INITIATIVE AND REFERENDA -- OUTLINE

A. GENERAL

1. Difference between Initiative and Referenda.
2. Charter Cities.
3. Liberal Construction to Favor Initiative/Referendum Rights.
4. The Doctrine of Substantial Compliance.

B. RULES FOR QUALIFYING MEASURES

1. Initiatives.
2. Referenda.

C. PROCEDURES FOR CALLING INITIATIVE/REFERENDUM ELECTIONS

1. Initiatives.
2. Referenda.

D. PRE-ELECTION CHALLENGES

1. Serious Consequence of Waiting for Post-Election Challenge.
2. Procedural Defect.
3. Measure is not Legislative in Nature.
4. Measure Violates Single Subject Rule.

E. OTHER LEGAL CHALLENGES

1. Future Legislative Acts.
2. Delegation to Legislative Body.
3. Interference with Essential Governmental Functions.
4. Matters Beyond the Power of the Electorate to Enact Through the Initiative Process.

F. OTHER CONSIDERATIONS

1. CEQA.
2. Conflicting Measures.
3. False Statements.
4. Strict Confidentiality of Petitions.

A. GENERAL

1. Difference between Initiative and Referendum.

"The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them. (Cal. Const. art. II, sec. 8(a).) "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const. art. II, sec. 9(a).)

In general, an initiative is a proposal by the people, a legislative act placed on the ballot by voters to be decided by voters. In contrast, a referendum is generally a political challenge by voters to an enactment already made by the legislative body. Both types of measures qualify for the ballot through submission of a petition signed by a designated percentage of the electorate.

2. Charter Cities.

In the case of charter cities, it is important to start with a close review of the city charter and any locally adopted election law provision adopted pursuant to that charter. Under Article 2, Sec. 11 of the California Constitution, charter cities are given the discretion to adopt procedures governing initiatives and referenda. This provision of the State Constitution states (emphasis added):

> "(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), **this section does not affect a city having a charter**.
>
> (b) A city or county initiative measure may not include or exclude any part of the city or county from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of the city or county or any part thereof.
>
> (c) A city or county initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure."

Often, the city charter will simply state that California laws will apply to all city initiatives and referenda. However, some charters may provide for rules that diverge from State law or authorize the city council to change some rules by ordinance, in which case it will also be important to review the city's municipal code.

3. The Power of Initiative is "Reserved by the People" and Courts will Liberally Construe in Favor of Initiative/Referendum Rights.

In 1911, California voters amended the state Constitution to provide voters the power to enact initiatives and referenda. The courts will generally go to great lengths to protect the rights of citizens with regard to initiative and referenda:

> "Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. . . . If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

(Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 41.)

Based on this history, the courts have described the right to initiative and referendum as a fundamental right the voters have reserved to themselves, which must be construed in favor of the voter. The right to adopt laws by initiative and referendum is "one of the most precious rights of our democratic process. It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled." (*Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

All presumptions will favor the validity of initiative and referenda measures. Initiative and referenda measures "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

The reluctance of courts to interfere with the right of initiative has been described as either a "judicial policy of liberally construing the power of initiative" or as a "presumption" in favor of the initiative power absent a clear showing of legislative intent to the contrary. (*Empire Waste Management v. Town of Windsor* (1998) 67 Cal.App.4th 714, 718.)

In *Rossi v. Brown* (1995) 9 Cal.4th 688, 711, the California Supreme Court noted that in construing the rights of voters, courts will begin with "the established principle that all reasonable doubts must be resolved in favor of the people's exercise of the reserved initiative power." The Supreme Court further noted, "[t]he initiative power must be construed liberally so as to promote the democratic process established by inclusion of the initiative and referendum in the Constitution." (Citations omitted.)

Consequently, there can be no doubt that California laws favor the right of initiative and construe that right in favor of the proponents who qualify an initiative measure. However, that right is not absolute, and may be subject to other principles and constitutional provisions.

4. The Substantial Compliance Doctrine.

Consistent with principle that courts seek to preserve the exercise of the rights of initiative and referendum, courts have created the doctrine of substantial compliance. Under this doctrine, courts will overlook minor, technical defects of an initiative or referendum petition.

