



MEMORANDUM

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TO: HONORABLE MAYOR & MEMBERS OF THE CITY COUNCIL
FROM: FRED M. GALANTE, CITY ATTORNEY *F.M.G.*
DATE: JULY 28, 2017
RE: MEASURE M – POSSIBLE AMENDMENT TO SAME TO ESTABLISH A BY-DISTRICT(S) ELECTION SYSTEM FOR PROJECTS SUBJECT TO THE MEASURE

I. INTRODUCTION & BACKGROUND

You have asked us to consider whether Measure M, a Council initiative adopted by the voters in 1988, could be amended by the voters to change its voter approval requirement from an at-large (or city-wide) election system to a by-district (or geographic area) election system. For the reasons that will follow, we are of the considered opinion that the voters of the City of Chino could affect such an amendment should the City Council determine to submit the same for voter consideration.

A. Any Change to “Measure M,” Codified at Chino Municipal Code § 20.15.020, May Only Be Accomplished Through The Passage Of A Ballot Initiative Repealing Or Amending The Measure.

“Measure M” prohibits increasing the maximum density of any land designated for a residential use within the city or converting any land designated for a nonresidential use within the city to a residential use, excepting school sites designated in the general plan or a specific plan, or development agreements approved by the city prior to November 8, 1988, without prior voter approval. Under California law, any change to a voter-approved zoning designation, either in whole or in part, must be approved by the voters. (*See*, Cal. Elec. Code § 9217; *see also*, *Mobilepark West Homeowners Association v. Escondido Mobilepark West*, 35 Cal.App.4th 32 (1995) [city council adopted ordinance purporting to clarify and implement existing rent control initiative measure declared invalid].)

Measure M specifically provides the following:

“A. Notwithstanding any other provision of the general plan, *the maximum density of any land designated for a residential use within the city shall not exceed the density for such land established by the zoning map and the zoning ordinance of the city, or any development agreements in effect on November*

8, 1988, excepting senior housing projects. However, the city council may reduce the density of any land designated for a residential use.

B. Notwithstanding any other provision of the general plan, *any land designated for a nonresidential use within the city shall not be converted to a residential use, excepting school sites designated in the general plan or a specific plan, or development agreements approved by the city prior to November 8, 1988.* However, the city council may convert any land designated for a residential use to any other nonresidential use, and may also change uses among lands designated for nonresidential uses.”

B. In 2016, the City Council Adopted Ordinance No. 2016-007 Changing the System for Elections to the City Council From At-Large System to a By-District System.

In 2016, the City Council adopted Ordinance No. 2016-007 changing the method of electing members of the City Council from an all at-large election system to a by-district election system for four (4) members of the City Council and retaining an at-large election system for the directly elected Mayor.¹

¹ Those four council districts are as follows:

Council District 1 shall comprise all that portion of the City beginning at the intersection of Francis Avenue, Telephone Ave, and the City's northern border; thence proceeding easterly along Francis Avenue and to Central Ave; thence proceeding southerly along Central Ave to Schaefer Ave; thence proceeding westerly along Schaefer Ave to Monte Vista Ave; thence proceeding northerly along Monte Vista Ave to Riverside Drive; thence proceeding westerly along Riverside Dr to Ramona Ave; thence proceeding northerly along Ramona Ave to Walnut Ave; thence proceeding westerly along Walnut Ave to the City border; thence proceeding clockwise along the City border to the point of beginning.

Council District 2 shall comprise all that portion of the City beginning at the intersection of Francis Avenue and Central Ave; thence proceeding southerly along Central Ave to Walnut Ave; thence proceeding easterly along Walnut Ave to Magnolia Ave; thence proceeding southerly along Magnolia Ave to Riverside Drive; thence proceeding easterly along Riverside Drive to Mountain Ave; thence proceeding southerly along Mountain Ave to Schaefer Ave; thence proceeding easterly along Schaefer Ave to the City border; thence proceeding counter-clockwise along the City border to Phillips Ave and continuing clockwise along the City border to Francis Ave approximately 200 years west of Central Ave; of Central Ave; thence proceeding easterly along Francis Ave to the point of beginning.

