The New Universe of Land Use Initiatives

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THE NEW UNIVERSE

OF LAND USE INITIATIVES

PROJECT PERMITTING THROUGH THE BALLOT BOX

League of California Cities

City Attorneys Department

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City of Carpinteria

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I. INTRODUCTION

The initiative process was originally designed by Governor Hiram Johnson shortly after the turn of the twentieth century as a tool to empower the disenfranchised to legislate independent of the State Legislature. Yet it is well known that despite these intentions, the initiative process has become a tool for special interest lobbies at both the state and local level. Proposition 26 - sponsored by alcohol, petroleum, and paint interest - is only the most recent case in point.

Over the past three decades, land use initiatives have been a staple of the California legal landscape. Until recently in the land use arena, the initiative process was largely devoted to traditional legislative enactments such as general plan amendments, sponsored by either development interests or by slow/no-growth citizen activists. However, a new trend is emerging in which project applicants are sponsoring initiatives that seek not only to approve traditionally legislative "framework" instruments such as general plan amendments, but also to approve the underlying land use project itself. In other words, well funded applicants are using the initiative power to achieve their own version of municipal manifest destiny. This raises a whole series of legal issues and challenges for local government's well-established authority to exercise adjudicative authority over land use development proposals. This paper will explore some of these issues in the context of a recent initiative campaign in the City of Carpinteria.

II. THE PAREDON OIL AND GAS DEVELOPMENT INITIATIVE IN CARPINTERIA

A. Original Ownership and Approval of the Carpinteria Oil and Gas Processing Facility

In the early 1960s, Chevron (the Standard Oil Company) proposed development of an onshore oil and gas facility on a 55-acre property on the coastal bluffs overlooking the Pacific Ocean in southern Santa Barbara County. The facility was intended to process oil and gas developed from fields located in both state and Federal offshore waters. The project, known as the Carpinteria Oil and Gas Processing Facility ("CPF") was duly approved by the Board of Supervisors.

In 1965, during the approval process, citizens in this portion of the County approved the incorporation of a new city, the City of Carpinteria. One of the first acts of the new city was to validate the County's permit for the CPF. The facility included a large bulk crude oil storage tank, pipeline shipping pumps and metering skids, a gas compression plant, a natural gas liquids recovery plant, field offices, maintenance shops, and other incidental equipment. Consistent with procedures at the time, fewer than ten very general conditions of approval were imposed on the permit. Also, because the project was approved prior to the establishment of the California Environmental Quality Act, no environmental review of the project and its potential impacts was conducted.

B. Change of Ownership and the Community's Shift toward Environmentalism

In the 1990s, Chevron sold much of its operations in Santa Barbara County to Venoco, Inc.[1] While Chevron owned the CPF in the early years of the City's incorporation, operation of the facility was not particularly controversial; a Chevron employee served as Mayor of the City in the 1980s, and Chevron donated to the City the building complex which currently serves as City Hall. But beginning in 1990, a more environmentally-conscious Council was elected as environmental issues became more important to the electorate. Processing had declined at the

[1] Venoco, Inc. is an independent energy company with corporate headquarters in Denver. Much of Venoco's oil and gas production occurs in California, primarily through interests in six offshore platforms in the Santa Barbara Channel. It also has some producing onshore properties in Southern California (one is located on the campus of Beverly Hills High School) and extensive operations in both the Central Valley and the Sacramento Basin. In 2010, total revenues for the company were $295 million, based on production of 6.7 million barrels of oil equivalent for the year.

CPF, and the facility took on a more aged look. Citizens purchased a 50-acre open space parcel next door to the CPF which had been proposed for housing but which became embroiled in land use litigation and controversy. One of Southern California's last remaining harbor seal rookeries, located at the base of the bluffs below the CPF and next to Venoco's processing pier, became an increasingly popular tourist destination. What had been a small number of houses adjacent to the CPF site in 1965 had grown into one of the City's major residential neighborhoods, located within 750-feet of the processing facility. Activist citizens publicized violations of air and water quality regulations at the plant.

C. Proposal to Upgrade the Facility Using the Traditional Approval Process

Over the years, a number of very small upgrades of the CPF were approved by the City. Venoco withdrew several more substantial upgrades when the City indicated that it considered these applications to be reopeners for the CPF's underlying development permit and for environmental review of the facility as a whole. In 2004, however, Venoco determined that it would be economically beneficial to develop the Paredon oil and gas field, located nearshore to the coast in state waters. This field was to be developed through extended reach ("slant") drilling from an onshore site located within the CPF parcel. The proposed project involved the installation, maintenance and replacement of exploratory and extended-reach oil drilling rigs, crude oil tanks, pipelines, a gas compression plant, natural gas liquid recovery plant, and other structures to support the gathering and transmission from onshore and off shore oil fields. The project was referred to locally as the Paredon project.

Because onshore drilling was not an authorized use in the City's Coastal Dependent Industry land use designation, a Zoning Ordinance Amendment was required. A conditional use permit and coastal development permit were required for the project. Because of the scope of modifications that would need to be made to the CPF to accommodate the proposed oil drilling operations, the City indicated that a revised development permit for the CPF and full environmental review would be required. The proposed project was complex, and the initial application was resubmitted three times before finally being deemed complete in 2005, more than a year after the initial application.

The Paredon project attracted a lot of attention in the City, particularly with regard its environmental impacts. Numerous citizens and organizations participated in the public hearing

process for the project's draft environmental impact report ("DEIR"). Over 600-pages of comments were filed with regard to the DEIR. City staff responded to public comments and prepared a Proposed Final EIR, which itself was over 850-pages long with over 700-pages of appendices, plus over 800-pages of responses to comments. The Proposed Final EIR reported a total of eleven "Class I" unmitigable environmental impacts. Among them were impacts to public safety, marine mammals, endangered species and water quality due to a risk of an oil spill and the use of hazardous materials, as well as viewshed impacts due to the prominence of the oil rigs on the bluff. The Proposed Final EIR contained over 65 mitigation measures.

D. The Switch to the Initiative Process

Venoco had not been communicating extensively with the City as City staff worked on finalizing the environmental document in 2008. On February 2, 2009, before the Proposed Final EIR could be converted into a Final EIR and the project scheduled for Planning Commission review, Venoco filed with the City Clerk a more than 60-page initiative which it entitled the "Carpinteria Community Initiative" (the City Attorney's Office, in preparation of the Ballot Title and Summary for the measure, ultimately changed the name to the "Paredon Oil and Gas Development Initiative"). Venoco explained their preparation of the initiative by stating that, in their discussion with members of the community, they had heard a strong sentiment expressed that the people should have the right to decide whether the project would be developed.[2] At Venoco's request, the City suspended processing of the pending permits once the Initiative was filed.

The Paredon Initiative proposed a land use development at the CPF that would use extended reach drilling to access the offshore reserves and would use on shore facilities to process the captured oil and gas, similar to the project application that the City had been processing. The project would commence with the use of a 175-foot high drill rig, later to be replaced by a 140-foot rig if exploratory drilling was successful. Production drilling would involve 6 years of continuous drilling 24-hours a day; oil and gas processing would operate weekdays from 6:30 A.M. to 4:30 P.M. The overall lifetime of the project was stated to be thirty years, with extensions possible by amendments to the Initiative. Affiliated facilities proposed to

[2] Critics of Venoco's decision suspected that the company felt the initiative option was more politically viable than convincing the City Council to override the 11 unmitagable impacts.

be installed within the CPF included crude oil tanks, pipelines, a gas compression plant, a natural gas liquid recovery plant, and other structures.

E. The Contents of the Paredon Initiative

To authorize the project, the Paredon Initiative proposed to (a) amend the City's General Plan/Local Coastal Land Use Plan making exceptions to policies, chiefly environmental protection policies, with which the project was in conflict, (b) adopt a new Paredon Specific Plan to create an overlay zone on Venoco's property where onshore drilling into offshore reservoirs could occur, (c) supersede any inconsistent City regulations, guidelines, ordinances, or code provisions, and (d) direct the City to issue all permits and Specific Plan modifications necessary to authorize the Paredon Project. The permits necessary for the project were stated in the proposed Specific Plan to be ministerial permits, such that neither environmental review nor the City's traditional exercise of discretion in permit issuance would be available.

The Paredon Initiative contained three major components: (1) amendments to the City's General Plan/Local Coastal Plan ("GP/LCP"), (2) a specific plan, and (3) a development agreement. Each of these is described in more detail below.

1. The GP/LCP Amendments.

The Initiative proposed 16 amendments to the City's GP/LCP. In general, the amendments exempted the Paredon Project - and potentially other coastal dependent industrial uses at the CPF - from GP/LCP provisions designed both to protect resources (*e.g.* protection of visual resources, coastal bluffs, harbor seal habitat, etc.) and to minimize impacts (*e.g.* minimization of impacts related to noise, lighting, etc.). This result was achieved by amending the GP/LCP to provide narrow exceptions applicable only for the Paredon project to policies that otherwise applied uniformly throughout the City. For example, a view protection policy was amended by inserting the following italicized text:

> "*Except for development . . . at the existing Carpinteria Oil and Gas Processing Facility*, [*e*]nsure development is controlled to avoid impacts to significant viewsheds, vistas and view corridors."

Similar changes were made to policies that protect the public and harbor seals from noise, vibration, and light.

2. The Paredon Specific Plan.

The Paredon Specific Plan, at 18-pages in length, was the heart of the Initiative. Unlike many specific plans, which commonly are only slightly more detailed than the general plan, the Paredon Specific Plan was extremely detailed, including site plans and project detail more commonly associated with permit applications. The Specific Plan created an Overlay Zone within the City's Coastal Dependent Industry zoning designation, authorizing all Paredon Project uses. Among the elements of the Specific Plan were the following:

- A set of findings stating that the Specific Plan is consistent with the Coastal Act and the City's GP/LCP.
- A "precedence clause" stating that the Initiative overrides or supersedes any regulation of the City that frustrates the purpose and intent of the Specific Plan.
- A description of the hearing that the City would conduct on the Project should the Initiative be approved by the voters. The hearing would be conducted by the City Council (rather than by the Planning Commission, as would normally be the case), and the Council would be mandated to make certain approval findings and issue a Coastal Development Permit for the Project, provided that the application is consistent with the Specific Plan's development regulations and standards. In other words, only one permit would be required for the Project, and that permit would be ministerial.
- A series of regulations and standards to govern development within the Overlay Zone. This section includes a detailed project description, the drilling program and schedule for phased development of the project, findings regarding adequacy of infrastructure, and development standards (height limit, setbacks, minimum parcel size).
- A requirement that the Owner offer to dedicate to the City an open space and coastal access area, although no details were provided regarding the offer.
- A statement that all provisions of the Specific Plan could be modified, at the Owner's request, if any one of a stated set of findings could be made, including that imposition of a development standard set forth in the Specific Plan will prevent or frustrate achievement of the entitlements authorized by the Specific Plan.

- A Mitigation Monitoring and Reporting Program, which in essence constituted self-imposed mitigation measures for the Project. While in a broad sense these mitigation measures were based on those contained in the old project's Proposed Final EIR, they were much more general, far fewer in number, and unclear as to what role the City would have in enforcement.

- A severability clause.