Generally, the proponent of an initiative or referendum petition has the duty to ensure that the petition complies with all statutory requirements that govern the referendum process, including those governing the form of the petition. (*Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, 1342 ["[I]t is the responsibility of the petition proponents to present a petition that conforms to the requirements of the Elections Code"]; *Browne v. Russell* (1994) 27 Cal.App.4th 1116, 1127 [clerk was under no obligation to save proponents from their failure to comply with procedural requirements governing petitions].) Local election officials have a ministerial duty to ascertain whether the procedural requirements imposed by the Legislature have been satisfied. If the official determines that the petition fails to comply with a procedural requirement, the official has a ministerial duty to reject that petition. (*Billig v. Voges* (1990) 223 Cal.App.3d 962, 970 ["city clerk had the ministerial duty to reject appellants' [referendum] petition which was procedurally invalid on its face"]; *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, [affirming election official's rejection of referendum petition for failing to include full text of measure on petition].

Although city clerks are under a duty to reject petitions that do not comply with statutory requirements, courts may determine that a facially defective petition is valid if the petition substantially complies with those requirements. The doctrine of "substantial compliance" is a judicially-created policy that *courts* apply where there has been some, although incomplete, compliance with the requirements of a procedural requirement. (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1013-22; *Zaremberg v. Superior Court* (2004) 115 Cal.App.4th 111, 118-120 [after Secretary of State rejected petition for failing to comply with statutory requirements, court found substantial compliance].) That doctrine does not alter the ministerial duty of *local election officials* to reject petitions that, on their face, fail to comply with explicit statutory requirements. (See *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969; *Myers, supra,* 196 Cal.App.3d at pp. 136-137.)

"A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition." *Nelson v. Carlson* (1993) 17 Cal.App.4th 732, 737 (quoting *Assembly v. Deukmejian, supra,* 30 Cal.3d at 652-53). Accordingly, substantial compliance 'means *actual* compliance with respect to the substance essential to every reasonable objective of the statute.'" *Myers v. Patterson* (1987) 196 Cal.App.3d 130, 136, 138 (quoting *Assembly v. Deukmejian, supra,* 30 Cal.3d at p. 649 (emphasis in original; some internal quotation marks omitted)).

B. RULES FOR QUALIFYING MEASURE

1. Initiatives.

The following are general rules and procedures for the steps related to initiatives. Consult the Elections Code for strict compliance with all rules relating to petition formatting and circulation:

a. **Notice of Intent**. Voters of the city draft the text of the measure and file it with the City Clerk along with the notice of intent to circulate petition. (Cal. Elec. Code § 9202.) The notice of intent may include a statement of the purpose of the measure, not to exceed 500 words. The legislative body may establish a filing fee not to exceed $200, provided that the fee must be refunded if, within one year, the city clerk certifies the petition as sufficient.

b. **Request for Title and Summary**. The city attorney must provide a title for the measure and an impartial summary, in fewer than 500 words, within 15 days of the filing of the notice of intent. (Cal. Elec. Code § 9203.)

c. **Publication or Posting**. The notice of intention filed with the city clerk and the title and summary prepared by the City Attorney must be published or posted by the proponents. (Cal. Elec. Code § 9205.)

d. **Preparation and Circulation of Petition**. After publication or posting, the proponents prepare and circulate the petition. (Cal. Elec. Code § 9207.) Elections Code section 9020 provides that the petition "shall be designed so that each signer shall personally affix . . . [h]is or her *residence* address." That requirement is intended allow the election official to determine during the verification process that the signer is properly registered at his or her residence address and therefore eligible to sign the petition. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638 [petition directing signers to write their address as registered to vote violates Elections Code].) In addition, each section of the petition must have a declaration of the circulator, the person soliciting the signatures, who must be qualified to vote in the city, and the declaration must be in a specific form prescribed by law. (Cal. Elec. Code § 9209.) The circulator's declaration must contain the information required by Elections Code section 104. Subdivision (a)(3) of section 104 requires that the declaration set forth "in the circulator's own hand . . . the dates between which all the signatures to the petition or paper were obtained . . . ." The California Secretary of State has consistently advised that the signatures on a petition may not be invalidated if they are obtained by an unqualified circulator. Rather, the proper remedy is to seek prosecution of the circulator.

e. **Withdrawal of Signatures**. Any voter who has signed a petition may withdraw his or her signature by filing a written request with the elections officer at least one day before the petition is filed. (Cal. Elec. Code § 9602.)

f. **Filing**. Signatures and sections must be filed with the City Clerk within 180 days of the receipt of the title and summary. (Cal. Elec. Code § 9208.) All sections of the petition must be filed at the same time by one or more of the official proponents or persons authorized in writing by the proponents. (Cal. Elec. Code § 9210.)

g. **Facial Examination**. If the city clerk determines, after a *prima facia* examination, that the petition does not have sufficient signatures or does not satisfy the format requirements imposed by the Elections Code, the petition is returned to the filer. If the petition is in proper form and appears to have sufficient signatures, the petition is accepted and the city clerk conducts signature verification to determine if the measure qualified.