Council District 3 shall comprise all that portion of the City beginning at the intersection of the City's eastern border and Schaefer Ave; thence proceeding westerly along Schaefer Ave to Mountain Ave; thence proceeding northerly along Mountain Ave to Riverside Drive; thence

That ordinance found and determined that the City had received a letter asserting its at-large electoral system violated the California Voting Rights Act, and threatened litigation if the City declined to adopt by-district election system in time for the 2016 City Council elections. While the letter did not contain any evidence of a violation, the City concluded that the cost of defending against a claim under the California Voting Rights Act would be extremely high, even if the City is successful, and that such an expensive defense would severely burden the City's budget and curtail the City's ability to provide needed services to its residents.

Accordingly, in reliance on Government Code § 34886, the City Council changed the method of electing members of the City Council of the City of Chino so as to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution, as set forth in Section 14031 of the California Voting Rights Act. It did so by adopting Chapter 2.06 of the Chino Municipal Code, codified at Section 2.060.010 through 2.060.040.

The ordinance created four (4) council districts, with specific geographic boundaries. Only voters within each council district could vote for candidates to the City Council from that district. Candidates for election to the City Council must also be residents of the council district from which they are running for election. The only exception to these rules is for the election of the Mayor, which remains an at-large seat on the City Council elected by the voters city-wide.

II. BALLOT INITIATIVE TO AMEND “MEASURE M”

Under California law, a ballot initiative to amend Measure M may be submitted to the voters of the City of Chino by Council initiative. The law and procedure underlying this process is detailed below.

proceeding westerly along Riverside Drive to Magnolia Ave; thence proceeding northerly along Magnolia Ave to Walnut Ave; thence proceeding westerly along Walnut Ave to Central Ave; thence proceeding southerly along Central Ave to Merrill Ave (also known as Manuel Gonzalez Drive); thence proceeding easterly, southerly and easterly along Merrill Ave (also known as Manuel Gonzalez Drive) to Magnolia Ave; thence proceeding southerly along Magnolia Ave to Kimball Ave; thence proceeding easterly along Kimball Ave to the City's eastern border; thence proceeding counter-clockwise along the City border to the point of beginning.

Council District 4 shall comprise all that portion of the City beginning at the intersection of Kimball Ave and the City's eastern border; thence proceeding clockwise along the City border to Walnut Ave; thence proceeding easterly along Walnut Ave to Ramona Ave; thence proceeding southerly along Ramona Ave to Riverside Dr; thence proceeding easterly along Riverside Dr to Monte Vista Ave; thence proceeding southerly along Monte Vista Ave to Schaefer Ave; thence proceeding easterly along Schaefer Ave to Central Ave; thence proceeding southerly along Central Ave to Merrill Ave (also known as Manuel Gonzalez Drive); thence proceeding easterly, southerly and easterly along Merrill Ave (also known as Manuel Gonzalez Drive) to Magnolia Ave; thence proceeding southerly along Magnolia Ave to Kimball Ave; thence proceeding easterly along Kimball Ave to the point of beginning.

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A. The California Constitution Expressly Provide For The Power Of Initiative.

“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).) In general, an initiative is a proposal by the people – a legislative act placed on the ballot by voters to be decided by voters. This type of measure qualifies for the ballot through submission of a petition signed by a designated percentage of the electorate.

Initiatives may *only* be applied to legislative acts and not to adjudicatory acts. (*Devita v. Napa County* (1995) 9 Cal. 4th 763.) Legislative acts generally involve the formulation of rules to be applied in all future cases, while adjudicatory acts generally involve the application of a fixed rule to a specific set of existing facts. (*City of San Diego v Dunkl* (2001) 86 Cal.App.4th 384, 399; *Citizens for Jobs & the Econ. v County of Orange* (2002) 94 Cal.App.4th 1311, 1332.) However, we are satisfied that the power of initiative could be lawfully applied to Measure M for two reasons.

(i) The court has held that initiative powers can be applied to zoning and re-zoning ordinances. (See, *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511; *Associated Homebuilders v. City of Livermore* (1976) 18 Cal.3d 582.)

(ii) The same has also been held with respect to general and specific plans. (See *Devita v. Napa County* (1995) 9 Cal.4th 763; *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765; *Nelson v. Carlson* (1993) 17 Cal.App.4th 732.)

