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Our Neighborhood Voices
Brand-Huang-Mendoza Tripartisan Land Use Initiative Committee

Re: Interpretation of Initiative 21-0016A1

Dear Mr. Brand, Mr. Heath, Ms. Huang, Ms. Mendoza, and Mr. Richards:

This firm writes at your request to provide our analysis of the scope of Initiative 21-0016A1 ("the Initiative"). Specifically, you have asked us to examine whether, as presently drafted, the Initiative could reasonably be interpreted to allow local governments to avoid compliance with the California Environmental Quality Act (CEQA), the Fair Employment and Housing Act (FEHA), or other anti-discrimination measures in state law.

It is our opinion that, under widely applicable rules of statutory construction, that the Initiative would not be interpreted to allow local governments to pre-empt the above listed state laws. We arrive at this answer by consulting the Initiative's plain language, and confirm this interpretation through the application of principles of statutory interpretation, as set forth in detail below.

Factual Background

The Initiative is a proposed amendment to the California Constitution. The Initiative adds Section 4.5 to the California Constitution, providing that county charters, general plans, specific plans, ordinances, and regulations that regulate the zoning, development or use of land in unincorporated areas of counties are deemed a county affair, and therefore shall prevail over a conflicting state statute. Similarly, the Initiative adds Section 5.5 to the Constitution, applying the same principal of local primacy to the provisions in city charters, general plans, specific plans, ordinances or regulations that establish land use policies or regulate zoning or development standards within California cities. The Initiative also provides that, for non-charter counties or cities, the general plan, specific plan, ordinance or regulation of such city prevails over conflicting general laws.

The Initiative specifically establishes that certain local provisions address statewide concerns if the local provision conflicts with state law regarding the California Coastal Act, the siting of a power generating facility (under specified circumstances), or the development or

construction of a water, communication or transportation infrastructure project for which the Legislature has made a declaration of a statewide concern.

In the uncodified introduction to the Initiative, the measure sets forth the intent of people in adopting the measure. These declarations include an explanation of the measure's purpose:

> "The purpose of this measure is to ensure that all decision regarding local land use controls, including zoning law and regulations, are made by the affected communities in accordance with applicable law, including but not limited to CEQA (Public Resources Code §§ 2100 et seq.), the California Fair Employment and Housing Act (Government Code §§ 12900-12996), prohibitions against discrimination (Government Code § 65008), and affirmatively furthering fair housing (Government Code § 899.50)."

The declarations also express concern regarding "[n]umerous state laws that target communities for elimination of zoning standards . . . that eliminate or erode local control over local development and circumvent [CEQA], creating the potential for harmful environmental impacts to occur."

According to the information provided to us, questions have been raised by others regarding the scope of the local control provided for in the Initiative. Some have questioned whether the Initiative would allow local governments to enact local laws that conflict with or supersede CEQA, FEHA, or other state anti-discrimination laws.

Legal Analysis

The Initiative is a constitutional amendment. In construing the meaning of a constitutional amendment, the courts are instructed to apply the same principles that they apply to the construction of statutes. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) The court's "fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose." (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) Courts look first at the language of an initiative, but the language "must also be construed in the context of the statute as a whole and the [initiative's] overall ... scheme." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) "Absent ambiguity, [the court] presume[s] that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543.) Where there is ambiguity in the language of the measure, "[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14.)

Courts considering the interpretation of a constitutional amendment generally begin their analysis with the codified provisions of the initiative measure. The codified provisions of the Initiative utilize similar language for counties, charter cities, and general law cities to describe the scope of the laws in which local laws will prevail over conflicting state laws: "a general plan,

specific plan, ordinance or regulation . . . that regulates the zoning, development, or use of land," is deemed to prevail over a conflicting state law. In considering whether such provisions would allow a locality to enact a law that conflicted with the requirements of CEQA or FEHA, a court would have to consider whether those statutes "regulate the zoning, development or use of land." CEQA is a statute that aims to "develop and maintain a high-quality environment" and to "require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality." (Pub. Resources Code, §21001.) CEQA does not directly regulate the use or development of land. A hypothetical local law that stated a specific type of development project was exempt from CEQA review would not be regulating the use or development of land, but would be regulating the process by which a development application is considered. FEHA likewise does not directly regulate the use of land, but establishes a civil right to seek, obtain, and hold housing without discrimination because of race, color, religion, sex, gender or other protected classifications. A hypothetical local law that permitted discrimination in housing would not directly regulate the use of land. The language of the Initiative does not support an interpretation that allows local governments to create their own exemptions to CEQA or FEHA.

This conclusion is only bolstered by turning to the statutory scheme as a whole, including the Initiative's declarations and statement of purpose. Uncodified statements of intent may be used to aid in the interpretation of constitutional provisions. (*People v. Allen* (1999) 21 Cal.4th 846, 860–861.) The Initiative plainly declares that all decisions regarding local land use should be made "in accordance with applicable law" and specifically lists "CEQA . . . the California Fair Employment and Housing Act, . . . prohibitions against discrimination, . . . and affirmatively furthering fair housing. . . ." The Initiative also identifies as a specific problem the state laws that have allowed development to "circumvent [CEQA], creating the potential for harmful environmental impacts to occur." These provisions make clear that the Initiative is not intended to allow local government to *evade* CEQA, but to require them to comply with it in the approval of land use and development projects by eliminating state exemptions from CEQA that have been included in "[n]umerous state laws that target communities for elimination of zoning standards." To conclude that an Initiative that states as part of its declaration of purpose that local land use decisions should be made in accordance with CEQA and FEHA, actually intends for local governments to be able to pass ordinances that conflict with those statutes would conflict with the fundamental principle of statutory construction: to effectuate the intent of the legislative body that enacted the measure. The California Supreme Court has employed this approach to interpreting constitutional initiative amendments. In *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, for instance, the Court noted that while an initiative amendment did not repeal certain statutes, the express statements in the measure's statement of purpose established without a doubt that the electorate intended to repeal those statutes by enacting the initiative. (*Id.* at p. 1038.)

The structure of the Initiative's codified provisions includes exemptions, and some may argue that the absence of CEQA or FEHA from these exemptions indicates an intent to include them in the scope of state laws that local ordinances can preempt. However, the listed exemptions all pertain to specific types of land use or development activities. CEQA and FEHA are not land use or development activities. The absence of CEQA or FEHA from the list of

exemptions is consistent with the types of activities that are exempted, and does not reflect an inconsistency in the measure or an intent to permit local governments to enact laws that directly conflict with CEQA or FEHA.

CONCLUSION

Under the generally applicable rules of statutory construction, it is our opinion that the Initiative would not permit local ordinance or regulations to conflict with CEQA's requirements or with antidiscrimination provisions in FEHA or other state laws.

Respectfully,

Beverly Grossman Palmer
STRUMWASSER & WOOCHER LLP