects current market conditions);

- The INITIATIVE fails to guarantee the development it proposes and contains language that appears to unilaterally allow the City to disregard the terms of the INITIATIVE. Taken as a whole, the INITIATIVE's terms are so vague or internally contradictory as to be unenforceable and invalid.

29. Shortly before the City filed its actions, a third case was filed which challenged the SDSU West Initiative on other grounds. (*Taylor v. Maland*, Sup. Ct. No. 37-2018-19172.) Petitioners requested that the three cases be deemed "related" and assigned to a single judge. These requests were denied and the cases proceeded before three different judges on different schedules. (App. 71-73; 100.)

30. The case involving the SOCCER CITY INITIATIVE was assigned to the Hon. Timothy Taylor (Dept. 72). Real party San Diegans for Open Government was given leave to intervene in opposition to the City's petition. (App. 128.)

31. A hearing on the City's request for a writ of mandate and proponent's anti-SLAPP motion were scheduled for July 13, 2018. Both were fully briefed and the Court issued a tentative decision on July 11, 2018 denying the requested pre-election writ relief and deferring a final determination of the INITIATIVE's validity and the anti-SLAPP motion until after the election. (App. 153-150.)

32. The parties submitted the matter for decision without oral argument and a final order was issued July 13, 2018. (App. 1541-1551; Caplan Declaration Re: Transcript.) In its order, the trial court found that petitioners had failed to make a "compelling showing" of pre-election invalidity and noted that "the Court of Appeal, of course, will have the final say." (App. 1547, 1543.) The court also noted that "principles of judicial economy" did not support addressing the merits of the INITIATIVE because if it failed to be enacted, review would be unnecessary. (App. 1550.)

33. The trial court erred in the standard it used for pre-election review and the application of law to this INITIATIVE. As demonstrated by the terms of the INITIATIVE and the supporting documents, the

INITIATIVE is legally impermissible for multiple reasons and cannot lawfully be submitted to voters. In the alternative, a substantial question exists and the INITIATIVE should be removed from the November 2018 ballot until a final determination is made as to its validity.

Need for Emergency Relief

34. The City estimates that it will cost several hundred thousand dollars to place the INITIATIVE on the November 2018 ballot if only the first 20 pages of the INITIATIVE are printed (as permitted by the San Diego Elections Code) and approximately ***$3.4 million*** if it is printed in its entirety. (App. 496.)

35. The City is also faced with the possibility that both competing initiatives for this PROPERTY may pass and it will be confronted with competing claims for immediate action required under both initiatives and claims that both initiatives are legally invalid. These competing claims for City action will be mutually exclusive and subject the City to the threat of litigation, including injunctive relief, from multiple parties.

36. The use of initiative in the manner presented by the INITIATIVE is a matter of first impression. In the absence of a judicial determination that the initiative process cannot be used in the manner proposed in the INITIATIVE, the City is likely to be faced with additional initiatives proposing the lease or sale of City-owned property. Without the ability to obtain a pre-election determination that these measures are impermissible, City-owned assets could be tied up for extended periods of time awaiting either elections or post-election litigation.

37. An error or omission is about to occur, within the meaning of Elections Code sections 13314(a), in the printing of the ballot for the November 6, 2018 election in the City of San Diego in that the ballot will

include the INITIATIVE even though it cannot be lawfully adopted by the voters.

38. The printing of materials for the November 6, 2018 will commence on or about ***August 30, 2018***. A determination by this Court on or before that date that the INITIATIVE cannot be submitted to voters will not substantially interfere with the conduct of the election.

Timeliness of Petition

39. The Superior Court's ruling denying pre-election writ relief was entered July 13, 2018. This Petition is therefore timely.

Authenticity of Exhibits

40. All exhibits accompanying this Petition are true copies of original documents on file with respondent court. The exhibits are incorporated herein by reference as though fully set forth in this Petition. The exhibits are paginated consecutively, and pages references herein are to the consecutive pagination. As indicated in the Declaration of Deborah B. Caplan, there is no transcript of oral proceedings because the parties submitted the matter after receipt of the trial court's tentative ruling, and the trial court's order was entered without oral argument.

PRAYER

WHEREFORE, Petitioners pray for relief as follows:

1. Issuance of a peremptory writ of mandate and/or prohibition in the first instance or such other extraordinary relief as is warranted directing respondent court to vacate its order denying pre-election relief with respect to the INITIATIVE and enter a new order granting the requested relief and directing Real Parties in Interest MALAND and VU to

refrain from taking any action to present the INITIATIVE to City voters at the November 6, 2018 general election;

2. Issuance of an alternative writ or an order to show cause why the INITIATIVE should not be declared invalid with an order directing Real Parties in Interest MALAND and VU to refrain from taking any action to present the INITIATIVE to City voters at the November 6, 2018 election pending further consideration by this Court;

3. For such other and further relief as may be just and proper.

Dated: July 30, 2018

MARA W. ELLIOTT,
City Attorney

By: _____
Mara W. Elliott
City Attorney

Attorneys for Petitioners

OLSON HAGEL & FISHBURN LLP
Deborah B. Caplan
Lance H. Olson
Richard C. Miadich

By: _____
Deborah B. Caplan

Attorneys for Petitioners

VERIFICATION

I, Mara W. Elliott, declare as follows:

I am an attorney duly admitted to practice law in the State of California and before this Court. I am the City Attorney for the City of San Diego and an attorney for petitioners herein.

I have read the foregoing Emergency Petition for Writ of Mandate and/or Other Appropriate Relief, and know its contents. The facts alleged in the Petition are within my own knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30th day of July, 2018 in San Diego, California.

