

Memorandum

Date: July 11, 2006

To: Robert Zweben
Albany City Attorney

From: Fredric D. Woocher
Beverly Grossman Palmer

Re: Preliminary Legal Analysis of Albany Shoreline Protection Initiative

Pursuant to Elections Code section 9212, this memorandum provides a preliminary legal analysis of the proposed initiative measure entitled the “Albany Shoreline Protection Initiative” (the “Initiative”). As we explain below, the analysis concludes that although the Initiative as a whole appears to constitute a valid exercise of the local electorate’s reserved initiative power, there are substantial questions regarding the validity of several specific provisions of the Initiative. Because these aspects of the measure are quite novel, if not unprecedented, their validity has not previously been addressed by the courts, and it is therefore difficult to predict with any certainty how a court might rule in the event a legal challenge were raised to the Initiative. Nevertheless, given the questionable validity of some of the Initiative’s provisions, it is quite likely that litigation will ensue if it is adopted, if not before then in a pre-election challenge.

SUMMARY OF THE INITIATIVE

As set forth in its statement of purpose, the “Albany Shoreline Protection Initiative” specifies guiding policies and procedures for the future planning of privately held property in the Albany Waterfront area, defined as all lands within the territorial boundaries of the City of Albany lying west of the I-80/580 Freeway. After making a series of legislative “findings” regarding the significance of the Waterfront and the need to enact a comprehensive plan for the future development of the area that preserves the shoreline and surrounding area as an open-space resource while still protecting the City’s revenues, the Initiative contains the following principal provisions:

- The Initiative amends the Albany General Plan by adding one new goal and six new policies to the Conservation, Recreation & Open Space Element and the Land Use Element. These general plan amendments provide that:

(1) any future development or redevelopment of the privately held property in the Albany Waterfront shall only occur pursuant to a Specific Plan adopted in accordance with the procedures and policies enacted by the Initiative;

(2) there must be at least a 500-foot setback from the water’s edge for commercial development on all but the northern or eastern borders of the

privately held property in the Waterfront;

(3) the Specific Plan and any zoning for the Waterfront shall maximize the area as an open-space resource, shall preserve as much as possible the existing open space of the Race Track and the privately held property at the Waterfront, and should minimize visual impacts of any commercial development;

(4) the total amount of square footage and nature of uses for commercial development within the Albany Waterfront shall be minimized, consistent with allowing the property owner to obtain a return on its investment that meets statutory and constitutional mandates;

(5) the purpose of any approved commercial development within the Waterfront is to provide sufficient revenues to at least replace the annual revenues that the City, School District, and Library are currently receiving from the uses of that property; and

(6) all forms of gambling shall be prohibited at the Albany Waterfront with the exception of pari-mutuel betting on horse races and the operation of related satellite wagering facilities.

- The Initiative mandates the immediate initiation of a Shoreline Protection Planning Process for the purpose of creating a Specific Plan and, if necessary, corresponding General Plan and zoning amendments for the privately held property at the Albany Waterfront. The key features of this planning process include:

(1) the creation of a nine-person Citizens' Task Force to guide the planning process under the auspices of the City's Planning Agency. Each member of the City Council appoints one member of the Task Force, and one member is appointed by each of the following environmental groups: Citizens for the Albany Shoreline; Sustainable Albany; Citizens for East Shore Parks; and the Sierra Club. The Task Force's duties include hiring a consultant with experience in sustainable development to prepare the Specific Plan and its associated environmental review documents; serving as the Lead Agency under the California Environmental Quality Act for preparation of an Environmental Impact Report; and giving "final approval" to the language of the Specific Plan. The City is required to supply appropriate staff and legal counsel to the Citizens' Task Force;

(2) as part of the planning process, the consultant retained by the

Task Force is also to arrange for a “competent economic feasibility study or studies” to determine the minimum amount and type of development at the Albany Waterfront that is necessary to avoid a taking of the property owner’s constitutional rights and to replace the revenues that the City, Library, and School District currently receive from the property;

(3) the Task Force shall hold a minimum of five open community meetings to collect public comment for use in preparing the Specific Plan and two public hearings on the draft plan prior to approving the Specific Plan. The Task Force shall comply with the Brown Act, California’s Open Meeting law;

(4) in addition to the public comment, the Task Force should be guided in preparing the Specific Plan by certain specified principles in order to protect and restore wildlife habitat and to provide for recreational enjoyment of the waterfront, including the location of a small nature interpretive center and facilities for small watercraft, and opportunities for hiking, bicycling, and play areas within the privately held property at the Albany Waterfront. All development approved on the property should adhere to ecologically sensitive, sustainable principles in building, landscaping, and transportation;

(5) after approval by the Task Force, the Specific Plan and any accompanying general plan and zoning amendments shall be forwarded to the City Council for consideration following the appropriate City and State procedures for such plans. The City Council shall hold at least one public hearing on the Specific Plan and shall review it for compliance with the requirements of the State planning law and the Initiative. Neither the Albany Planning and Zoning Commission nor the City Council may approve any amendments or changes to the Specific Plan and any associated amendments to the General Plan or Zoning Ordinance except upon a four-fifths vote by each body; and

(6) upon determining that the Specific Plan and any associated amendments to the General Plan and Zoning Code meet legal requirements, the Albany City Council shall order the Specific Plan and accompanying amendments placed on the ballot for consideration by the voters of Albany at the next regularly scheduled City municipal election following their submission to the City Council.

- In order to give the Task Force the time and opportunity to develop the plan for the Waterfront, the Initiative includes a “moratorium” on approvals of any

development of the privately held property at the Albany Waterfront, as well as on consideration of any rezoning of the property. The moratorium takes effect immediately upon passage of the Initiative and is effective for a period of two years or until the Specific Plan is approved by the people of Albany, whichever occurs first.

- The Initiative contains a standard Severability Clause, providing that if any part of the measure is for any reason held to be invalid, it is the intent of the people that the remaining portions remain in full force and effect.

LEGAL ANALYSIS

I. IN GENERAL, THE SHORELINE PROTECTION INITIATIVE APPEARS TO CONSTITUTE A VALID EXERCISE OF THE LOCAL ELECTORATE'S INITIATIVE POWER

The initial legal issue that is raised regarding the Shoreline Protection Initiative is whether it is a legislative act that constitutes a proper exercise of the citizen's initiative power. An initiative that does not enact a statute or a law is not a valid exercise of the initiative power. (See *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 694.) In particular, although it is well-established that "general plans can be amended by initiative" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775), an initiative measure may be considered "an improper exercise of the electorate's initiative power because rather than amending the general plan, it directs the city council to do so." (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1506 ("*Marblehead*").)