3. The Development Agreement.

Finally, the Initiative included a Development Agreement ("DA"). The DA was closely modeled after a development agreement that the City had adopted for an entirely different project several years earlier. However, the Paredon DA was drafted entirely by Venoco without any negotiation with the City. Among its provisions, the DA stated that: (a) Venoco has a vested right to develop the Paredon Project, (b) the DA shall supersede any inconsistent rules and regulations of the City that the City might adopt in the future, (c) the City must issue all permits for the project, (d) those permits shall be considered ministerial, and (e) should a third party legal challenge be filed against the DA, the City shall tender to Venoco the complete defense of that challenge. The DA also included an offer that Venoco would contribute funds to a local non-profit group providing financial support to Carpinteria schools in an amount up to $5 million, matched to profits Venoco would receive from the project.

F. <u>Other Provisions of the Paredon Initiative</u>

The Initiative contained a set of Findings, modeled on the findings required under the Coastal Act and the City Zoning Ordinance, stating that the Paredon Project is consistent with the Coastal Act and the City General Plan/Local Coastal Plan. By voting in favor of the Initiative, the voters were said to be making these findings. No facts or evidence were provided in the Initiative to support the consistency findings.

The Initiative also contained a section setting forth a procedure to respond to the Coastal Commission's review of the Initiative. Under the Coastal Act, an amendment of the City's Local Coastal Plan must be reviewed and approved by the Coastal Commission. In such review, the Coastal Commission often recommends changes to the proposed amendment; the City then has the option to either accept the changes or reject the changes and abandon the proposed

amendment. The Paredon Initiative, instead, stated that, should the Coastal Commission recommend changes to the Initiative's LCP amendments. Venoco would review the changes and, if it agreed with the Commission's changes, authorize the City Council to amend the Initiative. Thus, Venoco—and, at Venoco's direction, the City—were authorized to amend the Initiative without further vote of the people.

Finally, because the Initiative would be voter-sponsored, it would not be subject to any environmental review. Nor would subsequent environmental review occur when the Project was issued permits, since, as stated above, the Initiative contained numerous provisions that any permits issued by the City for the Project would be ministerial.

In summary, the Paredon Initiative not only proposed amendments to the City's legislative enactments (the General Plan/Local Coastal Plan) and authorized a private corporation to dictate how the Coastal Commission's modifications would be implemented, but also within a purported legislative act (the Specific Plan) provided project level of detail, defined all project permits as ministerial, and mandated issuance of such permits, all without environmental review. This is the new universe of land use initiatives in which "the whole enchilada" is presented to the voters for approval.

III. THE CITY ATTORNEY'S LEGAL CHALLENGE TO AND PROCESSING OF THE PAREDON INITIATIVE

A. The Decision to File Suit to Relieve the City Attorney's Ballot Obligation

Once an Initiative is filed with the City Clerk, the first step in the process is for the City Attorney to prepare within 15 days a ballot title and summary for the measure. Upon review of the Paredon Initiative, the City Attorney's Office determined that the measure contained legal defects that rendered it unconstitutional and that commencing the ballot title and summary process would incur unnecessary expense of public and private funds, mislead the public, and undermine the initiative process. Therefore, on the 15th day following submission of the Initiative to the Clerk, and with the City Council's approval, the City Attorney's Office filed suit in Santa Barbara Superior Court to obtain a judicial determination of the validity of the Initiative and to temporarily suspend the City Attorney's duties to prepare the ballot title and summary, pursuant to Civil Code § 1060.

More discussion is provided below as to the legal issues raised by "whole enchilada" initiatives. In the case of the Paredon Initiative, the City Attorney's Office sought judicial direction as to six potential legal defects:

1. *Initiatives must solely enact legislation and cannot render an administrative decision.* The Initiative went beyond legislative enactments and rendered an administrative decision by mandating issuance of a coastal development permit and providing vested development rights through a non-negotiated development agreement.

2. *Initiatives must show consistency with the City's General Plan (and Local Coastal Plan, for coastal jurisdictions).* The Initiative was inconsistent with the City's GP/LCP because it made narrow exceptions to otherwise uniformly-applicable City policies.

3. *Initiatives cannot contain language that is vague, false, or intentionally misleading.* The Initiative contained various unconstitutionally vague and misleading statements.

4. *An Initiative cannot name a private party or corporation to perform certain duties or functions or to hold certain powers*. The Initiative unconstitutionally named Venoco, a private corporation, to perform certain duties or functions or to hold certain powers (*e.g.* direct the City Council as to how to deal with Coastal Commission amendments).

5. *Initiatives cannot intrude on essential governmental functions*. The Initiative did so in several respects, such as intruding on the City's contractual authority to negotiate development agreements.

6. *Initiatives cannot violate state law*. The Initiative circumvented the environmental review necessary for such a project under the California Environmental Quality Act.

B. The Superior Court Decision

The filing of the Paredon Initiative and the City Attorney's litigation were big news items in the small city of Carpinteria. Reactions ranged from "the Initiative is an outrageous attempt at an end run around City processes" to "the litigation is an outrageous attempt to deprive the people of their right to have their say." However, both the City and Venoco treated each other professionally and with respect, developing an expedited briefing schedule so that the matter could be heard in the Superior Court as quickly as possible (about 5 1/2 months). The Superior

Court stayed the City Attorney's obligation to prepare the ballot title and summary, pending hearing on the complaint.

On July 28, 2009 after briefing and oral argument, the Superior Court issued its order in the case. The Court agreed the reasonable minds could differ on the legal issued presented, but ruled that, because the courts must give broad deference to the electorate's power to enact laws by initiative, the majority of the City Attorney's challenges to the Initiative must be overruled. However, the Court agreed with the City Attorney that a unilaterally-imposed Development Agreement interfered with the City's essential powers and constituted an administrative act, and ordered it stricken from the Initiative. The Court ordered the City Attorney to prepare the ballot title and summary forthwith. Shortly after the trial court's decision, the opinion in *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357 was issued.

C. The Decision to Both Appeal and Proceed with the Election

The City Council recognized that there was value in putting this question to the public, and at the same time believed that this Initiative raised novel legal issues which deserved judicial scrutiny. As a result, the City Council considered the trial court's ruling and decided (a) to appeal the court's decision, and (b) notwithstanding the appeal, to comply with the court's order and to prepare the ballot title and summary. That both steps were taken is notable, since the City had no obligation to process the initiative because the filing of an appeal normally would have stayed the superior court's order.

The appeal was filed by the City on largely the same grounds raised at trial.[3] Because the same appellate court in which the appeal would be heard had just handed down the decision in *Citizens for Planning Responsibly v. County of San Luis Obispo*, the City's brief made an effort to distinguish that case.

At the same time as the City was preparing the appeal, the City Attorney prepared the ballot title and summary and provided the same to Venoco. As was noted above, the City Attorney rejected the proponents suggested ballot title and summary and selected a more descriptive title and summary of the project and the measure's provisions. The proponents objected to this change, but nevertheless published the ballot title and summary and the notice of

[3] Venoco also filed a motion for attorney's fees, which was denied.

intent to circulate petition in the local paper, and then proceeded to circulate the petitions. Within three weeks, Venoco returned petitions to the City Clerk, which were determined to be sufficient to require an election (the City contracted with the Santa Barbara County Elections Office to assist in reviewing the signed petitions, which turned out to be very valuable). Citizen activists dogged the paid petition gatherers and complained about alleged misrepresentations made to induce voters to sign the petitions.

D. The Preparation of an Elections Code 9212 Report

While the petitions were still being circulated, the City Council directed that staff prepare a report pursuant to Elections Code 9212. Such a report is a city-generated analysis of the measure's impacts in seven specified areas and any other relevant areas.[4] The City Clerk reported to Council at a regular Council meeting of November 23, 2009 that adequate signature had been gathered pursuant to Elections Code 9214 to require the Council either to approve the measure or submit it to the voters. This started the 30-day clock running under Elections Code 9212 for the Council to consider the report and take the action required of it.

The Council held a public hearing to consider the 9212 report at a special meeting on November 30, 2009. The 9212 report was 44-pages in length and was divided into sections on the seven types of impacts identified by statute as well as a section on public health and safety, much of which was built around the Proposed Final EIR for the suspended project. The 9212 Report also included a chart comparing the initiative project to the original proposal, and a table showing anticipated royalty revenue.[5] There was intense public interest in the report, and numerous citizens provided public testimony. The City Council continued the hearing to a regular meeting of December 14, 2009. At that meeting, the Council adopted the 9212 report and voted to submit the Initiative to the voters.[6] The election was set for the next consolidated

[4] The specified areas include fiscal impacts, internal consistency, effect on use of land and housing, impacts on infrastructure, impact on business and employment, impact on uses of vacant parcels, impacts on agricultural lands, open space and traffic.

[5] Ordinarily a locality does not receive any revenues generated from the production of oil and gas. However, there was a possibility that pursuant to a state statute known as the Maddy Bill (which has sunsetted) the City of Carpinteria could receive a portion of the state's royalties. The applicability of the Maddy Bill would have been determined by the State Land's Commission.

[6] The 9212 report was subsequently updated at several later Council meetings as new information came to light, such as information concerning oil royalties.

general election (the countywide primary election of June 8, 2010), pursuant to Elections Code 1405.

E. The City Council's Position on the Measure and Order that Public Workshops be Held

At a special meeting on February 16, 2010 the City Council held a meeting to consider whether to take a position on the Initiative. After considering the 9212 report and extensive public testimony, the Council directed staff to prepare a resolution that reflected its opposition to the initiative, which had been given the designation of "Measure J" in the local election. On March 8th, the Council adopted the resolution of opposition by a vote of four to one. The resolution stated that the initiative: (a) interfered with City self-rule, (b) undermined local planning laws, (c) evaded environmental review, (d) authorized after-the-fact changes to the initiative, (e) did not benefit the local economy, and (f) left many unanswered questions.

The City Council also directed staff to conduct two public workshops at which staff would discuss the findings of the 9212 report and present information regarding the Initiative. The City Attorney's Office worked closely with City staff in preparing for (and presenting) these workshops, insuring that the principles enunciated in *Vargas v. City of Salinas* were followed. The City Attorney's Office also included in a number of staff reports discussion of the *Vargas* case, providing clear guidelines to City officials as to what sorts of activities were either permitted or prohibited under *Vargas*.

Two workshops were held – on April 7 and May 4, 2010 – and were heavily attended; the City had to provide larger venues than were available at City Hall to accommodate the public. The workshops were also televised and rebroadcast on the City's local channel. The first workshop focused on the contents of the Initiative. Since the Initiative was such a lengthy and technical measure, many members of the public were confused about what it entailed. This workshop involved staff presenting an explanation of each element of the initiative, giving the public and the sponsor a chance to ask questions. The second workshop focused on what would happen if Measure J passed or failed. This was designed to educate the public about what the effect of their vote would be, since numerous other public agencies (such as the California Coastal Commission and State Lands Commission) would have to issue permits and approvals before the project could be built. The timing and availability of local royalties was an issue of

particular interest. Attendees included organized groups of supporters wearing campaign buttons, opposition groups, and local residents seeking more information.