B. Council-Initiated Ballot Initiative

California law provides that the City Council of any city may amend or propose new law by ballot measure. Specifically, California Election Code § 9222 states that a city council may, on its own, submit a measure for voter approval *without a petition*:

"The legislative body of the city may submit to the voters, without a petition therefor, a proposition for the repeal, amendment, or enactment of any ordinance, to be voted upon at any succeeding regular or special city election, and if the proposition submitted receives a majority of the votes cast on it at the election, the ordinance shall be repealed, amended, or enacted accordingly. A proposition may be submitted, or a special election may be called for the purpose of voting on a proposition, by ordinance or resolution. The election shall be held not less than 88 days after the date of the order of election."

Accordingly, the City Council, in addition to any powers it may already have to enact new law or amend existing city law, may submit a measure doing the same to the voters. Cities frequently place measures before the voters, as authorized by Elections Code § 9222. In fact, some laws, such as those imposing or increasing taxes or fees, may not be adopted *unless* there is first a vote of the people.

However, as detailed below, while measures placed on the ballot by citizen petition drive do not require compliance with the California Environmental Quality Act ("CEQA"), a council-initiated ballot measure must either comply with CEQA or be exempt from CEQA, just as if the Council had enacted the measure directly.

C. **These Initiative Powers Would Allow the City Council to Submit a Ballot Measure to the Voters to Amend Measure M to Make the Same Congruent With the By-District Council Electoral System**

The question presented is, given that councilmembers are now elected by-district, is there any legal impediment to changing Measure M to also be an election by-district. Real property proposed to be converted to residential use will be located in one or more council districts. The voters most directly impacted by either the re-zoning of property to residential or the increasing of residential densities are the residents of the council district(s) within which such property is located.

Given the breadth of the initiative powers of the people, and given further the breadth of the City Council's authority to place measures before the voters (discussed above), we are of the legal opinion that the City Council could, in its sound discretion, place a ballot measure before the voters to amend Measure M to create a by-district ballot measure system for projects which are impacted by Municipal Code § 20.15.010. Also, in the event that a particular project crosses Council District boundaries, the ordinance could be drafted so as to require multiple Council District elections.

As noted above, any ballot measure to amend Measure M to establish a by-district election system would be lawful because such a measure would meet the test of a "legislative act," an act involving the formulation of rules to be applied in all future cases. However, a Council initiative is also subject to constitutional requirements like any other statute. (*Rossi v Brown* (1995) 9 Cal.4th 688; *Hawn v County of Ventura* (1977) 73 Cal.App.3d 1009 [court invalidated initiative that discriminated between voters in city and voters in county as violative of equal protection]; *Citizens for Responsible Behavior v Superior Court* (1991) 1 Cal.App.4th 1013 [anti-gay-rights initiative]).

Whether changing the voting system for projects subject to Measure M from an at-large system to a by-district system would be viewed by the courts as a denial of equal protection has never, so far as we have been able to determine, been raised or tested. The argument would seem to be that, while changing a property designation to residential or increasing the residential

density of a property is limited to a specific geographic area, the “impact” of such changes could be felt city-wide in the form increased traffic, city-wide impacts on roads, police services, park and recreations services, and general city services such that all residents of the city should be allowed to vote on the same.

Of course, the contrary argument has been noted above. It could be further argued that, while there may be limited city-wide impacts from a project subject to Measure M, those impacts are inconsequential such that voting on the same by-district (rather than city-wide) raises no constitutional issues of moment.

III. ELECTION PROCEDURE & COST.

If the Council proposes a ballot measure pursuant to Elections Code § 9222, the legislative body shall “[i]mmediately order a special election, to be held . . . at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city.” (Cal. Elec. Code § 1405(a).) The rules governing such a special regulation are detailed *supra*.

A. Election Type: Special vs. Regular Election

A council-initiated measure may be put on the ballot of a special or regular election, at the Council's option, so long as the Council also complies with the timing requirements for the same (detailed *infra*). (Cal. Elec. Code § 9222.)

C. Rules For Calling Special Election

i. Timing.