MARA W. ELLIOTT
SAN DIEGO CITY ATTORNEY

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The SOCCER CITY INITIATIVE, like the competing SDSU West Initiative, would require the City to negotiate and enter into a contractual agreement that would dictate the control and development of City-owned property in the area of the former Qualcomm Stadium. In the case of the SOCCER CITY INITIATIVE, it would require the City to "negotiate" a 99-year lease for approximately 230 acres surrounding the stadium site and 20 acres on Murphy Canyon Road ("PROPERTY") and the sale of 80 acres to a narrowly defined "Qualified Lessee" – essentially, Major League Soccer San Diego Pursuit LLC, the entity supporting the INITIATIVE. Approximately 100 requirements for the lease would be dictated by a new "ordinance." Although a new stadium and river park are the selling point, neither is guaranteed; the only thing guaranteed is that this valuable land would be tied up for years, as the INITIATIVE cannot be amended without voter approval until 2033.

To the City's knowledge, the forced lease of publicly-owned property through a privately financed initiative has never been done, nor should it be allowed. Although the INITIATIVE is invalid for a number of reasons, the fundamental problem is that it displaces the City's administrative authority and control over its own administrative processes and interferes with core municipal functions. Allowing such an initiative to be considered by voters represents an unprecedented – and impermissible– use of initiative and would open the door to misuse of the process by private concerns. In addition, the terms of the lease – 99 years with a one-time payment up front – violate state law prohibiting a lease of that length without the ability to periodically review and revise it to reflect the market.

The proponent's[5] response to these arguments is that ultimately the Mayor is not bound by the INITIATIVE's terms and the City can simply negotiate alternative terms or reject a lease altogether. (App. 547-549; 1086-1087.) If true, the INITIATIVE is essentially illusory and unenforceable. The proponent cannot have it both ways: either the INITIATIVE displaces the City's administrative authority and forces a lease of public property on disadvantageous (and illegal) terms or it simply presents a "proposal" to be considered. An initiative cannot legally do either.

The INITIATIVE has been funded largely by the partners of SD PURSUIT, private developers who stand to benefit from its adoption. (App. 933, 942-943.) The 250 acres targeted by the INITIATIVE significantly exceeds the land necessary for a stadium. The PROPERTY is one of the City's prime real estate assets and represents one of the last opportunities for large-scale development in the City. (App. 502 [¶ 5].) It would be expected to generate approximately 20% of the City's lease revenues. (App. 503-505.) It is also a planned location for future groundwater storage, an injection/extraction facility, and future wastewater recycling facility – all important elements of the City's long-range water plans. (App. 4676-470; 483-486.)

In 2015, the Mayor formed a Citizens' Stadium Advisory Group to study options for this site and, in 2016, Measure D was defeated, which would have affected this site. (App. 1260-1261.) The Chargers announced their departure in *January, 2017*. Less than two months later, in early *March 2017*, before a Request for Proposal could be issued by the City

[5] Petitioners refer to the proponent for clarity because real parties include the intervenor and elections officials.

(which could not be done before the Chargers gave notice, see App. 503, 1453), SD PURSUIT began circulating the INITIATIVE and spent more than a million dollars to qualify it – money largely supplied by SD PURSUIT's officers and the private interests who would benefit. (App. 933-957; 1430-1440.) [6]

The INITIATIVE includes a Specific Plan, Development Agreement, and several relatively minor zoning and community plan amendments, but the heart of the INITIATIVE is a proposed addition to the San Diego Municipal Code that would govern the elements of the lease and the procedures for "negotiating" and executing it (New Division 28). (App. 191-212.) If a proposed lease is presented within ***7 days*** of the measure's effective date, the Mayor is given ***10 days*** to respond, but only on the issue of whether the lease meets the requirements of the INITIATIVE. (App. 211 [§61.2803].)

The INITIATIVE was certified as having sufficient signatures on June 19, 2017. In October, 2017, another group of developers began circulating the "SDSU West Initiative." That measure was certified to the City Council on March 12, 2018. Faced with these competing measures and the possibility of even further efforts to dispose of City-owned property by initiative, the City Council voted to seek a determination that neither measure could properly be submitted to voters.[7]

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[6] The haste appears to have been related to trying to secure approval of an expansion team from Major League Soccer (MLS). MLS subsequently announced that two other cities would be awarded these franchises.

[7] The trial court suggested that the City failed to adequately explain the delay (App. 1550), although the court identified no legal obligation that would require the disclosure of the Council's confidential deliberations on this matter, nor did the court identify any deadline that was violated or any legal impediment to the City proceeding as it did. The City explained its

The proponent has attempted to distract from the legal issues by claiming that the City changed its position on the INITIATIVE between June 2017 and April 2018. This claim is unfounded. First, the proponent has characterized summaries of the INITIATIVE's provisions in a 2017 City Attorney Report as legal opinions concerning those provisions; the Report was simply summarizing the features of the measure and was not intended to provide a legal analysis or conclusion about its provisions. (App. 1446-1448.) Second, the proponent has suggested the City Attorney "approved" the legality of submitting the measure to voters because she advised the Council that their options were to enact the measure or submit it to voters, and they chose the latter. But the courts have long advised that the preferable course in these circumstances is to place the measure on the ballot and seek affirmative relief from the court to be relieved of the obligation to put the matter on the ballot. That is exactly what the City did.

Finally, the proponent claims that the City engaged in discussions with the INITIATIVE's financial supporters about possible implementation and indicated no concerns about the INITIATIVE. This is highly misleading. These discussions took place only *after* proponents had collected sufficient signatures to qualify the measure. The City engaged in these discussions out of an abundance of caution and *did* raise multiple concerns about the INITIATIVE. (App. 1450-1453.) At the end of the day, whatever discussions took place cannot change the terms of the INITIATIVE or the legal infirmities that led the City Council to vote to initiate this action.

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reasoning (App. 1054), and the fact that a second initiative was filed concerning the PROPERTY is a matter of public record. The declaration that was submitted by petitioners was rejected by the trial court. (App. 1446-48; 1543.)