In *Marblehead*, the Court of Appeal considered a voter-enacted initiative requiring certain levels of transportation, police, fire and emergency services to be maintained before new development may be approved in the City of San Clemente and providing that "the general plan of the City shall be deemed to be amended to contain these concepts and enforced as such by the City." (*Id.* at p. 1507.) The court determined that the initiative was not a valid exercise of the initiative power because that power extends only to "legislative acts." (*Id.* at p. 1509.) Emphasizing that "[i]t is the substance not the form which controls" whether an initiative enacts legislation (*ibid.*), the court concluded that the measure did not "directly amend" the City's general plan: "In effect, it constitutes a resolution by the voters declaring that the city's general plan should be revised to reflect the 'concepts' expressed in the measure. The actual amendment of the general plan is left to the city council. Which elements of the general plan are affected and how the substantive terms of [the initiative] are to be incorporated into these elements is unexplained." (*Id.* at p. 1510 (emphasis in original).) The Court noted that "[w]hile it might be argued that the electorate could amend a general plan and direct the city council to revise the city's zoning ordinances to comply with it," the initiative at issue went "beyond that" by "direct[ing] the city council to amend both the general plan and the zoning ordinance. This type of measure is not within the electorate's initiative power." (*Ibid.*)

The circumstance contemplated by the court in *Marblehead* — an initiative amending the general plan and directing the city council to revise the city’s zoning ordinances to comply with it — arose a few years later with an initiative adopted by San Diego County voters. In *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565 (“*Pala Band*”), the Court of Appeal applied *Marblehead*’s analysis to an initiative that amended certain provisions of the San Diego County’s general plan and then “direct[ed] the County to make all necessary amendments to ordinances, rules and regulations, the General Plan, subregional and community plans and the Zoning Ordinance.” (*Id.* at p. 572.) The court acknowledged that portions of the initiative did “not propose ‘direct’ amendments to the laws or the General Plan” (*id.* at p. 577), but it distinguished these provisions from the initiative invalidated in *Marblehead*:

“Here, the voters said precisely how the General Plan is to be amended — Section 7A changes the land use element Sections 7C and 7D merely tell the County to enact any necessary amendments to ensure the General Plan amendment will take place. Such enabling legislation promotes, rather than violates, the requirement that a general plan reflect an integrated and consistent document.” (*Ibid.*)

The *Pala Band* Court thus concluded that voters can, by initiative, instruct the legislative body to enact the ordinances necessary “to ensure consistency with” general plan amendments included in the initiative. (*Ibid.*)

The Shoreline Protection Initiative falls somewhere between the initiatives considered in *Marblehead* and *Pala Band*, and for that reason it is not possible to definitively determine how a court would analyze a challenge to the Initiative on the ground that it does not constitute a legislative act. As noted above, several provisions of the Initiative do not directly amend the City’s general plan or enact a new Specific Plan for the Albany Waterfront area, but instead merely direct the City to initiate a Shoreline Protection Planning Process and provide “guiding principles” for the content of the Specific Plan. (See, e.g., Initiative, §§ 6, 8(d).) To that extent, the Shoreline Protection Initiative is much like the initiative at issue in *Marblehead*, which merely “constitute[d] a resolution by the voters declaring that the city’s general plan should be revised to reflect the ‘concepts’ expressed in the measure.” (*Marblehead*, 226 Cal.App.3d. at p. 1510.) On the other hand, the Initiative does *directly* amend several policies and goals in the City’s general plan (Initiative, § 5), and it establishes a detailed planning process for enacting a new Specific Plan for the Waterfront, including creating a Citizens’ Task Force to implement that process and mandating the precise procedures by which the Specific Plan must be adopted (*id.*, § 8). Furthermore, the “guiding principles” contained in the Initiative for preparation of the Specific Plan are more specific and more detailed than the general “concepts” included in the *Marblehead* initiative, requiring that the Specific Plan provide “[t]o the maximum extent feasible” for the “reopening and restoration of creeks, restoration of wetlands and other habitats, natural expansion of existing beach and dunes, location of a small nature interpretive center that may include a restaurant or café within the 500-foot setback, location of recreational facilities for kayaks and other small watercraft (consistent with BCDC policies) at the water’s edge, public art, public restroom facilities, and completion of the San Francisco Bay Trail,” and that all

development at the Waterfront “should, at a minimum, qualify for Silver Leadership in Energy and Environmental Design (LEED) certification and, whenever feasible, Platinum LEED certification.” (*Id.*, § 8(d).) These provisions are much more like the “enabling legislation” approved as a proper initiative in *Pala Band*.

Although the issue is thus not entirely free from doubt, on balance, we believe the Shoreline Protection Initiative would likely be upheld by a court as a proper exercise of the electorate’s legislative power. The critical distinction between an improper initiative that merely articulates a series of “concepts” reflecting the views of the voters and one that properly enacts substantive legislation is that, *in addition* to providing a statement of policy, the lawful initiative also provides the ways and means for its implementation. As the classic judicial formulation describes a legislative enactment, “[l]egislative acts generally are those which declare a public purpose and make provisions for the ways and means of its accomplishment.” (*Marblehead*, 226 Cal.App.3d at p. 1509 [quoting *Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509].) Indeed, as the Supreme Court noted in *American Federation of Labor v. Eu*, *supra*, “it is common for statutes, including initiative statutes, to contain a section which declares policy and provides a guide to the implementation of the substantive provisions of the measure.” (36 Cal.3d at p. 694.)

The Shoreline Protection Initiative both declares general policies for the future development of the Albany Waterfront and provides a means for the implementation of those policies through the creation of a new Specific Plan for the Waterfront area. Unlike the measure at issue in *Marblehead*, the Initiative *does* directly enact specific amendments to the General Plan; it does not leave that task to the discretion of the City Council without any further guidance. To the contrary, the Initiative spells out in often-painstaking detail precisely how the Specific Plan should be adopted and what its contents should include. And although it is technically the case that a specific plan is considered to be a component of the general plan, rather than a separate “zoning ordinance,” we believe that the Initiative’s directive to adopt a Specific Plan for the Waterfront area that conforms to the stated policies set forth in the Initiative is comparable to the type of permissible direction to “revise the city’s zoning ordinances to comply with the initiative’s general plan amendments” that was expressly upheld in *Pala Band* and implicitly approved in *Marblehead*.

Moreover, as a policy matter, we believe the Shoreline Planning Process set forth in the Initiative is more akin to the traditional planning process than an alternative approach under which a select group of initiative proponents create their own Specific Plan and present it to the voters on a “take it or leave it” basis. In that respect, because an initiative embracing the latter approach would plainly be lawful, we believe it reasonable to presume that what might be perceived as a less-drastic alternative embodied in the present Initiative — which provides certain minimum standards and “guiding principles,” but allows for additional public input and procedural protections in formulating the final product — would find favor from the courts, as well.

In sum, especially in light of the longstanding “judicial policy to apply a liberal construction to [the initiative] power whenever it is challenged in order that the right be not improperly annulled”

(*Associated Home Builders etc. Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591), we believe a court would probably find the Shoreline Protection Initiative to constitute a valid exercise of the electorate's reserved legislative power. Nevertheless, the question is likely to be litigated, because a legitimate argument exists that in directing the City to create a Specific Plan for the Waterfront without specifying the precise *contents* of that Plan, the Initiative runs afoul of the *Marblehead* ruling. As noted above, these are complicated issues that have not yet been fully fleshed out in judicial decisions, and there is consequently no precedent that directly addresses the type of hybrid approach to adopting a Specific Plan that is contained in the Initiative. Furthermore, as we discuss below, even if the Initiative as a whole were deemed to constitute a proper legislative act suitable for adoption by initiative, that is not to say that certain specific provisions of the Initiative are not likely to face serious scrutiny from the courts in a potential legal challenge.