F. Preparation of the City Attorney's Impartial Analysis

Pursuant to Elections Code 9280, on January 15, 2010 the City Attorney prepared an impartial analysis for Measure J. The analysis described the proposed Paredon project, the existing CPF operations, the proposed operations, and the method by which the measure would achieve its objectives. Notably the City Attorney indicated that "several legal questions" existed with respect to the measure and described them generally (such as whether or not royalties would be available to the City). Finally, the impartial analysis explained what a "Yes" vote meant and what a "No" vote meant and identified the proportion of favorable votes required to approve Measure J. In the signing statement, the City Attorney stated that a full copy of the measure could be obtained at City Hall or by going to a listed website.[7]

G. The Election, the Appeal and the Aftermath

As the election approached, campaign efforts reached a fever pitch that had not previously been reached in this small beach town community.[8] The proponents took out radio and television ads, an unusual step for a community where most City Council candidates raise less than $10,000 and advertise exclusively in the local weekly newspaper. The opponents took a grassroots approach, organizing local events such as a paddle out on surfboards and kayaks in the ocean near the CPF, creating Facebook communities to share information, and circulating YouTube videos to illustrate the impacts of the initiative.[9] Yard signs, pro and con, were ubiquitous.

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[7] Although the Elections Code is silent as to whether such references to websites are permissible, we believe that such a reference is consistent with the goals of government transparency and accessibility. A copy of the impartial analysis and the ballot arguments is available online at http://www.smartvoter.org/2010/06/08/ca/sba/meas/J2010/.

[8] The public sentiment towards this election was unquestionably affected by the deadly explosion of the Deepwater Horizon rig in the Gulf of Mexico, which occurred less than two months prior to the vote.

[9] See e.g., a video created by a local artist, who created an original song which is built around the concept that the word "paredon" in Spanish means "execution wall," available online at: http://www.youtube.com/watch?v=M9REFFjwPDU.

The election on the Initiative attracted some attention; in addition to local coverage, the Initiative garnered articles in the Los Angeles Times and the Denver Post, among other media outlets.[10] As the election approached, City staff had to deal with perhaps a bit more than the usual election hi jinks. In addition to the to-be-expected trashing of competing election signs, City staff had to deal with private tethered blimps/election signs being floated by Initiative opponents over the City at the height of the proposed drilling rig (170-feet). Meanwhile, the appellate process continued; the City's opening brief was filed February 3, 2010, with Venoco's responding brief being filed April 15, 2010.

The election was held June 8, 2010, and the Paredon Initiative was defeated by a margin of 71% to 29%. The fact that the Horizon deepwater well blowout had occurred in the Gulf of Mexico in the months preceding the election probably had not helped the Initiative's chances. Venoco promptly filed a letter with the Court of Appeal stating that, given the election results, they considered the appeal to be moot and would not be participating further. The City replied by letters to the Court that an appeal does not need a Respondent and that we felt the legal issues were of such importance that the case should be heard. The City's closing brief was filed on July 6, 2010, and shortly thereafter that two amicus briefs were also filed in support of the City, one a joint brief by the League of Cities and California State Association of Counties and one by the Santa Barbara Environmental Defense Center representing the Sierra Club, Get Oil Out! and Carpinteria Valley Association, and Citizens for the Carpinteria Bluffs.

On September 8, 2010, the Court of Appeal, Second Appellate District, Division 6 on its own motion dismissed the case as moot. This outcome, while not surprising, was unfortunate. The appeal was an opportunity to explore further the holding of *Citizens for Responsible Planning*. It also could have addressed the substantive issues which the lower court had largely passed over so as to avoid interfering with the local voters' rights.

In subsequent correspondence with the State Land Commission, Venoco has stated that, given the results of the election, the company will not be developing the Paredon Project within the jurisdictional limits of the City of Carpinteria. Venoco is still considering implementing the

[10] See LA Times, "Oil Company Spending Lavishly to Get Around Carpinteria Law," February 21, 2010, republished online at: http://citizensagainstparedon.org/post/6-los-angeles-times-article. See also, Denver Post, "Denver-based driller wants Calif. voters to overrule City's opposition," March 3, 2010, available online at http://www.denverpost.com/business/frontpage/ci_14501179.

project, either from a location within the unincorporated territory of the County of Santa Barbara or by placing drill equipment and processing facilities on one of the offshore platforms in which it holds an interest. To date, when City staff have asked Venoco if staff should reclassify its land use application from "suspended" to "withdrawn," Venoco has refused to provide a definitive answer.

IV. SUBSTANTIVE ISSUES RAISED BY "TOTAL" LAND USE INITIATIVES

The contents of any local land use initiative will be heavily dependent on the particular architecture of a local jurisdiction's land use regulatory framework: i.e., the provisions of its General Plan/Local Coastal Plan, zoning ordinance, growth management ordinance, resource protection policies, and the like. A traditional land use initiative will seek to amend those provisions of these underlying policies and laws that are contrary to the proponent's interests. The "total" land use initiative not only accomplishes this objective, but also builds in mandatory adjudicative approval of the proponent's particular project. Thus, the new universe of land use initiatives involves what is essentially "instant planning and permitting" by making the desired development a permissible use in a particular location and simultaneously eliminating the discretionary authority of the municipality to deny an application for such development. While each initiative will raise its own distinct legal issues, we discuss below certain legal issues that we feel will likely be implicated by every "total" land use initiative.

A. Distinguishing Between Legislative and Adjudicative Elements in the Initiative

Since the objective of a "total" land use initiative is to avoid the City's normal regulatory process and gain complete project approval in a single voter-approved enactment, any such initiative must contain within it a vehicle for either granting what would normally be adjudicative approvals or compelling the issuance of such permits by the City after the initiative is passed. Any initiative that contains such language raises the issue of the appropriate limits of the initiative power.

That an initiative may only enact legislation is a central tenant of the reserved initiative authority.[11] Under the California Constitution, the electorate's power of initiative is limited to the consideration and amendment of the Constitution, statutes and ordinances.[12] For this reason, the courts have invalidated initiatives that tread beyond legislation into the administrative or adjudicatory realm.[13]

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[11] *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 695.

[12] Cal. Const., Art. II, §§ 8 and 11.

[13] See, *id*. at 708, 714; *McKevitt v. City of Sacramento* ("*McKevitt*") (1921) 55 Cal. App. 117, 124. [clarifying the legislative-administrative dichotomy]; *Wiltshire v. Superior Court* (1985) 172 Cal.

The distinction between legislative and adjudicatory acts has been described as follows: a legislative act is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.[14] Stated another way, "Legislative acts are those which declare a public purpose whereas administrative, sometimes called adjudicative or quasi-adjudicative, acts implement the steps necessary to carry out that legislative purpose."[15]

In the land use context, legislative acts include amendments to general plans and zoning ordinances.[16] Administrative, adjudicatory and other non-legislative acts include the issuance of coastal development permits[17] and conditional[18] and special use permits,[19] authorization for construction of specific improvements[20] and agency findings with respect to the implementation of policy.[21] In issuing these latter development approvals, the agency is not establishing policy; rather, it is applying established policies to a particular set of facts to grant an entitlement.

Structuring an initiative to secure <u>all</u> City approvals necessary for approval of a project arguably seeks to achieve more than the law allows. Adoption and amendment of general and specific plans are typically considered legislative acts—and therefore the proper subject of an

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App. 3d 296, 303 [the people's initiative power does not include the exercise of the adjudication of issues].

[14] *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal. App. 3d 168, 175.

[15] *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal. App. 4th 357, 367 (*Citizens for Planning Responsibly*), citing *City of San Diego v. Dunkl* (2001) 86 Cal. App. 4th 384, 399-400 (*City of San Diego*); see, also, *Fishman v. City of Palo Alto* (1978) 86 Cal. App. 3d 506, 509 (*Fishman*).

[16] *Citizens for Planning Responsibly, supra,* 176 Cal. App. 4th at 364 [general plan and zoning regulations]; *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal. 3d 511 [zoning ordinance] (*Arnel*).

[17] *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 176; see also, *City of Coronado v. California Coastal Zone Conservation Com.* (1977) 69 Cal.App.3d 570, 574; *Patterson v. Central Coast Regional Com.* (1976) 58 Cal. App. 3d 833, 841.

[18] See *e.g., San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal. 3d 205, 212 [the grant of a variance or the award of a conditional use permit are adjudicatory in nature.]; *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal. App. 3d 825 [the grant of a subdivision map is adjudicatory].

[19] *Wiltshire v. Superior Court* (1985) 172 Cal. App. 3d 296, 301 (*Wiltshire*).

[20] *Fishman, supra,* 86 Cal. App. 3d at 508-509.

[21] *City of San Diego, supra,* 86 Cal. App. 4th at 399.

initiative—because they ordinarily involve formulation of broad rules that are general in application.[22] However, acts taken to *implement* legislation are administrative in nature.[23] Where a single act simultaneously amends a general plan and grants a permit, the courts have not failed to distinguish the legislative action from the adjudicatory action.[24]

Frequently, the "total" land use initiative will seek to compel the City to make certain findings that would normally be undertaken as part of the City's traditional adjudicative permit review process. In the case of the Paredon Initiative, this took the form of requiring the City to make specified findings for any project that was "consistent with the development regulations and standards" contained in the Paredon Specific Plan. However, compelling the issuance of such findings arguably intrudes into City administrative powers for at least three reasons, which are described below.

First, the act of making consistency findings at the administrative level is an administrative act.[25] It is true that the act of making consistency findings for legislative-level programs is a legislative act.[26] Due process requirements of notice and hearing do not apply to legislative findings because, "[w]ith respect to legislative acts, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters."[27] However, the cases discussing administrative consistency

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[22] *Arnel, supra,* 28 Cal. 3d 511; *Devita v. Napa County* (1995) Cal. 4th 763.

[23] See, *McKevitt v. City of Sacramento* (1921) 55 Cal. App. 117, 124 [acts which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body are administrative.]; *Andrews v. City of San Bernardino* (1959) 175 Cal. App. 2d 459, 463 [the administrative acts that follow from a legislative policy are not subject to referendum or initiative].

[24] *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal. App. 3d 723, 729.

[25] *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal. App. 3d 584 [findings and decision regarding whether a development project is consistent with a local general plan are administrative]; *Andrews v. City of San Bernardino* (1959) 175 Cal.App.2d 459 [findings for approval of a final redevelopment plan is administrative]; *City of San Diego, supra,* 86 Cal. App. 4th at 390-391 [initiative which made certain findings required by an earlier ordinance, thereby reversing the agency's findings, was administrative].

[26] *Citizens for Planning Responsibly, supra,* 176 Cal. App. 4th at 377 (findings concerning whether zoning is consistent with a general plan).

[27] *Arnel,* 28 Cal.3d at 519-520, citing *Eastlake v. Forest City Enterprises, Inc*. (1976) 426 U.S. 668; see, also, *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 786.

findings settle the rule that the electorate is not entitled to substitute its judgment for that of an agency with respect to administrative matters.[28]

Second, a compelled finding in administrative matters violates due process. In *Horn v. County of Ventura* (1979) 24 Cal. 3d 605, the Supreme Court held that, when an agency acts in an "adjudicatory" capacity, due process "requires that both appropriate notice and an opportunity to be heard be given to persons whose property interests may be significantly affected."[29] That is so because:

> ". . . [r]esolution of these issues involves the exercise of judgment, and the careful balancing of conflicting interests, the hallmark of the adjudicative process. The expressed opinions of the affected landowners might very well be persuasive to those public officials who make the decisions, and affect the outcome of the . . . process."[30]

Where an initiative does not respect the requirement for administrative due process, such a measure is unlawful because "[i]n the exercise of that electoral right, there is obviously no opportunity for the notice and hearing and factual findings required in the adjudicatory process."[31]

Third, the findings that are required for issuance of a permit differ from those normally made when the agency acts on a completely legislative matter. When an agency issues an administrative land use permit, the agency is required to "bridge the analytic gap between the

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[28] *See Arnel,* 28 Cal. 3d at 402 [Rezoning of property by city initiative ordinance, which parcels had previously been given zoning classifications pursuant to city's general and special land use plans, was arbitrary, capricious and discriminatory, since new classification was selected without consideration of appropriate planning or land use criteria and since purpose of rezoning was to defeat the specific planned development.] See also *Wiltshire,* 172 Cal. App. 3d at 301 [Proposed municipal initiative requiring electorate approval for the establishment of waste-to-energy plant impermissibly withdrew from city council and lodged in electorate adjudicatory powers with respect to issuance of conditional use permits and denied due process of law.]

