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To: Honorable Mayor Scharf and Members of the City Council
From: Heather Minner, City Attorney
Date: February 13, 2019
Re: Vallco Town Center Specific Plan Project Referendum Petitions

SUMMARY

This memorandum addresses alleged legal deficiencies in two of the four referendum petitions submitted to the City protesting the City Council's approvals for the Vallco Town Center Specific Plan Project ("Project"). At the December 18, 2018, City Council meeting, the City Clerk certified that all four referendum petitions contained sufficient valid signatures to qualify for placement on the ballot or repeal by the City Council pursuant to Elections Code Section 9241. As detailed below, in consultation with the City Attorney's office, the City Clerk has since concluded that one of the challenged referendum petitions (which protests the ordinance rezoning the Vallco property) is procedurally defective and must be rejected because it does not comply with the Elections Code's requirement to include the full text of the challenged ordinance. The City Clerk accordingly informed the referendum proponents on February 13, 2019, that she has rejected that referendum petition.

The City Clerk believes that the other challenged referendum petition (which protests the General Plan Amendment for the Project) "substantially complies" with the "full text" requirement and all other Elections Code requirements. However, under the applicable case law, it is not clear whether the City Clerk (as opposed to a court) has discretion to make such a substantial compliance determination on her own. Accordingly, the City Attorney has recommended that the City Clerk file an action for declaratory relief in Santa Clara County Superior Court to establish whether this referendum petition substantially complies with the full text requirement. At the February 19, 2019, City Council meeting, the City Attorney and the City Clerk will request that the City Council authorize the City Attorney to file such litigation on behalf of the City Clerk.

Once the Court determines whether the referendum challenging the General Plan Amendment substantially complies with the Elections Code, staff will bring the two unchallenged referendum petitions (which protest approval of the development agreement and specific plan for the Project) back to the Council for a determination whether to place them on the ballot or repeal them pursuant to Elections Code section 9241. If the Court determines that the General Plan Amendment referendum substantially complies with the Elections Code, then the City Council would have these same two options with respect to the referendum on the General Plan amendment.

The purpose of this memorandum is primarily to inform the City Council and the public of the City Attorney's recommendations to the City Clerk regarding the two challenged referendum petitions. The only City Council action this memorandum recommends is to authorize the filing of litigation to determine the validity of the referendum petition against the General Plan Amendment.

BACKGROUND

In September and October 2018, the City Council adopted three resolutions and enacted three ordinances in connection with its approval of the Vallco Town Center Specific Plan Project. Opponents of the Project filed a total of four referendum petitions challenging two of the resolutions (No. 18-085, amending the City's General Plan, and No. 18-086, adopting the Vallco Town Center Specific Plan) and two of the ordinances (No. 18-2178, adopting zoning designations and amending the City's Zoning Map, and No. 18-2179, adopting a development agreement). The City Clerk accepted the petitions for signature verification. On December 18, 2018, the City Council received the City Clerk's certification that each referendum petition contained sufficient valid signatures.

In the meantime, the City received two letters from attorneys representing Vallco Property Owner, LLC, the developer and applicant for the Project. The first letter, dated December 6, 2018, claimed that the referendum petition against Resolution No. 18-085 (the General Plan Amendment) failed to include the full "text" of that Resolution as required by the Elections Code. The second letter, dated December 18, 2018, claimed that the referendum petition against Ordinance No. 18-2178 (the Zoning Amendment) similarly failed to include the full "text" of the Ordinance. The two letters are attached to this report as Attachments A and B.

DISCUSSION

The City Attorney's office and outside counsel have carefully reviewed the arguments contained in both letters and discussed these issues with the attorneys for both Vallco and the referendum proponents. *On the basis of that review, the City Attorney's office has recommended that the City Clerk proceed as follows:* (1) seek a ruling from the Santa Clara County Superior Court regarding whether the Referendum Against Resolution No. 18-085 (General Plan Amendment) substantially complies with the Elections Code; (2) reject the Referendum Against Ordinance No. 18-2178 (Zoning Designations and Zoning Map) for failure to actually or substantially comply with the Elections Code; and (3) after the Court determines whether the referendum on the General Plan Amendment substantially complies with the Elections Code, return to the City Council with options on the remaining referendum petitions. These recommendations are discussed in detail below.