II. THE INITIATIVE'S PROVISIONS ESTABLISHING THE SHORELINE PROTECTION PLANNING PROCESS MAY CONFLICT WITH CERTAIN ASPECTS OF THE ALBANY CITY CHARTER AND LIKELY VIOLATE ARTICLE II, SECTION 12, OF THE STATE CONSTITUTION

A. The Duties the Initiative Assigns to the Citizens' Task Force May Conflict With the Role of The Planning and Zoning Commission, and Possibly the City Council, Under the Albany City Charter, But The Conflicts Are Not Likely to Result in Invalidation of the Entire Initiative

One of the central elements of the Shoreline Protection Initiative, as described above, is its establishment of a "Shoreline Protection Planning Process" that creates and designates a "Citizens' Task Force" to develop a Specific Plan for the Albany Waterfront in conformity with the Initiative. (Initiative, § 8.) Specifically, the Initiative provides that upon its passage, "the City's Planning Agency shall immediately begin a planning process for the privately held property at the Albany Waterfront. The planning process shall be facilitated by a Citizens' Task Force under the auspices of the City's Planning Agency." (*Id.*, § 8(b).) The Initiative requires that the Task Force retain a consultant and "preside over the preparation of the Specific Plan." (*Ibid.*) "The Task Force has *final approval* of the language of the Specific Plan that is to be delivered to the City for placement on the ballot under Measure C." (*Ibid.* [emphasis added].) The Task Force is also designated the "lead agency" for purposes of the California Environmental Quality Act. (*Ibid.*) Once the Specific Plan has been approved by the Task Force, the City Council must consider the Specific Plan, and any accompanying zoning ordinances or general plan amendments, and the Council must determine that these documents meet legal requirements. (*Id.*, § 8(f).) The Specific Plan is then to be placed on the ballot for consideration of the voters. (*Ibid.*) Neither the Planning and Zoning Commission nor the City Council may amend the Specific Plan before placing it on the ballot "except upon a four-fifths vote by each body." (*Ibid.*)

The role of the Task Force as set forth in the Initiative appears to conflict with the role of the

Planning and Zoning Commission provided in the Albany City Charter. The Charter establishes the Planning and Zoning Commission, explicitly providing that the Commission “*shall have the power and be required* to (a) recommend to the Council the adoption, amendment or repeal of the master plan or any part thereof for the physical development of the City and (b) exercise such functions with respect to land subdivision, planning and zoning as may be presented by ordinance or resolution.” (Albany City Charter, § 3.16.) By contrast, the Shoreline Protection Initiative appears to strip the Commission of its authority and obligation to “recommend to the Council” the adoption or amendment of the land use plans for the Albany Waterfront, assigning that function instead to the Citizens’ Task Force — at least unless, and this caveat may be critical, the Commission is able to muster a four-fifths vote to amend the Specific Plan proposed by the Task Force. For similar reasons, the Initiative may conflict with the functions *implicitly* assigned to the City Council pursuant to the Charter, restricting the Council’s authority to approve and submit to the voters a version of the Specific Plan for the Waterfront that differs from that proposed by the Task Force, unless the Council amends the Plan by a four-fifths vote.

The City Charter also contains provisions relating to appointments that potentially conflict with the provisions in the Initiative that establish the manner of appointment of the Task Force members. Section 3.23, subdivision (a), of the Charter (as just recently amended in the June 6, 2006, election) provides that “all members of commissions, boards, committees, task forces, or any other similar bodies, who are appointed by the Mayor or by individual Council members, shall serve for a term lasting until the next general municipal election, unless re-appointed.” The Initiative, by contrast, specifies that the members of the Task Force “shall serve through the life of the Citizens’ Task Force” (Initiative, § 8(c)), which could extend beyond the next general municipal election.

It is unclear how a court would view these conflicts, because both the law in this area and the terms of the Initiative are somewhat uncertain. Generally speaking, when there is a conflict between the provisions of a voter-enacted initiative *ordinance* (which is what the Shoreline Protection Initiative is) and the governing city or county *charter*, the courts have responded in one of two ways. In some instances, the courts have held the initiative to constitute an invalid attempt to amend the City Charter by an initiative ordinance. This was the view adopted by the Court of Appeal in *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95 (“*Patterson*”), in considering the validity of an initiative that restricted the board of supervisors’ authority to dispose of real property. The court noted that “an ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution.” (*Id.* at p. 102 [citing *Lucchesi v. City of San Jose* (1980) 104 Cal.App.3d 323, 328].) Because the initiative in *Patterson* purported to enact an ordinance that directly conflicted with the board of supervisors’ charter-granted power to dispose of real property, the court concluded that “the proposed initiative is an indirect attempt to accomplish what can only be done directly by amendment of the charter.” (*Id.* at p. 105.) The initiative was therefore held to be invalid in its entirety.

Alternatively, instead of invalidating the Initiative because it conflicts with the City Charter, a court could conclude that the arguably-conflicting provisions can be reconciled and harmonized

to give effect to both the charter and the initiative. “Well-established principles, applicable both to statutes and constitutional provisions, including constitutional provisions added by initiative . . . , require that in the absence of irreconcilable conflict among their various parts, they must be harmonized and construed to give effect to all parts.” (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 676.) Thus, for example, in *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, the Court of Appeal considered a voter-enacted rent control initiative that apparently conflicted with the City Charter because it gave the Rent Control Board independent budget-making and legal authority. (*Id.* at pp. 1015-16.) Although the measure amended the charter to create the Rent Control Board, it did not amend the charter provisions giving the City Council the authority to approve budgets or to authorize litigation. (*Ibid.*) The court was required to determine whether the conflict between the new charter provisions allowing independent legal and budgetary action by the Board were in conflict with the existing charter provisions giving this power to the City Council. (*Id.* at p. 1017.) The court determined that the charter provisions could be *reconciled* to give effect to intent of the electorate that “the rent control law [be] exclusively administered by a popularly elected Rent Control Board independent of City Council interference.” (*Id.* at p. 1019.) “The choice of the people and the Council [to enact ordinances giving the Board budgetary and legal authority] cannot be said *clearly and unequivocally* to violate the mandate of the City Charter.” (*Id.* at p. 1022 [emphasis added].)

In the present circumstance, a court could conceivably follow *Patterson* and conclude that the Shoreline Protection Initiative unlawfully attempts to indirectly amend the Albany City Charter by removing the Planning and Zoning Commission’s authority to recommend land use actions to the City Council (and removing the Council’s implicit authority to propose land uses within the Waterfront to the voters), and by instead vesting this power exclusively with the Citizens’ Task Force. However, the conflict between the Charter and the Initiative in this case does not appear to be as “clear and unequivocal” as the one presented in *Patterson*. Although the Charter grants the Planning and Zoning Commission the power to “recommend” land use changes to the Council, it is not clear that the Initiative prevents the Planning Commission from presenting its own “recommendation” to the City Council, even if that recommendation were to differ from the Specific Plan adopted by the Task Force. Moreover, the Planning and Zoning Commission appears to retain the authority under the Initiative to amend the Task Force’s Specific Plan, albeit only by a four-fifths vote, and even that constraint on the Commission’s authority might be deemed to constitute a “procedural” restriction on the Commission’s action that may lawfully be imposed through an initiative ordinance, rather than requiring a charter amendment. (See City Charter, § 3.16 [giving Planning and Zoning Commission the power to “exercise such functions with respect to land subdivision, planning and zoning as may be presented by ordinance or resolution”].) Similarly, there is nothing in the Initiative that would prohibit the City Council from submitting its own version of a proposed Specific Plan for the Albany Waterfront to the voters for approval under Measure C, whether that Plan were presented as a “competing” alternative to the Specific Plan proposed by the Task Force or whether through a four-fifths vote amending the Task Force’s Specific Plan. On balance, then, it does not appear that the Shoreline Protection Initiative conflicts irreconcilably with the City Charter so as to constitute an invalid attempt to indirectly amend the Charter through an

initiative ordinance.