[29] *Horn v. County of Ventura,* 24 Cal. 3d at 610.

[30] *Id*. at 615. See, also, *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541 [due process principles apply to the issuance of an administrative, conditional use permit]; *Wiltshire v. Superior Court* (1985) 172 Cal.App.3d 296, 304 and *Topanga Assn. For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517 [award of special use permit is adjudicatory, requiring notice and an opportunity to be heard].

[31] *Wiltshire, supra,* 172 Cal. App. 3d at 304.

raw evidence and ultimate decision or order."[32] The same requirement does not apply to legislative acts:

> "A court cannot inquire into the wisdom of a legislative act or review the merits of a local government's policy decisions. Judicial review of a legislative act under Code of Civil Procedure section 1085 is limited to determining whether the public agency's action was arbitrary, capricious, entirely without evidentiary support, or procedurally unfair."[33]

If initiatives were allowed to compel adjudicative findings, there would be no assurance that land use decisions would ever comply with the legislative policies that govern all permit-level decision-making. Plainly, a city would not have the power to adopt an ordinance that removed both agency discretion and the requirement that findings be made only on the basis of substantial evidence. Because a City lacks this power, the electorate lacks the power as well.[34]

In the Paredon litigation, Venoco contended that the initiative power extended to administrative actions that resulted from the voters' approval, claiming that "legislative acts generally are those which declare a public purpose and *make provisions for ways and means of its accomplishment.*"[35] Administrative acts, they argued, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body.[36] However, neither of the cases cited by Venoco authorized initiative-based limitations on a city's authority to act in administrative and adjudicatory capacities.[37] Nor do these cases contravene the settled

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[32] *Topanga Assn. for a Scenic Community, supra,* 11 Cal. 3d at 515; Code Civ. Proc., §1094.5.

[33] *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1208.

[34] *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604-610 [an ordinance proposed by initiative must be one that the agency could itself enact]; see also *DeVita,* 9 Cal.4th at 775.

[35] *Fishman v. City of Palo Alto* (1978) 86 Cal.App. 3d 506, 510

[36] *Id*. at 509. See also *Lincoln Property Co. No. 41 Inc. v. Law* (1975) 45 Cal.App. 3d 230, 235.

[37] *Fishman v. City of Palo Alto* concerned a referendum of a city resolution permitting construction of a shelter and parking lot. The court determined that the resolution was not subject to referendum because the modification to development plans and permits was an administrative act, not subject to referendum. *Fishman,* 86 Cal.App.3d at 509. Similarly, *Lincoln Property Co. No. 41 Inc. v. Law* concerned a referendum petition requesting that a city resolution approving a development plan be repealed. The *Lincoln* court also determined referendum was unavailable because the action was administrative. *Lincoln Property,* 45 Cal.App. at 234. Thus, these cases stand for the proposition that the people cannot overturn by referendum actions taken by a city that are non-legislative in character.

law that land use entitlements are administrative, adjudicatory decisions.[38] For that reason, we believe that an initiative that purportedly approves or modifies development plans, vests development rights, or directs ministerial issuance of land use permits may impermissibly intrude upon administrative authority.

As discussed above, there is clear judicial authority that issuance of a coastal development permit is an adjudicative act, and thus could not be compelled by way of initiative. What about a situation in which a land use initiative addresses property located outside the coastal zone and includes an amendment to the City's zoning ordinance (a legislative enactment) providing that, within the specific plan or zoning overlay adopted for the project site, only ministerial permits (i.e., building permits) are required for development of the project? This was the situation in *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357.

In *Citizens for Planning Responsibly*, voters in San Luis Obispo County in 2006 approved an initiative measure that amended the County's general plan and zoning ordinance with regard to a 131-acre property known as the Dalidio Ranch. The property was in agricultural use and was near the San Luis Obispo County Airport. The initiative proposed a mixed-use development consisting of commercial, office, residential and agricultural uses, including a four-story hotel, a wastewater treatment plant, and open space and recreational amenities. A citizens group filed a petition of writ of mandate to set aside the voters' approval of the initiative. The trial court granted the writ of mandate on grounds that (a) the specific plan approved under the initiative was "too specific" to constitute a legislative act and (b) the State Aeronautics Act delegates exclusive authority to the County Board of Supervisors to regulate land uses within an airport area of influence. On appeal, the Court of Appeal reversed as to each of these grounds of the trial court decision.

A "normal" project of this scope in San Luis Obispo County would have required the issuance of discretionary permits. What the Court of Appeal decision does not address (and what appears not to have been briefed or addressed in any depth by the parties) is the fact that lodged within the initiative was language that converted the permits required for development of this

[38] *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 518-518 fn. 8.

substantial project into ministerial ones. The fact that this issue was not addressed may be due to the unique procedural history of the case, in which the County defended the initiative in court.

The lack of discussion in *Citizens* on this topic leaves up in the air the question of whether such reclassification of permit type for a single project is authorized. There probably is not a unified opinion among planning professionals and land use attorneys on this issue. Can a project-specific zoning ordinance amendment provide that only ministerial permits will be required for development of a large, complex project, whether approved by the voters or by the City itself? Our opinion is that the enactment of a regulation that establishes a regulatory scheme so wildly different from the normal permit process that applies to all development elsewhere in the City might well run afoul of the principle requiring uniform application of zoning regulations.[39]

B. Analyzing the Role of the Specific Plan in the Initiative

As discussed above, the Paredon Specific Plan played a critical role in Venoco's effort to obtain a complete approval for its proposed project through the initiative process. Not only did the Paredon Specific Plan include site plans and project-level detail, it also provided environmental mitigation measures and a detailed description of the process by which the City would implement the voters' approval. Citing *Yost v. Thomas* (1984) 36 Cal.3d 561, Venoco argued that approval of a specific plan is always a legislative act that is subject to the initiative and referendum power. Should every specific plan be treated in this manner?

Categorical distinctions are generally used to differentiate between legislative and administrative acts in both the land use and initiative/referenda context.[40] However, categorical distinctions cannot be based on labels which do not accurately describe the particular enactment.

In the land use context, when a single agency act has both legislative and adjudicative elements, the reviewing court separately examines each part of the act under the applicable

[39] See e.g., *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal. App. 4th 172 [invalidating a development agreement that ignored statutory procedures and protections of public involvement and deviated from established regulatory regimes such as zoning.]. It may also violate the rule that initiatives may not interfere with essential government functions, which is discussed *infra*.

[40] *Citizens for Planning Responsibly* at 367; *Arnel Development Co.*, 28 Cal. 3d at 59.

standard of review.[41] Similarly, in the context of initiative and referenda, courts have not hesitated to disregard labels and examine specific provisions of a measure, differentiating between legislative and administrative acts.[42]

Yost v. Thomas, 36 Cal. 3d 561 is sometimes cited for the broad proposition that the adoption of a specific plan is a *per se* legislative act.[43] However, the Supreme Court in *Yost* did *not* hold that the adoption of any document labeled a "specific plan" would be categorically deemed a legislative act. As the court acknowledged in *Citizens for Planning Responsibly*, p. 368, the Supreme Court held that "*the legislative aspects of a specific plan* are similar to those of general plans."[44]

What did the Supreme Court mean by the "legislative aspects of a specific plan"? To answer this question, we must begin with an examination of the very broad issue before the Supreme Court in *Yost*.

In *Yost*, the City of Santa Barbara amended the city's general plan, adopted a specific plan, and rezoned certain property, all in furtherance of the Coastal Land Use Plan (LUP) adopted by the City and certified by the Coastal Commission. In the *Yost* litigation, the City argued that, as a general principle, every single land use decision to be made following the adoption and certification of the LUP was "administrative." The Supreme Court disagreed:

> "Although certain actions of a city council may be characterized as 'administrative' and therefore not subject to referendum, not all land use decisions made after a coastal plan has been adopted and approved by the Commission fall into that category. The Coastal

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[41] See, e.g., *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723, 729; *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1625, fn. 13.

[42] See, e.g., *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311 (initiative which "purported to deem [certain] acts legislative" was administrative because it "would have changed the procedure and substance of the implementing decisions" (*Id*., 1322, 1333-1334)); *Fishman*, 86 Cal.App.3d at 511-512 [referendum identified subject matter as "zoning" but court found that measure was administrative]; *Southwest Diversified, Inc. v. City of Brisbane* (1991) 229 Cal.App.3d 1548, 1557-1558 [proponents claimed that court was bound by "generic analysis," but court found that adjustment of zoning boundary under a settlement agreement was an administrative act].

[43] See, e.g., *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 479-480; *W. W. Dean & Associates v. City of South San Francisco* (1987) 190 Cal.App.3d 1368, 1386; *Oceanside Marina Towers Assn v. Oceanside Community Development Com.* (1986) 187 Cal.App.3d 735, 746.

[44] *Yost*, 36 Cal.3d at 570, emphasis added.

> Act does not provide blanket immunity from the voters' referendum power."[45]

In addressing the broad question, the *Yost* Court first held that the adoption and amendment of the general plan and rezoning were "clearly legislative" (*Id.* at 570). The Court then turned to the specific plan:

> "This leaves the question whether the adoption of a specific plan is to be characterized as a legislative act. We have no doubt that the answer is affirmative. Certainly such action is neither administrative nor adjudicative. . . . On the other hand the elements of a specific plan are similar to those found in general plans or in zoning regulations-the siting of buildings, uses and roadways; height, bulk and setback limitations; population and building densities; open space allocation (Gov. Code, §65451). The statutory procedure for the adoption and amendment of specific plans is substantially similar to that for general plans (see Gov. Code, §65507). *It appears therefore that the legislative aspects of a specific plan are similar to those of general plans.* We find support for this decision in *Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 457 (adoption of a "precise" plan is a legislative act) and hold that the adoption of a specific plan by the city council was a legislative act subject to referendum."[46]

The Supreme Court's reference to the "legislative aspects" of a specific plan allows the reasonable inference that a specific plan might include "administrative aspects."[47] However, the *Yost* Court was not called upon to describe those administrative aspects. Its description of the specific plan was general in nature: "The specific plan was a 14-page document covering the 23 acres to be developed, which addressed the problems related to the development of the area."[48] However, we know from other portions of the *Yost* Opinion that the specific plan in *Yost* did not include or compel the issuance of "entitlements" for the project, because the developer in *Yost* had also filed separate applications for discretionary approvals, such as a tentative subdivision map, parking modifications, and development plan (*Id*. at 569).

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[45] *Id.* at 565.

[46] *Yost*, 36 Cal.3d at 570-571, citations omitted, emphasis added.