To qualify for a special election, the measure must "contain a request that the ordinance be submitted immediately to a vote of the people at a special election," and be signed by not less than 15% of the registered voters of the city according to the last report of registration issued by the County. (Cal. Elec. Code § 9214.)

Otherwise, to qualify an initiative, the petition must be signed by not less than 10% of the registered voters of the city, or in a city with less than 1,000 registered voters, by 25% of voters or 100 voters, whichever is less.

2. Referenda.

While most of rules regarding circulation of an initiative petition will also apply to a referendum petition, there are four major exceptions to the above:

First, proponents have only 30 days from the date the ordinance is adopted to circulate the petition.

Second, there is no title and summary or publication requirement. Proponents may commence circulating the petition as soon as the ordinance is adopted.

Third, the referendum must contain *the full text* of the ordinance or legislative act the proponents are challenging.

Fourth, the number of signatures required to qualify a referendum petition is equal to not less than 10% of the registered voters of the city according to the last report of registration issued by the County, or in a city with 1,000 or less registered voters, by 25% of voters or 100 voters, whichever is less.

For a more complete list of rules and procedures affecting referenda, see Elections Code sections 9235-9247.

C. PROCEDURES FOR CALLING INITIATIVE AND REFERENDUM ELECTIONS

1. Rules for Calling Special Election: Citizen Initiative.

The council must take some action at its next regular meeting, or within 10 days thereafter, when the measure qualifies with signatures equal in number to 15% of the city's registered voters (or 25% or 100 signatures, whichever lesser, if less than 1,000 voters). (Elections Code §9214) There are basically three options at the onset. The Council may adopt the ordinance, call a special election, or order 30-day report. (Elections Code § 9214 (a)-(c).)

When a citizens' petition triggers a special election, the election must be held no less than 88, nor more than 103 days, from the date the election is called. (Elections Code § 1405(a).) All elections must be held on Tuesday. No election may be the day before or after a state holiday. (Elections Code § 1100.) Normally, elections must be held on one of the established election dates. (Elections Code § 1400; Elections Code § 1000.) However, there is an exception for municipal initiative, referendum, or recall elections, so this provision does not apply. (Elections Code § 1003(e).)

There are three rules that can affect the calling of an election to consider a special election triggered by a citizens' petition:

a. If legally possible to hold special election on initiative within 180 days prior to a regular or special election occurring in the city, the special election may be moved to that election date (beyond 103 days). (Elections Code § 1405(a)(1).)

b. If it is legally possible to hold a special election on initiative between statewide primary and statewide general, the special election may be moved be to statewide general date (beyond 103 days). (Elections Code § 1405(a)(2).)

c. Not more than one special election for an initiative measure may be held by a jurisdiction during any 180 day period. In other words, the City may postpone the special election to avoid having two special elections within 180 days (beyond 103 days). (Elections Code § 1405(a)(3)-(4).)

2. Rules for Calling Special Election: Referendum.

The ordinance that is the subject of a referendum is automatically suspended once the referendum petition qualifies. To qualify, the referendum petition must contain signatures equal in number to 10% of the city's registered voters (or 25% or 100 signatures, whichever lesser, if less than 1,000 voters). (Elections Code § 9237)

The City Clerk (or other local elections officials) must transmit a Certificate of Sufficiency to the City Council at the next regular Council meeting. (Elections Code §

9237; Elections Code § 9240; Elections Code § 9114.) The council is not required to take any action immediately, but the targeted ordinance remains suspended.

Eventually, however, the Council must either repeal the ordinance, or place the measure on the next regular municipal election, or call a special election to consider the ordinance. (Elections Code § 9241; Elections Code § 1410.) If the city council chooses to repeal the ordinance, it may not later enact the same ordinance, although the council is not barred from legislating on the same subject as the repealed ordinance. (*Rubalcava v. Martinez* (2007) 2007 WL 4532669.) Failure to repeal the ordinance or call a special election will result in the measure appearing on the ballot at the next regular City election.