1. Seek a ruling from the Santa Clara County Superior Court regarding whether the Referendum Against Resolution No. 18-085 (General Plan Amendment) substantially complies with the Elections Code.

Resolution No. 18-085 amended the City's General Plan to accommodate the development anticipated in the Vallco Town Center Specific Plan. Those amendments included changes to General Plan Table LU-1, which establishes specific allocations for commercial, office, hotel, and residential development throughout the City, including in the Vallco Town Center area. As shown in an exhibit to Resolution No. 18-085 adopted by the City Council, Table LU-1 depicts the new development allocations in underlined red text, and the previous development allocations in blue text with red "strikethrough" lines indicating those allocations have been eliminated. A copy of Resolution No. 18-085 and exhibits, as presented to and voted upon by the City Council on September 18 and 19, 2018, is attached to this memorandum as Attachment C.

Vallco's December 6 letter claimed that the referendum petition challenging Resolution No. 18-085 failed to include the full text of the resolution. Specifically, Vallco claimed the version of Table LU-1 attached to the referendum petition omitted the "strikethrough" lines identifying the prior development allocations eliminated by the General Plan Amendment. Vallco argued that this discrepancy deprived potential petition signers of critical information about the effect of the General Plan Amendment and the referendum.

The City Clerk, in conjunction with the City Attorney's office, determined that the version of Table LU-1 attached to the referendum petition omitted some of the "strikethrough" lines shown in the version adopted by the City Council. Staff further determined, however, that the "strikethrough" lines also were missing from the certified, printed version of Resolution No. 18-085 that the City Clerk maintained in her files and provided to the referendum proponents. A copy of Table LU-1, as it appears in the certified version of the Resolution provided to referendum proponents, is attached to this report as Attachment D.

This certified version—although incorrect—was the version provided to the referendum proponents prior to the circulation of petitions. In response to the Vallco letter, and with the assistance of the City's IT department and vendors, staff subsequently determined that the "strikethrough" lines were inadvertently eliminated during printing of the certified resolution due to a software setting affecting the printing of PDF documents.¹

The City Clerk and City Attorney further determined that the version of Table LU-1 attached to the referendum petition also differed from the certified version provided to referendum proponents. For example, the words "With Vallco Town Center Tier 1" and "With Vallco Town Center Tier 2" were replaced with "With VTC Tier 1" and "With VTC Tier 2." Moreover, some—but not all—of the "strikethrough" lines inadvertently omitted from the certified version of the resolution appear to have been restored in the version of Table LU-1 attached to the referendum petition. A copy of Table LU-1, as it appears in the referendum petition, is attached to this report as Attachment E.

A referendum petition must include the "text" of the challenged resolution or ordinance. *See* Elec. Code § 9238(b)(2). Court decisions have made clear that the relevant "text" includes not only the text of the resolution or ordinance itself, but also any other documents attached to, or expressly incorporated by reference into, the resolution or ordinance. *See Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 419-20. The purposes of the "text" requirement include reducing confusion, informing prospective petition signers regarding the effect of the challenged resolution or ordinance, and providing voters with the

¹ The version of Resolution No. 18-085 available on the City's website continues to contain the same software "glitch" that either shows—or does not show—the strikethrough depending on how the document is printed. Pending completion of our investigation into this matter, we recommended that the City staff make no changes to this document. Pending further clarification from the Court, we likewise recommend that City staff make no changes to this document as it appears on the City's website.

information they need to exercise their right of referendum intelligently. *Billig v. Voges* (1990) 223 Cal.App.3d 962, 966.

The California Supreme Court has held that “substantial” compliance with Elections Code requirements—as opposed to strict “technical” or “actual” compliance—is sufficient to allow a referendum to proceed to the ballot, so long as technical deficiencies do not deprive potential signers of critical information, mislead the public, or otherwise affect the integrity of the electoral process “as a realistic and practical matter.” *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1012-13. This is particularly the case where the deficiency was inadvertent rather than intentional. *See id.* at 1029; *see also MHC Financing Ltd. Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1389-91 (ballot title and summary inadvertently prepared for wrong version of initiative sufficiently reflected initiative’s substance and did not invalidate city’s adoption of initiative ordinance). Other courts have suggested that referendum proponents may rely on the ordinances, resolutions, and exhibits provided by a city in preparing their petitions, and need not conduct their own investigations into what exactly the city might have intended to adopt. *See Lin*, 176 Cal.App.4th at 419.