[47] See, e.g., *Arnel Development Co.*, 28 Cal.3d at 518 [discussion of "'administrative' zoning decisions, such as the grant of a variance or the award of a conditional use permit, as being adjudicatory in nature."]

[48] *Yost*, 36 Cal.3d at 569.

Other than *Yost*, no published opinion expressly or impliedly recognizes that a specific plan might include both legislative and administrative aspects. Therefore, we turn to an analysis of the pertinent statutes.

The Legislature has specifically established that the adoption of a general plan is a "legislative act."[49] The Legislature has not expressly specified whether adoption of a specific plan is legislative or administrative.[50] However, the statutes which govern specific plans demonstrate that the Legislature contemplated that specific plans would be legislative by nature.

Section 65450 describes a specific plan as the manner by which the agency may implement the general plan "for all or part of the area covered by the general plan." Section 65451 sets forth the "required contents" of a specific plan, and describes those contents in legislative terminology. For example, specific plans must include the distribution, location and extent of the uses of land within the plan area, the proposed distribution, location, extent and intensity of essential facilities (i.e., sewer, water, etc.), standards and criteria under which development will proceed, and a program of implementation measures. The Legislature also mandated that specific plans be prepared, adopted and amended in the same manner as general plans.[51] These are doubtless the provisions which prompted the *Yost* Court to compare specific plans with general plans, and acknowledge the "legislative aspects" of a specific plan.[52]

Moreover, within the context of the hierarchy of planning decisions, specific plans are generally recognized as legislative planning and policy documents:

> "The specific plan, if one exists, is the next step down the land use regulation hierarchy ladder from the general plan. The specific plan must be consistent with the general plan and deal with specific land uses, the location, distribution, extent, and intensity of major public facilities, and standards for development and conservation." (Miller & Starr, California Real Estate, §25:7).

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[49] Gov't. Code § 65301.5.

[50] See, Gov't. Code § 65450 *et seq*.

[51] Gov't. Code § 65453.

[52] *Yost*, 36 Cal. 3d at 570-571.

Miller & Starr further explain that zoning ordinances – also legislative acts - fall next in line in the hierarchy (*Id*., at §25:8), and in the same passage they confirm the administrative, adjudicatory nature of land use permits:

> "In some cases, the zoning ordinance provides that specified sensitive land uses which otherwise conform to the applicable zoning designation for the property will be allowed only upon the issuance of a special or conditional use permit, which may be granted or denied in the local agency's discretion based on criteria specified in its ordinance. As with inferior legislative enactments, adjudicatory approvals such as conditional use permits or other discretionary land use permits must be consistent with controlling land use legislation, as embodied in zoning ordinances, specific plans, and general plans."

This land use planning hierarchy compels the conclusion that a specific plan goes beyond its legislative purpose and takes on "administrative aspects" when it intrudes into an agency's administrative, discretionary land use permitting procedures. That is particularly true where, as it did in the Paredon Initiative, a specific plan purports to create a right to the issuance of a permit or other land use entitlement; it is generally recognized that a specific plan does not involve the grant of an entitlement.[53]

Thus, if the specific plan or other purportedly-legislative enactment that is presented as part of an initiative steps in a detailed way into matters that are normally part of an agency's administrative permit process, we believe the agency's City Attorney can claim that that this goes beyond the power that is vested in the electorate through the initiative process.

C. Addressing the Initiative's Elimination of CEQA Review

Plainly one of the strategic purposes for a land use applicant to utilize the initiative process is to take advantage of an exemption from CEQA. However, the "total" land use initiative tests the applicability of that exemption, given that these measures not only adopt the policy framework that would make a particular use permissible, but also mandate that all necessary permits be issued for the development without the exercise of discretion. If the CEQA exemption is inapplicable to "total" land use initiatives, the question becomes whether such a local measure is invalid because it is contrary to CEQA, a state law.

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[53] See, e.g., *City of Poway v. City of San Diego* (1984) 155 Cal. App. 3d 1037, 1047; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 835. fn. 5 [same holding with respect to "community plan"].

At trial, Venoco argued that the Paredon Initiative's avoidance of CEQA review was mandated under the law because the Initiative was voter-sponsored, and thus exempt from CEQA review pursuant to the CEQA Guidelines.[54]

City-sponsored initiatives require CEQA clearance before they are submitted to the voters. Case law has not yet expressly recognized a difference in CEQA treatment between "voter-sponsored" initiatives that seek to enact solely legislative changes and those that seek project approval in an end run around City permit procedures.[55] However, if a City is successful in showing that the initiative at issue has as its intent the compulsory issuance of administrative permits, the argument that prior CEQA compliance is required is strong. This argument will be premised on the argument that an initiative is void if it conflicts with a California statute such as CEQA.

A strictly legislative voter-sponsored initiative is exempt from CEQA review because it is a ministerial act. It is a ministerial act because, unless the agency adopts the initiative whole cloth, the agency has no discretion to refuse to submit the matter to the voters.[56] Moreover, exempting a legislative voter-sponsored initiative from CEQA review is not particularly significant, since the agency would be obligated to conduct CEQA review for any projects that may be proposed in the future pursuant to that legislation.

In contrast, an initiative which compels the issuance of permits for a project is not strictly legislative, and therefore should not be entitled to an exemption from CEQA compliance. This argument gains further weight if the initiative at issue includes measures that on their face appear to be designed to mitigate environmental impacts, as was the case with the Paredon Initiative.

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[54] Title 14, Cal. Code Regs. § 15378(b)(3); see also, *Stein v. City of Santa Monica* 1980) 110 Cal. App. 3d 458 *; Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal. 4th 165. (Venoco also argued that, should the voters approve the Initiative, CEQA review would be conducted by public agencies subsequently reviewing the project, such as the California Coastal Commission and the State Land Commission, which have certified regulatory programs.)

[55] Presumably it a court found that an initiative were impermissible adjudicative, the CEQA argument would never come up. However, to the extent that a court finds that a "total" initiative is legislative and/or does not examine the propriety of the initiative, the court could be asked to examine this CEQA issue.

[56] Title 14, Cal. Code Regs., §15378, subd. (b)(3); *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458; *San Bernardino Associated Governments v. Superior Court* (2006) 135 Cal.App.4th 1106, 1114.

The formulation of mitigation measures under CEQA is a discretionary act.[57] An initiative that includes such mitigation substitutes the voters' discretion for the discretion that CEQA mandates be exercised by the City.[58]

In particular, *Friends of Sierra Madre* should not serve to allow the voters to substitute their discretion for the agency's discretion under CEQA. In *Friends of Sierra Madre*, the Supreme Court examined the regulatory history of CEQA Guidelines section 15378(b)(3) and held that the CEQA exemption applied only to voter-sponsored initiatives, not to an initiative generated by a city council.

> "As the Attorney General suggests, the distinction between initiatives generated by a city council and voter-sponsored initiatives serves a significant governmental policy. Voters who are advised that an initiative has been placed on the ballot by the city council will assume that the city council has done so only after itself making a study and thoroughly considering the potential environmental impact of the measure. For that reason a preelection EIR should be prepared and considered by the city council before the council decides to place a council-generated initiative on the ballot. By contrast, voters have no reason to assume that the impact of a voter-sponsored initiative has been subjected to the same scrutiny and, therefore, will consider the potential environmental impacts more carefully in deciding whether to support or oppose the initiative."[59]

As noted above, *Friends of Sierra Madre* involved a strictly legislative initiative (i.e., the removal of certain types of structures from historic preservation status). The Court's discussion of the voters' "careful" examination of the environmental impacts of legislative matters does not mean that voters have the power to usurp an agency's discretionary, adjudicative powers and responsibilities under CEQA. In fact, in *Friends of Sierra Madre*, the Supreme Court confirmed that the scope of the CEQA exemption for voter sponsored initiatives is limited to the authority granted to the regulators:

> "[T]he California Resources Agency did not intend to exempt from CEQA any project that might cause a significant adverse impact on

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[57] *Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n* (2008) 163 Cal.App.4th 215, 242.

[58] *See, e.g., City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 402.

[59] *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal. 4th 165, 190.

> the environment unless exemption is permitted by CEQA or mandated by other controlling law."[60]

CEQA is to be interpreted to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language."[61] Within this context, there is a serious question as to whether the CEQA exemption provided for the ministerial placement of voter-sponsored measures on ballots extends to an initiative which compels the issuance of permits for a project. While no case law yet addresses this subject expressly as regards applicant-sponsored initiatives, it would seem that CEQA review should be required prior to issuance of a substantive permit issued pursuant to the initiative.

D. Analyzing the Initiative's Consistency with the General Plan / Local Coastal Plan

Any "total" initiative that seeks to bypass the City's normal permit procedures will feature traditional legislative amendments to the City's general plan to accommodate the project, most notably in the Land Use Element. However, it is important to remember that amendments may be necessary to all elements of the General Plan, particularly those elements which contain resource protection policies. In the case of the Venoco Initiative, amendments were made to 16 policies of the General Plan because, absent these amendments, the proposed project violated numerous resource protection policies.

A general plan is a comprehensive, long-term plan for the physical development of the community.[62] The general plan addresses all aspects of development, including housing, traffic, natural resources, open space, safety, land use and public facilities.[63] All land use approvals must be consistent with a city's general plan.[64] For this reason, the general plan has been called the "constitution for all future development."[65] In coastal cities, a local coastal program can become part of the city's general plan and, therefore, part of the foundational land use doctrine in

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[60] *Id.*, 25 Cal.4th at p. 189, emphasis added.

[61] *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.

[62] Government Code §§ 65000 *et seq.*

[63] *Id.*

[64] See *DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 772.

[65] *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 540; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.

that community.[66] Consistent with general plan law, a city may adopt one or more specific plans; a specific plan is a comprehensive plan similar to a general plan that is limited to a specified geographic area.[67]

A general plan must be integrated and internally consistent, both among the elements and within each element.[68] Therefore, an initiative that amends a general plan or zone code must be internally consistent and must be consistent with the general plan as a whole.[69]

Consistency is achieved where a policy or project furthers the overarching objectives and policies of the general plan and does not obstruct their attainment.[70] Inconsistency occurs when a policy or project conflicts with a general plan policy that is fundamental, mandatory, and clear.[71] "The consistency doctrine has been described as 'the linchpin of California's land use and development laws; it is the principle which infuse[s] the concept of planned growth with the force of law . . ..'"[72]

Two types of consistency are required. Horizontal consistency refers to consistency within general plan elements.[73] Vertical consistency refers to consistency between the general plan and lower level planning documents or between those planning documents and land use permits.[74] It is well settled that initiative measures must achieve such consistency:

> "We emphasize that an initiative amendment must conform to all the formal requirements imposed on general plan amendments enacted by the legislative body. The amendment itself may not be

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[66] *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal. App. 4th 477, 494.

[67] Gov't. Code § 65450.

[68] Gov. Code § 65300.5; *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 97 – 98 [general plan held internally inconsistent where one portion of the circulation element indicated roads were sufficient for projected traffic increases, while another section described traffic congestion caused by continued subdivision development].

[69] See *DeVita v. County of Napa* (1995) 9 Cal. 4th 763, n. 12.

[70] *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.

[71] *Families Unafraid to Uphold Rural El Dorado County. v. El Dorado County Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-1342 ("*FUTURE*")

[72] *Corona-Norco Unified School Dist.,* 17 Cal.App.4th at 994.

[73] Gov. Code, §65300.5.

[74] Gov. Code, §§65454 and 65860; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572-573.