The trial court concluded that petitioners had "not surmounted the extremely high bar required to remove the 'Soccer City' Initiative from the ballot." (App. 1548.) As the Supreme Court explained in *AFL v. Eu*, "[i]f it is determined that the electorate does not have the power to adopt the proposal in the first instance...***the measure must be excluded from the ballot.***" (*AFL, supra*, 36 Cal.3d at 695 [pre-election relief important to protect the integrity of the electoral process].) In this case, the City submits that the invalidity is apparent from the text of the INITIATIVE. In the alternative, an election on the INITIATIVE should be deferred until its validity has been determined. As the Supreme Court reaffirmed two weeks ago in removing a statewide ballot initiative from the November, 2018 ballot, "when a ***substantial question*** has been raised regarding the proposition's validity and the 'hardships from permitting an invalid measure to remain on the ballot' outweigh the harm potentially caused by 'delaying a proposition to a future election,' ***it may be appropriate to review a proposed measure before it is placed on the ballot.***" (*Planning and Conservation League. v. Padilla*, 2018 Cal.LEXIS 5200, emphasis added.) The City requests such relief here.

ARGUMENT

I. THE INITIATIVE CANNOT LAWFULLY BE SUBMITTED TO VOTERS BECAUSE IT DIRECTS ACTION THAT IS FUNDAMENTALLY ADMINISTRATIVE: THE NEGOTIATION AND EXECUTION OF CONTRACTUAL AGREEMENTS

The INITIATIVE would force the City to lease and sell public property for a private development on terms dictated by private concerns. This is beyond the power to act by initiative, impermissibly interferes with the City's ability to manage its own affairs, and violates the Charter.

A. The INITIATIVE Impermissibly Directs the Negotiation and Execution of a Contractual Agreement – an Administrative Act Outside the Scope of Initiative

The initiative power extends only to legislative acts and not to administrative or executive acts. (Cal. Const., art. II, §§ 8, 11; *Citizens for Jobs & the Econ. v. County of Orange* (2002) 94 Cal.App.4th 1311, 1332; *Dunkl*, *supra*, 86 Cal.App.4th at 399.) "Legislative acts generally are those which declare a ***public purpose*** and make provision for the ways and means of its accomplishment. Administrative acts, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body." (*Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509, emphasis added.)

While the proponent may couch the proposed development as a boon to the City and therefore serving a "public purpose," the INITIATIVE unquestionably proposes ***a development designed to serve private interests rather than a public purpose***. All aspects of the development will be privately owned and controlled; the City's only role will be to collect the artificially low rent provided by the INITIATIVE. The INITIATIVE even attempts to limit the City's regulatory oversight over the project.

In the only reported case involving a sale of public property to a private party, the Court contrasted cases involving the *public acquisition of property for a public purpose* (deemed legislative) with the *sale* of City-owned property for a private development, which the Court termed administrative. (*San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530.) Although that case involved a referendum on a City-negotiated and Council-approved sale, the determination that the lease or sale of public property to a private developer is administrative applies even more forcefully to an initiative ***proposed by***

the private entity who stands to benefit. It simply cannot be said to be for a public purpose.

The trial court suggested an initiative can direct administrative action so long as it "prescribes a new policy or plan," *i.e.*, an initiative that does both is permissible. Petitioners believe this misreads the law. The courts have termed it "beyond dispute" that initiative or referendum "may be invoked ***only*** with respect to matters that are ***strictly*** legislative in character...to allow [them] to be invoked to annul or delay the exercise of executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." (*Dunkl*, *supra*, 86 Cal.App.4th at 399, emphasis added; *San Bruno*, *supra*, 15 Cal.App.5th at 530; *see also Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1090 [absence of administrative matters in initiative "not only proper, but also legally imperative"].) If the purpose of the rule is to prevent interference with basic governmental operations, the rule would be obliterated if an initiative could direct administrative action – and directly interfere with the business affairs of a city – simply by combining it with a "new legislative policy." (*See Newsom v. Bd. of Supervisors* (1928) 205 Cal. 262 [initiative could not be used to compel county to award bridge franchise because decision involved both legislative and administrative functions].)

The trial court concluded that the INITIATIVE articulated a "new policy" and that, even if the terms of the proposed "ordinance" and development agreement were administrative, that was insufficiently "compelling" to overcome the legislative "thrust" of the INITIATIVE. (App. 1549.) Virtually all initiatives could be said to articulate a new policy but can nonetheless be impermissibly administrative. In *Dunkl*, an initiative arguably asked voters to make a policy decision about the

appropriate type of financing for a stadium project, but the Court concluded it improperly directed administrative acts. In *Worthington v. City Council of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1142-43, proponents argued that an MOU represented approval or disapproval of Indian gaming within the City, but the Court concluded that the agreement was administrative (noting that an act could embody a policy preference but still not be legislative). In *Citizens for Jobs & the Econ. v. County of Orange, supra*, 94 Cal.App.4th at 1319-1320, the stated legislative purpose was to require public approval for certain land use decisions, but the Court found that it impermissibly directed administrative action.

In addition, the trial court was incorrect in characterizing the "thrust" of the INITIATIVE. The Municipal Code provisions requiring the City to lease and sell this PROPERTY on specific terms to a narrowly defined lessee and to use a specific process are not merely ancillary to the asserted "policy" – they *are* the new policy. They both directly dictate administrative action (the lease of City-owned PROPERTY to a specific lessee) and they dictate the administrative provisions that the City must include in the lease and the procedures by which it must be "negotiated." These provisions are central to the INITIATIVE; without those provisions, the remainder of the INITIATIVE is meaningless.