Here, the City Attorney believes—and the City Clerk agrees—that the version of Table LU-1 attached to the referendum petition substantially complies with the Elections Code’s “text” requirement notwithstanding the omission of some of the “strikethrough” lines shown in the exhibit to Resolution No. 18-085 adopted by the City Council. The “strikethrough” was omitted due to an entirely inadvertent technical error by City staff. City staff then provided referendum proponents with a copy of Resolution No. 18-085 that contained this inadvertent error.

Under the applicable case law, it is our view that referendum proponents are entitled to rely upon the documents provided to them by City officials in preparing referendum petitions. Moreover, even without the “strikethrough,” it is reasonably clear from the context in which Table LU-1 appears in the referendum petition that the underlined, red text is new text added by the challenged resolution, and that the figures shown in blue in the table were replaced by the new text. Finally, the other changes in the referendum petition table made by the referendum proponents, although apparently intentional, do not materially affect the meaning of the table, and if anything appear to have been intended to improve the readability of the table compared to the version provided by the City.

These conclusions are not free from doubt. One Court of Appeal decision invalidated a referendum petition that omitted three words from the title of the challenged ordinance, finding the omission created ambiguity as to the ordinance's effect. *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, 1340-41. That case, however, did not involve a referendum proponent's reliance on a city's inadvertent error in attachments to the challenged ordinance. The case also was decided prior to *Costa* and must be read in light of the Supreme Court's subsequent determination that an "inadvertent good-faith human error" will not invalidate a petition unless, "as a realistic and practical matter," the error undermines the integrity of the electoral process or frustrates the underlying purpose of the statutory requirements. *Costa*, 37 Cal.4th at 1027-28. On balance—and considering that courts generally will uphold the exercise of the referendum power wherever reasonably possible—the City Attorney agrees with the City Clerk that the referendum petition against Resolution No. 18-085 substantially complies with the Elections Code.

That said, it is unclear under the applicable court precedents whether the City Clerk has the authority to determine on her own that the petition is substantially compliant. A city clerk's evaluation of a referendum petition is generally limited to comparing the petition itself with relevant statutory requirements, a ministerial exercise that does not allow for substantial discretion or subjective judgment. *See Lin*, 176 Cal.App.4th at 420-21; *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 133-34.

Accordingly, our office has advised the City Clerk that the most appropriate course of action under these circumstances is for the City Clerk to file an action for declaratory relief—essentially, a request that the Superior Court determine whether the referendum petition substantially complies with the Elections Code. Such an action is particularly appropriate here, where there is some legal uncertainty, and where any decision by the City Clerk—either to accept or reject the petition—would almost certainly result in litigation by either Vallco or the referendum proponents. Accordingly, the City Attorney recommends that the Council authorize the initiation of litigation on behalf of the City Clerk.

2. _____ Reject the Referendum Against Ordinance No. 18-2178 (Zoning Designations and Zoning Map) for failure to actually or substantially comply with the Elections Code.

Ordinance No. 18-2178 amended the zoning designations applicable to parcels within the Vallco Town Center Specific Plan and made corresponding changes to the City's official Zoning Map. A copy of Ordinance No. 18-2178, as adopted by

the City Council and provided to the referendum proponents by the City Clerk, is attached to this report as Attachment F.

Vallco's December 18 letter claimed that the referendum petition against Ordinance No. 18-2178 "fail[ed] to include the full-text" of the ordinance and contained "wildly inaccurate exhibits." Specifically, Vallco asserted that the version of the Zoning Map attached to the petition was "substantially and meaningfully different" from the Zoning Map attached to Ordinance No. 18-2178. A copy of the Zoning Map attached to the referendum petition is attached as Attachment G.