Likewise, the Initiative's appointment provisions can fairly easily be reconciled with the terms of the City Charter. Although the Initiative specifies that the members of the Task Force "shall serve through the life of the Citizens' Task Force," it also makes clear that the City Council "shall appoint its members pursuant to its rules." (Initiative, § 8(c).) It is therefore possible to interpret the Initiative as providing that Task Force members appointed by the Council will serve for the life of the Task Force *unless* the Council's rules require otherwise, such as when the term of the appointing council member would expire before the Task Force's work is completed. Construed in this manner, there would be no conflict between the Initiative and the City Charter. (We think a court would be especially reluctant to find a conflict in this instance since this section of the City Charter was amended after the Initiative had already been in circulation.)

In sum, while there are potential conflicts between the terms of the Initiative and some provisions of the City Charter, we do not believe these conflicts would be fatal to the Initiative's validity. It is more likely that a court would attempt to reconcile these provisions in order to avoid any conflict, and if it were unable to do so, the court would simply excise the offending provisions from the Initiative, such as by deleting the requirement that any amendments made to the Specific Plan by the Commission or the City Council prior to its presentation to the voters must occur by a four-fifths "supermajority" vote.

C. Even if The Shoreline Protection Initiative Were to Conflict With Certain Provisions of the Albany Municipal Code, Because Both the Municipal Code and the Initiative Are Ordinances, Any Conflicts Would Either Be Reconciled or the Later-Enacted Initiative Would Be Held to Prevail

The functions assigned to the Citizens' Task Force by the Shoreline Protection Initiative may also conflict with some existing City Municipal Code provisions, but these conflicts are not fatal to the Initiative because both the Initiative and the existing Municipal Code provisions have the stature of ordinances, and thus the Initiative may properly amend or repeal these ordinances by implication, even if it does not do so explicitly.

The Municipal Code elaborates somewhat on the functions assigned by the City Charter to the Planning and Zoning Commission, noting that the Commission's role is "to act in matters regarding the General Plan of the City, the physical development of the City and to exercise such functions with respect to land subdivision, planning and zoning as may be prescribed by this Code and existing ordinances, and the applicable provisions of State law" (Albany Muni. Code, § 2-18.1.) The Code sets forth public meeting and conflict-of-interest requirements applicable to members of the Planning Commission. (*Id.* at §§ 2-18.4, 2-18.5.) As discussed in the preceding section, under the Initiative, the Planning Commission's role in preparing the Specific Plan for the Albany Waterfront is restricted, although it retains at least some role in the planning process by

virtue of its apparent authority to make changes to the Specific Plan by a four-fifths vote. Generally speaking, the Municipal Code language describing the Commission's authority is open-ended enough that the Initiative may not be deemed to conflict with it at all. For instance, the Initiative contains open meeting requirements but no conflict-of-interest requirements for Task Force members. In the absence of any prohibition in the Initiative, however, conflict-of-interest requirements similar to those imposed on the Commission could presumably be imposed on the Task Force by the City Council.

The duties of the Task Force under the Initiative also overlap with the duties assigned to the Planning Department and Planning Director in the Municipal Code. The Planning Director (who is appointed by the City Council under section 2-13.2 of the Code) and the Planning Department are delegated a number of planning duties. The department "[p]lans, organizes and directs all activities of both current and long-range planning of the land use and physical development of the City;" "[r]esearches, formulates and recommends planning actions;" "[a]cts as staff to the Planning and Zoning Commission and to other citizens' committees or other interim committees as the City Council finds necessary;" "[p]repare[s] various elements of the City's General Plan and is responsible for the overall implementation of the General Plan;" "[a]dministers the zoning, subdivision and other pertinent ordinances;" and "[a]dministers the California Environmental Quality Act (CEQA) and other pertinent State planning laws." (Albany Muni. Code, § 2-13.3(a)-(h).)

Although the Shoreline Protection Initiative plainly assigns the primary responsibility for preparing a Specific Plan for the Albany Waterfront to the newly created Citizens' Task Force — going so far as to authorize the Task Force to select and retain a consultant to assist in preparing the Plan, the necessary environmental documentation, and an economic feasibility study — the Task Force's role does not appear to violate the Municipal Code provisions governing the Planning Department. For one thing, the existing Municipal Code expressly contemplates a role for citizen committees such as the Task Force created by the Initiative: Although the Planning Department "[p]repare[s] various elements of the City's General Plan and is responsible for the overall implementation of the General Plan," it also "[a]cts as staff to the Planning and Zoning Commission and to *other citizens' committees* or other interim committees as the City Council finds necessary." (Muni. Code, § 2-13.3(d) & (e) [emphasis added].) Moreover, to the extent that the existing Code does not already address this issue, the Initiative itself provides that "[t]he planning process shall be facilitated by a Citizens' Task Force *under the auspices of* the City's Planning Agency." (Initiative, § 8(b) [emphasis added].) The Initiative also requires that "[t]he City shall supply appropriate staff and legal counsel to the Citizens' Task Force." (*Ibid.*) Thus, despite the overlapping duties of the Task Force and the Planning Department, there is no impermissible conflict within the Municipal Code resulting from the role assigned to the Task Force by the Initiative.

The Shoreline Protection Initiative also raises a question about consistency with the Municipal Code provisions regarding compliance with the California Environmental Quality Act (CEQA). The Initiative provides that the Citizens' Task Force shall serve as the lead agency for preparation of the Specific Plan and accompanying environmental documents for purposes of CEQA.

(Ibid.) By contrast, the Municipal Code provides that the Planning Department and Planning Director are charged with the duty to “administer[] the California Environmental Quality Act (CEQA) and other pertinent State planning laws.” (Muni. Code, § 2-13.3(g).) The conflict between these provisions can nevertheless be reconciled, because the “administration” of CEQA does not necessarily preclude another entity from serving as a lead agency. Further, under the provisions of CEQA, it appears that the Citizens’ Task Force can lawfully serve as a lead agency. CEQA requires that a local agency prepare an environmental impact report or other documentation for the activities it plans to authorize. (Pub. Res. Code § 21151.) The “lead agency” for such preparation is “the public agency which has the principal responsibility for carrying out or approving a project.” (Pub. Res. Code § 21067.) Under the CEQA Guidelines, a “local agency” includes “cities, counties, charter cities and counties, districts, school districts, special districts, redevelopment agencies, local agency formation commissions, *and any board, commission, or organizational subdivision of a local agency when so designated* by order or resolution of the governing legislative body of the local agency.” (CEQA Guidelines § 15368 [emphasis added].) Under this broad definition, a court is likely to hold that a voter-approved initiative is permitted to designate a local commission like the Citizens’ Task Force to serve as the “lead agency” for purposes of CEQA compliance.

In sum, we do not believe that adoption of the Shoreline Protection Initiative would create any irreconcilable conflicts with the Albany Municipal Code, but even if it did, the Initiative’s provisions would likely be held to supersede any existing provisions of the existing Code with which it conflicted. For this reason, if the Initiative were to be adopted, it would be prudent for the City to carefully review the existing Municipal Code for any possible conflicts with the Initiative and to make appropriate amendments to harmonize any conflicts or ambiguities that might be found.