The proponent has also argued that actions must implement a *prior* legislative plan in order to be administrative and there is no current legislative plan for this property. In fact, a prior legislative policy is ***not*** legally required for an initiative to be found impermissibly administrative. In *The Park at Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, the Court invalidated an initiative that required all projects to have a specific plan approved by voters, finding that it impermissibly withdrew

administrative authority from city officials. No prior legislative act was involved.[8]

Many of the cases focused on prior legislative action involved referenda rather than initiatives and make sense in that context: it is sound public policy to require a new public policy to be challenged when first enacted rather than downstream when the public entity is already in the implementation phase. However, in the initiative context, where ***any*** initiative can claim to reflect a "new policy," the requirement for an existing policy makes less sense and its application is necessarily more limited. The fundamental question in the case of an initiative should be whether it impermissibly intrudes on the administrative functions of the public entity. Here, that test is more than met.

The proponent has repeatedly argued that the INITIATIVE is not administrative because it merely provides a "framework" for the development of the PROPERTY and the Mayor retains "discretion" to negotiate the lease terms and fair market value of the PROPERTY. This description cannot be squared with the text of the INITIATIVE, which places approximately 100 lease terms into the Municipal Code that would *not* be subject to negotiation and gives the Mayor only 10 days to determine

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[8] Even many cases that involve prior legislative acts also provide *additional* reasons for the administrative determination. In *Dunkl*, *supra*, 86 CalApp.4th at 393, the trial court noted that "findings" in the initiative were "such as those that are typically made by a governing entity in an administrative decision" and were impermissible. In *San Bruno*, *supra*, 15 Cal.App.5th 524, 531-532, the Court first concluded that the sale of city-owned land to a private party did not involve a municipal purpose or services to residents *before* going on to analyze the prior legislative action. In *Citizens for Jobs & the Econ.*, *supra*, 94 Cal.App.4th at 1332, the Court found that *specific elements* of the proposed initiative were administrative in nature and impermissible for an initiative.

whether the application is "complete." (App. 211.) If a lease is submitted that is "complete," the Mayor "***shall*** proceed with the process...in Section 61.2805" (*i.e.*, he "shall" request the City Attorney prepare a final lease with any modifications "***that do not alter or vary the standards of [the ordinance proposed in the INITIATIVE] and the Specific Plan.***") (App. 212 (emphasis added).) The Mayor's approval is a "ministerial" determination that the lease "meets all of the objective requirements" of Division 28. (*Id.* [also stating that City officials have no discretionary authority to revise the conditions of development in the Specific Plan].) This is *not* "negotiation" as that term is commonly understood.

The fact that the INITIATIVE directs a lease and sale ***at all*** and includes highly prescriptive requirements constrains the ability of the City – particularly the Mayor – to negotiate the terms of a lease or sale in the best interest of the City. In directing the City to exercise its discretion in a specific way, the INITIATIVE displaces the City's administrative authority and impermissibly directs administrative action.

If the purpose of prohibiting administrative acts in initiatives is to prevent interference with the public entity's business affairs, it is difficult to imagine anything that would interfere with the business affairs of a public entity more directly than requiring it to lease or sell public property on terms that it has not negotiated and which are not necessarily in the public interest. *Negotiation* of contract terms is an administrative act: "When an action requires the consent of the governmental body and another entity, the action is contractual or administrative. The give-and-take involved [in a negotiation] ...is not legislation, but is a process requiring the consent of both contracting parties." (*Worthington, supra*, 130 Cal.App.4th at 1142.) The INITIATIVE impermissibly attempts to direct just such action.

Even if a prior legislative plan were required, the City has at least two existing policies affecting this PROPERTY that would be frustrated by the INITIATIVE.

First, the provisions governing the lease and sale of City-owned real property are located in Chapter 2, Article 2, Division 9 of the Municipal Code (App. 975), as well as Council Policy 700-10. (App. 510-524.) These provisions provide the *process* for land sales and leases to be approved by the Council, but do not dictate specific terms or conditions (consistent with the Mayor's Charter authority over contract negotiation and administrative matters). The INITIATIVE does not amend these general policies and there is no claim that the existing policies could not be used for the proposed development.[9] Instead, the INITIATIVE dictates a host of new administrative requirements and procedures ***applicable to this PROPERTY only***. While the INITIATIVE couches these standards as "legislative provisions...that must be contained in any Lease agreement" (App. 192 [§61.2801(d)]), the specific terms of a contract (ranging from price to indemnification to subleases to the City's right of re-entry) are administrative matters, not legislative.

Second, the City has two long-terms plans to use the aquifer under the PROPERTY for groundwater extraction and storage and for the placement of a water treatment facility. (App. 467-470; 483-486.) The INITIATIVE does not amend these policies, rather, it requires specific administrative actions that simply ignore the existing City policies. By

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[9] The trial court stated that the new terms and procedures are necessary because the PROPERTY is "unique," but it cited only self-serving statements in the INITIATIVE itself. (App. 1549.) No showing was made that the City's normal policies, including Policy 700-10, could not be used. The specific lease terms and procedures in the INITIATIVE appear necessary only to meet the proponent's objectives.

imposing administrative requirements for this PROPERTY that frustrate existing City policies, the INITIATIVE suffers from the same fatal defect as the local initiatives struck down in *Dunkl* and *Citizens for Jobs & the Econ.*

Petitioners have acknowledged the INITIATIVE includes some relatively minor zoning changes to facilitate the INITIATIVE's contemplated development, and zoning changes are generally considered legislative in nature. (*Arnel Dev. Co. v. Costa Mesa* (1980) 28 Cal.3d 511, 516.) However, ***the totality of the INITIATIVE proposes something far different than a simple zoning change.*** It asks voters to take away the administrative power of the Mayor and other City officials to negotiate agreements relating to City-owned land, and accept terms that were crafted, without City input, by the very private parties who are sponsoring the INITIATIVE and who would benefit most from its adoption. It is not regulating land use; it is prescribing the execution and terms of a specific lease and sale of City property. This has never been done by initiative, and no case law suggests that it is permissible. Indeed, the use of initiative in this manner would be precedent-setting.