The City Clerk, in consultation with the City Attorney's office, determined that the version of the Zoning Map attached to the referendum petition differs in numerous respects from the Zoning Map attached to Ordinance No. 18-2178. The deviations from the Zoning Map adopted by the City Council are substantial and material enough to create confusion and undermine potential signers' understanding of the effect of the ordinance. *See Hebard*, 65 Cal.App.4th at 1340-41 (incorrect ordinance title in petition created ambiguity and multiple interpretations of how ordinance might affect particular parcels); *Chase v. Brooks* (1986) 187 Cal.App.3d 657, 664 (petition omitting exhibit describing property affected by ordinance failed to inform prospective signers of effect or breadth of ordinance).

Moreover, the deviations in the version of the Zoning Map attached to the referendum petition are entirely due to actions taken by the referendum proponents. Unlike with the General Plan Amendment, there were no inadvertent good faith errors by City staff in providing the proponents a version of the document that differed from what was actually adopted by the City Council.

Accordingly, and on the advice of the City Attorney, the City Clerk has determined that the referendum challenging Ordinance No. 18-2178 does not actually or substantially comply with the Elections Code. Under the applicable case law, the City Clerk thus has a legal duty to reject the petition against Ordinance No. 18-2178 as procedurally defective. A copy of the City Clerk's February 13, 2019, Receipt Rejecting [this] Referendum Petition is attached as Attachment H. Pursuant to the Elections Code, there is no further action for the City Clerk, or the City Council, to take in connection with this referendum petition.

3. Return to the City Council with options on the remaining referendum petitions after the Court determines whether the referendum on the General Plan Amendment substantially complies with the Elections Code.

As noted above, the City Clerk on December 18, 2018, certified that all four referendum petitions had sufficient valid signature to qualify for placement on the ballot or repeal by the City Council pursuant to Elections Code section 9241. Neither Vallco nor anyone else has identified any defects in the remaining two referendum petitions, which protest the City Council's adoption of Resolution No. 18-086 (approving the Vallco Town Center Specific Plan) and Ordinance No. 18-2179 (approving the Vallco development agreement). Accordingly, the City Council must ultimately determine what actions to take with respect to these two referendum petitions (i.e., whether to (1) repeal one or both of the challenged enactments entirely; (2) place one or both of them on the ballot for the "next regular municipal election occurring not less than 88 days after the order of the election"; or (3) place one or both of them on the ballot for a special election occurring not less than 88 days after the order).

The Elections Code does not specify any particular deadline for the City Council to take one of these specified actions, and the "next regular" municipal election on which the referendums could potentially appear is not until November 3, 2020. Although there is no published case law directly on point, it is possible that a court might conclude that the City Council must take one of the authorized actions within a reasonable period of time.

Under the circumstances, and because the City Council's decision with respect to these two referendums may depend upon the outcome of the declaratory relief action that we recommend the City Clerk file regarding the General Plan Amendment, we recommend that the City Council not make any decision on whether to repeal or place these two referendums on the ballot until after the Court has issued a decision in that case. Accordingly, we have recommended that City staff return to the City Council for possible action on the two unchallenged referendum petitions once the court has issued a decision regarding whether the General Plan Amendment referendum petition substantially complies with the Elections Code. If the court determines that the General Plan Amendment referendum petition does substantially comply with the Elections Code, the City Council would consider possible action on that referendum petition as well at the same time.

Attachments:

A – Dec. 6, 2018, letter from Sean Welch regarding alleged defects in referendum petition against Resolution No. 18-085

B – Dec. 18, 2018, letter from Sean Welch regarding alleged defects in referendum petition against Ordinance No. 18-2178

C – Resolution No. 18-085 and all exhibits, *as presented to and voted upon by the City Council on September 18 and 19, 2018*

D – Table LU-1, as it appears in the certified version of Resolution No. 18-085 *provided to referendum proponents*

E – Modified Table LU-1, *as it appears in the referendum petition*

F – Ordinance No. 18-2178 (including the Zoning Map and other all exhibits), *as adopted by the City Council and as provided to referendum proponents*

G – Modified Zoning Map, *as it appears in the referendum petition*

H – City Clerk's February 13, 2019, Receipt Rejecting Referendum Petition

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