D. The Initiative’s Provisions Governing Appointments to the Citizens’ Task Force Likely Violate Article II, Section 12, of the California Constitution By Naming A Private Corporation to Perform the Appointment Function

In establishing the Citizens’ Task Force to prepare the Specific Plan for the privately held property at the Albany Waterfront, the Shoreline Protection Initiative identifies four non-governmental organizations that are each to appoint one member of the Task Force. Specifically, the Initiative provides that:

“The Citizens’ Task Force shall be made up of nine (9) Albany voters: one appointed by each member of the City Council, and one appointed by each of the following environmental groups: Citizens for the Albany Shoreline, Sustainable Albany, Citizens for East Shore Parks, and the Sierra Club. It is not necessary that the representative appointed by each organization be a member of that organization.” (Initiative, § 8(b).)

Of the four organizations named in the Initiative, at least two are California corporations: the

Sierra Club and Citizens for East Shore Parks. Article II, section 12, of the California Constitution, however, prohibits an initiative measure from naming a private corporation to perform any function or to have any power or duty. The question therefore arises whether assigning the appointment function to these two non-profit corporations violates the constitutional restriction.

Article II, section 12 prohibits naming or identifying a “private corporation” to perform any function or duty by an initiative in California:

“No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that . . . names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.” (Cal. Const., art. II, § 12.)

Courts analyzing this provision have determined (1) that it applies to both state and local initiatives (see, e.g., *Pala Band*, *supra*, 34 Cal.App.4th at p. 580); and (2) that it includes *nonprofit* corporations within its prohibition, as well as more traditional private business corporations (see *Calfarm Ins. Co. v. Deukmajian* (1989) 48 Cal.3d 805, 834 (“*Calfarm*”). In *Calfarm*, the Supreme Court determined that a provision in Proposition 103 that established what “would probably be classified as a ‘nonprofit public benefit corporation’” to advocate for consumers’ interests in insurance matters violated the constitutional restriction. (*Id.* at p 835.) Because the initiative identified a corporation (albeit a corporation that had not yet been formed) and gave that corporation a function to perform, the Court concluded that this provision violated the Constitution. (*Id.* at pp. 833-834.) The Court specifically rejected the argument that the constitutional prohibition was aimed solely at *for-profit* corporations, reasoning that the initiative process could be abused to aid the interests of a nonprofit corporation just as easily as it could aid a for-profit corporation:

“It may be less likely that promoters seeking self-aggrandizement would employ a nonprofit corporation as a vehicle, but we still perceive a danger that supporters of a particular nonprofit organization might seek to obtain through the initiative some special privilege not afforded other organizations. One might even perceive this danger in the present case. There are several consumer-advocacy corporations, and others could be formed. But Proposition 103 gives a kind of state imprimatur to one particular corporation . . . and gives that organization alone the benefit of a low-cost or free statewide mailing to solicit memberships.” (*Id.* at p. 834.)

The Supreme Court thus concluded that any type of corporation was subject to the constitutional restriction, and that if a private corporation were identified to perform any function or have any power or duty, that provision of the initiative would be in violation of article II, section 12. (*Id.* at p. 835.)

The *Calfarm* analysis was followed in *Pala Band*, where the Court of Appeal determined that a local initiative measure that identified a specific corporation as “the Applicant,” and gave that

corporation “the sole responsibility of preparing and submitting the site plan” for a proposed waste disposal facility, violated article II, section 12. (54 Cal.App.4th at pp. 584-585.) The Court rejected the argument that the corporation was simply “permit[ted] to ‘apply’ to perform a function,” holding instead that “[t]he initiative specifies functions and duties that Servcon [the identified corporation] must perform in operating the facility” (*Id.* at p. 585.)

Like the initiatives in *Calfarm* and *Pala Band*, the Shoreline Protection Initiative names two private corporations, the Sierra Club and Citizens for East Shore Parks, to perform a function and to have a power or duty — namely, to appoint a representative to the Citizens’ Task Force. As in *Calfarm*, even though the two organizations are nonprofit corporations and are unlikely to be “seeking self-aggrandizement” through this mechanism, there is nevertheless still “a danger that supporters of a particular nonprofit organization might seek to obtain through the initiative some special privilege not afforded other organizations” (48 Cal.3d at p. 834) — in this instance, the special privilege of having that organization’s views represented on the Task Force that is assigned the responsibility for preparing a Specific Plan for the future development of the Albany Waterfront.

We recognize that the role assigned to these two nonprofit corporations in the overall scheme of the Shoreline Protection Initiative — selecting a representative to the Task Force, who need not even be a member of their organization — is concededly rather limited. By contrast, the initiative in *Calfarm* established a consumer advocacy corporation that would be the recipient of substantial financial assistance and was intended to play a very prominent role in the regulation of insurance rates and practices; likewise, the corporation identified in the local initiative in *Pala Band* would have operated a major waste disposal facility. Nevertheless, article II, section 12 was given an expansive reading in both *Calfarm* and *Pala Band*, and we therefore believe that a court would likely conclude that even the limited function assigned to these nonprofit corporations in the Shoreline Protection Initiative is sufficient to violate the constitutional prohibition.¹

¹There is a broader question whether it is lawful for the Initiative to assign *any* private organization, regardless of its corporate form, the responsibility to designate a member of the Citizens’ Task Force, on the theory that this would constitute an unlawful delegation of *government* authority to a *private* entity. While there is a doctrine prohibiting the delegation of the legislative powers of a city to private persons or entities, several well-established principles serve to limit the scope of the doctrine. In particular, “legislative power may properly be delegated if channeled by a sufficient standard.” (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-76.) Generally speaking, the delegation doctrine “rests upon the premise that the legislative body must itself resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.” (*Id.* at pp. 376-77.)

In this circumstance, given that the role of the Citizens’ Task Force is only to prepare a *proposed* Specific Plan for the Albany Waterfront, with the “truly fundamental issue” of whether the

If the provision designating these two corporations to appoint representatives to the Task Force were indeed held to be unconstitutional, a question would then arise as to the impact of such a determination on the validity of the remainder of the Shoreline Protection Initiative. The answer requires a rather complex analysis, and it may well depend upon whether the court addresses the issue in a pre- or post-election context. Both *Calfarm* and *Pala Band* were post-election challenges, and in both of those cases, the courts concluded that although article II, section 12 prohibits “submitt[ing]” to the voters an initiative that names or identifies a private corporation, the constitutional prohibition does not require invalidation of the entire initiative. (See *Calfarm*, 48 Cal.3d at p. 836.) Rather, “when a part of an initiative violates article II, section 12, the rule is clear: the offending part must be stricken from the initiative, and the remainder may take effect.” (*Ibid.*; accord, *Pala Band*, 54 Cal.App.4th at p. 585-86.) At least in the post-election context, then, the impact of the unlawful appointments provision on the remainder of the Shoreline Protection Initiative depends upon whether — and to what extent — that provision can be severed from the remaining portions of the Initiative. (See *Calfarm*, 48 Cal.3d at p. 836.)²

Specific Plan will actually be adopted being made by the voters acting in their reserved legislative capacity, we do not believe that a court would find that allowing private organizations to appoint certain members of the Task Force constitutes an unlawful delegation of legislative authority. The whole Task Force mechanism itself, after all, constitutes a delegation of authority to a private entity. Although the role assigned by the Initiative to the Citizens’ Task Force is much greater than that typically enjoyed by citizens’ advisory committees and task forces, such a mechanism for receiving community input is not at all uncommon, and it is specifically contemplated in the Albany City Charter. While the Shoreline Protection Initiative perhaps presses the outer bounds of such authority, we ultimately do not believe that its mechanism for employing a citizens’ task force or the means by which a minority of its members are appointed transgress the limits on delegation of legislative authority to private persons or organizations.