The required approval of a unilaterally drafted Development Agreement in the INITIATIVE is administrative for similar reasons. A development agreement is an agreement that is negotiated between a landowner and city staff, and then approved by the Council to bind the City. The INITIATIVE directs the City to execute a contract (development agreement) in which all the administrative terms have been crafted in advance by private parties supporting the INITIATIVE, and which the city has no ability to negotiate.[10]

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[10] Nor has the development agreement been negotiated by a person having a legal or equitable interest in real property as that term is used in

The trial court concluded that the INITIATIVE does not direct "administrative" action because the Government Code section defines development agreements as "legislative" and does not articulate a distinction between the approval and negotiation of such an agreement. While that provision may not directly draw such a distinction, it is inherent in the language used. Section 65867.5 states that "[a] development agreement is a legislative act ***that shall be approved by ordinance and is subject to referendum.***" (Emphasis added.) In context, this language can only refer to the ***approval of the final agreement*** as the legislative act. It cannot seriously be asserted that ***negotiations*** of the agreement would be conducted "by ordinance" or that those negotiations would be "subject to referendum." Section 65867.5 must necessarily be limited to the approval of the agreement, and the INITIATIVE's attempt to dictate terms in place of terms that would be negotiated by the City impermissibly directs administrative action.

In sum, the negotiation and execution of contracts is administrative in nature and no case comes close to supporting the use of an initiative to direct a public entity to contract away public property.

B. The INITIATIVE Impermissibly Impairs Essential City Government Functions

As noted above, initiative and referenda may only be used with respect to legislative action because to allow them "to annul or delay the exercise of executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality." (*Dunkl*, *supra*, 86 Cal.App.4th at 399.) An initiative cannot be used where "the

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Government Code section 65865(a), as the proponents of the INITIATIVE have no present interest in the PROPERTY and are not identified in the text of the development agreement. (App. 447.)

inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential." (*Simpson v. Hite* (1950) 36 Cal.2d 125, 134; *Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826.) An enactment that interferes with the City's ability to carry out its day-to-day business or makes it impossible to carry out the public business is not a proper use of the initiative power. (*Lincoln Property Co. No. 41, Inc. v. Law* (1975) 45 Cal.App.3d 230, 233-234; *Housing Authority v. Superior Ct.* (1950) 35 Cal.2d 550, 559.)

1. Management of City Assets in the Public Interest Is An Essential Government Function

Here, the INITIATIVE interferes with one of a public entity's most essential and practical functions, *i.e.*, its responsibilities for managing public assets. It is uncontested that the PROPERTY is one of the City's largest real property assets and that the anticipated annual lease revenues from the PROPERTY would represent approximately one-fifth of the City's total annual real estate rental revenues (more than $1 billion in City revenues over the life of the lease). (App. 500-506.) Revenues generated from leases of City-owned land are a vital component of the City's budget and support bonds used for many critical infrastructure projects. (*Id.* [¶¶ 8, 11-12].)

The INITIATIVE overrides the normal City policies governing real estate and instead requires the City to accept lease and sale terms that benefit private parties. (*Id.* [¶¶ 7-10].) It substitutes a non-competitive process with a specified lessee and specified terms for the City's regular competitive bidding process. (*Id.* [¶ 4].) It includes valuation terms unfavorable to the City and allows the lessee to purchase approximately a quarter of the PROPERTY below market value. (*Id.* [¶¶ 12-17].) The

structure of the lease contrary to fiscal principles that would normally govern the disposition of City property and deprives the City of any increase in value by providing for a one-time payment at the commencement of the lease that is not subject to renegotiation regardless of improvements to the PROPERTY. (*Id.* [¶ 14].) The loss of long-term lease revenue reduces the City's ability to sell lease revenue bonds, which it uses to finance the City's infrastructure needs. (*Id.* [¶ 15].) The INITIATIVE also precludes the City from ending any subleases if it re-takes possession of the PROPERTY, and prohibits the City from shifting existing bond indebtedness to the lessee. (*Id.* [¶¶19-20].)[11]

The City's policy is to "optimize . . . the lease rent" from City-owned property (*Id.* [¶3].) The trial court asserted that this was not itself an essential government function. (App. 1550.) This was not the City's argument. ***The reason to optimize value is to ensure that public assets are used in a way that benefits the public to the extent possible. This is an essential responsibility of local government.*** An initiative that directs the sale or lease of public property on terms that are instead intended primarily to benefit private parties impermissibly interferes with this important government responsibility.

Indeed, the implications of the proponent's argument are profound. Just the *possibility* that the PROPERTY could be subject to the terms of the INITIATIVE has already interfered with the City's ability to take action concerning the PROPERTY. (App. 507 [¶ 21].) If the INITIATIVE were adopted by voters, it could tie up this asset until at least 2033, ***even if the proposed lease agreement and stadium never materializes***. If private developers are permitted to use the initiative process in this manner,

[11] The INITIATIVE also requires a number of adjustments adverse to the City because the lease was not executed before the end of 2017.

virtually any developer could identify public property for potential private development and circulate an initiative petition (or threaten to do so) to leverage a better deal from the City. This kind of "reverse eminent domain" process could ultimately cause the City to lose control over its own property and its ability to make decisions in the best interest of its citizens.

The proponent actually argued that City management of its own property is not an essential government function or, alternatively, that any impairment is "speculative" because the City cannot prove that it would get a better deal on the open market. It is not speculative to observe that the INITIATIVE contains terms that would objectively benefit the lessee and disadvantage the City. But arguing about the substance of the proposal misses the fundamental point: The INITIATIVE directs the City to lease and sell one of its most significant real estate assets on terms proposed by, and favorable to, private concerns. Since lease revenues are a vital component of the City's budget, the use of initiative to force a lease or sale of City-owned property on disadvantageous terms would unreasonably impair the authority of City officials to manage City-owned property and engage in prudent fiscal planning. (*See Citizens for Planning Responsibly v. City of San Luis Obispo* (2009) 176 Cal.App.4th 357, 376 [fiscal matters considered essential government functions]; see also *Totten v. Bd. of Supervisors*, *supra*, 139 Cal.App.4th 826.)