Council-Initiated Measure – Election *Must* Take Place Not Less Than 88 Days From Election Order. If the Council calls a special election to place a measure before the voters, the special election must be held ***not less than 88 days*** from the date the election is ordered (i.e the date the council gives notice of the election, which it is required to do at its next meeting or within 10 days of the qualification of the petition). (Cal. Elec. Code § 9222.) However, there is no “maximum” notice requirement, only a minimum. Hence, the City must call an election at least 88 days in advance, but could order the election 100 days, 150 days, 200 days, or more in advance of the election.

The timing rules, detailed below, apply to an election:

1. All elections must be held on Tuesday. (Cal. Elec. Code § 1100.)
2. No election may be the day before or after a state holiday. (Cal. Elec. Code § 1100.)

3. Normally, elections must be held on one of the established election dates. (Cal. Elec. Code §§ 1000, 1400².) However, there is an exception for municipal initiative, referendum, or recall elections, so this provision does not apply to the instant situation. (Cal. Elec. Code § 1003(e).)

4. If it is legally possible to hold a special election on an 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). (Cal. Elec. Code § 1405(a)(1).)

If it is legally possible to hold a special election on initiative between statewide primary and statewide general, the special election may be moved to statewide general date (beyond 103 days). (Cal. Elec. 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). (Cal. Elec. Code § 1405(a)(3)-(4).)

ii. Rules & Deadlines Regarding Impartial Analysis/Ballot Arguments.

1. The typical documents related to a ballot measure include the following:

- a. City Attorney's Impartial Analysis of the measure.
- b. Arguments in Favor of the Measure.
- c. Arguments Against the Measure.
- d. Rebuttal to Arguments in Favor of the Measure.
- e. Rebuttal to Arguments Against the Measure.

2. Impartial Analysis.

When directed by the council, the City Attorney must prepare an impartial analysis on a city measure. The analysis must not exceed 500 words. The analysis explains the legal effect of the measure on existing law and the operation of the measure. (Cal. Elec. Code § 9280.)

² Established Election dates include:

- (a) The second Tuesday of April in each year;
- (b) The first Tuesday after the first Monday in March of each odd-numbered year;
- (c) The first Tuesday after the first Monday in June of each year;
- (d) The first Tuesday after the first Monday in November of each year; and
- (e) The first Tuesday in February in years divisible by 4 (presidential primary years). (*Id.*)

3. Ballot Arguments.

The proponents may file an argument in favor of the measure and the city council may file an argument against the measure. Arguments may not exceed 300 words. (Cal. Elec. Code § 9282.) If the city council has previously approved the application of Cal. Elec. Code § 9285, the proponents and the city council may submit rebuttal arguments which do not exceed 250 words. Cal. Elec. Code § 9285.

Arguments “for” and “against” a measure must be filed on a date fixed by the elections official within 14 days of the date the election is ordered. (Cal. Elec. Code § 9286.)

Rebuttal Arguments are not mandatory, but may be authorized by the Council. (Cal. Elec. Code § 9285(b).) If authorized, the rebuttals shall be due no later than 10 days after arguments are filed. (Cal. Elec. Code § 9285(a)(4).) There are no additional specific statutory deadlines for approving documents related to a ballot measure.

4. Public Examination Period.

There is a mandatory “public examination period” that begins on the day after the arguments and rebuttals are filed and extends for ten (10) calendar days. (Cal. Elec. Code § 9295.) The purpose for the public examination period is to allow members of the public to see the arguments and to decide whether to sue to have the arguments changed. Documents subject to public examination during this period can only be challenged if a lawsuit is filed during the public examination period.

4. Other Deadline Considerations.

While there are no specific statutory deadlines for these documents other than those mentioned above, the elections official (i.e. the City Clerk) will need sufficient time to ensure that printing deadlines are met. If ballot materials will need to be translated into Spanish or other languages, additional time is necessary.

D. Election Costs

The Registrar of Voters provides this *estimate* of costs for a stand alone election for your preliminary planning purposes. Actual costs will be applied in compliance with OMB A-87 and will include labor and overhead, supplies, services, and other expenditures incurred during the election. Invoices and spreadsheets outlining actual costs may be examined following receipt of all invoices related to the election upon request.