²The availability of severance as a remedy in the context of a *pre-election* challenge to a proposed initiative is less clear. In *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, the Supreme Court concluded that a different standard applied to severability of initiatives in the pre- and post-election contexts. (*Id.* at p. 716, fn. 27.) The Court noted that “[a]fter 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.” (*Ibid.*)

There are only two or three cases that analyze severability in the pre-election contest, and in each of them — as was the case in *American Federation of Labor v. Eu* — the provisions held to be invalid were really the main thrust of the proposed ballot measure. (See, e.g., *Citizens for Responsible Behavior v. Superior Court* (1992) 1 Cal.App.4th 1013, 1035; *City and County of San*

“Where, as here, the initiative contains a severability clause, the invalid provision is severable if it can be separated grammatically, functionally, and volitionally.” (*Pala Band, supra*, 34 Cal.App.4th at p. 586.) A provision is considered “volitionally severable” if the remainder of the statute would have been adopted by the legislative body if it had foreseen that the provision at issue would be invalid. (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.) In both *Calfarm* and *Pala Band*, the courts held that the unlawful provisions met the severability standard. In *Calfarm*, the Court concluded the consumer-advocacy organization section could mechanically and functionally be severed from the remainder of Proposition 103, and it refused to engage in a “factual inquiry” into whether the provision establishing the consumer advocacy corporation had a volitional influence on the voters. (48 Cal.3d at p. 836.) The court noted that “[t]he test of severability is one based on reason, and it stands to reason that voters who favored a measure that provides for public regulatory hearings with consumer participation would still favor that measure had they foreseen the invalidity of the provision creating a particular corporation to represent the consumers.” (*Id.* at pp. 836-837.) In *Pala Band*, the Court observed that the initiative did not discuss the corporation at any length and that the impartial analysis and ballot arguments did not even mention the corporation. The court therefore concluded that “the voters’ decision to site a solid waste facility at Gregory Canyon could not have been motivated by the fact that Servcon was identified as the proposed operator of the facility.” (54 Cal.App.4th at p. 586.)

In the present case, we have little doubt that a court conducting a severability analysis would similarly conclude that the provision of the Shoreline Protection Initiative authorizing the Sierra Club and Citizens for East Shore Parks each to appoint one member of the Citizens’ Task Force is “volitionally severable” from the remainder of the Initiative. As in *Calfarm* and *Pala Band*, the issue of which particular organizations may designate representatives to the Task Force would seem to be a relatively minor and less significant aspect of the Initiative, and it is unlikely that those who support the Initiative in its current form would not still support the measure if this particular provision were held to be unenforceable.

Francisco v. Patterson (1988) 202 Cal.App.3d 95, 106 & fn. 10.) In *Citizens for Responsible Behavior*, for example, the Court of Appeal removed the entire initiative from the ballot prior to the election because “the primary provisions of the proposed ordinance are invalid. We think it clear these affirmative, mandatory provisions, which we have declared invalid, would arouse the most passionate support and opposition.” (202 Cal.App.3d at p. 1035.)

In the present case, it is not at all clear that anyone would consider the potentially invalid provisions of the Shoreline Protection Initiative to be the “primary” provisions of the proposed measure or those that would “arouse the most passionate support and opposition.” Given the absence of any case law in this context, we are unable to predict whether the invalid provisions of the Initiative would be severed from the remainder of the measure if a successful pre-election challenge were mounted to the Initiative.

The more difficult issue is whether, and to what extent, this provision is grammatically and functionally severable from other portions of the Initiative. Purely as a grammatical matter, if the names of the two corporations were removed, the Initiative would read:

“The Citizens’ Task Force shall be made up of nine (9) Albany voters: one appointed by each member of the City Council, and one appointed by each of the following environmental groups: Citizens for the Albany Shoreline [and] Sustainable Albany.”

Functionally, this provision no longer makes sense, either, because there would be only *seven* individuals and organizations identified to designate the *nine* members of the Task Force. How should this conflict be resolved: Should the Task Force be reduced to seven members? Should each of the two remaining environmental groups appoint two representatives, instead of one? Should the City Council appoint the other two members? Should the seven members of the Task Force who are appointed in the specified manner appoint the other two members?

There is an argument to be made that in accordance with another provision of the Initiative, a court could hold that the Task Force should still technically have nine members, but that it would merely operate with two permanent vacancies for the positions that would have been appointed by the Sierra Club and Citizens for East Shore Parks. (See Initiative, § 8(c) (“An organization may elect not to appoint anyone *or may be unable to appoint a person* who qualifies as a Task Force member, in which case that position shall remain vacant until such time as that organization appoints a qualified person.”) [emphasis added].) Alternatively, a court could invalidate all of the provisions of the Initiative regarding the method of appointing Task Force members, leaving only the sentence, “The Citizens’ Task Force shall be made up of nine (9) Albany voters” (*id.*, § 8(b)), and leaving it up to the City Council to appoint all nine members of the Task Force according to the Council’s rules and procedures. Although we believe a court is unlikely to go so far under a severability analysis as to find the entire mechanism of the Citizens’ Task Force to be invalid, we do not believe it possible to predict with any certainty exactly how a court would choose to sever the invalid appointment provisions from the remainder of the Initiative. Further, as is discussed in Part IV, *infra*, the severability analysis may be even more uncertain in the context of a pre-election challenge to the Initiative.

In sum, the provision of the Shoreline Protection Initiative authorizing the Sierra Club and Citizens for East Shore Parks each to appoint one member of the Citizens’ Task Force is likely to be found to violate article II, section 12 of the state Constitution. If a challenge were made to the Initiative on this ground following the adoption of the measure by the voters, we believe that this invalid provision would be severed from the remainder of the Initiative, but it is impossible to predict whether such severance might result simply in the elimination from the Task Force of the two members who would otherwise be appointed by these two organizations, whether it might result in the City Council having the authority to appoint all nine members of the Task Force, or whether it might result in the invalidation of the whole Task Force altogether, leaving only the requirement that a Specific Plan be prepared in accordance with the substantive terms and guiding principles set forth

in the Initiative.

III. THE DEVELOPMENT “MORATORIUM” IMPOSED BY THE INITIATIVE MAY VIOLATE STATE LAW AND MAY NOT BE EFFECTIVE IN ANY EVENT TO ACCOMPLISH ITS STATED OBJECTIVES

As described above, the Shoreline Protection Initiative also establishes a two-year “moratorium” on approvals for any development or rezoning of privately held property at the Albany Waterfront. Section 9 of the Initiative provides:

“In order to give the Citizens’ Task Force the time and opportunity to develop the plan for the future of the privately held property at the Albany Waterfront, immediately upon passage of this initiative, there shall be a moratorium on any approvals for any development of the privately held property at the Albany Waterfront, including any that are then pending. In addition, immediately upon passage of this initiative, there shall be a moratorium on consideration of any rezoning of the privately held property at the Albany Waterfront. These moratoria on development approvals and rezoning for the privately held property at the Albany Waterfront shall be effective for a period of two years or until the Specific Plan for the privately held property at the Albany Waterfront is approved by the people of Albany pursuant to Measure C, whichever occurs first.”