2. The City's Long-Term Water Planning Is An Essential Government Function

The City's ability to go forward with its long-term water plans is also an essential government function that would be "annulled or delayed" by the INITIATIVE. Water supply is a critical issue in the City and water service is required by the City Charter. (Charter, art. V, § 26.1.) Consistent

with state laws that prioritize and encourage the use of groundwater and water conservation (*see, e.g.*, Water Code, § 10720 *et seq.*), the City has developed two different programs related to providing long-term water solutions to the City of San Diego.

The first plan is the City's Mission Valley Groundwater Project ("MVGP"), which envisions capturing, treating and storing surface water in the aquifer through infiltration and/or injection. (App. 466-470.) Water stored in the aquifer could then be pumped through extraction wells to a treatment facility located on the 233-acre site for municipal use. (*Id.*) The INITIATIVE's contemplated development of the PROPERTY would interfere with the City's plan to use the aquifer under the site for groundwater supply and the planned facilities. The aquifer cannot be moved and is located directly under that site. (*Id.* [¶14].) The wells must be located on-site to adequately inject or extract water from the aquifer, infrastructure will need to be constructed there to move the water off the stadium site to the municipal water system. (*Id.* [¶¶13-14].)

Second, the City has developed the multi-phase Pure Water San Diego project, which is designed to eventually provide one third of the City's water using water purification technology. Phase II of this project involves construction and operation of a water purification facility, currently planned to be located on the PROPERTY. (App. 483-486.) In addition, this plan may use the aquifer for future storage of treated recycled water. (*Id.* [¶9].)

Together, these plans are part of the City's long-range water supply plan. Relocating the planned facilities would not only be very difficult because of engineering requirements; it would result in significant loss of time and expense for the City. (App. 469-70; 485-486.) Both plans have

evolved over time and represent substantial City commitments that involve the PROPERTY.

Contrary to the trial court's assertion, the City does not have to show that the City's water supply will be directly impacted, but only that the INITIATIVE unreasonably interferes with this important government function. That burden is met here. Forcing the City to relocate long-planned water recycling and groundwater extraction facilities that are critical to the City's long-term water supply plans or develop alternatives constitutes unreasonable interference.

In *Citizens for Jobs & the Econ.*, the Court invalidated an initiative that interfered with the City's ability to locate airports, jails and landfills because it found that it impermissibly impaired those essential government functions. (*Citizens for Jobs & the Econ., supra*, 94 Cal.App.4th at 1327-28.) The City submits that the matters affected by the INITIATIVE here are at least as important as the responsibilities found to be impaired in that case.

C. The INITIATIVE Conflicts with the San Diego City Charter

San Diego is a charter city. In 2010, a San Diego City Charter ("Charter") amendment made the "strong mayor" form of city government permanent in the City. Article XV, Section 260, provides that the "executive, authority, power and responsibilities conferred upon the City Manager. . . shall be transferred to the Mayor, assumed, and carried out by the Mayor." (App. 970-971.) The Charter also includes the execution of contracts among the Mayor's transferred administrative functions. (App. 968; Charter, art. V, § 28.)

The Charter limits the exercise of power by the City and its officers. (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598.) It

provides the governing rules under which the City must conduct its affairs (Cal. Const., art. XI, § 3.) Just as the State Legislature cannot adopt statutes that are contrary to the State Constitution, local governing bodies cannot enact ordinances that conflict with the charter, and an initiative similarly cannot be used to enact an ordinance that conflicts with the city charter. (*Campen v. Greiner* (1971) 15 Cal.App.3d 836, 842-43 [invalidating local initiative that conflicted with provisions in the city charter]; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775 [local electorate's right of initiative generally coextensive with the legislative power of the governing body]; *Galvin v. Bd. of Supervisors* (1925) 195 Cal. 686, 691 [proposed initiative must be "in the nature of such legislation as the board of supervisors has power to enact"]; *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95 [same].) [12]

The San Diego City Attorney has advised that engaging in contract negotiations is an administrative function under the Charter and that attempts by the Council to exercise that function would violate the Charter. In Opinion 86-7, the City Attorney advised that the Charter "makes absolutely no provision for any role for the City Council in the administrative affairs of the City, including, but not limited to, the negotiation of contracts []." (App. 979.) While the Council's legislative authority allows it to veto a contract it does not believe to be in the public interest, the Council may not change the terms of the contract or become

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[12] While the voters of a charter city may use an initiative to amend the city charter (see Elec. Code, §§ 9255-9269), charter amendments require additional procedures not applicable to regular initiatives. An initiative that conflicts with the city charter has been characterized as an unlawful attempt to amend the charter without complying with the stricter requirements for charter amendments. (*Patterson, supra*, 202 Cal.App.3d at 104-05.)

directly involved in the negotiations without impermissibly exercising executive authority in a manner prohibited by the Charter. (*Id.*)[13]

There is therefore no dispute that the Charter gives the Mayor, not the Council, the authority to negotiate contracts. Under the Charter, the Council could not validly adopt an ordinance that directed the Mayor to execute a lease and sale on specified terms and an initiative that attempted to do so is similarly invalid. The INITIATIVE violates the City Charter by proposing an ordinance that takes away the Mayor's administrative authority over contracting.