> internally inconsistent, or cause the general plan as a whole to become internally inconsistent (Gov. Code, §65300.5), or to become insufficiently comprehensive (*Id.,* §65300), . . . When matters of substance rather than procedure are concerned, courts will not employ a double standard for initiative amendments and general plan amendments enacted by the legislative body."[75]

It is also well established that a single inconsistent general plan policy is sufficient to invalidate a general plan amendment or a specific plan.[76] A ballot measure that adopts a policy inconsistent with the general plan is vulnerable to legal challenge since it is considered "void *ab initio,*" or invalid when passed.[77]

Finally, the requirement of consistency may not be evaded by incorporating a subordination or precedence clause stating that one provision of the general plan controls another provision in the event of a conflict.[78]

Any land use initiative must be reviewed carefully by City planning staff and the City Attorney to insure that it meets the standards set forth above. In the case of the Paredon Initiative, we believed strongly that the Initiative's attempt to carve out exceptions to numerous General Plan/Local Coastal Plan policies that were otherwise uniformly applicable to all other properties across the City was a clear indication that the Initiative was unlawful.[79] The drafters of the Paredon Initiative seemed to recognize this problem as well, and included a precedence clause to address it. However, as noted above, such a short cut is insufficient to achieve the required consistency.

The "total" initiative will test the boundary of how extensively the GP must be amended to accommodate a project that would otherwise be inconsistent with local laws. Can a would-be

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[75] *DeVita,* 9 Cal.4th at 796, fn. 12, emphasis added.

[76] See *FUTURE,* 62 Cal.App.4th at 1341-1342; Gov't Code, §§65300.5 and 65454.

[77] See *DeVita,* 9 Cal. 4th 763, n. 12; *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal. 3d 531, 544 (1990); *Building Indus. Ass'n v. City of Oceanside,* 27 Cal. App. 4th 744, 762 – 63 (1994); *deBottari v. City Council of the City of Norco* (1985) 171 Cal.App.3d 1204, 1212.

[78] See, *Sierra Club v. Board of Supervisors* (1981) 126 Cal. App. 3d 698, 708 [expressly rejecting use of a precedence clause in which the county general plan's land use and open space elements designated conflicting land uses for the same property.]

[79] Among other problems with the drafting was the fact that the Paredon Initiative only amended 16 policies when there were dozens of similar policies which remained unaltered.

applicant turned initiative proponent simply graft project specific exemptions onto policies that are otherwise uniformly applied throughout the City? If this is done consistently throughout the general plan, will this "instant planning" suffice? Or does such "spot" planning inherently violate the overarching purpose of a General Plan or zone code to provide comprehensive development planning?

E. Additional Areas to Look in Reviewing A Proposed Initiative

Depending on the particular facts of the initiative, the issues discussed below may be presented. We provide a brief overview of them here.

1. Unlawful Naming

Because "total" initiatives are designed to benefit a specific project applicant with a particular development, it is likely that the initiative will either specifically (by name) or generally (by description, such as "Owner" or "Operator") name the project's beneficiary.[80] The California Constitution Article II, section 12 restricts the use of naming particular beneficiaries in an initiative. It provides as follows:

> "No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect."[81]

This provision was enacted "to prevent the initiative from being used to confer special privilege or advantage on specific persons or entities."[82]

The Supreme Court has found that the Constitutional naming prohibition was violated where an initiative identified a particular corporation (a consumer advocacy corporation) to perform a function (to advocate the interests of insurance consumers).[83] The Court's holding has

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[80] Even where a particular owner or corporation is not named, a city may also consider a challenge on equal protection grounds to the extent the initiative singles out a particular property. See e.g. *Fry v City of Hayward* (ND Cal 1988) 701 F Supp 179 [invalidating an initiative that banned housing on a former golf course to preserve open space because the property was improperly singled out.].

[81] Cal. Const. Art. II § 12.

[82] *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 832.

[83] 48 Cal.3d at 834-5.

been followed by lower courts in factually similar circumstances to the one that may be presented by a "total" land use initiative.[84]

In the Paredon Initiative, the City believed that the naming prohibition had been violated in several respects. The development agreement that was included in the Initiative (and that was eventually stricken by the trial court) provided Venoco, Inc. with a vested right to develop the project. Moreover, within the specific plan component of the Initiative, Venoco, Inc. was actually named several times as an actor under the specific plan. The Initiative identified the existing Carpinteria Processing Facility and how it would function under the Initiative. Finally, as owner and operator of the CPF, Venoco was specifically granted a number of unusual powers and duties. These included the power to unilaterally decide how to respond to potential Coastal Commission amendments of the initiative, to implement mitigation measures, to determine when to decommission the facility, and to evaluate the project's economic feasibility.

When unlawful naming issues are presented in an initiative, the critical issue becomes whether the offending language at issue can be stricken, thus saving the remainder of the initiative. *Pala Band* and *Calfarm* discuss this issue at length. There are three tests that must be met to allow the offending language to be stricken. The court will determine if the offending language is:

a) grammatically severable - is the remaining text intelligible on its own?

b) functionally severable - is the remaining text "complete in itself and capable of independent application?

c) volitionally severable - would the initiative been adopted by the electorate had they known that the offending language could potentially be invalidated?

In the case of the Paredon Initiative, the City believed that the offending language was non-severable. Among the reasons for this position was that both the initiative itself and the ballot materials, such as the Notice of Intention to Circulate a Petition and the Ballot Arguments (pro and con), specifically referred to Venoco by name. For that reason, the City argued that the voters understood that the Initiative was designed to exclusively benefit a particular property owner and corporation whose identity was inseparable from the initiative, even if the text could

[84] See e.g., *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal. App. 4th 565 [initiative impermissibly defined a private corporation, Servcon, to be the "Applicant" and unlawfully specified powers and duties that applicant had to perform in operating a solid waste facility.].

be amended to get rid of references to Venoco. As discussed above, the trial court did not specifically address the naming prohibition, and the City never received an appellate court ruling on the issue.

Finally, even if the initiative that is proposed does not specifically mention the development proponent by name (for example, by using instead the word "Owner"), this does not end the matter. A reviewing court must construe the language in the initiative "in the context of the [initiative] as a whole and the overall statutory scheme."[85]

2. Impairment of Essential Governmental Functions

A ballot measure that impairs an essential government function cannot be the subject of the initiative process.[86] This constitutional limitation has been relied upon as a basis for voiding an initiative.[87] We believe that this limitation may be useful in addressing "total" land use initiatives, since such measures are necessarily designed to override a municipality's self-rule authority.

In the case of the Paredon Initiative, the City argued that the Initiative impaired three of the City's essential governmental functions as follows:

- Land Use Planning: The Initiative restricted the City's adjudicatory powers, mandated that the City Council find the project consistent with the General Plan, precluded the evaluation of environmental impacts, prevented the City from independently responding to any amendments the Coastal Commission might make to the initiative, and imposed a development agreement which had not been negotiated by the City.

- Fiscal Management: The Initiative precluded the City from expending oil and gas royalties received from the project without prior action of a Citizens Advisory

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[85] *In re Damien V.* (2008) 163 Cal.App.4th 16, 21.

[86] *Citizens for Jobs and the Economy v. County of Orange* ("*Citizens*") (2002) 94 Cal. App. 4th 1311; *DeVita v. County of Napa* (1995) 763, 776 [initiative and referendum power could not be used in areas in which the local legislative body's discretion was largely preempted by statutory mandate]; *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 456 (1982); *Simpson v. Hite* (1950) 36 Cal. 2d 125.

[87] *Citizens*, 94 Cal. App. 4th at 1331 [invalidating an initiative that restricted County functions relating to the conversion of a military base]; *Totten v. Board of Supervisors* (2006)139 Cal.App.4th 826, 844 [invalidating an initiative that interfered with County budgeting authority].

Committee established by the Initiative. The proposed development agreement also imposed limitations on the City's ability to impose taxes, fees and assessments on the project.

- Litigation Authority: The development agreement contained in the Initiative required the City to tender to Venoco the compete defense of any third party challenge to the Initiative, thus controlling the City's discretionary control over litigation.

Notably, the limitation on initiatives that impair essential governmental functions applies even if the particular act could be classified as "legislative" in character.[88] Thus, impairment of essential governmental functions is a potentially important argument for a local agency faced with a "total" initiative, even if a court otherwise characterizes an initiative as legislative.

3. Vague, Ambiguous and Misleading Provisions

A law which does not fairly inform a person of what is prohibited or permitted is considered vague and therefore unconstitutional.[89] Where an initiative's language is drafted in a manner so vague as to be considered unworkable, the courts will strike it down.[90] A "total" land use initiative may suffer from lack of clarity because it attempts to achieve the competing goals of providing enough specificity to allow a project to be initially defined and providing enough flexibility to allow project changes as the development is built and operated.

A number of ambiguous or misleading provisions whose ultimate import was difficult to ascertain were included in the Paredon Initiative, such as the following:

- Because the Initiative blurred the line between the ongoing operations of the CPF and the "new" operations of the project, it was difficult to tell exactly what operations were covered by the Initiative.
- The project description for the project that would be "permitted" by the Initiative was provided in much less detail than that which accompanied the project originally analyzed by the City.

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[88] See, *Newsom v. Board of Supervisors* (1928) 205 Cal. 262.

[89] *Connally v. General Construction*, 269 U.S. 385, 391 (1926).

[90] *Citizens*, 94 Cal. App. 4th at 1334–35.

- The Initiative was vague as to exactly how and to what level environmental impacts of the project would be mitigated.
- The Initiative was vague as to exactly what interest in land was proposed to be offered for dedication to the City for open space and public access purposes.
- The Initiative contained misleading statements as to how much oil and gas royalties the City would receive if the project were developed.

When a complex land use project undergoes normal City permit processing, a tremendous amount of detailed descriptive and analytical data is normally developed. This information provides a substantial benefit to decision-makers, the applicant, and members of the public in understanding the project and its potential impacts and benefits. By definition, most of this sort of material will be missing within the text of any "total" land use initiative that seeks to abrogate the City's traditional land use permitting authority.

Additional substantive legal issues with land use initiatives are summarized in *Curtin's California Land Use and Planning Law, Chapter 14 (Solano Press, 2010).*

V. PROCEDURAL ISSUES RAISED BY "TOTAL" LAND USE INITIATIVES

A detailed discussion of the procedures for qualifying an initiative for the ballot and the City's role in this process is beyond the scope of this paper. There are a number of excellent reference materials which can guide agency attorneys through this process, chief among them *Curtin's California Land Use and Planning Law, supra* and *Ballot Box Navigator: A Practical and Tactical Guide to Land Use Initiatives and Referenda in California (Solano Press, 2003).* If a City has never undergone one of these intense initiative campaigns or a City Clerk is not experienced in this area, we recommend that the City enter into a contract with the County Elections Office to provide assistance throughout the initiative qualification process; this will decrease the likelihood that procedural errors will be committed.

A. Procedural Milestones for an Initiative Measure

To provide some context, we provide below a truncated version of the sequence of procedural milestones in the prosecution of a land use initiative for the ballot, from initial filing of the Notice of Intention to the finalization of election materials for the actual ballot. We have not provided a comprehensive schedule regarding the time periods within which these events must occur. Following our discussion of procedural milestones, we provide some brief thoughts on selected important decision points that will arise during the progress of any land use initiative.