At the outset, it should be noted that the Initiative’s “moratorium” differs from the traditional notion of a development moratorium in one important respect. The traditional moratorium is authorized under state law by Government Code section 65858. That statute establishes procedures whereby “the legislative body of a county, city, including a charter city or city and county,” in order “to protect the public safety, health, and welfare,” may enact *as an urgency measure* an *interim* ordinance that prohibits “any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission, or the planning department is considering or studying or intends to study within a reasonable time.” (Gov. Code § 65858(a).) The purpose of such an urgency ordinance — enacted without the lengthier procedures and environmental review that would normally accompany any legislative change in zoning or other land use laws — is to “freeze” all current development in its place and to prevent the issuance of what might otherwise be ministerially mandated development approvals for projects that are authorized under the existing zoning laws but which might be impermissible under the contemplated legislative changes to those zoning and planning laws.

The Initiative’s “moratorium,” by contrast, applies both to “any approvals for any development of the privately held property at the Albany Waterfront” — the traditional notion of a moratorium — *as well as* to “consideration of any rezoning of the privately held property at the Albany Waterfront.” (Initiative, § 9.) This latter restriction on the City Council’s *legislative* authority to consider rezoning of the Waterfront not only exceeds the permissible scope of a

moratorium authorized under Government Code section 65858 and is of questionable validity — it is not at all clear that the electorate by initiative may flatly prohibit the city council from exercising its police power authority even to “consider” the rezoning of a particular property, even for a limited duration — but it appears to be ineffective in any event. The Shoreline Protection Initiative, like any other initiative, may always be amended by another vote of the people (Elec. Code, § 9217), and the City Council has the authority to submit to the voters a proposal for the amendment of the Initiative at any time (*id.*, § 9222). Moreover, under Measure C, any amendment to the zoning ordinance for the Waterfront area is *already required* to be submitted to the voters for their approval.

Thus, if the City Council wanted to rezone the privately held property at the Albany Waterfront during the two- year period covered by the Initiative’s “moratorium,” it could simply submit the proposed rezoning to the voters (as it would be required to do anyway under Measure C) together with a proposed amendment to Section 9 of the Shoreline Protection Initiative permitting the rezoning to occur notwithstanding the existence of that section. In short, if one purpose of the Initiative’s “moratorium” is to prevent the City Council from rezoning the Waterfront before a Specific Plan is adopted in accordance with the Initiative, it seems both unnecessary and ineffectual to accomplish that objective. On the other hand, if the Initiative’s moratorium is intended to prohibit the City Council from even “considering” any rezoning of the Waterfront during this period — even if the proposal were ultimately to be submitted to the voters for approval — this provision would be of doubtful legality. (See *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 Cal.App.4th 1410, 1417-20 (city cannot enact a development moratorium that suspends the *processing* of development applications as opposed to the *approval* of those applications).)

To the extent that the moratorium contained in Section 9 of the Shoreline Protection Initiative prohibits “any approvals” for development of the Albany Waterfront until the Specific Plan is adopted for the area, then that is indeed be a traditional function of a moratorium, but the issue is whether such a moratorium can be enacted by the voters or whether the Legislature has occupied the field and required that moratoria may only be enacted by a local legislative body following the procedures contained in Government Code section 65858, which requires a four-fifths vote of the city council, mandates certain findings to be made, and specifies the permissible duration of any such ordinances. (See Gov. Code, § 65858(a)-(d).) Although the question is not free from doubt, it is quite possible that a court would find the moratorium enacted by the Initiative under the present circumstances to be invalid.

In *Bank of the Orient v. Town of Tiburon*, the Court of Appeal concluded that Government Code section 65858 imposes limits on the exercise of the initiative power. (*Bank of the Orient v. Town of Tiburon* (1990) 220 Cal.App.3d 992, 999 (“*Bank of the Orient*”) (disapproved on other grounds by *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725).) In *Bank of the Orient*, the Tiburon Town Council had adopted, pursuant to Government Code section 65858, an urgency ordinance that imposed a moratorium on the processing and approval of development permits. (*Id.* at p. 996.) After the ordinance had been extended twice by the Council, the voters of Tiburon approved Measure C, a development moratorium that required the town to undertake a traffic study.

(*Id.* at p. 996-997.) The moratorium enacted by Measure C was to last 15 months beyond the end date of the Council's moratorium, and it provided that it could be further extended if necessary to complete the traffic study. (*Id.* at p. 997.) The court concluded that Measure C was invalid because it imposed a moratorium that exceeded the scope of the power granted to the legislative body by Government Code section 65858. (*Id.* at p. 999.)

In reaching its conclusion, the court in *Bank of the Orient* determined that the Legislature had intended for the substantive requirements of Government Code section 65858 to apply to *all* development moratoria, even those enacted by initiative and even those enacted by normal legislative procedures and not on an urgency basis. (*Bank of the Orient, supra*, at pp. 1001-1005.) The court observed that the statute's reference to "the legislative body," under the then-recent decision in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491 ("*COST*") was "'not conclusive as to legislative intent' to preclude action on the same subject by the electorate, even though [such references] may support such an inference." (*Bank of the Orient, supra*, at p.1001, quoting *COST, supra*, at p. 501.) The court of appeal therefore considered the legislative history of the provision, concluding that the Legislature had repeatedly amended the provisions in order to restrict the use of development moratoria, and that "the relevant history manifests a legislative intent, albeit indirectly, to limit *all* moratorium ordinances." (*Bank of the Orient, supra*, at p. 1003 (emphasis in original).) However, the court concluded that the procedural requirements of Government Code section 65858 could be excised from the statute as inapplicable to laws enacted through the initiative process: "[W]hile a statute providing certain substantive limits may be within the Legislature's power, it may not burden the electorate with unworkable procedures." (*Id.* at pp. 1003-1004, citing *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 594.) The court therefore held that the prescribed periodic extensions and the requirements for written reports and findings were inapplicable to voter-enacted moratorium ordinances, but that the *substantive* limits on development moratoria should apply to moratoria adopted by initiative. (*Bank of the Orient, supra*, at p. 1003.)

Applying its analysis to Measure C, the court of appeal concluded that the initiative violated the substantive requirements of Government Code section 65858 because it allowed for what was in effect a third extension of a pre-existing moratorium in violation of the two-extension and two-year limit established by the statute. (*Bank of the Orient, supra*, at p. 1006.) As the court held, "at the time Measure C was adopted, the town no longer had any legislative power, whether vested in the electorate or the council, to extend the moratorium beyond the date fixed by the second extension." (*Ibid.*)

The court's holding in *Bank of the Orient* is not directly on point because the development approval moratorium contained in the Shoreline Protection Initiative does not contravene the *substantive* limitations for moratoria imposed by Government Code section 65858. Nevertheless, the decision is instructive because the court of appeal did conclude that "the Legislature intended to occupy the entire field of interim zoning moratoria." (220 Cal.App.3d at p. 1005.) If that is the case, and the Legislature also intended to delegate the *exclusive* authority to enact development moratoria

to the local legislative body, then under the *COST* rationale, the exercise of that authority by the electorate through an initiative would be precluded. The court in *Bank of the Orient* did not undertake a full *COST* analysis, in part because it did not consider whether zoning moratoria are issues of statewide concern. Under *COST*, if a statute address “matters of statewide concern rather than strictly municipal affairs,” a legislative intent to prevent voter action on an issue may be more readily inferred. (45 Cal.3d at p. 504.)

Reviewing Government Code section 65858 and its legislative history in its most recent enactment, a court could well conclude that the Legislature intended to preclude the adoption of interim development moratoria through the initiative process. First, as the court in *Bank of the Orient* noted, the statute repeatedly refers to the enactment of such moratoria by the “legislative body,” giving rise to at least weak inference that the intent was to preclude action by initiative or referendum. Moreover, the statute requires specific findings to be made by the “legislative body” in order to impose certain moratoria, again suggesting that action by the voters was not contemplated.