The trial court concluded that the INITIATIVE merely provides a "framework" and the Mayor would technically "negotiate" and "execute" the Lease. This is incorrect on two counts. First, the INITIATIVE does not merely provide a "framework" that allows for "substantial future negotiations," it provides a restricted set of terms and directs the Mayor to execute a lease that "meet[s] the requirements" set out in the INITIATIVE without "altering or varying" the INITIATIVE or Specific Plan. (App. 212.) This cannot reasonably be characterized as "substantial future negotiation," and the intrusion on the Mayor's authority violates the Charter. Second, the Charter commits all administrative functions to the Mayor. This would include the *negotiation* of contracts, not simply the ministerial execution. It cannot seriously be asserted that the Council could dictate the terms contained in the INITIATIVE to the Mayor by ordinance

[13] The differing roles of the Mayor and Council under the Charter are also reflected in Council Policy 700-10. (App. 510-524.) That Policy delegates to the Mayor the authority to determine which property can be disposed of, as well as authority to initiate or negotiate the sale or lease of real property. (*Id.*)

just because he would "execute" the final contract, nor can it be done by initiative.

The proponent argued that adoption of the INITIATIVE is similar to the Council adopting other general policies such as Policy 700-10. This confuses legislative authority to *set* policy with administrative or executive authority to *implement* policy. Of course the Council can set general policies for disposition of City-owned property and can attempt to influence the terms of an agreement by refusing to approve it and making the basis of its disapproval clear. Both actions are quite different from simply dictating the terms of a sale or lease for a property in advance. (Compare App. 510-224 [Policy 700-10, providing methodology for disposition of City-owned property] with App. 191-212 [detailing required terms of agreement].)

II. THE INITIATIVE CONFLICTS WITH STATE LAW

"[I]f the State Legislature has restricted the legislative power of the local governing body that restriction applies equally to the local electorate's power of initiative." (*Mission Springs Water Dist. v. Verjil* (2013) 218 Cal.App.4th 892, 920.) The INITIATIVE conflicts with state law governing long-term leases of public property.

Government Code section 37380 provides that a city may only lease public property for more than 55 years if certain conditions are met. For charter cities, section 37380(a) requires that the lease be subject to "periodic review by the city and shall take into consideration the then current market conditions."[14] The INITIATIVE violates this law because it requires a 99-year lease but does not provide for either "periodic review" of

[14] Government Code section 37396 allows leases up to 99 years for stadiums and sports arenas, but the INITIATIVE involves an area well in excess of that necessary for a stadium and proposes extensive non-stadium development. The proponent has not argued that section 37396 applies.

the lease nor for modification to reflect "then current market conditions." In contrast, its terms provide for a one-time payment, paid at the outset, based on a March 2017 valuation, and it precludes the City from taking future uses into account. (App. 203-204 [§61.2803(f)(1)&(5)].)

The proponent argues that this problem can be cured simply by adding any provisions to the final lease that are "required by law." The trial court apparently agreed. (App. 1550.) This is not how an initiative works. Once adopted, the INITIATIVE terms ***become the law***, and cannot be changed by the legislative body. The INITIATIVE provides that additional terms are only permitted "***that do not alter or vary the standards of [the ordinance proposed in the INITIATIVE] and the Specific Plan.***" (App. 212 (emphasis added).) Since the INITIATIVE contains terms that directly preclude periodic review and modification, it conflicts with state law governing leases of City-owned land.[15]

III. IF THE INITIATIVE DOES NOT ACTUALLY REQUIRE A LEASE OR ANY SPECIFIC TERMS, IT DOES NOT ENACT AN ENFORCEABLE ACT AND IS IMPERMISSIBLY VAGUE OR ILLUSORY

An initiative must propose concrete action; it cannot merely direct the legislative body to address a perceived problem. A proposed ordinance does not constitute a "legislative act" merely because it may be said to embody "what might be called a policy decision." (*Worthington*, *supra*, 130 Cal.App.4th at 1142.) "[A] legislative act necessarily involves more

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[15] Petitioners argued below that the INITIATIVE also violates the California Environmental Quality Act (Pub. Resources Code, § 21000, *et seq.*) by purporting to address environmental issues as a matter of legal definition rather than factual inquiry and directing that any permits be considered ministerial rather than discretionary. (*See, e.g.*, §§ 61.2801(c), 61.2805(d).) Petitioners do not renew that argument here but point out that it is an additional attempt to direct administrative action.

than a mere statement of policy. It carries the implication of an ability to compel compliance . . . [and] must be obeyed and followed by citizens, subject to sanctions or legal consequences." (*Id.* at 1142-43.)

In this case, the heart of the INITIATIVE is a lease agreement that will supposedly provide for a major league soccer stadium, a river park, and specified development of the surrounding area. However, it is undisputed that nothing in the INITIATIVE ***requires or guarantees*** any of those developments. Indeed, the proponent has conceded that the INITIATIVE ***does not require any particular terms and does not even require that a lease agreement ever be executed***, as everything is subject to "negotiation" and the Mayor's "discretion." (App. 546-547; 1186-1187.) The INITIATIVE provides some support for this argument, particularly sections 61.2805(c)-(d), which purportedly allow the Mayor to unilaterally decide "without limitation" "the appropriate content of the Lease" and "whether or not" to execute it. (App. 212 [§61.2805(c)-(d)].) And, of course, a "qualified lessee" may never come forward in the first instance.

But this would mean that the INITIATIVE does not guarantee the very legislative policy it purports to enact – a problem inherent in the use of an initiative to attempt to direct the negotiation of an agreement rather than enact concrete action. Simply put, either the INITIATIVE dictates the terms of the lease and sale of public property on the terms set forth (which presents all the foregoing problems) or it merely constitutes a proposal, to be accepted, rejected or modified as the City deems fit. In the latter case, it is clear that voters are not enacting any enforceable legislative action and it runs afoul of the cases above that require initiatives to direct enforceable legislative action. (*See, e.g., AFL v. Eu, supra*; *Widders v. Furchtechnicht* (2008) 167 Cal.App.4th 769.)

Although the purpose of the INITIATIVE is to direct the City to execute a lease that will provide for a stadium, a river park and substantial commercial development, the proponent concedes that none of this is required or guaranteed. This ambiguity raises questions about what, if anything, the INITIATIVE actually requires of the City or guarantees to voters.