If a special election is called, the special election must be held no less than 88 days from the date the election is called. (Elections Code § 1410; Elections Code § 1405(a).) All elections must be held on Tuesday. No election may be the day before or after a state holiday. (Elections Code § 1100.) Normally, elections must be held on one of the established election dates. (Elections Code § 1400; Elections Code § 1000.) However, there is an exception for municipal initiative, referendum, or recall elections, so this rule is will not apply. (Elections Code § 1003(e).)

D. PRE-ELECTION CHALLENGES

In general, courts will disfavor pre-election invalidation of an initiative or referendum measure, particularly where the opponents are challenging the substantive validity of the measure. As stated in *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4-5:

> "We do not reach the other issues raised by petitioners. As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. (Citations omitted.)

The rule that courts disfavor pre-election challenges is based, in part, on the strong presumption of validity and the general policy that the right of initiative and referendum is to be construed in favor of the proponent of a measure. This rule is also almost certainly based on the fact that any legal dispute with an initiative or referendum measure could become moot – i.e., if the measure fails.

1. Serious Consequences of Waiting.

The California Supreme Court noted an exception to the rule that it will not "disrupt the electoral process" by invalidating an upcoming ballot measure. One year after the *Brosnahan* case was decided, the same Supreme Court considered *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, which approved the pre-election challenge to a

reapportionment initiative, removing it from the ballot and distinguishing this case from the policy statement in *Brosnahan*:

> "That principle [disfavoring pre-election challenges] is a salutary one, and where appropriate we adhere to it. However, where the requisite showing of invalidity has been made, departure from the general rule is compelled.
>
> The general rule favoring postelection review contemplates that no serious consequences will result if consideration of the validity of a measure is delayed until after an election. Under those circumstances, the normal arguments in favor of the "passive virtues" suggest that a court not adjudicate an issue until it is clearly required to do so. If the measure passes, there will be ample time to rule on its validity. If it fails, judicial action will not be required.
>
> In this case both state and local election officials -- while not taking any position on the substantive resolution of the case -- have urged the court to decide the matter before the election because of what they consider to be the dire consequences of delay. They point, in part, to the high costs -- estimated at $15 million -- which both state and local governments will be required to absorb if this special election is allowed to proceed, and suggest that if the initiative is in fact invalid this expenditure will be for naught. And they point -- most significantly, in our view -- to the very substantial problems for election officials, candidates, and supporters that would exist if our consideration of this matter were deferred beyond December."

Legislature v. Deukmejian (1983) 34 Cal.3d 658, 665-667

In *Legislature v. Deukmejian* the Supreme Court was reviewing a reapportionment measure, which affects a fundamental right – the right of citizens to vote for public officers. The issue was very time sensitive because, if the measure was adopted by the voters, it would have changed the boundaries for state and federal offices just a few months before the next election. The Supreme Court considered the difficulty that would have resulted if the measure passed, then there was litigation while candidates were running for office in districts where the boundaries were uncertain.

2. Procedural Defects.

Sometimes, a procedural "defect" in a measure will result in judicial intervention prior to the measure's being considered by the voters. A court may rule that the measure

should not be considered by the voters, for example, because it did not qualify under the rules set forth in law for circulation of petitions.

In the concurring opinion in *Brosnahan v. Eu* (1982) 31 Cal. 3d 1, 6, Justice Mosk wrote that while courts should generally decline to hear constitutional challenges to an initiative or referendum until after the election, "this rule applies only to the contention that an initiative is unconstitutional because of its substance." He contends that, if it is determined the measure fails to comply with the procedures required by law to qualify for the ballot, or the electorate does not have the power to adopt the proposal in the first instance the measure must be excluded from the ballot.

Indeed, recently the California Supreme Court strongly indicated that a failure to challenge a procedural defect before the election may result in waiving the right to challenge that defect if the measure is adopted. (*Costa v. Superior* Court, supra, 37 Cal.4th at pp. 1006-07 ["In light of this well-established remedial limitation regarding post-election challenges, it cannot be said that there is no harm in postponing until after the election a determination of the validity of this type of procedural challenge to the petition-circulation process, because after the election the procedural claim may well be considered moot".)