- Notice of Intention - The initiative proponents file with the City Clerk a Notice of Intention to Circulate Petition.[91] This may include a 500 word statement of the reasons for the petition. This is filed at the same time as the initiative text.

- Ballot Title and Summary - At the same time as the Notice of Intention, the proponents file a request with the City Attorney asking that he/she prepare a Ballot Title and Summary for the Initiative.[92] The Ballot Title and Summary must be prepared within 15 days of the measure being filed with the Clerk. The City Attorney must describe the

[91] Elections Code § 9202.

[92] Elections Code § 9203.

purpose of the measure, and the ballot title must be a true and impartial statement of the measure's purpose.[93]

- Publication - Once the Ballot Title and Summary is prepared, the Notice of Intent and Ballot Title and Summary are published by the initiative proponents and the circulation of initiative petitions may commence.[94]

- Initiative Petition - The format of the initiative petition, and procedural matters regarding petition circulation, collection of signatures, and filing of completed petitions, are set forth in Elections Code.[95]

- Election Official Examination of Petition Signatures - When the initiative petitions are filed with the City Clerk, the Clerk must examine the petitions within 30 days to determine if signatures in the proper number and format have been appended to the petitions.[96] The number of valid signatures that have been obtained will determine the date on which the election must be held.[97]

- Certification of Results - By the end of this 30-day period, the Clerk must certify the results of his/her canvass of the petitions to the City Council. Either before the Council meeting or at the meeting at which the results are provided, the Council may order a 9212 report from City staff on the impacts of the initiative. The report must be submitted to the Council, and the Council take action regarding the initiative, within 30 days of the Clerk's certification of the results of petition circulation.[98]

- City Council Action - Assuming sufficient signatures have been gathered to call an election, the City Council's options, after considering the 9212 report, are limited to approval of the initiative or setting it for election.[99]

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[93] If the title is false, misleading or inconsistent it will be subject to challenge via a writ of mandate and expedited proceedings. Elections Code § 9204.

[94] Elections Code §§ 9205, 9207.

[95] Elections Code §§ 9203, 9206, 9210 et seq.

[96] Elections Code § 9211.

[97] Elections Code §§ 9214, 9215.

[98] Elections Code § 9212.

[99] Elections Code §§ 9214, 9215.

- Election Timing –The number of signatures collected and the proximity of the proponent's action with the timing of a special or general election will dictate the timing of the election on the measure.[100]

- Arguments For and Against Ballot Measure - Once the Council calls for the Election, there is a schedule provided in the Elections Code within which initiative proponents and opponents must submit first opening arguments and then (if authorized) rebuttal arguments for and against the initiative.[101] The City Council as a body, or individual members of the City Council, may submit such arguments.

- City Attorney's Impartial Analysis - If requested to do so by the City Council, the City Attorney must prepare an Impartial Analysis of the initiative "showing the effect of the measure on the existing law and the operation of the measure." The Impartial Analysis is filed at the same time as are the opening arguments regarding the initiative.[102]

- Public Examination Period - All arguments and the Impartial Analysis must be available for public review for a minimum of 10 days after the deadline for their filing and before these materials are submitted for formal inclusion in the packet of printed election materials.[103] During this 10 day period, any interested party may file a writ of mandate lawsuit to challenge these materials.[104]

- Election Date - An election will be scheduled and occur according to the schedule dictated by the Election Code.

- Election Results - If approved by majority of voters an initiative will go into effect 10 days after the date the vote on the measure is declared by the legislative body .[105] Thereafter, Initiative cannot be amended except by voters, unless measure has provision allowing the legislative body to amend.

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[100] Election Code §§ 9214, 9215, 1405.

[101] Elections Code § 9219, 9220, 9282 *et seq*.

[102] Elections Code § 9280.

[103] Elections Code § 9223.

[104] Elections Code § 9295.

[105] Elections Code § 9217.

B. Filing A Pre-Election or Post-Election Challenge

When the Notice of Intention is first filed with the City, the City Attorney must immediately and quickly conduct a thorough review of the initiative and determine if it raises legal issues. If it is a "total" land use initiative that intrudes into the City's traditional adjudicative land use powers, legal issues will be presented. The City Attorney should prepare an analysis of those issues and present it to the City Council in closed session pursuant to the "initiation of litigation" provision of Government Code 54956.9(c). We recommend that this closed session be held well within the 15-day period following the filing of the Notice of Intention with the City, so as to preserve the City's ability to file a declaratory relief action before the deadline for preparation of the Ballot Title and Summary is required.

Of course, the City Council can decide that it favors the initiative or that it does not want to become actively involved in the initiative process at all, except to fulfill its obligations under the Elections Code, in which case it would likely not favor any legal action to challenge the initiative.[106] On the other hand, the Council could conclude that the initiative improperly invades the City's traditional adjudicatory land use review process and raises important legal issues that must be addressed. If the Council takes this position, it could authorize a legal challenge to be filed at one of three points: (a) immediately, before the City Attorney prepares the Ballot Title and Summary (this was the path taken by the Carpinteria City Council), (b) after preparation of the Ballot Title and Summary but before the election is conducted, or (c) after the election is conducted.[107]

This choice presents interesting issues. Regarding pre-election challenges, there is case law going both ways as to whether such a challenge is appropriate. It is a truism that the initiative power is one of the most precious rights of our democratic process.[108] There are cases

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[106] The Council may also determine that the measure is sufficiently controversial that it can save the taxpayers money by leaving the litigation to the interest groups which may be opposed to the "total" initiative. This appears to be what occurred in the *Citizens for Planning Responsibly* case. However, if the City considers this option, it must evaluate whether the interest groups are adequately versed in this area of law and appropriately funded to act as the City's proxy.

[107] Alternatively, the City could allow the voters to act on the measure and if it is approved, refuse to enforce the measure as void as a matter of law. Taking this position would then draw a legal challenge from the measure's proponents. This may be an appropriate response in some situations.

[108] A*ssociated Home Builders v. City of Livermore* (1976) 56 Cal. 2d 847.

stating in essence that, once an initiative is filed, it is improper for the City to refuse to place the initiative on the ballot despite any doubts as to the initiative's legal validity.[109] On the other hand, more recent cases authorize the filing of a declaratory relief action when it clearly appears that the substantive provisions of the initiative are invalid.[110] If the City decides that it is appropriate to file a challenge prior to the City Attorney's preparation of the Ballot Title and Summary, we believe the City Attorney should file this action in his or her own name and include within the petition a request for injunctive relief and immediate stay regarding his/her responsibility to prepare the Ballot Title and Summary.

Our experience is that courts may well be reluctant to determine an entire initiative invalid at the pre-election stage, particularly a complex initiative such as the Paredon Initiative. However, where the initiative intrudes into the City's adjudicative procedures, it may be important to establish this legal issue at the earliest point in the process.

Different considerations are created should the initiative be passed by the voters and then the City Council determine to challenge its legality. On the one hand, a number of cases state that this is the preferred way to address an initiative's legality. However, this course can be costly for the City, since processing and holding an election on an invalid measure is an expensive and potentially futile exercise. A post-election challenge also raises political challenges for the City Council, which would then run the risk of being accused of ignoring the will of the voters. This may be an important issue for some judges as well. Finally, filing a post-election challenge also raises the issue of whether the City has an obligation to defend the initiative, particularly if the initiative is also subject to attack by third parties. The issue of whether the City would be required to pay attorneys fees for pro-initiative parties who intervened in such a suit must also be considered.

If the City has doubts about the legality of the initiative but decides to await the results of the election before filing a legal challenge, we believe it would be important that the possible legal defects of the initiative be raised in such documents as the Elections Code 9212 report and the City Attorney's Impartial Analysis.

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[109] See, e.g., *Save Stanislaus Area Farm Economy v. Boars of Supervisors* (1993) 13 Cal.4th 141.

[110] See, e.g., *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769*; Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250.

C. The City Attorney's Preparation of the Ballot Title and Summary and Review of Ballot Arguments

Elections Code 9203 specifically grants the City Attorney the power to determine what the title for the initiative should be; this title may differ from that chosen by the initiative proponents. This can be a very important issue in providing to the voters a clear statement as to what the actual subject of the initiative is, since the ballot title and summary will be in the voter pamphlet.

The ballot title and summary also constitutes primary legislative history as to the meaning of the initiative. Note that, where an initiative text is very long, the actual text of the initiative will not be included in the voter's pamphlet; the voters will only see the City Attorney's ballot title and summary and a reference as to where the full test of the initiative can be obtained.[111] Following the Impartial Analysis (see below), a statement must be provided that a full copy of the measure will be mailed to any voter upon request.[112]

As to the ballot arguments that are provided by proponents and opponents of the measure, the City Attorney's obligation is to assist the Clerk in insuring that these arguments are not "false, misleading or inconsistent" with the requirements of the Elections Code.[113] Material that is personally insulting or totally unrelated to the measure is also not proper for inclusion in the ballot arguments. As with the ballot title and summary, ballot arguments become primary legislative history in any legal challenge as to the meaning and interpretation of the measure.

D. City Attorney's Preparation of the Impartial Analysis

The City Attorney's Impartial Analysis must reflect the independent judgment and objective analysis of the City Attorney, with the goal being to provide accurate information to the voters as to the operation of the initiative and its effect on existing law. Fair mindedness and accuracy should be the hallmark of any Impartial Analysis. The Impartial Analysis may state that the initiative raises unanswered legal questions. If the initiative raises both positive and negative effects for the City, both classes of impacts should be discussed in the Impartial

[111] As noted above, the City Attorney in preparing the summary for the Paredon Initiative identified both the physical location, City Hall, and a website.

[112] Evidence Code § 9280.

[113] Elections Code § 9295.

Analysis. As discussed above regarding the Ballot Title and Summary and the arguments both for and against the initiative, the Impartial Analysis is an important piece of legislative history in any litigation regarding the meaning of the initiative.

E. City's Preparation of an Election Code 9212 Report

We have already discussed above how important an Elections Code 9212 report can be in providing information to the voters regarding the impacts of a "total" land use initiative on the City, including the impacts created by bypassing the City's land use approval and environmental review processes. It can be a useful resource both for the voters and for the City Council in informing their decision as to whether (a) to approve the initiative or set it for election (b) to take a position on the measure. It is also a secondary element of legislative history which may help shape the ultimate interpretation of the initiative if it is implemented and there is a subsequent dispute as to implementation of the initiative.

In order for an effective document to be prepared, however, the City Council may need to authorize a significant investment in staff resources (time, money, energy), which will have to be borne by the City. The City of Carpinteria was fortunate to have sufficient resources available to create a comprehensive 9212 report; Carpinteria also had available to it a significant bank of information to rely on for preparation of the report in the form of analysis related to the abandoned "traditional" Paredon application and its associated environmental document. Finally, preparation of a 9212 report can be characterized by initiative proponents as "meddling" in a process that should be left to the voters. To that end, the City should strive to make the 9212 report as factual as possible and avoid placing judgment or expressing a subjective opinion about the effect of any particular impact

F. Advising the City Council Regarding Taking a Position on the Measure

Expenditure of public funds for the City to develop a position, pro or con, regarding an initiative measure is permissible. Once the City adopts a formal position regarding the initiative, the expenditure of public funds regarding the measure must be kept in strict compliance with applicable law regarding City participation in election campaigns.[114] It is crucial that the City

[114] See the League of Cities guides on ballot measure advocacy available online at: http://www.ca-ilg.org/BallotMeasureLegalIssues and http://www.cacities.org/resource_files/24773.ballot-measure-campaign-rules.pdf

Attorney play an active and continuing role in informing City decision-makers and employees as to the requirements of the law in this area; these efforts should start early in the initiative process.