Perhaps even more telling, however, recent amendments to Government Code section 65858 strongly suggest that the statute was intended to address a matter that the Legislature deemed to be one of statewide concern. As the Supreme Court emphasized in *COST*, “[w]hen construing statutes containing generic references, such as ‘legislative body’ or ‘governing body,’ the Courts of Appeal have generally permitted exercise of the initiative and referendum when the subject matter was of purely local concern but not when the statute dealt with a matter of statewide concern.” (45 Cal.3d at p. 504 [citations omitted].) In 2001, Government Code section 65858 was amended to make its provisions applicable to charter cities and counties, as well as to impose additional requirements on local governments seeking to impose moratoria that would delay multifamily housing projects. That the law applies to charter cities suggests that the measure is of broader than “purely local” concern because it restricts the “home rule” powers of charter cities. The legislative history materials reveal that the Legislature was particularly concerned about local governments using development moratoria to delay affordable housing projects:

“[R]emoving barriers to housing to development at the local government level is one of the keys to increasing housing production in California. Moratoria are often used to block rental housing projects that a local government otherwise has no legal authority to deny. . . . In the last two years, at least seven cities have adopted moratoria that affect multi-family housing development. Though more general in appearance, the moratoria were almost all adopted in response to a development proposal for a particular rental housing project and affected few other proposals.” (Senate Housing & Community Development Com., Report on SB 1098, May 7, 2001, pp. 2-3.)

The Legislature thus appears to have been responding to a perceived abuse of the development moratorium provisions in a specific context by expressly expanding the law’s

applicability (and limitations) to charter cities, and by imposing additional conditions upon issuance of moratoria that implicate multi-family housing. Although a court might conclude that the type of moratorium proposed by the Shoreline Protection Initiative does not involve an issue of statewide concern because the moratorium is not particularly directed toward blocking the development of any housing proposed for the Waterfront area, the most recent amendments to section 65858 suggest that the Legislature intended to curb the use of development moratoria more generally and to limit the ability of any cities, including charter cities like Albany, to enact such measures. It is not possible to say with certainty whether a court will conclude that under these circumstances, the use of an initiative to enact any development moratorium is prohibited, but there is a substantial question whether Section 9 of the Shoreline Protection Initiative would be upheld by the courts. Even if the development moratorium were invalidated, however, that section does appear to be grammatically, mechanically, and volitionally severable, so the remainder of the Initiative would not necessarily be affected.

IV. GIVEN THE SUBSTANTIAL QUESTIONS REGARDING THE VALIDITY OF SOME OF THE INITIATIVE'S PROVISIONS, LITIGATION WILL LIKELY RESULT IF THE INITIATIVE IS ADOPTED BY THE VOTERS, AND IT COULD POSSIBLY BE SUBJECT TO A PRE-ELECTION CHALLENGE

As discussed above, there are several provisions of the Shoreline Protection Initiative that are of questionable validity and that may therefore provoke a legal challenge to the measure. The City Council, of course, has a legal obligation either to adopt a qualified initiative without alteration or to place it on the ballot for a vote of the people, regardless of any doubts as to the measure's validity. (See generally *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141.) Once an election is called on the initiative, however, it may be subject to either of two types of legal challenges: (1) a pre-election challenge seeking to remove the measure from the ballot before it is even voted on; and (2) a post-election challenge, assuming the initiative is adopted by the voters, seeking to invalidate all or part of the measure. One question that arises is whether the potential legal deficiencies identified in the Shoreline Protection Initiative would be more appropriately reviewed by a court before or after the election.

Generally, pre-election review of qualified initiatives and referenda is disfavored. Courts follow the admonishment of the Supreme Court that "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." (*Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.) However, the Court has established some exceptions permitting a pre-election challenge for *procedural* deficiencies or measures that are beyond the power of the electorate to adopt by initiative.

In two recent cases, the Supreme Court has elaborated on the conditions under which pre-election review of a ballot measure is appropriate. In *Costa v. Superior Court* (2006) 37 Cal.4th 986,

the Court reaffirmed that challenges to an initiative based on procedural violations “may be brought and resolved prior to an election.” (*Id.* at p. 1006) The Court reasoned that procedural challenges must be resolved before the election because such challenges present the question “whether the initiative measure has satisfied the constitutional or statutory procedural prerequisites necessary to qualify it for the ballot” (*Ibid.*) Indeed, the Court noted that there may be no available remedy for a procedural violation once an initiative has been presented to the voters in a valid election. (*Ibid.*) We are aware that a lawsuit is pending in Alameda County Superior Court that raises just this type of procedural challenge to the Shoreline Protection Initiative — that the Notice of Intent to Circulate was not properly published in accordance with the Elections Code. Aside from this claim, however, we are not aware of any other alleged procedural deficiencies in the Initiative, and the issues that we have identified in this Memorandum would not fall into that category.

In *Independent Energy Producers Association v. McPherson*, announced on June 19, 2006, the Supreme Court explained that challenges based “on a contention that the measure is not one that properly may be enacted *by initiative*” may also appropriately be adjudicated prior to an election. (*Independent Energy Producers Assn. v. McPherson* (June 19, 2006, S135819) __ Cal.4th __ [Slip Opn., p. 11] (emphasis in original).) Nonetheless, although the Court noted that such a challenge *could* be resolved prior to the election, it emphasized that “[b]ecause this type of claim is potentially susceptible to resolution either before or after an election, there is good reason for a court to be even more cautious than when it is presented with the type of procedural claim at issue in *Costa* before deciding that it is appropriate to resolve such a claim prior to an election rather than wait until after the election.” (*Id.* at pp. 11-12.) The Court observed that it is appropriate for a court to consider the cost to the public of postponing the resolution whether a measure is valid, but added that “deferring judicial resolution until after the election — when there will be more time for full briefing and deliberation — often will be the wiser course.” (*Id.* at p. 12.) Moreover, as the Court stressed in *Costa, supra*, “[o]nly when a court is confident that the challenge is meritorious and justifies withholding the measure from the ballot, should a court take the dramatic step of ordering the removal of a measure that ostensibly has obtained a sufficient number of a qualified signatures.” (37 Cal.4th at p. 1007-1008.)

On the basis of the analysis set forth above, we believe it unlikely that a court would consider any of the possible grounds for challenge to the Shoreline Protection Initiative to be so compelling as to warrant removal of the initiative from the ballot prior to the election. Although Section 9 of the Initiative imposing a moratorium on development approvals and rezoning for the Albany Waterfront may exceed the local electorate’s initiative power, the Initiative as a whole appears to constitute a proper subject for an initiative, and there does not appear to be any urgent need for a judicial resolution of the Initiative’s validity prior to the election.

Likewise, a claim that the Initiative violates article II, section 12, of the state Constitution might provide grounds for pre-election challenge, particularly because the Constitution explicitly states that no such initiative “may be submitted to the electors.” Nevertheless, as both *Calfarm* and *Pala Band* demonstrate, courts are fully capable of reviewing and remedying violations of this

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section of the Constitution after the election is held, if necessary, and the fact that this challenge would be directed only to the manner in which representatives would be appointed to the Citizens' Task Force, rather than to a more central element of the Initiative, is likely to dissuade a court from viewing the matter as presenting any special urgency.

On balance, then, we think it unlikely that a court would entertain a pre-election challenge to the Shoreline Protection Initiative, although if the Initiative were to be adopted by the voters, litigation is quite likely to ensue.