As previously discussed not all procedural defects are fatal. Under the doctrine of substantial compliance, whether a failure to comply with any procedural requirements in the Elections Code will be fatal to an initiative depends upon the nature and purpose of the statutory requirement. (*Ibarra v. City of Carson* (1989) 214 Cal.App.3d 90, 98.) Defects which are mere "technical" defects of form will not affect the validity of an initiative measure if there is "substantial compliance" with all procedures. (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 652.)

In contrast, "actual compliance" (sometimes referred to as "strict compliance") is required if the procedure "is essential to the objective of the statute." (*Assembly v. Deukmejian* (1982) 30 Cal.3d 638, 649.) (See discussion on "The Doctrine of Substantial Compliance," *supra*.)

There are numerous procedural requirements concerning the petition format, notice of intent, publication, circulation, declaration of the circulators, etc. See Elections Code sections 100- 105 and 9201-9210 for most procedural steps.

3. Measure is not Legislative in Nature Or Otherwise Beyond the Power of the Voters to Adopt.

Courts have allowed pre-election challenges to measures on the basis that the electorate did not have the power to enact them since they were not legislative acts. Acts are deemed to be legislative if they declare a public purpose, and make provisions for ways and means of accomplishing that purpose. (*Worthington v. City Council of the City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140-41.)

For example, in *Simpson v. Hite* (1950) 36 Cal.2d 125, the Supreme Court invalidated a referendum eliminating certain proposed sites for courthouses and adding new ones. It held the proposed referendum was not a legislative act, and that it infringed on the power of the Board of Supervisors to implement legislative acts by choosing courthouse locations. In *Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, the Court of Appeals affirmed a decision to strike a referendum to a resolution approving modifications to development plans, which permitted construction of a covered parking structure, as the act was "administrative" not legislative.

Similarly, courts have engaged in pre-election review where an initiative purports to accomplish by ordinance an action that may only be accomplished by a charter amendment. (*City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 105-106.) The Patterson court also explained that the normal severability rules that govern a post-election challenge do not apply if material provisions of a proposed measure is deemed invalid in a pre-election challenge:

> After the election, no harm ensues if the court upholds a mechanically severable provision of an initiative, even if most of the provisions of the act are invalid. In a preelection opinion, however, it would constitute a deception on the voters for a court to permit a measure to remain on the ballot knowing that most of its provisions, including those provisions which are most likely to excite the interest and attention of the voters, are invalid.
>
> (*Id*. at p. 106.)

Whether a court will consider this type of challenge before the election involves balancing the strong presumption against pre-election challenges with "potential costs [that] are incurred in postponing the judicial resolution of a challenge to an initiative measure until after the measure has been submitted to and approved by the voters . . . ." (*Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1030.) In discussing this issue, the Court quoted the following passage from *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1154:

> The presence of an invalid measure on the ballot steals attention, time, and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

4. Measure violates Single Subject Rule.

Article 2, section 8(d) of the California Constitution provides "An initiative measure embracing more than one subject ***may not be submitted to the electors*** or have any effect." A ballot measure may not be acted upon by the voters where such measure

entails more than one subject. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 581-582.)

Although a measure contains a "severance" clause which purports to severe any provision that might otherwise render the initiative invalid, a severance clause will not protect against a violation of the single-subject rule. (*Senate of the State of Cal. v. Jones, supra,* 21 Cal.4th 1142.)

Courts have held that "an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of this parts are "reasonably germane" to each other, and to the "general purpose or object of" the initiative. If a measure contains an "unnatural combination of provisions . . . dealing with more than one subject . . . that have been joined together simply for improper tactical purposes," such measure may violate the single-subject rule. (*Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142 [holding that reapportionment measure which also reduces salaries for legislators and constitutional officers violates the single subject rule].)

In *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, the State Legislature had approved two separate Constitutional amendments to present to the voters. One amendment provided that the membership of each political party could determine its party's nominees, an apparent attempt to counter a state initiative allowing open primaries. The other amendment provided for the sale of surplus government land to pay off bond debt. Both amendments were placed together by the Legislature in the same ballot measure, an act held ***invalid*** by the Supreme Court. While California Constitution article XVIII, section 1 provides that each amendment must be "so prepared and submitted that it can be voted on separately," the rule is essentially the same as the test under Article 2, section 8(d), that the elements be "reasonably germane" to each other and the general purpose of the measure.