For example, as noted above, the INITIATIVE purports to give the Mayor unfettered discretion to decide whether to enter into a lease, and on what terms, but other provisions prohibit him from altering or varying the standards in the ordinance and Specific Plan," and direct him to make the "ministerial" determination to accept a proposed lease if it includes the terms required by the INITIATIVE. (App. 212 [§61.2805(a)&(d)].)

The language of the INITIATIVE and the proponent's own argument that the City can reject a lease or negotiate alternative terms demonstrate that the INITIATIVE fails to enact an enforceable legislative act. These questions also makes it virtually impossible for voters to evaluate the proposed project, since whether the INITIATIVE contains enforceable requirements (and what they are) goes to the heart of what voters are being asked to vote on.

Moreover, without knowing whether the INITIATIVE's critical terms are binding or whether the City has unlimited discretion to reject them, City officials cannot possibly understand their legal obligations and comply with the directives in the INITIATIVE without lawsuits from various sides. (*See, e.g., Citizens for Jobs & the Econ., supra*, 94 Cal.App.4th at 1335-36.) The trial court suggested that since the INITIATIVE has a great deal of detail, it expresses more than policy and cannot be impermissibly vague. That is incorrect. In *Citizens for Jobs & the Econ., supra*, 94 Cal.App.4th at 1334-1335, the initiative provided a

great deal of detail on multiple issues. The Court nonetheless reviewed the nature of the requirements and the overall structure of the initiative and concluded that it was "so vague as to be an unworkable interference with the [legislative body's] duties." (*Id.*, citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188.) The INITIATIVE is analogous.

IV. SEVERABILITY IS NOT AN APPROPRIATE CONSIDERATION AT THIS STAGE

The proponent has argued that because the INITIATIVE contains a severability clause, even if portions of the INITIATIVE are invalid, the remaining valid portions should be left on the ballot. Case law indicates that consideration of severance is inappropriate at the pre-election stage. Although "severance of offending portions of a statute is often a permissible approach if the law has been enacted, the policy must be different when a court is faced with a *proposed* law." (*Citizens for Responsible Behavior*, *supra*, 1 Cal.App.4th 1013, 1035, emphasis in original; *see also*, *Patterson*, *supra*, 202 Cal.App.3d at 106, citing *City of Atascadero* v. *Daly* (1982) 135 Cal.App.3d 466, 470 ["Appellants advanced the argument that the presence of the severability clause in the proposed initiative ordinance might save it. Such is not the law"].) The proponent relied on *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565, but that case concerns the severability of an initiative *already approved* by the voters.

Avoiding pre-election consideration of severability makes good sense. The proponent has circulated a petition that has been signed by the requisite number of voters, presumably in reliance on representations about the contents of the INITIATIVE. The courts have been clear that if an initiative is invalid for any reason it cannot be submitted to voters. For the Court to attempt to re-write the INITIATIVE in an attempt to selectively

save certain provisions would be inappropriate and amount to a bait-and-switch for voters. Furthermore, the infirmities of the INITIATIVE are not limited to isolated provisions; they go to its basic approach and structure, *i.e.*, the use of an initiative to direct the negotiation of a lease and sale of public property on specific terms to a private party for private development.

Even if severability were an appropriate consideration at this stage, the presence of a severability provision would not save this INITIATIVE. Such a provision is not binding; the Court must undertake its own analysis to determine if severability is appropriate. (*Calfarms Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.) If the invalid provisions are considered an important or critical part of the measure, severability should be rejected. (*See, e.g., Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1510 [if defect affects entire measure, it cannot be saved with severance clause].) This is such as case.

CONCLUSION

Based on the foregoing, City petitioners respectfully request that the Court issue a peremptory writ in the first instance determining that the INITIATIVE is not a valid use of the City initiative power or, alternatively, remove the INITIATIVE from the November 6, 2018 ballot pending

further review by this Court and issue an order directing real parties to show cause why the INITIATIVE should not be determined to be invalid.

Dated: July 30, 2018

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DECLARATION OF DEBORAH B. CAPLAN

RE: TRANSCRIPT

I, DEBORAH B. CAPLAN, declare as follows:

1. I am an attorney employed by the law firm Olson Hagel & Fishburn LLP. I am an attorney for petitioners in this case. If called upon to do so, I could testify from my own personal knowledge as to the matters stated herein.

2. There is no transcript of proceedings in this case because there was no oral argument. The hearing on petitioner's request for a writ of mandate was scheduled to be heard on July 13, 2018. On July 11, 2018, the trial court released a tentative decision that indicated the court was denying the request for pre-election relief. After conferring with opposing counsel, a decision was made to submit the matter on the tentative ruling without oral argument. The trial court made the tentative final on July 13, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 27, 2018

DEBORAH B. CAPLAN

CERTIFICATION PURSUANT TO RULE 8.204
OF THE CALIFORNIA RULES OF COURT

Pursuant to Rules 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a type-face of 13 points or more and contains 13,251 words, exclusive of the cover page, tables, verification and this certification, as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: July 30, 2018

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By: _____
Mara W. Elliott
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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

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City of San Diego v. Maland, et al.

Superior Court Case No. 37-2018-00023295-CU-WM-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On the below date, I served true copies of the following document(s) described as:

EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER

EXHIBITS TO EMERGENCY PETITION FOR WRIT OF MANDATE AND/OR OTHER APPROPRIATE RELIEF (6 VOLUMES)

on the interested parties in this action as follows:

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Clerk of San Diego Superior Court Hon. Timothy Taylor 330 West Broadway, D-72 San Diego, CA 92101	Respondent **(Via Overnight Delivery)**

[XX] (BY ELECTRONIC SERVICE) By transmitting via TrueFiling to the above parties at the email addresses listed above.

[ ] (BY PERSONAL SERVICE) I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

[XX] (BY OVERNIGHT DELIVERY) I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

[ ] (BY UNITED STATES MAIL) I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 30th day of July 2018, at San Diego, California.

Marci Bailey