G. Holding of City-Sponsored Public Education Workshops on the Initiative

When it comes to "total" land use initiatives, we believe that there are considerable advantages in having the City hold educational workshops regarding the initiative, both to explain what its elements actually are and to discuss possible effects of the initiative on the City. Such workshops have the advantage of providing an opportunity to provide education to the voters about a complex matter and to allow questions to be answered. Educational sessions are a permissible activity for the expenditure of public funds, provided that they are not used as a forum for the City to engage in advocacy activities.

Without careful forum control, however, the workshops can become an opportunity for advocates on various sides of the initiative to turn the event into a campaign hearing. Tensions can run high between proponents and opponents of these measures. If the City decides to conduct such workshops, the City should consider a policy restricting public comments to questions only rather than allowing position statements by advocates. The City also needs to consider whether and how it will seek to restrict advocacy props such as banners, campaign buttons, t-shirts and signs. Plainly, any action taken by the City must conform to the requirements of the First Amendment.

VI. TAKE-AWAY ISSUES/BEST PRACTICES REGARDING CITY INVOLVEMENT IN "TOTAL" LAND USE INITIATIVES

Based on our experience with the Paredon Initiative and a review of the case law set forth above, we believe the following best practice advisories can be helpful to any City Attorney confronted with one of these "total" land use initiatives.

A. City Opposition to an Initiative, if Responsibly Presented, is a Potent Factor with the Electorate

In this post-City of Bell era, it is easy to conclude that voters must be cynical about the good faith of public officials in carrying out City business. In addition, should the City ultimately take a position of opposition to the initiative, initiative proponents will certainly take the position that the City is "standing in the way of the voters having their say." However, we believe most voters still believe that City officials do their best to act in the best interests of their constituents.

Assuming that the City Council determines that it wishes to take a position of opposition to the Initiative because it undermines the established land use permit review process, a sober and well thought-out presentation by City staff and the Council as to why such undermining is a bad idea can have a strong impact on voters. We believe most Initiative proponents would agree that such City opposition to an initiative raises the bar considerably for an initiative to be approved by the voters.

B. The City Council Should Stress the Effect of the Initiative on Land Use Planning, Rather than the Merits of the Project which the Initiative Seeks to Approve

As discussed above, City opposition to a "total" land use initiative can be potent. However, this is much more likely to be the case if the City focuses on the impact of the Initiative on the City's land use process, rather than on the merits of the project which the Initiative seeks to approve. If there are citizen groups that are concerned about the merits of the project (i.e., environmental impacts), the City should let those groups focus on such issues independently. As to the underlying project itself, the City's position should be that it will evaluate the merits and impacts of the underlying land use project if and when the project is brought to decision-makers through the regular land use entitlement process. Be mindful of the fact that, if the initiative is not successful, the applicant could return to the City to seek approval

through the traditional processes. In that event, if the elected and/or appointed officials have spoken against the project itself, the applicant may claim the decision-makers are biased, and the City may face claims that the applicant's due process rights in subsequent entitlement hearings have been violated.

C. The City Council Should Always Order that an Elections Code 9212 Report be Prepared

When a "total" land use initiative is proposed, we believe it is crucial that the City Council order that an Elections Code 9212 report be prepared and brought to the Council for consideration. The preparation of such a report has a well-established role in the California initiative process. Because such a report serves an informational function, the expenditure of public funds for its preparation is a legitimate governmental expense.

As was described *supra*, Elections Code section 9212 sets forth a specified list of topics which the report may address. A City Attorney should work closely with staff or city consultants in preparing this report. The City Attorney should be sure that the 9212 report, when prepared, covers all the topics set forth in section 9212, even if the discussion of the topic is limited; as this will demonstrate that the City Council is following the law.

The statute also allows the public agency to include within the report other topics relevant to the initiative. This allows the City the flexibility to address other areas that are unique to the particular measure at issue and to the community involved. For example, some discussion of potential environmental impacts is a valid exercise of the Council's powers under section 9212. To the extent that the project underlying the initiative has not received environmental review, even a superficial analysis may be enlightening for the public and the agency decision-makers. The credibility of such an analysis will be enhanced if the City hires an environmental consultant to prepare the analysis. However, the scope of review will necessarily be limited by the agency's time and resources available to prepare this analysis.

It is proper for a 9212 report to draw conclusions, good or bad, about the effects of the initiative. If there are potentially positive aspects to the initiative, these should be discussed. Whatever conclusions are drawn should be supported by factual analysis. If this is done, hopefully this should insulate the City Council against charges that it is improperly or unfairly interjecting itself into the initiative process.

D. The City Attorney Should Provide an Early and Continuing Education Campaign for City Officials Regarding the Permissible Limits of Public Official Participation in Initiative Campaigns

As soon as circulation of the Paredon Initiative began in Carpinteria, the City Attorney's Office circulated to all public officials a memorandum regarding the proper scope of involvement for public officials in initiative campaigns. We used both our own analysis and the excellent analysis that is publically available from the League of California Cities and the Institute for Local Government. We reinforced this legal advice in the "Legal Issues" section of nearly every staff report regarding the Initiative that was prepared prior to the Council's taking an official position on the Initiative. In each report, we stressed the absolute importance that all public officials adhere closely to the legal principles set forth in the relevant case law (the best recent example being *Vargas v. City of Salinas*).

The campaign rhetoric by citizen proponents in favor and against the Paredon Initiative was very heated. A few public officials wrote letters to the editor of the local newspaper, posted blogs, and took an active role in advancing their personal position regarding the Initiative. By and large, there was very good adherence to the appropriate legal standards by all public officials, and our sense is that there was very little feeling among the electorate that the City and City officials had stepped over the line into impermissible advocacy.

Based on our experience, we strongly recommend that the City Attorney's office take a very strong and sustained position during any initiative campaign to emphasize the importance of adherence to legal standards regarding the permissible scope of involvement by public officials in the initiative process.

E. The City Should Consider Sponsoring a Public Information Program Regarding the Initiative

As discussed above, the City of Carpinteria sponsored two educational workshops regarding the Paredon Initiative. The workshops were well-publicized and well-attended. The announced purpose of the workshops was twofold: for City staff to explain the various elements of the Paredon Initiative, since it was a complex document, and to answer questions. The workshops were conducted by a panel of three City staff, consisting of the City Manager, the Director of Community Development, and a representative of the City Attorney's Office.

Because a quorum of legislative body members was not present, these workshops were not subject to the Brown Act.

Public comments was encouraged at both workshops. Both in the materials advertising the workshops and at the workshops themselves, City staff emphasized that the purpose of the workshops was not to allow proponents or opponents to make campaign speeches, but for the public to ask factual questions which staff would endeavor to answer. While of course there were violations of this ground rule, in general members of the public adhered to this direction. Such adherence was reinforced by strict forum control imposed by the presenters. A City particularly concerned about forum control should consider accepting public input and questions via written submission. These submissions can be reviewed and summarized during a break in the workshop. In this way, when questions are addressed the presenters can avoid the possibility that the event will turn into a campaign forum.

The workshops created a good impression that the City was trying to provide factual information that was sometimes lacking in the campaigns that were being waged regarding the Initiative. Under V*argas v. City of Salinas*, the City is granted broad latitude to organize such educational programs and disseminate educational materials. Any city facing a "total" land use initiative should consider undertaking such an educational program.

F. The City Attorney Should Work Closely with the City Clerk

As soon as a "total" initiative is filed, the City Attorney should meet with the City Clerk and review the sequence of events that is required under the Elections Code. As each of these milestones approaches, check in with the Clerk to determine how things are going. Emphasize to him or her that any issues that may arise in the Clerk's processing of the initiative are important legal issues. Tell the Clerk that you are there to help him or her.

If your city has not had to deal with many local initiatives, consider entering into an agreement with the Elections Department of your county to provide contract services. The County likely will have considerable experience in dealing with sophisticated initiative issues, such as validation of signatures. Insure that the contract is formally approved by the City Council so that it is apparent to the public that the City is treating the initiative seriously and responsibly.

Encourage a good-humored relationship with the Clerk. Initiatives are highly stressful matters for most Clerks (for City Attorneys too!), and of course many wacky things can and will occur in the course of the campaign. Emphasize to the Clerk from the get-go that your mutual goals will be to insure that the initiative is processed fairly and professionally and to have a good time.

G. The City Should Consider whether a Pre-Election Challenge will have Public Benefit Even if Unsuccessful

The odds are against any pre-election challenge succeeding unless the initiative is patently unlawful, given the strong presumption in favor of the initiative power. However; this potential outcome should not necessarily determine the advice a City Attorney gives his or her Council regarding whether to proceed. A pre-election challenge may become a post election challenge should the Council do what the Carpinteria City Council did and allow the initiative to proceed forward while the appeal from the trial court decision was pending. Such a scenario potentially preserves legal issues for appeal in the event that the initiative passes, obviating the need to file a post-election lawsuit. This may also avoid the claim that waiting to file litigation until after the initiative passes represents an abdication of the duty to defend.

VII. CONCLUSION

The "total" land use initiative seeks to fundamentally re-work the City's long-established role of providing adjudicatory review of land use development proposals. This poses important policy questions as to the role of local government in the regulation of land use. Until there is a definitive court ruling addressing directly the issues raised by these initiatives, it will be critical for City Attorneys in jurisdictions where such an initiative is proposed to carefully analyze it and provide advice to his or her client on a variety of complex issues.

A set of documents and legal materials related specifically to the Paredon Initiative in connection with this paper is provided at the League's City Attorney Department website.

VIII. ADDITIONAL RESOURCES

1. The California Municipal Law Handbook, published by CEB, Section 3.80 *et seq*.
2. "Ballot Box Navigator: A Practical and Tactical Guide to land Use Initiatives and Referenda in California" by Michael Durkee *et al*, published by Solano Press Books (2003).
3. "Ballot Box Planning: Understanding Land Use Initiatives in California," published by the Institute for Local Self-Government. Available online at http://www.ca-ilg.org/ballotbox.
4. "Drafting Titles, Summaries and Impartial Analyses" by Sandra Levin and Holly Whatley (2008). Available online at http://www.cllaw.us/papers/Election_seminar--drafting_titles_summaries.pdf.
5. "Current Issues in Elections Law: Challenging the Validity of an Initiative Ballot Measure" by Peter Pierce and Ginetta L. Giovinco (2004). Available online at http://www.cacities.org/resource_files/newCybrary/2004/legalresource/22759.hCurrent%20Issues%20in%20Elections%20Law%20PETER%20PIERCE.DOC.
6. "Ballot Measure Advocacy and the Law – Legal Issues associated with City Participation in Ballot Measure Campaigns," by Steven S. Lucas and Betsy Strauss (2003). Available online at http://www.citipac.org/documents/Ballot.pdf.
7. "Working on a Ballot Measure Campaign – Some Rules for City Officials" by Steven Lucas. Available online at http://www.cacities.org/resource_files/24773.ballot-measure-campaign-rules.pdf.
8. "The Local Initiative in California," by Tracy M. Gordon, published by the Public Policy Institute of California (2004). Available online at http://www.ppic.org/content/pubs/report/R_904TGR.pdf