Additionally, the result in *Californians for an Open Primary* was that the trial Court ordered the single ballot measure to be broken into two separate measures so voters could consider them separately. The Supreme Court held that "splitting" the measure was improper - the remedy for violation of the single subject rule is that the measure is stricken from the ballot. In this case, however, since the election had already taken place and each measure received majority approval, the Court would not invalidate the result.

E. OTHER CHALLENGES TO LEGALITY OF INITIATIVES AND REFERENDA

While an initiative or referendum may be susceptible to a pre-election challenge because it is not a legislative act, there is no requirement that the challenge be brought prior to the election. Also, it is not unusual for litigation to be instituted before the measure is voted on, but decided after the election, assuming the dispute is not moot due to the defeat of the measure.

Many cases challenging ballot measures are brought on multiple levels (e.g., not a single subject, not a legislative act, and procedures not followed, etc.) The same legal issues that can be raised in a pre-election challenge can also be raised in a post-election challenge.

1. Future Legislative Acts. An initiative measure is invalid if it directs a legislative body to perform a legislative act in the future. An illustration of this is *Marblehead v. City of San Clemente* (1991) 226 Cal. App. 3d 1504, where an initiative required the city council to revise zoning ordinances to reflect the concepts expressed in the measure.

2. Delegation to Legislative Body. When State law provides that certain actions are delegated to the local legislative body, and discretion must be exercised by that body, the courts will find such actions are not subject to control by initiative and referendum. For example, in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal. 3d 491, the Court held that state law enabling local governments to engage in decisions regarding funding and location of highways precluded an initiative measure on the subject. (See also *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1128-29; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 474.)

3. Interference with Essential Government Functions. In *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466, the Court held that a local initiative measure that redefined the term "special tax" and that curtailed the power of the city to raise revenue was an unlawful attempt to impair essential governmental functions through interference with the administration of the City's fiscal powers. *(See also Citizens for Jobs*, *supra*, 94 Cal.App.4th 1311, 1124; 1327-28; *Rossi v. Brown* (1995) 9 Cal.4th 688, 703 ["If essential governmental functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended"]; *Gieger v. Board of Supervisors* (1957) 48 Cal.3d 832, 837-840)

4. Matters Beyond the Power of the Electorate to Enact Through the Initiative Process. As a general matter, acts that would be illegal if taken by the legislative body, are also beyond the power of the people to adopt by initiative or referendum. For example, a proposed initiative measure which, if approved, would result in altering the terms of private parties can not be adopted by initiative. (See e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 [Prop. 103 requirement to cut insurance rates by 20% and prohibiting insurance companies from voiding policies was unconstitutional impairment of contract, but severance clause allows other provisions to take effect].)

Other examples of illegal acts arise in the context of development approvals, i.e., that a measure would result in a "taking" or would create a land use scheme that is inconsistent with the general plan or state land use laws. Two cases illustrating this are

deBottari v. City Council (1985) 171 Cal.App.3d 1204 ("*deBottari*") and *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868 ("*Irvine* case").

In *deBottari*, the Norco City Council amended its general plan to change the land use designation on a particular parcel from "residential/agricultural" (allowing only 0-2 units per acre) to "residential low density" (allowing 3-4 units per acre). Two weeks later, the council adopted ordinances approving zone from "R-1-18" to "R-1-10," allowing homes to be built on 10,000 square foot lots (about 4 per acre) instead of 18,000 square foot lots. The zone change brought the property into compliance with the general plan. A group of residents challenged the council's action to change the zoning, but not the action to change the general plan. The city council refused to act on the petition, recognizing that repealing the ordinance would result in a zoning limit of 2 units per acre, while the general plan allowed 3-4 units per acre, in violation of Government Code section 65860(a). The referendum proponents sued to compel the city council to repeal the zone change or submit the matter to the voters. The court held the referendum could not be voted upon because, if passed, it would result in a "legally invalid zoning scheme," and the decision was upheld on appeal.

In the *Irvine* case, the City Council approved a general plan amendment allowing a 760-acre parcel to be developed to include over 23,000 square feet of general commercial space and between 1,621 and 2,885 residential units. The Council also approved a zoning amendment allowing such development. The 760-acre parcel had previously been zoned "development reserve" which would not allow <u>any</u> immediate development. When voters in Irvine qualified a referendum on the zoning change, but not the general plan amendment, the City Council filed a suit for "declaratory relief." The suit asked the Court to determine if the referendum was defective because of zoning conflicts. The Court ruled the referendum invalid and prohibited the Council from taking action on it.