The calculation of *estimates for stand alone* elections is based upon a projection of total jurisdictional participation and an average cost per voter. The total jurisdictional participation is calculated by taking the current number of registered voters 35,014 as of February, 2017, and projecting a 10% increase in voter registration. The average cost per projection formulae are

based upon experience over past elections of this type. For a stand alone election, we are estimating \$5.62 per voter. In addition, the cost of including the measure information in the sample ballot is estimated to be \$15,000.

Based on the above, the total cost estimate for a stand alone election regarding a City of Chino ballot measure is: **\$175,000+/-**.

IV. CEQA Compliance.

The California Environmental Quality Act (“CEQA”) requires environmental review of a project prior to its consideration by a public agency. (Cal. Pub. Resources Code § 21061.) If review of the project concludes that it may have a significant effect, an environmental analysis, which may include a full Environmental Impact Review (“EIR”), is required to be completed before the project is approved.

A ballot measure placed on a ballot by a city council is *not exempt* from CEQA and *is* considered a discretionary “project” under CEQA such that environmental review under CEQA is required. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165.) In the case of a Council-initiated ballot measure, there is also some uncertainty over whether compliance with CEQA must be achieved prior to placing the measure on the ballot, or prior to the election.

Under CEQA, “approval” of a project means the decision by the agency which commits the agency to a definite course of action regarding the project. (*Lee v. City of Lompoc* (1993) 14 Cal.App.4th 1515, 1523-24.) In some cases, the courts have construed the act of calling for an election as the decision which “commits” the agency with respect to the project. For example, in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, the Supreme Court held the City of Sierra Madre should have conducted an EIR before calling an election to vote on a measure. The Supreme Court held:

“We conclude, therefore, that initiative measures generated and placed on the ballot by a public agency are not exempt from CEQA. ***Before placing any such measure that may lead to voter approval of a project on the ballot, the agency must comply with CEQA.*** If compliance leads to the preparation and consideration of an EIR, when that process is final the information contained in the EIR must be made available to the electorate for its consideration ***prior to the election.***”

On the other hand, in *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199 (“*City of Albany*”), the Court of Appeal looked at a ballot measure to authorize a card club at the City’s race track facility. The ballot measure included, among other things, a zoning amendment and development agreement. The Court concluded that the decision to place the “zoning amendment” on the ballot did not commit the City to any course with respect to the card club project. However, the City’s approval of a “development agreement,” contingent upon

the approval of the voters, was considered an act committing the City to a particular course with regard to the project.

A possible argument could be made that the discretionary act would be the approval by voters of a ballot measure, and therefore, the Council only need comply with CEQA before the election date. However, there is some compelling case law to argue the opposite position – that compliance must be reached prior to placing a measure on the ballot. Taking a position that the Council may place a measure on the ballot, then comply with CEQA before the election date, would likely result in bringing the City Council into litigation with a substantial risk of an adverse decision. Consequently, we believe that the Council should only consider options which clearly comply with CEQA (or are exempt from CEQA) before placing a measure on the ballot.

Some measures are categorically exempt under CEQA. For example, CEQA Guidelines provide for a range of actions exempt from CEQA for various reasons, such as (a) where the nature of the action only protects the environment (habitat protection measures), or (b) it is not a critical action in the development cycle (property acquisition is exempt but seeking development approval is not).

Finally, it should be noted that a council's ministerial action of calling for a special election (as opposed to drafting and proposing the measure itself), does not trigger CEQA review. (*Lee v. City of Lompoc* (1993) 14 Cal.App.4th 1515 [holding that CEQA did not apply to the city's act of calling a "discretionary" election pursuant to the California Elections Code and that CEQA's definition of a "project" does not include the submittal of proposals to the electorate].)

V. CONCLUSION

We are comfortable that, should the City Council in its sound discretion, wish to change the elections system for development projects subject to Measure M from an at-large (or city-wide election) to a by-district(s) (or limited geographic election), there is no legal prohibition on the same. Should the City Council wish to proceed in this direction, we would then request Council direction to prepare the necessary ordinance and resolution(s) for public consideration and possible action.

[END OF MEMORANDUM]