However, compare the *de Bottari* and *Irvine* cases, with *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, where opponents of Measure D challenged its validity after it was approved. Measure D amended the general plan by revising the urban growth boundary of the eastern Alameda County to reserve less land for urban growth and more land for agriculture and open space. The court held that Measure D was consistent with the general plan since it was possible to read the measure's provisions and find that them substantially compatible with the goals and policies of the general plan.

F. OTHER CONSIDERATIONS

1. Compliance with CEQA.

It is not necessary to conduct an environmental review before qualifying an initiative proposal for the ballot. "The submittal of proposals to a vote of the people of the state or of a particular community" is not considered a "project" under CEQA. (Cal. Code of Regs.15378(b)(3). Therefore, even if a proposed measure would have

significant environmental effects, an EIR cannot be required prior to putting a voter-initiated measure on the ballot. (*Stein v. City of Santa Monica* (1980) 110 Cal. App. 3d 458.)

In stark contrast, a ballot measure placed on a ballot by a city council is considered a discretionary project under CEQA, and environmental review under CEQA is required. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal. 4th 165.)

2. Conflicting Measures.

If provisions of two ballot measures conflict, and if both measures are passed at the same election, the provisions of the measure with the highest affirmative vote shall prevail. (Cal. Const. art. II, sec. 10(b).) For a good example and explanation of this rule, consider *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744.

At the June 7, 1988 primary election, California voters approved Proposition 68 and 73, with Proposition 73 receiving a higher number of votes. Propositions 68 and 73 were each intended to reform the political process, but the methods were different. Prop. 73 created limits on contributions to candidates for state and local offices and limits on total receipts by all candidates, prohibited the use of public funds for campaign expenditures, and prohibited newsletters and mass mailings at public expense. Prop. 68 limited contributions to candidates for State Assembly and State Senate and established a "matching" fund program to assist candidates who adhere to spending limits. A court held the two measures had conflicting provisions and ruled only Prop. 73's provisions shall become law.

3. False Statements.

Proponents of a ballot measure who insert factual misstatements into a measure or include such statements on the fact of the petition run the risk that such statements could invalidate the petition. For example, in *San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, the Court of Appeal reviewed initiative petitions filed and held the petition was void as a result of false statements in the Notice of Intent. The Court held:

> "Appellants misled voters as to the tenor, substance and purpose of their initiative by claiming it was justified by facts which were materially false. In essence the petition stated that the voters should repeal Propositions D and F because the previous election was fraudulent, the funding of the stadium would cost San Franciscans more than the represented limit of $ 100 million, and the two-thirds majority required by Proposition 218 placed the results in question. These misleading falsehoods violated the rationale of section 18600 [prohibiting false or misleading

> statements in voter materials] and justified the trial court's issuance of a writ."

In this case, the court invalidated a close election where the voters of San Francisco had narrowly approved a new sports stadium. The Court held that an elections official had a "ministerial duty" to reject initiative petitions containing misinformation if such misinformation constitutes a "substantial defect."

4. Strict Confidentiality of Petitions.

Initiative and referendum petitions, as well as any memoranda prepared by the elections official in examining the petitions, are not public records and must be kept confidential. (Cal. Gov. Code § 6253.5.) Disclosure of such documents is limited to the elections official and staff. If the measure fails, the proponents may inspect the petitions and memoranda prepared in connection with the petitions. Other officials, such as a district attorney, city attorney, or attorney general, may inspect the petitions, but only if a court order is issued first. Petitions must be retained by the clerk for eight months after certification of the election results. (Cal. Elec. Code § 17200.)

LEAGUE OF CALIFORNIA CITIES

2008 CITY ATTORNEYS
CONTINUING EDUCATION SEMINAR

INITIATIVE AND REFERENDA

PRESENTED BY

RANDY RIDDLE, ESQ.

&

DOUGLAS P. HAUBERT, ESQ.

RANDY RIDDLE, ESQ.
RENNE, SLOAN, HOLTZMAN & SAKAI, LLP
50 CALIFORNIA STREET, SUITE 2100
SAN FRANCISCO, CALIFORNIA 94111
(415) 678-3800

DOUGLAS P. HAUBERT, ESQ.
ALESHIRE & WYNDER, LLP
190TH STREET, SUITE 565
GARDENA, CALIFORNIA 90248
(310) 527-6660